

Report on the 6th Summer School of the South African-German Centre for Transnational Criminal Justice

By Dr. **Sosteness Materu**, LL.M. (UWC), Dar es Salaam, **Fatuma Mninde-Silungwe**, LL.M. (UWC), Berlin/Cape Town, **Marshet Tadesse Tessema**, LL.M. (UWC), Berlin/Cape Town*

From 23.6.-11.7.2014, the 6th Summer School of the South African-German Centre for Transnational Criminal Justice was held at Humboldt-Universität zu Berlin. The South African-German Centre for Transnational Criminal Justice (hereafter 'Centre') is one of six so-called Centres of Excellence established in Africa with the support of the German Academic Exchange Service (DAAD) and funding from the Federal Foreign Office of Germany.¹ The Centre is a result of a seasoned cooperation between the University of the Western Cape, Cape Town, South Africa, and Humboldt-Universität zu Berlin, Germany. It is hosted by the Law Faculty of the University of the Western Cape,² and offers an LL.M. and Ph.D. programme in Transnational Criminal Justice for students from different parts of the world, but mainly from Africa.³ Within a short period of time the Centre has successfully produced over 80 LL.M. and four Doctoral graduates. As part of the Centre's programme, a summer school is held every year at Humboldt-Universität zu Berlin. The summer school provides an opportunity for the students of the Centre to meet experts in the field of their studies and to attend lectures, talks and presentations held by acclaimed practitioners, academics, representatives of different organizations and many others.

The summer school was opened by Prof. *Gerhard Werle* and Prof. *Jan-Hendrik Olbertz* (President of Humboldt-Universität zu Berlin) on 23.6.2014. Welcoming speeches were held by *Ulrich Grothus*, Deputy Secretary General of DAAD and H.E. Reverend *Dr. Makhenkesi Stofile*, the Ambassador of South Africa to Germany. The Ambassador welcomed the participants and expressed his government's satisfaction with the fruitful cooperation between the two universities, and commended the contribution the Centre is making to ensure good governance in Africa. He urged the African students to impart the knowledge they acquire and also make use of it to

help solving the problems their respective countries are facing in the criminal justice arena.

The keynote speech was delivered by Judge *Sanji Mmasenono Monageng*, First Vice-President of the International Criminal Court (ICC). But before the keynote speaker delivered her lecture, Prof. *Werle* put it into context. He started by stating that "there was once a marriage and honeymoon between the ICC and the African states." To explain this, he noted that African countries actively participated and played a key role in the establishment of the Court, and that Africa forms the largest regional bloc currently represented in the ICC's Assembly of States Parties (ASP).⁴ He indicated, however, that while the relationship between the Court and Africa started so promisingly, it seems now that the "honeymoon" is over and the marriage itself is highly overwrought, although the current controversy has not yet resulted in an absolute divorce of the marriage. By this metaphor, Prof. *Werle* was making reference to the current hostile stand that the African states (through the African Union) have adopted towards the ICC. The keynote speaker was, therefore, invited to speak on this vexing issue. Her lecture was entitled "Africa and the International Criminal Court – Present Situation and the Future Development".

She started off by indicating that the establishment of the Court is "a gift of hope to the future generations, and a giant step forward in the march towards universal human rights and the rule of law".⁵ She then underscored the fact that at the outset an overwhelming number of African states supported the ICC. Africa being the largest regional bloc represented in the ICC system was instrumental in the coming into force of the court by ratifying the Rome Statute at the earliest stage. The first and the most recent countries to ratify the Rome Statute were African countries, namely Senegal and Ivory Coast, respectively.

However, she regretted that as the time went by the support of the African countries started dwindling. She noted that following the indictment of the Sudanese President, Al-Bashir, and later with the issuance of summonses against Kenya's President Kenyatta and Deputy President Ruto (who, notably, were not holding their current positions at the time the summonses were issued), the promising relationship between the Court and many African countries started to suddenly deteriorate. The judge stated that all of the situations

* *Dr. Sosteness Materu*, LL.M. (UWC) is a lecturer at the University of Dar es Salaam, Tanzania, and Researcher at the South African-German Centre for Transnational Criminal Justice. *Fatuma Mninde-Silungwe*, LL.M. (UWC) and *Marshet Tadesse Tessema*, LL.M. (UWC) are both Ph.D. candidates and researchers at the South African-German Centre for Transnational Criminal Justice.

¹ See *Makoni*, AFRICA, Centres of excellence develop future leaders

(<http://www.universityworldnews.com/article.php?story=20110211211807593> [21.10.2014]).

² For more details about the Centre:

<http://www.transcrim.org>.

³ The Centre is directed by Prof. *Gerhard Werle* (Humboldt Universität zu Berlin) and Prof. *Lovell Fernandez* (University of the Western Cape); it is coordinated by *Dr. Moritz Vormbaum*.

⁴ 34 out of the 54 African countries are States Parties to the Rome Statute. 23 % of the States Parties to the ICC are from Africa. The first country to refer its own situation to the ICC is from Africa. And also the first country to ratify the founding document of the Court is also from the same continent.

⁵ A quote from a statement by Kofi Annan, former Secretary-General of the United Nations, at the opening of the Preparatory Commission for the International Criminal Court, New York, 16.2.1999.

before the Court thus far are from Africa, but the majority of these situations were voluntarily referred to the Court by the concerned States Parties themselves. Therefore, she argued, the criticisms against the Court and the attempt to politicize the Court are based on a misunderstanding of the Court's legal foundation or regime which was created by the States Parties themselves, not by the Court. As regards the situations which were referred to the Court by the United Nations Security Council (UNSC), she pointed out that such referrals were made on the basis of the legal framework that the ASP has legislated. She first stated clearly that it was the ASP that gave the UNSC (a political organ) the power to activate the jurisdiction of the Court over states such as Libya and Sudan as well, which are not parties to the Rome Statute.⁶ In addition, she argued that the criticism of bias that has been leveled against the Court does not refer to an inherent problem of the Court, but rather of the UNSC. The AU and other African countries, she further stated, are blaming the Court for the problems of the UNSC and, therefore, for problems that the Court could not rectify. Hence, in her view, it is fallacious and legally unsound to blame the Court for not exercising jurisdiction over, for example, the ongoing Syrian crisis, in which, in fact, the UNSC failed to adopt a resolution that would have referred the situation to the Court. She admitted, however, the fact that all the cases currently before the Court are from Africa, but noted that criticizing the Court for doing what it was created for and is supposed to do is unfounded. Judge *Monageng* added that Africa and most importantly the ordinary Africans need the Court, for it plays a significant role in ensuring human rights protection. For her, the Court is a unique mechanism for the victims to air their voices by way of participation in the Court's proceedings, indicating that so far about 7,000 victims have been participating in the proceeding of the Court. Trying to politicize the Court and attempting to divert it from its main judicial function, she said, is not only inappropriate, but it is tantamount to ignoring the victims' cry for justice. In conclusion, she stated that given the relevance of the ICC to the majority of Africans, there is a need to mend the deteriorating relationship between Africa and the Court. She opined that this can only be achieved if a constructive dialogue is carried out, and that the African States Parties to the Court have a special role to play in this regard. She insisted that opening a Court liaison office at the Headquarters of the AU in Addis Ababa, Ethiopia, is one of the ways which could help to repair the souring relationship between the AU and the Court, despite the fact the AU has so far rejected the idea.

In the afternoon of the same day, Prof. *David Scheffer* (Northwestern University, Chicago, USA) gave an intriguing presentation on where the United States of America stands in its relationship with the Court. He himself led the US delegation in the negotiation process at the Rome Conference leading to the establishment of the Court and, therefore, gave the participants enlightening first-hand information about the role that his country played in that process and since the inception of the Court. He stated that although the USA played a signifi-

cant role in the negotiation and creation of the ICC, it was not satisfied with some of the provisions which were proposed and adopted in the legal framework of the Court; hence, it voted against the adoption of the Statute and has not ratified it yet.⁷ However, he refuted any thinking that the USA was opposed to the creation of an independent international criminal court noting that the only debate or issue which became of concern to the USA was the kind of a court the ICC should be, particularly in terms of the legal framework on which it would operate. Explaining further why the USA failed to join the ICC, he stated that Washington wanted first to see how the Court operates before accepting the applicability of the Statute to US citizens. *Scheffer* refuted the narrative that the USA signed and then "unsigned" the Rome Statute, arguing passionately that the signature "is still there". He argued that what happened was not "unsigned" per se, but rather that the Bush administration "suspended its obligations" as a signatory state and that the suspension was later ended by the subsequent administration. His argument notwithstanding, some of the participants were of the opinion that what the USA did is practically tantamount to "unsigned" of the Statute.

Moreover *Scheffer* claimed that the USA "is a de facto State Party" of the ICC. In support of this claim, he outlined a number of reasons as to why he believes that this is the state of affairs, including that:

- (1) there are now "positive statements" by the Obama administration about the Court;⁸
- (2) the USA has been actively participating in all ASP meetings, including the recent Kampala Review Conference;
- (3) the USA also supported referrals of different situations by the UNSC to the ICC;⁹
- (4) the USA has availed its military and intelligence in the ongoing efforts to track and capture Joseph Kony and other leaders of the Lord's Resistance Army in respect of whom there are pending arrest warrants by the ICC;
- (5) the USA, being a permanent member of the UNSC, did not support deferral requests in respect of the Kenya and Sudan situations; and
- (6) more importantly, the USA has recently surrendered Bosco Ntaganda to the Court from its embassy in Kigali.

During the discussion round, some participants claimed that the USA has been protecting its citizens from facing the Court by using different mechanisms like "The Hague Inva-

⁷ The power entrusted on the Office of the Prosecutor (OTP) is one of the areas the USA opposed.

⁸ Interestingly, he stated that the USA administration under Bush used to be very reluctant to mention the ICC in their official documents and public speeches but under Obama it has relatively changed.

⁹ In the referrals of the Libyan and Sudan situations USA made affirmative votes for the referrals.

⁶ See Art. 12 of the Rome Statute.

sion Clause”¹⁰ and bilateral agreements it has signed with many countries to shield US citizens from the reach of the Court. Therefore, some participants were of the view that the USA is preaching water and drinking wine, and for that reason, it is a misnomer to regard her as a ‘friend’ of the Court. When asked to prophesy as to when the USA will ratify the ICC Statute, Prof. *Scheffer* replied that ratifying the Statute does not seem to be a priority for the USA in the foreseeable future, given that there are many other conventions that the country has not ratified or acceded to.¹¹ However, he said that his country will probably ratify the Rome Statute “within the coming 15 to 20 years”.

Prof. *Christian Waldhoff*, Dean of the Law Faculty of Humboldt-Universität zu Berlin, opened the second day of the summer school. He expressed his warm welcome to the participants and introduced the guest-speaker Prof. *Shizhou Wang* (Peking University, China). *Wang* delivered an insightful presentation on how China is trying to fight the disastrous “cancer of corruption”. He started his presentation titled “The Fight of Corruption in China” by unraveling the structure of criminal law and the anti-corruption system in China. He spoke on the various forms of corruption under the China’s legal framework. He outlined the notion of “corruption below the guilty line”, also known as moral corruption. This is a form of corruption peculiar to China’s criminal law. He stated that this unique form of corruption has been mocked and highly criticized by different actors. Prof. *Wang* concluded his presentation by highlighting high profile corruption cases before Chinese courts in which several senior officials are being prosecuted.

Prof. *Sam Rugege*, Chief Justice of the Supreme Court of Rwanda, delivered a sagacious presentation on the topic “Prosecution of International Crimes by Domestic Courts – the Rwandan Experience”. He commenced by unraveling the episodes of mass killings that Rwanda has experienced since the 1950s, thereby painting a clear picture that there had been cycles of mass massacres in Rwanda even prior to the 1994 genocide. He stated that the divide-and-rule approach of the Belgian colonizer was the root cause of the atrocities which ensued in Rwanda, including the 1994 genocide against the Tutsi. He illuminated on how the post-genocide Rwanda arrived at the road map it took in confronting its past. He rightly stated that the United Nations Ad hoc Tribunal for Rwanda (ICTR), created by the UNSC to deal with the most responsible perpetrators of the genocide in Rwanda, could deal with only a handful of perpetrators, a fact which inevitably necessitated the development of domestic mechanisms to deal with the remaining huge number of perpetrators. Taking into account the peculiar constraints of Rwanda in the aftermath of the genocide, gacaca courts, being quasi-judicial organs, were employed to deal with the genocide and to start the process of healing the wounds inflicted upon Rwandans

by fellow Rwandans. He outlined that in Rwanda, via the approaches adopted to deal with the genocide, reconciliation and criminal accountability has been achieved to some extent, and that the country is moving forward from the horrific past. He also commented passionately on the recent “unpleasant” trend in the judgments of the ICTR’s Appeals Chamber, which has raised eyebrows not only in Rwanda but also internationally amongst scholars. He noted that there are many standards that have been set by important decisions of the ICTR which have been applauded for having contributed tremendously to the international criminal justice jurisprudence regarding the crime of genocide. He noted, however, that recently there has been “a change of course” – a reversal of the previous reasoning – by the Appeals Chamber which has now adopted a different standard that has resulted in letting the persons accused for having committed the genocide go scot-free or get unjustifiably reduced sentences. He referred to this trend as “back-peddling” by the Appeals Chamber, and accordingly, in his view, it not only undermines the contribution the Court has made so far, but also is disturbing for the victims and international community. He insisted that it is worth investigating as to why the Appeals Chamber would make such a move – (almost a U-turn) 15 years after developing a stable jurisprudence, and more so at the time the Tribunal is finalizing its work.¹²

Another insightful talk was given by Prof. *Ademola Abass* (Professor at the United Nations University, Bruges, Belgium) who delivered a mind-boggling lecture on the topic “A Regional Criminal Court for Africa?”.¹³ His talk focused on the ongoing efforts of the African Union to create an “African Criminal Court Division” within the African Court of Human and Peoples Rights. He stated that the idea of establishing an African regional criminal court is not new as it was conceived for the first time already in the 1970s, although it did not materialize. As he further explained, the idea then was that a court of that nature was needed to prosecute the crime of apartheid in South Africa, given that the conduct was already criminalized and declared as a crime against humanity by the United Nations.¹⁴ As to what has rejuvenat-

¹² Allegations are made specifically against Judge *Theodor Meron*, President of the Appeals Chamber, for having unjustifiably influenced the change of course in bad faith. See *Wallis*, Al Jazeera of 18.4.2014 (<http://www.aljazeera.com/indepth/opinion/2014/04/international-justice-rwanda-u-2014417153532217202.html> [21.10.2014]); *Musoni*, New Times Rwanda of 20.6.2013 (<http://allafrica.com/stories/201306200232.html> [21.10.2014]); *Bideri*, New Times Rwanda of 14.5.2014 (<http://allafrica.com/stories/201405140618.html> [21.10.2014]); *Gallimore*, New Times Rwanda of 8.4.2014 (<http://allafrica.com/stories/201404080280.html> [21.10.2014]).

¹³ See his article related to the topic, *Abass*, Netherlands International Law Review 60 (2013), 27.

¹⁴ See International Convention on the Suppression and Punishment of the Crime of Apartheid = G.A. res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc.

¹⁰ This is the name given to the American Service Members Protection Act of 2002.

¹¹ He cited, for example, the Genocide Convention and others which took very long for the USA to ratify despite being less contentious than the ICC Statute.

ed the idea recently, he noted that perhaps it is because of the grievances that the AU and other African countries have towards the ICC following the issuance of warrants of arrest against President Al-Bashir of Sudan as well as the refusal by the UNSC to defer the Sudan and Kenya situations.

Abass stated that there is no legal barrier or any prohibition whatsoever for establishing a regional criminal court in Africa or in another region. But he raised his serious doubts on the motive of the recent move by the AU on this issue. First, he noted that there would not be a possibility of prosecuting African heads of state and government in the envisioned African Criminal Division even if they committed crimes within the jurisdiction of the court. In fact, he noted, indictment of such leaders is the very aspect against which the AU leaders are fighting in relation to the ICC. Second, he also raised his concern on the list of crimes included in the draft protocol for the proposed division. He referred to the list as a “laundry basket”, among other things, to allude to the high number and the mishmash of crimes over which the envisioned division will prosecute. Commenting further on the proposed Protocol for the African Criminal Division, *Abass* doubted it would ever be approved by the African heads of state meeting in Malabo. He added that even if the protocol was approved,¹⁵ he was almost certain that it would never become operational for different reasons, the main one being that corruption, which in the African context is first and foremost a “leadership crime”, would not be prosecuted before the division. He also commented on the way the UNSC has handled the deferral requests of the AU and other African states on which he stated that it could have been dealt with in a better way, so as to avoid the AU’s blame that the concerns raised by Africa are not being taken seriously.

Prof. *Najma Moosa*, former Dean of the Law Faculty of University of the Western Cape, spoke on “Bridging the Gulf between Competing Perspectives on Abortion in South Africa”. She enlightened the participants on the issue of right of unborn child vis-a-vis how abortion is treated under the laws of several states. While talking about decriminalization of abortion in some countries, including South Africa, she pointed out the health of the mother and socio-economic factors as one of the reasons which necessitated decriminalization of abortion. Further, she stated that there are some religions which are strongly against the idea of decriminalization of abortion. To bridge the competing interests at stake in relation to the idea of decriminalization of abortion, the laws have to refrain from allowing unrestrained abortion. She concluded her presentation by emphasizing on the need to put in place measures for effective implementation of the law on abortion.

Prof. *Bernard Martin* (Dean of the Law Faculty of the University of the Western Cape, Cape Town, South Africa) through his topic “The Framework of Agreements for the

Prosecution of Intellectual Property Infringements” provided a novel perspective of dealing with intellectual property infringements. He considered prospects of applying criminal law in the area of intellectual property and took a historical approach by analyzing the criminal sanctions provided under several treaties on intellectual property rights, including the Paris Convention¹⁶, the Bern Convention¹⁷, the Agreement on Trade-Related Intellectual Property Rights, and the Anti-Counterfeiting Trade Agreement. Prof. *Martin* enlightened the participants on the notion of parallel importation. He outlined how difficult it is to effectively protect the “brain child of individuals” in this digital era where dynamic and constantly changing means of violating intellectual property rights are easily available. His presentation was eye opening on the possibility of applying criminal sanctions as a means to protect intellectual property rights.

Dr. Chantal Meloni (University of Milan, Italy) gave a lecture on “Targeted Killings under International Law”. This lecture could not have been more topical, given that it touched on the very important and controversial area of contemporary international law, namely the modern responses to terrorism and asymmetric warfare. She stated that few states have already adopted policies on targeted killings in international law, although these killings per se are not yet a legal concept. She unpacked the notion of targeted killings by identifying its common elements, which include the deliberate and intentional use of force by governments against specified individuals who are identified in advance and who are not under detention of that government. She pointed out that targeted killings can be analyzed by using different lenses: international criminal law, international human rights law, or international humanitarian law. She emphasized the fact that under human rights law, targeted killings could be viewed as a violation of the right to life, but it is unclear whether, for example, such killings would amount to war crimes under humanitarian law. Further, she identified some problems relating to targeted killings operations, especially in relation to so-called “war on terror”, such as (i) the lack of transparency in such operations; and (ii) the challenge of differentiating civilians from combatants. She indicated that one common method for conducting the targeted killings is through the use of drones (unmanned aircrafts), and that although in a positive sense, drones offer a military advantage – as they are cheaper and do not put life of the military at risk –, they have made it easier for states to kill without accountability. Put differently, she viewed a “playstation-like mentality” as one of the biggest repercussions of the use of drones.

Moreover, *Meloni* distinguished targeted killings carried out as a method of law enforcement, e.g. by the police at the domestic level of a state, and those carried out as a method of conducting hostilities. She said it is not always possible to distinguish between the two situations. She argued that there are different rules for these two regimes in that, on the one

A/9030 (1974), 1015 U.N.T.S. 243, entered into force 18.7.1976.

¹⁵ The Protocol was approved during the 23rd Ordinary Session of the Assembly of the AU Summit which was held from 20.-27.6.2014 in Malabo, Equatorial Guinea.

¹⁶ The Paris Convention for the Protection of Industrial Property 1883.

¹⁷ The Berne Convention for the Protection of Literary and Artistic Works 1886.

hand, targeted killings as a method of law enforcement requires that states protect the right to life, whereas on the other hand, targeted killings as an integral part of hostilities requires observance of principles of international humanitarian law, such as proportionality, distinction and necessity. However, she argued that it is difficult to apply the classic rules of international humanitarian law in contemporary asymmetric conflicts. There are conflicting obligations of states namely protecting citizens and respecting individual's right to life. She concluded by putting down some questions, inter alia, on how to differentiate civilians from combatants in asymmetric warfare. Similar questions have also been raised in the Report of the United Nation's Special Rapporteur on extra-judicial, summary or arbitrary executions of 2010.¹⁸

Advocate *Wolfgang Kaleck*, Founder and General Secretary of the European Centre for Constitutional and Human Rights (ECCHR, Berlin, Germany),¹⁹ gave a lecture entitled "Torture of Iraqi Detainees by the British Military before the International Criminal Court". He brought in the practitioner's perspectives to international criminal law as he narrated the process that the ECCHR has taken in order to push for accountability for torture allegedly committed by the British Military in Iraq. He provided the historical background to the case against the UK military by referring to the fact that in 2006, the ICC's Prosecutor concluded the first review on the matter. At that stage, he explained, the OTP decided not to initiate any investigation on the basis of a quantitative criterion since the number of victims was less than 20, so in the view of the OTP the cases did not meet the gravity test under the ICC Statute. He further highlighted how the ECCHR and other partners worked to compile information that was later submitted to the ICC on the basis of which the ICC was called upon to open an investigation into the situation in Iraq.²⁰ In their view, the situation in Iraq could satisfy the admissibility criteria under Art. 17 of the ICC Statute. In particular, he stated that although there have been efforts at the domestic level in the UK to address accountability for torture, this has been limited only to lower-level officials. Accordingly, he said that the ECCHR is pushing for command responsibility to be used as a basis for holding accountable senior officials in the British Army and in the British Government. The positive report emerging from these efforts is that after the ECHR presented their request to the prosecutor, the OTP decided to open a preliminary investigation

into the situation.²¹ His prognosis in this situation is that the OTP must put resources in order to have deeper investigations into the matter. In addition, in his view, this might act as a way of entrenching positive complementarity by 'forcing' the British Government to expand the scope of its investigation, given that it will want to avoid the ICC jurisdiction. This lecture demonstrated vividly the significant role which non-state actors could play in pushing for accountability for international crimes.

Prof. *Lawrence Douglas* (Amherst College, USA) engaged the participants in his lecture given in the context of "Kosmos Dialog" at Humboldt-Universität zu Berlin.²² The topic of the dialogue was "The Wages of Legitimacy: Trials before Military Commission at Guantanamo Bay". He explained the processes of providing justice in US military commissions for persons accused of committing certain terrorist acts. As *Douglas* set forth, the *Bush* and *Obama* administrations gave different labels to the detainees; they were castigated as "unlawful enemy combatants" under the *Bush* administration, whereas they are now denominated "unprivileged enemy belligerents" under the *Obama* administration. He delved into the politics behind the use of military commissions as opposed to civilian courts (so-called Article III Courts), highlighting the fact that military commissions were considered more flexible in terms of the applicable rules of evidence as opposed to civilian courts, e.g. proceedings carried out under military commissions not only entail a less strict criminal procedure but also admit hearsay evidence (giving advantage to the prosecution). He highlighted some progress made in cases before the military commissions in Guantanamo, and also noted that the US military commissions were declared as a violation of the Geneva laws. However the difference between military commissions and regular courts is dwindling after the *Bush* administration. Nevertheless, hearsay is still admissible before such commissions. Before finalizing his presentation, he highlighted the fact that there is a continued detention of individuals without any charges against most of them. Out of hundreds of detainees currently held, there are only six individuals who are charged and their cases being heard by the military commissions.²³ He concluded that the military commissions are in an appeal battle to construct their legitimacy; hence, it could be said that the military commission model itself is on trial.

Prof. *Florian Jeßberger* (Hamburg University, Germany) presented on "The Modern Doctrinal Debate on the Crime of

¹⁸ UN General Assembly (*Philip Alston*), Report of 28.5.2010 – A/HRC/14/24/Add. 6 (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions); UN General Assembly, Report of 13.9.2013 – A/68/382 (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions); UN General Assembly (*Ben Emmerson*), Report of 11.3.2014 – A/HRC/25/59 (Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism).

¹⁹ On this Centre see <http://www.ecchr.de>.

²⁰ The report is available at: <http://www.ecchr.de/united-kingdom.html> (21.10.2014).

²¹ The decision of the Prosecutor to reopen the investigation is available at:

http://www.icc-cpi.int/EN_Menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/iraq/pages/iraq.aspx (21.10.2014).

²² The "KOSMOS Dialogues" are specific research and teaching projects funded by Humboldt-Universität zu Berlin in order to develop and advance international scientific exchange.

²³ Court, Jud. of date – reference (United States v. Abd al-Rahim al-Nashiri and United States v. Khalid Shaikh Mohammed et al).

Aggression”. His presentation was an in-depth historical analysis of scholarly works on the doctrine of the crime of aggression. He demarcated his analysis into some historical phases, analyzing the doctrine in the 1920s, 1930s, 1940s, 1990s and the current debates. In summary, he argued that in each of the historical phases under analysis, the doctrine had developed through the influence of external factors, for example, the World War I in the 1920s, the World War II in the 1940s, the Cold War and the internationalization of international criminal law in the 1990s and thereafter. He highlighted proposals by different scholars within the periods under his study. Some interesting proposals include the double-sided concept of responsibility for the crime of aggression by Pella in the 1920s, individual liability for aggression and the crime being regarded as *ex post facto* in the 1940s, and the shifting of the crime to the UN trigger mechanism under the current framework of the Court. He argued that although there were many proposals on how the crime could be defined, some of them, if not many, did not form part of the definition of the crime of aggression. He concluded that the crime of aggression has remained under-theorized to date.

Shamila Batohi, Senior Legal Advisor to the Prosecutor of the ICC, delivered a presentation on “The International Criminal Court: A Legal Entity in a Political World”. She highlighted the history of the creation of the ICC, pointing to the fact that African states made a significant contribution in the establishing of the Court. She acknowledged the difficult relationship that currently exists between Africa and the ICC. She argued that in accusing the ICC of being biased against Africa, it is important to consider some empirical evidence that is often ignored, namely that over five million people have been displaced in Africa, that over 40,000 people have been killed, that hundreds and thousands of child soldiers have been recruited, that women, children and men have been sexually abused as a tool of war, and that countless communities have been destroyed. She argued that it is the voice of these victims that the Court exists to serve.

She also highlighted the fact that most allegations and criticisms against the ICC fail to consider how the court got to be involved in the situations under investigation. As an example, she noted, that four situations under investigation, namely Uganda, Mali, the Democratic Republic of the Congo, and the Central African Republic, are self-referrals. Only in relation to Kenya and Côte d’Ivoire, the situations are a result of *proprio motu* investigations. But she also noted the unique circumstances of these two situations. As far as Kenya is concerned, she stated, the ICC intervened mainly as a result of Kenya’s unwillingness to prosecute the crimes at the domestic level as it had promised to do, while for Côte d’Ivoire, the *proprio motu* intervention was a legally convenient procedure in a non-state party to the Rome Statute which voluntarily accepted the jurisdiction of the Court. In trying to answer the question as to why the Court is seen as ignoring atrocities committed in some parts of the world, especially by the West, she stated that the ICC does not have universal jurisdiction, a fact which makes its operations restricted to its States Parties, save for cases that may arise as a result of Security Council referrals, such as Sudan and Libya. She said

that the States Parties created an “imperfect system” by allowing the UNSC to use the Court, but that the OTP as a legal entity works within the rules laid down in the Rome Statute by the States Parties themselves.

On the issue of complementarity, she emphasized the role of domestic courts to exercise primary jurisdiction over international crimes, and the importance of the cooperation pillar of the Court. She identified the challenges that the Court faces in cooperation, especially where the accused persons before it are powerful individuals or protected by militias. She pointed out that the strength of the ICC system depends on shared responsibilities and emphasized that the role of a preliminary examination, which is conducted by the Prosecutor, regardless of the type of trigger mechanism, is to help the Court determine independently and objectively whether it should investigate into a situation. She rightly indicated that the preliminary examination is part of positive complementarity in that it puts pressure on states to conduct investigations.

The next speaker was *Matthias Korte* who tackled “Combating Corruption – International Legal Instruments”. His presentation highlighted and illuminated some pertinent provisions in anti-corruption treaties covering Europe, Africa, Americas, and Asia as well as under international organizations such as the UN, OECD, G20 and the ICC. Some of the conventions covered were the Convention on the Protection of the Financial Interests of the European Community, the Council of Europe’s Criminal Law Convention on Corruption and its Additional Protocol, the Council of Europe’s Civil Law Convention on Corruption, the AU’s Convention on Preventing and Combating Corruption, the Inter-American Convention against Corruption, the United Nations Convention Against Corruption amongst others. He stated that most of the conventions on corruption but the AU’s Convention on Preventing and Combating Corruption do not provide for a definition of corruption. He pointed out that the AU’s convention on corruption lags behind in monitoring compliance and review mechanisms as compared to other similar conventions. He concluded his presentation by drawing the attention of the participants to the lack of comprehensive legal framework on private sector corruption.

The last presentation was given by Prof. *Martin Heger* (Humboldt-Universität zu Berlin) on “Rape, Espionage and Mutual Legal Assistance in Criminal Matters in the EU and abroad – The cases of Assange and Snowden”. He mainly focused on the Council of Europe’s Framework Decision on the European arrest warrant and the surrender procedures between Member States of 13.6.2002. He highlighted on the scope of the arrest warrant, illustrated how the arrest warrant could be filed,²⁴ and the grounds for mandatory non-execution of the European Arrest Warrant.²⁵ In relation to Edward Snowden he analyzed as to whether on the basis of the Extra-

²⁴ Art. 2 of the Framework Decision on European arrest warrant and the surrender procedures between Member States of 13.6.2002.

²⁵ Art. 3 of the Framework Decision on on European Arrest Warrant and the Surrender Procedures between Member States of 13.6.2002.

dition Treaty between Germany and the USA, Germany would have to extradite Snowden to the USA (in case Snowden travels to Germany). He emphasized that under the Extradition Treaty, Art. 1 para. 1, Germany would indeed have an obligation to extradite him to the USA. He highlighted the political crime exception provisions in the treaty and argued that it would be a matter for interpretation if the Snowden Espionage case in the USA would qualify as a political crime. In the case it qualifies as political crime then legally speaking Snowden cannot be extradited. In the case of Julian Assange, he analyzed the provisions under the Framework Decision on European Arrest Warrant, highlighting some salient issues to be considered if Julian Assange is to be extradited from the UK to Sweden on a charge of rape. He highlighted that despite the differences in the definition of the crime of rape in the UK and Sweden, the Framework Decision on the European Arrest Warrant requires adherence to the principle of mutual recognition whereby the law of the state issuing the arrest warrant is the one to be applied.

In summation, the 6th Summer School, which lasted for three weeks, brought together experts in the field of international criminal justice and beyond. It exposed the participants to various contemporary vexing issues in the areas of international criminal justice. Akin to the previous summer school programmes, this year's programme again offered successful and fruitful scholarly and practical legal debates.