

immunity of the foreign minister of the Congo was not the same as according impunity to that official, because the number of ways of prosecuting him remained intact (*Arrest Warrant of 11 April 2000*, Merits, General List No. 121, 14 February 2002, paras 60–61). The efforts to combat impunity for the perpetrators of serious crimes are conducted by two methods. The first method relates to establishing international tribunals, which has been the case since the Nuremberg and Tokyo Tribunals in the aftermath of World War II. This method is limited, because international tribunals necessarily have limited jurisdiction. They cannot address the problems of impunity in general, but only those aspects of it which are covered by their mandate as specified in their statutes. Even if this mandate is quite general, as is the case with the International Criminal Court (ICC), the actual extent to which impunity will be combatted still depends on the voluntary decision of states to become party to the Statute. The second method reflects the limited nature of international criminal tribunals. The remaining problems of impunity are addressed through the exercise of jurisdiction by national courts. This is reflected in the fact that the multiplication of international criminal tribunals over the past 15 years has not caused any decline in the activities of national courts in this field. Quite the contrary; the growth of international criminal jurisdiction has been accompanied by the equally remarkable growth of national criminal jurisdiction to address international crimes, including those committed extra-territorially.

The 1984 UN Convention against Torture has been at the forefront of combating impunity for serious international crimes, especially in terms of the arrangement of provisions on universal jurisdiction and the duty to prosecute in Articles 5 and 7. The commentary written by Nowak and McArthur is a high-quality contribution to the subject. A work like this was long overdue since the well-known commentary by Burgers and Danelius was published nearly two decades ago. The Nowak and McArthur commentary covers wide ground and all relevant practice

Manfred Nowak and Elizabeth McArthur. ***The United Nations Convention Against Torture. A Commentary.*** New York City: Oxford University Press, 2008. Pp. 600. \$250.00. ISBN 9780199280001.

Otto Triffterer (ed.). ***Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article.*** Portland: Hart Publishing Ltd, 2006. Pp. 1954. \$480.00. ISBN 9781841138886.

It is indisputable that the fight against impunity for the perpetrators of serious international crimes is a fundamental policy of the international community. As the International Court of Justice emphasized in the *Arrest Warrant* case, the functionally and temporarily limited

of recent years which has been dealt with on multiple occasions, yet rarely considered in a systematic manner within a single work. This concerns the conclusions and recommendations of the UN Committee against Torture which should be at the forefront of discussions in this area of law. This makes the CAT commentary a reference work for anyone working in this field. The second edition of the ICC Statute Commentary is composed of contributions of a number of well-known scholars including William Schabas, Andreas Zimmermann, Christopher Hall, Jelena Pejic, Gerhard Hafner, and Kai Ambos. Both volumes consist of careful, up-to-date and comprehensive, article-by-article, consideration of the relevant normative texts and ensuing practice,¹ and thus recommend themselves as indispensable for both academic international lawyers and practitioners, whether at public service or in private practice.

While dealing with allegedly different fields of national and international jurisdiction, both commentaries engage with one fundamental question: how treaties like the Torture Convention and ICC Statute deal with exercising national and international jurisdiction to avoid and combat impunity for the perpetrators of serious international crimes. Both universal jurisdiction under treaties such as the Convention against Torture (Nowak and McArthur, at 315), and jurisdiction under the ICC Statute deal with cases in which at least some governments linked to a particular international crime, for instance by territorial or nationality connection, are unwilling or unable to ensure prosecution. In this sense, both international criminal jurisdiction under the ICC Statute and universal jurisdiction under the Torture Convention are meant as remedial elements in the process of avoiding impunity for perpetrators of serious international crimes and not to permit situations of safe haven to materialize. Obviously both instruments can

achieve this task, but only within the limitations of their membership. Within that limit, both instruments contain quite rigorous requirements for exercising jurisdiction.

In the first place, as Nowak and McArthur point out, Article 5(1)(a) of the Torture Convention requires a state party to establish jurisdiction over torture committed in any territory under its jurisdiction. This covers, according to the authors, the areas under the military occupation or similar legal or *de facto* control of the state party, such as the control of the US over the detainees in Guantanamo. The same provision also includes the flag principle, whereby the state's duty to establish jurisdiction applies to ships and aircraft regardless of the precise location where the crime is committed (at 309, 415).

As for universal jurisdiction, Nowak and McArthur specify that the only precondition for its exercise is the presence of the alleged torturer on the territory under a state party's jurisdiction and reliable information being available to the government that the person has committed the crime of torture anywhere in the world (at 318). Given that CAT is based on the desire to combat impunity for the crime of torture and eliminate safe havens for torturers, this requires states parties to establish jurisdiction without loopholes, as well as their cooperation in terms of extradition and judicial assistance. For this purpose, Article 8 CAT is aimed at removing, as far as possible, legal obstacles for the extradition of alleged torturers from one state party to another (at 377).

Nowak and McArthur interestingly illustrate how the concept of obligations to prosecute and extradite has evolved to obtain the shape it has taken under the Torture Convention. At the drafting stage, there were two different legal approaches. One approach was that of the order of priorities of the grounds of jurisdiction, leading to the duty to extradite the suspect to the state with a stronger title of jurisdiction. The other approach was giving priority to the duty of the state in possession of the suspect to prosecute, and extradite only if requested to do so. While anti-terrorist conventions had already adopted the *aut dedere aut judicare* principle, the second of the

¹ It should be emphasized that the Triffterer commentary does not have a subject index, an authorities index or a bibliography, which would make it better searchable. But this does nothing to diminish its scientific value.

above approaches prevailed in the shape of what are now Articles 7 and 8 of CAT. Nowak and McArthur clarify that the prosecution approach has an advantage in avoiding the lengthy and complex procedure of extradition; while the extradition approach can be more advantageous in the sense that the territorial state or the state of the nationality of the perpetrator may have better access to evidence than the state which exercises universal jurisdiction (at 378). While the authors' conclusions on these points are valid, the Torture Convention balances these approaches in a way that admits the *possibility* of the practice of the extradition approach if the state which has the suspect in its custody is not interested in prosecution. But the universal jurisdiction approach is upheld in the Convention as a necessary remedy for the case when other possibilities of jurisdiction do not work.

Of no less importance than criminal prosecution is that of civil remedies and universal civil jurisdiction, as provided for under Article 14 of the Torture Convention: '[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation'. Apart from constituting an essential part of the jurisdictional arrangements under the Convention, universal civil jurisdiction can at times be the only way in which the victims of torture can be vindicated and thus the Convention be enforced. This relates to the cases where individual perpetrators are not physically in the country where the victim is and/or where prosecution can be conducted against them; for instance because of the lack of domestic procedural rules and legislation. In such cases, including the cases where the defendant is a state or state official, the only way the victim can seek redress can be in a civil court. Obviously state immunity is invoked in these cases, but there is no need to examine this particular question because Article 14 CAT which provides for universal jurisdiction automatically displaces any conflicting immunities under general international law.

Nowak and McArthur initially tend to agree with the view that Article 14 does not impose

an obligation to provide a remedy for torture committed abroad, nor prohibit the exercise of universal civil jurisdiction (at 494), and that as international law stands at present states parties are not yet obliged to adopt universal civil jurisdiction over torture (at 502). However, the matter is not only how general international law stands, but also what the Convention itself requires from states. The plain wording of Article 14 is framed as a mandatory obligation, and it does not include any limitation of territoriality. Thus, Article 14 does not deal with *entitlements*; it deals with *duties*, and does so without a territorial limitation. Although the authors denote universal civil jurisdiction as fragile and embryonic, it still remains the case that this type of jurisdiction is duly enshrined in the Convention. States are under a duty to apply it, and the rest, such as the adjectival evaluation, is only a matter of rhetoric.

Nowak and McArthur then refer both to doctrinal opinion and the practice of the UN Committee against Torture. The UN Committee has pointed to the failure by Canada to observe its obligations under Article 14 because its courts upheld the sovereign immunity of Iran for the acts of torture in the *Bouzari* case. Based on these considerations, Nowak and McArthur endorse the idea that universal civil jurisdiction is consistent with the object and purpose of the Torture Convention (at 493, 495), a point which was hardly addressed in judgments which adopted restrictive interpretations of Article 14, including the Canadian judgment in *Bouzari* and the English judgment in *Jones v Saudi Arabia*. The authors also support the initiative of Lord Archer of Sandwell to present the UK House of Lords with the Torture (Damages) Bill, and recommend that the UK adopt this legislation. The approach of the authors on this particular point is supported by CAT and the view of the UN Committee against Torture. Certainly the UN Committee's conclusions on *Bouzari* promote the view that there is a duty to provide a solution for extraterritorial torture. In general, the Committee's conclusions have to be regarded as authoritative statements even when they are not formally binding. By

becoming parties to CAT, states effectively delegate to the Committee the power to interpret the Convention in exercising its responsibility to ensure compliance with it. In this sense the Committee's practice is not just an institutional practice: its relevance is equivalent to that of state practice proper.

The question of how far the treaty regime obliges the relevant actors to avoid inaction in relation to prosecution of the relevant crimes is at the heart of the jurisdictional arrangements as specified in Articles 12–18 of the ICC Statute. As Sharon Williams and William Schabas comment on Article 12 of the Statute, this instrument does not adopt the universal jurisdiction approach in relation to the ICC. This approach was not adopted because the conflict-ridden states would then not have joined the Statute and 60 ratifications would not have been gathered. As the Statute stands at present, it has certainly encouraged more ratifications (Triffterer, at 561). In addition, the increase in the number of states parties will certainly increase jurisdictional networks, and with time it is hoped that the Court's jurisdictional reach will, in practical terms, approximate to, even if not be identical to, the position as if the Court had actually possessed universal jurisdiction.

Williams and Schabas also raise another issue relevant to the reach of the ICC jurisdiction – that of the referral of cases to the Court by the UN Security Council under Article 13 of the Statute. This is an instance where the Court's jurisdiction can cover crimes committed in a state which has not yet acceded to the Court (Triffterer, at 569–570). Williams and Schabas go further and examine what the impact of particular Security Council resolutions referring cases to the Court may be. Dealing with Security Council Resolution 1593 (2005) referring the Sudan situation to the Court, these authors raise the issue of the illegality of paragraph 6 of that Resolution which excludes the prosecution before the Court of the personnel or officials from contributing states outside Sudan which are not parties to the Statute. If this condition is illegal, this might raise the possibility of declaring the referral invalid in its entirety or of proceed-

ing with prosecutions notwithstanding the offending paragraph (Triffterer, at 572–573). In general, Williams and Schabas consider that the Security Council's power to refer cases is part of its broader power to determine the existence of a 'threat to the peace' under Article 39 of the UN Charter, but also specify that challenges to such determination as *ultra vires* cannot be excluded (Triffterer, at 573).

Morten Bergsmo and Jelena Pejic conduct an interesting and thought-provoking analysis of the process of initiating and conducting prosecution before the ICC. Given that Article 15 uses the term 'may', the Prosecutor's right to initiate cases is unconditional and discretionary, but carefully balanced by the need for authorization by the Pre-Trial Chamber. The Prosecutor cannot start prosecution of his own motion because states were not prepared to delegate such power to him. As Bergsmo and Pejic conclude, 'there is no unequivocal prosecutorial independence in international criminal law and justice'. At the same time, the 'reasonable basis' test – which guides the Prosecutor in terms of initiating prosecution – is an evidentiary test, not one of appropriateness (Triffterer, at 586–587).

Another dimension of interpreting the ICC Statute, especially its complementarity dimension in a way to avoid impunity and lack of prosecution, is presented in the analysis of Article 17 of the Statute (on admissibility) by Williams and Schabas. They highlight the 'uncontested admissibility' theory developed by the Office of the Prosecutor. According to this theory, the complementarity test is satisfied by inactivity of the relevant state as opposed to the overt manifestation of the will of that state to proceed with the investigation (Triffterer, at 615). This approach is not only right in principle, but also it is more expedient to require the establishment of inactivity as a matter of fact, as opposed to the complex exercise of interpreting the will and intention of the relevant state as to whether it does, in fact, wish to prosecute.

Williams and Schabas also examine the problem of amnesty as a possible bar to prosecution before the ICC. At the stage of the adoption of the Statute, South Africa insisted

on inserting into the Statute an exception to prosecution. But these proposals were rejected because such an exception could have been applied to less transparent Latin American amnesties (at 617). Still Williams and Schabas consider that a sincere truth commission can be considered by the Court as not amounting to a 'genuine unwillingness' of the state to prosecute in terms of Article 17 of the Statute (at 617–618). Nevertheless, it is difficult to think of any more 'genuine unwillingness' to prosecute crimes if the state establishes a truth commission precisely as an alternative to the prosecution of those crimes. There seems to be no explanation and reason why the Court could consider truth commissions as excusing non-prosecution of crimes subjected to the Court's jurisdiction. This would go against the very essence of the complementarity arrangement under the Statute.

A related problem is presented by the provision in Article 53 of the Statute regarding the decision not to prosecute a crime because it may be of insufficient gravity or the prosecution may not be in the interests of justice. The commentary by Morten Bergsmo and Pieter Kruger on Article 53 is very useful and illuminating, while simultaneously illustrating that there is not much practice in terms of evaluating the parameters of the elusive criteria of 'sufficient gravity', 'interests of justice', or 'interests of victims'. The safeguards seem to be mostly of a procedural nature. For instance, the Prosecutor has no arbitrary power to establish substantial grounds that prosecution is not in the 'interests of justice', and his decision can be reviewed *proprio motu* by the Pre-Trial Chamber (Triffterer, at 1071–1072). Obviously this process requires a stringent assessment of facts and possibly an elaboration on a set of consistent and transparent criteria to specify the parameters of the elusive notions included in Article 53(2). This would be indispensable for keeping the complementarity arrangement intact and effective.

Thus, both commentaries highlight that both the CAT and ICC treaty frameworks develop a number of ways to deal with the problem of impunity and safe haven by providing the requisite arrangements of jurisdic-

tion, prosecution, approaches to complementarity, and lack of recognition of domestic acts which preclude prosecution, such as amnesties. Both instruments establish complex networks of rights and obligations of states to prosecute suspected perpetrators. Both instruments have leeway in terms of giving states a choice between prosecution and extradition, as under CAT, or prosecutorial discretion, as under the ICC Statute; although neither provides for arbitrary discretion. Precisely for the gaps in this process, such as the lack of universality of the ICC jurisdiction and the limited number of states parties to the Statute, the role of national prosecution and the exercise of universal jurisdiction by national courts should not be underestimated. In conceptual terms, the ICC jurisdiction is complementary in the same sense as the jurisdiction of states to exercise universal jurisdiction. Both jurisdictions serve as a remedy for the inaction of states with a territorial or nationality connection with a crime.

Given the complexity, yet lack of comprehensiveness, of the prosecution regimes examined above, some questions could be singled out for further analysis by international lawyers. First, the application of the law of state responsibility, as codified in the ILC's 2001 Articles, to the field covered by CAT and the ICC Statute, is worth examining and understanding. The fundamental question is the responsibility of the state which provides a safe haven for perpetrators of international crimes, and the remedies that can be due from such state, such as restitution. Furthermore, by analogy with the procedural and jurisdictional arrangements under the ICC Statute, is there any room for the argument that the torture suspect should not be extradited to the state which is not genuinely interested in prosecuting that specific crime of torture? What are the legal consequences if the suspect is extradited to the state but then is not properly prosecuted? To what extent would the extraditing state be obliged to follow up through diplomatic channels? What would be the ultimate remedy under the law of state responsibility if the relevant prosecution is not conducted? The answers to some of these

questions may well be inferable from the CAT or the ICC Statute, while other answers must be sought in general international law.

To conclude, both commentaries provide a landmark for examining the efforts and legal framework for avoiding impunity for the perpetrators of serious international crimes. If the efficiency of these legal frameworks is to be maintained, then the impermissibility of impunity has to be considered as part not only of international law, but also of the state of mind.

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