SUMMARY OUTCOME

EXPERT WORKSHOP ON THE AFRICAN UNION CONCERNS REGARDING THE APPARENT IMPASSE IN THE SIXTH COMMITTEE ON THE AGENDA ITEM "SCOPE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION"

Sixth Committee Experts, African Group, New York

Permanent Mission of the Republic of South Africa to the United Nations

Friday, 6 September 2019

Introduction

1. The Assembly of Heads of State and Government of the African Union issued two decisions referenced Assembly/AU/Dec.672(XXX) and Assembly/AU/Dec.738 (XXXII) adopted in the January 2018 and February 2019 African Union Summits respectively, requesting the African Group in New York and the Commission, to make recommendations to the summit on how to move discussions on Universal Jurisdiction forward, in view of the apparent impasse in the Sixth Committee.

2. Towards fulfillment of the request for recommendations on how to move the current discussion forward, as per the above-mentioned Assembly decisions, the Sixth Committee experts of the African Group in New York were convened by the coordinator, Mr. Amadou Jaiteh, at the Permanent Mission of the Republic of South Africa on 6 September 2019. A full day workshop was organized to allow a thorough discussion of the issues. The present outcome constitutes a summary of the workshop proceedings. It highlights the main trends of the discussion as well as the main options canvassed during the workshop. **It is worth noting here that this workshop came on the hills of a previously convened workshop by the African Union Commission (Office of the Legal Counsel), which is yet to produce an outcome.**

Participating States and Experts

3. It should be noted that 26 Member State attended the workshop. Three independent African legal academics were invited, including a former legal counsel of the Organization of African Unity, **Prof. Tiyanjana Maluwa**. Two of the invited African experts attended and shared their expertise on the subject. All eight African members of the International Law Commission (ILC) were also invited to share information and expertise, however, only two were able to participate, including the proponent of the topic at discussion, which has been placed on the long-term programme of work at the ILC in 2018, under the title 'Universal Criminal Jurisdiction. Attached is the list of Participants at the workshop.

Background on the purpose of the meeting and adoption of programme of work

4. The African Group Sixth Committee Coordinator explained the purpose for the meeting, which was initially supposed to take place at the premises of the AU Permanent Observer Mission to the United Nations, however had to change venue due to a conflict with another meeting. He mentioned with appreciation that South Africa and Uganda had kindly offered their conference facilities, for which the Group was grateful.

5. The Coordinator briefly recalled the history of the Scope and Application of the Principle of Universal Jurisdiction agenda item before the Sixth Committee. He also highlighted the AU Assembly's 2018 and 2019 decisions directing the African Group in New York to formulate recommendations on ways to take forward the universal jurisdiction discussions. He emphasized that the AU Assembly had itself concluded that there was an impasse in the Sixth Committee. He urged experts to use the workshop to focus the discussions on finding solutions that would help to unblock the current impasse. He emphasized that it is through identifying solutions that the African Group could successfully formulate recommendations for onward transmission to the Permanent Representatives of the African Group and to the AU Commission. He expressed gratitude to all African Group and African ILC members present at the workshop.

6. The coordinator thereafter invited a discussion of the programme of work for the workshop, which was previously circulated to all delegations. The programme was adopted without amendments.

Discussion of the AU concerns by the Invited Experts

7. **Prof. Roland Adjovi** introduced the universality principle, including providing a definition of it, and distinguishing between its civil and criminal forms. He also highlighted that both treaties and customary law may be sources of universal jurisdiction crimes. Piracy, for instance, was a classic universal jurisdiction offence under both customary and treaty law. He also mentioned that the core crimes, namely war crimes, genocide, and crimes against humanity are often accepted as universal jurisdiction offences. He explained that notwithstanding the importance of these crimes, and the widespread recognition of the universality principle, disputes can arise when foreign criminal courts purport to assert universal jurisdiction especially against foreign government officials. One of incidents is the Arrest Warrant Case between the Democratic Republic of the Congo and Belgium, which was litigated at the International Court of Justice.

8. In his presentation, **Prof. Dire Tladi**, a member of the ILC explained the two-step process for selection of topics brought before the ILC. He explained that the Commission has a rigorous process for addition of topics in the long-term work programme. The items that are considered for the long-term agenda of the Commission may be proposed by ILC members in a working group dedicated to the identification of new topics. The detailed criteria for new topics were set out in 1996. Each topic must fulfill such criteria, including showing that the State practice is at a sufficiently advanced stage to permit codification and progressive development. A decision is taken by consensus and becomes a recommendation to the planning group, and if positive, also by the plenary of the ILC. That process had been followed in relation to the topic "universal criminal jurisdiction", which reflected the consensus of the ILC.

9. From his experience in the Sixth Committee, when the "scope and application of universal jurisdiction" agenda item was added to the agenda of the General Assembly, there was a preference by the African Group to discuss the topic in the General Assembly because it was felt that ILC projects took too long. An example frequently given in that regard at the time was the decades of work on the law of treaties and the draft articles on State responsibility. Yet, ten years later, not much had been accomplished in the Sixth Committee's own discussions of universal jurisdiction. He argued that the ILC has proved its efficiency in the more recent consideration of topics. He cited the example of the ILC's expeditious work on other related topics such as crimes against humanity, which was added to the long-term work programme in 2014. It completed a second reading on crimes against humanity in the 2019 session. The Commission also had the advantage of having a process in place to ensure decisions can be taken.

10. **Prof. Pacifique Manirakiza**, for his part, pointed out that one of the core AU principles is the commitment to ensure accountability for international crimes committed on the continent. The commitment to the fight against impunity is manifested in various ways, including in the 2000 Constitutive Act of the AU. Article 4(h) of the Constitutive Act provided for the right of the AU to intervene in grave circumstances, which were defined as situations where war crimes, crimes against humanity and genocide are being committed.

11. The AU States had also accepted the use of universality, as manifested in their regional conventions on mercenaryism and terrorism. African States had also joined multilateral treaties such as the Torture Convention, which provided for universal jurisdiction for torture and established a duty to prosecute or extradite. He emphasized that the AU has been careful to distinguish between its support for the principle and its concerns about the potential for its political abuse and misuse, especially in relation to high-level African government officials. There was, in his view, a need for African States to ensure greater accountability in their domestic

courts. This was one way to stem the tendency of foreign courts, especially those of the former colonial powers, to seize themselves of jurisdiction over universal crimes allegedly committed by Africans against other Africans.

12. In his view, the Sixth Committee was a political forum. It is thus the main multilateral forum for discussion of the AU's concerns regarding UJ at the political level. However, this did not mean that the ILC could not take up the topic. He asserted that the ILC being comprised of independent legal experts serving in their personal capacities, retained competence to study UJ within its own mandate and as per its statute. A technical legal study of the Universality topic by the ILC should bring greater legal clarity on the scope, as well as the limits, of the principle. He proposed that the two options of retaining the item in the General Assembly, for political discussions, while also supporting an ILC study at a technical level should be seriously considered.

13. **Prof. Jalloh**, ILC member and proponent of the topic 'universal criminal jurisdiction', explained developments leading to the inclusion of the UJ item on the long-term work programme. He concurred with the prior speakers that the topic had attracted significant concern for African States at the bilateral, regional and international levels. It had led to diplomatic and political friction between some African and some European States, citing cases involving France and Spain and Rwanda. All those aspects had been highlighted in the syllabus for the topic contained in the 2018 report of the ILC to the General Assembly.

14. He further explained how the ILC works under its 1947 statute, which allowed the General Assembly, States or other principal organs of the United Nations and even specialized bodies established by intergovernmental agreement to refer topics to the ILC for possible consideration. Under its statute and its practice, the ILC also proposes topics for study which are then notified to the General Assembly for feedback. Members submit topics to the working group on long-term programme of work, and if supported by consensus, they are forwarded to the planning group, and if positive, then to the plenary for decision. Universal criminal jurisdiction was one such topic which was approved in 2018. The ILC had accepted there was need for greater legal clarity on the Universality principle, as the topic was found to have satisfied all the four-part criteria necessary for ILC consideration. He then reviewed in detail the scope of the syllabus presented for the ILC topic in the 2018 report of the Commission to the General Assembly and the proposed outcome of guidelines or draft conclusions.

15. He highlighted what he perceived as generally positive feedback given by States to the Universal Jurisdiction topic in the October 2018 debate. Most individual States that spoke on the issue had supported the ILC proposal to study

the topic. Several other delegations had expressed some doubts and even some opposition. The ILC would take a decision on whether to bring the item to the current agenda at a future date, after considering the availability of space on its programme of work and a potential special rapporteur. He also highlighted the fact that there have been very few African ILC members appointed as special rapporteurs over the past 70 years in comparison to other regions, pointing that the UJ topic presents a good opportunity for the appointment of an African special rapporteur in the ILC.

Exchange between ILC Members, Sixth Committee, and Academic Experts

16. A robust exchange of divergent views followed each of the presentations. Several rounds of questions were posed to each of the academic experts and the two African ILC Members. While some African Group Members voiced out concerns regarding the referral of the UJ matter to the current programme of work of the ILC, others expressed support, while the rest remained silent on the matter. There was a tensed exchange on the issue of whether Africa 'supports' UJ in principle as suggested by the Legal Academics present at the workshop, or whether the main concern is limited to UJ's misuse and abuse, and no consensus was achieved as to this point.

17. Member States opposing the referral of the matter to the programme of work of the ILC as per the recommendations of the legal experts that have made presentations, stated as follows:

    - The change of political context initiating the AU's action to introduce the UJ topic to the General Assembly in 2009 (several cases based on UJ launched in European courts against African officials), as opposed to the situation today, where this problem no longer exists.

    - The unfeasibility of obtaining consensus on a General Assembly resolution referring the matter to the ILC on its current programme of work, given that many countries will not agree (it was mentioned that China already seeks to remove the item from the agenda of the Sixth Committee)

    - Initiating the collective action by the African Group Sixth Committee to refer UJ to the current programme of work of the ILC, necessitates *prima facie*, having a clear view on the desired outcome of the ILC in the manner that enables the African Group Sixth Committee to collaborate efficiently to achieve it, which does not exist at the moment.

    - Referring the matter to the ILC at this point maybe detrimental to the concerns of AU Member States regarding the misuse and abuse of UJ.

- UJ is primarily a political matter and not a legal matter, and that is the reason for stagnation of the item within the Sixth Committee. Moreover, there is no guarantee that the ILC will be able to achieve a consensus on the matter that addresses the concerns of AU Members States regarding the misuse and abuse of the UJ principle.

18. AU Member States supporting the referral of the UJ item to the current programme of work of the ILC emphasized the importance of achieving a breakthrough on the item which has been stagnating in the Sixth Committee for ten years. They referred to the impartiality of the ILC and the much needed legal clarity on the UJ matter by such a renowned and independent subsidiary legal body of the United Nations.

Conclusion

19. After taking into consideration the totality of the views expressed above, coupled with information provided on the workshop convened by the AU Commission (Office of the Legal Counsel), it is the report of the African Group Sixth Committee Experts that we are unable to reach a consensus on a way forward concerning item **"scope and application of the principle of universal jurisdiction".**

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