ANZSIL *Perspective*

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Editorial

WELCOME to our first edition of ANZSIL Perspective for 2022. It is a bumper edition with two fascinating articles on universal jurisdiction by Kiran Menon and Dr Melinda Rankin, and an instructive book review by Monique Cormier.

As Russia launches a military invasion of Ukraine and Ukraine has issued proceedings at the ICJ, now more than ever the spreading of expert knowledge of international law becomes vital and we hope we can encourage our members and readers to contribute to our next edition.

As ever, I look forward to receiving submissions from a diverse range of scholars who have previously contributed to ANZSIL Perspective, and welcoming new and emerging authors at every level of postgraduate scholarship and legal practice.

Felicity Gerry QC (Editor)

The deadline for the next ANZSIL *Perspective* is 18 April 2022. The current call for Perspectives and submission details and guidelines are on the ANZSIL *Perspective* webpage.

The views expressed in contributions to ANZSIL *Perspective* are those of the authors. Those views are not necessarily shared by ANZSIL or the Editors of *Perspective*.

Perspectives

On Some Recent Universal Jurisdiction Contexts and Cycles

By Kiran Menon

It could be argued that the progress of universal jurisdiction has been defined by cycles, in that it has had periods of relative dormancy, at least in terms of profile, and phases of resurgence. The mere claim that there can exist a 'universal criminal jurisdiction' albeit for certain grave and selected crimes, is a claim that evokes great political sensitivity and legal confusion.

Universal Jurisdiction in context

Maximo Langer surveyed 1051 universal jurisdiction related complaints received by public authorities in different nations and juxtaposed this with the numbers that went into trial and the nationality of the defendants. This revealed that in the case of 87 complaints brought against citizens of Rwanda, 11 went on to the trial stage. In contrast, of the 55 that were brought against nationals of the United States and 44 against Chinese nationals, a grand total of zero went onto the trial phase.

As a doctrine, universal jurisdiction on the one hand may not be dependent on the United Nations or multilateral frameworks for its implementation but, on the other hand, needs to tread the delicate space between acting upon intangible and sometimes imaginary consensus within the international community. Add to this State behaviour that has the potential to be volatile based on international relations incentives and we can start to see why the use of universal jurisdiction has the potential to possess a cyclical character. For this reason, any review of universal jurisdiction related developments that ignores the political components that revolve around it will most likely lead to incomplete conclusions.

For example, a closer look at the Spanish experience over the last three decades points to both the cyclical ups and downs that have been faced by universal jurisdiction as well as the impact of decisions of a non-judicial nature on the creation of these cycles. The 2014 decision by the Spanish parliament that significantly diluted the ability of the nations' courts to initiate such proceedings remains important in this context.

An extraordinary phase of revival

More recently, universal jurisdiction proceedings have undergone a renewal perhaps due to more domestic awareness, the arrival and presence of perpetrators in states with universal jurisdiction legislation, the establishment and empowerment of specialized units within national prosecution and investigation agencies, and partly as a response to the existence of stalemates and resource related issues in the international context.

Structural and focused investigations in Germany have led to multiple developments targeting perpetrators who were living in the country. Most notably, a judgment of the Higher Regional Court of Koblenz of 24 February 2021 convicted a Syrian official belonging to the Assad regime's secret service of crimes against humanity. This followed a judgment, from January 2021, delivered by the German Federal Court of Justice dealing with a former officer of the Afghan National Army who was in German territory, which held that State officials do not enjoy functional immunity under international law in the case of international crimes. The judgment while narrow in its construction has been described as having the potential to be pioneering. Another verdict from the Frankfurt

regional court, from November 2021, became the world's first verdict to hold that genocide was committed against the Yazidi people, while sentencing an Iraqi member of the Islamic State to life in jail.

Whether these proceedings will lead to the evidence collected being used for future evidence-sharing, the prosecution of higher officials, or will meet the threshold to invite political action, remains to be seen. In relation to this, if higher officials will in fact be targeted and tried, more hierarchies confronted, and politically high-cost proceedings both come into fruition and survive. All this should play a role in how this cycle of universal jurisdiction proceedings and its distinct, individual components will be judged.

In Sweden, the owner and chief executive of the Swedish company Lundin energy was charged by Swedish prosecutors of complicity in grave war crimes committed in Sudan. The company officials have been charged with asking the Sudanese government to secure an oil field, despite understanding or choosing to be indifferent to the fact that such securing would have had to be done by force and in violation of international humanitarian law. It may be contended that this is not a universal jurisdiction case, but it is still a useful example of how multinational and extraterritorial issues can be tried.

Other recent updates also reflect the distinct ability of universal jurisdiction proceedings to look backward and identify impunity gaps in relation to historical crimes and periods. This is a characteristic that has the capability to allow such proceedings to penetrate spaces and bring justice to issues that may escape the focus of international mechanisms. Time, resources and political wrangling can be managed.

The Jesuits massacre trial that was held in 2020 in Spain, in which an El-Salvadoran colonel was convicted for his role in the murder of six Jesuit priests and two women (some of whom were Spanish citizens) in November 1989 as well as the recent indictment by an Argentine judge of Rodolfo Martin Villa, a former minister of the Franco regime (on the basis of a complaint by an Argentinian relative of a Spanish victim) showcase the possibilities of universal jurisdiction. The fact that the latter indictment was made despite a letter sent to the judge by four former Spanish Prime Ministers, from across the political spectrum, discrediting the charges, point to political factors that may play a role as the trial progresses.

Universal Jurisdiction at the United Nations

In 2005, the Institute of International Law adopted a resolution during its Krakow session, on "Universal Criminal Jurisdiction with regard to the crimes of genocide, crimes against humanity and war crimes", which contained the following excerpt:

"the jurisdiction of States to prosecute crimes committed by non-nationals in the territory of another State must be governed by clear rules in order to ensure legal certainty and the reasonable exercise of that jurisdiction".

This may seem self-evident, but the reality is that 15 years later the 75th and 76th sessions of the United Nations General Assembly saw States expressing their frustration in relation to the lack of clarity as to what universal jurisdiction, in a true sense, signifies. Clarity would aid the understanding of how it is supposed to interact with international courts and tribunals and the principle of subsidiarity.

State expressions of concerns persist : The submission of the African Union in particular stated that "the exercise of universal jurisdiction cannot do away with the legal obligations provided in international Law without running the risk of contradicting the very international law upon which it

purports to rely" while concluding that it "is not against the use but it is against the misuse of the principle of Universal Jurisdiction".

Despite such objections, more nations are removing obstacles and incorporating universal jurisdiction enabling provisions into their domestic law, with Costa Rica even expanding on the traditional focus and scope of such provisions with a 2019 amendment bringing under the purview of the nation's universal jurisdiction enabling Act, "the responsibility of legal persons for domestic bribery, transnational bribery and other offences".

Next year we can anticipate a draft resolution recognizing this diversity of views on the role and purpose of universal jurisdiction from the 76th session working party.

Being universal in an unbalanced world

Gerry Simpson in his book, "Great Powers and Outlaw States Unequal Sovereigns in the International Legal Order" describes the international legal order as a product of the interaction between 3 languages: the language of sovereign equality, the language of great power prerogatives and the language of anti-pluralism.

In some ways, the cycles of universal jurisdiction interact with these languages and to some degree, any lack of clarity may merely be a reflection of universal jurisdiction's intrinsic, decentralized nature, and of having to be 'universal' in an unbalanced world.

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From Pinochet to Anwar R.

By Dr Melinda Rankin

Non state actors, particularly witnesses and victims of atrocity crimes, have long played a critical role in holding those most responsible for crimes against humanity to account.

In January this year, German judges in the Higher Regional Court of Koblenz found Anwar R., a former member of the Syrian secret service, guilty of crimes against humanity in the form of killing, torture, serious deprivation of liberty, rape and sexual assault in combination with murder in 27 cases. The first case of its kind against a senior leader of the Syrian government, Anwar R was given a life sentence for his role in the wide-spread and systematic oppression of the civilian opposition by Syrian government forces in the wake of the Arab Spring. It was important first step for Syrian witnesses and victims of atrocities since 2011. Yet, as the European Commission for Constitutional and Human Rights (ECCHR) stated in response to the judgement, '[t]his verdict is not only FOR the Syrians affected by the crimes of the Assad regime - but it is also a trial and verdict made possible BY them.'

Indeed, private non state actors, most particularly witnesses and victims of Syrian crimes, played a vital role adopting the practices ordinarily associated with the offices of international prosecutors to hold those most responsible to account. Since 2011, they have attempted to close the accountability gap when local and international efforts failed or remained unavailable. Groups such as the Commission for Justice and Accountability (CIJA) and Chief Investigator 1, a Syrian investigator (as well as a witness to the earliest crimes of the Syrian regime and founding member of the CIJA) collected material that links those most responsible to underlying crimes for the purposes of a future prosecution, including the trial of Anwar R. in Germany. Similarly, ECCHR, a Berlin based nongovernment organisation, played a central role working along-side hundreds of Syrians to identity witnesses and victims of core crimes; and also encouraged German courts to include sexual crimes in the case. All played a significant role in contributing to the case against Anwar R.

This begs the question: *should* private non state actors play a role in the accountability process, including adopting practices ordinarily associated with the offices of international prosecutors, such as collecting evidence and identifying witnesses, with the intention of informing a future criminal prosecution? There are four key reasons why I argue they should.

First and foremost, private non state actors, including witnesses and victims of core crimes, have historically played a central role in holding those most responsible for core international crimes to account. Juan Garcés, a witness to the earliest crimes of Pinochet, was in the Palace with President Salvador Allende on the day Pinochet's forces launched a US-backed military coup in Chile. Years later, Garcés submitted a private criminal and civil complaint to the Madrid courts, which triggered a formal investigation by the investigating judge. Garcés not only identified and located evidence that could link Pinochet to the underlying crimes, but also played a role identifying other witnesses and victims of the military junta, at one point representing around 4,000 victims in the case. Garcés relied upon a broader community of practitioners, witnesses and victims to develop the case against Pinochet, alleging the widespread, systematic oppression of civilian opposition, including the systematic use of torture. Nevertheless, Baltazar Garzón, the super-judge who issued the famous extradition request for Pinochet to the British authorities, stated that 'without a doubt, for me, the great architect of the Pinochet case was not Judge Garzón or not any other judge, initially, but it was

Juan Garcés'. Arguably, the Pinochet case is one of the most important criminal cases in international law today.

Similarly, Souleymane Guengueng, a witness and victim of core international crimes under Hissène Habré, played a critical part, working with other witnesses, victims, and local Chadian lawyers, as well as international groups such as Human Rights Watch (HWR), to identify important documents produced by the security services linking Habré to numerous underlying crimes, including widespread torture, and identifying key witnesses and victims. Guengueng also submitted a criminal complaint in the Dakar criminal courts, where Habré lived in exile, which years later led to the establishment of the Extraordinary African Chambers in Senegal, and the successful prosecution of Habré for crimes against humanity. It was the first time a former head of state had been prosecuted in Africa by a foreign court exercising universal jurisdiction.

Second, and following on the above, many domestic criminal legal systems are designed to facilitate the active involvement of private non state actors, including witnesses and victims of crime. As stated above, in the case of Pinochet and Habré, the law permitted private non state actors to submit a private criminal complaint for domestic (and international) crimes. For example, Juan Garcés and Souleymane Guengueng both submitted private criminal complaints to the Spanish and Senegalese (and Belgian) courts, respectively, which triggered formal criminal prosecutions by the investigating judges. In both instances, private non-stators were also permitted to be parties to the case. In the Extraordinary African Chambers, civil parties were permitted to play a role in the prosecution. Similarly, the landmark case in the British House of Lords permitted a number of private non-state actors and NGOs to be granted leave to provide oral submissions during the case. Aside from this, common law systems even permit *private* criminal prosecution. In other jurisdictions, such as Germany, private non state actors, including witnesses and victims of crimes can act as civil parties or auxiliary prosecutors in a criminal case. In the case against Anwar R. in the Higher Regional Court of Koblenz, witnesses and victims were represented as civil parties with the assistance of the ECCHR.

Third, important legal analytical perspectives recognise the role of private actors in law, including criminal law. For instance, in his seminal book, *The Concept of Law*, HLA Hart stated that that 'both private persons and officials are provided with authoritative criteria for identifying the primary rules of obligation.' Identifying the primary rules of domestic and international law is the first critical step to enforcing law, and one that was taken in the Pinochet and Habré firstly by non state actors. While a formal criminal decisions must be made by an 'official' judge, such as the judges in the Koblenz case against Anwar R, private non-state actors played a crucial role in the Pinochet, Habré and Anwar R. cases by not only identifying the sources of law, including domestic and international law, but also adopting the practices of the offices of international prosecutors, such as collecting evidence and identifying witnesses. It is this willingness to use the law, and indeed, international law, which is key.

In the past, the notion that private non-state actors, particularly witnesses and victims of crimes, were vital to the international criminal law process for those most responsible for core international crimes may have seemed fantastical or unsubstantiated. Moreover, there may have been a notion that private non state actors, particularly witnesses and victims of crimes, were somehow less reliable or legitimate actors in adopting the practices that uphold the international laws governing core international crimes, particularly crimes accepted and recognised as jus cogens of international law, such as torture. Yet the cases of Pinochet, Habré and Anwar R. illuminate how private non-state actors, most particularly witnesses and victims of core crimes, are not only legitimate and reliable actors in closing the accountability gap left by others, including state legal 'officials' in Syria, but play

a vital role in the maintenance of the international criminal law system and, with it, the contemporary international legal order.

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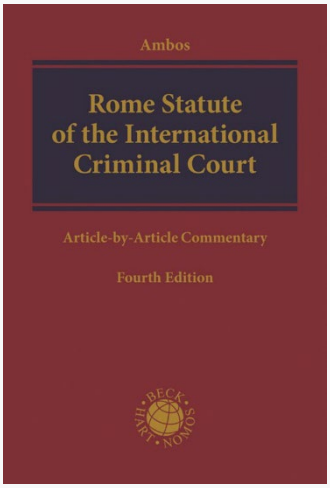
Book Review: Kai Ambos (ed), *Rome Statute of the International Criminal Court Article-by-Article Commentary* (4th ed, Beck/Hart, 2022)

By Monique Cormier



Anyone who has researched, studied or practised in the field of international criminal law will be familiar with Triffterer's Commentary on the Rome Statute. First published in 1999, the volume is now in its fourth edition, and is the first with Kai Ambos as sole editor. The third edition in 2016 was co-edited by Otto Triffterer and Ambos, and published soon after Triffterer's death. The fourth edition is again dedicated to Triffterer's memory as the 'founder and father' of the commentary.

The new edition comes six years after the third version, and after arguably the most 'active' era in the International Criminal Court's history. In the past five years there has been significant new case law, amendments to the rules of procedure and evidence, and the introduction of new crimes. The Commentary's coverage of these developments is evidenced by the fact that the already hefty tome is now 3064 pages.

Some of the key decisions handed down over the past few years involved legal issues or procedural questions that had not previously received consideration by the Court. For example, in 2016, Jean-Pierre Bemba Gombo became the first accused to be convicted via command responsibility and the first to be convicted of war crimes and crimes against humanity involving sexual violence. In 2018, Bemba also became the first defendant to have his conviction overturned on appeal. Also in 2016, the ICC handled its first prosecution for the war crime of intentionally directing attacks against religious and historic buildings, with Ahmad Al Faqi Al Mahdi becoming the first accused to plead guilty before the Court.

Other important decisions have contributed—for better or worse—to existing ICC jurisprudence. Whether or not the opening of an investigation into the situation in Afghanistan would serve the interests of justice in accordance with Article 53 of the Statute was resolved in the affirmative by the Appeals Chamber in 2020. The lengthy proceedings in the Omar Al Bashir litigation on head of state immunity and state party cooperation obligations came to an end in 2019 with the Appeals Chamber affirming Al Bashir is not immune from arrest and transfer to the ICC.

Such decisions provide rich source material for analysis and critique of the Rome Statute's application. This is reflected in the continuing evolution of the Commentary from its first iterations in which there was an emphasis on historical development and broader interpretation of the Statute, to a more practical resource providing important contemporary context and evaluation of current ICC jurisprudence and practice.

As a result of new ICC case law and, in some instances, new Commentary contributors, there have been some significant revisions or rewrites of certain chapters. Article 28, for example, on the 'responsibility of commanders and other superiors' has been shortened by reducing the lengthy summary of the historical development of the doctrine in favour of getting into the analysis of the elements of the provision. The ICC's *Bemba* decisions now feature prominently in the discussion. Conversely, Article 98 'cooperation with respect to waiver of immunity and consent to surrender' is an example of a chapter that has been significantly expanded for the new edition. Article 98 was the subject of much of the *Al Bashir* litigation, with the Appeals Chamber's reasoning in relation to immunity causing considerable controversy among academic commentators. Claus Kreβ, who is now listed as the sole author of this chapter, dives into the legal complexities and evaluates competing views of the immunity question.

One of the criticisms levelled at the previous edition was that there was not sufficient inclusion of relevant state practice in the Commentary. It was contended that focusing on the law and practice of the ICC and other international criminal tribunals meant that judgments and decisions of domestic courts were given short shrift. While it is true that Article 21 provides that the Court shall apply customary international law as one of the sources of applicable law, the Commentary itself is not intended to be a compendium of international criminal law custom. Given the increasing volume of decisions generated by the ICC, it makes sense that the Court's jurisprudence should now be at the core of the Commentary.

An editorial decision that demonstrates this tighter focus on ICC practice can be seen in a note at the end of the literature section in the chapter on Article 7: 'the former items 6-9 (Decisions of the ICTY and ICTR, Decisions of national courts, national legislation) have not been continued and can be consulted in the previous edition at pp. 149-151'. Condensing and pruning material is also a smart and necessary move to keep the length of the Commentary within a single, manageable volume, while ensuring previous editions are not automatically obsolete. This will likely become more common practice in future editions of the Commentary.

As well as providing an update of the ICC's case law, one of the objectives of the fourth edition is 'to provide clarity and structure of presentation as well as greater consistency'. The volume has been reformatted to improve readability – headings, paragraph spacing and the format of quotations have undergone small, but useful, changes. A welcome addition is the inclusion of the well-organised table of cases at the end of the volume.

There are still some minor inconsistencies of presentation among chapters, notably the liberal use of bolded text in some chapters and its absence in others. A more substantial inconsistency to be remedied for the next edition should be to refocus the literature lists at the start of each chapter. Some chapters appear to be aspiring for completeness rather than selectivity; other chapters barely scratch the surface of the important literature on the topic. See, for example, the clear disjunction between the five sources listed for Article 6 Genocide, and the many hundreds listed for Article 98.

No doubt this new edition of the Commentary aims to be the starting point for anyone conducting research relating to the Rome Statute. At RRP A$995, however, it is a significant investment, indicative

of a wider concern that access to important international law texts is limited by cost. For anyone who does manage to get their hands on a copy, they will be rewarded with finely-tuned, well-researched and up-to-date commentary on the Rome Statute.

Monique Cormier is a Senior Lecturer at Monash University Faculty of Law. Her main research interests are jurisdiction in international criminal law and legal issues relating to nuclear non-proliferation. Recent publications include The Jurisdiction of the International Criminal Court over Nationals of Non-States Parties (Cambridge University Press, 2020) and 'Can Australia Join the Nuclear Ban Treaty without Undermining ANZUS?' (co-authored with Anna Hood, Melbourne University Law Review, 2020).