

OBSERVATIONS OF THE AFRICAN UNION ON THE SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION

I. INTRODUCTION

1. The African Union (“AU”) has long recognized the principle of universal jurisdiction as an important legal tool available to States in the ongoing fight against impunity for atrocity crimes such as war crimes, crimes against humanity and genocide, and which is in alignment with Article 4(h) of the Constitutive Act of the African Union, - reserves the right of the African Union to intervene in a Member States in respect of grave circumstances.
2. The AU’s commitment to the principle is further illustrated in its decisions over the years, including the numerous Decisions¹ by the AU Assembly of Heads of State and Government on the application of universal jurisdiction, the adoption of the *African Model National Law on Universal Jurisdiction over International Crimes (“AU Model Law”)*,² which called on African States to domesticate the principle in their national legal systems, as well as the push from African States at the global level, for the adoption of United Nations General Assembly (“UNGA”) Resolutions to call for the development of clear guidelines on the scope, application and limitations to the assertion of the principle of universal jurisdiction in conformity with existing international law.³
3. A practical application of Universal Jurisdiction, had taken place in Africa, with the Hissene Habre Case⁴. The trial which the African Union mandated the Republic of Senegal “to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial”⁵. The Application of Universal Jurisdiction, to crimes to which the AU, “observe[s] that, according to the terms of Articles 3 (h), 4 (h) and 4 (o) of the

¹ AU Assembly Decisions: Assembly/Dec.199(XI); Assembly/Dec.213(XII); Assembly/Dec.233(XIII); Assembly/Dec.292(XV); and Assembly/Dec.335(XVI)

² “Decision on the African Union Model National Law on Universal Jurisdiction Over International Crimes”, Decision EX.CL/Dec.708 (XXI) adopted by the 21st Ordinary Session of the Executive Council of the African Union held in July 2012 in Addis Ababa.

³ For example, United Nations General Assembly Resolution 64/117 (A/RES/64/117) entitled “Scope and Application of the Principle of Universal Jurisdiction”, adopted at its 64th Session, 16 December 2009, originated at the request of the Republic of Tanzania on behalf of the African Group (A/63/237/Rev.1)

⁴ AU Decisions on Hissene Habre Case: Assembly AU DEC 401 (XVIII); Assembly AU Dec 615 (XXVII); Assembly AU DEC 546 (XXIV); Assembly AU DEC 401 (XVIII); Assembly AU DEC 371 (XVII); Assembly AU DEC 340 (XVI); Assembly AU DEC 297 (XV); Assembly AU DEC 272 (XIV); Assembly AU DEC 246 (XIII); Assembly AU DEC 240 (XII); Assembly AU DEC 157 (VIII); Assembly AU DEC 127 (VII); Assembly AU DEC 103 (VI)

⁴Assembly/AU/ Dec.127(VII)

⁵Assembly/AU/ Dec.127(VII)

*Constitutive Act of the African Union [...] fall within the competence of the African Union*⁶. In view of the application of Universal Jurisdiction, the decision does not in any way take away from the State where the crime was committed to prosecute the crime.

4. However, whilst affirming universal jurisdiction, the AU has also taken cognizance of the political use and abuse of the principle by some States against African leaders in particular. Essentially, African States have consistently echoed concerns with the selective and political manner in which universal jurisdiction is exercised by non-African foreign States against African State Officials, and which has the potential to undermine the peace efforts and stability on the Continent⁷ as well as other existing international law principles such as the principle of sovereign equality of State.
5. The AU notes that the issue of universal jurisdiction is complex and multidimensional and as such, it is premised on functionality and therefore requires a holistic approach in attempting to define its scope and application or in developing a sound legal framework on the issue to guide States in its exercise.

II. ISSUES OF CONCERN TO THE AFRICAN UNION

6. While individual AU Member States may express diverse views on the existence and applicability of universal jurisdiction in their respective national laws, for the AU as an organisation, the considerations in defining the scope and application of universal jurisdiction are as elaborated in its Model Law, noting in particular the following core aspects:
 - i. Priority of the territorial State and complementarity; and
 - ii. Immunity of sitting heads of states and state officials.

III. PRIORITY OF THE TERRITORIAL STATE AND COMPLEMENTARITY

⁶ Assembly/AU/ Dec.127(VII)

⁷ Decision Assembly/Dec.199(XI) on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (2008).

7. Article 4 of the AU Model Law states:

1) *“The Court shall have 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.*

2) *In exercising jurisdiction under this law, a Court shall accord priority to the Court of the State in whose territory the crime is alleged to have been committed, provided that the State is willing and able to prosecute.”*

8. Based on the above provision, the AU suggests that in exercising universal jurisdiction, the State in whose territory the crime is alleged to have been committed should have priority to prosecute over other States given that that territorial State is ultimately most affected by the crime, evidence is easier to be gathered and victims are close to witness the trial. In this regard, it is only in cases where the territorial State is unwilling and/or unable to prosecute that another State can proceed with prosecution. This approach is in line with the international principle of complementarity and serves to protect the sovereignty of States while ensuring the delivery of justice and accountability.

IV. IMMUNITY OF SITTING HEADS OF STATES AND STATE OFFICIALS

9. Article 3(f) lists as one of the objectives of the Model Law, to *“give effect to immunities enjoyed by foreign State officials under international law”*, while Article 16 provides that *“the jurisdiction provided under Article 4 of this law shall apply subject to any national or international law on immunities.”*

10. This provision serves to ensure that the existence of universal jurisdiction in respect of a crime does not disentitle State officials, including Heads of State, from their enjoyment of the immunity under customary international law. Thus, the fact that a foreign State can apply universal jurisdiction does not bar an indicted official of another State from citing immunity to oppose the exercise of that jurisdiction, and where the existence of such immunity is established, the court of the foreign State must respect it and cease to pursue prosecution in respect of that official.

V. RETAINING DISCUSSIONS IN THE SIXTH COMMITTEE

11. Although discussions on universal jurisdiction within the Sixth Committee have yielded little results over the past several years, the recent Decision of the of the African Union Heads of States emphasised the African Position for discussions on universal jurisdiction, within the UN, to be retained in the Sixth Committee rather than to refer it to the International Law Commission.⁸ While the topic is to some extent undoubtedly technical, it is more so political and any such theoretical exercise must be premised on the outcomes of a political discourse between States that is properly concluded to provide a basis for subsequent legal and systematic discussions.

VI. CONCLUSION

12. Certainly, the premise for determining the scope and application of universal jurisdiction should remain the protection of fundamental rights by ensuring justice and accountability for the most heinous crimes through the adoption of collective State measures, however, the determination of the scope and application of the principle should be done in equal consideration of all other legal obligations which form the basis for international relations, such as the customary international law obligation to respect the immunity of sitting Heads of State and Government and other senior State officials, from foreign criminal jurisdiction. In other words, 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 as well as the potential to endanger international relations, order, peace and security.

13. Finally, the process of defining the scope and application of the principle should be State led to ensure that the intended objectives are achieved while also putting in place certain parameters to guard against the abuse of the principle by some States. The African Union is not against the use but it is against the misuse of the principle of Universal Jurisdiction.

⁸ *“Decision on the International Criminal Court”*, Decision Assembly/AU/Dec.789(XXXIII) adopted by the 32nd Ordinary Session of the African Union Assembly of Heads of State and Government in February 2020, para. 11