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Universal Jurisdiction: Questions of Blind Universality

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I want to suggest, at the outset, that we must approach all claims of universality with caution and trepidation. There can be little doubt that visions of universality and predestination have been intertwined throughout modern history, and have been deployed as the linchpin for advancing narrow, sectarian, and exclusionary ideas and practices. At the purely theoretical level, therefore, we are chastised to look not once but twice, and again at universalizing creeds, messages, ideas, and phenomena. This is not to suggest that universality is always wrong-headed, or devious, but it is rather to assume that universality is not a natural phenomenon. In other words, universality is always constructed by an interest for a specific purpose, with a definite intent.

Secondly, I want to suggest that all truths are local, contextual, cultural, historical, and time-bound. Again, this is not to say that local truths cannot become universal truths. They can. But the question is how one gets there. If we do not understand this basic admonition, we risk repeating the colossal inhumanities and incalculable mistakes which were wrought by the evils of slavery (in pursuit of the universalization of the market); Christianity and Islam (in the quest for the spiritual conquest of non-European and non-Arabic peoples and the destruction of their cosmologies; and colonization (in search of the imposition of commerce and Eurocentrism).

The question, therefore, is how local truths are legitimately transformed into universal creeds what value judgements are made, who makes those judgements, how they are made, and for what purpose. Ultimately, we must ask ourselves what good is intended by universal creeds and whether they redound to the benefits of peoples everywhere. For me these questions are non-negotiable because they must be answered before we can declare a particular creed universal, in effect a glimpse of eternity, or an inflexible truth. This is crucial because once we confer that status to a creed or truth, then that truth becomes trans-historical, universally valid and urgent. The failure to comply with it denotes a fundamental breach of civilization, for which the direst consequences might be borne by the violator.

It is in this context that we have to interrogate recent international legal developments that seek to expand the purview of universal jurisdiction to cover particular international crimes. The idea that selected human scoundrels of the worst kind are those who commit the most barbaric atrocities such as genocide, slavery, crimes against humanity, and war crimes like colonialists, modern-day imperialists, Adolph Hitler, Slobodan Milosevic, Pinochet, Idi Amin, the Bothas of South Africa, and so many others must be brought before a tribunal to answer for their abominations is an open and shut case. On that there is no debate. They must answer for their deviant conduct. That is not the question; the question is rather the range of individuals who must be brought to book, by whom and where or in what forum they must be brought to book, the relationship between the judicial process, the delivery of justice to victims and the processes of national and societal reconstruction and development.

We must know, for example, what we seek with the application of a criminal process to universal jurisdiction. We must ask ourselves the purposes that such a process will serve. There are three generally agreed reasons for judicial adjudication. The first is the vindication of the rule of law by providing justice in an individual case, that is looking backwards to correct an historical wrong to an individual victim. This is the most basic assumption that is made about adjudication. The second is protecting rights through behavior modification, that is, the salutary effect of prosecutions and convictions as a deterrent or modifier of the behavior of would-be violators. Finally, it is to expound the law, to interpret and elucidate it to create a jurisprudence from which conduct can be judged, regulated, and refined.

Out of these three purposes of adjudication, the first is perhaps the most noble. But I regret to say that it is also the most impossible in cases of mass atrocities, particularly in the context of the proposed International Criminal Court (ICC) or the application of universal jurisdiction by a single international forum like the International Criminal Tribunal for

the Former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR). In these cases, international tribunals are constrained by politics, space, time, resources, and personnel and as such they must be careful about which cases they hear and for what purposes.

International tribunals certainly should prosecute the chief authors of the atrocities, the heads of state, senior officials, and their ilk. They may also hear a case or two involving a peasant participant or some other officially or socially insignificant participant in the atrocities. But they would be wasting their time to hear too many of such cases because they have little to no value added. The thing to recognize here is that mass atrocities are always committed with the acquiescence or active participation of common, normal, and ordinary people and it is impossible to prosecute a whole society. It is doubtful. Could one have prosecuted the entire German population? Such massive prosecutions would have implied that Germans have a genetic and psychotic pathology for committing genocide.

What this means is that international prosecutions must aim at making examples of the authors of atrocities, not doing individual justice, for that is impossible. This in turn means that such judicial processes are best used to fulfil the last two purposes of adjudication: behavior modification and deterrence, and law-making. Ultimately, such law, once made, must be applied by domestic tribunals which are in a better position to dispense individual justice, and which are more likely to be organically connected to national reconstruction and reconciliation processes. If an international tribunal strays from this narrow scope, it will orbit in space, and become an instrument for only pleasing lawyers and a seemingly fatigued Western world. So we must be clear that universal jurisdiction applied by international tribunals does not displace domestic legal processes, that it in fact should strengthen them, and allow them to work to punish violators.

Finally, allow me to return to my admonition against blind universality. Africa, and the rest of the non-Western world, must be wary of the expansion of the scope of universal jurisdiction if its effect will be to simply go after suspects the West deems to be demons it must get rid of. We should not support universal jurisdiction that has in it an in-built program of selectivity and favoritism for Western Europeans and North Americans, and their fellow travelers. Secondly, most non-Western societies are in some sort of transition (political, economic, social) and we should therefore relate such jurisdiction to these transitions to make sure that we are reconstructing society, not simply putting on legal spectacles that dazzle but have no long-lasting effects. In this quest to end the most heinous of crimes, we as Africans must be concerned with fairness, the political relevance of judicial processes, and the need to reconstruct and develop our societies.