Chapter 10
'On Behalf of Africa': Towards the Regionalization of Universal Jurisdiction?

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Contents

10.1 Introduction

In November 2008, the then Rwandan Chief of Protocol and former major of the Rwandan Patriotic Front, *Rose Kabuye*, was arrested at Frankfurt International Airport. Two years prior to the arrest, the German authorities had executed an international arrest warrant issued by a French judge for *Kabuye's* alleged involvement in the assassination of former Rwandan President *Habyarimana* in a plane crash. This plane crash triggered the 1994 genocide in Rwanda. After *Kabuye* was arrested by the German authorities, she was transferred to France. There, a couple of months later, the charges against her were dropped. The '*Kabuye* affair' provoked harsh protests by the Rwandan government and led to serious tensions between France and Rwanda.[1]

[1] For more information on this affair, see Jalloh 2010, pp. 29–42; van der Wilt 2011, pp. 1061–1062; see also Beste et al. 2008.

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In February 2014, the Higher Regional Court of Frankfurt found the Rwandan *Onesphore Rwabukombe* guilty of aiding and abetting genocide and sentenced him to 14 years of imprisonment.[2] After a three year trial, the Court found that the former mayor of the Rwandan town of Kiziguro assisted in the killing of hundreds of Tutsi in 1994.[3] The judgment marked the preliminary end of a judicial tug of war which had kept German and Rwandan authorities busy for years. *Rwabukombe* had left for Germany in 2002 and was granted asylum in 2007. The same year, Rwanda's justice authorities issued an international arrest warrant against him and *Rwabukombe* was taken into custody by the German police. However, a German court dismissed the Rwandan extradition request and ordered his release.[4] The court based its ruling on a decision of the ICTR Trial Chamber where the referral of a case to the Republic of Rwanda was denied due to a lack of fair trial guarantees.[5] Afterwards, the German Federal Prosecutor General decided to prosecute *Rwabukombe* in Germany and indicted him in 2010 on charges of genocide and murder. *Rwabukombe's* conviction in February 2014 was based on a provision in German law which establishes universal jurisdiction for the crime of genocide.[6] In a first reaction, the Rwandan Ambassador to Germany expressed her gratitude to the German authorities and judiciary for taking over the difficult task of prosecuting *Rwabukombe*. The Ambassador also expressed her satisfaction that *génocidaires* present in Germany would not get away with it.[7] German observers commented on the trial and judgment much more critically,[8] pointing, inter alia, to the difficulties of finding reliable witnesses, and ultimately, raising the question whether there is any point at all in adjudicating offences committed thousands of kilometers away in German courts.

The two incidents, the '*Kabuye* affair' and the trial and conviction of *Onesphore Rwabukombe*, shed light on different but characteristic facets of the difficult and ambivalent relationship between Africa and Europe in the area of international criminal justice—a relationship which is not only determined by the prosecution (or non-prosecution) of 'African leaders' before European courts on the basis of

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[2] Higher Regional Court (*Oberlandesgericht*) Frankfurt am Main, Judgment of 18 February 2014.

[3] For more information on this case, see Dehner 2014 and Johnson 2014; see also Kroker 2011.

[4] Higher Regional Court (*Oberlandesgericht*) Frankfurt am Main, Decision of 6 November 2008.

[5] *Prosecutor v. Munyakazi*, ICTR (TC), Decision of 28 May 2008; partly confirmed in *Prosecutor v. Munyakazi*, ICTR (AC), Decision of 8 October 2008. In the meantime, the ICTR as well as the European Court of Human Rights reassessed the conditions of criminal proceedings in Rwanda; today, suspects can be extradited or transferred to Rwanda, see *Prosecutor v. Uwinkindi*, ICTR (TC), Decision of 28 June 2011, paras 222–225; confirmed in *Prosecutor v. Uwinkindi*, ICTR (AC), Decision of 16 December 2011; see also *Ahorugeze v. Sweden*, ECHR, Judgment of 27 October 2011, paras 117–129.

[6] See Sections 220a and 6 No. 1 of the German Criminal Code in the applicable version (now, Sections 1 and 6 of the German Code of Crimes against International Law).

[7] See Dehner 2014.

[8] See, inter alia, Dehner 2014 and Johnson 2014 and the sources quoted there.

universal jurisdiction, but also, and perhaps even more so, by proceedings before the International Criminal Court, such as the cases against the Heads of State of Kenya and the Sudan respectively, *Kenyatta* and *Al Bashir*.

Against this background, this chapter will present some observations concerning the exercise of universal jurisdiction in an African context. To begin with, it will recapitulate, in a nutshell, a few key elements of the theory of universal jurisdiction. It will then try to identify and outline the 'African position' on universal jurisdiction. Subsequently, some observations concerning the use, the non-use, and the alleged "abuse" of universal jurisdiction shall be presented. Here, the chapter will distinguish the exercise of universal jurisdiction by African states and their courts on the one hand from the exercise of universal jurisdiction by non-African states against accused from Africa on the other. In the subsequent brief sections the chapter will indicate what the author thinks are the three latest trends in the exercise of universal jurisdiction including a novel mode of extraterritorial jurisdiction: 'regionalized' universal jurisdiction.

10.2 Different Kettle of Fish: Universal Jurisdiction and Related Issues

Surprisingly enough, a significant number of official statements addressing the prosecution of crimes under international law committed in Africa lack a nuanced understanding of the legal issues involved. Given this confusion, it may be useful to clarify what this chapter is concerned about: universal jurisdiction. This is not a modern concept. In fact, universal jurisdiction is much older than the enforcement of criminal law through international courts and tribunals; universal jurisdiction represents the most far-reaching form of (extraterritorial) jurisdiction.[9] Traditionally, the concept is based on the idea that certain acts which concern common interests of the community of states are eligible for prosecution and punishment by each of those states. Anyone of those states, the so-called third states, may then act as a trustee or agent for the international community.[10] It is safe to say today that international customary law allows for the exercise of universal jurisdiction over genocide, crimes against humanity and war crimes. These crimes are directed against the interests of the international community. Thus, not only the international community may defend itself with criminal sanctions against attacks on its elementary values, but also each individual state can—but is not obliged to—prosecute such crimes, regardless of where, by whom and against whom they have been committed.

It is less the validity of the principle as such, but the specific conditions of its exercise which are a matter of discussion. Major controversies concern the

[9] For more details, see Jeßberger 2009 and Werle and Jeßberger 2014, marg nos 212 et seq.

[10] On the theory of universal jurisdiction, see also Sammons 2003, pp. 125–137.

following questions: Is there any specific nexus required (other than the one established through the nature of the crime itself) linking the crime or the perpetrator to the prosecuting third state? In particular: Is the presence of the perpetrator in the forum state a prerequisite for prosecution and trial? And: Is the exercise of universal jurisdiction a mere subsidiary means of ensuring that there is no impunity? In other words: Should the territorial state and perhaps an international tribunal have priority? If so: Could or should the complementarity regime applicable under the ICC Statute be transferred to the horizontal level of the interstate relationship?[11] Who would then be competent to determine whether the state with priority has taken serious action? According to what criteria? To what extent, if at all, is the (expected) fairness of proceedings to be taken into account? And at what time should the priority principle be taken into consideration? Should it already bar investigations in a third state? While these issues are controversial indeed, it is submitted that it is possible to identify a position on the requirements of the exercise of universal jurisdiction to which a great majority of scholars and state officials, including those from Africa, could subscribe. Such a position would make the exercise of universal jurisdiction subject to the presence of the accused in the territory of the prosecuting state at least at (but not necessarily before) trial stage, and would give priority to the territorial state, as long as this state is willing and able to seriously investigate and prosecute.

As a legal concept, universal jurisdiction should not be mixed up with related issues of international criminal law, including: the International Criminal Court, the implementation of the Rome Statute into the domestic legal orders, extraterritorial jurisdiction, and the immunity of certain officials from foreign prosecution. Accordingly, in this chapter, the difficult relationship between the International Criminal Court and Africa will not be addressed.[12] Second, the issue of the incorporation of the Rome Statute into domestic legal orders shall not be addressed.[13] It is true not only that many states took the ratification of the Rome Statute as an opportunity to revise and adapt their domestic legislation, but also that this new legislation often implements or extends universal jurisdiction. Third, the prosecution of crimes under international law on bases other than universal jurisdiction shall not be addressed. This concerns territorial prosecutions but also other forms of extraterritorial jurisdiction such as jurisdiction based on the

[11] In determining whether a particular case is being or was investigated or prosecuted by a state and, therefore, whether proceedings before the International Criminal Court are generally inadmissible, the Court adopts a narrow approach and requires that the same person is investigated or prosecuted by the state's authorities for substantially the same conduct as he or she would be before the International Criminal Court ("same person, same conduct" test), see *Prosecutor v. Muthaura, Kenyatta and Hussein Ali*, ICC (AC), Judgment of 30 August 2011, paras 39–46; *Prosecutor v. Ruto, Kosgey and Sang*, ICC (AC), Judgment of 30 August 2011, paras 40–47.

[12] For discussion of this issue, see Ambos 2013; du Plessis et al. 2013; Magliveras and Naldi 2013. As is well known, the International Criminal Court in particular does not have universal jurisdiction—with the notable exception of Security Council referrals.

[13] On this topic, see Chap. 6 by *Kemp* in this book.

nationality of the offender or the victim. And finally, from a legal point of view it is useful to distinguish the ambit of domestic criminal law as a matter of substantive criminal law from the immunity of certain officials from prosecution by foreign courts.

10.3 Mixed Feelings: 'African Attitudes' Towards Universal Jurisdiction

What then are the 'African attitudes' towards universal jurisdiction? Needless to say: there is no such thing as a uniform position of Africa—different states have different positions, the official position may differ from the position of civil society and so on. However, the point of reference in the debate is usually the position as it has been voiced full-throated by the Heads of State and Government in the Assembly of the African Union.

In October 2013, on the occasion of an extraordinary summit held in Addis Ababa, the African Union once again reaffirmed its position on, what it called, "the abuse of the principle of universal jurisdiction".[14] Since 2008, the condemnation of the alleged "abuse" of universal jurisdiction has become a routine element of almost every AU meeting.[15] Then, triggered by criminal investigations against Rwandan officials in Spain on charges of genocide and crimes against humanity,[16] the Assembly had adopted the "Report of the Commission on the Abuse of the Principle of Universal Jurisdiction" and resolved that:

> The abuse of the principle of universal jurisdiction is a development that could endanger international law, order and security. The political nature and abuse of the principle of universal jurisdiction by judges from some non-African States against African leaders,

[14] Decision on Africa's Relationship with the International Criminal Court (ICC), AU Extraordinary Session, 2013 Addis Ababa, Ext/Assembly/AU/Dec. 1 (Oct. 2013), para 3. This Decision, as well as the Decisions referred to in the following footnotes, can be found in the Annex to this book.

[15] Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/731(XXI), AU 19th session, 2012 Addis Ababa, Doc. Assembly/AU/Dec. 420 (XIX); Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/640(XVIII), AU 16th session, 2011 Addis Ababa, Assembly/AU/ /Dec. 335 (XVI); Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/606(XVII), AU 15th session, 2010 Kampala, Assembly/AU/Dec. 292 (XV); Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/540(XVI), AU 14th session, 2010 Addis Ababa, Assembly/AU/Dec. 271 (XIV); Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/11(XIII), AU 13th session, 2009 Sirte, Assembly/AU/Dec. 243 (XIII) Rev. 1; Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, DOC. Assembly/AU/3(XII), AU 12th session, 2009 Addis Ababa, Assembly/AU/Dec. 213 (XII).

[16] For a thorough discussion, see Commentator 2008.

> particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States.[17]

This position has been, in more drastic words, endorsed by several heads or high ranking officials of individual states. For instance, the Rwandan Minister of Justice and Attorney General accused European judges of seeking to recolonialize Africa through a form of what he called a "neo-colonial judicial *coup d'etat*" under the guise of judicial independence and universal jurisdiction.[18]

Interestingly, or perhaps, irritatingly, the African Union, at the very same meeting in October 2013, encouraged its Member States to take full advantage of an "African Union Model National Law on Universal Jurisdiction over International Crimes"[19] in order to enact or strengthen their domestic legislation in this area. This Model Law, which has been drafted by a group of experts and government officials, is ambitious indeed and, surprisingly, by no way does it limit the reach of universal jurisdiction. According to Section 4(1) of the Model Law

> the court shall have jurisdiction to try any person charged with any crime prohibited under this law, regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State at the time of the commencement of the trial.

Furthermore, the Model Law provides for a hierarchy of jurisdictions by suggesting that priority should be given

> to the court of the State in whose territory the crime is alleged to have been committed, provided that the State is willing and able to prosecute.[20]

Remarkably, the Model Law extends this universal jurisdiction regime even beyond genocide, crimes against humanity and war crimes and includes piracy, trafficking in narcotics and terrorism.[21] Also, with regard to the immunity issue, the Model Law does not take a particularly restrictive position. Section 16 provides that

> Foreign State officials entitled to jurisdictional immunity under international law shall not be charged or prosecuted under this law […].

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[17] Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/14(XI), AU 11th session, 2008 Sharm El-Sheik, Assembly/AU/Dec. 199 (XI), para 5 (i–iii).

[18] For references to severe criticism expressed by the Rwandan government, see Commentator 2008, p. 1009 n. 39.

[19] African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–15 May 2012, Addis Ababa, EXP/MIN/Legal/VI.

[20] Section 4(2) of the African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–15 May 2012, Addis Ababa, EXP/MIN/Legal/VI.

[21] Sections 12, 13 and 14 of the African Union (Draft) Model National Law on Universal Jurisdiction over International Crimes, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–15 May 2012, Addis Ababa, EXP/MIN/Legal/VI.

Reference to 'international law' is the traditional approach to immunity issues in the majority of jurisdictions around the world. The key question, however, is (and remains) to what extent, if any, international law allows for immunity from foreign prosecution of crimes under international law.[22] Many would suggest that there is broad agreement that even before national courts there is no such immunity except for the personal immunity which incumbent Heads of State and perhaps a small number of other high(est)-ranking state officials, such as Heads of Government, Foreign Ministers etc. enjoy.[23] However, the Model Law is silent on this point.

In addition to the rhetoric about the "abuse of universal jurisdiction" on the one hand and the Model Law on the other, there is a third element which may be consulted to understand the 'African position' on universal jurisdiction. In 2009, an ad hoc expert group jointly established by the African Union and the European Union and composed of lawyers from Algeria, Zambia, Tanzania, Italy, Belgium and Australia presented its "Report on the Principle of Universal Jurisdiction".[24] Perhaps surprisingly, this report again takes up quite a progressive stance. According to the Report, international law does not provide for any rule specifically restricting the exercise of universal jurisdiction—neither the presence requirement nor the subsidiarity principle is, the Report finds, part of universal jurisdiction under international law.[25] In fact, the Report approves of unrestricted universal jurisdiction for crimes under international law. As a matter of policy only, the report recommends to accord priority to territoriality as a basis of

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[22] In the case of crimes under international law, immunity *ratione materiae* is inapplicable not only to trials before international courts, but also vis-à-vis state judiciaries. This is today anchored in customary international law, see Cassese 2002, pp. 870–874 (with numerous examples from state practice); Werle and Jeßberger 2014, marg no 721 et seq. On the more restrictive approach taken by the International Law Commission, see International Law Commission, Sixtieth session, Immunity of State Officials from Foreign Criminal Jurisdiction, Memorandum by the Secretariat, 31 March 2008, UN Doc. A/CN.4/596, para 189 ("uncertainty that still appears to surround this question"), and the Report by the Special Rapporteur RA Kolodkin concluding that "the arguments set out above demonstrate that the various rationales for exceptions to the immunity of officials from foreign criminal jurisdiction prove upon close scrutiny to be insufficiently convincing", International Law Commission, Sixty-second session, Second Report on Immunity of State Officials from Foreign Criminal Jurisdiction, 10 June 2010, UN Doc. A/CN.4/631, para 90. Immunity *ratione personae*, however, creates an obstacle to prosecution before domestic courts, at least as long as the respective person holds office, see *DR Congo v. Belgium*, ICJ, judgment of 14 February 2002 (Case Concerning the Arrest Warrant of 11 April 2000), para 56; Cassese 2002, pp. 865–866; Gaeta 2002, pp. 983–989.

[23] It is unsettled if other officials than acting Heads of State, Heads of Government, Foreign Ministers, and diplomats belong to the small set of persons entitled to immunity *ratione personae*. For discussion of this issue, see Akande and Shah 2010, pp. 820–825 (with further references); Cryer et al. 2010, p. 548; Sanger 2013, pp. 196–199.

[24] AU-EU Expert Report on the Principle of Universal Jurisdiction, paras 8-14. For detailed discussion of this report, see Geneuss 2009. Council of the EU, The AU-EU Expert Report on the Principle of Universal Jurisdiction, Doc. 8672/1/09 Rev. 1, 16 April 2009.

[25] AU-EU Expert Report on the Principle of Universal Jurisdiction, para 14. See also Geneuss 2009, pp. 955–959.

jurisdiction.[26] This Report has been endorsed by the AU Assembly when it "urged the EU and its member states to implement the recommendations of the AU-EU Joint ad hoc Expert group".[27]

In concluding this part of this chapter, the official (AU) 'African position' on universal jurisdiction may be characterized as follows: Despite concerns regarding the exercise of universal jurisdiction by some European countries—which are framed under the heading of "the abuse" of the principle—, the African Union does not reject the principle altogether. The Union explicitly endorses the view that universal jurisdiction is a principle of international law and stresses that it is an important tool in the fight against impunity. Regarding the requirements for the exercise of universal jurisdiction, the African Union has taken a progressive stance. After all, it seems that the main concern of 'African states' is to a lesser extent related to the principle of universal jurisdiction as such but rather to the supposed disregard of immunity of 'African leaders'. It should be noted however, that the implicit understanding of who qualifies as a 'leader' and, thus, qualifies for immunity from prosecution, is rather broad.[28]

10.4 The Use, the Non-use and the Abuse of Universal Jurisdiction

Let us now turn to the practical implementation and application of the principle of universal jurisdiction in an African context. Is there a point in the "abuse" argument?

First, the exercise of universal jurisdiction by courts and prosecutors in Africa shall be examined. A considerable number of African states have provided their courts with statutory universal jurisdiction—including, inter alia, Kenya, Uganda, Senegal and South Africa.[29] For instance, the South African Implementation of the Rome Statute of the International Criminal Court Act of 2002 provides that crimes committed outside South African territory are under the jurisdiction of South

[26] AU-EU Expert Report on the Principle of Universal Jurisdiction, R9.

[27] Decision on the Abuse of the Principle of Universal Jurisdiction, Doc.EX.CL/640(XVIII), AU 16th session, 2011 Addis Ababa, Assembly/AU/ /Dec. 335 (XVI), para 6; Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/606(XVII), AU 15th session, 2010 Kampala, Assembly/AU/Dec. 292 (XV), para 8.

[28] See also Jalloh 2010, pp. 29–49.

[29] Section 8(c) of Kenya's International Crimes Act 2008; Article 669 of the Code of Criminal Procedure of Senegal; Section 18(d) of Uganda's International Criminal Court Act 2010; Section 4(3)(c) of South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002. See also AU-EU Expert Report on the Principle of Universal Jurisdiction, para 15–16.

African courts "if the perpetrator is a South African citizen or resident or if she' after the commission of the crime, is present in the territory of the Republic".[30]

However, this jurisdiction has been exercised only exceptionally. In 2009, the AU-EU expert group found that not a single African state was, in effect, exercising universal jurisdiction.[31] Meanwhile, we know of at least three cases. The most remarkable case is the prosecution and trial of former Chadian dictator *Hissène Habré* before a Senegalese tribunal. This case deserves closer scrutiny and will be discussed in detail below.[32] The two other cases concern proceedings pending before South African courts. The subject of these proceedings are alleged crimes committed by the former Madagascan President *Ravalomanana*, and acts of torture committed in Zimbabwe. The latter proceedings demonstrate once again how reluctant justice systems typically are to go after foreign officials. In March 2008, a human rights group—the Southern Africa Litigation Centre—asked the South African law enforcement authorities to initiate an investigation under the Implementation of the Rome Statute of the International Criminal Court Act of 2002 on the basis of the principle of universal jurisdiction. The request related to a case of alleged crimes against humanity involving mainly torture committed in Harare, Zimbabwe in March 2007. Then, the headquarters of the Zimbabwean opposition political party—the Movement of Democratic Change—was attacked by the Zimbabwean police. More than 100 people were arrested and some of them were taken into custody for a few days. In police custody, they were, inter alia, severely beaten and tortured through mock executions, waterboarding and electric shocks. According to information of the Southern Africa Litigation Centre, the raid was ordered by members of the *Mugabe* regime and the ruling party, the Zimbabwe African National Union—Patriotic Front (ZANU-PF). It is reported that the alleged perpetrators often visit South Africa on official or private occasions.[33] In June 2009, the South African investigating and prosecuting authorities decided not to open an investigation because it would lack the chance of success and could lead to diplomatic complications with Zimbabwe. The Southern Africa Litigation Centre challenged this decision and filed a complaint with the North Gauteng High Court in December 2009.[34] On 8 May 2012, the Court delivered a judgment in favor of the Centre[35]

[30] See also Chap. 6 by *Kemp* in this volume. For more information on the South African implementation of the Rome Statute, see Jeßberger and Powell 2001.

[31] AU-EU Expert Report on the Principle of Universal Jurisdiction, para 19.

[32] See also Chap. 8 by *Fall* in this book.

[33] Southern Africa Litigation Centre 2013, p. 70; Werle and Bornkamm 2013, pp. 660–661.

[34] Southern Africa Litigation Centre 2013, p. 71.

[35] *SALC and Another v. National Director for Public Prosecutions and Others, High Court of South Africa (North Gauteng High* Court), Judgment of 8 May 2012. For a more detailed discussion of this judgment, see Werle and Bornkamm 2013, pp. 665–673. See also Southern Africa Litigation Centre 2013, pp. 72–76.

which was confirmed by the Supreme Court of Appeal of South Africa[36] in November 2013.[37]

The Zimbabwe case is, however, a rare exception. The truth is that courts and prosecutors located in Africa do not prosecute and punish crimes under international law on the basis of universal jurisdiction—although their statutory law often explicitly allows for it. This corresponds to the generally rather poor record of African states with regard to the prosecution of international crimes.[38] With Rwanda being an exception,[39] only a handful of proceedings took place, inter alia, in the Democratic Republic of the Congo, Ethiopia, Uganda, Sierra Leone and, most recently, in Northern African Arab Spring states.[40]

Obviously, however, the "abuse" argument is based on the arbitrary application of universal jurisdiction by courts and prosecutors in Europe against accused persons from Africa.[41] Concerning legislation, universal jurisdiction is, in principle, available across Europe with regard to war crimes, genocide, and crimes against humanity.[42] Unlike in Africa, those statutes have been applied at least occasionally. Proceedings in Spain[43] and Belgium[44] between 1998 and 2008 received the most public attention. But courts in other European countries, too, did deal with universal jurisdiction cases, for instance in Austria, Denmark, Finland, France, Germany, the Netherlands, Norway, Sweden, Switzerland and the UK.[45]

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[36] *National Commissioner of the South African Police Service and Another v. Southern African Human Rights Litigation Centre and Another*, Supreme Court of Appeal of South Africa, Judgment of 27 November 2013, paras 51–70. On both decisions see Chap. 6 by *Kemp* in this book.

[37] One of the immediate effects of the judgment of the North Gauteng High Court was the opening of criminal proceedings against the former Madagascan president *Marc Ravalomanana* who lives in exile in South Africa. In August 2012, the South African prosecuting authorities initiated an investigation against *Ravalomanana* who is allegedly responsible as a superior for crimes against humanity committed in Antananarivo in 2009. See Southern Africa Litigation Centre 2013, p. 76.

[38] Van der Wilt 2011, p. 1054 (he additionally mentions proceedings in Sierra Leone and Uganda).

[39] In Rwanda, tens of thousands of *génocidaires* have been tried by national courts and so-called *Gacaca* courts. However, the view on these mass proceedings is divided. In particular, the guarantee of fair trial rights to the suspects is questionable. See, e.g., Lahiri 2009; Sadat 2009, p. 556. See also Bornkamm 2012, and Chap. 7 by *Rugege* in this book.

[40] For further details and references, see van der Wilt 2011, pp. 1052–1053, in particular for the *Mengistu Haile Mariam* trial in Ethopia see Tiba 2007.

[41] See AU-EU Expert Report on the Principle of Universal Jurisdiction, para 26 (EU member states); Jalloh 2010, pp. 14–28; Langer 2011 (for the period of 1961 until June 2010); Reydams 2003, pp. 86–219; van der Wilt 2011, pp. 1055–1059.

[42] AU-EU Expert Report on the Principle of Universal Jurisdiction, para 23.

[43] See Langer 2011, pp. 32–41.

[44] Ibid., pp. 26–32.

[45] For details and further references see Werle and Jeßberger 2014, marg nos 344 et seq.; Langer 2011, p. 42 (Table 2). AU-EU Expert Report on the Principle of Universal Jurisdiction, para 26.

During the last 10 or 15 years, main 'targets'—numerically—of those proceedings were accused or suspects from Rwanda and Yugoslavia. Only exceptionally did investigations result in actual trial, save convictions. A majority of cases were dismissed for immunity reasons, by exercising prosecutorial discretion, or transferred to the ad hoc Tribunals. Based on a systematic analysis of available data, *Maximo Langer* identified 1.051 accused persons involved in complaints or cases considered by public authorities around the world—a majority in Europe or the rest of the Western world—or on their own motion. Of those, one third were suspected for crimes under Nazi-rule (here, for plausible reasons, *Langer* did not distinguish by nationality), 18 % former Yugoslavs, 12 % Argentineans, 8 % Rwandans, 5 % US-Americans, 4 % Israelis and 4 % Chinese.[46] Only 32 (3 %) of those 1.051 accused persons have been brought to trial. Of those 32 defendants who were brought to trial, three-quarters were Rwandans, former Yugoslavs or persons allegedly responsible for crimes under the Nazi-rule.[47] *Langer* convincingly concludes that universal jurisdiction cases have concentrated on what he calls "low cost defendants"—those for whom their states of nationality have not been willing to exercise their leverage and especially those on whose prosecution the international community has been in broad agreement.[48] Such accused persons may include accused persons from Africa, but a racial or geographic bias is not supported by the data.[49]

The findings of *Langer's* study are confirmed if one examines the individual countries. Let us take Germany as an example. Starting in the mid-1990s, the German Federal Prosecutor General led investigations against 177 accused persons for crimes, in particular genocide and war crimes, committed in former Yugoslavia. In four cases the accused were convicted.[50] Later, based on legislation which was introduced in 2002 and which provides for unrestricted universal jurisdiction, the German Federal Prosecutor General received more than 60 complaints.[51] All these complaints which concerned alleged crimes committed in Uzbekistan, Iraq, Guantanamo, China and the Middle East, were dismissed, mostly because the perpetrators were not present in Germany. These complaints concerned, inter alia, *Donald Rumsfeld*, *Henry Kissinger*, *Ariel Sharon*, *Jiang Zemin* and *Zakir Almatov*—but, this may be relevant in our context, no 'African leader'.

In 2003, the first complaint on the basis of the German Code of Crimes against International Law of 2002 that attracted public attention was filed against former Chinese President *Jiang Zemin* and other members of his government. This complaint regarding acts of persecution of *Falun Gong* practitioners, amounting to

[46] Langer 2011, p. 8 (Table 1).

[47] Ibid., p. 8 (Table 1).

[48] Ibid., p. 5.

[49] See also AU-EU Expert Report on the Principle of Universal Jurisdiction, para 40; Jalloh 2010, pp. 14–18.

[50] See Werle and Jeßberger 2014, marg nos 344 et seq. See also Reydams 2003, pp. 149–156.

[51] Langer 2011, pp. 14–15.

genocide and crimes against humanity, was dismissed by the Federal Prosecutor General in 2005. The Prosecutor argued, inter alia, that *Jiang* would enjoy immunity under international law. With regard to the other accused, the prosecutor based his decision particularly on their absence from German territory.[52] Another complaint was presented in 2005 against the Minister of Internal Affairs of Uzbekistan, *Zakir Almatov* and others, for their alleged responsibility for the massacre of Andijan as well as for systematic torture in Uzbek prisons. The Federal Prosecutor General again refused to open investigations because the accused were not present on German territory and they were not expected to enter the country.[53] What attracted the most public attention were the complaints against former US Secretary of Defence *Donald Rumsfeld* and other superiors of the military and civil staff of the United States as well as legal consultants of the US Government. These complaints were filed on the basis of allegations of maltreatments and torture committed in the Iraqi detention center Abu Ghraib and in Guantánamo Bay. Again, no official proceedings were instituted. The first complaint was filed in 2004 and dismissed in 2006, since—at least in the view of the German Federal Prosecutor General—the 'Abu Ghraib complex' has adequately been prosecuted by the US judiciary.[54] In 2006, a second complaint regarding the incidents in Abu Ghraib followed, as well as allegations of war crimes committed in Guantánamo Bay. According to the Federal Prosecutor General, this time the requirements of Section 153f of the German Code of Criminal Procedure were given so that he could exercise his discretion. Contrary to the arguments brought by the complainants, the Prosecutor opined that none of the alleged crimes was committed on German territory.[55] Besides, no suspect resided or was expected to reside in Germany. The Prosecutor clarified that the mere theoretical possibility of a presence on German territory would not suffice.[56] The Prosecutor based his decision to dispense with prosecuting the alleged crimes on the lack of a prospect of success of such an investigation.[57] In addition, he was of the view that an overstraining of the German law enforcement authorities, as well as forum shopping, should be prevented.[58]

In Germany, only two trials concerned accused persons from Africa. The first one was the trial of *Onesphore Rwabukombe*. As explained above, he was convicted for aiding and abetting genocide and sentenced to 14 years' imprisonment. Representatives of the Rwandan government applauded the judgement. The second trial is still ongoing. It is the trial against *Ignace Murwanashyaka*, the former

[52] Keller 2013, p. 147; Langer 2011, p. 14.

[53] See Amnesty International 2008, pp. 104–105. For detailed discussion of the Prosecutor's decision, see Zappalà 2006.

[54] Amnesty International 2008, pp. 103–104; Keller 2013, pp. 143–144.

[55] Keller 2013, p. 142. See also Amnesty International 2008, p. 104.

[56] Keller 2013, p. 143.

[57] Langer 2011, p. 15.

[58] Keller 2013, pp. 144–145.

president of the *Forces Democratiques de Liberation de Rwanda* and his Vice President *Musoni* on charges of war crimes and crimes against humanity committed in the Democratic Republic of Congo.[59] The Stuttgart Higher Regional Court (*Oberlandesgericht*) started to hear this case in 2011. Unlike the *Rwabukombe* trial, this trial is not based on universal jurisdiction. Since both accused of the Stuttgart trial had lived in Germany for 20 years and allegedly committed the crimes from German territory (using mobile phones and internet communication devices), the prosecution is based on territorial rather than extraterritorial jurisdiction.

10.5 Keeping It at Bay: The Decline of Universal Jurisdiction in Europe

Now, three trends will be indicated which have the potential to shape the exercise of universal jurisdiction in the coming years. The first trend which shall be mentioned is relatively well described.[60] After 10 years of enthusiasm and optimism about universal jurisdiction in Europe we now start to see disillusionment. As *David Luban* put it, "the honeymoon is over".[61] Universal jurisdiction in Europe, the heartland of the movement, is on the decline. Many states and judicial systems have by now realized that universal justice is costly, complicated and exhausting. The consequences are manifold. Prime examples are Belgium and Spain. Both cut back their laws on universal jurisdiction, and are thus no longer able to prosecute international crimes that have no direct connection to their territory or citizens. *Baltasar Garzón*, the judge who initiated the proceedings against *Pinochet* in the mid-1990s, and one of the most visible protagonists of a forceful system of international criminal justice, has been sidelined. In several countries, such as Germany, new and ambitious legislation has rarely been applied.

10.6 Striking Back: The Reversion of Universal Jurisdiction

The second 'trend', which has not yet developed to a real trend though, relates to what could be called the 'reversion' of universal jurisdiction. Universal jurisdiction is not a one-way road. Theoretically, it never was. Practically, some observers, as we have seen in particular observers from Africa, have suggested this: a North-South levy in the exercise of universal jurisdiction. And, yes, we have seen that

[59] For details see Keller 2013, pp. 148–151.

[60] See the contributions in Jeßberger and Geneuss 2013.

[61] Luban 2013, p. 505.

universal jurisdiction has been exercised primarily by European judges and prosecutors. Against this background it is remarkable indeed that in September 2013 an Argentinean judge issued international arrest warrants for four former Spanish police officials accused of torturing political prisoners under the *Franco* Regime in Spain. After attempts to initiate proceedings in Spain had failed due to the Spanish amnesty law of 1977, a number of victims supported by human rights organizations filed complaints in 2010 in Buenos Aires. Two of the four suspects have already died and the Spanish authorities seem unlikely to extradite the others. At least, they had to deliver their passports and are obliged to report regularly to the police. At the moment, the case is pending before the *Audiencia Nacional* that has to decide about the admissibility of the extradition. Here, it will probably be crucial if the amnesty law is valid.[62] This represents a perhaps novel development, since it is, to the author's knowledge, the first time that a judiciary of the 'global south' 'strikes back' and uses universal jurisdiction to go after perpetrators from Europe.

10.7 Keeping It Home: The Regionalization of Universal Jurisdiction

The third and perhaps most sustainable trend concerns a development which may be called the regionalization of universal jurisdiction. This is what finally happened in the *Habré* case: *Hissène Habré* ruled Chad from 1982 to 1990, when he was overthrown by the current President of Chad *Idriss Déby Itno*. During his dictatorship serious violations of human rights occurred.[63] The truth commission which was established after the fall of *Habré* stated in its report of 1992 that he and his government were responsible for about 40,000 murders of political opponents and established a regime of systematic torture.[64] In 1990, *Habré* went into exile to Senegal where he initially lived unmolested. In the aftermath of the arrest warrant decision against *Pinochet*, some of *Habré's* victims supported by human rights groups tried to initiate criminal proceedings against him in Senegal. At first, investigations were carried out, leading to an indictment and *Habré* was placed under house arrest.[65] However, the Senegalese *Court d'Appel* of Dakar held in July 2000 that criminal proceedings against *Habré* in Senegal are inadmissible because he committed his alleged deeds abroad and therefore Senegal lacked jurisdiction.[66]

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[62] Hamilos 2013; Minder 2013.

[63] For more background information, see Brody 2006, pp. 278–281. See also Moghadam 2007–2008, pp. 495–496; Neldjingaye 2011, pp. 187–189. See also *Belgium v. Senegal*, ICJ Judgment of 20 July 2012 (Questions relating to the Obligation to Prosecute or Extradite), paras 15–41.

[64] See Brody 2006, p. 283.

[65] Ibid., pp. 286–287; Moghadam 2007–2008, pp. 497–499.

[66] République du Sénégal, Cour d'Appel de Dakar, Chambre d'accusation, Arret no. 135 du 4 juillet 2000. For a critical view on this decision, see Magliveras 2012, p. 3; see also Moghadam 2007–2008, pp. 501–503.

This decision was confirmed by the Senegalese *Court de Cassation* in March 2001.[67] Besides these efforts to initiate proceedings against *Habré* in the country of his residence, some victims addressed their complaints under the Belgian universal jurisdiction law to the Belgian law enforcement authorities, who then started investigations. In 2002, a Belgian investigating judge and other officials travelled to Chad and conducted investigations in situ.[68] Three years later, the Belgian authorities finally issued an international arrest warrant against *Habré* and filed an extradition request to Senegal. However, the Senegalese authorities refused to extradite *Habré*. The *Court d'Appel* of Dakar held that it did not have jurisdiction to rule on the extradition request.[69] Triggered by the Belgian engagement in the *Habré* case, Senegal reported the issue to the African Union which, in turn, set up a "Committee of Eminent African Jurists" to consider the possibilities of prosecuting *Habré*.[70] In a Decision of 2006 the AU Assembly mandated

> the Republic of Senegal to prosecute and ensure that *Hissène Habré* is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial.[71]

At about the same time, the Committee against Torture declared that Senegal is in breach of its obligations arising from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) by failing to extradite or prosecute *Habré*.[72] In 2007, the Senegalese legislator amended its penal and constitutional law and allowed for the prosecution of international crimes even though they were committed abroad.[73] After a further period of standstill, in February 2009 Belgium referred the case to the International Court of Justice with the aim to compel Senegal to comply with its obligation to extradite or prosecute resulting from the Torture Convention.[74] In the meantime, *Habré* filed a complaint against his prosecution in Senegal to the Court of Justice of the Economic Community of the West African States. In November 2010, this court ruled that a prosecution of *Habré*, based on the amended Senegalese penal law would violate the principle of *nullum crimen sine lege* (the absolute

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[67] République du Sénégal, Cour de Cassation, Première chamber statuant en matière pénale, Arret no. 14 du 20 mars 2001.

[68] Brody 2006, pp. 288–289.

[69] Magliveras 2012, p. 5 (with further references).

[70] Decision on the Hissene Habré Case and the African Union, Doc.Assembly/AU/8 (VI) Add.9, AU 6th session, 2006 Khartoum, Assembly/AU/Dec.103 (VI). See also Magliveras 2012, pp. 6–7.

[71] Decision on the Hissène Habré Case and the African Union, Assembly/AU/Dec.127(VII), August 2, 2006, Doc. Assembly/AU/3(VII), para 5(ii).

[72] UN Committee against Torture, *Communication No. 181/2001: Suleymane Guengueng and Others v. Senegal*, 19 May 2006.

[73] For thorough discussion, see Niang 2009. See also Adjovi 2013, p. 1021 (with further references); Magliveras 2012, pp. 9–11.

[74] See Magliveras 2012, pp. 12–13.

prohibition of the retroactivity of criminal law) but he could be prosecuted by an extraordinary or ad hoc Tribunal.[75]

After a governmental change in Senegal in March 2012 and the judgment of the International Court of Justice in July 2012 in favor of Belgium[76] an agreement between Senegal and the African Union[77] was concluded. According to this agreement which was signed in August 2012, special chambers were established within the existing Senegalese justice system—the so-called 'Extraordinary African Chambers' (EAC).[78]

Surprisingly, the African Union and Senegal established the Extraordinary African Chambers to prosecute a former Head of State with retroactive universal jurisdiction.[79] The Chambers differ from other hybrid courts in that they are established in a third state and exercise universal jurisdiction. Under Article 3(1) of the EAC Statute, the Chambers

> shall have the power to prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law and international conventions ratified by Chad, committed in the territory of Chad during the period from 7 June 1982 to 1 December 1990.[80]

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[75] *Habré v. Senegal*, Court of Justice of the Economic Community of States of Western Africa, 18 November 2010. For a critical assessment of this judgment, see Spiga 2011, pp. 16–22. See also Magliveras 2012, pp. 13–15; Neldjingaye 2011, pp. 190–191.

[76] The International Court of Justice held by majority that Senegal has breached its obligations under Articles 6(2) and 7(1) of the Torture Convention "by failing to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed by […] Habré" and "by failing to submit the case to its competent authorities for the purpose of prosecution", see *Belgium v. Senegal*, ICJ, Judgment of 20 July 2012 (Questions relating to the Obligation to Prosecute or Extradite), para 122.

[77] International Legal Materials 2013, 1024–1027.

[78] The four different chambers established according to Article 2 of the EAC Statute are mainly composed of judges of Senegalese nationality but both the trial and the appeals chamber will be presided by a non-Senegalese judge from another African Union Member State. See Articles 11(3)(2) and (4)(2) of the Statute. On the structure of the Extraordinary African Chambers, see also Southern Africa Litigation Centre 2013, p. 88, and Chap. 8 by *Fall* in this book.

[79] In the meantime, the African Union even considered building special criminal chambers at the existing African Court of Justice and Human Rights to prosecute, inter alia, genocide, crimes against humanity and war crimes, see Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Revisions up to Tuesday 15 May 2012, Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, 7–11 and 14–15 May 2012, Addis Ababa, EXP/MIN/IV/Rev.7. The decision on the adoption of the amended protocol was postponed for further consideration. See Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Doc. Assembly/AU/13(XIX)a, AU 19th session, 2012 Addis Ababa, Assembly/AU/Dec. 427 (XIX). See also Decision on Africa's Relationship with the International Criminal Court (ICC), AU Extraordinary Session, 2013 Addis Ababa, Ext/Assembly/AU/Dec. 1 (Oct. 2013), para 10(iv). For discussion, see Murungu 2011.

[80] The Chambers have jurisdiction *ratione materiae* with respect to genocide, crimes against humanity, war crimes and torture. These crimes are defined by Articles 5 to 8 of the EAC Statute. Besides international law and the Statute itself, the Chambers will apply Senegalese law in

In February 2013, the Extraordinary African Chambers were inaugurated and investigations started. *Habré* was charged with crimes against humanity, war crimes and torture and placed in custody in July 2013.[81] The trial is expected to start later in 2014.[82]

The '*Habré* saga' is a typical example of the stamina needed to actually trigger criminal proceedings involving crimes under international law: It took more than 20 years, required enormous external pressure—proceedings under universal jurisdiction in Belgium, involvement of the civil society, regional mechanisms, international mechanisms, including most notably the International Court of Justice—and was ultimately successful only because the political atmosphere in the countries involved was favorable for the trial to be held. At the same time, the *Habré* saga ended in uncharted waters. What makes the *Habré* trial a model? Perhaps the low cost, perhaps the regional if not local 'ownership'. Is this model compatible with the universal jurisdiction theory? Yes, it is submitted that it is, since it corresponds to the very logic of the concept of universal jurisdiction that a state, as a trustee can act 'on behalf' of a specific, not necessarily a global group of states.

10.8 Conclusion

Universal jurisdiction has been predominantly exercised in (Western) Europe (and some other Western countries). For a few years now there have been signs of a possible downtrend. There is no evidence of a racial or geographical bias in the selection of universal jurisdiction cases, be it on investigation or on trial stage. The majority of the accused have been Europeans (in this respect, universal jurisdiction practice differs from the International Criminal Court, but corresponds to the practice of international tribunals as a whole). Therefore, there is no basis to suggest an "abuse". There is, however, evidence that 'low-cost defendants' are disproportionally affected. Such defendants are 'low-cost' in terms of the political and enforcement resources their prosecutions require, which may be particularly so because there is a consensus in the international community to prosecute and punish specific groups of perpetrators. The group of low-cost defendants may also include Africans, in particular, Rwandans (given the worldwide consensus to prosecute and punish those responsible for the 1994 genocide). Interestingly,

(Footnote 80 continued)
particular the Code of Senegalese Criminal Procedure, Article 1(4) of the Agreement and Articles 16 and 17(1) of the Statute. According to Article 3(1) of the Agreement and Article 32 of the Statute, the Chambers will be financed "in accordance with the budget approved by the Donor's Round Table of 24 November 2010." Table ronde des donateurs pour le financement du process de Monsieur Hissène Habré, Dakar, le 24 novembre 2010, Document Final, p. 4. Thus, the costs will be bore, inter alia, by the EU (2 million Euro), the AU (1 million US Dollars), Chad (2 billion CFA francs or 3,743,000 US Dollars), Belgium (1 million Euro), and Germany (500,000 Euro).

[81] Adjovi 2013, p. 1020. See also Chap. 8 by *Fall* in this volume.

[82] Southern Africa Litigation Centre 2013, p. 88.

consensus on the international level triggers not only direct enforcement through international courts (the ad hoc tribunals, the International Criminal Court), but is also a key factor in the indirect enforcement of international criminal law.

Still, universal jurisdiction remains an exception.[83] Only a few persons were convicted worldwide. It would be unrealistic to argue that universal jurisdiction will hold a substantial share of the perpetrators of international crimes accountable. Rather, purposes other than conviction come to the fore when we discuss the role of third states: triggering prosecution in territorial states, collecting and providing evidence and so on. This is also why it is useful and necessary to discuss universal jurisdiction as part and parcel of the complex and multileveled system of international criminal justice. This system includes international courts, territorial states and third states exercising universal jurisdiction on behalf of the international community. With the Extraordinary African Chambers operating "on behalf of Africa" currently a novel intermediate level is about to be established, located between the national and the international levels on the basis of universal jurisdiction.

The regionalization of universal jurisdiction is an option, if it works. So far, the reports are promising. It may help to ensure the independence and legitimacy of the proceedings. It may insulate local judges to some degree against intimidation from their governments. It may enhance local 'ownership' and counter the 'jurisdictional imperialism' critique.[84] But more than that, it may also help to avoid or mitigate many of the practical problems that European courts exercising universal jurisdiction have experienced. Regionalized universal jurisdiction has, therefore, the power to address the problems of both cases mentioned in the introduction, the *Kabuye* incident—triggering harsh accusations of colonial justice—and the *Rwabukombe* conviction—giving reason to rethink the use and possibility of trials far away from the *locus delicti*. In this perspective, the *Habré* case may indeed open a new chapter in the story of Africa and universal jurisdiction.

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[83] See also AU-EU Expert Report on the Principle of Universal Jurisdiction, paras 26, 40; Jalloh 2010, pp. 20–25.

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