

THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION: THE REPORT OF THE SIXTH COMMITTEE A/64/452-RES 64/117

COMMENTS FROM KENYA

The principle of universal jurisdiction is classically defined as 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'.¹ The rationale behind it is based on the notion that 'certain crimes are so harmful to international interests that states are obliged to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim'. Universal jurisdiction allows for the trial of international crimes committed by anybody, anywhere in the world.'²

There are aspects of the principle of universal jurisdiction– such as the compatibility of the ICC Statute with constitutional provisions to the immunity of Heads of State and amnesty laws – that have been considered recently. Buttressed by the *aut dedere aut judicare* principle, States have increasingly implemented the principles of universal jurisdiction and complementarity in a more systematic and concrete manner through their national legislation.

The preamble to the ICC Statute contains the universal jurisdiction principle: (*aut dedere aut judicare* principle) which provides:

'Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation' (para. 4); (universal jurisdiction) 'Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes' (para. 6); (principle of complementarity) 'Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions' (para. 10).

¹ Kenneth C. Randall, 'Universal jurisdiction under international law', *Texas Law Review*, No. 66 (1988), pp. 785–8; International Law Association Committee on International Human Rights Law and Practice, 'Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences', 2000, p. 2.

² Mary Robinson, 'Foreword', *The Princeton Principles on Universal Jurisdiction*, Princeton University Press, Princeton, 2001, p. 16.

There are basically three necessary steps to get the principle of universal jurisdiction working: the existence of a specific ground for universal jurisdiction, a sufficiently clear definition of the offence and its constitutive elements, and national means of enforcement allowing the national judiciary to exercise their jurisdiction over these crimes.³

With regard to Kenya, the enactment of the International Crimes Act Number 16 of 2008 was an acknowledgement that serious crimes do occur and should not go unaddressed. It is an Act of Parliament to make provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes, and to enable Kenya to co-operate with the International Criminal Court established by the Rome Statute in the performance of its functions. Section 6 (1) provides:

6. (1) A person who, in **Kenya or elsewhere**, commits:

- (a) genocide;
- (b) a crime against humanity; or
- (c) a war crime, is guilty of an offence.

Sub-section (4) then defines the crimes as follows:

In this section:

"crime against humanity" has the meaning ascribed to it in article 7 of the Rome Statute and includes an act defined as a crime against humanity in conventional international law or customary international law that is not otherwise dealt with in the Rome Statute or in this Act;

"genocide" has the meaning ascribed to it in article 6 of the Rome statute;

"war crime" has the meaning ascribed to it in paragraph 2 of article 8 of the Rome Statute."

³ Xavier Phillipe, The principles of universal jurisdiction and complementarity: how do the two principles intermesh?, *International Review of the Red Cross*, Volume 68 Number 862 June 2006, p 379

Section 8 (2) then bestows competent jurisdiction on the High Court of Kenya. It provides that "A trial authorised by this section to be conducted in Kenya shall be conducted in the High Court." In terms of judicial practice, Kenya is yet to prosecute any person under this Act.

With these three ingredients satisfied, it is evident that Kenya has set up the mechanisms for the appropriate handling of matters related to universal jurisdiction. The Rome Statute grants the international bedrock that underpins the domestic enactment of the International Crimes Act and the engagement of the Judiciary to handle cases that offend humanity in general irrespective of their location or residence.

We are of the opinion that these serious crimes that attract the application of universal jurisdiction are captured within the principle of *jus cogens* from which there can be no derogation by any State. We are all bound as members of the international community to punish under the due process of law, persons alleged to have committed serious crimes. Impunity cannot be allowed to thrive at the expense of fellow human beings. Those who commit wanton acts of atrocity should be brought to face the legal consequences of their actions. State officials must realize that immunities granted to them are not for their personal benefit, but for the pursuit of State interests. These State interests must also be tempered with reasonability.