First Meeting of the South-North Criminal Justice Research Network (SNN)

28 and 29 April 2017, Humboldt-Universität Berlin

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On 28 and 29 April 2017, the Chair of Prof. *Gerhard Werle* at the Juristische Fakultät at Humboldt-Universität zu Berlin hosted a gathering of 12 members[1] to the inaugural meeting of the South-North Criminal Justice Research Network, which was funded by the KOSMOS programme of Humboldt-Universität zu Berlin. The meeting commenced with a welcome address by Prof. *Gerhard Werle* and a general self-introduction of the members of the network and their roles in their respective institutions. The research network is aimed to bring together experts in the field of criminal law from the global south and north with an initial focus on researchers and institutions from Sub-Saharan Africa and Germany.

The first panel on "South Africa's Withdrawal from the ICC Withdrawn: Thoughts on the Way Forward" was opened by Prof. *Gerhard Kemp*. Introducing his presentation, *Kemp* gave a timeline of the events that culminated in South Africa's notice of withdrawal and its subsequent revocation. *Kemp* traced the history of the crisis from 31 March 2005, when the UN Security Council referred the situation in Darfur, Sudan to the ICC, to 28 May 2015, when South Africa was notified by the ICC of a request to cooperate in the arrest of former president Omar Al Bashir who was to visit South Africa for the African Union Summit. *Kemp* noted that there was an urgent meeting on 12 June 2015 between an ICC judge and members of the South African government in The Hague. However, the AU Summit held between 13 and 15 June 2015 opened the next day in South Africa and surprisingly, Omar Al Bashir was in attendance.

Kemp described the internal processes in South Africa during this period including the urgent application filed before the High Court of South Africa for the arrest of Omar Al Bashir who managed to leave the country before the arrest could be effected.[2] *Kemp* emphasized that the Supreme Court of Appeal on 15 March 2016 held that the South African government had violated the constitution, its international obligations and domestic laws under the Rome Statute Implementation Act by its refusal to arrest President Bashir. The South African government had initially appealed this decision but later withdrew its appeal.[3] On the international level, *Kemp* noted that the ICC opened proceedings against South Africa pursuant to Article 87 of the Rome Statute in September 2015.[4]

On 21 October 2016, South Africa became the first state party to the Rome Statute to announce its intention to withdraw from the ICC, having notified the UN Secretary-General of the withdrawal two days earlier. A bill to repeal the domestic Rome Statute Implementation Act was submitted to Parliament on 13 November 2016. *Kemp* pointed out the technical difficulties that the repeal bill was fraught with. He further highlighted the role of political parties and NGOs who opposed the government of South Africa on the fact that, in their view, there cannot be a treaty withdrawal without a parliamentary debate under the South African Constitution. The High Court in its judgement[5] agreed that the Parliament had to be the first port of call in the process of treaty withdrawal and consequently, the purported withdrawal was deemed unlawful and unconstitutional. The government, which did not appeal the decision, was ordered to revoke the withdrawal notification.

Kemp noted that, on 7 March 2017, the South African government complied with the judgment and notified the Secretary-General of the UN of the revocation of its earlier notice of withdrawal from the ICC. Additionally, he highlighted the fact that the Repeal Bill was consequently withdrawn from Parliament on 15 March 2017. On 7 April 2017, there was a public hearing at the ICC on South Africa's cooperation with regards to the Omar Al Bashir case. The decision of the ICC is still pending.

Concerning the future of the relations between the ICC and South Africa, *Kemp* noted that although South Africa is no longer withdrawing from the ICC, an important determining factor would be the ruling of the ICC in the Article 87 process. He stated that a number of scenarios are possible. In

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[1] Members of the network are Prof. *Gerhard Werle* (HU Berlin), Prof. *Gerhard Kemp* (University of Stellenbosch, South Africa), *Dr. Hannah Woolaver* (University of Cape Town, South Africa), *Dr. Moritz Vormbaum* (HU Berlin), *Dr. Juliet Okoth* (University of Nairobi, Kenya), *Dr. Charity Wibabara* (National Prosecutorial Authority, Rwanda), *Dr. Sosteness Materu* (University of Dar es Salam, Tanzania), *Dr. Marshet Tadesse Tessema* (Jimma University Ethiopia/University of the Western Cape, South Africa), Ms. *Seada Adem Hussein* (Ethiopia/HU Berlin), Ms. *Victoria Olayide Ojo* (Nigeria/HU Berlin), Ms. *Tanja Altunjan* (HU Berlin), Ms. *Anna Krey* (HU Berlin).

[2] The High Court issued an interim order preventing Omar Al Bashir from leaving South Africa on 14.6.2015 pending the final determination of the substantive suit. Copy of interim order, available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Interim-interdict.pdf (12.9.2017).

[3] South Africa Litigation Centre South Africa/Sudan: Seeking Implementation of ICC Arrest Warrant for President Bashir, available at http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/ (12.9.2017).

[4] Article 87 (1-7) of the Rome Statute regulates requests for cooperation by the ICC to member states.

[5] High Court of South Africa, Judgment of 22.2.2017 – 83145/2016 (Democratic Alliance [DA] v. Minister of International Relations and Cooperation and others).

the event that a finding of non-cooperation is made against South Africa in a "soft" manner, there is the possibility of negotiations between the Assembly of State Parties and South Africa to forestall the likelihood of future similar incidences. Alternatively, if South Africa is reprimanded "harshly", *Kemp* foresees that this might trigger renewed withdrawal talks and, due to the subsisting decisions of the South African Courts referred to above, the decision might become a parliamentary one.

The role of internal party politics was also highlighted by *Kemp*. He noted that whoever emerges as the party leader of the ANC in December 2017 might possibly affect the policy direction of the party and consequently the future interrelations with the ICC. He also emphasized the importance of viewing the South African issue within the perspective of the broader discourse of Africa and the ICC and the reform of the relations of the ICC with member states of the AU.

Dr. Hannah Woolaver in her comment to the presentation adopted a three-pronged approach. First, she addressed the political lessons to be learnt from the debacle, second, the complexity of the interpretations of some provisions in the Rome Statute and third, she raised certain fundamental issues from the perspective of public international law. On the political lessons to be learnt, *Woolaver* highlighted the difficulty to predict the reaction of governments when legal issues are intertwined with political ones. According to her, much would depend on domestic politics in South Africa. She also noted that the development of international criminal law is not always forward moving and that its linear progression is very fragile. This, to her, should necessitate a more serious exploration into other possible alternatives for the prosecution of international crimes.

On the challenges with the interpretation of the Rome Statute, *Woolaver* noted that South Africa asked the ICC for clarification of certain provisions including Articles 86 and 87, which in her view indeed required further clarification. She however disputed the argument of the South African government that conforming strictly to the provisions of the Rome Statute interfered with South Africa's role in keeping peace in Africa.

In light of general public international law, *Woolaver* noted the importance of the role of domestic procedures in withdrawing from international treaties and pointed out that South Africa's attempt to withdraw from the ICC had highlighted this. Also, in her view, it is not yet clear what the appropriate response of the ICC should be to a withdrawal that does not comply with the domestic processes of the member state in question. Additionally, this situation has also stressed the need to have better and more convincing judgments of the ICC. This, in her view, is crucial in order to ensure that the Court's decisions are not exploited in the anti-ICC rhetoric.

The second panel dealt with the "Criminalization and Prosecution of Transnational Crimes in Kenya". *Dr. Juliet Okoth's* presentation on the topic highlighted two transnational crimes, namely terrorism and corruption. The geneses of the crimes are suppression Conventions[6] which set out obligations to criminalize and cooperate. The cooperation often relates to issues on investigation, evidence collection, mutual legal assistance and extradition. As the Conventions are not self-executing, *Okoth* pointed out the need for domestication in order to enable domestic enforcement. Nonetheless, in light of Article 2 (5) and (6) of the Kenyan Constitution, any ratified Convention becomes part and parcel of Kenyan law, without the need for domestication. This, *Okoth* noted, presents a challenge in the application of the provisions as the scopes of the crimes differ between the suppression Conventions and the Kenyan Law criminalizing the conducts. The difficulty that arises regarding crimes provided in suppression Conventions is that they are often defined too broadly.

In relation to these transnational crimes, *Okoth* evaluated the implications of signing the African Union's Malabo Protocol[7] in regard to the distinct elements the Protocol included in the definition of the crimes. The Malabo Protocol to which Kenya is a signatory presents a new dimension in the area of international criminal justice that, inter alia, includes the transnational crimes of terrorism and corruption. *Okoth* questioned the implication of ratifying the Malabo Protocol and whether the crimes of the Protocol would then directly apply in Kenya. In the event where there is a disparity between the definitions in the Protocol and a Kenyan Statute criminalizing the conduct in the Protocol, there is no law indicating which definition shall take precedence. As the Protocol is silent on the notion of complementarity, she asked if and how the African Court could intervene for cases in which Kenya has jurisdiction and whether it could give rise to issues on the principle of legality.

Due to its geographical proximity to Al-Shabab and in response to the various acts of terrorism committed against Kenya, the country has enacted the "Prevention of Terrorism Act" in 2012.[8] *Okoth* held that the Act lists out a range of offences as terrorism. This broad approach, *Okoth* explained, has affected the implementation of human rights obligations and has given rise to the national security versus human rights debate. The act criminalizes terrorist groups and membership thereto. It defines a terrorist group as "an entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act". She noted that a significant problem arises in regard to the pro-

[6] See, for instance, the United Nations Convention against Transnational Organized Crime (2000).

[7] African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014, available at https://www.au.int/web/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (12.9.2017). On the Protocol see Werle/Vormbaum (eds.), The African Criminal Court – A Commentary on the Malabo Protocol, 2017.

[8] Prevention of Terrorism, Act No. 30 of 2012, available at http://www.kenyalaw.org/lex/actview.xql?actid=No.%2030%20of%202012 (12.9.2017).

cess of classifying a "specified entity".[9] As understood from the discussion on the case Muslims for Human Rights (MHURI) and another v. Inspector-General of Police and 5 Others (2015),[10] implementation of the act gives rise to issues concerning the constitutional standards of human rights and fundamental freedoms. The underlying issues regarding criminalization of terrorism and adoption of laws to enforce security measures that seem to infringe upon the freedom and rights of individuals were also reflected in the case Coalition for Reform and Democracy (CORD) and 2 others v. Republic of Kenya and 10 others (2015).[11]

These exemplary cases, to *Okoth*, illustrate that over-criminalization and ambiguously defined crimes create problems in the enforcement of terrorism laws. Their implementation has also led to cases before the Constitutional Court, requiring the latter to "draw out the delicate balance between protecting the fundamental rights of citizens and protecting them from terrorists by providing national security". She further questioned whether the implementation of the Malabo Protocol in respect to terrorism would encounter similar challenges.

Discussing the crime of corruption, *Okoth* drew attention to the fact that Kenya suffers from monetary loss attributed to corruption despite the existence of several laws enacted to combat the crime. So far, there have been very few prosecutions and no convictions of Kenyan senior officials involved in corruption scandals. As corruption in Kenya continues unabated, *Okoth* questioned whether the law in place is dysfunctional. Enforcement through the Malabo Protocol, she suggests, could help fill the existing gap in the implementation of the anti-corruption law of Kenya.

Dr. Charity Wibabara in her comment appreciated the legal challenges that arise when there is lack of harmonized law and hierarchy. These challenges, she stressed, are not limited to the East African Community. Enforcement of transnational crimes is difficult, as definitions of the crimes are not harmonized across countries. *Wibabara* pointed out the need to amend laws that do not comply with international instruments and to create a harmonized system that defines the relationship between international, regional and domestic enforcement mechanisms. Political will to implement, execute and enforce laws dealing with transnational crimes also plays a significant role in the successes of enforcement regimes. *Wibabara* argued there is a need to develop the technical skills of parties involved in the process. Particularly in the enforcement of anti-terrorism legislations, striking the necessary balance between human rights and national security concerns is crucial.

The third panel of the meeting, on 29 April 2017, focused on the discussion of the future of the network. The inaugural network meeting wound up with allocation of tasks to the participants for the next annual meeting, which is intended to take place in spring 2018.

[9] Section 3 of the Act defines "specified entity" as an entity which has (a) committed or prepared to committed, attempted to commit or participated in or facilitated the commission of, a terrorist act; or (b) an entity acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a). See Prevention of Terrorism, Act No. 30 of 2012, available at http://www.kenyalaw.org/lex/actview.xql?actid=No.%2030%20of%202012 (12.9.2017).

[10] Petition No. 19 of 2015, Muslims for Human Rights (MUHURI) and another v. Inspector-General of Police and 5 others (2015) eKLR.

[11] Petition No. 628 of 2014, 630 of 2014 and 12 of 2015, Coalition for Reform and Democracy (CORD) and 2 others v. Republic of Kenya and 10 others (2015) eKLR.