



Universal Jurisdiction for International Crimes: *Africa's Hope for Justice?*

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Summary points

- Impunity for gross human rights violations, whether perpetrated in war or peacetime, was for long the norm, but the 1990s witnessed a transformation worldwide with increasing demands for legal accountability in respect of international crimes.
- The genocide in Rwanda prompted the establishment of an ad hoc tribunal while the International Criminal Court is pursuing prosecutions in respect of serious human rights violations committed in the Democratic Republic of the Congo, the Central African Republic, Uganda, Darfur, Sudan and Kenya.
- But the limited capacity of international mechanisms to deal with the scale of violations has redirected attention to domestic courts both within the state where the crime was committed and abroad.
- The initiation of criminal proceedings by European courts has generally been welcomed by the state where the crime was committed. Sometimes, however, the exercise of universal jurisdiction, particularly where it has involved senior sitting officials, has caused serious political friction between African and other states.
- It is unlikely that principles to determine which state should try which crimes will be agreed upon. If the state where the crime was committed is able and willing to prosecute, that is usually the best course, but the need to bring justice for victims should encourage any state to bring proceedings if the territorial state is not able to do so.

Introduction

Universal jurisdiction is a principle of international law that allows a state's courts to prosecute individuals for international crimes¹ committed anywhere in the world, even though neither the offender nor the victims are linked by nationality to the prosecuting state. Although its origins can be traced back to the figure of the pirate,² the scope and application of universal jurisdiction remain contested under contemporary international law. While many within the human rights community lobby states to claim the right of universal jurisdiction on the basis that perpetrators of egregious crimes must be held accountable, those who take a more cautious approach point to the risk inherent in the right, which challenges the foundational doctrine of international law – the sovereign equality of states. These are equally compelling claims that can be neither reconciled nor avoided.

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The exercise of the principle of universal jurisdiction has caused friction between African states and Western jurisdictions. In 2000, for example, the Democratic Republic of the Congo (DRC) was confronted by Belgium's expansive universal jurisdiction laws when a Belgian magistrate issued an international arrest warrant for the DRC's Foreign Minister on charges of crimes against humanity and war crimes committed outside Belgian territory in which no Belgian nationals had been victims. This

incident not only damaged diplomatic relations between the DRC and Belgium but culminated in a legal dispute before the International Court of Justice (ICJ) in which Belgium was found to have violated the DRC's sovereign immunity.³ In 2002, the alleged involvement of Congo's President, the Interior Minister, and two senior military officials in crimes against humanity and torture committed in the Republic of Congo became the subject of a criminal investigation by the French courts on the basis of France's universal jurisdiction laws on torture.⁴ Senegal, by contrast, has been internationally criticized for *not* using its jurisdiction under the Convention against Torture (CAT) and for allowing Hissène Habré, the former president of Chad, to seek refuge in Senegal after his fall from power. Pressure on Senegal intensified in 2005 with the decision of the Belgian courts under their universal jurisdiction laws to request Habré's extradition from Senegal on charges of crimes against humanity and torture perpetrated by him during his tenure as president.

On 9 November 2008, Rose Kabuye, Rwandan President Paul Kagame's Chief of State Protocol, was arrested by German police officers at Frankfurt airport on a warrant authorized by a French investigative judge, Jean-Louis Bruguière. Kabuye was transferred to Paris shortly after and was brought before investigating magistrates, interrogated and released on conditional bail. Charged with 'complicity to murder in relation to terrorism' under France's universal jurisdiction laws, Kabuye was accused of involvement in the assassination of Rwanda's former President Juvenal Habyarimana, which had sparked the genocide in 1994. The fact that the court had been entitled under France's law to initiate a criminal proceeding against a non-national for an offence committed outside French territory where the victims were not French citizens was to trigger a series of diplomatic rows.

1 Examples of international crimes include genocide, crimes against humanity, war crimes and torture.

2 The pirate was described as the '*hostis humani generis*' – the enemy of mankind – by C.J. Coke in *King v Marsh* (1615) 3 Bulstr. 27, 81 E.R. 23.

3 *Case Concerning the Arrest Warrant of 11 April 2000* (DRC v Belgium) 14 February 2002, at www.icj-cij.org.

4 This matter is now subject to litigation before the ICJ; see *Certain Criminal Proceedings in France* (Republic of the Congo v France), at www.icj-cij.org.

Within days, Rwanda ordered the expulsion of the German ambassador and recalled its own from Berlin. Acrimonious public exchanges erupted between France and Rwanda, marking an all-time low in the relationship between the two states. Diplomatic ties had already been severed in 2006 when Bruguière's indictment, naming Kabuye and eight other senior Rwandan officials, was first made public. On being informed of Kabuye's arrest, President Kagame was reported to have commented angrily, 'you cannot have France or any other country thinking it has the right to exercise its judicial powers beyond its borders to cover other sovereign entities'.⁵ The African Union (AU), sub-regional organizations, and individual African states were united in their support for Rwanda, with some condemning the arrest as 'a blatant abuse of the Principles of Universal Jurisdiction on the part of both Germany and France'.⁶

Relations between European and African states deteriorated further when, in February 2008, a Spanish investigative judge issued an indictment charging 40 senior Rwandan military officials (both sitting and retired) with genocide, crimes against humanity and war crimes perpetrated between 1990 and 2002 in Rwanda and its neighbouring territories. The prosecution of President Kagame was only ruled out on grounds of head of state immunity.

It was this last incident which prompted the AU to adopt a decision in July 2008 on 'the abuse of universal jurisdiction' and to decide that the 'warrants shall not be executed in African Union Member States'. Recognizing that the exercise of universal jurisdiction was having 'negative consequences for the relationship between the EU and Africa', in late 2008 the African Union-European Union Ministerial Troika agreed to establish an ad hoc expert group to report on the principle of universal jurisdiction as understood in the respective continents. The arrest of Kabuye, which came at a moment when discussions were still pending, was therefore hugely damaging to AU-EU relations.

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In engaging with contemporary legal thinking on the ambit and content of universal jurisdiction within the context of international criminal justice and Africa, this paper seeks to identify the legal questions that continue to be contested not only between states but within the legal community itself, with the aim of engendering informed debate. The principle of universal jurisdiction marks a pivotal point at which international law and national law intersect, where the 'twin contradictions'⁷ between the rights of states and human rights confront one another, and law and politics collide. Disputes that arise between different parties in respect of the scope and applicability of the principle therefore cannot be resolved exclusively by reference to the law, though that is not to under-estimate the need for further clarity of the law.

There are also signs that the confrontation between African and European states over universal jurisdiction extends to its interplay with the doctrine of sovereign immunity. Immunity in international law functions to bar domestic courts from prosecuting certain state officials even for the most serious international crimes. But states continue to disagree over which officials are entitled to claim immunity from domestic criminal proceedings. The dispute between Rwanda and Germany and France was therefore as much about the

⁵ Agence France-Presse, 14 November 2008.

⁶ ICGLR press release, 13 November 2008.

⁷ Hannah Arendt, *The Origins of Totalitarianism* (1951).

immunity owed to Kabuye as Rwanda's Chief of Protocol as it was about the contours of universal jurisdiction. But the war of words between Europe and African over universal jurisdiction may point to a deeper tension that lurks below the surface. For if international law offers 'the expectation of coequal discursive dignity', its realization, at least from the perspective of Africa, continues to prove elusive.⁸

Some of the conversations that have focused on the criminal accountability of senior African state officials have served to confuse debates on universal jurisdiction by conflating the principle with other quite distinct questions of law and politics, not least those involving the jurisdiction of the International Criminal Court (ICC). This paper aims to offer some clarity to those discussions.

Prosecuting international crimes in domestic courts

Since the mid-1990s there has been a steady rise in the number of instances in which domestic courts have taken steps to hold individuals criminally accountable for their conduct on the basis of the principle of universal jurisdiction. This trend should not be viewed in isolation. At the international level, the end of the Cold War reignited a global commitment to international human rights that was to embrace a renewed interest in international criminal justice. The establishment by the UN of two ad hoc tribunals followed by the realization of an international criminal court – a project that had remained dormant since the Nuremberg trials – seemed to reawaken a global interest in the promise that international law offered. Global justice was no longer an aspiration. Impunity for serious crimes of international concern would no longer be tolerated. International law provided a means of enabling states acting collectively to constitute international courts and tribunals to prosecute individuals accused of gross human rights violations. The International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone

(SCSL) are just three examples of international tribunals created since the 1990s.

But international law, through the principle of universal jurisdiction, also enabled states – acting alone but on behalf of the international community – to prosecute an individual before its *domestic* courts irrespective of when, where and by whom such crimes were perpetrated. The sentiment was shifting and a culture of legal accountability seemed to take root. From Augusto Pinochet to Henry Kissinger, from Ariel Sharon to Hissène Habré, no one was beyond the reach of the law: that was the claim.

Have European courts targeted African states?

But even accounting for this global trend, there is a perception among African states that a disproportionate number of criminal proceedings initiated by European courts involve senior African officials. This was exemplified by a pronouncement made by Rwanda's Justice Minister, Tharcisse Karugarama, at a meeting of African ministers of justice in November 2008 in which he called for 'a unified stand to fight neo-colonialism spearheaded by foreign judges hiding under international law'.⁹ But does the record corroborate this perception?

‘ There is a perception among African states that a disproportionate number of criminal proceedings initiated by European courts involve senior African officials ’

Disturbing though recent events have proved for African states, it is potentially misleading to say that senior African officials have been 'singularly targeted' by European states. The findings of the *AU-EU Expert*

⁸ Upendra Baxi, 'What may the "Third World" expect from international law?', 27 *Third World Quarterly* (2006), 713–25 at 722.

⁹ Edwin Musoni, 'AU Justice Ministers Protest Abuse of Universal Jurisdiction', 5 November 2008, at www.allafrica.com/stories/200811050742.html.

Group on Universal Jurisdiction, published on 16 April 2009, indicate otherwise. An assessment carried out by the expert group shows that of the multiple cases brought by eight of the twenty-seven EU member states, proceedings have been instituted against nationals not only from Africa but from Afghanistan, Argentina, Bosnia-Herzegovina, Chile, China, Cuba, El Salvador, Iran, Iraq, Israel, Guatemala, Mexico, Peru, Suriname, the United States and Uzbekistan.¹⁰ This record, as well as subsequent state practice including the issuing of an arrest warrant by a UK court for the former Israeli foreign minister Tzipi Livni in December 2009, may go some way to dispelling the myth that senior African officials are specifically 'targeted'. Nonetheless, the evidence fails to refute convincingly Judge Bula-Bula's worry that '... the large number of African, Latin American and Asian leaders brought before Belgian [and European] justice might – wrongly – suggest that the presumed violations of international humanitarian law, in particular crimes against peace, crimes against humanity and war crimes, are a monopoly of Africa, Latin America and Asia.'¹¹ This concern merits considered critical self-reflection on the part of those who champion international criminal justice globally.

The vitriolic exchanges that have erupted between the different parties on each occasion indicate that the contours of universal jurisdiction are not as firmly established in law as many of its proponents have claimed. These disagreements should not, however, be allowed to damage the shared belief held by both African and European states that universal jurisdiction has a vital role to play in addressing impunity. Tangible evidence of this shared belief can be found in the fact that some African states have incorporated universal jurisdiction into their domestic legislation, though

admittedly there has only been one attempt to exercise the right.¹² Moreover, it should also be noted that there have been a considerable number of prosecutions by non-African states involving African nationals based on universal jurisdiction which have been welcomed by the territorial state, not least by Rwanda.

Nevertheless, amid mounting unease that the 'ambiguities of universal jurisdiction' were enabling the 'abuse' and 'manipulation' of the principle for 'political ends', the Sixth Committee of the UN General Assembly adopted a draft resolution on 6 November 2009 requesting the Secretary-General to invite Member States to submit their views 'on the scope and application of universal jurisdiction by 30 April 2010.'¹³ This decision was taken at the request of Tanzania acting on behalf of the Group of African States, prompted by a report on universal jurisdiction produced by the Commission of the African Union in 2008. The AU report represents the latest in a series of other recent endeavours to delineate the scope and applicability of the principle.¹⁴

What does international law permit?

It is on the question of the circumstances under which international law permits the exercise of the principle of universal jurisdiction that opinions divide. It is clear that it is far from being an absolute right but one that is subject to other legal norms. Nonetheless, because the precise ambit of the legal limitations remains unsettled, disputes continue to surface.

To initiate criminal proceedings on the basis of universal jurisdiction, domestic courts have relied on their own enabling domestic legislation. Thus the question turns on whether the national legislation complies with the principles of jurisdiction as generally accepted under international law or whether some states have

10 *The AU–EU Expert Report on the Principle of Universal Jurisdiction (AU–EU Expert Report)*, April 2009, 8672/1/09 REV1, para 26.

11 Separate opinion of Judge Bula-Bula, the *Arrest Warrant* case (DRC v Belgium).

12 Section II, *AU–EU Expert Report*, para 19.

13 A/C.6/64/L.18.

14 See the Resolution on Universal Jurisdiction adopted by the Institut de Droit international (IDI) in 2005 www.idi-ii.org; see also Cairo and Princeton Principles and the work of the International Law Commission on 'Immunity of State officials from foreign criminal jurisdiction', http://untreaty.un.org/ilc/summaries/4_2.htm. In the ICJ *Arrest Warrant* case, the majority avoided any discussions on universal jurisdiction; nonetheless, some of the judges in their separate and dissenting opinions examined the scope and applicability of the principle in some depth – see www.icj-cij.org.

Box 1: Types and bases of jurisdiction

1. Types of criminal jurisdiction

- *Prescriptive / Legislative*
The state's authority to make its own substantive criminal law and to decide its geographical reach.
- *Adjudicative / Judicial*
The authority of the state's organs to investigate, prosecute and punish those who have breached its laws.
- *Enforcement / Executive*
The authority of a state to enforce its laws – generally regarded as limited to within its territory.

2. Bases of prescriptive criminal jurisdiction

- *Territorial*
A state is entitled to prosecute all persons irrespective of nationality who have committed a crime prescribed by its laws within its territory

(Extraterritorial prescriptive bases of jurisdiction)

- *Active personality (nationality of offender)*
A state's entitlement to prosecute its own nationals for crimes committed outside its territory. State practice indicates that for the purpose of jurisdiction, states treat those who have acquired the nationality of the forum state after the date of the offence but prior to the prosecution as nationals.
- *Passive personality (nationality of victim)*
A state's entitlement to prosecute individuals who have harmed its own nationals even when such harm is committed outside its territory.
State practice indicates that for the purpose of jurisdiction, states treat those who have acquired the nationality of the forum state after the date of the offence but prior to the prosecution as falling under the passive personality principle.
- *Protective*
A state's right to protect its national security entitles it to prosecute individuals who commit a harm that threatens the security of the state even when such harm has been committed outside its territory.
- *Universal*
A state's right to prosecute individuals for international crimes committed anywhere in the world even though neither the offender nor the victims are linked by nationality to the prosecuting state.

enacted legislation that goes beyond this. International law recognizes three types of jurisdiction: prescriptive (legislative), adjudicative (judicial) and enforcement (executive) (see Box 1). As far as the question of universal jurisdiction is concerned, it is the first two types of jurisdiction that are relevant since prescriptive jurisdiction refers to a state's authority to create its own substantive criminal law and to decide its geographical reach, while adjudicative jurisdiction denotes the authority of the state's organs to investi-

gate, prosecute and punish those who have breached its law. International law treats these two types of jurisdiction as distinct because they can be subject to different legal regimes. For example, the domestic court's authority to adjudicate on a matter does not necessarily follow even when there is valid prescriptive jurisdiction, as the domestic courts may be barred from doing so by the doctrine of state immunity. This was made clear by the ICJ in the Arrest Warrant case involving the Foreign Minister of the DRC.

Some states (as in the cases of Belgium, Spain and more recently Germany and Canada) have adopted an expansive version of the principle in their domestic legislation while others have been more circumspect, legislating only for specific offences and limiting the basis of jurisdiction as expressly required (rather than permitted) under a particular treaty obligation. Procedural differences between states regarding who is entitled to initiate a criminal process, and how, means that state practice shows wide disparities in respect of both prescriptive and adjudicative universal jurisdiction.

Insofar as prescriptive jurisdiction is concerned, customary international law permits states to exercise criminal jurisdiction on a number of bases, the most common of which is the *territoriality* principle. Clearly, a state is entitled to prosecute all persons irrespective of nationality who commit a crime prescribed by its laws within its territory. The most firmly established basis of extra-territorial jurisdiction is the *active personality* principle that permits a state to claim jurisdiction on the basis of the nationality of the alleged offender even when the offence is committed abroad. States may also assert extra-territorial jurisdiction on the basis of the *passive personality* principle or where the *victim* is a national of the forum state. A growing proportion of prosecutions in domestic courts have been brought by and against those who have acquired the nationality of the forum state as refugees, who have fled from either violence and persecution or justice (Nazi war criminals, Rwandan genocidaires) in their original state of nationality. Recent state practice would therefore suggest that even where offenders and/or victims have acquired the nationality of the forum state *after* the commission of the offence, as long as they have acquired the nationality *prior* to the start of the criminal investigation, the basis of jurisdiction is treated as active or passive personality – rather than universal – jurisdiction by the forum state. International law recognizes a third extra-territorial basis of jurisdiction – the *protective* principle – which permits states to assert jurisdiction where the offence in

question constitutes a threat to the state's security or national interest. By contrast to all the above-mentioned bases of jurisdiction, *universal* jurisdiction is the most contentious for the reason that it requires no nexus (link) to the prescribing state, but is based solely and exclusively on the abhorrent nature of the offence. It is the heinousness of the offence that instils a right in any or all states to take action on behalf of humanity.

Although there continue to be arguments as to which offences international law permits states to exercise universal jurisdiction over, there is wide agreement that it applies to most war crimes, crimes against humanity, genocide, slavery and, at least for parties to the relevant treaties, grave breaches of the Geneva Conventions, torture and some international terrorism crimes.¹⁵ International law has long recognized that such offences amount to international crimes and few would disagree that the perpetrators of any one of these offences must be held criminally accountable. The 'heinousness of the offence' theory fails to explain, however, why there is also universal jurisdiction in customary international law for the crime of piracy. Piracy can be considered a *sui generis* crime because it is committed on the high seas where other primary bases of jurisdiction are either irrelevant or have little practical effect. Kenya's enactment of the Merchant Shipping Act 2009, which provides for a very broad version of universal jurisdiction¹⁶ in that it permits Kenyan courts to prosecute pirates captured off the coast of Somalia by *third parties*, appears to have been motivated by the need to respond to a practical problem rather than one guided by any claim based on the abhorrent nature of the offence itself.

But whatever the law, there is also disagreement as to the practice. State practice indicates that the exercise of universal jurisdiction is often conditioned by policy and pragmatic considerations. In circumstances where international courts, for one reason or another, lack jurisdiction and primary jurisdiction holders show a reluctance to bring alleged perpetrators to justice, when and

¹⁵ See ICJ's Arrest Warrant case and Separate and Dissenting Opinions of Judges Guillaume, Higgins, Kooijmans, Buergental, Koroma, Oda and Van den Wyngaert.

¹⁶ Section 369(4)(a) provides that piracy is an offence under Kenyan law 'whether the ship ... is in Kenya or elsewhere [or] whatever the nationality of the person committing the act'.

under what circumstances should domestic courts with no nexus to the crime step in to fill the 'impunity gap'?

From theory to practice: two steps forward and one back?

In exercising the right to prosecute *solely* on the basis of universal jurisdiction, domestic judicial authorities may be seen as interfering with one of international law's cardinal principles – the principle of non-intervention – which governs the relations between all states. As the Israeli Supreme Court conceded in *Attorney-General v Eichmann*, the exercise of universal jurisdiction in respect of international offences other than piracy is generally resisted for the reason that it is likely to involve 'excessive interference with the competence of the State in which the offence was committed'. The right to invoke universal jurisdiction is therefore a hugely significant act that must carry with it corresponding responsibilities, including, perhaps, a moral responsibility to take account of historical context and sensitivities. If universal jurisdiction is to play its full part in addressing gross human rights abuses, it simply cannot afford to be tarnished, in its infancy, by a reputation that 'evokes memories of colonialism'.¹⁷

The actual practice of states indicates that it is highly unusual for a domestic court to rely exclusively on universal jurisdiction in customary international law when initiating criminal proceedings. Even in the case of *Eichmann*, one of the most controversial cases that is cited for being the first example of a domestic court's reliance on universal jurisdiction, multiple bases of jurisdiction were pleaded including the passive personality and the protective principles.

Significantly, nearly all the criminal proceedings involving senior African officials before European courts have been based on the passive personality principle to which universal jurisdiction has subsequently been pleaded. For example, the initial investigation by the Spanish investigative judge into the allegations involving senior members of the Rwanda Defence Forces (RDF) was prompted by complaints from the families of nine

Spanish nationals who were killed or who disappeared during the period covered by the indictment. Similarly, the request for an international arrest warrant by Jean-Louis Bruguière in respect of the Rwandan officials, including Rose Kabuye, was originally based on a complaint filed by the daughter of the French co-pilot killed in the downing of President Habyarimana's plane. Proceedings pending in Belgium against Hissène Habré are also based on the passive personality principle. In other words, even when domestic legislation provides for universal jurisdiction, judicial authorities have been reluctant to rely exclusively on it.

The jurisprudence of the Spanish courts, however, tells a different story. In July 2007, despite noting that it would be 'advisable' to read the jurisdictional statute to require a connection to some national interest, the Supreme Court ruled that Article 23(4) of the *Organic Law on the Judiciary* permitted Spanish courts to exercise universal jurisdiction in respect of the most serious international crimes.¹⁸ A month earlier, relying on the 2005 decision of the Spanish Constitutional Court in the *Guatemalan Generals* case, a Spanish court concluded that universal jurisdiction under Article 23(4) is 'absolute', permitting the investigation to proceed against China's ex-President Jian Zemin in the *Falun Gong* case. In February 2008 a *revised* indictment charging the senior officials of the RDF for crimes committed against Rwandan and Congolese victims based on the principle of universal jurisdiction was entered by the Spanish judge.

Faced with mounting criticism, Spain has recently introduced legislation to curtail the broad powers exercised by the Spanish judicial branch. The amended legislation to restrict its courts from exercising jurisdiction without evidence of some link to Spain was approved by the Senate on 15 October 2009. For those who have long advocated the need to address impunity, this is nothing short of a regressive step that evokes memories of a similar fate that befell Belgium's expansive universal jurisdiction laws, which were repealed in 2003.¹⁹

¹⁷ AU–EU Expert Report, para 37.

¹⁸ Spanish Supreme Court judgment in *Adolfo Scilingo*, available at www.derechos.org/nizkor/.

¹⁹ Under the new legislation, Belgium has incorporated the core international crimes (genocide, crimes against humanity and war crimes) into its criminal code and has limited the jurisdiction of Belgian judges to active and passive personality principle unless treaty obligations mandate otherwise.

Is universal jurisdiction in retreat?

Such developments have prompted some to wonder whether universal jurisdiction is ‘on its last legs, if not already in its death throes’.²⁰ However, a concurrent trend appears to be emerging that suggests it may be far too early to speak of the ‘bell tolling for universality’. This is because, in introducing domestic legislation to reflect their treaty obligations under the International Criminal Court statute, a growing number of states, including Germany,²¹ the Netherlands, the UK, New Zealand and Canada,²² have adopted very broad bases of jurisdiction that in some cases amount to universal jurisdiction over genocide, crimes against humanity and war crimes. Moreover, despite the prescriptive changes in Spain and Belgium, judges in both states are still able to assert wide extraterritorial jurisdictional powers based on liberal interpretations of active and passive personality jurisdiction. Thus Belgium’s amended law now provides for jurisdiction if the alleged offender has Belgian nationality or residency status, and expressly includes those who have become residents or citizens after the crime was committed. It was this law that, in December 2009, enabled Belgium’s courts to convict Ephrem Nkezabera, dubbed the ‘genocide banker’, for having armed and financed the Interahamwe during the Rwandan genocide. Likewise, UK courts may prosecute not only UK nationals but those with residency status for war crimes, genocide and crimes against humanity, and legislation adopted in November 2009 applies this law to crimes dating back to 1991,²³ it is now likely that the UK authorities will be pursuing criminal investigations into a significant number of suspected war criminals and genocidaires who have settled in the UK since the early 1990s.

The ICC statute has therefore encouraged states to enact comprehensive legislation criminalizing the three core international crimes and to galvanize states to close any and all legal loopholes – or ‘impunity gaps’ – within their domestic legislation. Taken together, these

prescriptive changes point to a growing trend among states to enact legislation that conveys the unambiguous message that the presence of perpetrators of gross human rights abuses will no longer be tolerated on their territories. If universal jurisdiction in its absolute form is in temporary retreat, it would seem that universality in a conditional form requiring there to be some link between the forum state and the offence – however tenuous – is on the advance. A current case brought before the ICJ by the Republic of Congo in respect of criminal proceedings in France in which one of the alleged offenders has legal residency status in France may serve to clarify the status of customary international law in this regard.²⁴

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Does international law impose an obligation to prosecute?

While customary international law may permit states to exercise universal jurisdiction, treaty obligations, such as those provided in the UN Torture Convention, *require* states to either extradite or prosecute (*aut dedere aut judicare*) alleged offenders should they be present on the territory of the state party. Despite the entry into force of the Torture Convention in 1987, the first conviction based on its requirement for universal jurisdiction was

20 Antonio Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’, 1 *Journal of International Criminal Justice* (2003), 589–95.

21 Article 1, section 1 of the German Code of Crimes against International Law, 2002 reads, ‘this Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany’.

22 Crimes Against Humanity and War Crimes Act, 2000.

23 The 2001 ICC Act [amended by the Coroners and Justice Act 2009] gives domestic courts jurisdiction for the core crimes, wherever committed, provided that the accused is either a UK national or ‘resident’ and the offence was committed on or after 1 January 1991.

24 *Case Concerning Certain Criminal Proceedings in France* (Republic of Congo v France), www.icj.org.

not made until April 2004 when a Dutch court convicted Sebastian Nzapali, a Congolese national, for complicity in acts of torture committed in 1996 in the former Republic of Zaire (now the DRC). In the absence of an extradition request from the DRC, the Dutch authorities were obliged under the Convention to prosecute Nzapali (albeit with the DRC's cooperation) once his presence in the Netherlands was drawn to their attention.²⁵

The *aut dedere aut judicare* obligation, as emphasized by the AU–EU expert group, is conceptually distinct from universal jurisdiction. The latter (as with any of the other bases of jurisdiction) is logically prior to the former since only when the relevant prescriptive jurisdiction is available does the question of ‘extradite or prosecute’ become pertinent. Nonetheless the *aut dedere aut judicare* obligation is relevant to the question of universal jurisdiction since ‘such a provision compels a state party to exercise the underlying universal jurisdiction that it is also obliged to provide for by the treaty.’²⁶ Although over half the member states of the AU are parties to the Convention, requiring them to enact legislation prescribing universal jurisdiction in respect of torture, it is troubling that most have not done so.

Senegal's failure to introduce legislation to satisfy its obligations under the Torture Convention meant that its courts could not prosecute Hissène Habré (who had been given refuge in Senegal in 1990) despite his indictment by a Senegalese judge in 2000 on charges of torture and crimes against humanity. In 2006 the UN Committee against Torture found Senegal to be in breach of its treaty obligations for failing to prosecute or extradite Habré. This finding was reaffirmed by the AU Committee of Eminent African Jurists which also concluded that it was ‘incumbent on Senegal in accordance with its international obligations, to take steps, not only to adapt its legislation, but also to bring Habré

to trial’. Regrettably, in spite of the incorporation of the relevant enabling legislation in 2007 followed by constitutional amendments allowing for Senegal's courts to prosecute genocide, crimes against humanity and war crimes, the criminal prosecution against Habré remains pending and has resulted in the application by Belgium to the ICJ to declare Senegal in breach of its obligations under the Torture Convention.

‘ There is a demonstrable reluctance on the part of states to prosecute on the basis of universal jurisdiction, notwithstanding treaty obligations ’

Of the different treaty regimes in force, the 1949 Geneva Conventions and Additional Protocol I probably come closest to a mandatory universality principle by requiring states parties to ‘search for and prosecute’ persons alleged to have committed grave breaches, requiring no territorial or nationality nexus with the forum state.²⁷ By contrast to the obligation under the Torture Convention, the Geneva Conventions imposes on states a *primary* obligation to prosecute, which may account for why there have been more domestic criminal proceedings initiated on the basis of universal jurisdiction under the grave breaches provisions despite the additional legal ‘hurdle’ that must be met – proving the existence of an international armed conflict – by the relevant court.

There is a demonstrable reluctance on the part of states to prosecute on the basis of universal jurisdiction, notwithstanding treaty obligations. Political

25 A similar situation arose in the UK when it was brought to the attention of the UK authorities that Faryadi Zardad Sarwar, a mujahadeen military commander in Afghanistan, was living in London. When it became apparent that no request for extradition from the Afghan authorities was forthcoming, the UK authorities were obliged to prosecute under the terms of the Torture Convention. In July 2005, Zardad was convicted of acts of torture and hostage-taking committed during the 1990s in Afghanistan and sentenced to twenty years' imprisonment; the case was the first conviction under the UK's universal jurisdiction laws on torture.

26 *AU–EU Expert Report*, para 11.

27 See *AU–EU Expert Report* for comprehensive list of all African and European states which have enabling legislation granting universal jurisdiction over grave breaches of the Geneva Convention; paras 15–16 and 22–23.

considerations grounded in the desire to maintain cordial international relations as much as a self-interest in guarding the principle of non-intervention offer partial explanations. But it was probably not until the ground-breaking judgment in *ex parte Pinochet* in 1998 that domestic courts became cognizant of the possibilities, but also the legal limitations, that universal jurisdiction offered in the fight against impunity.

Universal jurisdiction: legal and policy limitations

Sovereign immunity or impunity?

Of all the issues identified by the AU–EU expert group as giving rise to disquiet among African states, it would appear that the most divisive pertains to the scope of immunities under international law. That African states have welcomed many of the criminal proceedings instituted by European courts involving African nationals would suggest that the concern among African states is not with universal jurisdiction *per se* but with its interplay with the doctrine of sovereign immunity. The indictments for serving state officials by European courts was identified in the AU–EU report as giving rise to a belief among African states that there is ‘disregard for immunities enjoyed by state officials under international law’ the consequence of which has been to ‘severely constrain the capacity of African states to discharge the functions of statehood on the international plane’.

The law on immunities has evolved significantly in the last decade, prompted in large measure by the judgment of the House of Lords in *Pinochet No. 3*.²⁸ In finding that a *former* head of state is no longer entitled

to claim immunity where the act in question is governed by a treaty such as the Torture Convention, the court left undisturbed the customary international law rule that heads of state or government, diplomats and possibly other high-ranking government officials, even if accused of the core international crimes, enjoy immunity from prosecution before domestic courts for the time that they continue to hold office. This rule was affirmed in the *Arrest Warrant* case, which concerned the question of whether an arrest warrant issued by a Belgian investigating magistrate for the incumbent Foreign Minister of the DRC, Abdulaye Yerodia Ndobasi, alleging grave breaches and crimes against humanity, was a breach of customary international law. In upholding the DRC’s claim, the ICJ found Belgium to have violated international law concerning the absolute inviolability and immunity from criminal process of foreign ministers in office. Even where domestic legislation expressly removes immunity in respect of international offences, as in Belgium’s 1993 Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, such provisions have been interpreted as *not* to exclude immunities under customary international law.²⁹

There is consistent and clear state practice that domestic courts will not allow any form of criminal procedure involving sitting heads of state or government, as exemplified by recent French and Spanish practice involving investigations into President Kagame’s alleged role in the death of President Habyarimana.³⁰ There remains uncertainty as to which other governmental posts (in addition to foreign ministers and diplomats) are entitled to absolute immunity, as evidenced by divergent state practice. In February 2004 a London court rejected

28 The *Pinochet* case was instigated by a Spanish judge who had the authority to demand Pinochet’s arrest for crimes committed primarily in Chile and primarily against Chileans. There was no traditional jurisdictional nexus linking the alleged perpetrator and the prosecuting state. The alleged crimes had not been committed in Spain; Pinochet was not a Spanish national; and he was not in Spain at the time of his arrest. Furthermore, the alleged victims were not Spanish citizens, and, ostensibly, there were no protected Spanish economic interests at stake. In other words, Spain was acting in the universal interest of the international community and the basis of Spain’s jurisdiction was exclusively the nature of the alleged crime of torture.

29 See decision of the Court de Cassation declaring inadmissible the case against Israel’s then Prime Minister Ariel Sharon of February 2003.

30 Judge Bruguière’s indictment expressly precludes President Paul Kagame on the grounds that he ‘is immune from prosecution in France because of his status as a sitting head-of-state and can not be charged in the context of this process’ (para 442). Likewise Judge Merelles also concluded that President Kagame could not be prosecuted in Spain because of sovereign immunity. During 2004, the English courts refused to entertain any action in respect of both US President George W. Bush and Zimbabwean President Robert Mugabe on grounds of head of state immunity.

Box 2: Immunity v impunity: *Arrest Warrant Case*, paragraph 61

Offenders:

- a) do not enjoy immunity in their own countries and may be prosecuted by their own domestic courts;
- b) may lose their immunity from foreign jurisdiction should the state which they represent decide to waive that immunity;
- c) may be prosecuted by foreign courts for acts committed prior or subsequent to their period in office, as well as in respect of acts committed during that period of office in a private capacity once they cease to hold the official post for which immunity was granted; and
- d) may be subject to criminal proceedings before certain international criminal courts, where these have jurisdiction, irrespective of whether they are incumbents or former state officials.

an application for an arrest warrant to be issued against Israeli Defence Minister Shaul Mofaz on the basis of immunity and in November 2005 a magistrate refused to issue an arrest warrant against Chinese Trade Minister Bo Xilai, arguing that as part of an official delegation to the UK, Bo Xilai would enjoy immunity. Yet the arrest and transfer of Rose Kabuye by German and French authorities would seem to suggest that a post such as the Chief of State Protocol may not automatically bar a domestic court from jurisdiction in respect of serious international crimes. Nevertheless, this is a troubling case in that on an official visit with President Kagame earlier in the year, the German authorities had clearly accorded Kabuye immunity. That her arrest was possible because the visit several months later was in a 'private' capacity is unconvincing in law given the ICJ's unambiguous statement that an incumbent who is entitled to immunity is not divested of that immunity while travelling in private. Be that as it may, it is unsettled whether absolute immunity can attach to senior military posts, or to senior posts in the security sector.³¹

The indeterminacy of the law as to which state officials are entitled to immunity will no doubt continue to prove divisive. Moreover, the ICJ's reasoning in respect of foreign ministers in the *Arrest Warrant* case has probably served to muddy the waters. For if it is

accepted that absolute immunity applies to state officials on the basis that in the performance of their official functions, 'he or she is frequently required to travel internationally, and thus must be in a position freely to do so whenever the need should arise', in today's global world in which travel abroad is both demanded and increasingly common, the category of state officials who might arguably be entitled to immunity is potentially extremely wide. Although the ICJ was keen to point out that immunity from jurisdiction should not be equated to impunity – highlighting four situations in which alleged offenders might be held criminally responsible for their actions (see Box 2) – the perception that the doctrine of sovereign immunity continues to shield those most responsible for serious human rights abuses is not far from the truth.

The principle of subsidiarity – tempering universal jurisdiction?

Apart from the law on sovereign immunity, international law does not provide any specific rules limiting the exercise of universal jurisdiction to adjudicate. As we have seen above, this does not mean that individual states have not prescribed additional rules that restrict their own courts from exercising adjudicative jurisdiction. These limitations are, however, grounded in both domestic law and policy considerations.

³¹ French requests for international arrest warrants include Major General James Kabarebe of the RDF, Ambassador Faustin Nyamwasa-Kayumba (Rwandan Ambassador to India) and RDF Chief of Staff Charles Kayunga; Spanish indictments include Joseph Nzabamwita (Deputy Chief of the Rwandan National Security Services), Colonel Gacinya (military attaché at the Rwandan Embassy in Washington) and General Karenzi Karake (Rwandan Defense Forces, former Deputy Joint Force Commander, UNAMID).

There are good reasons why, as a matter of judicial policy, the exercise of universal jurisdiction should be governed by the principle of subsidiarity which gives priority to the territorial state. Whether a customary international law rule to that effect exists remains doubtful. This was also the conclusion reached by the AU–EU expert group when it observed that a state which enjoys universal jurisdiction over, for example, crimes against humanity ‘is under no positive legal obligation to accord priority in respect of prosecution to the state within the territory of which the criminal acts occurred or to the state of nationality of the offender or victims’.³²

Nonetheless, some state practice suggests that domestic courts are generally under a *domestic* legal obligation, whether by judicial precedent or legislative requirement, to take into account some form of subsidiarity principle in the exercise of universal jurisdiction. For example, Spain’s constitutional court has favoured an approach based on a ‘measured priority’ in favour of the territorial state. In subsequent judgments Spanish courts have reasoned that as a ‘default’ jurisdiction, universal jurisdiction was intended to grant extra-territorial jurisdiction in the event that the state with primary jurisdiction failed to act and therefore a principle of priority existed in favour of the state on whose territory the crime was committed. A similar approach has been adopted by German courts.³³ In recommending that ‘as a matter of policy, [states should] accord priority to territoriality as a basis of jurisdiction’ the AU–EU expert group, reinforcing the reasoning articulated by domestic courts in Spain and Germany, recognized that those states and communities directly connected with the offence possessed a legitimate primary interest in bringing the perpetrators to justice.

An equally compelling reason to favour the subsidiarity principle is that much of the evidence would also be located within the territorial state. This practical consideration is not always accorded adequate weight given the high failure rate of extra-territorial prosecutions where the territorial or nationality state has refused to collaborate in securing evidence. By contrast, the prosecution by Belgian courts in the case of the ‘Butare Four’ on the basis of universal jurisdiction was regarded as hugely successful in that several other countries including Rwanda actively supported the investigation and collation of the necessary evidence.³⁴

While the advantages of the subsidiarity principle remain uncontested, the details of its practical application are subject to some dispute. Opinion divides as to when the principle should become operative: at the beginning or end of the investigative stage? Moreover, there is no consensus as to what standard of proof is required in assessing whether or not the state with the primary basis of jurisdiction is unwilling or unable to prosecute.

In absentia – is there a problem?

One issue which continues to divide legal opinion is whether domestic courts are entitled to institute criminal proceedings against non-nationals for crimes committed abroad against non-nationals when the alleged offender is not even in the territory of the forum state. The view articulated by ICJ President Guillaume in his separate opinion in the *Arrest Warrant* case, that international law does not accept universal jurisdiction *in absentia*, is not uncommon.³⁵ But the question of whether universal jurisdiction *in absentia* is lawful or not is a moot point since that is to conflate prescriptive with

³² AU–EU Expert Report, para 14.

³³ This principle was also endorsed by several of the ICJ judges. ‘A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned.’ (Higgins, 60)

³⁴ *Public Prosecutor v the ‘Butare Four’*, 8 June 2001. In 1999, with support from Rwanda, a Swiss Military Tribunal convicted Fulgence Niyonteze, a Rwandan bourgmestre, for his part in the genocide. Under its universal jurisdiction law, an investigation into applicable crimes can be opened only if there is a geographical or personal link with Switzerland; *Niyonteze v Public Prosecutor*, Tribunal militaire de cassation (Switzerland), 27 April 2001.

³⁵ *Arrest Warrant Case*, para 16.

enforcement jurisdiction.³⁶ It follows that the only germane question is whether the exercise of universal jurisdiction in the absence of the accused on the territory of the forum state is desirable or not. In other words, this question is governed by policy considerations rather than by international law.

Among those states that do provide for universal jurisdiction, some expressly require the presence of the alleged offender on the territory before the judicial authorities are entitled to claim jurisdiction. Practice among states indicates that a distinction tends to be drawn between the investigative phase of the criminal proceedings and the trial phase, with the latter – trials *in absentia* – often prohibited under domestic law on the basis that such proceedings violate basic fair trial rights. Domestic legislation in, for example, the DRC, Senegal, Ethiopia, South Africa, Denmark, France, Ireland, the Netherlands, Germany, Spain and the UK each requires the presence of the alleged offender in the forum state at the trial stage and in some cases prior to the initiation of an investigation. However, because in many civil law systems the commencement of an investigation marks the start of the criminal process, this distinction – though attractive on one level – may in practice be somewhat superficial, as illustrated by the events leading up to and including the indictment of the 40 current and former senior military officials of the RDF by Spain's judicial branch.

The fact that Spanish law prohibits trials *in absentia* and that therefore a criminal trial cannot proceed unless Rwanda is willing and able to extradite those named in the indictment has been treated, unsurprisingly, as a peripheral issue by the Rwandan government. For Rwanda, it was the fact that a foreign judge was able to institute criminal proceedings against sitting state officials that transformed what would otherwise have been regarded as a legitimate legal question into a politically contentious one in the light of the charges contained in the indictment.

The future of criminal justice in Africa

Too much law or too much politics?

In describing the Belgian and Spanish indictments as 'an abuse of international law [amounting to]... political and judicial bullying' Rwanda's information minister, Louise Mushikiwabo, has not been alone in questioning the motivation of European courts that have resorted to universal jurisdiction. Several months earlier, in adopting its July 2008 decision on universal jurisdiction, the AU also openly challenged what it described as 'the political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders'.

The counter-response, often voiced by European states, has been to emphasize 'the cardinal constitutional principle of the independence of the judiciary'.³⁷ In other words, the exercise of universal jurisdiction is based exclusively on the law, which seeks to do justice independent of politics. Although there is no suggestion that any of the criminal proceedings initiated by European judicial authorities are politically motivated, the 'independence of the judiciary' claim is perhaps not entirely sustainable since the act of invoking universal jurisdiction permits the judicial branch to reach beyond its own borders. As such, it is the *ultimate* political gesture and one that necessitates engaging with the wider political ramifications and consequences of its exercise as a legal tool.

Universal jurisdiction therefore demands that states confront some hard questions in the pursuit of global justice. For example, what concerns, other than those that fall within the domain of law, should the judiciary take into consideration when contemplating the exercise of universal jurisdiction? Should amnesties preclude the exercise of universality? What of other local justice mechanisms such as gacaca courts? To what extent should the needs and priorities of those most affected by the violations be taken into account? Should domestic courts concern themselves with peace processes and the risk that prosecutions might pose in

³⁶ Roger O'Keefe, 'Universal Jurisdiction', 2 *Journal of International Criminal Justice* (2004), 735–60, at 747–52.

³⁷ AU–EU Expert Report, para 41.

fragile post-conflict environments? What questions are better decided by the executive or legislative branches rather than the judiciary? Should states prescribe legislation that expressly requires executive consent or alternatively the possibility of executive veto?

But the hard questions are not confined to those who seek to exercise universal jurisdiction. Demands for justice and accountability in the wake of gross human rights abuses are not the construct of Western imperialism but a common cry of those who have been subjected to such violence. If the purpose of universal jurisdiction is to fill the 'impunity gap', the questions that are rarely asked are why, and who is responsible for having allowed that gap to exist in the first place. The need for critical self-reflection works both ways.

On 23 September 2008, in an address before the General Assembly of the United Nations, President Kagame stated:

Allow me to raise another issue that may have wider implications, namely, that of justice and, more specifically, of universal jurisdiction and its abuse. It is important that those who consider themselves powerful nations do not misuse that tool of international justice to extend their laws and jurisdiction over those they perceive to be weaker countries. If unchecked, one can only imagine the legal chaos that would ensue should any judge in any country decide to apply local laws to other sovereign States. The United Nations has a duty to ensure that universal jurisdiction serves its original goals of delivering international justice and fairness, as opposed to abuse.³⁸

President Kagame's statement is a provocative reminder that there is a need to recognize that while universal jurisdiction is in theory available to all states, in practice it is a tool of the privileged. As the AU-EU expert group observed, 'the practical problems likely to be faced by AU Member States in exercising universal jurisdiction will probably be the same as those encountered by EU Member States, but, given the relative capacity of AU Member States, it stands to reason that the impediment[s]

will be greater'.³⁹ Perhaps the more troubling and inescapable fact is that hand in hand with the position of privilege comes the possibility of circumventing, if not nullifying, the reach of universal jurisdiction in its entirety, as exemplified by the confrontation between Belgium and the US over possible war crimes charges involving US nationals in Iraq. That Belgium's 1993 universal jurisdiction laws went beyond what was regarded as permissible under international law was apparent from the judgment of the ICJ in the Arrest Warrant case. But whether, without US pressure, Belgium would have repealed its legislation rather than opting to amend it is open for debate.⁴⁰ What this episode nevertheless exposes is international law's intrinsic weakness. The problem is not, as Kagame infers, the application of international law by the powerful over the weak but the law's apparent impotence when confronted by the powerful.

Demands for justice and accountability in the wake of gross human rights abuses are not the construct of Western imperialism but a common cry of those who have been subjected to such violence

But is universal jurisdiction now so tainted by allegations of politicization that its demise is inevitable? While the opponents of universal jurisdiction are swift to point to the 'abuse' of the principle by politically motivated judges, the record clearly indicates that Africa's encounter with universal jurisdiction does not provide the simple narrative that some of its challengers might wish to convey. For example, the Rwandan authorities welcomed the conviction in June 2005 of Etienne Nzabonimana and Samuel Ndashyikirwa on charges of war crimes perpetrated in the 1994 genocide under

³⁸ A/63/PV.6.

³⁹ AU-EU Expert Report, para 19.

⁴⁰ Luc Reydams, 'Belgium Reneges on Universality', 1 *Journal of International Criminal Justice* (2003), 679–89.

Box 3: Examples of international tribunals and international jurisdictions**International Criminal Tribunal for Rwanda**

The tribunal was established by UN Security Council under its Chapter VII powers (SCR 955) in 1994. As with the ICTY, the ICTR and domestic courts have concurrent jurisdiction but the ICTR has primacy and may therefore formally request national courts to defer to its competence. The ICTR has jurisdiction over all persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994.

Special Court for Sierra Leone

The SCSL was established by treaty between the UN and the Government of Sierra Leone in 2000. It has jurisdiction only over 'persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'.

International Criminal Court

The ICC was established by treaty under the Rome Statute 1998 and has jurisdiction over war crimes, crimes against humanity, genocide and aggression although it will only be able to try the latter crime when agreement is reached on the definition. The Court is able to exercise jurisdiction over the relevant offences only when such crimes have been committed on the territory or by a national of a state party to the treaty, unless the Security Council refers the situation to the Court. The Court was designed to be 'complementary' to domestic courts and therefore will have jurisdiction only where a state party is genuinely 'unable' or 'unwilling' to investigate or prosecute a person accused of the crimes as defined in the Rome Statute. The ICC may exercise jurisdiction only with respect to crimes committed after the entry into force of the Statute for that state unless otherwise consented to by the state party.

Belgium's amended universal jurisdiction laws. A spokesperson from Rwanda's Office of the Prosecutor declared it was 'a very good and important thing. ... other countries should follow this example and prosecute genocide suspects on their territories'.⁴¹

If proof is needed that there continues to be a widely shared view that universal jurisdiction provides a vital tool in confronting impunity, the statement made in October 2009 by Rwanda's spokesperson for the office of the Prosecutor General is worth recalling. Urging the French courts to prosecute a former Rwandan gendarme – Captain Pascal Simbikangwa – who had fled to France to evade justice in Rwanda for his part in the 1994 genocide, the spokesperson added, 'I hope that the French magistrates do not get involved in politics.'

Are international courts the better option?

The question of whether internationally constituted courts offer a *better* alternative to domestic courts which exercise universal jurisdiction in addressing the 'impunity gap' is far from settled. There is, however, little doubt that since the early 1990s the proliferation of international criminal courts and tribunals has provided states with valuable additional institutional mechanisms for holding individuals criminally accountable for serious violations of international law. But because of the temporal, geographical, personal and subject-matter limitations on the jurisdictional scope of these tribunals, they have necessarily been regarded as judicial institutions that both complement and supplement the work of domestic courts (see Box 3).

⁴¹ www.hirondellenews.com/content/view/2677/525/.

In addition to the ICTR and SCSL, both of which have the competence to prosecute offences perpetrated on African territory, it is the ICC that has the widest jurisdictional competence in Africa: out of a potential 53 African states, 30 have chosen to be parties to the 1998 Rome Statute. Nonetheless, with a total of 110 states parties to the ICC statute, the fact that all five situations currently being investigated or prosecuted by the Prosecutor involve African states has prompted some to question whether the Court might be more accurately described as 'the ICC for Africa'. Although three of the situations – Uganda, the DRC and the Central African Republic (CAR) – were referred to the Prosecutor by the states parties themselves, this has not placated those who have begun to question whether African states are being targeted by the Court. Such claims have been fuelled by the damaging rhetoric of a vocal minority including the current AU chair, Muammar Gaddafi, who has described the Court as a 'terrorist organization' bent on 're-colonization'.

Of all the matters before the Court, the case involving Darfur has proved the most contentious. The ICC statute provides for the Security Council, acting under its Chapter VII powers, to refer a situation to the Prosecutor irrespective of whether or not the state is a party to the treaty. The adoption of Security Council resolution 1593 in March 2005, referring the situation in Darfur to the Prosecutor and culminating four years later in the issuing of an arrest warrant for Sudan's President Omar Hassan al-Bashir for war crimes and crimes against humanity,⁴² has provoked condemnation in Sudan but unease and divisions within Africa. In July 2009, the AU adopted a decision not to cooperate with the ICC to enforce the Bashir arrest warrant, while some called for complete withdrawal from the Court. But the backlash has not been unanimous; some African states parties including Botswana have expressly distanced themselves from the AU decision. An AU Panel on Darfur, headed by South Africa's former President Thabo

Mbeki, has avoided taking a position on the Bashir warrant but has recommended the establishment of a new hybrid court consisting of Sudanese judges and judges appointed by the AU to prosecute the most serious crimes committed in Darfur.

If international tribunals or courts were seen as a potential means by which perceptions of politically motivated criminal prosecutions could be avoided, they have clearly failed to meet that objective. As with universal jurisdiction, allegations of politicization simply cannot be avoided, although equally such charges cannot merely be dismissed out of hand. Whether the future of the international criminal justice project is in the international, regional⁴³ or domestic arena, or an amalgamation of all three, it would seem that there is now no turning back. Impunity for core crimes will no longer be tolerated.

Conclusions

Universal jurisdiction provides one solution to the difficulty of prosecuting perpetrators of atrocities, but it also presents its own problems, in particular to countries which consider that their sovereignty is infringed by the actions of foreign courts. This is clearly not exclusively an 'African' problem since at different times other states including the US, Chile, China and Israel, for example, have been just as concerned about the exercise of universal jurisdiction by foreign courts.

Are there ways to solve the perceived problem? Can the disagreements be resolved by legal principles?

The establishment of international courts is one way to bring international criminals to justice without resorting to universal jurisdiction by national courts. But there are inherent difficulties in this approach, not least the problem of limited resources and scope.

Another way forward is by adopting new treaties that expressly provide for wide jurisdiction. Such a provision could be included, for example, within a new treaty on crimes against humanity. This would ensure that the states which join the treaties do in fact agree to other states being able to prosecute.

⁴² The Prosecutor's wish to include genocide within the arrest warrant is now again before the Pre-Trial Chamber, having been remitted there by the Appeals Chamber.

⁴³ At its annual summit in January 2009, the AU resolved to examine the implications of the African Court on Human and People's Rights trying international crimes.

An alternative approach, evidenced in many states, is to limit the exercise of universal jurisdiction to occasions where there is a link to the state concerned, including, for example, where the victims have acquired the nationality of the forum state, albeit after the commission of the offence, or where the offender is resident in the state.

To develop an international principle of subsidiarity might also be seen as a way forward – that is, to allow the state of nationality, for example, the first opportunity to try an offender. But any such principle would have to remain subject to other competing obligations – as, for example, where the state with custody of the accused was bound by human rights obligations that precluded it from transferring the defendant to the territorial or nationality state, or where there were already obligations under relevant treaties which required any state with custody to take jurisdiction over the offender.

In any event, the existence of universal jurisdiction – and its perceived problems – should encourage states to ensure that their own nationals can be prosecuted in their own courts. If the judicial system concerned is not well equipped to cope with trials of major atrocities, the international community should

be ready to help with capacity-building. This is certainly the conclusion reached by the AU–EU expert group in recommending that ‘the relevant EU bodies should assist AU Member States in capacity-building in legal matters relating to serious crimes of international concerns ... [including] training in the investigation and prosecution of mass crimes, the protection of witnesses, the use of appropriate forensic methods, and so on.’

The forthcoming proceedings at the ICJ in *Congo v France* may confirm the state of current international law in respect of universal jurisdiction. It is unlikely, however, that discussions in the UN General Assembly will result in firm conclusions.

In the meantime, it is likely that states will continue to reserve the right to prosecute on the basis of universal jurisdiction, in spite of political obstacles. The problem for too long has been that there have been too few prosecutions for atrocities, not too many. As for Africa, much as the critics might wish to portray the exercise of universal jurisdiction as a ‘neo-imperialist intervention’ by foreign courts, the fact that it offers the possibility of justice to those victims in Africa who have been denied local justice transforms universal jurisdiction into their hope.

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