Chapter 1
Introduction: Africa and the International Criminal Court

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Contents

This book is based on the conference "Africa and the International Criminal Court" which the South African-German Centre for Transnational Criminal Justice[1] hosted on 22 and 23 November 2013 in Cape Town. The conference brought together eminent experts in the field of international criminal justice at both the international and domestic level, and it was also attended by a large number of young African lawyers from twelve African countries.

At the time of the conference, the tensions between the African Union and the International Criminal Court had reached a new peak, for only a few days prior to the start of the conference the Assembly of the African Union had decided in an

[1] The Centre is a joint project between Humboldt-Universität zu Berlin and the University of the Western Cape, Cape Town. It was founded in 2008 as one of six 'Centres of African Excellence' established on the African continent in cooperation with German partner universities as a teaching and research centre. The Centre is funded by the German Academic Exchange Service (*Deutscher Akademische Austauschdienst*, DAAD) under the auspices of the German Federal Foreign Office (see http://www.transcrim.org). The Centre is located in the Faculty of Law in the University of the Western Cape and also has offices in the Faculty of Law at Humboldt-Universität zu Berlin. The Directors are *Lovell Fernandez* (University of the Western Cape) and *Gerhard Werle* (Humboldt-Universität zu Berlin); the Coordinator is *Moritz Vormbaum* (Humboldt-Universität zu Berlin).

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G. Werle et al. (eds.), *Africa and the International Criminal Court*,
International Criminal Justice Series 1, DOI 10.1007/978-94-6265-029-9_1

extraordinary session that no charges should be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government and that any AU Member State that wished to refer a case to the International Criminal Court "may inform and seek the advice of the African Union".[2] Earlier in 2013, the Ethiopian Prime Minister and then Chairman of the African Union, *Hailemariam Desalegn*, stated during an AU summit that "[t]he intention [of establishing the International Criminal Court] was to avoid any kind of impunity but now the process has degenerated into some kind of race-hunting".[3] At its summit in January 2014 in Ethiopia, the African Union again urged its members to comply with AU Decisions and "to speak with one voice" against criminal proceedings brought against sitting Heads of State.[4]

These developments stand in stark contrast to the instrumental role played by Africa in the creation and the establishment of the International Criminal Court. Today, with 34 members, Africa constitutes the largest regional group of States Parties to the ICC Statute. Furthermore, Africans occupy a number of key positions at the International Criminal Court. At the time of writing, four Judges (including the First Vice President), the Prosecutor, the Head of the Jurisdiction, Complementarity and Cooperation Division, the Principal Counsel for the Defence, among others, are Africans. Moreover, several African States have enacted laws which incorporate the ICC Statute into their domestic legal orders.[5]

However, only a few years into the Court's taking up of its work, this once promising relationship between the International Criminal Court and the African Union has deteriorated. Representatives in the African Union have recently been highly critical of the fact that after more than ten years, all of the eight situations with which the Court is now seized relate to African states. The accusations, coming from a number of African politicians, are that the International Criminal Court is focusing on Africa while, for the sake of political expedience, it overlooks international crimes perpetrated elsewhere. Furthermore, some African leaders are of the view that the UN Security Council's role in the system of the International Criminal Court is partial, in the sense that it uses the Court to prosecute African Heads of State and political leaders of countries that are not States Parties to the ICC Statute. The International Criminal Court came under sharp criticism, in particular, when both the current Kenyan President, *Uhuru Kenyatta,* and his Deputy, *William Ruto,* were indicted. In addition, certain African states have criticized European states, alleging that they are abusing the principle of universality to prosecute Africans.[6]

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[2] See the Decisions taken at the Extraordinary Session of the Assembly of the African Union on 12 October 2013 in the Annex to this volume.

[3] See Reuters, available at http://www.reuters.com/places/africa/article/2013/05/27/us-africa-icc-idUSBRE94Q0F620130527 (accessed on 3 April 2014).

[4] See the Decision taken at the 22nd Ordinary Session, 30–31 January 2014 in the Annex to this volume.

[5] On the implementation of the ICC Statute in Africa see Chap. 6 of *Kemp* in this book.

[6] See on this matter Chap. 10 by *Jeßberger* in this book.

In their criticism, some African politicians have sought to portray the International Criminal Court as having become a neo-colonial instrument for targeting Africa and its leaders. On the one hand this criticism could be refuted on the ground that it is politically biased. On the other hand it cannot be denied that all eight situations with which the Court is currently dealing are located in Africa. When addressing these issues one must bear in mind that international criminal justice has, since its coming into being, been selective. Prosecutions of international crimes took place only when the political conditions were favorable, as was the case with the Nuremberg and Tokyo trials as well as the Yugoslavia and Rwanda tribunals. Following other situations of human rights atrocities, no courts were created, especially when the interests of political leaders or the military of powerful states where at stake.

Against this background, the following questions arise in the present African context: Why does Africa feature so prominently in the work of the International Criminal Court? Is there a specific bias against Africa? What can be done by African states to avoid impunity and to step up the prosecution of international crimes perpetrated in Africa? And how can the relationship between Africa and the Court be shaped in the future?

These are the questions that the contributors to this book seek to answer from their respective different backgrounds as international or domestic judges and prosecutors, and scholars of international criminal law.

Part I of this book deals with the interface between the International Criminal Court and African states. Accordingly, Judge *Sanji Mmasenono Monageng* (First Vice-President of the International Criminal Court) looks into the relationship between Africa and the Court (Chap. 2). The Judge depicts the Court as a non-political organ whose duty it is to interpret and apply the Rome Statute and to work within this given legal framework. *Monageng* emphasizes that any proceedings before the Court are conducted purely in accordance with the Rome Statute, which, of course, includes any proceedings against sitting Heads of State. It, therefore, surprises her that some African States Parties to the ICC Statute criticize it for doing precisely what it was meant to do by exactly those states. Should there be deficiencies in the Rome Statute, *Monageng* argues, it is not the Court itself, but the Assembly of States Parties which must remedy them. The latter, as a political body, is the competent forum to suggest changes and eventually amend the Statute. *Monageng* leaves little doubt as to her own opinion regarding accusations of racism that have been leveled against the Court, given that there are many Africans employed in various branches of it. As regards the complementarity principle, *Monageng* points to the fact that African states need to take ownership of the justice mechanisms created to deal with human rights atrocities committed on African territory, and that this can be done by implementing the appropriate laws to deal with such crimes. However, notwithstanding the current strained relationship between African states and the International Criminal Court, *Monageng* remains optimistic.

In her chapter on the relation between African states and the International Criminal Court, as seen from a judge's perspective (Chap. 3), *Ekaterina Trendafilova*, an incumbent judge at the Court, analyzes some of the most important legal and practical issues that the Court has to deal with and which have had an impact on the relationship between the International Criminal Court and African states. This includes the admissibility of cases before the Court, the immunity of Heads of State, and the cooperation of African States with the Court. *Trendafilova* points out that where the Court's admission of a case is challenged, the Court looks at the status of the domestic proceedings at the time the challenge is brought. More precisely, the International Criminal Court has to establish whether any concrete steps have been taken to investigate the crimes. She, therefore, argues that the judicial reforms which Kenya had promised, as well as the envisaged institution of criminal investigations, did not meet the standards applied by the Court. The result was that the challenge was rejected. With regard to the issue of immunity for sitting Heads of State, *Trendafilova* cites the *Al Bashir* case and states that in her view there are "convincing arguments" why *Al Bashir* was stripped of immunity by the Security Council's referral in 2005. She argues that the referral not only enabled the International Criminal Court to exercise jurisdiction over *Al Bashir*, but it also activated the entire peace and security mechanisms, which include the deprivation of immunity as contemplated under Article 27(2). *Trendafilova* points to the fact that states such as Chad, Malawi and Nigeria acted contrary to their obligations to cooperate with the Court under Articles 86 and 89 of the Rome Statute when they allowed *Al Bashir* to enter their respective territories without taking any legal steps to arrest him. She adds that as regards *Al Bashir's* envisaged travel plans, it should be noted that countries which are not States Parties are also required to cooperate fully with the Court in the light of the complex Resolution 1593 taken by the UN Security Council under Chapter VII of the UN Charter. *Trendafilova* further expresses her discontent with the UN Security Council for not following up on its referrals to the International Criminal Court and for not giving actual support in such cases.

René Blattmann, former Vice-President and Judge at the International Criminal Court, who is presently a German Academic Exchange Service law professor at Humboldt-Universität zu Berlin, gives an insight into the Court's workings in the *Lubanga* case (Chap. 4), in which the International Criminal Court handed down its first trial judgment. In his introduction, *Blattmann* reflects on the history of international courts by taking us back to the 19th Century Anti-Slavery Courts, which existed, amongst other places, in Freetown and Cape Town. He cites them as an historical example of how international tribunals dealt successfully with violations of human rights in the African context. As regards the *Lubanga* trial itself, *Blattmann* shares some of his experiences as a judge in this trial. He refers, in particular, to the challenging situation in 2008 when the Prosecution, based on agreements it had made with third parties, failed to disclose potentially exculpatory evidence to the accused. *Blattmann* describes this as a decisive moment in the trial, as, in his view, the failure to disclose evidence would have violated the fundamental rights of the accused and furthermore, could have undermined the

credibility of the Court as an impartial judicial body. He describes how the Chamber, in reaction to this attitude of the Prosecution, ordered a stay of proceedings—a measure which the Chamber applied two years later for a second time when the Prosecution refused to disclose the identity of intermediaries. Interestingly, *Blattmann* evaluates these incidents positively, as, in his view, they demonstrate that the Trial Chamber was able to react properly to procedural situations that were not foreseen by the Rome Statute.

Shamila Batohi, Senior Legal Advisor to the Prosecutor of the International Criminal Court, gives the Prosecutor's view on the activities of the Court in Africa (Chap. 5). She stresses that many African states were very supportive of the work of the Prosecutor and cooperated in many respects. As regards the perception of an 'African bias' which the Court is confronted with, in her view, this perception is, to a certain extent, understandable. However, as she further argues, the Prosecutor of the International Criminal Court is, unfortunately, not the "world Prosecutor". *Batohi* refers in this connection to the magnitude of human rights violations that were committed in Africa and the huge number of victims who were left without a voice. In her view, the real constituency of the Court are the victims of mass atrocities and the affected communities. International criminal justice, she further contends, was historically developed to fight impunity, a task which the International Criminal Court still strives to fulfill. The Court cannot, therefore, simply ignore the international crimes committed in Africa. *Batohi* describes the work of the Office of the Prosecutor, both in general and especially in relation to African countries by referring to Guinea and Kenya. She underlines that it is important for the Office of the Prosecutor to encourage states to institute their own criminal investigations and to prosecute the alleged perpetrators. Finally, *Batohi* discusses the accusation that the Court's interventions undermine on-going peace processes in Africa. She does this by way of debating the question of 'peace vs. justice'. In her view, justice could create peace that is more stable and long-lasting.

Part II deals with alternative ways of prosecuting international crimes in Africa other than through the International Criminal Court. *Gerhard Kemp*, a law professor at Stellenbosch University, South Africa, regards the domestic implementation of the Rome Statute by African states as key to the enforcement of international criminal law (Chap. 6). He points out several legislative initiatives taken by African states such as South Africa, Mauritius, Kenya, Senegal and Uganda, to incorporate the Rome Statute into their respective domestic legal systems. He analyzes strategies to implement the Rome Statute and refers to the *Windhoek Plan of Action on the ICC Ratification and Implementation in SADC* (*Southern African Development Community*) of 2001, according to which Southern African states agreed to give "priority to the drafting of implementing legislation of the Rome Statute in order to effectively cooperate with the ICC and give effect to the principle of complementarity". However, *Kemp* states that in practice the progressive ideas embodied in the plan did not translate sufficiently into actual collaborative efforts. He cites, as a positive example, the South African ICC Act of 2002, which made South Africa the first country in Africa to incorporate the Rome

Statute fully into its national law. He describes how this Act has in the meantime proved its practical usefulness in a case dealing with allegations of torture committed by Zimbabwean officials against Zimbabwean political activists in Zimbabwe. The North Gauteng High Court in Pretoria had to decide whether the South African criminal justice authorities were under an obligation to investigate this case. The Court held that the ICC Act not only provides for conditional universal jurisdiction, i.e. prosecutions contingent on the presence of the suspect on South African territory, but it also imposes a duty on South African authorities to investigate the allegations before a perpetrator enters the country. This landmark decision was recently affirmed by the Supreme Court of Appeal.

In his wide-ranging contribution (Chap. 7), Chief Justice *Sam Rugege* of the Rwandan Supreme Court, together with *Aimé Muyoboke Karimunda*, analyzes Rwanda's multi-dimensional approach in dealing with the legacy of the 1994 genocide. He states that, in general, the domestic jurisdiction and international jurisdiction must not be regarded as an alternative to the other. He assesses the work of the International Criminal Tribunal for Rwanda (ICTR) positively, referring to the convictions of many *génocidaires*, the establishment of a vast body of jurisprudence on genocide and crimes against humanity, and the useful role played by the ICTR in building the capacity of the Rwandan judiciary. As shortcomings, he points to the fact that the ICTR trials took place far away from where the crimes were committed, which meant that only a few victims, survivors and their relatives could attend the trials. His chapter covers the problems encountered by the Rwandan justice system in handling the genocide cases. He concedes that the Rwandan judicial system was, indeed, overstretched. This resulted in resorting to the traditional Gacaca courts as forums to try the huge number of cases which the ordinary courts were unable to handle. The use of the Gacaca courts has often been referred to as an "African solution to an African problem". *Rugege* argues that this form of participatory justice serves as a reminder that the crimes were committed in public and that there is a "moral obligation to tell the truth" about the crimes witnessed, experienced or perpetrated. *Rugege* contends that the Gacaca courts were successful, as they disposed of 1,958,643 cases through rather informal and less intimidatory judicial procedures which, in turn, encouraged the telling of the truth. In conclusion, *Rugege*, therefore, argues for a multi-dimensional approach in dealing with post-conflict situations.

Mbacké Fall, the Chief Prosecutor at the Extraordinary African Chambers in the Courts of Senegal, depicts another African approach to prosecute international crimes (Chap. 8). He discusses the case of former Chadian president, *Hissène Habré*, who is currently standing trial before the Extraordinary African Chambers in the Courts of Senegal. The Chambers were established by an agreement between the African Union and Senegal on 22 August 2012. As *Fall* argues, the involvement of the African Union in the creation of the Chambers implies that the prosecution of the crimes with which *Habré* is charged, is conducted "on behalf of Africa". He emphasizes the fact that the Chambers are independent and are not in any way linked to either the Senegalese Ministry of Justice or the African Union.

Neither of them monitors the work of the Chambers, nor are the Chambers accountable to either of the two bodies. *Fall* also gives an in-depth insight into the law and procedure applied by the Chambers, which try crimes that were perpetrated in Chad between 7 June 1982 and 1 December 1990. He points out that whenever situations occur for which the Statute does not provide a solution, the Chambers are allowed to resort to Senegalese law as a subsidiary source. Furthermore, the appeal judges may draw upon the jurisprudence of international criminal courts and tribunals, according to Article 25(3) of the Statute. As regards possible alternatives to the interventions of the International Criminal Court in Africa, *Fall* argues in favor of creating temporary ad hoc tribunals. He concludes the chapter with a few remarks on the relationship between the International Criminal Court and the African Union. He suggests that the African Union needs to act ahead of the Court, which means that the African Union should encourage States Parties to fulfill their obligations under the Rome Statute and to try those responsible for international crimes themselves.

While the previous two chapters show proof of 'African success stories' in the fight against impunity, the contribution of *Temitayo Lucia Akinmuwagun* of the Federal Ministry of Justice, Abuja, Nigeria, and *Moritz Vormbaum*, senior researcher in the Faculty of Law at Humboldt-Universität zu Berlin, deals with an on-going African conflict in which the vast majority of the perpetrators have until now not been brought to justice (Chap. 9). In the region of Jos in central Nigeria, communal violence has erupted on a regular basis and has resulted in the deaths of thousands of the region's inhabitants. The authors state that the Nigerian authorities have so far not taken any effective measures to halt the killings. The troops dispatched to the region by the Federal Government of Nigeria have themselves been accused of committing human rights violations in the course of the conflict. There have been only sporadic prosecutions of the planners and perpetrators of the attacks in Jos. This has resulted in the ICC Prosecutor's investigation of the Jos situation as well. However, as *Akinmuwagun* and *Vormbaum* conclude from their legal analysis of the Jos situation, the investigations by the Office of the Prosecutor, too, are irresolute, as the Prosecutor focuses exclusively on the attacks by the Islamist group, *Boko Haram*, which became involved in the conflict a few years ago. The authors argue that there is sufficient evidence pointing to the fact that the planners responsible for most of the international crimes committed in Jos can also be held accountable for crimes against humanity.

Florian Jeßberger, a law professor at the University of Hamburg, Germany, deals with the prosecution of international crimes in Africa by third states, based on the principle of universal jurisdiction (Chap. 10). He analyzes the African position on universal jurisdiction as expressed by the African Union in its extraordinary session on 12 October 2013 at which the Union pointed to the "abuse of universal jurisdiction" while pushing for a Model National Law on universal jurisdiction. Therefore, *Jeßberger* concludes that the African Union generally endorses the principle of universal jurisdiction. However, he finds that although many African states provide for universal jurisdiction in their respective laws, they hardly implement it in practice, unlike in Europe where several trials on

the basis of this principle have taken place in countries such as Belgium, France, Germany, the Netherlands, Norway, Spain and Switzerland. As regards the accusation of alleged "abuse" of universal jurisdiction, *Jeßberger* refers to a survey[7] which found that of the total number of cases that were tried worldwide on the basis of universal jurisdiction over the past 25 years, less than five per cent involved Africans. This figure, he infers, does not prove any racial bias against Africans. As a unique instance of the use of universal jurisdiction in Africa, *Jeßberger* singles out the current case of *Hissène Habré*.[8]

Part III focuses on the difficult relationship between the African Union and the International Criminal Court. *Tim Murithi,* who is Head of the Justice and Reconciliation in Africa Programme at the Institute for Justice and Reconciliation, Cape Town, and Research Fellow at the African Gender Institute, University of Cape Town, sketches the relations between African countries, the African Union, and the International Criminal Court from the perspective of a political scientist (Chap. 11). He analyzes the deterioration of this relationship by highlighting the African Union's rationale for criticizing the International Criminal Court. Some of the arguments put forward against the Court, as *Murithi* states, cannot be ignored, for example, the concern that the arrest warrant against *Al Bashir* may run counter to the efforts of the African Union to establish peace in Sudan, or that the Court does not seem to invest the same effort in the prosecution of international crimes in other parts of the world as it does in Africa. Still, he stresses that African states have divergent opinions on the International Criminal Court. *Murithi* then focuses on how the relationship between the Court and the African Union may be improved. His key point is that, on the one hand the International Criminal Court must accept the political dimension of its work and, on the other hand that the African Union must move away from its exclusively political point of view regarding the enforcement of international criminal law. According to him, much will depend on the ICC Prosecutor in the future, but that civil society also has a key role to play in improving the relationship. He stresses the need for the International Criminal Court to communicate politically, an initiative which, in his view, could be bolstered by the appointment of a senior political advisor to the Office of the Prosecutor of the International Criminal Court.

In Chap. 12, *Juliet Okoth*, a law lecturer in the University of Nairobi, Kenya, draws attention to a crucial legal issue complicating the current conflict between the African Union and the International Criminal Court: the question of deferrals of situations before the International Criminal Court on the basis of Article 16 of the Rome Statute. This Article authorizes the UN Security Council to adopt a Resolution under Chapter VII of the UN Charter in which it requests the Court not to commence or proceed with an investigation or prosecution for a renewable period of 12 months. *Okoth* analyzes how the UN Security Council initially

[7] Survey published by Langer (2011).

[8] On the *Habré* case see Chap. 8 of *Fall* in this book.

applied Article 16 in several Resolutions. She argues that Article 16 is a tool that seeks to reconcile the interests of peace and security on the one hand, with the interests of justice and the fight against impunity on the other. Therefore, in her view, a deferral under Article 16 should not happen automatically. Although she identifies shortcomings in the practice initially adopted by the UN Security Council, she assesses the latest Security Council Decisions positively. *Okoth* concludes that the Security Council's turning down of an application by the African Union to have the Kenyan situation deferred has correctly had the effect of setting a high threshold for determining a threat to peace and security as set out under Article 16 of the Rome Statute.

Sosteness Materu, a law lecturer at the University of Dar es Salaam, Tanzania, reflects on the relationship between the African Union and the International Criminal Court against the background of the Kenya situation (Chap. 13). In his view, it is doubtful whether the positions articulated by the African Union in connection with the demand for a deferral of the trials of the Kenyan political leadership are representative for the whole of Africa. He argues that this is especially so because not all Member States of the African Union are States Parties to the ICC Statute. Therefore, the African Union may not adopt a 'common position' on the work of the Court in the same way as, for example, the European Union whose Member States are all signatories to the ICC Statute. In addition, he alludes to the fact that a number of African states, especially those from francophone regions, have expressed their support for the work of the Court. *Materu* further distinguishes between the opinions of leading African politicians and African citizens. He cites, as an example, the findings of a survey conducted in Kenya which showed, inter alia, that 67 percent of the Kenyan population would like to see President *Kenyatta* stand trial at the International Criminal Court. He concludes that, for the victims of international crimes committed in Africa, the Court is still an important institution. *Materu* suggests that in future the opinion of this group should take precedence over that of the political elites.

The book is complemented by an Annex that catalogues Decisions taken by the African Union on the activities of the International Criminal Court relating to African states and on the issue of universal jurisdiction. This compendium of Decisions gives an overview of the controversies dealt with in this book, and affords the reader ready access to important sources referred to by the contributors. In addition, the Annex includes a collection of relevant UN Security Council Resolutions.

After the official closure of the conference, the young African lawyers who had attended expressed their opinions on the theme under discussion. Their statement critiques the position of the African Union as well as the role of the United Nations Security Council in respect of the International Criminal Court. We included the statement in the Annex as we are of the view that the recommendations made will contribute to the debate on the role of international criminal justice in Africa.

Reference

Langer M (2011) The diplomacy of universal jurisdiction: The political branches and the transnational prosecution of international crimes. Am JInt Law 105:1–49