

EDITORIAL

On Inaccessible Judgments, the Role of NGOs in Advancing Global Justice, and African State Practice on Universal Jurisdiction

On behalf of the Editorial Board of the *African Journal of International Criminal Justice* (AJICJ), I am pleased to present the second issue of the AJICJ. This edition contains two peer-reviewed articles and a collection of important African Union (“AU”) documents which attempt to capture the African State Practice on the always controversial doctrine of Universal Jurisdiction¹ under international law.

The first article, by Matthew C. Kane, takes up a largely ignored but at the same time concerning aspect of the emerging practice of international penal tribunals, that is, the tendency of courts such as the permanent Hague-based International Criminal Court (“ICC”) to issue long and inaccessible judgments. As Kane notes, these judgments, which come at the end of trials, are the final outcomes of the criminal justice processes before the ICC. They therefore tend to be of interest to multiple stakeholders, including the adversarial parties in the court proceedings (*i.e.* the defence and prosecution) as well as others outside the ICC such as the victim communities and the media in the State where the atrocities occurred and even the general international public. Unfortunately, although they arguably must only primarily fulfil the statutory requirement of being “reasoned judgments” (to which all accused are entitled as part of their fair trial rights), the judgments are often “incomprehensible” to the suspect and the lay public – in other words, the majority of persons outside the small group of lawyers specializing in international criminal law. On top of that, as Kane shows, these judicial pronouncements often fail to address issues perceived to be of interest to stakeholder audiences in the situation countries in Africa. His article seeks to help remedy this and includes practical proposals on how future ICC judgments can be made more appealing to a wider African and global audience. He asserts that some of these improvements might also offer legitimacy and other soft benefits to the ICC.

In the second article, on a topic that appears to be gaining renewed interest among scholars, Charles C. Jalloh considers the role of non-governmental organizations (“NGOs”) in the human rights field focusing on academic criticisms of

1 The AU defines universal jurisdiction as “jurisdiction to try any person alleged to have committed any crime 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.” (See *AU Model Law on Universal Jurisdiction* in this issue, at section 4.)

their lack of transparency, accountability, and legitimacy. He then calls for a more context-sensitive approach to assessments of the place of such non-state actors in modern international affairs. Taking a long view, he examines the prominent role that NGOs have played, and continue to play, in advocating justice for atrocity crimes over the decades. Jalloh claims that the advent of contemporary international criminal courts can partly be credited to the advocacy and other persistent efforts of a global civil society spearheaded mainly by NGOs. He concludes that, by and large, the explosion of coordinated action for criminal accountability at the international level is a positive, not a negative, development in the international community's ongoing struggle against impunity.

As is widely known among international lawyers, the AU, which is the regional body created by African States based in Addis Ababa, Ethiopia, has been a key player in shaping the direction of modern international criminal justice. In recognition of that reality, in the last section of this issue, we have reproduced in chronological order the various decisions of the AU on Universal Jurisdiction, its Model Law on Universal Jurisdiction, as well as its Agreement with the Government of Senegal for the creation of an Extraordinary Chambers in the Courts of Senegal to try former Chadian President Hissène Habré on allegations of torture committed while he was in office. The latter is the first ad hoc hybrid tribunal created by a regional body in history, building on the experiences of the United Nations in this area since the establishment of the Yugoslav and Rwanda Tribunals in 1993 and 1994 and the Special Court for Sierra Leone in 2002.

All the documents included in this issue relate to Universal Jurisdiction in one way or another. The debates on the meaning, application, and scope of that doctrine led to serious diplomatic disputes between the AU and European Union ("EU") about six years ago. The matter has resurfaced recently with the June 2015 arrest of Rwandese Lt.-General Kareke in the United Kingdom on an European Arrest Warrant issued by a Spanish Judge purporting to assert universal jurisdiction. The AU decisions were taken by its highest body, the Assembly of Heads of State and Government, and was the follow up to the issuance of several indictments for senior Rwandese government officials such as Lt.-General Kareke by certain courts in Spain and France. This led the African governmental leadership to express serious misgivings about the "abuse" and "misuse" of universal jurisdiction for political purposes. As detailed elsewhere, African governments thereafter called for an EU "moratorium" on the use of the principle as well as initiated a process that led to a global study of state practice on universal jurisdiction.² That study, ongoing for several years now, continues at the expert level in the Sixth Committee (Legal) of the United Nations General Assembly in New York.

Although the careful reader will notice that the AU had taken exception to the version of universal jurisdiction European courts were relying upon, as demonstrated by its decisions, the AU has perhaps surprisingly gone on to supple-

2 See C.C. Jalloh, 'Universal Jurisdiction, Universal Prescription: A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', *Criminal Law Forum*, Vol. 21, No. 1, 2010, pp. 1-65.

ment them with the adoption of a *Model Law on Universal Jurisdiction* which it is urging its member states to incorporate into national laws. Interestingly, by that action, instead of rejecting universal jurisdiction outright, AU States seem to have not just accepted but also endorsed the use of the universal jurisdiction ground for prosecutions of certain serious crimes in Africa, particularly genocide, crimes against humanity, war crimes, piracy, drug trafficking, and terrorism. A key point, evident also in the *Model Law*, is that the AU advances a more “limited” and arguably more realistic variant of the universal jurisdiction principle which requires presence of the suspect in the territory of the investigating state. That idea was matched with a corollary subsidiarity principle that would accord prosecution priority to the State in whose territory the crime is alleged to have occurred. It is the lack of will and ability to prosecute by the territorial state that would then give legal basis for another State to pursue the suspect, provided that the person being investigated is in its territory.

The above documents are important for researchers, including at the UN Sixth Committee who are undertaking the unprecedented UN study of the global customary international law status of universal jurisdiction. Under custom, of course, States must engage in practice based on a belief that they are bound to follow a given rule for a norm to crystallize into law. It follows that universal jurisdiction is a significant component of possible law making. By reproducing the important AU instruments on universal jurisdiction, constituting the African practice which is an especially affected region whose views may therefore carry greater weight than other regions, we hope that these documents will constitute useful benefits for our readership.

Finally, a house keeping matter. Readers are invited to submit articles for publication consideration for the next issue of the journal. All submissions must comply with our style guide, which is available on our website at <www.elevenpub.com/authors>. Note that, by the time this issue hits the stands, we expect to be in a position to receive manuscripts through Editorial Manager – a popular journal article submission database system that eases the process of submitting, receiving, managing, and peer-reviewing articles. Authors are able to follow the progress of their articles pending our formal decision on publication. Do stay tuned through our website!

Of course, if you have any questions, we are only a quick email away at ajicj@gmail.com.

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