

Second Conference of the African-German Research Network for Transnational Criminal Justice: “International and Transnational Criminal Law in Africa: Practice, Challenges and Prospects” (30/31 October, 4 December 2020 via Zoom)

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The African-German Research Network for Transnational Criminal Justice conducted its second annual conference on “International and Transnational Criminal Law in Africa: Practice, Challenges and Prospects“ in October and December 2020 via Zoom. Along with the participating alumnae and alumni from Ethiopia, Kenya, Malawi, Nigeria, South Africa, Tanzania and Uganda, the network welcomed its Advisory Board members, in particular *Prof. Dr. Gerhard Kemp* (University of Derby, United Kingdom), *Prof. Dr. Moritz Vormbaum* (University of Münster, Germany), *Dr. Marshet Tadesse Tessema* (Assistant Professor, Hawassa University, Ethiopia) and *Dr. Hannah Woolaver* (Associate Professor, University of Cape Town, South Africa). In addition, colleagues associated with the network took part in the conference, namely *Prof. Dr. Florian Jeßberger*, *Dr. Leonie Steinl, LL.M. (Columbia)* and *Dr. Tanja Altunjan* (Humboldt-Universität zu Berlin, Germany). The conference was organized by the director of the network *Prof. Dr. Gerhard Werle* and the project coordinator *Nella Sayatz*.

In a total of seven lectures, the participants lively discussed current issues of international criminal law in Africa. Besides vivid discourses on the crime of human trafficking and compelling approaches to prosecution in Malawi, South Africa and Tanzania, there was also room for a comprehensive discussion on concepts of restorative justice in international criminal law.

30 October 2020: Conference Day 1

The first lecture on “Restorative Justice to Victims in International Criminal Law Through Reparative Complementarity: Exploring a Possible Approach in Nigeria” was given by *Deborah Damilola Adeyemo* (Lecturer, University of Ibadan, Nigeria). She stated that on the one hand, the ICC faces several issues pertaining to victim’s reparations and the scope of the defendant’s liability. On the other hand, Nigeria would not recognize victims as active participants in the administration of criminal justice and lacks the legal framework for both prosecution and reparation. *Deborah* opined that the state does not precisely recognize reparations for international core crimes and is often hampered by issues such as constitutional immunity, peace settlements and amnesty or sheer unwillingness to exercise their right of first refusal to prosecute crimes. To address the needs of victims of core international crimes, *Deborah* adopted a reparative perspective of the restorative justice theory believing that the state needs to explore reparative complementarity. Therefore, the primary obligation lies with the perpetrator but devolves to Nigeria when he or she is unable or unwilling to provide reparation for victims. The principle should ensure that the victims receive reparations in the face of its glaring limitation factors at the ICC. In *Deborah’s* opinion holding the state responsible in complementary obligation for reparation to the person concerned irrespective of the alleged perpetrator’s prosecution is plausible as states may be actively involved or have created the enabling environment to perpetrate crimes by its inactions and omissions. *Deborah* pleaded for the adoption of reparative complementarity in Nigeria especially in the light of the overwhelming needs of the victims and the seeming unwillingness to pursue prosecutions.

The second presentation was given by *Felisters Francisco* (Legal Counsel, Malawi Revenue Authority, Malawi) on “Human Trafficking as a Crime Against Humanity: A Focus on Malawi and South Africa’s Legal and Institutional Framework“. She explained that Africa is greatly affected by human trafficking, but has no regional instrument providing for the legal framework under which the endemic problem can be dealt with. As a consequence, states like Malawi and South Africa enacted laws but have faced many challenges to implement them. Sometimes, prosecutions have failed because the public officials have condoned corruption or are accomplices to human trafficking. Therefore, *Felisters* recommended human trafficking to be included in the ICC Rome Statute as an individual crime under crimes against humanity. In her opinion, this would help in the enforcement of the state’s obligation to criminalize and prosecute such conduct. Besides, she stated that human trafficking activities involve money laundering, being common to any large-scale criminal organization. Interestingly, she

elaborated on how the illegality of the proceeds collected from trafficking activities is concealed through apparently legitimate forms of investments to generate seemingly licit profit and wealth.

31 October 2020: Conference Day 2

The first lecture on the second conference day by *Brenda Nanyunja* (Legal Researcher, Uganda Legal Information Institute, Uganda) was entitled “An Obligation Challenge? A Look at Uganda’s Response to Bashir’s Arrest Warrants”. She introduced the topic by mentioning the African Union’s call to its member states for defying Bashir’s arrest warrants. However, according to the ICC it reflects customary international law that immunities are not a bar to the exercise of jurisdiction. As a consequence, there is no head of state immunity vis-à-vis an international court. The International Crimes Division of the High Court of Uganda was petitioned to enforce the warrants. In late 2019, it held that the state failed to fulfil its obligation to the international community when it did not detain Al-Bashir and emphasized the necessity of implementation of the arrest warrants issued by the ICC. *Brenda* concluded that the extradition refusal of the African nations along with the African Union disregarded the victims of the Darfur conflict as well as the state parties’ obligations. Besides, she emphasized that Sudan’s referral to the ICC presented a number of novelties: For the first time a situation in the territory of a non-member state was investigated and a head of state was indicted by the court. According to her, this is in favor of the preservation of international peace and security. Furthermore, she stated that the Rome statute cannot be used to enforce an arrest warrant if the country in question is a non-member state to the ICC statute. Eventually, she called for a discussion on the contradictions presented in the Bashir case and a united front in regard to court decisions and referrals of third-party states by the UNSC.

Afterwards *Nicksoni Filbert* (Legal Researcher, African-German Research Network for Transnational Criminal Justice, Tanzania) lectured on “An Examination of the Criminalisation Provisions of the Prevention of Trafficking in Persons Act of Uganda in Light of International Law”. He opined that the content of the 2009 Act is quite comprehensive, as it deals with the prevention, criminalization and prosecution of human trafficking as well as with the protection of its victims using merging elements from international stipulations and the domestic legal framework. Hence, the Ugandan law criminalizes the offence of human trafficking according to international standards and follows the obligations these impose. According to *Nicksoni*, the law recognizes peculiar manifestations of the crime in Uganda, but

sometimes remains unclear concerning its terminology. However, the legal shortcomings would not affect the substance of the law's criminalization provisions. In fact, the 2006 Trafficking in Persons Bill, which paved the way for the current law, forms an important persuasive source that aids in understanding and interpreting the 2009 Act. Notwithstanding, he expressed that rectification of the shortcomings is necessary to remove ambiguity and guarantee consistent application and coherence. He also stated that the High Court of Uganda needs to take a new legal approach to interpreting and applying the 2009 Act for providing predictability, certainty and compatibility with its international underpinnings. That is why he hopes to stimulate dialogue and legal reforms as far as the anti-trafficking efforts in Uganda are concerned.

The third presentation on that day was given by *Samuel Matsiko* (Legal Researcher, Syrian Legal Network, University of Amsterdam, Netherlands) on „Data Protection and Domestic Prosecution of International Crimes in Uganda“. He especially focused on normative foundations of data protection in international criminal judicial proceedings and dealt with the applicability and enforcement of the Data Protection and Privacy Act in the investigation, prosecution and punishment of international crimes in Uganda. According to *Samuel*, a court needs to be able to explain why it processes certain personal data and which safety mechanism it uses to protect them. In this context, he suggested to appoint a data protection supervisory judge at the International Crimes Division of the High Court of Uganda. Furthermore, he proposed to create an African International Crimes and Data Protection Handbook. This book should define when and what personal data may be processed, collected and shared in the domestic prosecution of international crimes and how long the data may be kept. Moreover, the Handbook should provide provisions on the use of a data register for data procession operations as well as on a data protection officer. Additionally, it should determine the accountability mechanisms for data breaches (e.g. offence against the administration of justice) and clarify the data subject's rights.

4 December 2020: Conference Day 3

The third conference day was opened by a lecture of *Sarah Ngachi* (Legal Fellow, Natural Justice (NGO), Kenya) on the “Regional Implementation of International Criminal Justice; Africa's Role in Prosecuting International Crimes”. *Sarah* emphasized the importance of regionalized courts that prosecute international and transnational crimes. Nevertheless, pertaining to the Malabo Protocol, she criticized the Protocol's immunity clause as an impediment to

prosecution and the drafters to have neglected the practical aspects of prosecution in terms of the elements of crime. Although, in her opinion, the African Criminal Court has great potential, the implementation of international criminal justice is wanting as the Protocol is yet to be ratified after several years and the political will to establish accountability mechanisms is lacking. She concluded the slow implementation of international criminal justice at regional level can be attributed to a lack of determination to set up accountability instruments, to state decisions to provide safe havens for war lords and to a strict interpretation of the concept of sovereignty resulting in a failure to apply universal jurisdiction in domestic prosecution of international crimes. Hence, *Sarah* called on African states to embrace universal jurisdiction over heinous crimes and to avoid protecting perpetrators. According to her, to achieve regional implementation clearly defined institutional mechanisms for accountability as well as more specialized courts need to be set up.

The final presentation of the conference was given by *Denis Wangwi Moroga* (Lecturer, Moi University, Kenya and Legal Research Assistant, Otieno and Amisi Advocates, Kenya) on “Witness Interference: The Achilles Heel of the International Criminal Court”. He discussed the ICC’s approach to witness protection and its ramifications to the international criminal justice system. He introduced his topic by explaining that tampering of witnesses occurs in many forms, such as coaching, inducement, bribery, intimidation, coercion and threat to life of witnesses or their close family members. Furthermore, he explained that interferences make it difficult finding the truth, stifle the ability of the court to give a just decision or even lead to the termination of proceedings. In this regard, *Denis* warned that, unless this challenge is adequately addressed, the ICC will lose its allure as a bastion of justice capable of holding high level accused persons accountable, because the court could be viewed as susceptible to the same challenges as national courts. However, an antidote to witness interference is seen in witness protection. There are several instruments that can be used for this protection: effective coordination between the Office of the Prosecutor, the Victims and Witnesses Unit and the chambers of the court, concealing the identity of witnesses as well as the admission of retracted statements, among others. Bearing in mind the accused persons’ rights (e.g. the right to examination of witnesses, Art. 67(1)(e) of the Rome Statute), some of these measures require the court to strike a balance in order to ensure a fair and impartial trial. Additionally, to maintain objectivity *Denis* demanded the OTP to constantly investigate allegations of interference and to only indict when all vital evidence and witnesses are secured. Eventually, he concluded that the ICC’s contribution to ending impunity can only be guaranteed when there are effective witness protection mechanisms.

Conclusion

The conference was characterized by excellent presentations and fruitful debates on the practice, challenges and prospects of international and transnational criminal law in Africa. Eventually, there has been a consensus to continue working on the topic and to devote the next conference to a similar subject.

Next Conference 2021: “Transnational Criminal Justice in Africa”

Following the 2020 conference, the next conference will be entitled “Transnational Criminal Justice in Africa” and further analyzing and assessing the criminalization and prosecution of transnational crimes in Africa. A selection of the following crimes will be thoroughly discussed: the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit exploitation of natural resources. The conference aims to examine whether and how African states have criminalized these offenses domestically and what legal and practical challenges for effective implementation arise.