THE PRINCIPLE OF UNIVERSAL JURISDICTION AS A TOOL OF INTERNATIONAL CRIMINAL JUSTICE: CHALLENGES FOR AFRICA

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(Human Rights and Democratisation in Africa)

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Dedication

To my daughter, Simbi, my wife Angéline and my late grandfather Kampala.

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Abbreviations

AFHRD	Asian Forum for Human Rights Development
CCL	Control Council Law
Chap.	Chapter
CONF.	Conference
Doc.	Document
DRC	Democratic Republic of Congo
ECHR	European Court of Human Rights
ed.(s)	edition (s)
FARF	Forces Armées pour la République Fédérale
G A	General Assembly (UN)
HRW	Human Rights Watch
ICC	International Criminal Court
ICHRP	International Council on Human Rights and Policy
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
NATO	North Atlantic Treaty Organisation
NGO(s)	Non-Governmental Organisation (s)
OAU	Organisation of African Unity
Res.	Resolution
RUF	Revolutionary United Front
SC	Security Council (UN)
UK	United Kingdom
UNTS	United Nations Treaty Series
USA	United States of America
USSS	Union Socialist Soviet Republic
v.	versus

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Chapter 1 Introduction

1.1 Background to the study

> The subject of universal jurisdiction is of great relevance to all who work for human rights. I regard the search for ways to end impunity in the cause of gross violations of human rights as an essential part of the work of my Office and an essential instrument in the struggle to defend human rights...In my daily work as High Commissioner for Human Rights, I see many situations involving gross, and sometimes widespread, human rights abuses for which the perpetrators often go unpunished...These disturbing trends have given me cause to reflect on the possibilities for alternative means of securing justice and accountability.
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> Mary Robinson, United Nations High Commissioner for Human Rights, in the Foreword to the Princeton Principles on Universal Jurisdiction, Princeton University's Program in Law and Public Affairs, January 2001.

Every now and then we hear new accounts of atrocities, human rights violations being committed in countries around the world. In the past, many of these atrocities and human rights violations went without any redress. Today however, there is a growing sense that these crimes constitute a *hostis humanii generis* (enemies of all mankind),[1] and those who carry out such brutal acts of human right violations should be punished.[2] The United Nations General Assembly (GA) declared that the offences prosecuted at Nuremberg Tribunal were crimes under international law and individuals who committed such crimes were responsible and liable to punishment.[3]

Two important and complementary means currently exist for the punishment of international criminals within the framework of international criminal justice: prosecution by international criminal tribunals and the domestic application of the principle of

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1 Summers, M A (2003) 21 *Boston University International Law Journal* 62 65.

2 International Council on Human Rights Policy (hereinafter ICHRP) (2001) Preface by B W Ndiaye.

3 International Law Commission (hereinafter ILC) (1950) *Principles of the Nuremberg Charter and Judgement* U.N.Doc.A/1316 (1950) 99. See also ILC (1996) *Report Draft Code of Crimes Against the Peace and Security of Mankind* available at <http://www.un.org./law/ilc/reports/1996/chap02.htm> accessed on 23 August 2003.

universal jurisdiction. This latter means pre-dates the twentieth century and was instituted for mainly the punishment of two international crimes: piracy and slavery.[4]

Even though universal jurisdiction with regard to pirates can be justified by the fact that pirates operate outside the legal order of states, there is a shared practical problem with international crimes: the impunity resulting in the impossibility of apprehension and the protection of criminals by their home states.[5] It would nowadays be intolerable and shocking for the human conscience, if the perpetrator of a crime under international law committed against innocent people, would be left in peace, or extradited to a state that is patently not willing to prosecute him.[6]

In addition, it is almost impossible for the existing international criminal tribunals, either *ad hoc* or permanent, to investigate and prosecute all cases of international crimes. In reality, it seems that these tribunals will only cover a handful of the most serious cases.[7] In the same vein, through its cornerstone principle of complementarity, the International Criminal Court Statute (the Rome Statute)[8] highlights the fact that international prosecutions alone will never be sufficient to achieve justice and emphasises the crucial role of national legal systems in bringing an end to impunity.[9]

The sad reality however, is that territorial states often fail to investigate and prosecute serious human rights abuses either due to the lack of willingness or inability. Moreover,

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4 Bassiouni, C (2001) 42 *Virginia Journal of International Law* 81 115-135.

5 As above.

6 The *Prosecutor v. Djajic*, the High Court of Bavaria Judgement (Germany) available at <http://www.u-j.info/index/106494> accessed on 28 August 2003.

7 In August 2003, the International Criminal Tribunal for Rwanda (ICTR) has only completed 15 cases since its establishment by the United Nations Security Council in 1994. See ICTR 'Completed Cases' available at <www.ictr.org/ENGLISH/case/completed.htm> accessed on 28 August 2003.

8 The Statute of International Criminal Court (Rome Statute) U.N. A/CONF.183/9 (1998). Also available at<http://www.un.org/law/icc/statute/99_corr/cstatute.htm> accessed on 20 January 2003.

9 Robinson, M Foreword of 'Princeton Principles on Universal Jurisdiction' (2001) 16 *Program in Law and Public Affairs*, Princeton University. See also *Democratic Republic of Congo v. Belgium*, request for the indication of provisional measures, ICJ, 8 December 2000. Available at <www.icj.cij.org> accessed on 05 October 2003.

human rights violations are generally committed by the state organs and agents who are ordinarily supposed to protect them.[10]

The principle of universal jurisdiction is defined as a power of a domestic court, to prosecute non-national offenders, regardless of connection between offenders and the prosecuting state.[11] The only determinant element is the nature of the crimes that must be a serious violation of human rights.[12] It is for this reason that the grave violations cease to be a matter of only one state and become an international concern. Hence, all states are given the power to prosecute perpetrators of such violations in the name of the whole international community. Used successfully, universal jurisdiction therefore becomes a crucial means of international criminal justice.

Although the principle of universal jurisdiction is not a new phenomenon, for many years, most states failed to give effect to it and many criminals went unpunished. However, in the post World War II period, the international community became sensitive to the gross violations of human rights and began the prosecution of international criminals.

This was first done through the Nuremberg[13] and Tokyo Tribunals.[14] Currently, the International Criminal Tribunal for the former Yugoslavia (ICTY),[15] the International Criminal Tribunal for Rwanda (ICTR)[16] and the more recent International Criminal Court (the ICC) are given powers to prosecute international criminals.[17] At the same time, some states have finally begun to fulfil their responsibilities under international law by

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10 International Law Association (ILA) *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* to the Committee on International Human Rights Law and Practice, London-Conference (2000) 564.

11 Brownlie, I ed. (1990) 304.

12 As above.

13 See the London Agreement of 8 August 1945 between France, the former Union Soviet Socialist Republic (USSR), the United Kingdom of England (UK) and the United States of America (USA).

14 See the Charter of the International Criminal Tribunal for the Far East (1946), available at <http://www.yale.edu/lawweb/avalon/imtfech.htm> accessed on 24 October 2003.

15 See the United Nations Security Council (SC) Resolution 825 (1993) establishing the ICTY.

16 See the SC Resolution 955 (1994) establishing the ICTR.

17 See the Rome Statute n 8 above.

enacting laws permitting their courts to exercise universal jurisdiction over grave international crimes.[18]

Subsequently, the courts in Austria, Denmark, Germany, Netherlands, Sweden and Switzerland have exercised universal jurisdiction over grave crimes under international law committed in the former Yugoslavia.[19] Similarly, courts in Belgium, France and Switzerland have opened criminal investigations and prosecutions related to genocide, crimes against humanity and war crimes committed in Rwanda in 1994.[20] Italy and Switzerland have opened criminal investigations of torture, extra judicial executions and enforced disappearances in Argentina in the 1970s and 1980s.[21] Spain, Belgium, France and Switzerland sought the extradition from the United Kingdom of the former head of state of Chile, Augusto Pinochet, who was indicted for such crimes[22]. All these examples testify the renaissance of universal jurisdiction for the punishment of international crimes.

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18 The 1993 Belgian universal jurisdiction law gives Belgian courts universal jurisdiction over grave breaches of the Geneva Conventions and Protocol I and II, all ratified by Belgium. The law was amended in 1999 to include genocide and crimes against humanity. It is however unfortunate that the recent amendments of April 2003 to the law have sensitively reduced the Belgium's courts powers with regard to universal jurisdiction. In fact, the actual law repealed the landmark "universal jurisdiction statute" in Belgium. These amendments are due to the United States of America s pressure that Belgium risked losing its status as host to NATO's headquarters if it did not rescind the law. The actual law gives jurisdiction to Belgian courts only over international crimes if the accused is Belgian or is primarily resident in Belgium; if the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed; or if Belgium is required by a treaty to exercise jurisdiction over the case. This is a step backwards in the global fight against the worst atrocities. Nevertheless, some cases already pending before Belgian courts will continue, including those concerning Rwanda, Guatemala and Chad. For more details on this law, see Human Rights Watch (HRW) 'Belgium: Universal Jurisdiction Law Repealed' available at <http://www.hrw.org/press/2003/08/belgium080103.htm> accessed on 04 October 2003.

19 See *Public Prosecutor v N.N*, High Court of Ostre Landstrets Denmark (1994); *Prosecution v Refic Saric, Prosecution v Novislav Djajic* , Bavarian High Court, Germany (1997).

20 In July 1998, a Rwandan *N.* was charged with crimes against humanity, war crimes and genocide. He was found guilty in 1999 and sentenced to life imprisonment by Switzerland court. See also the *Prosecution v Capt Alfredo Astiz* (1990:France).

21 In 1999, seven persons were indicted in Italy for murder and kidnapping in Argentina.

22 Amnesty international 'Universal Jurisdiction: 14 principles of effective exercise of Universal jurisdiction' available at <http://web.amnesty.org/web/web.nsf/pages/14_pinciples#top> accessed on 05 May 2003.

Although many similar heinous crimes are committed in Africa or by Africans, not much has been done by African states in the implementation of the principle of universal jurisdiction. This situation does not contribute to the new developments in the protection of human rights and the eradication of the culture of impunity worldwide. The single *Hissène Habré* case involving the former president of Chad, which could have created a precedent and a notable step for Africa in this regard, has failed. He was charged in Senegal with complicity in acts of torture and crimes against humanity.[23] The *Cour de Cassation* ruled however that Senegalese courts have no competence to try a foreign national who committed, or aided and abetted crimes of torture in a foreign country[24]. It is noteworthy that although Senegal had ratified the Convention Against Torture and other Cruel, Inhuman and Degrading Punishment in 1986, it had not adopted necessary implementing provisions to incorporate it into its domestic legislation.[25]

The motivation for undertaking this research is to identify the challenges in the implementation of the principle of universal jurisdiction for the most serious international crimes, with particular attention to Africa. This is because though a large number of people suspected of having committed international crimes live in Africa,[26] their prosecution has been rare. The paper begins with an assessment of the debate on the international crimes (Chap.2), followed by a discussion on the legal basis of universal jurisdiction (Chap. 3). An analysis of the challenges including the legal, practical and political obstacles will be made with a specific attention to the African continent (Chap.4). Also a look at strategies for a better implementation of the principle of universal jurisdiction will form the basis of recommendations in the paper (Chap.5).

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23 Brody, R <Habré/Dictators' <http://www.fas.org/man/dod-101/ops/war/2000/02/000223-chad1.htm> accessed on 16 October 2003.

24 Amnesty International 'The Habré legacy' available at <http://web.amnesty.org/library/Index/engAFR200042001?OpenDocument&of=COUNTRIES\CHAD?OpenDocument&of=COUNTRIES\CHAD> accessed on 28 August 2003.

25 As above.

26 Besides many other alleged international criminals all over Africa, this situation may be illustrated by the Rwandan case. After committing the genocide and other international crimes in Rwanda, those responsible found safe-heavens in the neighbouring countries without any fear of prosecution.

1.2 Hypothesis/Research question

The principle of universal jurisdiction is the key tool of international criminal justice. It complements the existing international tribunals and the national courts in combating impunity. While it is not a new phenomenon in criminal justice, it continues to be a controversial issue. Similarly, its implementation has been rare or inefficient both in the so-called old democracy countries as well as in Africa. The question is whether this lack of success is due to the uncertainties surrounding the principle of universal jurisdiction itself or to the existence of obstacles faced in the implementation of the principle.

The crimes subject to the regime of universal jurisdiction as well as its legal basis in international criminal law are not clearly defined. Moreover, legal, practical and political obstacles to using universal jurisdiction constitute a bar to the global fight against the most harmful crimes. While a relative renaissance of the principle in the western countries and particularly in Europe is remarkable, Africa has the record of reluctance and delay in its implementation. The question is whether the few existing cases and attempts in the implementation of universal jurisdiction, offer any lessons to the African continent.

1.3 Limitations to the study

This paper intends to examine the challenges in the implementation of the principle of universal jurisdiction. Even though universal jurisdiction is not a new phenomenon in international criminal justice, the world is facing the embryonic status of its evolution. Moreover, the principle constitutes one of the most rapidly changing areas of international law and this may be a limitation to the study.

While some writings and jurisprudence can be found in the western countries, especially in Europe and America, Africa lags behind in this regard. This limitation may not allow a view from the African judicial perspective and a deep comparative analysis on the question. In addition, the principle itself is not for a common understanding in international law. The universality, the legal basis and the crimes under the principle are very contentious issues.

1.4 Methodology

For the purpose of this study, the main discussion will be dialectic by analysing relevant international conventions and writings. The study will also resort to the discussion of the existing jurisprudence related to the principle of universal jurisdiction where appropriate.

1.5 Literature survey

A lot has been said on universal jurisdiction. Respected authorities like Bassiouni,[27] Summers[28] and Brownlie[29] have extensively discussed the issue of universal jurisdiction in its different ways of implementation. Many authors including Horowitz[30], Morris[31], O'Shea[32] have discussed some questions on issues such as immunity of officials and amnesty with specific reference to the existing jurisprudence. The 14 Princeton Principles on universal jurisdiction of the Princeton University[33] are key principles in the implementation of universal jurisdiction. Amnesty International's commentaries and updates are very useful for the development of universal jurisdiction.[34] However, none of these authorities has focused the debate on the African continent so as to identify the reasons for the lack and the delay in the implementation of the principle. Although many of these challenges are not for Africa alone, some of them have particular significance in the African context. The paper therefore attempts to make a contribution in this regard.

27 Bassiouni, C eds. (1999), (1992) and (1987).

28 Summers (2003) n 1 above.

29 Brownlie, I eds. (1998) and (1990).

30 Horowitz, J (1999) 23 *Fordham International Law Journal* 509.

31 Morris, M H (2001) 35 *New England School of Law* 337.

32 O'Shea, A ed. (2002).

33 The Princeton Principles on universal jurisdiction are principles proposed by the Princeton Project on Universal Jurisdiction of the Princeton University Program in Law and Public Affairs (2001). These principles aim to advancing the continued evolution on international law and the application of international law in national legal systems. Available at <http://www1.umn.edu/humanrts/instree/princeton.html> accessed on 22 October 2003 (hereinafter Princeton Principle).

34 Amnesty International <http://web.amnesty.org/library/index> accessed on 15 January 2003.

Chapter 2 Assessing the debate on the international crimes

There is no common acceptance on the growing and emerging list of international crimes. Similarly, the degree or seriousness of these crimes to qualify for universal jurisdiction is hotly debated. Hence, beyond the controversy on the legality of the exercise of universal jurisdiction, the crimes subject to it are themselves controversial issues. A lack of clarity exists on the question relating to whether all violations of the laws and customs constitute international crimes.[35] It has been argued in this regard, that some are too minimal to support the appellation of international crimes.[36] Also, the absence of a definition of the scope of violations of international criminal law for instance, which ought to fall within the purview of punishment, is one of the considerable difficulties.[37]

While crimes over which international tribunals have jurisdiction are listed or defined in the instruments that establish them, the principle of universal jurisdiction does not have such a privilege. This is partly because universal jurisdiction does not have a universal instrument.

The lack of uniformity in defining international crimes is one of the obstacles to the application of universal jurisdiction as it causes legal uncertainty.[38] As a matter of fact, even in theory there is no uniform definition of what exactly is to be considered a crime against humanity or a war crime. Admittedly, international criminal law is not as rigorous as some national legal systems with respect to the specificity required in the definitional contents of international crimes. There is nonetheless a minimum standard of specificity which must be met.[39] Another interesting question might be to know what exactly distinguishes an ordinary criminal under municipal law from an enemy of humankind.[40]

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35 O'Shea (2002) n 32 above 134-141.

36 As above 138-141.

37 Lauterpacht, H (1944) 21 *British Yearbook of International Law* 61 79.

38 Bassiouni (1999) n 27above 232. See also O'Shea (2002) n 32 above 134-141.

39 Bassiouni (1999) as above 282.

40 Bassiouni, C 'Universal Jurisdiction: Myths, Realities, and Prospect' Published by American Association of International Law November 3, 2000 New England School of Law, Boston-Massachusetts. Also available at <http://www.nesl.edu/confernc/CTRJURIS.HTM> accessed on 17 August 2003.

As stated by Friedmann, there has always been international criminal law of modest and ill-defined proportions and, the only recognised crimes were piracy *jure gentium* and war crimes.[41] As a result, he wondered whether the crimes started in the Nuremberg Charter, other than genocide, would become part of universal criminal law.[42] Although piracy was the classic "universal" crime, later joined by slave trading, since the Nuremberg trials of Nazi leaders at the end of World War II, the list of crimes subject to universal jurisdiction under international law has grown to include atrocities such as genocide, torture, apartheid, and systematic "crimes against humanity."[43]

Some considerations might be relevant in determining which crimes give rise to universal jurisdiction under international law. In this regard, indicators from international treaties such as the United Nations Convention Against Torture, or the Geneva Conventions for war crimes and the general custom of states (customary international law) under which genocide and crimes against humanity are considered to be crimes, are useful.

Although international tribunals have played and continue to play a great role, the recent intervention of the Rome Statute is one of the most recent instruments, which is very relevant in defining crimes and establishing individuals' criminal responsibility. Though it was generally accepted by the drafters of the Rome Statute that the list of the crimes in Article 7 reflected customary law, this list was not necessarily complete.[44] It is unfortunate that the Statute extends the prosecution to the crimes that are not listed in Article 7 without giving further guidance.

In the same vein, there are some expansionist views proposing that because some offences such as gross misappropriation of public funds are so crucial to Africa, they should be added to the list of crimes susceptible to universal jurisdiction.[45] As a matter of

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41 Friedmann, W (1964) 167.

42 As above 168.

43 Brody, R 'Universal jurisdiction' available <http://www.pbs.org/wnet/justice/world_issues_uni.html > accessed on 15 July 2003.

44 Simma, B (1999) 93 *American Journal of International Law* 302 310.

45 Kwakwa, E 'Preliminary Draft Guiding Principles on Universal Jurisdiction in Respect of Gross

fact, many African states have been and still are being characterised by "Kleptocracy",[46] by which leaders usually loot public treasury and stash away the proceeds in foreign banks.[47] This is done to the detriment of millions of citizens who are impoverished, dying with HIV/AIDS, malnutrition and many other afflictions. It is submitted that the inclusion of crimes such as misappropriation of public funds is very relevant in the context of Africa, considering its scale and the harm it causes to human beings. If there was a practice of states in this regard, by prosecuting those responsible for these new crimes, this practice would create customary international law. To date however, there is no such a practice, neither on the African continent nor outside Africa.

Even though there is no unanimity on crimes under universal jurisdiction today, it is however hoped that once prosecutions start, through the ICC jurisprudence and state practice, a significant degree of clarity and consistency in international criminal law will be achieved.

2.1 The crimes under international law

General international law encompasses international conventions, custom, general principles of law as well as jurisprudence of courts deciding with equity.[48] Although all these aspects of international law are applicable while dealing with international crimes, this paper mainly assesses international crimes based on treaties, customary international law as well as on the role of domestic laws. A special focus on the Rome Statute has the advantage of taking into consideration the most recent developments in the debate.

Human Rights Offences: An African Perspective' a paper presented at the Symposium on 'Universal jurisdiction for international crimes: Diversity and Inclusivity' Maastricht-Netherlands, 7 December 2001 (hereinafter Maastricht symposium).

46 As above.

47 It is for instance known that Sani Abacha, former President of Nigeria, stole huge sums of pounds 3 billion during his regime. Today several bank accounts of about pounds 100 million in Liechtenstein are suspected by the Nigerian Government to be kept by his entourage. See <http://news.bbc.co.uk/1/hi/world/africa/877113.stm> accessed on 10 October 2003.

48 See Art 38 of the Statute of the International Court of Justice (Statute of the ICJ) available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> accessed on 15 July 2003.

2.1.1 Identification of the crimes

Treaties are the primary means of norm creation in international law. As argued by Kwakwa, treaties govern several aspects of our lives.[49] In fact, the law of treaties is one of the oldest and most established branches of international law. It is vital to the understanding of international law in general, as the bulk of international law is ultimately found in treaties.[50] The statute of the International Court of Justice (the ICJ Statute) itself considers treaties as the first source while deciding on disputes in accordance with international law.[51] It is therefore useful to consider international crimes on the basis of this important source of international law.

With regard to the international crimes, it was not clear in the past, what specific crimes were included under general headings such as crimes against humanity or war crimes. Although there is still some confusion,[52] treaties have proved to be a very fruitful source for the identification of international crimes. The same treaties also constitute a guide in the determination of whether the crime should be prosecuted on the basis of universal jurisdiction.[53]

The international community has made considerable effort to reinforce international criminal law. This is continuously done by concluding treaties incorporating crimes generating states' obligations to use the principle of universal jurisdiction. Beside the old crimes of piracy and slavery, different treaties have listed or defined crimes subject to the obligation to prosecute or extradite. These treaties include the Genocide Convention,[54] the 1973 Apartheid Convention,[55] the 1949 Geneva Conventions[56] and

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49 Kwakwa, E 'Law of Treaties', a paper presented at the Summer School on International Law, University of Pretoria, (January 2003) unpublished.

50 As above.

51 See Art 38 of the Statute of the ICJ n 48 above.

52 See ICHRP (1999) n 2 above 35.

53 Bassiouni (1987) n 27 above 355-477.

54 See United Nations General Assembly Res. 26 A (III) of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, into force 12 January 1951.

55 See International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973 U.N G.A Res. 3068 (XXVIII) U.N Doc. A/9030 (1973).

56 First Geneva Convention for the Amelioration of the Condition of the Wounded in the Field of 12

1977 Additional Protocols[57] as well as the 1984 Convention Against Torture and Cruel, Inhuman or Degrading Treatment and Punishment.[58] The Rome Statute is the most recent treaty that defines four categories of international crimes under its jurisdiction.[59] These are genocide, crime against humanity, war crimes and the crime of aggression.[60]

While the treaties referred to above can be seen as focussing on the fundamental rights of individuals, there is also a group of treaties that deal specifically with the punishment of violations of the rights of others. They are not normally classified in the group of human rights treaties.[61] These include treaties on offences against diplomatic agents, drugs offences, theft of nuclear material, money laundering, fraud, corruption and insider dealing.[62] All these treaties list and define genocide, crimes against humanity and war crimes that are considered as crimes under international law and that allow *mutatis mutandis* the universal jurisdiction rule to apply. At least when the state does not exercise criminal jurisdiction, it is required to extradite the offender found on its territory[63] or to assist other states in the prosecution of crimes such as money laundering, fraud, corruption and insider dealing.[64]

August 1949 75 UNTS (1950) 31-83; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 75 UNTS (1950) 85-133; Third Geneva Convention Relative to the Treatment of prisoners of War of 12 august 1949 75 UNTS (1950) 135-285; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 75 UNTS (1950) 287-417.

57 See the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) UNTS (1979) 609-699.

58 See the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 24 ILM 535 (1985).

59 See Art 5 of the Rome Statute n 8 above.

60 The jurisdiction over the crime of aggression is suspended until an agreement is reached on the definition of this crime.

61 O'Shea (2002) n 32 above 189.

62 For a detailed discussion on treaties regarding these crimes, see O'Shea (2002) as above 189-196.

63 O'Shea (2002) as above 195.

64 As above.

In addition to the crimes defined by treaties, custom deriving from state consent and practice contributes to the determination of international crimes.[65] The ICJ Statute describes custom as evidence of general practice accepted as law.[66] It has been argued that codification of conventions; academics commentary and the case law of ICJ have contributed to a customary resurrection of custom.[67] Although the existence of customary international criminal law does not meet unanimous recognisance,[68] almost all agree that the crime of torture has matured into customary law.[69]

Beyond the attempts through treaties and customary international law to identify crimes subject to universal jurisdiction, the doubt persists on the full content of some crimes such as crimes against humanity or war crimes. This was recognised by the drafters of the Rome Statute stating that with regard to crimes against humanity, the list referred to in article 7 was not necessarily complete.[70] Even at the international level there seems to be no consistent abstract definition of crimes against humanity as it may be noticed for example by the difficult interpretation of genocide over the years.

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65 Bassiouni (1999) n 27 above 82.

66 See Art 38 1 (b).

67 Reisman, W M (1987) 17 *California Western International Law Journal* 137 137.

68 Brownlie argues that custom is a suitable source for peremptory norms because it serves as a vehicle for generally binding international law on important moral issues. See Brownlie (1998) n 29 above 514-517. In contrast, Weil, argues that issues with the concept of *jus cogens* rules, are not truly customary because they can be asserted despite a lack of state practice and consent by states. See Weil, P (1983) 77 *American Journal of International Law* 409 413. In the same sense, Jennings has insisted that "most of what we perversely persist in calling customary international law is not only not customary law: it does not even faintly resemble a customary law." See Jennings, R Y ' The Identification of International Law' in Cheng, B (1982) 237 *Teaching and Practice* 3-5.

69 Meron, T (1989) 87. See also The *Prosecutor v. Furundzija* (1999) 38 ILM 317; Also Roberts arguing that contemporarily the most coherent explanation of fit and substance would be that torture is illegal under customary international law. Roberts, A E (2001) 95 *American Journal Of International Law* 763 763-764. Also Klein, D F (1983) 13 *Yale Journal of International Law* 350 353. According to Bassiouni, piracy also has for centuries acquired such a character of customary international criminal law. See Bassiouni (1999) n 27 above 233.

70 Simma (1999) n 44 above 302-310.

Consequently, the definition of what constitutes a crime against humanity is highly ambiguous and often arbitrary.[71] However, one should admit that insofar contemporary international law certainly does not require a detailed written description of certain conduct as criminal. It is sufficient that the wrongfulness of the conduct is universally acknowledged and, therefore its punishment should follow the commission of such an act.[72]

2.1.2 The Rome Statute contribution

International institutions and, more specifically, international tribunals have enhanced the development of international criminal law. From the Nuremberg to the ICC, any comparison between the law of today and that of five years ago demonstrates that in the area of individual criminal responsibility, international law has clearly moved towards much greater criminalisation.

This shift appears in the international arena, involving both the recent development of international criminal tribunals and international humanitarian law.[73] For instance the ICTY has extended the character of international crime to those crimes committed during conflicts of a non-international character.[74] The Rome Statute as the most recent development has for instance exhaustively individually defined acts constituting crimes against humanity. In addition it has extended the definition of war crimes to those serious violations of the laws and customs applicable in armed conflicts not of an international character.[75] The Rome Statute has been said to provide for more efficiency, immediate action and consistency in resolving issues involving criminal acts worldwide.[76]

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71 Bassiouni n 40 above.

72 This position was recognised in trials of the Nazi-war criminals. See United Nations War Crimes Law Commission, *Reports of Trials of War Criminals*, London 1949, vol. XV, 166-170. But also more recently, the *European Court of Human Rights* (ECHR) *Reports*, Series A, vol. 335-B and 335-C (*SW v. UK*; *Cr v. UK*). Also see Greenwood, C (1996) 7 *European Journal of International Law* 279 281.

73 Meron, T 'Is International Law Moving towards Criminalization?' available at <http://ejil.org/journal/Vol9/No1/art2.html> accessed on 23 September 2003.

74 The *Prosecutor v Dusko Tadic* (1996) 35 ILM 32.

75 See Art 8 (2) e).

76 See AFHRD ' Primer on the International Criminal Court' <http://www.forumasia.org/projects/

2.1.3 The seriousness of the crime

All international crimes do not necessarily lead to the use of the universal jurisdiction rule. Only the most serious offences are, in international law, subject to universal jurisdiction.[77] Sometimes the crimes have to reach the extent of "shocking the conscience of humankind."[78] As argued by Goldstone, the seriousness of the crime is a determinant element in the identification of crimes that are so chocking to the conscience of mankind. They are qualified as such if they can truly be said to be crimes, not only against the immediate victims, or the country in which they are committed, but against all humankind and humanity.[79]

Following this argument, it was stated in the *Hostage* case that:

> An international crime is an act universally recognised as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances".[80]

The grave matter of international concern derives from the seriousness of the crime concerned. The crimes set out in Article 5 of the Rome Statute cover most of the serious crimes of concern to the international community as a whole. As noted by O'Shea, however, the crime of genocide and crimes against humanity are necessarily among the most serious while with war crimes, an act may be an infringement of the laws and customs of war without necessarily reaching the required level of seriousness.[81]

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icc.html> accessed on 15 August 2003.

77 See Hampson, F 'Jurisdiction, Universal' available <http://www.crimesofwar.org/thebook/jurisdiction-universal.htm> accessed 12 August 2003.

78 See Maastricht symposium n 45 above.

79 Goldstone, R 'International Jurisdiction and Prosecutorial Crimes' in Barnhizer, D (2001) 114.

80 See the *Hostage case* decided under CCL 10 Allied Control Council Law (CCL) 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Humanity, December 20, 1945, Official Gazette of the Control Council for Germany No 3 January 31 1946. This case concerns officers of German Armed Forces charged with murdering thousands of civilians in Greece, Yugoslavia and Albania.

81 O'Shea (2002) n 32 above 128.

The International Law Commission (ILC) has set out two indicators of this category of crimes. They should be systematic and of large scale. The systematic manner requirement implies a preconceived plan or policy while the large scale refers to acts directed against a multiplicity of victims either as a result of a series of attacks or a single massive attack.[82] It is therefore submitted that while dealing with universal jurisdiction, the international crimes should include crimes proposed by the ILC in the drafting of the Rome Statute. These include crimes under general international law, such as genocide, aggression, serious violations of the laws and customs applicable in armed conflict, crimes against humanity and certain enumerated treaty crimes. This is because the Rome Statute seems to have identified most of these crimes while the uniformity on the seriousness can be reached through the time.

The scale, gravity and planned pattern behind the commission of these crimes will probably be reached on a case-by-case basis in the long run, by having a consistency in jurisprudence over time, preferably by the international courts.[83] As Meron noted, the future pace of progress will depend primarily on the efficacy of the ICC and on the future success of the Yugoslavia, Rwanda and Sierra Leone Tribunals.[84]

82 See ILC, *Draft report of the on the work of its 48th session*, UN Doc. A/CN.4/L.527/Add.9, 17 July 1996, pp. 2 ff.

83 See Maastricht symposium n 45 above.

84 Meron (1989) n 69 above 87.

Chapter 3 Looking for the legal basis of universal jurisdiction

Generally, states exercise jurisdiction in the field of criminal law on five basis. These basis have been identified as being:

> (1) Territorial, which is based on the place where the offence was committed; (2) Active Personality or Nationality, which is based on the nationality of the accused; (3) Passive Personality, which is based on the nationality of the victim; (4) Protective, which is based on the national interest affected; and (5) Universality, which is based on the international character of the offence.[85]

Only the last basis is considered in this paper. As stated in the *United States v. Yunis* case, this last category of jurisdiction gives a broad scope to states. It encompasses acts that take place outside the state's territory but for which any state, even without a personal or territorial link with the offence, is entitled to try the offender.[86] This is justified by the fact that the crime committed is of a universal character and it therefore generates universal right or even a more binding obligation for prosecution.

The legal basis for universal jurisdiction has developed largely since World War II even though its foundations in international law remain somewhat shaky.[87] Although the rule is well established to some extent, there remain grey areas where the application of universal jurisdiction is not clear.[88] Moreover, state practice is not uniform in recognising and ensuring the prosecutions based on universal jurisdiction. The legal basis and state practice for exercising universal jurisdiction differ depending on whether the crime is set out in an international treaty or is part of customary international law. Once a treaty is part of the law of the land, it also becomes a more perfect legitimate basis of prosecution.

The rationale for universal jurisdiction is that there exist certain offences, which due to their very nature affect the interests of all states, even when committed in another state

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85 Bassiouni (1999) n 27 above 227.

86 See *United States v. Yunis* 681 F Supp. 896 (DDC 1988) at 900-1.

87 ICHRP (2001) n 2 above 35.

88 As above.

or against another state, victim or interest.[89] They are so serious and so unacceptable that they justify the founding of universal jurisdiction.[90]

Based on this premise, scholars have controversially claimed that the principle of universal jurisdiction assumes that each state has an interest in exercising jurisdiction to combat offences condemned by all nations, regardless of any connection with that state.[91] Bassiouni has even claimed that there is a general rule requiring the prosecution of international offenders and therefore there is a general application of universal jurisdiction.[92] Higgins in contrast, has argued that the right to exercise universal jurisdiction can stem either from a treaty of universal or quasi-universal scope, or from acceptance of customary law under general international law.[93]

However, while the general obligation to prosecute based on customary international law is not certain in international criminal law, the practice has shown that the existence of a treaty requiring prosecution is the main legal basis of universal jurisdiction.

As the *Pinochet* case[94] demonstrated, the majority of the judges found that torture is a crime under customary international law. They concluded that prohibition of torture amounts to a norm with special status (*jus cogens*) that generally takes precedence over treaties and customary international law.[95] Yet, despite this finding however, judges still found it necessary to rely on the Convention Against Torture than on customary international law. They were more comfortable when using treaty provisions incorporated into national law, and were more reluctant to apply customary international law.[96] However, despite the problem of these uncertainties the legal basis for the use of universal jurisdiction can be found in treaties, customary international law or at the national level, in the case incorporated into national legislation.

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89 Green, C L (1989) 59 *British Yearbook of International Law* 214 217.

90 Goldstone n 79 above 114-116.

91 Sunga, L S (1992) 110-115.

92 Bassiouni (1992) n 27 above 499-527.

93 Higgins, R (1994) 58.

94 Regina v. Bartle Pinochet and the Commissioner of Police for the Metropolis and Others (2000) 1 AC 147 (HL. 1999) 380.

95 See ICHRP n 2 above 31.

96 As above.

3.1 Treaty-based obligations

Treaties constitute not only the main legal basis for general international law, but also the main basis for the prosecution of the most serious international crimes subject to universal jurisdiction. The reading of many treaties reveals the existence of the duty for states parties to prosecute or to extradite international criminals. In addition, as mentioned above in the *Pinochet* case, there is a common feeling that treaties are more binding in international law. Though the obligations to prosecute or to extradite generally go together, this paper is mainly limited to the obligation to prosecute.

The obligation to prosecute based on treaty was affirmed in the *Green v. United States* case, where the American district court perceived the treaty-based obligations as the most binding in international criminal law by stating that:

> [T]he modern view and the one maintained in this country is that the state is under no obligation to surrender fugitives accused of crimes unless it has contracted to do so.[97]

Although piracy was accepted as customary international law, allowing universal jurisdiction for centuries, as well as slave trade and traffic in children and women,[98] customary obligations therein were further reproduced into treaties to make them more binding. In the same vein, the Geneva Conventions that came in the aftermath of World War II and their Additional Protocols contained provisions on the duty to prosecute, extradite and to provide mutual assistance to the High Contracting Parties.[99]

The Conventions oblige states to search for persons who commit crimes qualified as grave breaches of the Conventions and regardless of their nationality or where the crimes took place. The states are obliged either to bring them before their own courts or to hand them over for trial to another state party.[100] The action taken by the Conventions

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97 See *S J Green v United States of America*, District Court No 98-572-M (1998). Also available <http://www.paed.uscourts.gov/documents/opinions/98D1234P.HTM > accessed on 21 September 2003.

98 Schabas, W A (2000) 554.

99 As above 503.

100 A I 'Universal jurisdiction: The duty of states to enact and enforce legislation' available at

to endorse the concept of universal jurisdiction was conceived as an extraordinary significant step; and indeed remains an important source of international obligation for many states that have ratified the Conventions.[101]

More recently, some multilateral treaties have also recognised universal jurisdiction for particular offences. They include hijacking and other threats to air travel, piracy, attacks upon diplomats, nuclear safety, terrorism, apartheid and torture.[102]

All these treaties speak the same language that there are certain breaches that are universally serious to justify universal jurisdiction.[103] They therefore constitute the legal basis for states parties to exercise universal jurisdiction in accordance with the pertinent provisions of those treaties. In addition as one author has noted, most of these instruments irrespective of their specific binding effect have become part of customary international law and also constitute a general principle of law.[104]

It is important to note that as the most harmonised and recent treaty of crimes committed in time of war as well as in time of peace, the Rome Statute has the merit of defining international crimes. Surprisingly however, the reading of its provisions does not lead to the conclusion that the Court is entitled to exercise universal jurisdiction. The preconditions to the exercise of jurisdiction provided for refer to states parties and to their acceptance.[105] However, the Court can exercise universal jurisdiction in the case the Security Council acting under Chapter VII of the United Nations Charter refers the situation to it.[106]

Another problem is that not all treaties regarding international crimes say clearly that states should rely on universal jurisdiction in prosecuting criminals. In addition, no

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<http://web.amnesty.org/library/index/engior530022001?OpenDocument> accessed on 7 August 2003.

101 Goldstone n 79 above 116.

102 See the *Report of the ILC Draft Statute of the ICC* UN Doc. E/CN.4/Sub.2/1996/17. Also available at < http://ejil.org/journal/vol9/No1#P83_19740> accessed on 17 August 2003.

103 Paust, J J (1989) 11 *Houston Journal of International Law* 337 340.

104 Bassiouni (1992) n 27 above 503.

105 See Art 12 of the Rome Statute n 8 above.

106 See Art 13 b of the Rome Statute as above.

specific treaty deals with some crimes that have reached the level of international crimes such as enforced disappearances or extra-judicial executions.[107] Moreover, some relevant treaties like the Genocide Convention do not clearly make provisions for universal jurisdiction. The latter, for example, provides for territorial jurisdiction or jurisdiction to be exercised by an international penal tribunal.[108] Considering all these gaps with regard to treaty-based obligations, it is important to attempt to fill the *lacunae* by considering obligations deriving from customary international law in the following section.

3.2 Customary international law

The ICJ Statute describes custom as evidence of general practice accepted as law.[109] Customary law has its origin in some acts or arises from the consent of states.[110] As already stated above, conventions, scholars' writings and the case law of the ICJ have contributed to build customary international law.[111] It is also argued that state acceptance that some crimes are of international concern as whole has created customary international or *jus cogens* for those crimes.[112]

In this regard, it is beyond doubt that some international crimes have acquired the status of *jus cogens* norms that are defined as peremptory norms of international law.[113] In a decisive manner, the Vienna Convention on the Law of Treaties consecrates the notion of peremptory norms of international law as superseding national and other sources of international law.[114] Obligations *Erga omnes* deriving from customary international law are norms that all states have a legitimate interest in enforcing. The fact that many

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107 Bassiouni, (2001) n 4 above 19-25.

108 See Art 6 of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948, entered into force, 12 January 1951.

109 See ICJ Statute Art 38 1 (b) n 48 above.

110 See Bassiouni (1999) n 27 above 82.

111 Reisman (1987) n 67 above 137 137.

112 See Van Schaack, B (1997) 106 *Yale Law Journal* 2272 2274.

113 Bassiouni (1992) n 27 above 489. Also Brownlie (1990) n 11 above 514-515.

114 See Art 53 of Vienna Convention on the Law of Treaties, May 23, 1969 U.N. Doc.A/CONF.39/27. Also Available at <http://fletcher.tufts.edu/multi/texts/BH538.txtl> accessed on 9 October 2003.

international crimes have acquired the status of *erga omnes* norms may entitle all states even with no direct interest to exercise universal jurisdiction.[115]

Relying on customary international law as a source of states' obligations to exercise universal jurisdiction may be important because there is no treaty covering all crimes. Even in case there is a treaty, all states are not always parties to such treaties recognising universal jurisdiction. Furthermore, not all treaties recognise universal jurisdiction as a rule or an obligation. Therefore the recourse to customary international law as a basis of prosecution is an important tool of international criminal justice. This is because the status of a crime under customary international law determines the obligation of all states regarding the crime, whether or not they are parties to a convention.[116]

In the *Prosecutor v. Furundzija*, with regard to torture, the court first analysed the state of international norm against torture and found it to be peremptory in nature and thus it has acquired the status of a *jus cogens* norm.[117] From there the court concluded that:

> the consequence of the jus *cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.[118]

Brody has similarly qualified the torturer, like a pirate and slave trader, as constituting an enemy of all mankind and giving to all states power to prosecute or to extradite.[119]

However, although it is beyond doubt that several crimes violate customary international law and therefore constitute a legal basis for universal jurisdiction,[120] it is not clear when exactly a crime becomes part of *jus cogens*.

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115 Schabas (2000) n 98 above 445-446.

116 Ratner, S R *et al* (1997) 40.

117 See *Prosecutor v. Furundzija*, Judgement, case No IT-95-17/1-T, 10 Dec. 1998 para 153.

118 As above para 155-156.

119 Brody n 43 above.

120 Horowitz (1999) n 30 above 509.

As a result, the tendency for states is to be reluctant and to rely more on treaties than on customary law. The absence of any reliance upon customary international law in the *Pinochet* case[121] is eloquent in this regard. It is submitted nevertheless that there is a sharp trend of recognition of the character of customary international law with regard to the crime of torture.[122] Such a character has also emerged in the Geneva Conventions and the Genocide Convention. This is partly evidenced by the number of states that are party to the Geneva Conventions and the Genocide Convention because of the heinous character of the crimes therein.[123]

Apart from treaties and customary international law that constitute legal basis for universal jurisdiction, the recognition of international crimes in the national laws is the best basis of prosecution.

3.3 National legislations

Because of some jurisdictional limitations, international tribunals are not able to exercise jurisdiction over all international crimes. The jurisdiction of the existing international tribunals is limited either by time, by territoriality or by states acceptance of their competence. Given these limitations and the increasing number of serious criminals, the Rome Statute itself has highlighted the fact that international prosecutions alone will never end impunity.[124] Consequently, the main role in ending impunity has to be played by national courts enforcing national laws. This enforcement should mainly be based on the prosecution of nationals or aliens through the principle of universal jurisdiction.

In this regard, some countries, mostly in Europe[125] and America[126] have laws giving their courts extensive jurisdiction over atrocities committed abroad. They even sometimes

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121 Wilson, R J (1999) 21 *Human Rights Quarterly* 965 965.

122 Bassiouni, C (1996) 59 *Law and Contemporary Problems*. 63 63-67; also Horowitz (1999) n 30 above 509.

123 See Amnesty International n 100 above.

124 Robinson n 9 above.

125 For instance, Austria, Denmark, Germany, Netherlands, Sweden, Switzerland, Belgium, France, Italy and Spain have laws permitting to some extent universal jurisdiction.

126 For instance the United States of American law provides for the prosecution of torture and certain war crimes committed abroad if the defendant is in the USA. Similar laws are found in Canada.

begin investigations while the person is not yet in the prosecuting country,[127] later seeking extradition as Spain did in the *Pinochet* case.[128] It is therefore submitted that once a state has enacted laws permitting universal jurisdiction at the domestic level, these laws constitute the perfect basis for the use of such a jurisdiction.

There is no doubt today that international crimes exist and even occur. It is also generally accepted that at least for some of these crimes, states must investigate and prosecute. This is not to say however, that the exercise of universal jurisdiction is an easy matter. There are significant legal, practical and political challenges regarding its implementation. The following section will discuss those challenges with a specific attention to the African continent.

127 See Arrest warrant of 11 April 2000, ICJ, Democratic Republic of Congo v. Belgium, Judgement of 14 February 2002.

128 Equipo Nizkor ' Pinochet Ugarte must be extradited to Spain: Urgent Action of 27 January 1999' available at <http://www.derechos.org/nizkor/chile/juicio/ua2.html> accessed 23 May 2003.

Chapter 4 Challenges to the implementation of universal jurisdiction in Africa

The principle of universal jurisdiction has become the preferred technique to prevent impunity for international crimes.[129] As noted by Bassiouni, it is the most effective method to deter and prevent international crimes by increasing the likelihood of prosecution and punishment of its perpetrators.[130] Even though the combination of international law (treaties and customary law) and national sources of law may be seen to produce a cumulative effect sufficient to warrant the recognition of universal jurisdiction for *jus cogens* crimes, its applicability remains problematic in Africa and elsewhere.

While Africa is lagging behind in punishing international crimes, a number of alleged criminals live in Africa. For instance Milton Obote who is now living in Zambia is alleged to have killed and tortured between 100.000 and 300.000 Ugandan people during his reign (1980-1985). Colonel Mengistu Haile Mariam, suspected to be responsible of thousands of death of Ethiopians during his regime (1974-1991) is now living peacefully in Zimbabwe. The majority of Rwandan Hutus who carried out the genocide on the Tutsis in 1990-1994 still living in the neighbouring countries and all over Africa. The former president, Charles Taylor of Liberia, who is accused to have committed different atrocities in his country, is now living a quiet life in Nigeria.[131] Besides, many other crimes are committed on innocent people during different armed conflicts on the African continent.

Though there are many international criminals in Africa, not one criminal trial has been completed on the continent using universal jurisdiction. Only one initiated prosecution of the former dictator of Chad, Hissène Habré, by the Senegalese courts, faced some of the challenges discussed in this paper. As a result, the Senegalese court did not convict the indicted dictator.[132]

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129 Bassiouni (2001) n 4 above 82.

130 As above 153.

131 For more information on these alleged criminals, see different reports and press release of HRW available at <http://www hwr.org> and amnesty international <http://web.amnesty.org> accessed on 25 August 2003.

132 It is however important to note that the Senegalese government has agreed to extradite Hissène

Although the challenges that the implementation of universal jurisdiction faces in Africa are not exclusive to Africa, many of them may have a particular significance for the continent. This is partly because of the political and economic situation of Africa in the new global order. In addition, a discussion of these challenges may be useful in understanding the delay or the absence of the implementation of the principle of universal jurisdiction in Africa.

The difficulties faced by the applicability of universal jurisdiction in Africa include legal, social, economic, political and cultural challenges. This paper does not cover all these challenges that call for a much broader scope. It only attempts to discuss a few of them based on a legal, practical and political perspective.

4.1 The legal obstacles

As a legal approach, the implementation of the principle of universal jurisdiction in Africa sometimes faces difficulties relating to either international or national legal framework. These include the absence of laws or their inadequacy in national legal systems, national amnesty laws and other similar measures of impunity as well as the problem of immunity.

4.1.1 Absence of domestic laws or their inadequacy

The recognition of human rights as a paramount concern of the international community should lead to the enactment of specific and more effective national rules for the implementation of this part of international law.[133] The Vienna Convention on the Law of Treaties[134] specifies that international law deriving from treaties "must be performed in

Habré to Belgium for trial. As the new 2003 amendment to the Belgium law on universal jurisdiction allows Belgian courts to continue the ongoing prosecutions, there is hope that the former dictator will be tried in Belgium.

133 Vicuna, F O *et al* 'The Implementation of the International Law of Human Rights by the Judiciary: New Trends in the Light of the Chilean Experience' in Conforti, B et *al* (1997) 135.

134 The Vienna Convention on the Law of Treaties n 114 above.

good faith."[135] This implies that in good faith, all measures particularly laws, should be put in place at the domestic level to give effect to international law. Although this provision concerns treaties, its application could be extended to customary international law.[136]

Consequently, it is generally believed that the obligation to enact laws should be considered to be more binding if it is entrenched in a treaty than if it comes from customary international law. It is submitted however that a permissive approach, giving a more binding character to treaties should not be encouraged as it tolerates the possibility of safe-havens and thereby undermines accountability. This is why some commentators have argued that crimes under customary international law are really mandatory and not permissive.[137] This is true because while some human rights may be part of customary international law, virtually all such rights are now contained in various international treaties.[138]

In this regard, the reliance on national laws that provide that international law, either conventional or customary international law is part of national law, sometimes is not sufficient to permit courts to exercise universal jurisdiction over crimes under international law. Even in case the international law is declared to be part of domestic law, it is not always clear whether such provisions incorporate only the substantive criminal law provisions or also the procedural ones.[139] However, through the work of courts, the right interpretation of these provisions and their procedural aspects will be given. In these circumstances it is preferable that the state unequivocally sets up laws that allow universal jurisdiction without ambiguity.

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135 See Art 26 as above.

136 Broomhall, B (2001) 35 *New England Law Review* 399 401.

137 Sansani, I (2001) 2 *Human Rights Brief* 332 333.

138 Higgins, R 'The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom' in Conforti *et al* (1997) n 133 above 37.

139 Francioni, F 'The Jurisprudence of International Human Rights Enforcement: Reflection on the Italian Experience' in Conforti *et al* (1997) as above 15-32.

4.1.1.1 Absence of laws

International crimes are generally regulated by international law. Yet, international law does not easily apply in the national legal system, if the latter does not have provisions for its application. There is therefore urgency for national legal systems to adopt such provisions,[140] because it is certainly easier for courts to enforce international law when it is entrenched in an express manner in the domestic legal order.

Senegal was the first country in the world to ratify the Rome Statute of the International Criminal Court.[141] It was also the first state to indict an ex-African president on the continent on the basis of the principle of universal jurisdiction.[142] It could not however convict him on the argument that Senegal does not have laws allowing it to do so.[143] This justification of Senegal is questionable and it should not bar the enforcement of international law. Indeed, as the Vienna Convention puts it clear, a party to a treaty may not invoke the provisions of its internal laws or absence of such provisions as justification for its failure to perform a treaty.[144] Yet, Senegal has ratified the Convention Against Torture, crime alleged in the case, since 1986,[145] but failed to take domestic laws permitting universal jurisdiction. Similarly, as Broomhall notes, universal jurisdiction is mandatory as far as treaties requiring prosecution are concerned and must be given effect at the domestic level.[146]

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140 See Maastricht symposium n 45 above.

141 Coalition for the International Criminal Court 'Country-by-country ratification status report' available at <http://www.iccnow.org/html/country.html> accessed on 16 October 2003. Senegal ratified the Rome Statute on 2 February 1999.

142 See the *Report* of the of Experts Meetings organised by Africa Legal Aid 30-31 July 2001 Cairo, Egypt available at <http://www.afla.unimaas.nl/en/act/univjurisd/repunivjurisd.htm> accessed on 15 July 2003 (hereinafter Cairo Report).

143 See HRW 'Senegal Bars Charges against ex-Chad dictator Habré's victims vow to fight on' available at <http://www.hrw.org/press/2001/03/habre032.htm> accessed on 7 May 2003. One of the grounds on which the case was dismissed was that insofar as Senegal ratified the Convention Against Torture in 1986 and did not enact legislation until 1996, the provisions of these two instruments could not be applied retroactively.

144 See Art 27 of the Vienna Convention on the Law of Treaties n 113 above.

145 See Amnesty International n 100 above.

146 Broomhall (2001) n 136 above 404-406.

The situation of absence of laws is not unique to Senegal. Many other African countries do not have laws enabling their courts to exercise universal jurisdiction over grave crimes under international law.[147] Is this situation a simple negligence or a deliberate will? Whatever may be the reason, the absence of laws regarding universal jurisdiction constitutes a serious bar to the eradication of impunity on the continent.

4.1.1.2 Inadequate laws

One may legitimately sympathise with those few states which have legislation permitting, to some extent, universal jurisdiction, rather than with those which have no laws at all. However, these states which have attempted to fulfil their international responsibilities also still have a long way to go. In fact, while incorporating international criminal law, many of them do not include all international crimes in national laws, or these laws lack precise definition of crimes and penalties. They often refer to international law as part of the national legal system, without further qualifications.[148]

In this regard, it has been argued that in the absence of precise definitions of crimes and their punishment in the domestic law, courts are concerned that prosecutions would be inconsistent with the fundamental principle of *nullum crimen, nulla poena sine legem.*[149] It is however submitted that there might be possibility for courts within the constraints of this legal framework to exercise universal jurisdiction. As pointed out by the third Princeton Principle on universal jurisdiction:

> With respect to serious crimes under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it.[150]

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147 See Amnesty International n 100 above.

148 For instance Art 190 of the new Rwandan Constitution 2003 provides that "upon their publication in the Official Gazette, international treaties and agreement which have been conclusively adopted in accordance with the provisions of law shall be more binding than organic laws and ordinary law..." Although this provision may allow treaty-based international criminal law to apply, it is too broad for treaties to be easily implemented without further guidance and precision for each treaty by national legislations.

149 This principle states that where there is no law determining the existence of a crime, there should not be any punishment.

150 Princeton Principle 3 " Reliance on Universal Jurisdiction in the Absence of National Legislation"

To this end, international criminal law provisions may be used[151] together with international tribunals jurisprudence. In this context, international criminal law provided in treaties or customary international law, could constitute a legal basis of definition of crimes, while the jurisprudence of international tribunals could determine penalties to these crimes. This would not be inconsistent with the principle above, since these international crimes do exist in the international legal framework and their penalties are constantly determined by international courts through their jurisprudence.

The incorporation of international obligations into domestic laws with regard to universal jurisdiction includes the recognition of international crimes in domestic legal system. It also allows prosecutions regardless of where the crime occurred.[152] For instance, as a part of Spain's domestic law, Article 23 gives Spain universal jurisdiction over crimes proscribed by the treaties it ratifies.[153] In contrast, many African states' legal systems are lacking in this regard. As noted in a meeting in Cairo, a few African states have laws permitting universal jurisdiction for one or more crimes.[154] These laws however, either do not cover all crimes or impose other conditions such as the presence of the criminal on their territories.[155] There is therefore urgency for African states to ensure by means of laws, that courts are effectively empowered to exercise universal jurisdiction over grave crimes under international law.[156]

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n 33 above.

151 T Scovazzi ' The application by Italian Courts of Human Rights Treaty Law' in Conforti *et al* n 133 above 63.

152 For instance when Spain ratifies a treaty, it is written into its official publication of laws thereby making the treaty domestic law. See Redress 'Universal Jurisdiction in Europe' available at <http://www.redress.org/annex.html> accessed on 7 August 2003 (hereinafter Redress).

153 See Redress as above.

154 See Cairo Report n 142 above.

155 As above.

156 See Principle 6 of Amnesty International n 22 above.

4.1.2 The persistent excuse of immunity

Even in the presence of domestic law that permits prosecution on the basis of universal jurisdiction, immunity usually constitutes a barrier to a successful result.[157] This immunity problem generally concerns current or former heads of state as well as other government officials, particularly diplomats.

Immunity is defined as the ability of a state official to escape prosecution for crimes for which he or she would otherwise be held accountable.[158] Traditionally, the justification here is that immunities are given to the heads of state and other officials " to ensure the effective performance of their functions on behalf of their respective states."[159] As a result, it precludes domestic courts from exercising jurisdiction over foreign authorities.

It is generally recognised that some human rights norms enjoy such a high status that their violations even by states officials constitute an international crime.[160] For this reason, the recent developments of international criminal law have reconsidered the traditional conception of immunity. For example in Belgium, the 1993 legislation was amended in 1999[161] to eliminated sovereign immunity as a defence. These changes were made regardless of whether the individual was acting or not in an official capacity.[162] It is however noteworthy that this law was recently repealed in April 2003 to reduce its scope of jurisdiction.[163] While before April 2003, Belgium was the only state to have the best legislation regarding universal jurisdiction, no single African state is known to have removed immunity barrier in its law.

157 ICHRP (2001) n 2 above 39.

158 Infoplease Dictionary, Jurisdiction at <http://infoplease.com/ipd/A0502550.htm> accessed on 15 June 2003.

159 Horowitz (1999) n 30 above 520.

160 Dugard, J 2 ed. (2000) 202.

161 See Act of 16 June 1993 Concerning the Punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Protocols I and II of 18 June 1977 as modified by the Act of 10 February 1999 Concerning the Punishment of Grave Breaches of Humanitarian Law, 38 ILM 918, 921 (1999).

162 Hans, M (2002) 15 *Transitional Lawyer* 372 373.

163 See the substantive changes of this law supra, Chap 1 n 18.

In the same vein, in 2000, the British House of Lords held that:

> [B]ecause international law proscribes crimes against humanity, then sovereign immunity traditionally granted for former heads of states had been abolished.[164]

It is however important to note that at the same time in this case, the House of Lords held that an acting head of states in the same circumstances would have absolute immunity from prosecution.[165]

While it was held in the *Pinochet* case that, the former heads of state are not entitled to immunity from universal jurisdiction,[166] the International Court of Justice in the *Yerodia Ndombasi* case,[167] held that heads of state enjoy immunity from universal jurisdiction during their term in office.[168] Consequently, the Court ordered Belgium to cancel its arrest warrant for Yerodia, because it violated international law at the time the warrant was issued.[169]

This decision of the ICJ is regrettable as it allows criminals to escape prosecutions under universal jurisdiction until they leave office or their respective states waive immunity.[170] Indeed, the beneficiaries of immunity are generally people having power to commit such atrocities and yet escape punishment. In these circumstances, as correctly mentioned by Lasso, "a person stands better chance of being tried and judged for killing one human being than for killing 100.000"[171]

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164 See *Regina v. Bartle Pinochet* (2000) 1 AC 147 (HL.1999) in Hans (2002) n 162 above 380.

165 Simma (1999) n 44 above 314-315.

166 See Kirgis, F L ' Indictement in Senegal of the Former Chad Head of State' *The American Society of International Law* Insights February 2000 available at <http://www.asil.org/insights/insigh41.htm> accessed on 16 October 2003.

167 See Case Concerning the Arrest Warrant of 11 April 2002 (*DRC v. Belgium*) 2002, ICJ 121 available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/icobe_ijudgement_20020214.PDF> accessed on 12 January 2003.

168 Horowitz (1999) n 30 above 520.

169 Simma (1999) n 44 above 315.

170 Hans (2002) n 162 above 385.

171 Lasso, J A 'United Nations Establishment of an International Criminal Court' available at <http://www.un.org/law/icc/general/overview.htm> accessed on 14 February 2003.

Though this decision may have grave consequences on human rights in general, its implications in Africa may be dangerous. In fact, with the lack of democracy and transparency in Africa, dictators may commit more atrocities in their countries while struggling to stay in power and to enjoy immunity, fearing prosecutions once removed from power.

4.1.3 National amnesty laws and similar measures of impunity

Many of the reasons against immunity are valid for the elimination of amnesties as a defence to universal jurisdiction.[172] Yet, amnesty laws and similar measures of impunity are rapidly emerging on the African continent[173] as an alternative of transitional justice to punishment[174]. Amnesty is qualified when the government agrees not to hold persons liable for past criminal acts.[175] In many cases amnesty constitutes a political compromise between the regime and other forces[176] by granting forgiveness for the past criminal acts. In return, generally, criminals agree to give up their criminal activities and to peacefully work with the regime.

In many African countries, where amnesty or similar measures took place, criminals are simply required not to undermine the democratic process, especially when it is in its

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172 Hans (2002) n 162 above 387.

173 In 2000, President Bouteflika of Algeria, granted amnesty to the members of armed groups responsible for several atrocities. See Amnesty International Report 2001 available at <http://web.amnesty.org/web/ar2001.nsf/6c3a91be2a3c991b80256a4f003517b3/b5c20fc4e67b4a8280256a48004ab72b/$FILE/algeria.pdf> accessed on 23 October 2003. Despite the horrible atrocities committed by armed forces in Chad by the Armed Forces for the Federal Republic (FARF), the peace accord of April 1999 with the government granted amnesty to all members of the FARF. See Amnesty International 1998 Report on Chad available at <http://www.amnesty.org/ailib/aireport/ar98/afr20.htm> accessed on 23 October 2003. In Sierra Leone, the Lomé Accord of 7 July 1999 grants amnesty to the Revolutionary United Front (RUF) despite its commission of international crimes during the civil war. Similarly, the Promotion of Unity and Reconciliation Act (Act 34 of 1995) in South Africa, grants amnesty to responsible of atrocities committed during the Apartheid regime. Amnesty has been also proposed to the recent peace agreement for the Democratic Republic of Congo. See O'shea (2002) n 32 above 37.

174 O'Shea (2002) as above 32.

175 Hans (2002) n 162 above 389.

176 Fernandez, L (1999) 3 *Law, Democracy and Development* 209 209.

earliest and most vulnerable days.[177] In the case of South Africa for instance, the argument was that it could be difficult to build democracy and to establish respect of law without public acknowledgement of the extent of human rights violations of the past.[178] In contrast, in Rwanda, the truth and reconciliation commission as well as the *Gacaca* courts, were established because the government was unable to accelerate the trials of hundreds of thousands people accused of international crimes.[179]

The development of amnesty laws in the recent years on the continent reveals that, it now represents a political device employed by states in difficult situations as a price to transition to democracy.[180] It is also used when the regime faces serious difficulties to proceed with prosecutions.[181]

While amnesty and similar measures may have some valid political and practical justifications, they constitute a challenge to end impunity through the principle of universal jurisdiction. They constitute a violation of international law and a denial of justice to victims. This is the case even when they do not constitute blanket amnesty like in the case of Rwanda.

4.1.3.1 The violation of international law

Domestic amnesty measures for international crimes are a violation of international law. Dealing with the legality of amnesty laws as regards international law, the Inter-American Court of Human Rights in the *Loayza Tamayo* case stated:

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177 Institute for Justice and Reconciliation 'Neither too much, nor too little justice: Amnesty in the South African Context' available at <http://www.ijr.org.za/art_pgs/art35.htm>accessed on 18 September 2003 (hereinafter Institute for Justice and Reconciliation).

178 Fernandez (1999) n 176 above 209.

179 Sarkin, J (1999) 3 *Law, Democracy and Development* 223 224.

180 Ngonji, E (2001) 37, LLM Dissertation, Western Cape, Unpublished. This was for instance the case with South Africa, Sierra Leone, and Chad.

181 This was the case for instance in Rwanda after the genocide of 1994. In fact, though the new regime was willing to prosecute, it was practically incapable of trying around 125.000 people in detention.

> In the Court's judgement, the Amnesty Law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru's argument that it cannot comply with the duty to investigate the facts that gave rise to the present case must be rejected.[182]

In fact, the value of these amnesty measures depends on whether international law requires prosecution or not. And yet for many of these crimes, international law requires either prosecution or extradition.

The international crimes as discussed early in this paper, are considered to be harmful not only to the state or its victims, but also to the whole international community.[183] Moreover, while these crimes have their effect on the international plane, domestic amnesty measures have their effect within the national legal system.[184] This was certainly the reason why neither the *Pinochet* lawyers nor the judges raised amnesty as a possible bar to jurisdiction.[185]

Many crimes committed on the African continent constitute crimes under international law, proscribed either by treaties or customary international law. Consequently, international law requires prosecution of these crimes wherever they are committed and in all circumstances. Therefore, amnesty laws and other similar measures bar prosecutions and constitute a violation of international law. With regard to Sierra Leone, it has been argued however that though amnesty may apply at the domestic level, it is not legally binding outside the borders of Sierra Leone and the perpetrators may be prosecuted if they travel outside.[186]

4.1.3.2 The denial of justice to the victims

The term justice is undoubtedly difficult to define. It is however accepted that it contains a recurring element of granting to each his or her right.[187] With international law, the

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182 See *Loayza Tamayo* case, Inter-American Court of Human Rights Serie C, Case No 42, 27 November 1998 para 168.

183 Steven, A (1999) 39 *Virginia Journal of International Law* 331 332.

184 O' Shea, A (2000) 16 *South African Journal of Human Rights 642* 643.

185 As above 644.

186 Tejan-Cole, A (1999) 3 *Law, Democracy and Development* 239 249.

187 O' Shea (2000) n 184 above 666.

perpetrators have committed their horrible acts on the people, the victims. The latter's rights have been seriously violated and usually the consequences are too heavy, not only on the direct victims, but indirectly on others as well.[188] The logical consequence of these acts should therefore be to render justice to all those victimised by the commission of the crime.

Surprisingly, with amnesty, those responsible for international crimes are granted forgiveness with disregard of the rights of victims to justice. In some instances however, where truth and reconciliation commission has been established such as in South Africa, the pardon depends on a full disclosure of truth.[189] A similar condition exists in Rwanda for the reduction of the punishment. It is however our contention that in all these circumstances victims are denied the right to justice. Wilson has correctly described the situation of victims with regard to amnesty:

> A victim must be compassionate and generous towards the offender; he must be willing at least nominally to look at things from the wrongdoer's point of view. He must try to find some commonality with his violator, understand his background and be prepared to accept that people who do bad things, even when they act from bad motives, are not simply making a foolish and easily corrigible error, but that they are yielding to pressures, many of them social, which lie deep in the fabric of human life.[190]

This situation of victims is worsened when, as experience has shown, national and international approaches to dealing with serious international crimes generally focus on the perpetrators while not much is done for victims.[191] It is for instance a surprising phenomenon to notice that in the Rwandan case, the 2002 ICTR's budget was $98.000.000[192] when hundreds of thousands of victims still do not even have access to

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188 See for instance hundreds of orphans suffering from the consequences of these crimes in Rwanda, Sierra Leone, Liberia and Burundi.

189 For instance, out of 7.000 amnesty applications received by the commission in South Africa, 77% were refused and 16%granted. See Institute for Justice and Reconciliation n 176 above.

190 S Wilson ' The myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty' (2000) 16 *South African Human Rights Law Journal* 531 541.

191 MacDonald, A (1999) 3 *Law, Democracy and Development* 139 140.

192 See Pillay, N 'African Perspectives on Universal Jurisdiction for International Crimes' a paper presented during the experts meeting on universal jurisdiction , Arusha-Tanzania, 18-20 October 2002.

the basic necessary services. Indeed, while international community for prosecutions allocates such a sum, its contribution to the victim's fund set up in Rwanda to assist victims has been almost non-existent. It is submitted that the prosecutions of international crimes should go together with the consideration of the right to reparation and compensation of victims in order to give effect to justice. Indeed, as MacDonald has argued:

> the payment of reparations, rehabilitation and other modes of compensation [...] are essential ingredients of any healing and reconciliation process, and should be part of every method of dealing with serious and widespread violations of international humanitarian law and human rights.[193]

Consequently, with regard to victims of serious human rights violations, the state as well as the international community have the obligation not only to punish those responsible, but also to ensure that the victims get adequate compensation. In this regard, it was stated in the *Velasquez Rodriquez* case that instead of granting amnesty:

> The state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to curry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[194]

Enormous numbers of victims of international crimes in many African countries, where amnesty or other similar measures of impunity apply, are denied their right to justice. This is more pertinent in the civil law system where the principle of "*le criminel tient le civil en état*"[195] applies.[196] By this principle, the victim is not entitled to institute civil proceedings for civil reparations if the criminal who caused the damage is not convicted by a criminal court. The absence of criminal proceedings therefore bars the civil claim for victims.

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193 MacDonald (1999) n 191 above 140.

194 See *Velasquez Rodriquez* case, Inter-American Court of Human Rights Ser. C,No 4 1988 para 174.

195 "Civil proceedings depend on criminal ones" (my own translation).

196 Glazebrook v Housing Committee of the States of Jersey CA: (Southwell J.A.) September 14th, 2000, unreported Available at <http://www.jerseylegalinfo.je/Publications/jerseylawreview/feb01/feb2001jlr2.asp> accessed on 18 October 2003.

In the context of Africa, where the lack of democracy leads very often to the struggle for power, rejecting amnesty is necessary in the struggle to defend human rights.[197] This is because almost always this struggle is accompanied by serious violations of human rights. Therefore amnesty would engender the culture of impunity that will encourage further atrocities, as the perpetrators are almost sure that they will in any case, enjoy impunity at the end. It is submitted that amnesty measures not only violate victims' rights to justice, but also encourage further commission of international crimes. However, in some situations, a combination of a sort of amnesty and justice, discussed in the following section, has been sought in order to avoid a blanket amnesty for international crimes. The Rwandan case in this regard is relevant.

4.1.3.3 The Rwandan response to the international criminal justice

About one million people were killed in Rwanda during the genocide of 1994.[198] As a consequence, more than 120.000 people accused of participating in the tragedy were subsequently arrested and detained. Although in the aftermath of the genocide, the government was willing to prosecute criminals, it was facing and continues to face massive problems and challenges[199] related to the high number of prisoners. As stated by MacDonald, even a country with adequate resources and infrastructure would find it impossible to undertake prosecution of this scale.[200]

The situation was more complicated as great number of people were in prison for years without charges. Therefore, the hard case was either to release without trial, or to keep innocent people in prison for years because they cannot practically be distinguished by trial from criminals.

In the circumstances of serious gross human rights violations such as in Rwanda, criminals should not go unpunished. This was also the view of the United Nations Security Council when establishing the ICTR. It was stated that:

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197 See Robinson n 9 above.

198 Sarkin (1999) n 179 above 223.

199 MacDonald (1999) n 191 above 142.

200 As above.

> ...in the particular circumstances of Rwanda, the prosecutions of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.[201]

At the same time, it seems that contrary to many other amnesties, the government was willing to prosecute but was incapable to do so. It is in these circumstances that a solution of *Gacaca* courts[202] was adopted as transitional justice to deal with international crimes. At the same time, a truth and reconciliation commission was established for social and political reasons of reconciliation.

Although this system goes beyond the South African truth and reconciliation commission, as it encompasses a sort of justice, it does not adequately address impunity as far as international crimes of such scale are concerned. In fact, with this system, when a perpetrator of international crimes discloses and repents for their crimes, the punishment is substantially reduced. The system has therefore the merit to partly render justice to victims on one hand, and to allow them to seek civil reparations in court on the other hand. Though the implementation of *Gacaca* system has now started, it still is at the beginning stage and has not yet shown its efficacy in dealing with international crimes.

Though it is not a proper model of prosecution of international crimes, the *Gacaca* system in the particular circumstances of Rwanda, is an attempt to combine justice and reconciliation. By determining individual responsibilities through trials, the public and victims know who is guilty and who is innocent. This contributes to the end of attribution of collective responsibility on ethnic, racial or political grounds that prevailed in the

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201 United Nations SC Resolution n 16 above.

202 The *Gacaca* courts are traditional community-based mechanisms of conflict resolution. Customarily, the *Gacaca* were composed of elder men who were respected in their communities. The system involves the community in the process of trials. Under the *Gacaca* courts, when the accused acknowledges and repents for the wrongful acts, the punishment is substantially reduced. It acts as a local healing and dispute resolution mechanism that is cheap and accessible. See Sarkin (1999) n 179 above 227-228.

aftermath of the genocide. It therefore, at the same time, has the advantage of making reconciliation possible while looking for justice and trying to avoid a blanket amnesty.

Nevertheless, this system constitutes a challenge to the principle of universal jurisdiction. In fact, it is not clear in international law whether a person tried by the *Gacaca* courts, would escape prosecutions abroad if the prosecuting state believes that the proceedings and the penalties do not meet international prosecution standard as far as international crimes are concerned. In fact, as the ILC noted:

> International law does not make it an obligation for states to recognise a criminal judgement handed down in a foreign state and where a national judicial system has not functioned independently or impartially or where the proceedings were designed to shield the accused from international criminal responsibility. The international community should not be required to recognise a decision that is the result of such a serious transgression of the criminal justice process.[203]

Since the *Gacaca* courts do not necessarily meet international criminal justice requirements, either in proceedings or in penalties, it remains questionable whether their decisions bind other states in international law.

4.2 The practical challenges

The need to implement the principle of universal jurisdiction in Africa in the fight against impunity is beyond doubt. However, besides the challenges discussed above, that may sound legal, there is in addition, a considerable number of practical obstacles to its success. These include a range of problems linked to the state capacity to conduct proper prosecutions with due process as well as the problem caused by non-state actors.

4.2.1 The capacity of states to prosecute

Experience shows that the practical implementation of the principle of universal jurisdiction is expensive.[204] Sustaining a trial to the end implies expenses in terms of

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203 See Report of the ILC, 48 session 6 May to 26 July 1996 U.N. Doc. A/51/10, 1996 at 67.

204 See Higgins, R in her separate opinion in *Congo v. Belgium* ICJ, February 14, 2002 available at

human and financial resources. These expenses include travel and accommodation costs for witnesses at the centre of trial, paying the defence counsel, collection of evidence, training of competent judges and so forth. This makes implementation of universal jurisdiction unattractive for many states especially in the developing world where budgets for the administration of justice have to compete with other priorities.

These complications were illustrated by the *Fulgence Niyonteze* case, where Switzerland embarked on a two-year investigation. In this case, the Swiss government just for the travel expenses of 22 witnesses to testify in Switzerland, allocated a sum of $200.000.[205] In the mean time, other costs were involved in several trips of the court to Rwanda for locating and interviewing witnesses who could not or would not go to Switzerland.[206]

In view of these expenses, one may understand why African states are more likely to support international tribunals rather than prosecute themselves. In this regard, some African states have shown willingness to co-operate with the ICTR including the offer to accommodate convicted prisoners.[207]

In Africa, some of these practical challenges may be circumvented. The crimes discussed in this study concern the international community as a whole. The co-operation of states in facilitating prosecutions by either financial or technical support may therefore be very fruitful. Also, the costs of proceedings might be reduced by the combination of civil and common-law systems. This system could for instance combine the features of the accusatorial system with elements of the inquisitorial system. Subsequently, the active role of judges, feature of the inquisitorial system, would enable judges to investigate cases without necessarily for all witnesses to appear in courts for their testimonies.[208]

<http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>accessed on 20 September 2003.

205 Pillay n 192 above.

206 As above.

207 For instance Mali and Benin have concluded agreements with the ICTR for the enforcement of sentences of convicted prisoners. See the 'Statement by the President of the ICTR' of 29 October 2002. Available at <http://www.ictr.org/ENGLISH/speeches/pillay291002sc.htm> accessed on 14 October 2003.

208 See Maastricht symposiumr n 45 above.

4.2.2 The problem of non-state actors

Non-state actors include all actors, other than state, that may commit international crimes. Though these actors are not generally parties to international human rights instruments prohibiting human rights violations, they are in many cases responsible for these violations.

Obligations to prosecute or extradite international criminals derive from treaties and customary international law. Traditionally, in international law, these obligations are primarily incumbent upon the states to prosecute criminals found on their territories. However, with the recent developments of international criminal law, individuals and other non-states actors are bound and may even be held responsible for human rights violations. In some cases, individuals are held responsible even when their respective states are not party to a specific treaty.

This was the case in *Unites States v. Yunis*[209] where a national of a non-state party[210] was prosecuted for hijacking. For the same reasons, a Palestinian hijacker, in *United States v. Ali Rezag*,[211] was convicted although Palestine was not a party to the Convention for the Suppression of Unlawful Seizure of Aircraft[212] at the time.

The United Nations Commission on Human Rights reiterated the individual criminal responsibility with regard to the crimes committed in the Sierra Leone war context. It stated the following:

> [The United Nations Commission on Human Rights] affirms that all persons who commit or authorise serious violations of human rights or international humanitarian law at any time, are individually responsible and accountable for those violations, and that the international community will exert every effort to bring those responsible to justice.[213]

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209 *United States v. Yunis* n 86 in Scharf, M P (2001) 35 *New England Law Review* 363 363-382.

210 The defendant was of a Lebanese and Lebanon was not a party to the Hague Convention on Aircraft Hijacking of 1970.

211 *United States v. Ali Rezaq*, 134 F 3d 1121 (DC Cir. 1998) in Scharf (2001) n 209 above 363-382.

212 The Convention for the Suppression of Unlawful Seizure of Aircraft Dec. 16 1970, 22 UST/641.860 U.N.I.T.S. 105.

213 See the United Nations Commission on Human Rights criticising the Sierra Leone Peace

Though individual responsibility with regard to the international crimes is not in contestation, sometimes states are not able to apprehend international criminals on their territory. This is common in Africa during numerous internal conflicts, where non-state actors are fighting against the government.[214] In these circumstances, non-state actors commit international crimes and yet, even willing to prosecute, states do not have control over the portion of territory controlled by them in order to bring them to justice.

For the purpose of effective universal jurisdiction and the end of impunity, it is submitted that other states in similar circumstances, should co-operate with the state in order to prosecute non-state actors. In the African context for instance, although the state may genuinely not be able to arrest and prosecute rebels, experience shows that it negotiates with them in foreign countries. It is therefore possible for the state in which negotiations are being held to prosecute them once they are in its territorial jurisdiction. This process however, though it may be efficient in the prosecution of non-states actors for international criminals, may be incompatible with the traditional notion of conflict resolution in Africa or elsewhere.[215]

4.3 The political considerations

One of the most serious challenges to the principle of universal jurisdiction is related to political considerations. As Morris notes:

> Sometimes universal jurisdiction will work well; perpetrators will be duly tried and punished, and the purposes of criminal justice will be served. Sometimes, universal jurisdiction will not work well; defendants will be tried without due process, or in politically motivated, biased proceedings that may themselves exacerbate interstate tensions.[216]

Agreement" U.N. Doc. E/CN.4/RES/2000/24 of 18 April 2000 para 2.

214 In many African countries where those crimes are being committed, the government authorities do not have access to regions controlled by the non-sates actors. This is the case for instance in the Democratic Republic of Congo, in Liberia, Cote d'Ivoire and Burundi.

215 It was for instance on the ground of this justification that the Ghanaians authorities failed to arrest the former president, Charles Taylor, during the peace talk with the rebels in Accra in June 2003. See Scoop ' Ghana Called On To Arrest President Charles Taylor' available at <http://www.scoop.co.nz/mason/stories/WO0306/S00079.htm> accessed on 14 October 2003.

216 Morris (2001) n 31 above 337 338.

This underscores the existence of political barriers to the success of universal jurisdiction. These barriers are located at both the domestic and the international level, though this may not be obviously apparent between the two levels.

4.3.1 Domestic political interferences

At the national level, for various political reasons, states do not enact laws regarding incorporation of the principle of universal jurisdiction or do not implement the principle. Even though laws are interpreted and applied by the judiciary, they are made by political organs, by parliaments. The decision of enacting laws is therefore political, and the lack of political will in this regard will constitute a bar to the efficiency of universal jurisdiction.

Moreover, even if laws exist at the domestic level, the enforcement of judicial decisions is not always guaranteed. In these circumstances, the lack of the judicial independence, impartiality and due process, particularly in politically charged cases makes prosecutions under universal jurisdiction farcical.[217] The need for an independent judiciary is more pronounced in many African countries where, the doctrine of the separation of powers does not apply in practice.

This was recently illustrated in the Hissène Habré case. The accused former President of Chad was indicted on February 3, 2000 in Senegal for multiple charges of torture committed during his rule from 1982-1990. In March 2000, Senegal elected Abdoulaye Wade as President. Since he took office however, "there have been conspicuous shenanigans in the Habré case".[218]

In June 2000, whilst the indicting chamber of the court hearing the Habré case was deliberating on a motion for dismissal of the case, a panel headed by President Wade called an unscheduled meeting of the *Conseil Superieur de la Magistrature*[219] of

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217 Morris (2001) n 31 above 353.

218 As above.

219 The Superior Council of Magistracy (my translation) is the organ in charge of the promotion and removal of prosecutors and judges.

Senegal. At that meeting, the prosecutor was removed from his post. The president of the indicting chamber was promoted to the State Council.[220]

On the 4 July 2000, the president of the indicting chamber dismissed all charges against Habré.[221] As Morris concluded in this case, there is legitimate reason to suspect that the dismissal of the case involved political tempering with the judiciary at the highest levels.[222] More close to these political challenges is the possibility of frivolous or mock prosecutions that may be organised by the prosecuting state.

4.3.2 Possibility of fallacy in prosecutions

Due to the fear of criticisms of international community, and looking for the protection of its nationals, a state might have a tendency to organise farcical prosecutions. This is because international criminal law generally requires the state either to prosecute or to extradite international criminals without determining the standards of these prosecutions. Therefore, if it is obvious that the prosecutions were organised for the purpose of shielding the person from criminal responsibility, should these prosecutions constitute a bar to further trials by universal jurisdiction?

For the purpose of justice and the end of impunity, it seems that these prosecutions should not bar further prosecutions abroad under universal jurisdiction. This is also consistent with the provisions of the Rome Statute on the admissibility of cases, providing that the Court should have a look at whether the prosecution was conducted genuinely, with due process according to international law.[223]

Similarly, due to various reasons, universal jurisdiction may lead to competing jurisdiction, as experienced in the Pinochet case,[224] since international law permits all states to prosecute.[225] Pillay has argued that this situation constitutes a practical

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220 Morris (2001) n 31 above 353.

221 As above.

222 As above.

223 See Art 17 of the Rome Statute n 8 above.

224 In this case, Belgium, France, Italy, Spain and Switzerland were all willing to prosecute.

225 Pillay n 192 above.

challenge to the universal jurisdiction rule because it generates conflicts of jurisdiction between states.[226] It is however submitted that this should not constitute a challenge if all states pursue the same aim of justice. Because international crimes are the concern of the international community, all states demanding to exercise universal jurisdiction need to do so in the name of this community. The only requirement for jurisdiction should thus be determined by the guarantees for an adequate prosecution, taking into consideration the state human and financial capacity to organise a fair trial.

4.3.3 International political implications

Apart from these local problems, the principle of universal jurisdiction has similar implications at the international level. These implications have led commentators to criticise the principle as it may generate inter-state conflicts.

In this regard, King-Irani argues that the trials, instead of deterring crimes, will rather "dismantle the Westphalian system of sovereign nation-states".[227] Other commentators have argued that the implementation of universal jurisdiction may give states a powerful weapon that could be used against other states.[228] Similarly, it has been argued that this form of justice could "provide an opportunity for political harassment"[229] or turn "into a means to pursue political enemies rather than universal justice".[230]

In contrast, Amnesty International, giving some examples where universal jurisdiction has been used, argues that these views exaggerate the use of universal jurisdiction. Everywhere the principle has been resorted to, this never led to a break of such inter-states relations; rather, whatever problems resulting from the implementation of universal jurisdiction arose were resolved judicially.[231] This was the case, in *Yerodia Ndombasi*, where the DRC contested before the ICJ the Belgium arrest warrant against

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226 As above.

227 L King-Irani ' Universal Jurisdiction: Still Trying to Try Sharon' Middle East Report on-line available at <http://merip.org/mero/mero073002.html> accessed on 30 August 2003.

228 See Roling, B V A *et al* (1993) 95.

229 Kissinger, H A 'The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny' *Foreign Affairs*, July/August 2001 at 86-88.

230 As above.

231 See Amnesty International n 100 above.

its minister Yerodia. The ICJ decision was thereafter respected by both two states and the good relations continued.

Though the arguments above may be relevant to some extent, one must admit that political implications of the implementation of universal jurisdiction constitute a challenge in the struggle against impunity. In this regard, Morris notes that while prosecutions for international crimes would be in general desirable, it is not desirable for those prosecutions to be conducted for political purposes.[232] It is however submitted that even in case where prosecutions are alleged to be initiated for political reasons, an independent judiciary should examine these allegations during the proceedings.

Moreover, the inequalities between states either politically or economically exacerbate the problem of applicability. Indeed, as correctly illustrated by Gutto, the chances of a successful conviction by a poor African state for instance, for a crime committed by an official of a western state are very limited.[233]

In this regard, it is unfortunate that international law is still being significantly characterised by inequalities between states, despite the equality principle recognised by the United Nations Charter.[234] These considerations are even more relevant in the context of Africa, when one considers the facts that many African countries depend heavily on political and financial support from the north. It is therefore fruitful for all human rights activists to convince states on the importance of the prosecution of international crimes in order to make them ready for its success and to minimise the *lacunae*.

The lack of co-operation between states is equally relevant as far as universal jurisdiction concerned. For instance, instead of delivering international criminals to justice, some states often offer asylum to them despite the demand by other states for

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232 Morris (2001) n 31 above 355.

233 Maastritcht symposium n 45 above.

234 The United Nations Charter was signed on 26 June 1945 and entered into force on 24 October 1945. Art 2. 1 of the Charter provides " The organisation is based on the principle of the sovereign equality of all its Members".

prosecution.[235] This practice is contrary not only to the international criminal law, but also to the United Nations Convention relating to the Status of Refugees.[236]

235 This is the case with the actual asylum to the former Liberian president Charles Taylor offered by the Government of Nigeria despite demands for prosecution by many other states including Liberia itself. See Eze, I ' Government gives conditions for Charles Taylor's Asylum' *Vanguard,* Thursday August 07, 2003. Available at <http://www.vanguardngr.com/articles/2002/headline/ f107082003.html> accessed on 15 October 2003.

236 See the Convention relating to the Status of Refugees, 189 U.N.T.S.150 , entered into force 1954. Art 1 F of this Convention provides "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a) he has committed a crime against peace, a war crime or a crime against humanity, as defined in international instruments drawn up to make provision in respect of such crime;

b) he has committed a serious no-political crime outside the country of refuge prior to his admission to that country as a refugee;

c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Chapter 5 Conclusion and recommendations

International crimes are a matter of humanity. In fact, one may not be wrong to affirm that today, there is no state in the world that can proclaim loudly to be totally secured against crimes. Similarly, nowadays no state can legitimately proclaim publicly not to be concerned with gross human rights violations occurring worldwide. Indeed, in this era of globalisation, the world has become a global village.[237] The tendency of erasing geopolitical boundaries is extending the scope of committing crimes and facilitating the movement of criminals. Moreover, the international community in the recent years has shown its determination to eliminating impunity.[238] This is demonstrated by the creation of *ad hoc* international tribunals as well as the recent permanent ICC. In the mean time, states have started to prosecute international criminals using the principle of universal jurisdiction.

Though the creation of international tribunals has shown the commitment of the international community in ending impunity, there is however still limitations to the achievement of this goal. The main limitation of these tribunals is the scope of their jurisdiction. The jurisdiction of the *ad hoc* tribunals is limited by the time, place and nature of the crimes. Similarly, though the ICC is now in existence, its jurisdiction is also limited. It has jurisdiction over offences committed within the territory or by a national of a state party or a state that has specially accepted its jurisdiction.[239] Nevertheless, according to the Rome Statute,[240] its jurisdiction is unlimited when the case is referred to the Prosecutor by the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations.[241] In addition, neither the ad hoc tribunals nor the ICC are in a position to prosecute all the increasing number of international criminals.

Africa has been and continues to be a victim of numerous human rights violations and commission of international crimes. In less than ten years, two international tribunals

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237 James, G ' The World of Science Becomes a Global Village: Archive Opens a New Realm of Research' The *New York Times*, May 1, 2001 31.

238 Summers (2003) n 1 above 96.

239 Nsereko, D T N (1999) 10 *Criminal Law Forum* 105 106.

240 Art 13 (b) of the Rome Statute n 8 above.

241 Art 39 of the United Nations Charter refers to measures that should be taken in order to maintain or restore international peace and security.

have been established[242] on the continent and more may be established. These tribunals however are not immune from the jurisdictional limitations mentioned above. Moreover, the African Court on Human and Peoples' Rights, when operational,[243] will be principally condemning the conduct of states with regard to human rights violations. Therefore, it will not constitute an adequate court for individual criminal responsibility.

Bearing in mind all these limitations and considering the growing number of criminals either in Africa or elsewhere, it is obvious that eyes must be turned to the national courts for the purpose of ending impunity. This aim will be achieved either by each African state prosecuting its own criminals or by implementing universal jurisdiction over criminals from other countries on one hand, and by co-operating with the existing international courts on the other hand.

However the application of the principle of universal jurisdiction in Africa is confronted by a number of challenges. In order to overcome some of these challenges it is important for African states to enact laws enabling them to enforce international criminal law through the principle of universal jurisdiction. This is because usually the failure of states to prosecute international criminals is due to the absence or inadequacy of laws.[244] Moreover, national laws would facilitate the task of prosecutors and judges who are very often reluctant to rely on the international law when the latter is not expressly incorporated into domestic law by legislation.

In the same vein, the lack of awareness concerning universal jurisdiction has been identified as a factor affecting its effectiveness. In fact, many prosecutors are not conversant with the principle of universal jurisdiction to enable them undertaking investigations and prosecutions based on it.[245] In fact, neither prosecutors nor judges are usually adequately trained to address the complex questions of international law, which

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242 The ICTR and the Sierra Leone Court.

243 The Protocol establishing the African Court on Human and Peoples' Rights was adopted by the OAU (now African Union) Assembly of Heads of States and Government on 9 June 1998. Not into force as the requirement of 15 ratifications is not yet met.

244 The Hissène Habré case is eloquent in this regard. The discharge of the former dictator was based on the absence of laws enabling Senegal's courts to try him.

245 Byers, M (2000) 10 *Duke Journal of Comparative and International Law* 415 420-421.

are an unavoidable part of universal prosecutions.[246] It is therefore recommendable that all the effort and the strategies being used by all human rights activists for the ratification of the African Court on Human and Peoples' Rights should be used as well for convincing states to enact laws allowing the use of universal jurisdiction in Africa.

Similarly, the immunity and amnesty clauses have grave consequences on human rights in Africa. Indeed, there is a legitimate reason of thinking that African leaders, fearing prosecutions, would become more tyrannical in order to stay in power and to enjoy the protection of immunity for their criminal acts. As regards to amnesty laws and similar measures of impunity, their non-recognition by other states would have effect of discouraging their adoption in the future. This is because these amnesty laws not only violate international law, but also they deny justice to victims. In addition, instead of resolving conflicts and consolidating reconciliation, amnesty creates a culture of impunity and thereby potential future human rights violations. In the case of obvious technical or practical failure to prosecute such as in Rwanda, an involvement of the entire international community to assisting both in prosecuting criminals and compensating victims would be fruitful. This co-operation could take all forms of assistance including the provision of qualified judges and prosecutors sitting all over the country.

As a response to the practical problems of expenses, the combination of advantages of the civil and common law systems[247] in proceedings should be encouraged. This combined system could for instance empower judges in criminal matters to gather testimony without necessarily the need for witnesses to testify in court. This system would also have the advantage of minimising the costs during the investigations and the trials abroad, especially for states with limited resources. In this context, prosecutors investigating the case could for instance use video records, tapes, notes and when possible some new technologies of communication such as video-conferencing facilities in order to reduce the travel costs. Also some professional investigators in criminal matters such as Interpol could be strengthened and used by prosecuting states in

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246 See *Report* of the meeting organized by the International Council on Human Rights Policy on 'Thinking Ahead on Universal Jurisdiction'. Geneva 6-8 May 1999. Available at <http://www.ichrp.org/cgi-bin/show?what=project&id=2001> accessed on 14 October 2001.

247 The mixture of the inquisitorial and the accusatorial system whereby the judges could be more active in proceedings would be useful.

conducting investigations. This would have the advantage of impartiality for not belonging to a particular state and would also limit the costs. The organisation of trials in the neighbouring countries not far away from the state where the crime was committed may also have the same effect of facilitating access to evidence and minimising the costs.

Finally, as regards the political will either in protecting criminals by offering safe-heaven or refusing co-operation; intensive international pressure may be used to convince the state to co-operate. This pressure could come from the United Nations, the African Union, International Financial Institutions, Non-Governmental Organisations (NGOs) or other states. In fact today, it is hard for a state to ignore totally the international community's pressure for respect of human rights. In this context, individual sanctions on travel of those in authority that are unwilling to prosecute or to extradite, may also be used as a means of pressure. This is because unlike economic sanctions that affect innocent persons, these would only affect the recalcitrant. Similarly, with international co-operation, some potential conflicts of competing jurisdictions could not generate conflicts between states; instead, a compromise could be reached and the most able state in terms of human and financial resources to guarantee fair proceedings could be given preference.

This international co-operation should also include the consolidation of democratic structures in Africa. In fact, democratic institutions which allow for the separation of powers are vital for the implementation of the principle of universal jurisdiction. This is because an effective separation of powers creates an independent judiciary. Thus, the prosecuting state may not easily find co-operation with the executive of the territorial state, but can get such a co-operation with other organs of the state if of course they are independent. In this regard, an independent judiciary could co-operate with the prosecuting authorities of another state, by providing information and evidence as well. Subsequently, for achieving this co-operation, a great campaign on the importance of universal jurisdiction should be organised at all levels by human rights activists, NGOs, academics and institutions.

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