

ITEM 84:
**Scope and application of the
principle of universal jurisdiction**

STATEMENT
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CHECK AGAINST DELIVERY

Mr. Chairman,

We appreciate this opportunity to address the “scope and application of the principle of universal jurisdiction”. We hope that the panel discussion which we organized together with the Mission of Tanzania served its purpose to inform and prepare for this debate and contributed to a better understanding of the concept of universal jurisdiction. In our view, any discussion on universal jurisdiction must start from the premise of our **common goal, the end of impunity for the worst crimes of international concern**. We note that today there is universal acceptance for the notion that the perpetrators of such crimes must not go unpunished. The **primary responsibility** to prosecute perpetrators rests with those States on whose territory the crimes were committed. In accordance with well-established principles of international law, however, other States are also entitled to investigate such crimes – in particular the State of nationality of the perpetrator as well as the State of nationality of the victims. In some situations, however, where these States are unwilling or unable to genuinely bring to justice the perpetrators of crimes, other States that have no direct connection to the crime should fill the gap on the basis of universal jurisdiction. Understood this way, universal jurisdiction is an important **subsidiary tool to ensure accountability for the worst crimes on behalf of the international community** – including in particular genocide, war crimes, crimes against humanity, and torture. The **scope** of the principle of universal jurisdiction, as reflected in treaty law and customary international law, is to our mind clearly defined, and we are not aware of any efforts to expand that scope.

Universal jurisdiction is thus a very specific and narrow concept under international law that is firmly grounded in treaty law and customary international law. It is applied in practice only in extremely rare cases. It should **not be confounded with other forms of exercise of jurisdiction** that involve more than one State, such as the passive personality principle. We understand that in some cases the application of

the passive personality principle may lead to disagreement between the two or more States involved. **Conflicting jurisdiction** is indeed a common phenomenon in criminal justice. In the context of the worst crimes of international concern, international law provides little guidance on how to resolve such conflicts. That in itself is an expression of the sovereign equality of the States involved, as there can be no generic answer to the question which State has a more legitimate interest to prosecute. The issue is even more vexing when one State involved wishes to proceed with an investigation and prosecution, and another State wishes to prevent such proceedings, in particular where the case involves a person that may enjoy **immunity** under international law. Where bilateral consultations between the States involved do not lead to a solution, the States concerned should strive to settle their dispute by peaceful means, and should when necessary resort to the appropriate dispute settlement mechanisms. In this context, we reiterate our call for States to accept the compulsory jurisdiction of the **International Court of Justice** (Article 36, paragraph 2 of the ICJ Statute). The ICJ is best placed to pronounce itself on legal disputes arising over the application of criminal jurisdiction, be it on the basis of universal jurisdiction or on the active or passive nationality principle.

The ICJ is also competent to address any issues arising with respect to questions of immunity, as evidenced in particular by the Court's judgment in the Yerodia case.¹ We note that in that instance the Court upheld the functional immunity of a Foreign Minister in the domestic court of another country. In light of the imperative of fighting impunity, however, the Court added that "jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility." It is worth noting that the ICJ's judgment in the Yerodia case was not concerned with the application of universal jurisdiction itself, but focused on the question of immunity. Most

¹ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)

importantly, the ICJ did not pronounce itself on the question of immunity in international courts.

Mr. Chairman,

Some of the concerns expressed in our debate about the application of universal jurisdiction relate to the work of the **International Criminal Court**. The ICC does not act on the basis of universal jurisdiction, but on the basis of delegated jurisdiction from States Parties, or on the basis of a Security Council referral. The regime established by the Rome Statute does however interact with the principle of universal jurisdiction, as it is a powerful tool to overcome the impunity gap resulting from States' unwillingness or inability to investigate and prosecute. To our mind, the ICC is furthermore a response to concerns of political selectivity that are sometimes raised with respect to national efforts to fight impunity. Within its limited field of geographical and material jurisdiction, the Court as an international, geographically balanced institution holds the best promise to apply the law in an equitable manner, irrespective of political considerations. The ICC can not be blamed, however, for not being able to deal with cases outside of its jurisdiction.

Mr. Chairman,

In conclusion we would like to reiterate our commitment to the international fight against impunity, and our understanding of universal jurisdiction, other forms of jurisdiction as well as the International Criminal Court as the cornerstones of these efforts. We are interested in pursuing this dialogue further, and agree that the International Law Commission as an independent expert body could also be asked to make a contribution in this regard, in particular in relation to its current work on the principle of *aut dedere aut iudicare*.

I thank you.