



Meeting Summary

Beyond the ICC: The Role of Domestic Courts in Prosecuting International Crimes Committed in Africa

Summary of a meeting held at Chatham House on Friday 30 April, 2010

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Chair:

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Introduction

The Chair welcomed and introduced the speakers and noted that the event launches the publication of a Chatham House briefing paper, “Universal Jurisdiction for International Crimes: Africa’s Hope for Justice?” by Louise Arimatsu. The briefing paper is available online: <http://www.chathamhouse.org.uk/publications/papers/view/-/id/853/>.

Context: The international Criminal Court

In order to assess the role of domestic courts in prosecuting international crimes, some preliminary observations concerning the International Criminal Court (ICC) and its background are necessary. Efforts to establish an international criminal court date back over 80 years to the intended prosecution of the German Kaiser at the end of World War I. In 1937, the Convention for the Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court were drafted by the League of Nations, but neither ever came into force. These marked the first in a series of failed attempts until the eventual coming into force of the Rome Statute in July 2002. The Statute has now been ratified by 111 states inclusive of all of South America, Europe and more than half of the 54 African states. Three states have “unsigned”: the United States, Israel and Sudan.

The intention of the ICC is to provide a legal mechanism, not for the prosecution of the losers of war, but for peace time. The experience of the Nuremberg and Tokyo tribunals had been very much perceived as “victor’s justice”, with Americans notably absent from the list of defendants (what about the bombing of Hiroshima?). The question is: have we succeeded in getting the framework right?

African states played an invaluable role in ensuring that the Rome Conference negotiations succeeded and were among the first to ratify the Rome Statute (Senegal being the very first state to do so). Additionally, three of the situations currently before the Court were self-referred by states party to the Rome Statute: Uganda, the Democratic Republic of the Congo and Central African Republic. All of the situations currently under investigation by the ICC concern African states.

It must be remembered that Africa suffered greatly from the indignities of slavery and colonialism, and so can be touchy about being preached to, especially by former colonial oppressors. Thirty African states have now ratified the Rome Statute, and many have amended their domestic legislation

to implement the complementarity regime, although fewer have adopted laws with respect to the cooperation requirements.

Although a comprehensive survey of the legislative approaches to the crimes provided for in the Rome Statute in the national legislation of member states of the African Union (AU) does not exist, a survey commissioned by the AU within the context of engagement with the European Union (EU) on approaches on universal jurisdiction illustrates that jurisdiction over serious crimes of international concern is exercised pursuant to customary international law and the various relevant treaties. For example, with respect to the Geneva Convention, common law states have legislation incorporating the grave breaches provisions into national law. In some cases, this law remains the relevant colonial-era legislation; in others, the colonial legislation was re-enacted by the independent state. Certain African states with civil law systems have ratified the Geneva Conventions, and accept jurisdiction on this basis. Among these states are Algeria, Angola, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Comoros, Côte d'Ivoire, the Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Gabon, Libya, the Republic of Congo and Tunisia. With respect to the Convention Against Torture (CAT), despite the fact that over half of AU member states are party to CAT, and are therefore obliged to establish universal jurisdiction over torture as defined in CAT, most have not enacted legislation to incorporate it into national law. Notable exceptions are Burundi, the Democratic Republic of the Congo and Cameroon, although different approaches have been taken.

The commitment on the part of AU member states to fighting impunity for serious crimes was clearly signalled in the Constitutive Act of the African Union¹ and subsequent AU resolutions, as well as regional pacts, such as the Pact on Security, Stability and Development in the Great Lakes Region (the Great Lakes Pact).² In addition, it has been given practical effect by means other than the exercise of universal jurisdiction including territorial jurisdiction in national courts, and *ad hoc* tribunals. Moreover, the Truth and Reconciliation Commission in South Africa and the *gacaca* courts in Rwanda provide examples of alternative justice mechanisms.

¹ [Article 4(h) of the AU Statute affirms the right of the AU to "...intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity..."]

² [Article 8 of the Great Lakes Pact reads, in part:
The Member States, in accordance with the Protocol on the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, recognize that the crime of genocide, war crimes, and crimes against humanity are crimes under international law and against the rights of peoples, and undertake in particular:
a) To refrain from, prevent and punish, such crimes;]

Given the upcoming Review Conference, there are a number of challenges faced by the ICC. For example, the apparent contradiction of Articles 27 and 98 pose a significant challenge to the functioning of universal jurisdiction. While Article 27 provides that the Rome Statute applies equally to all persons without any distinction based on official capacity, Article 98 requires the Court not to take any action that would result in violation by states of their international obligations to accord immunity to foreign states' officials. This is an issue on which legal scholars are divided.

A further challenge relates to the crime of aggression, provided for in Article 5(2) of the Rome Statute. The ICC cannot exercise jurisdiction until a definition has been agreed upon (by at least two-thirds of states parties) and adopted (by at least seven-eighths of the states parties). But even if a definition is agreed, there is a serious question about the appropriate trigger mechanism; there is a real concern that the United Nations Security Council (SC) is too politicised for this function. In response to a question about what other body would be in a position to refer cases of aggression to the ICC, it was stated that, given the role of the SC as the guardian of peace and security in the United Nations system, the SC should be best placed to fulfil this role. However, concerns about the SC's functioning have led to other suggestions, including the ICC Assembly of States Parties or the International Court of Justice (ICJ).

Moreover, given that the crime of aggression would target very senior government officials, there is a practical issue about whether countries would ever surrender their nationals for prosecution. And which situations may be investigated by the Court; should there be a requirement that the aggressor has accepted the Court's jurisdiction over the crime of aggression? These issues present serious questions about the functioning of the ICC. The argument that the exercise of jurisdiction by the court over the crime of aggression would politicise the court and in the process undermine it may prove to be an understatement and thus including the crime of aggression is undeniably a major challenge facing the ICC.

There is a clear perception within Africa of double standards concerning the imposition of international criminal justice. For example, it has been noticed that the Security Council referred the situation in Darfur to the ICC, but it has not referred other seeming equally deserving situations including Chechnya, Sri Lanka, Gaza, Colombia, Georgia etc. (The African Union has never said that President Al-Bashir should be tried, but neither has it said that he should not be tried, nor that he is not guilty. Obviously some African states have taken a different position, as has the Arab League. While most Arab League

countries are also members of the AU, the two organisations do not hold identical views.)

Throughout Africa there is a firm commitment to fighting impunity, with a strategic plan from 2004-2007 to encourage the universal ratification of the Rome Statute and an ongoing capacity-building plan to enhance the capacity of legal personnel internally. It is unlikely however that such a resolution supporting universal ratification could be adopted today.

In response to a question about double standards, however, one member of the panel made it clear that justice is not just about prosecution, it is about vindicating the rights of victims. Thus a failure to protect Chechnyan victims should not imply that the ICC should stop delivering justice for African victims. Human Rights Watch is currently involved in the struggle to seek accountability for events in Gaza, Guantánamo and Abu Ghraib. It is agreed that the politicisation of the Security Council is deplorable, and it is desirable that the ICC Prosecutor look at other cases, but there must be a basis (jurisdiction over states parties or a SC referral) for the Prosecutor to do so.

Another significant issue for African states is the interlink between peace and justice. While the AU considers the two to be inseparable, there is an ongoing debate about how best to achieve both. For example, the AU has called for a stay of proceedings against Sudanese President Al-Bashir in the interests of peace, and the Mbeki Report on Darfur proposes a peace process that includes the creation of a special court composed of national and international judges to try those accused of atrocities. The international community cannot tell those affected by civil war in Mozambique or Sierra Leone that judicial proceedings must precede peace negotiations. In the African view, achieving peace first, then justice, does not equate to a culture of impunity.

A participant asked whether, given the mutual protection of African leaders, there could truly be said to be a strong political will within Africa to combat impunity. In response, it was noted that the failure to implement treaty obligations is certainly not unique to the African continent. While there is still a problem, the expansion of democratic space in Africa has diminished the reality of a "Heads of State" club.

Universal Jurisdiction

If it takes place, the prosecution of Hissène Habré will be the first prosecution in Africa under universal jurisdiction. In some ways, the Habré story begins in

London with the arrest of Augusto Pinochet. This arrest signified a wake up call for dictators but more importantly it gave hope to victims and NGOs around the world. Geoffrey Robertson QC has said that "... universal jurisdiction ... is the solution that international law offers to the spectacle of impunity for tyrants and torturers who cover themselves with domestic immunities, amnesties and pardons." The *Pinochet* case exposed the impunity gap and then applied principles of universal jurisdiction to close it, thereby creating a precedent for bringing to justice those who previously seemed out of reach. It was a moment of effervescence in the human rights community. The question then became whether and to what extent the *Pinochet* precedent could be applied to other situations.

For example, it was hoped that the *Pinochet* principles could be applied to the former dictator of Ethiopia, Mengistu Haile Mariam, who was living in Zimbabwe, when he travelled to South Africa to receive medical treatment. A dossier was passed to the South African government in an effort to have an arrest warrant issued, but the South African Justice Minister announced that he would be willing to investigate, and Mengistu slipped back into Zimbabwe and the protection of Robert Mugabe. Equally, when the man considered to have been responsible for gassing the Kurds at the behest of Saddam Hussein, Ibrahim al-Douri, went to Austria to receive medical treatment, it was hoped that he too could be arrested. However, despite extensive internal and international pressure, Austria put its obligations to Saddam Hussein's government above its obligations to international law and subsequently let Al-Douri return to Iraq. Similar choices have been made by the Saudi Arabian and US governments (regarding Idi Amin and former Peruvian Intelligence Service Major Ricardo Anderson Kohatsu respectively). In each case, politics trumped human rights.

The case of the former dictator of Chad, Hissène Habré, provides an opportunity for determining whether universal jurisdiction is truly universal; that is, whether it will be exercised in Africa and not just in Belgium, Spain or the UK. It is particularly appropriate, perhaps, that the Habré case is playing out in Senegal, the very first country in Africa to ratify the Rome Statute.

After Habré took refuge in Senegal in 1988, Human Rights Watch, along with other human rights organisations, formed a coalition with Habré's victims to compile a case to bring him to justice. The *Pinochet* precedent was used to evoke pressure for the exercise of universal jurisdiction. While an arrest warrant was issued by a Senegalese judge in February 2000, charging Habré with crimes against humanity, it would seem that Habré has been able to buy a great deal of political interference with funds stolen from the Chad Treasury

(which interference has been denounced by two UN special rapporteurs). Ultimately, Habré managed to get the case thrown out by the Senegalese Court of Cassation on the grounds that, even though Senegal had ratified the Convention against Torture, Senegalese courts did not have jurisdiction over such crimes committed outside Senegal by non-Senegalese nationals.

The case would have stopped there had the victims not gone to Belgium, which, at the time, had expansive universal jurisdiction laws. Following extensive research over four years, a Belgian judge indicted Hissène Habré for crimes against humanity and torture and sought his extradition from Senegal. But the extradition proceeding also encountered political interference, and a Senegalese court concluded that it could not grant the requested extradition because of immunities claimed by Habré as a former head of state (despite Chad waiving such immunity). Senegal then referred the issue for consideration by the African Union, with the Committee of Eminent African Jurists concluding that, as Senegal was a state party to the Convention against Torture, Senegal was obliged to prosecute Habré and should amend any legislation that interfered with its ability to do so. In 2006, the African Union called upon Senegal to prosecute Habré on behalf of Africa and called on the AU to provide the necessary assistance to ensure the conduct of the trial.

Senegal has since amended its laws to provide for the widest application of universal jurisdiction anywhere in the world. Nonetheless, the trial of Hissène Habré is nowhere near ready to begin. The Senegalese government has maintained that they will proceed once the international community has committed to fully funding Court proceedings: the initial budget demand was €67 million, with current negotiations based on an €18 million cost. In the meantime, Senegal's failure to either prosecute Habré or extradite him to Belgium has led to Belgium filing a case against Senegal at the international Court of Justice. In addition, Belgium brought an application for provisional measures to prevent Habré from leaving Senegal pending the Court's final judgment. In May 2009, the ICJ accepted Senegal's formal pledge to ensure that Habré would not leave Senegal until the pronouncement of a judgment.

Budget negotiations between Senegal, the AU, the EU and the US are ongoing, but so far a case that should provide an example of how an African state can address crimes in Africa, particularly when it is mandated by the AU, is unfortunately proving unsuccessful. There is clearly a lot of feeling in Africa that African countries are being targeted for international criminal prosecution and there is little doubt that a double standard is being applied both at the ICC and under universal jurisdiction. When cases were brought

against the US and Israel in Belgium, the threat of universal jurisdiction provoked then US Defence Secretary Donald Rumsfeld, on a trip to NATO headquarters in Belgium, to suggest that NATO headquarters would have to be moved, resulting in the reduction of the Belgian universal jurisdiction laws. Cases filed in Spain regarding Latin American countries have proceeded, but when cases were filed with respect to Guantánamo, Tibet, Gaza, the Spanish law was curtailed. But while double standards exist, that problem does not explain the lack of progress in the Habré case: the crimes are clear, Chad has given a green light to prosecution, and this is not European justice imposed from the outside – Senegal has been given a mandate by the AU to prosecute. Thus, unfortunately, the Habré case exposes many of the African arguments as mere excuses.

Another panellist noted that the AU was grateful for the assistance of Human Rights Watch in this matter and that an AU delegation was due to go to Senegal in the next 10 days to discuss this issue. It was asked who was going to provide the funding sought by Senegal for the prosecution, and the response was that discussions were ongoing between the EU, the US and donor states to assemble a multi-donor trust fund.

One of the participants noted that it is not without political controversy that the current régime in Chad has waived Habré's immunity. In response, it was made clear that Human Rights Watch has not hid from the reality of current abuses within Chad and, in fact, does not want to see Habré extradited to Chad due to human rights concerns. Similarly, Human Rights Watch opposed the prospect of Ethiopian proceeding against Mengistu due to concerns that he would not receive a fair trial. In truth, it is ironic that the victims would rather see Habré tried in Belgium than on African soil.

A question was asked about what the AU is doing to animate the principle of complementarity, that is, what is the African alternative to the ICC? In response, it was noted that a model law on universal jurisdiction should be ready towards the end of the year and there are expected to be proposals to expand the competence of the African Court on Human and Peoples' Rights made in July 2010. One of the other panellists noted that it is regrettable that a whole other mechanism might be created when 30 African states are already party to the ICC. It also seems somewhat unrealistic: the ICC has a thousand employees and costs USD\$100 million per year; the AU hasn't even funded the lower-cost Habré court.

It was noted by one of the participants that, when discussing the African position on universal jurisdiction, a distinction must be made between African

leaders and victims. While there may be little political will to impose criminal procedures, victims often look beyond their borders for assistance and for justice. In response, one panellist commented that, in reality, those in power make decisions regarding the arrest or surrender of those accused of international crimes. Thus, to some extent, those leaders criticising double standards should look at themselves. On the other hand, in the Kenya situation currently under investigation by the ICC, it was a decision of civil society (i.e. non-state actors) to pursue justice and to choose the ICC as the appropriate forum. Another panellist added that leaders and victims are not necessarily discrete groups holding polarised views. For example, the leaders of the opposition Movement for Democratic Change in Zimbabwe are well aware of both international criminal justice mechanisms and the need to reinvigorate national judicial mechanisms. Moreover, the South African Truth and Reconciliation Commission would not meet current standards of international criminal justice but, whatever its flaws, it was an important means of supporting the transition to democracy.

The Experience of Universal Jurisdiction in South Africa

South Africa's Implementation of the Rome Statute of the International Criminal Court Act, 2002 ("ICC Act") goes further than what is required by the Rome Statute and is based on universal jurisdiction. What follows is the experience derived from one case in which universal jurisdiction was invoked.

On March 29, 2008, a few weeks before the 2008 Zimbabwe elections, the South African Litigation Centre (SALC) and the Zimbabwe Exile Forum applied to the South African National Prosecuting Authority (NPA) to investigate crimes against humanity by 18 senior Zimbabwean police officials. The particular incident in question was the arrest of 100 people at the opposition Movement for Democratic Change (MDC) headquarters on March 28, 2007, following which the detainees were tortured. It was felt that these incidents were heinous not just by reason of the amount of bloodshed, but were made particularly egregious because they were perpetrated and facilitated by the state itself, and thus the perpetrators could be expected to be immune from prosecution in Zimbabwe. It was hoped that if these officials travelled to South Africa, as they frequently did, they could be arrested and prosecuted.

The timing of this application was not coincidental. The 2008 elections were being held in the face of public threats by Zanu PF of further arrests and

violence. The application was intended to draw attention to and deter violence, and give notice of international scrutiny. Unfortunately, it did not seem to have that effect. In response to a question, it was also noted that any increased attention created by the application was limited to South Africa itself, and the only tangible result in South Africa seems to have been the holding of a high-level government meeting to discuss the ramifications of a prosecution. On the other hand, the global political agreement between Zanu PF and the MDC does seem to be holding together and there are real reforms afoot, including transitional justice mechanisms.

So what became of the South African submission? After a series of requests for additional information, the Head of the NPA wrote to SALC in June 2009 advising that the Police Commissioner had decided not to investigate the matter. SALC responded by filing an application for judicial review, and has recently received the record, and so are now able to ascertain the reasons for the decision, which include:

- The universal jurisdiction provided for by the ICC Act cannot exceed the scope of the Rome Statute, and since Zimbabwe is not a party to the Rome Statute, South African police cannot exercise jurisdiction over Zimbabwean activities or nationals. This fundamentally misunderstands South Africa's legal obligations;
- The investigation would be injurious to relations between South Africa and Zimbabwe. In other words, there was a lack of political will to proceed;
- The police cannot initiate an investigation on the basis of the anticipated presence of the accused in South Africa (despite legal opinions to the contrary); and
- The police anticipated difficulties in conducting an extraterritorial investigation, although SALC counsel had advised that, given the comprehensive nature of the dossier provided, there was no need to conduct further investigations.

Of course, should the application for judicial review succeed on this last ground, it would be quite a narrow victory, but SALC hopes to keep the door open to prosecution, however slim that opening. In truth, perhaps the greatest obstacle to a South African prosecution is the broader public sentiment that, given the extent of South Africa's domestic criminal problems, judicial resources are not well spent on international issues.

Conclusion

It was noted that the AU has put an item regarding universal jurisdiction on the agenda of the UN General Assembly, which has elicited preliminary discussions. The Secretary-General is in the process of soliciting comments and observations on the subject from all members of the General Assembly, with a view to a report being issued in the near future. The AU and the EU had already received a report on the issue of universal jurisdiction.³

³ The report can be found on http://www.africa-eu-partnership.org/sites/default/files/rapport_expert_ua_ue_competence_universelle_en_0.pdf