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TABLE OF CONTENTS

OBITUARY

INGO WINKELMANN: Antonius “Tono” Eitel † (1933–2017)	11
--	----

FORUM

The Relationship between African States and the International Criminal Court

GERHARD WERLE AND MORITZ VORMBAUM: African States, the African Union, and the International Criminal Court : A Continuing Story	17
DIRE TLADI: Of Heroes and Villains, Angels and Demons: The ICC-AU Tension Revisited	43

FOCUS

International Law and the Dehumanisation of Activities

HELMUT PHILIPP AUST: “The System Only Dreams in Total Darkness”: The Future of Human Rights Law in the Light of Algorithmic Authority	71
THOMAS BURRI: International Law and Artificial Intelligence	91
ALDO CHIRCOP: Testing International Legal Regimes: The Advent of Automated Commercial Vessels	109
STEPHAN HOBE AND BENJAMYN I. SCOTT: International Civil Aviation and the Dehu- manisation of Activities	143
STEFAN A. KAISER: Legal Challenges of Automated and Autonomous Systems	173

6 TABLE OF CONTENTS

NICHOLAS TSAGOURIAS AND RUSSELL BUCHAN: Automatic Cyber Defence and the
Laws of War..... 203

ANTJE VON UNGERN-STERNBERG: Artificial Agents and General Principles of Law... 239

Walther Schücking Lecture

PHILIP ALLOTT: Beyond War and Diplomacy: A Giant Step for Mankind..... 269

Special Section

Towards Utopia – Rethinking International Law

JENS T. THEILEN, ISABELLE HASSFURTHER, AND WIEBKE STAFF: Guest Editors' Intro-
duction: Towards Utopia – Rethinking International Law 315

JENS T. THEILEN: Of Wonder and Changing the World: *Philip Allott's* Legal Utopianism 335

KA LOK YIP: What is Human? Reading Social Idealism against the Reality of *Blackman*
and *Azaria* 365

RADHIKA JAGTAP: Resistance through Utopia: Reflections on the Niyamgiri Anti-
Mining Movement and International Law 393

WIEBKE STAFF: Customary International Law: A Vehicle on the Road from Istopia to
Eutopia? 423

ISABELLE HASSFURTHER: Transforming the “International Unsociety”: Towards Euto-
pia by Means of International Recognition of Peoples’ Representatives 451

DOROTHY MAKAZA: Towards Afrotopia: The AU Withdrawal Strategy Document,
the ICC, and the Possibility of Pluralistic Utopias 481

SEVERIN MEIER: The Influence of Utopian Projects on the Interpretation of Interna-
tional Law and the Healthy Myth of Objectivity..... 515

MARNIE LLOYDD: Persistent Tensions? International Legal Perspectives on ‘Other’
Foreign Fighters 539

MICHELLE STAGGS KELSALL: From a Stark Utopia to Everyday Utopias 575

ROSSANA DEPLANO: Building Pragmatic Utopias: The “Other” Security Council, International Law, and the United Nations Dream	607
--	-----

GENERAL ARTICLES

PETER LAWRENCE AND LUKAS KÖHLER: Representation of Future Generations through International Climate Litigation: A Normative Framework	639
ANJA SEIBERT-FOHR: From Complicity to Due Diligence: When Do States Incur Responsibility for Their Involvement in Serious International Wrongdoing?	667

GERMAN PRACTICE

AVRIL RUSHE: Same-Sex Marriage under the <i>Grundgesetz</i> and the European Convention on Human Rights	711
ISABELLE HASSFURTHER: Will There Be “Justice for Syria”? The <i>Assad</i> Regime in German Courts	731
FELIX WÜRKERT: The German Past between Collectives and Individuals	751
TOBIAS THIENEL: Application and Repeal of the Offence of Insulting Foreign Heads of State: The <i>Böhmermann</i> Affair	763
ALENA KUNSTREICH: Prohibition or Non-Proliferation? Germany’s Point of View Concerning the Treaty on the Prohibition of Nuclear Weapons and Effective Nuclear Arms Control and Disarmament	773
MARKUS GENTZSCH AND MARC BECKER: PSPP: Curtain Up for a New Act in the Drama “German Federal Constitutional Court <i>versus</i> European Court of Justice”	785

BOOK REVIEWS

<i>ONUMA Yasuaki</i> : International Law in a Transcivilizational World (TOMUSCHAT)	801
<i>Andrzej Jakubowski/Karolina Wierczyńska</i> (eds.): Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry (KRZAN)	804
<i>Rosalyn Higgins/Philippa Webb/Dapo Akande/Sandesh Sivakumaran/James Sloan</i> : Oppenheim's International Law: United Nations (KRZAN)	806
<i>Nobuo Hayashi/Cecilia M. Bailliet</i> (eds.): The Legitimacy of International Criminal Tribunals (O'KEEFE)	808
<i>Christine Chinkin/Mary Kaldor</i> : International Law and New Wars (KOLB)	811
<i>Marina Lostal</i> : International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan (GAVIRA DÍAZ)	816
<i>Brian D. Lepard</i> (ed.): Reexamining Customary International Law (RUSHE)	820
<i>Anne Peters</i> : Beyond Human Rights. The Legal Status of the Individual in International Law (ROEDER)	823
<i>C. J. Jenner/Tran Truong Thuy</i> (eds.): The South China Sea: A Crucible of Regional Cooperation or Conflict-making Sovereignty Claims? (YE)	825
<i>Daniel Bodansky/Jutta Brunnée/Lavanya Rajamani</i> : International Climate Change Law (SCHLACKE AND HUGGINS)	828
<i>Andreas Kulick</i> (ed.): Reassertion of Control over the Investment Treaty Regime (HOPPE)	830

OBITUARY

Antonius “Tono” Eitel † (1933–2017)

Diplomat and international law expert “*Tono*” *Eitel* passed away in Münster on 25 June 2017 at the age of 84. With “*Tono*”, as all his friends called him at his request, we are bidding farewell to a man who inhabited two worlds: the diplomatic world and the world of international law. He was a recognised authority in both of these worlds and was able to engage people in an inimitable way.

Tono Eitel as a diplomat. *Tono Eitel* joined the Federal Foreign Office in 1963. In the course of his career, his postings took him from Kingston to Berne, from Beirut to New York. Having started out in Kingston, he spent five years in Beirut honing the art of diplomatic survival against the backdrop of civil war. He maintained a particular affection for Lebanon and its people throughout his life. His leadership of the Permanent Mission of the Federal Republic of Germany to the United Nations (UN) represented the culmination of his active professional life. Under his direction, Germany held a non-permanent seat on the UN Security Council for two years (1995-1996), and it was during his tenure that the historic and varied discussion surrounding an expansion of the UN Security Council experienced one of its early highlights of the past twenty years in the form of the *Razali* plan.¹ During this period, Germany was able to secure each and every one of its numerous candidacies for UN offices. *Eitel* was able to win over and impress difficult partners and rivals on the UN stage with both his sincere interest in the other and his quick-wittedness. When an opponent of new permanent seats on the Security Council once claimed that they did not want to create new permanent members as these would surely be “eternal”, *Eitel* promptly and cheerfully retorted that there was no danger of this happening as tempo-

¹ United Nations General Assembly, Paper submitted by the Chairman of the Open-Ended Working Group On The Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council, UN Doc. A/51/47 Annex II (1997).

rary “permanent representatives” (*i.e.* the heads of mission of the UN Member States) were called “permanent representatives” and not “eternal representatives”.

In Germany, *Eitel* was held in high regard from early on as a member of the chancellery staff under *Egon Bahr* tasked with preparing the Moscow Treaty in 1970² and the Treaty concerning the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic³ in 1972. He published his experiences of this work, which was highly political and of great importance to German post-war politics, under a pseudonym (*Benno Zündorf*, *Die Ostverträge* (1979)). Today, this can certainly be regarded as the definitive work on the subject. Subsequent important staging posts in his career included the leadership of a task force working on the Third UN Conference on the Law of the Sea in Jamaica, and finally Director-General for Legal Affairs at the Federal Foreign Office (1992–1995). In this last role, he served as an advisor on international law to the Federal Government and chaired the Federal Foreign Office’s exclusive Advisory Council on Public International Law.

Tono Eitel also earned great respect *as an international lawyer*. He was, to the very last, an External Academic Member of the Max Planck Institute for Comparative Public Law and International Law. He held an honorary professorship at the Ruhr-Universität Bochum from 1991. The fact that a special publication was dedicated to him on his 70th birthday (Jochen Abraham Frowein *et al.* (eds.), *Verhandeln für den Frieden/Negotiating for Peace: Liber Amicorum Tono Eitel* (2003), 857 pages) is highly unusual for a career diplomat. Among other things, almost three dozen of his own publications on international law are listed therein. Even before his leading role in what came to be known as the Maastricht proceedings before the Federal Constitutional Court in 1993, *Eitel* was extremely well connected in the German legal scene. His profound humanistic education and outstanding intelligence manifested themselves in an ostentatious modesty, always carefully controlled demeanour and appropriate, expert contributions to what was going on around him. Many German candidates for important international offices owe their success to his support.

² Treaty between the Federal Republic of Germany and the Soviet Union, 12 August 1970, Federal Republic of Germany-USSR, *Bundesgesetzblatt* (BGBl.) 1972 II, 354.

³ Treaty concerning the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic, 21 December 1972, Federal Republic of Germany – German Democratic Republic BGBl. 1973 II, 421.

Following his active career, *Eitel* devoted himself to special missions entrusted to him by the Federal Foreign Office, which never forgot how great an asset he and his network were. At the centre of his life was his beloved paternal home in Münster, whose doors were open to numerous visitors from his circle of colleagues and friends throughout the year. Alongside the old and new centre of his life in Münster, *Eitel* was also, for many years, Rector of the Postgraduate Program in International Affairs. Through this programme, which was organised and financed by the Robert Bosch Stiftung and the German Academic Scholarship Foundation, he advised and mentored twenty young scholarship holders each year in joint activities preparing them for future employment in international organisations. This work was also rewarding for him and earned him further new “fans”.

As a diplomat and person, *Tono Eitel* belonged to that very rare species that seemed to have nothing but friends. On the diplomatic and international scenes, which are not entirely without their fair share of pronounced self-confidence and ego, this is something that is particularly remarkable. He was able to achieve this feat with many great warm-hearted gestures, by reaching out particularly to those who were smaller and weaker – whether people or countries – and by getting involved in and caring about the lives of others. His spontaneous, dry, and unique humour was also legendary, and never came at the expense of others nor was it delivered without considered courtesy. Time and again, *Eitel* displayed his great skill in defusing tensions arising during discussions with short, pithy remarks, thereby restoring a positive atmosphere for talks. When he bade farewell to New York (in the summer of 1998), observers were amazed to see delegates in the General Assembly chamber rise from their seats and applaud him.

Tono Eitel described his personal career in a private print edition, completed one year prior to his death, entitled ‘*Schnee von gestern: zu Hause und im Amt geräumt*’ (2016, 296 pages), which offered readers even deeper insights into his personality and the factors that determined his life. *Eitel’s* childhood in pre-war and war-time Germany left its mark. He was deeply rooted in his Westphalian homeland near Münster. His early and strong proclivity for classical education manifested itself in later life when he managed, from time to time, to work metaphors from Greek mythology into speeches or talks – even in responses in the United Nations General Assembly Hall in New York – without ever appearing overly academic in the process. In later life, he im-

pressed others with the high degree of forbearance with which he approached weaknesses of others, while always being prepared to exercise restraint and self-criticism, something which is also borne out by his notes.

With *Tono Eitel's* passing, we bid farewell to a great German post-war diplomat who skilfully straddled two worlds. We have also lost an extraordinary friend and a lasting inspiration for all those who, either in a professional or private capacity, were fortunate enough to have known him.

INGO WINKELMANN

San José

FORUM

THE RELATIONSHIP BETWEEN AFRICAN STATES
AND THE INTERNATIONAL CRIMINAL COURT

African States, the African Union, and the International Criminal Court: A Continuing Story*

GERHARD WERLE** AND MORITZ VORMBAUM***

ABSTRACT: This article analyses the strained relationship between African States, the African Union, and the International Criminal Court. It starts by scrutinising the allegations of ‘anti-Africa bias’ that the African Union and some African States have voiced towards the International Criminal Court. Then it looks at the threat of a pull-out of certain African States parties from the ICC Statute after Burundi, South Africa, and The Gambia declared in October 2016 that they were planning to withdraw from the Court. Finally, it analyses the Malabo Protocol, an initiative by the African Union which aims to create criminal chambers in the African Court of Justice and Human and Peoples’ Rights, simply put: an ‘African Criminal Court’.

Keywords: Africa, International Criminal Court, Universal Jurisdiction, Selectivity, South Africa, Burundi, *Al-Bashir*, Heads of State Immunity, Malabo Protocol

I. The Beginning – From Honeymoon to Marital Crisis

The relationship between Africa and the International Criminal Court (ICC) got off to a promising start.¹ At the State conference in Rome in 1998, many African States

* The article is based on a piece written by the authors (Afrika und der Internationale Strafgerichtshof, *Juristenzeitung* 2015, 581–588) and follows up on the ideas developed in it.

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¹ *Kai Ambos*, Expanding the Focus of the African Criminal Court, in: William A. Schabas/Yvonne McDermott/Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law* (2013), 499, 508; *Gerhard Kemp*, Taking Stock of International Criminal Justice in Africa: Three In-

strongly supported the creation of a powerful international criminal court. Senegal was then the first country to ratify the Rome Statute² (also referred to as the ICC Statute) in 1999. The first situations the ICC dealt with were, indeed, referred to the Court by African States, namely by Uganda, the Democratic Republic of the Congo, and the Central African Republic. With 34 Member States, Africa became the largest regional group of States parties to the ICC Statute. Many Africans have been employed at the ICC, some in leading positions, including the current Prosecutor of the Court, *Fatou Bensouda*.

A. Background to the Tension: Controversy between African States and the International Criminal Court

However, only a few years after the Court took up its work, this once promising relationship began to deteriorate. Harsh criticism has been voiced against the ICC by the African Union (AU) and by a number of African States – the AU has called on its Member States not to cooperate with the Court, and a mass pull-out of African States parties from the Rome Statute has even been proposed.³ These actions have been accompanied by severe and polemic verbal attacks. Leading African politicians have expressed the view that the ICC is focusing on Africa while, for the sake of political expedience, it deliberately overlooks international crimes perpetrated elsewhere. The former Chairperson of the Commission of the AU, Mr. *Jean Ping* (Gabon), for example, has characterised the ICC as a “neo-colonial plaything”.⁴ The former Ethiopian Prime Minister and then Chairperson of the AU, Mr. *Hailemariam Desalegn*, stated during an AU summit in 2013 that “the intention [of establishing the International

ventories Considered, in: Hermanus J. van der Merwe (ed.), *International Criminal Justice in Africa* (2014), 7, 12 *et seq.*; *Sanji Mmasenono Monageng*, *Africa and the International Criminal Court: Then and Now*, in: Gerhard Werle/Lovell Fernandez/Moritz Vormbaum (eds.), *Africa and the International Criminal Court* (2014), 13, 14.

² Rome Statute of the International Criminal Court, 17 July 1998, UNTS 2187, 90 (Rome or ICC Statute).

³ A selection of relevant African Union (AU) Decisions can be found in: Werle/Fernandez/Vormbaum (eds.) (note 1), 255, 257 *et seq.*, 262 *et seq.*, 265 *et seq.*, 268 *et seq.*, 272 *et seq.*, 274 *et seq.*, 277 *et seq.*

⁴ See *Max du Plessis/Tiyanjana Maluwa/Annie O'Reilly*, Programme Paper: Africa and the International Criminal Court, Chatham House, International Law 2013/01, 1 July 2013, 11, available *via*: <https://www.chathamhouse.org/publications/papers/view/193415> (accessed on 27 November 2017).

Criminal Court], was to avoid any kind of impunity, but now the process has degenerated to some kind of race hunting”.⁵ In other words, the Court has been accused of racially biased selectivity and of having become a neo-colonial tool used to target Africa and its leaders.

B. Validity of the Criticism

There are, in fact, a number of grounds for this harsh criticism.⁶ First of all, as a matter of fact, ten out of eleven situations currently under investigation by the ICC⁷ are located in Africa. In addition, the ICC has accused two African heads of State, namely the Sudanese President *Omar Al-Bashir* and the Kenyan President *Uhuru Kenyatta*, of perpetrating crimes under international law.⁸ The powerful role the United Nations (UN) Security Council plays in the context of the ICC Statute has also been subjected to criticism by the AU: It has accused the Security Council of, among other things, political selectivity in referring cases to the ICC.⁹ In addition, a number of African leaders have criticised non-African States for their “targeting” of Africans through their domestic legal systems, alongside the ICC prosecutions, alleging that

⁵ See *Anon.*, African Union accuses ICC of ‘hunting’ Africans, BBC News, 27 May 2013, available at: <http://www.bbc.com/news/world-africa-22681894> (accessed on 7 August 2017). The Ugandan President *Museveni* repeated the claim almost verbatim on 13 December 2014.

⁶ For a summary and analysis of the criticism see *Tanja Altunjan/Aziz Epik*, The International Criminal Court in Crisis?, International Law Observer, 17 January 2017, available at: <http://www.internationalobserver.eu/2017/01/17/tanja-altunjan-and-aziz-epik-the-international-criminal-court-in-crisis> (accessed on 14 August 2017).

⁷ The situations relate to Uganda, the Democratic Republic of the Congo, the Central African Republic (two situations), Darfur/Sudan, Kenya, Libya, Ivory Coast, Mali, Georgia, and Burundi.

⁸ The Office of the Prosecutor withdrew the charges against *Kenyatta* on 5 December 2014 due to lack of evidence; the case, therefore, is considered closed until the Prosecutor submits new evidence. See International Criminal Court (ICC), The Office of the Prosecutor, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014, available via: <https://www.icc-cpi.int/pages/record.aspx?uri=1879204> (accessed on 7 August 2017). An arrest warrant against Libya’s then head of government, *Muammar Gaddafi*, was withdrawn on 22 November 2011 after he had been killed.

⁹ See, for example, the AU Decision of February 2009, in: Werle/Fernandez/Vormbaum (eds.) (note 1), 242 *et seq.* The criticism is also voiced in an internal document of the AU, see AU, Draft 2 – Withdrawal Strategy Document, 12 January 2017, available at: https://www.hrw.org/sites/default/files/supporting_resources/icc_withdrawal_strategy_jan_2017.pdf (accessed on 7 August 2017).