

A Case for Universal Jurisdiction in the Face.....

**A Case for Universal Jurisdiction in the Face of Resistance from Africa:
A Critical Overview of the United Nations General Assembly Sixth
Committee Debate on Universal Jurisdiction Principle**

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Abstract

The aim of this paper is to critically review the debate on the universal jurisdiction principle and makes a case for the enhancement and continuous adoption of universal jurisdiction for international crimes with particular concern on the resistance from Africa. The researcher uses descriptive and prescriptive analysis while relying on library-based or desktop research methodology to achieve the aim of this paper. Importantly, this study contributes to knowledge as it recommends the need to continue the application of universal jurisdiction in the prosecution of international crimes irrespective of the elite's sponsored resistance against the principle in Africa.

Keywords: Africa, Universal Jurisdiction, International criminal law, war crimes, United Nations,

I. Introduction

In most cases, the principles of international criminal law mandate domestic courts to limit its jurisdictional scope to the prosecution and determination of criminal liability on those crimes that have taken place within the territorial jurisdiction of the domestic court or in cases where the alleged offender(s) or/and victim(s) is/are citizens of the country.¹ However, the principle of universal jurisdiction under international criminal law has been adopted as an exception to the above rule.² Remarkably, the principle of universal jurisdiction allows any state to prosecute and its courts to entertain the prosecution of international crimes notwithstanding that the state does not have any nexus linking it to the crime, the alleged offender(s) or the victim(s) of the crime.³ Since the introduction of the principle of universal jurisdiction, there have been proponents and opponents of the

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¹ M. Politi. *The Rome statute of the International Criminal Court: A challenge to impunity*. (London: Routledge, 2017).

² R. I. Rotberg, (ed.). *Mass atrocity crimes: Preventing future outrages*. (Brooking Institution Press, 2010).

³ Roger O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2(3) *Journal of International Criminal Justice* 735.

continuation of reliance on the principle in prosecution of international law crimes such as genocide, war crimes, and crimes against humanity.⁴

Principle of universal jurisdiction allows for the investigation and prosecution of individuals by national authorities, for offences classed as international crimes.⁵ It does not matter whether or not the crime was actually committed in different territorial jurisdiction.⁶ This implies that Mexican government could decide and actually prosecute Belgian nationals for crimes committed in Kosovo and Czech Republic. The principle upon which universal jurisdiction is made is that certain crimes have exceptional effects that they have significant effect on the common interest and well-being of the international community as an entity.⁷ Thus, for crimes categorized as international crimes such as genocide, crimes against humanity, war crimes, and torture; the country relying on universal jurisdiction to prosecute does not have to establish that the alleged offender(s) or victim(s) is/are her citizen(s).⁸ Also, such country does not need to show that the crime had in any way harmed her national interest as a sovereign state. This infers that a state exercising the principle of universal jurisdiction does not need to show that there is a nexus linking itself to the crime committed.⁹

The sole condition on which the principle of universal jurisdiction is exercised is not predicated on the fundamental traditional doctrine of national jurisdiction, neither does it involves the *locus criminis* or national interests.¹⁰ What matters is the nature of the crime. There has been increase the numbers of cases filed before domestic/national courts relying on the principle of universal jurisdiction.¹¹ The increase in number could be associated to an increase in the interest of international community to end impunity by holding individuals or groups responsible for serious international crimes accountable for their acts.¹²

⁴ Bruce Broomhall, Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law, 35 NEW ENG. L. REV. 399, 401–02 (2001).

⁵ *ibid*

⁶ Peru, The Scope and Application of the Principle of Universal Jurisdiction, (d) (May 18, 2010), available at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Peru_E.pdf.

⁷ M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', (2004) 42 VA. Journal of International Law, 81-82.

⁸ David Stewart, 'Some Perspectives on Universal Jurisdiction', (2008) 102 AM. SOC. INT'L L. PROC. 404-406.

⁹ *ibid*

¹⁰ Kenneth Roth, 'The Case for Universal Jurisdiction', (2001) 80 FOREIGN AFF. 150.

¹¹ Amnesty International, 'Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction'. (2009) Amnesty International, 7, 33–34.

¹² Amnesty International (n11)

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In cases where national courts had entertained cases on the basis of universal jurisdiction, the ratio relied on by the court is that every sovereign and independent State has a right under International Law to prosecute war criminals in its custody and the nationality of the victim or that of the offender and the *locus criminis*.¹³ This ratio was in accordance with the aim of ameliorating the horrors of war, ending impunity and establishing rules that sanction criminals without regard to borders. A succinct example is the case against a Chilean dictator (Augusto Pinochet) in October 1998.¹⁴ In the said case, Spanish magistrate had issued an arrest warrant against Pinochet and successfully secured Pinochet's arrest in the UK. Subsequently, a Belgian court held that the basis for the prosecution of Augusto Pinochet and his indictment for crimes against humanity was Universal Jurisdiction.¹⁵

Over the years, it can be said that universal jurisdiction has contributed towards eradicating impunity, by making provision for an approach that could be applied in addressing international crimes, particularly in cases where the state directly affected is unable to prosecute, cannot prosecute or negate to prosecute.¹⁶ However, the foregoing does not vitiate the claims that there have been certain complications surrounding the exercise, scope and practice of universal jurisdiction.¹⁷ The principle of universal jurisdiction is one that is both contested and advocated by different parties.¹⁸ Amongst the grievances against the exercise of the principle; there appears to be a concerted resistance amongst leaders from Africa against the principle of universal jurisdiction.¹⁹ While it may be argued that the principle has aided in punishing international criminals, some critics have clamored for the abandonment of the principle citing that it is being exploited for political ends.²⁰ Particularly,

¹³ Tanaz Moghadam, 'Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hiss'ene Habr'e', (2008) 39 *Columbian Human Rights Law Review* 471, 473-74.

¹⁴ Human Right Watch, 'The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad', (2011) Human Rights Watch, <http://www.hrw.org/legacy/campaigns/chile98/precedent.htm>

¹⁵ *ibid*

¹⁶ Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, (2003) 1 *Journal International Criminal Justice* 589, 595.

¹⁷ *ibid*

¹⁸ Roger O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction', (2009) 7 *Journal of International Criminal Justice* 811-816.

¹⁹ Duson, N. A. & Amadi, F. C. 'The Principle of Universal Jurisdiction in International Law: An Exceptional measure of Criminal justice'. (2020) 2(2) *Port Harcourt Law Journal*, 60-83; African Union Panel of the Wise, 'Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity' The African Union Series, New York: International Peace Institute, February 2013.

²⁰ B. Olugbuo, 'Law and Politics at the International Criminal Court' (2015) 1 *Open Democracy*.

African states have argued that the principle is being used disproportionately against Africa and Africans.²¹

Since the introduction of the principle of universal jurisdiction, there have been proponents and opponents of the continuation of reliance on the principle in prosecution of international law crimes such as genocide, war crimes, and crimes against humanity.²² Though series of debates and consultations have been held concerning the principle; the aim of this paper is to critically review the debate on universal jurisdiction principle at the United Nations General Assembly Sixth Committee, and makes a case for the enhancement and continuous adoption of universal jurisdiction for international crimes with particular concern on the resistance from Africa. Since this study aims to contribute to the continuity and consistent certainty of law while relying on existing information on the topic, the researcher makes use of descriptive and prescriptive analysis while relying on library-based or desktop research methodology to achieve the aim of this paper. The method applied in this paper allows the researcher to source data and information from existing literatures, thereby giving the researcher the opportunity to consult larger sources of data and information.²³

II. Rationale for Adoption of Universal Jurisdiction Principle

Under this section, it is imperative to have an idea of the origin of universal jurisdiction as a principle of international law. The crime of piracy is seen as the original crime that was made subject to universal jurisdiction.²⁴ It was considered that pirates are involved in activities that have devastating effects on mankind, therefore, piracy is a crime that all states were allowed to prosecute.²⁵ To substantiate the fact above, piracy as a crime was mostly committed on and within high seas – mostly outside the territory of the jurisdiction of a particular state.²⁶ It was on the

²¹ C. B. Murungu, 'Immunity of state officials and prosecution of international crimes in Africa' (Doctoral Thesis, University of Pretoria 2011).

²² M. Koskeniemi, 'The Politics of International Law-20 years later', (2009) 20(1) *European Journal of International Law*, 7-19

²³ Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007), 6; A. Abd-Razak, 'Understanding Legal Research' (2011) 204 *Integration and Dissemination* 19, 21.

²⁴ Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', (2004) 45 *Harvard International Law Journal*, 183-184.

²⁵ Florian Jessberger, *Universal Jurisdiction*, in A. Cassese (ed.), *Oxford Companion to International Criminal Justice* 555, (2009)

²⁶ Madeline H. Morris, 'Universal Jurisdiction in a Divided World: Conference Remarks', (2001) 35 *New England Law Review*. 342-45;

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foregoing basis that the practice was adopted allowing all states to prosecute the crime of piracy.²⁷

With the growth in jurisprudential system and international law, it was established that there are crimes which are against all humankind whereby their effects transcend the interest of a particular state.²⁸ It was on the above basis that universal jurisdiction was formed to combat those crimes with devastating effects against humanity and against all states.²⁹ The most cited events marking the recognition of the principle of universal jurisdiction are the criminal trials that followed the aftermath of World War II. Therefore, though the principle of universal jurisdiction was originally applied as a means of holding pirates and slave traders/raiders accountable for their atrocities; universal jurisdiction as an international criminal law principle presently extends to all crimes that serious violates or abuse human rights.³⁰

One could argue that national courts or national jurisdictions are most preferred in obtaining justice for persons who are victimized as a result of severe violations of human rights and dignity. However, there are core factors that justify the application of the principle of universal jurisdiction; the core factors are:

a) Possibility of allowing victims of international crimes to access/obtain justice:

Often, the victims of international crimes are unable to access national courts for various reasons. Some of such reasons are not limited to “domestic immunities or self-imposed amnesties and de facto impunity and security risks, especially when the crimes were state-sponsored”.³¹ For instance, Augusto Pinochet (former Chilean dictator) and other Chilean State’s official were protected under a domestic amnesty law in Chile.³² However, owing to the existence of the principle of universal jurisdiction, a case was successfully filed against Pinochet and the other officials in

²⁷ Yana Shy Kraytman, ‘Universal Jurisdiction – Historical Roots and Modern Implications’, (2003) 2 BSIS Journal of International Study,

²⁸ *ibid*

²⁹ Charles Chernor Jalloh, ‘Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction’, (2010) 21 (1) Criminal Law F. 3–4.

³⁰ M. R. Damaska, ‘What is the point of international criminal justice?’ (2008) 83(1) Chicago Kent Law Review.

³¹ Roseanne Van Alebeek, ‘The Immunity of States and Their Officials’ (2008) International Criminal Law and International Human

Rights Law; U.N. Secretariat, Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/596 (Mar. 31, 2008)

³² Lorna McGregor, ‘Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty’, (2007) 18 European Journal International Law 903-911.

Spain. Thus, the domestic amnesty law was not able to stop the trials and prosecution.³³

b) The application of Universal jurisdiction aids in minimizing the level of impunity:

It is possible for victims of international crimes to access/obtain justice via international tribunals and courts including the International Criminal Court (ICC).³⁴ However, there is a restriction on the mandates of these courts as they are constrained to specific territories, conflicts, or timeframe. For instance, a Special Court was set up for the conflict in Sierra Leone,³⁵ an ad-hoc tribunal for the conflict in Yugoslavia and another ad-hoc tribunal for the Rwandan conflict.³⁶ Notably, the special court as well as the ad-hoc tribunals, were specifically limited to specific conflict; it means that their mandates are constrained to the cases and conflicts upon which they were established.³⁷ With respect to the ICC, there is a limitation to the period within which ICC may prosecute a case. The enabling law that established ICC limited its jurisdiction to crimes that were committed after the 1st of July, 2002. This implies that the ICC cannot try crimes that were committed prior to the stated date.³⁸ These limitations as adumbrated in the foregoing do not apply in the exercise of universal jurisdiction.

Also, there is a probability that ICC, the special courts and other international courts and tribunals do not possess adequate resources to engage in the investigation or prosecution of all alleged offenders.³⁹ It is in view of the foregoing constraints that the Prosecutor of the ICC opined that unless all appropriate methods and channels are adopted by national authorities, the international community, and the

³³ Ex parte Pinochet Ugarte (No. 3), [2000] 1 AC 147 (H.L.) (Lord Browne-Wilkinson) (emphasized that torture is not a state act to warrant state-imposed immunity);

³⁴ Du Plessis, Max, Tiyanjana Maluwa and Annie O'Reilly. Africa and the International Criminal Court. (London, Chatham House, 2013). Available at https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0713pp_iccafrica.pdf [Accessed 13 September, 2022].

³⁵ Charles Chernor Jalloh (ed), The Sierra Leone Special Court and its Legacy: the impact for Africa and international criminal law (CUP 2014).

³⁶ Matthew Saul, 'Local Ownership of the International Criminal Tribunal for Rwanda: Restorative and Retributive Effects' (2012) 12 International Criminal Law Review, 427-437.

³⁷ Lydia A. Nkansah, 'Justice Within the Arrangement of the Special Court for Sierra Leone Versus Local Perception of Justice: a Contradiction or Harmonious?' (2014) 22(1) African Journal of International and Comparative Law 103; Charles Chernor Jalloh, 'Special Court for Sierra Leone: Achieving Justice?' (2011) 32 Michigan Journal of International Law 395;

³⁸ Catherine, Gegout. 'The International Criminal Court: Limits, potential and conditions for the promotion of justice and peace'. (2013) 34(5) Third World Quarterly, 800-818.

³⁹ N Roht-Arriaza, 'Just a "bubble"? Perspectives on the enforcement of international criminal law by national courts' (2013) 11 Journal of International Criminal Justice.

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ICC collaborating to ensure justice against perpetrators of international crimes, there will be a risk of an increasing impunity gap.⁴⁰ Thus, universal jurisdiction is considered as being fundamental in bridging the impunity gap as the principle complement traditional national jurisdictions, international community and international justice system in ensuring justice for victims of international crimes.⁴¹ The relevance and importance of the principle of universal jurisdiction is reemphasized with the resolutions of the UN General Assembly in 2009 and 2011 to continue discussing the principle in future session while aiming for the application of the principle in a manner that is consistent with international criminal law.⁴²

III. Scope of Universal Jurisdiction

Presently, significant numbers of states have actually ratified some treaties that embed the principle of Universal Jurisdiction.⁴³ Some good examples of such treaties are not limited to⁴⁴ “International Convention on Suppression and Punishment of the Crime of Apartheid 1973”, “Additional Protocols to Geneva Convention 1977”, “Convention on the Law of the Sea 1982”, “Convention Against Torture and Other Cruel Inhuman And Degrading Treatment Or Punishment 1984”.⁴⁵ Other treaties have also been enacted in line with universal jurisdiction following the September 11th terrorist attack in the USA. Since the turn of the millennium, there is an increase in the numbers of countries that have introduced the principle of Universal jurisdiction in their respective laws on genocide, war crimes, torture, and crimes against humanity.⁴⁶ For instance the German government adopted and enacted the “Code of Crimes against International law”; in 2002, the South African government adopted the “Implementation of Rome Statute on International Criminal Court Act.”⁴⁷

Notwithstanding the fact that universal jurisdiction enjoys a wide legitimacy in principle, the crimes to which the principle applies, have been the subject of series

⁴⁰ Gegout (n38)

⁴¹ *ibid*

⁴² P. Wegner. ‘International Criminal Law and Deterrence – A Pointless Endeavour?’ (Justice in Conflict, 25 October 2011) <<https://justiceinconflict.org/2011/10/25/internationalcriminal-law-and-deterrence—a-pointless-endeavour/>>

⁴³ van der Merwa, H. J. & Kemp, G. *International Criminal Justice in Africa: Issues, Challenges and Prospects*. (Nairobi: Strathmore University Press, 2016).

⁴⁴ Amnesty International, ‘Universal Jurisdiction: A Preliminary Survey of Legislation around the World – 2012 Update’ (Amnesty International, 9 October 2012) <<https://www.amnesty.org/en/documents/ior53/019/2012/en/>>

⁴⁵ *Suresh v. Canada*, [2002] 1 S.C.R. 3, 45 (Can.);

⁴⁶ Henry A. Kissinger, ‘The Pitfalls of Universal Jurisdiction’, (2001) 80 *Foreign Affairs*, 86, 90–91, 96;

⁴⁷ K. Lantz, ‘Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?’ (2012) 143(1) *Geo. Wash. International Law Review*, 419-468, published by Schulich School of Law, Dalhousie University: Schulich Law Scholars.

of debates and arguments.⁴⁸ The fact is that the crimes which are subject to universal jurisdiction are regulated under the customary international law.⁴⁹ What is the implication? The implication is that it does not matter if the specific treaty state has been ratified by a state or a state has been able to incorporate the crimes into its national law.⁵⁰

The legal theorists have a common agreement that “piracy, slavery, war crimes, genocide, crimes against humanity, apartheid, and torture” are the crimes that subject to universal jurisdiction. There are some proponents positing that offences related to terrorism acts should be recognised as crimes that are subject to universal jurisdiction. However, such proposal has not enjoyed wide acceptance, perhaps owing to the fact that there have not been universally accepted definition of ‘terrorism’.⁵¹ Though some studies claim that there are unanimous views with respect to the crimes to which universal jurisdiction applies; the submissions that have been made to the UN recently shows diverse views.⁵² For example, whereas China only made a submission that piracy should be the only crime to which the principle of universal jurisdiction applies, both Belarus and Iraq submits that the principle of universal jurisdiction should extends to ecocide as well as crimes relating to the sabotage of international channels of communication.⁵³ Whether or not there is unanimous acceptance of the principle of universal jurisdiction, there are controversies surrounding the scope and appropriate application of the principle. Some of these controversies have been with respect to its application to Africa and Africans.⁵⁴ The next section will enumerate the issue regarding the resistance of Africa to the principle of universal jurisdiction.

IV. Nature of Resistance in Africa

Since the end of the second quarter of 2008, the African Union (AU) representing Africa and Africans, has taken a strict stance regarding the flagrant abuse of the principle of universal jurisdiction to the detriment of Africa and Africans.⁵⁵ The claim by the AU is that universal jurisdiction may have some

⁴⁸ Georges Abi-Saab, ‘The Proper Role of Universal Jurisdiction’, 1 (2003) *Journal of International Criminal Justice*, 599–600.

⁴⁹ George P. Fletcher, ‘Against Universal Jurisdiction’, 1 (2003) *Journal of International Criminal Justice*, 582–84.

⁵⁰ *Ibid.*

⁵¹ Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, (2006) 100 *American Journal of International Law* 142.

⁵² Lantz (n47)

⁵³ *ibid*

⁵⁴ Kissinger (n46); Lantz (n47)

⁵⁵ African Union (A.U.) Ass., *Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction*, 5(i)–(ii), A.U. Doc. Assembly/AU/Dec.199(XI) (July 2008).

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negative effects on international relations and criminal justice system.⁵⁶ The known origin of the resistance of Africa against the principle is traced to the “indictment of nine Rwandan officials in France (including Kabuye, the presidential officer of protocol) and the issuance of forty arrest warrants for current or former Rwandan officials by a Spanish investigative judge”. The perception popularly held across Africa regarding the arrest warrants was that it merely forms part of a subtle ‘legalized campaign’ against states in Africa while specifically violating the independence, territorial integrity and sovereignty of Rwanda as a state.⁵⁷ The Assembly of the A.U. made a declaration indicating that the

*...abuse of universal jurisdiction could endanger international law, order and security... the political nature and abuse of the principle ... by judges from some non-African States against African leaders, particularly Rwanda, is a clear violation of the sovereignty and territorial integrity of these States.*⁵⁸

The Assembly of the AU shows the position of majority of African states as it issued a warning that no member of AU should execute the warrants, stating that the prosecutions would cause “destabilizing effect on the political, social and economic development of States and their ability to conduct international relations.”⁵⁹ In order not to make it seem that the resistance is one borne out of unreasonable stance; AU indulged the international community to establish an entity that will be vested with the competence and capacity to review and/or address any complaints or grievances which any state/party may have as a result of abuse of the principle of universal jurisdiction.⁶⁰ Furthermore, the AU advised that the members of international community should uniformly place a moratorium on execution of warrants unless they are satisfied that “all the legal and political issues have been exhaustively discussed”.⁶¹

Interestingly, it was the issue of Africa’s resistance to the principle of universal jurisdiction that paved way for joint unions’ sessions between the AU and the

⁵⁶ Simon, M. Weldehaimanot. Arresting Al-Bashir: The African Union’s opposition and the legalities. (2011) 19(2) African Journal of International and Comparative Law, 19 (2), 208–235. Available from: <http://www.eupublishing.com/doi/abs/10.3366/ajicl.2011.0011> [Accessed 13 September, 2022].

⁵⁷ Ibid., Fletcher (n49).

⁵⁸ Lantz (n47), at 442

⁵⁹ Ibid.

⁶⁰ Kamari Maxine Clarke, ‘Why Africa?’ in Richard H Steinberg (ed), Contemporary Issues Facing the International Criminal Court (Brill 2016) 326-332

⁶¹ Ademola Abass, ‘Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges’, (2013) 24 European Journal of International Law 933, 935;

European Union (EU). Notwithstanding the recommendations reached at the joint sessions of AU and EU, the joint deliberations were not able completely alleviate the concerns of African Union.⁶² Thus, at the beginning of the third quarter of 2009, the Assembly of the AU showed resistance as they cited the incessant abuse of the principle of universal jurisdiction⁶³ whereby African leaders and personalities are continually indicted¹³⁶ unlike their counterparts in Europe and North America.⁶⁴

Overtime, the resistance against universal jurisdiction by Africa, though centered on the issue of African states officials being indicted is perceived in different perspectives. First, there is a strong view that states in the global North (EU states) are targeting African leaders, unfairly. This is aggravated by the fact that most of the persons indicted in the cases are serving officials of African states. It is claimed that indictment of active or serving officials of African states would have severe effects on the international relations of Africa with others.⁶⁵

There is a counterclaim stating that Africans have not been solely targeted by European states in exercising the duty under universal jurisdiction. This is substantiated with the fact that European states⁶⁶ had relied on the principle of universal jurisdiction to prosecute citizens of “Afghanistan, Argentina, Bosnia-Herzegovina, the Central African Republic, Chile, China, Cote d’Ivoire, Cuba, Democratic Republic of the Congo, El Salvador, Equatorial Guinea, Iran, Iraq, Israel, Guatemala, Mauritania, Mexico, Morocco, Peru, Republic of the Congo, Rwanda, Suriname, Tunisia, the United States, Uzbekistan, and Zimbabwe”.⁶⁷ One would observe that while the countries mentioned are all African states; most of the countries outside Africa are ones that share similar socio-political and economic characteristics with states in Africa. Perhaps, the resistance from Africa equally represents resistance from the countries of the global south, third world countries or countries that could be classified as developing economies.

Another counterargument is that majority of the cases where universal jurisdiction is activated in European courts against Africans; private parties (mostly of African indigenous) had instituted these cases in convenient and safer territories

⁶² The AU-EU Expert Report on the Principle of Universal Jurisdiction, Brussels, 16 April 2009, 8672/1/09 REV 1

⁶³ *ibid*

⁶⁴ Jalloh, (n29)

⁶⁵ Lantz (47); Kissinger (n46)

⁶⁶ The eight European states that have exercised universal jurisdiction are Austria, Belgium, Denmark, France, Germany, the Netherlands, Spain, and the United Kingdom.

⁶⁷ Lantz (n47) at 444

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with few of the cases being supported by non-African human rights organizations.⁶⁸ Africans also argued that exercising the principle of universal jurisdiction while negating immunities clearly stands as a violation of the sovereignty, independence and territorial integrity of states. When these violations are coming from states that colonially manned Africa, the memories of colonialism are evoked.⁶⁹

The arguments being held by the proponents of the resistance from Africa is that indictments of African states officials have the capacity to impair the ability of the states to conduct their international relations in an effective manner as well as constraining the states from discharging its statehood responsibilities.⁷⁰ In a case where the issuing of *arrest warrant* is considered, one may be pushed to give credence to the resistance by AU with respect to the fact that the indictments of serving officials of African states is probably unlawful under international law and practices. However, the credence is to the extent that the recognition of immunity depends on the office held by the official as well as the roles of the accused that could be recorded as acts in official capacity.⁷¹

There is also a consideration that the indictments of states officials could constrain the socio-economic and political growth and inclusive development of a state and its people. One may tend to agree with the consideration above on the basis that the indictment could cause the leader indicted to lose legitimacy amongst his/her nationals.⁷² This exactly may be the case of the former President of Sudan (Al Bashir) who was indicted from the crime of genocide. But the concern here is that aligning with the resistance being put by the AU could simply persuade one to undermine the effective roles of universal jurisdiction in international criminal law.⁷³ Worsening the matter is the group of the proponents for the resistance of Africa against universal jurisdiction, who relies on theories of post-colonialism, Africanism and Pan-Africanism as a persuading factor to turn Africa and Africans against the recognition of universal jurisdiction.⁷⁴

⁶⁸ *ibid*

⁶⁹ Jalloh (n29)

⁷⁰ *ibid*

⁷¹ Anthony, Pagden, *The Enlightenment and Why it Still Matters*, (New York: Random House, 2012).

⁷² Jalloh (n29); Lantz (n47)

⁷³ Jalloh (n29); Kissinger (n46)

⁷⁴ Timothy Murithi, *The African Union: Pan-Africanism, Peacebuilding and Development* (Routledge 2005); Abdulqawi A. Yusuf, *Pan-Africanism and International Law* (Hague Academy of International Law 2014).

V. The Committee Debate and Reflections on Africa's Resistance

The United Nations General Assembly's Sixth Committee (Legal) concluded a debate in October, 2021.⁷⁵ The theme of the debate centers on the scope and application of universal jurisdiction.⁷⁶ On the surface, it appears that the delegates at the debate were keen on the imperative of finding equilibrium between preservation of State sovereignty and application of universal jurisdiction. With respect to State sovereignty, there is an interest that the primacy of national jurisdiction should be recognised even in the prosecution of serious international crimes; whereas in regards to universal jurisdiction, there is an interest aligning that perpetrators of certain crimes that can be considered as heinous should not be allowed to enjoy impunity.⁷⁷ Going further, this study will briefly highlight the summary of the stance taken by delegates representing different countries at the session.

The delegate representing Rwanda (an African country), underscores the need for universal jurisdiction as a principle of international law to come under a mandatory regulation that aids towards the prevention of the abuse of the principle.⁷⁸ From the stance of the Rwandan's representative, one could easily see a reflection of what the true grievances of Africans are with respect to the application of the principle of universal jurisdiction in international criminal law. The delegate here did not call for complete abolition or abandonment of the principle, rather, there is a call requesting that the practices surrounding the principles be reviewed with regulations that would help to ensure that the principle is not being abused by state actors and non-state actors.⁷⁹

The delegate representing Myanmar stressed that the most germane way to eradicate impunity is through the principle of universal jurisdiction. The representative referred to the case of illegal military coup in Myanmar. In the opinion of the Myanmar's delegate, the Myanmarees are helpless in holding the perpetrators accountable for the crimes.⁸⁰ One notable thing pointed out by the delegate is the incapability of the domestic courts to administer justice against the military that had

⁷⁵ United Nations General Assembly Sixth Committee, 'Concluding Debate on Universal Jurisdiction Principle'. 76th Session of the United Nations General Assembly Sixth Committee, October, 2021. Available at:

<https://www.press.un.org/en/2021/gal3642.doc.htm>

⁷⁶ *ibid*

⁷⁷ Pagden (n71)

⁷⁸ United Nations General Assembly Sixth Committee (n75)

⁷⁹ United Nations General Assembly Sixth Committee, 'Universal jurisdiction', (2021b)

https://www.un.org/en/ga/sixth/76/universal_jurisdiction.shtml

⁸⁰ United Nations General Assembly Sixth Committee (n75)

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impounded the democracy in Myanmar with the use of live ammunition, arbitrary detention and enforced disappearances.⁸¹ Myanmar, though not an African country is still faced with similar challenges economically and politically like most African countries. One could see how the perpetrators of crimes against humanity in Myanmar would enjoy impunity if other states are foreclosed from prosecuting international crimes that they have no linkages to.

It appears that the true picture of the stance of Africa in relation to universal jurisdiction is clearly captured in the opinion and observations made by the delegate that represented Zimbabwe. The Zimbabwean representative indicated that universal jurisdiction as a principle of international criminal law must not only be used in good faith, but must also be used as a last resort.⁸² In the opinion of the representative from Zimbabwe, universal jurisdiction should only be applied as a complementary mechanism activated in cases where domestic courts are not willing, interesting or able to take action on a specific case. As a recommendation, the Zimbabwean delegate stated that the consent of the national jurisdiction should be sought and obtained prior to application of the principle of universal jurisdiction.⁸³ Emphasising on the grievances of Africans with respect to the use of universal jurisdiction in prosecuting international crimes, the delegate cited that the selective application of universal jurisdiction and its misapplication against officials of African descent, have caused African leaders to become critically resistant of the principle.⁸⁴ This view of applying the principle of universal jurisdiction only as a last resort was also supported by the representative of Saudi Arabia.⁸⁵

In the view of the delegate representing the UK, there are only few international crimes where the UK will make use of the principle of universal jurisdiction.⁸⁶ Though, it is not ascertained whether the delegate went on to specify those few crimes, the point being made by the UK's delegate is that the authority best positioned to prosecute such crimes is the authority within whose territorial jurisdiction the crime was committed, whose citizens are victims or whose national(s) is/are the perpetrator(s). Summarily, the opinion of the representative from the UK is that the absence of international consensus on the scope, practice and application of universal jurisdiction, brings a suggestion that each case should be

⁸¹ *ibid*

⁸² United Nations General Assembly Sixth Committee (n75; n79).

⁸³ *ibid*

⁸⁴ United Nations General Assembly Sixth Committee (n75)

⁸⁵ *ibid*

⁸⁶ *ibid*

approached collaboratively by the concerned states.⁸⁷ This opinion infers that a state wishing to exercise universal jurisdiction but does not have any nexus linking it to the crime, must exercise the principle of universal jurisdiction in collaboration with states that have the nexus. Practically put, if a group of six persons from US, Israel, Kenya, China and Norway, perpetrated international crimes in Zambia; Germany is not allowed to entertain or prosecute the case relying on universal jurisdiction since Germany does not have any nexus linking it to the crime. If Germany wishes to entertain or prosecute the crime, such must be predicated on a sort of voluntary collaboration amongst the countries that have nexus (Zambia – for the victims and place of commission; US, Israel, Kenya, China and Norway – Countries of the perpetrators' origin). If the foregoing correctly captures the opinion of the UK's delegate; does it mean that unless collaboration amongst the states concerned is attained; the victims should be denied justice while the perpetrators enjoy impunity?

Russian representative noted that universal jurisdiction is controversial in nature, stating the broad views regarding the application of the principle have not provided any progress in the scope and practice of the principle. In the opinion of the representative of Russia federation states that the rationale for the use of universal jurisdiction is owed to the inability of states to entertain and prosecute the crimes particularly owing to depleted resources.⁸⁸ In his view, the Russian delegate that there are other less-controversial approaches which could be applied by states to counter impunity. He elaborately posits that states should apply treaty-based mechanisms to cooperate on matters such as legal assistance, information exchange, and collaborative investigations.⁸⁹ This opinion is purely a stance against universal jurisdiction from the Russian representative; stating that states should explore treaty-based mechanism to collaborate with other states in prosecuting or trying international crimes. His arguments infer that other states without nexus could only act as a support base for the states with nexus. The delegate had based his recommendation on the basis that the depleted resources is discouraging the states with national jurisdiction from exercising such; perhaps, believing that if such resources are made available, states with national jurisdiction would go on to exercise such instead of reliance on universal jurisdiction to combat impunity. However, depleted resources, is not the only reason states with national jurisdiction

⁸⁷ United Nations General Assembly Sixth Committee (n75)

⁸⁸ *ibid*

⁸⁹ *ibid*

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negate to prosecute or try cases on international crime. Lack of political will and the need not to rupture international relations could also be a reason.⁹⁰

Both Zambian and Algerian representatives were of the view that the scope and practice of universal jurisdiction were formulated based on the dynamics of the existing political systems and international relations as at the time the principle of universal jurisdiction was adopted.⁹¹ These two African countries were of the view that as the society has overtly evolved, there is need for the scope and practice of the principle of universal jurisdiction to evolve as well to align with the current demands of the society and other prevailing issues in international relations.⁹² The Zambian delegate was specific on the inclusion of the extent to which universal jurisdiction as a principle of international criminal law applies to more-covert criminal actions perpetrated outside the context of war.⁹³ From, the views of the Zambian and Algerian representatives, it appears that making specific amendments for the scope and practice of universal jurisdiction principle to evolve with the prevailing issues, grievances and concerns relating to the principle will lead to a significant level of agreement on the use of the principle by states.

Generally, there may be specific reasons which makes Africans to be disproportionately subject to the exercise of the principle of universal jurisdiction.⁹⁴ Where the use of universal jurisdiction is weighed in line with foreign states enforcing international criminal law; one would easily observe that if the states exercising the principle are compared, significant numbers of states in Africa have a judicial system/legal system that is weaker, alongside with limited resources and capacity, thereby increasing the potential unwillingness to try or prosecute international crimes.⁹⁵ Judging from the discourse at the UN general assembly's sixth committee and alongside the discourse on Africa's resistance against the principle of universal jurisdiction, the willingness and the interest towards eradicating impunity could be a unifying factor to resolve the issue of Africa's hostility toward universal jurisdiction, specifically and the enforcement of international criminal law, generally.

Judging from the nature of territorial jurisdiction for enforcement, the attainment of justice is highly dependent on inter-state cooperation.⁹⁶ Where there is

⁹⁰ Duson & Amadi, (n19)

⁹¹ United Nations General Assembly Sixth Committee (n75; n79)

⁹² *ibid*

⁹³ *ibid*

⁹⁴ Jalloh (n29)

⁹⁵ *Ibid*; Lantz (n47).

⁹⁶ Koskenniemi (n22)

no such collaboration, a defendant allegedly staying in a foreign country could possibly escape prosecution; though such person may be prosecuted *in absentia*.⁹⁷ A good example of this is the notorious case of the former President of Sudan Al-Bashir,⁹⁸ as most African states were reluctant or refusing to execute the arrest warrant issued against a then sitting president.⁹⁹ However, it is currently claimed that the Sudanese government are willing to collaborate towards his prosecution.¹⁰⁰ One identified problem against the prosecution of an accused person *in absentia* is that it allows perpetrators of the crime to evade justice since the sentence given at the trial *in absentia* cannot be executed *in absentia* as well.

The foregoing clearly shows that it may be impossible to eradicate impunity without first enhancing international collaboration and cooperation. Therefore, instead of view the resistance or supposed hostility from Africa from a negative stance, the resistance should be considered as clarion call to states in international comity of nations to purposively resolve the prevailing issues and concerns; thereby formulating the most effective approach in the scope and practice of the principle of universal jurisdiction.

VI. Conclusion and Recommendation

In this present dispensation, the principle of universal jurisdiction cannot be regarded as a mere legal theory. This is evident with the increase in the number of proceedings where the principle of universal jurisdiction has been applied against international crimes. Importantly, the foregoing does not vitiate the fact that there are fundamental factors that are imperative in order to contribute positively to the number of successful cases and trials. This is owed to the fact that utilizing the principle without attaining the objective of ending impunity is little or no relevance for the international community. Amongst the fundamental factors is the political will, resources and dedicated personnel. It is also important to having seamless international framework that provides for cooperation and exchange as well as making room for the effective and efficient investigation and prosecution. Apparently, the foregoing will also help to ensure that the principle is truly universal

⁹⁷ Lantz (n47)

⁹⁸ Akande, Dapo. 'The Bashir Indictment: Are serving Heads of State immune from ICC prosecution?' (2008) Oxford Transitional Justice Research Working Paper Series. Available at <https://www.law.ox.ac.uk/sites/files/oxlaw/akande1.pdf> [Accessed 14 September, 2022].

⁹⁹ Jalloh (n29); Dusson & Amadi (n19)

¹⁰⁰ Dabanga Sudan, 'Interview: Will Al Bashir face ICC in the Hague or Sudan?' (5 March, 2020). Available at: <https://dabangasudan.org/en/all-news/article/interview-will-al-bashir-face-icc-in-the-hague-or-sudan>

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as the name depicts by enhancing the level of commitment currently enjoyed by the principle beyond the territories of Europe and Latin America into Africa.

Another area of concern is the issue regarding the exercise of immunities and the principle of universal jurisdiction. This is owed to the uncertainty that has surrounded both practices. Observation shows that specific officials of states do enjoy immunity traditionally, thereby exempting the officials from prosecution in foreign jurisdictions for crimes related to their actions in official capacity as state officials.¹⁰¹ A normative argument has been proffered against the existence of immunity for states' officials. The argument holds that judging by the nature of the elements making up for the international crimes such as war crimes, torture, crimes against humanity and genocide; no one, including states officials should enjoy immunity against prosecution. In justifying the basis for the argument, it is opined that the state officials have a higher moral culpability for overseeing, authorizing or directing the perpetration of the crimes.¹⁰² Perhaps, this could be the ground to justify the issuing of arrest warrant against a sitting president in Sudan (Africa).

The uncertainty regarding official immunity was also considered by the International Court of Justice, where it opined that specific high-ranking officials in a State including but not limited to the Head of State/president, Head of Government, Minister of Foreign Affairs and other diplomatic officers have immunity from both criminal and civil prosecution by foreign jurisdictions during the subsistence of their tenures in office.¹⁰³ This implies that the trial or issuing arrest warrant against a state's official would contradict the obligation of the issuing state to the state of origin of the official.¹⁰⁴

The clause on immunity provides that upon cessation from holding office, the former state official may be prosecuted for acts committed before assumption of office. It is also the practice that a state official upon leaving office may be prosecuted for the commission of any private acts committed while still in office.¹⁰⁵ However, it cannot be wholly stated that torture, genocide, war crimes and crimes against humanity can suffice as official acts of the state officials to warrant their exemption from prosecution and thus, allowing them to enjoy immunity from

¹⁰¹ van der Merwa & Kemp (n43)

¹⁰² Lantz (n47); Dusson & Amadi (n19)

¹⁰³ Lantz (n47)

¹⁰⁴ Mark S Ellis, *Sovereignty and Justice: Balancing the Principle of Complementarity between International and Domestic War Crimes Tribunals* (Cambridge Scholars Publishing 2014).

¹⁰⁵ A. Ross. 'Geographies of Crime and Justice: Contemporary Transitional Justice and the Creation of 'Zones of Impunity'' (2007) *The International Journal of Transitional Justice* 45.

foreign prosecution under the principle of universal jurisdiction.¹⁰⁶ This study holds that resolving novel issues surrounding the scope and practice of universal jurisdiction in line with evolving events in international relations, would increase the legitimacy and level of acceptability enjoyed by the principle even in Africa. Importantly, this study contributes to knowledge as it recommends the need to continue the application of universal jurisdiction in prosecution of international crimes irrespective of the elite's sponsored resistance against the principle in Africa.

¹⁰⁶ Kenya, Scope and Application of the Principle of Universal Jurisdiction, at 3, available at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Kenya.pdf