CHAPTER 11

Prosecuting Crimes against Humanity in Domestic Courts

Affirming that the most serious crimes of international concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation

Introduction

The above paragraph of the Preamble to the ICC Statute raises, but does not resolve, the many difficult issues involved when state courts prosecute ‘the most serious crimes of international concern’. This includes universal jurisdiction, immunities and the alleged duty to extradite or prosecute. These issues are particularly difficult in the context of crimes against humanity, which – unlike genocide, war crimes and torture – is not governed by an applicable treaty. While many of the issues are often addressed in relation to international crimes generally, this Chapter considers these issues specifically in relation to crimes against humanity.

This chapter examines the issue of state courts prosecuting crimes against humanity in three parts. First, it considers the alleged right under customary international law to assert universal jurisdiction over crimes against humanity. Secondly, it considers the application of immunities. Thirdly, it explores the alleged duty to prosecute all those reasonably suspected of committing crimes against humanity (including the role played by amnesties).

Those who claim that there exists both such a right and such a duty to prosecute international crimes frequently ground their case on the need to ensure that such crimes ‘must not go unpunished’. As Judges Higgins, Kooijmans and

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1 Rome Statute of the International Criminal Court (‘ICC Statute’), Preamble.
2 ICC Statute, Preamble.
Buergenthal put it in their Joint Separate Opinion in the *Arrest Warrant Case*, ‘the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international tribunals, treaty obligations and national courts all have their role to play.’

There exists a paradox in the prosecution of crimes against humanity before state courts. On the one hand, the very reason for the international concern that perpetrators of crimes against humanity may go unpunished will frequently arise because of state involvement or acquiescence in the crimes in question – hence the need to ensure effective measures are taken by state courts outside the place of the offence. On the other hand, it is this very situation which makes it practically difficult for state courts to prosecute. States – particularly those with no link to the perpetrator or the victim of the crime – are understandably reluctant to launch an extraterritorial prosecution of a foreign state official because of the tension this may cause to relations between the two countries.

It was to address this problem that the ICC was regarded as necessary. Concern for state sovereignty also led the drafters of the ICC Statute to depart from the model of the supremacy of international tribunals seen in the ad hoc Tribunals to the model of complementarity. Now that the ICC is operating, where does that leave state prosecutions? Should they be emboldened or should they leave the work to be done by international institutions? This chapter explores this question in the context of crimes against humanity.

## Extraterritorial Jurisdiction over Crimes against Humanity

### 2.1 Introduction

Extraterritorial or universal jurisdiction over serious international crimes, such as crimes against humanity, continues to arouse a great deal of interest.

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