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## Sixth Committee

### Summary record of the 12th meeting

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*Chairperson:* Mr. Salinas Burgos . . . . . (Chile)

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*The meeting was called to order at 10.05 a.m.*

**Agenda item 84: The scope and application of the principle of universal jurisdiction (A/66/93 and Add.1)**

1. **Mr. Baghaei Hamaneh** (Islamic Republic of Iran), speaking on behalf of the Movement of Non-Aligned Countries, said that the principles enshrined in the Charter of the United Nations, in particular those relating to the sovereignty and political independence of States and non-interference in their internal affairs, must be strictly observed in any judicial proceedings. However, the exercise of criminal jurisdiction by national courts, invoking universal jurisdiction over high-ranking officials who enjoyed immunity under international law, violated the most fundamental principle of that law, namely the sovereignty of States. The immunity of State officials, which was rooted in the Charter of the United Nations and firmly established in international law, must be fully respected.

2. The range of crimes falling under universal jurisdiction and the conditions for its application were among the controversial questions surrounding its use as a tool for prosecuting perpetrators of certain serious crimes under international treaties. The legal and political implications for the immunity of State officials before the courts of other States — and consequently for the sovereignty of the States concerned — were alarming and had generated concern in cases where universal jurisdiction had been invoked against State officials of members of the Non-Aligned Movement. In its decision Assembly/AU/Dec.335 (XVI), the African Union, while reiterating its commitment to fight impunity, had called not only for international law and the immunity of State officials to be respected when applying universal jurisdiction, but for a durable solution to abuse of the principle. The decisions and judgements of the International Court of Justice could provide useful clarification and inform the Committee's discussions, as could the work of the International Law Commission.

3. The Non-Aligned Movement cautioned against the unwarranted expansion of crimes under universal jurisdiction. It remained open to sharing the relevant information and practices of its members and stood ready to consider all options and mechanisms aimed at ensuring that the principle of universal jurisdiction was properly applied and served the interest of justice without hampering the sovereign rights of States.

4. **Mr. Errázuriz** (Chile), speaking on behalf of the Rio Group, said that the Working Group on the scope and application of universal jurisdiction would undoubtedly identify aspects of the topic that required further exploration. Insofar as universal jurisdiction was a legal institution of exceptional character with respect to the exercise of criminal jurisdiction, the framework for its exercise was necessarily defined by international law. The Rio Group endorsed the view, expressed by several delegations, that universal jurisdiction should not be confused with the exercise of international criminal jurisdiction or the obligation to extradite or prosecute (*aut dedere aut judicare*); they were different, albeit complementary, legal institutions in the effort to end impunity.

5. Topics that could be productively addressed by the Working Group included such procedural aspects of universal jurisdiction as the conditions for its exercise in accordance with international law; the relationship between the various criteria for its establishment and State preferences with respect to its exercise; the regime of immunity in international law; and mechanisms for strengthening international cooperation in criminal matters. It was too early to predict the outcome of the Working Group's efforts, which the Rio Group would do its utmost to assist, but referral of the topic to the International Law Commission remained a possibility.

6. **Ms. Robertson** (Australia), speaking on behalf of Canada, Australia and New Zealand (CANZ), said that it was in the interests of all States to ensure suppression of the most serious crimes of international concern by exercising criminal jurisdiction over the individuals responsible, irrespective of where the conduct occurred, the nationality of the perpetrator and any other links between the crime and the prosecuting State. In that regard, the well-established principle of universal jurisdiction generally provided a permissive basis. Primary responsibility for the investigation and prosecution of serious international crimes lay with the territorial State in which the conduct occurred since it was usually best placed to gather evidence, secure witnesses and ensure that justice was seen to be done by the persons most affected by the crime. In that light, universal jurisdiction should be viewed as an important complementary mechanism for ensuring that persons accused of such crimes did not enjoy impunity where the territorial State was unable or unwilling to exercise jurisdiction.

7. Universal jurisdiction must be distinguished, however, from the treaty-based obligation to extradite or prosecute with which it was often confused, and which had been described by some judges of the International Court of Justice as an obligation to establish territorial jurisdiction over persons in respect of extraterritorial acts on the basis that the national court had jurisdiction over the alleged offender. Moreover, that obligation was usually a mandatory one, imposed by convention, whereas universal jurisdiction functioned as an entitlement. The Working Group should seek to delineate the boundaries of those two related but distinct concepts, taking into account the work of the International Law Commission on the obligation to extradite or prosecute.

8. The scope and application of universal jurisdiction was likewise conflated with questions of immunity by the oft-repeated argument that it could be used by States to usurp or contravene the sovereign immunity of another State. Necessarily, however, any immunities enjoyed by the alleged offender could be considered by a national court only after a basis for jurisdiction, whether universal or otherwise, had been established. States exercising universal jurisdiction should be mindful of their obligations under international law. Views concerning the exercise of universal jurisdiction by national courts were extremely disparate, not least in that other applicable forms of extraterritorial jurisdiction had sometimes been overlooked. The CANZ countries therefore looked forward to working to further define the concept of universal jurisdiction with the ultimate goal of ending impunity for perpetrators of the most serious crimes of international concern.

9. **Mr. Al-Binali** (Qatar), speaking on behalf of the Arab Group, said that the principle enshrined in international law was that the prime responsibility for prosecuting the perpetrators of serious crimes, including genocide, war crimes and crimes against humanity, lay with the State in which the crime was committed in accordance with the principle of territoriality. Universal jurisdiction was, however, important as a complementary mechanism for ensuring that persons suspected of such crimes did not escape prosecution in the event that they moved between countries and that the principle of territoriality was not brought to bear.

10. Experience from around the world indicated that the application of universal jurisdiction by national courts was both difficult and controversial, particularly with regard to the range of crimes covered and the

persons to whom it applied. It was essential to address those problems and to apply the principle of universal jurisdiction in good faith, without abuse, selectivity or politicization, and responsibly, taking into account its role as a deterrent to international treaty crimes. Its scope and application must therefore be determined in order to strike the right balance between strengthening international criminal justice and ending impunity, on the one hand, and preserving friendly relations between States, on the other.

11. The African Union had adopted numerous decisions expressing grave concern over the abuse of universal jurisdiction and the primary focus on applying it to African leaders and officials, potentially in violation of the principle of the immunity of State officials before the courts of other States. In that context, the clearly emerging consensus on the need to exercise universal jurisdiction in good faith and in full conformity with the relevant principles and rules of international law was welcome. The Arab Group looked forward to active engagement in the effort to reach a common understanding of the application and scope of the principle of universal jurisdiction with a view to arriving at a sustainable solution for avoiding its abuse.

12. **Mr. Kamau** (Kenya), speaking on behalf of the Group of African States, said that, as reflected in various African Union decisions, the African States recognized universal jurisdiction as a principle of international law. Indeed, the Constitutive Act of the African Union provided for the right of the African Union to intervene in a member State pursuant to a decision of its Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity. Moreover, African States had adopted progressive human rights instruments, including optional protocols permitting individual complaints or grievance procedures against the applicant's government, and they honoured their reporting obligations under United Nations human rights treaties. Other norms of international law to be respected in the application of universal jurisdiction included the sovereign equality of States, territorial jurisdiction and the immunity of officials under customary international law. In that regard, the International Court of Justice had recently expressed the view that the cardinal principle of the immunity of heads of States should be neither questioned nor re-examined.

13. The Group was, however, concerned at the abuse of the principle of universal jurisdiction by

non-African States, a development that could endanger international law and efforts to combat impunity. Some of those States and their domestic courts had sought to justify their arbitrary or unilateral application or interpretation of the principle on the basis of customary international law. Yet, as recognized in the principal legal systems worldwide and reflected in the jurisprudence of the International Court of Justice, a State that relied on a purported international custom must, generally speaking, demonstrate to the satisfaction of the Court that the alleged custom had become so established as to be legally binding on the other party.

14. African and other like-minded States and citizens were seeking the adoption of measures to end the abuse and political manipulation of the principle of universal jurisdiction by judges and politicians from States outside Africa, including violation of the principle of the immunity of heads of State under international law. In particular, the African heads of State and Government had called for a moratorium on all pending arrest warrants and prosecutions filed against African leaders and other high-ranking officials until discussions on that subject had been concluded at the United Nations level and appropriate recommendations had been made.

15. **Mr. Saleh** (Egypt), elaborating on a number of the salient points made by the representative of Qatar on behalf of the Arab Group, said that, owing to their extreme gravity, the suppression of international treaty crimes was a collective concern of the international community. While the perpetrators of serious crimes must be promptly prosecuted and punished, the goal of ending impunity through the exercise of universal jurisdiction should not in itself generate abuse, selectivity, double standards or politicization or conflict with other rules of international law. He reiterated his support for the concerns expressed by the African Union over the legal and political implications of such abuse. The Working Group should focus on the elaboration of clear rules to ensure the reasonable exercise of universal jurisdiction, including the conditions for a State's competence to investigate or prosecute extraterritorial offences and the range of crimes to which the principle of universal jurisdiction applied.

16. **Ms. Gutzwiller** (Switzerland) said that international criminal justice played an increasingly important part in international relations, with

combating impunity recognized as an essential precondition for sustainable peace. In the context of its valuable efforts to ensure the punishment of those responsible for the most serious crimes, the International Criminal Court should operate on as universal a basis as possible. However, success was achievable only if the States primarily responsible for investigating and prosecuting the perpetrators of international crimes assumed their responsibilities.

17. Switzerland had adopted legal measures enabling it to exercise jurisdiction over certain crimes, even in the absence of traditional forms of jurisdiction. A number of international conventions, for instance, made provision for the exercise of universal jurisdiction by obliging States parties to prosecute or extradite persons suspected of having committed crimes covered by those instruments. Furthermore, the amendments to the Swiss Criminal Code made following the implementation of the Rome Statute of the International Criminal Court were now in effect, making the principle of universal jurisdiction applicable in respect of crimes prosecuted by virtue of an international agreement and of particularly serious crimes proscribed by the international community.

18. Her delegation welcomed the establishment of the Working Group; however, given the fundamentally juridical nature and technical character of the topic, that task might have been better entrusted to the International Law Commission, which was already considering the closely linked issue of the obligation to extradite or prosecute. The Working Group should take into account the Commission's work on that topic.

19. **Ms. Enersen** (Norway) said that the importance of universal jurisdiction as a tool in combating impunity for the most serious crimes must be fully recognized. The Committee should nonetheless adopt a cautious approach to the topic in order to avoid counterproductive debate. Views differed as to the crimes to which the principle of universal jurisdiction applied and the scope of that principle was constantly evolving, but new treaties, State practice and the views of international tribunals and scholars were gradually enhancing the clarity and substance of the concept. It would therefore be unwise to seek consensus on the list of crimes to which it could be applied.

20. In common with other legal principles, universal jurisdiction could be applied only in the interests of justice. Any attempt to assert such jurisdiction for

political reasons or to otherwise abuse its exercise must be prevented. To that end, the Committee might wish to consider the existence or development of procedural or organizational best practices relevant to application of the principle that could be universally recommended.

21. While possibly relevant to a discussion on criminal proceedings against officials of other States, questions concerning criminal immunity would be best avoided under the current agenda item for three reasons. First, immunity as an obstacle to a court's consideration of a case on its merits could arise only after the court had established its jurisdiction. Any discussion of immunity therefore differed qualitatively from discussion of the principle of universal jurisdiction and might even derail or confuse it. Second, questions of immunity might arise with respect to the exercise of any type of jurisdiction. Third, discussion of the immunity of State officials might prejudice the Committee's consideration of the present topic, which had also been addressed by the International Law Commission.

22. **Mr. Rodríguez-Pineda** (Guatemala) said that he welcomed the establishment of the Working Group, which demonstrated the Committee's firm commitment to combating impunity for the crimes of greatest significance for the international community. Its work would contribute to the progressive development of international law in accordance with the Charter of the United Nations and would permit the discussion to clarify certain legal issues while avoiding political sensitivities as far as possible. He urged the Chair of the Working Group to consider the question of which crimes were covered by universal jurisdiction and whether they were based on treaty law or customary international law. Its application was limited, not only in terms of the crimes to which it applied, but also in terms of its subsidiary or compulsory application in practice. The role of national courts as the primary forum for the exercise of universal jurisdiction must also be considered.

23. International cooperation for the purpose of applying universal jurisdiction must be strengthened and harmonized, especially in view of the difficulties involved in finding and preserving evidence, issuing judgments in absentia, executing arrest warrants and conducting extradition proceedings. Other difficulties sprang from the shortcomings of national courts, amnesty laws for international crimes, differences in States' investigation, prosecution and sentencing

procedures and the variety of ways in which international law had been incorporated into national legislation, resulting in different definitions and penalties. It would be interesting to identify synergies in international cooperation on the basis of relevant conventions, including in application of the *aut dedere aut judicare* rule, even though the latter was not in itself a form of jurisdiction.

24. The next step in the work on the topic, which was still at a preliminary stage, should be a structured and informed discussion in the Working Group with a view to formulating recommendations for the Sixth Committee and, if necessary, a draft resolution. It was time to bring the matter before the General Assembly or, alternatively, to refer it to the International Law Commission, which could prepare a study for future consideration by the Committee.

25. **Mr. Quintana** (Colombia) recalled that his Government had submitted written observations for inclusion in the report of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/66/93 and Add.1). Unlike the criminal jurisdiction of States, universal jurisdiction was prescriptive in nature. It had traditionally been authorized, to a limited extent, by international law. As the Permanent Court of International Justice had pointed out in the 1927 *S.S. "Lotus"* (France v. Turkey) case, the freedom of States to submit cases to their domestic criminal jurisdiction was limited by the rules created for that purpose by the international legal system. There were five recognized bases for the exercise of criminal jurisdiction: territoriality, active and passive personality, protection of the State and universal jurisdiction.

26. Universal jurisdiction was residual in nature, being exercised in respect of crimes presumed to have been committed in the territory of one State, by or against a national of another State, without posing a direct threat to the vital interests of the State exercising jurisdiction. The essence of the concept was therefore the legislative authority of a State to extend its prescriptive jurisdiction even in the absence of any national or territorial link with the crime in question.

27. Universal jurisdiction existed for crimes established in either treaty law or customary law, an example of the former being the crime of apartheid as defined by the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.

Under customary law, the crimes of genocide, war crimes and crimes against humanity were covered by universal jurisdiction, as recognized by national and international courts and tribunals. Unlike the customary law obligation *aut dedere aut judicare*, however, it was an optional, not a compulsory, form of jurisdiction. Universal jurisdiction should also be distinguished from the complementary jurisdiction exercised by special international tribunals, such as the International Criminal Court, whose jurisdictional capacity derived from their constitutive instruments and not from customary international law.

28. Universal jurisdiction was of its nature non-territorial, whereas a State seeking to exercise its enforcement jurisdiction outside its borders without the consent of the State on whose territory the crime had been committed would be violating important principles of international law, including the principle of non-intervention in the internal affairs of States. Universal jurisdiction enabled States to prosecute the perpetrators of international crimes residing in a State which was unable or unwilling to do so and could only be exercised in accordance with international law. It was subject to the same legal limitations as any other form of jurisdiction, including the general principles *nullum crimen sine lege* and *nulla poena sine lege*.

29. Universal jurisdiction must not be exercised in disregard of jurisdictional immunity. Even in cases of war crimes, crimes against humanity and genocide, the immunity of high officials of a State was absolute, as the International Court of Justice had recognized in *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium). Proceedings instituted on the basis of universal jurisdiction must comply with the principles governing the conduct of any criminal case, including the principle of legality and respect for officially recognized jurisdictional immunities.

30. **Mr. Maza Martelli** (El Salvador) emphasized that universal jurisdiction did not apply as a general rule, but rather as an exception in cases of serious violations of human rights and preemptory norms of international law. To deny it would be an invitation to arbitrary justice and violation of the most basic principles of human dignity; it was therefore an essential obligation of the international community. The principle of universal jurisdiction was recognized in El Salvador's Penal Code as applicable solely by virtue of the nature of the crime, in accordance with the Princeton Principles.

31. Universal jurisdiction was to be exercised only as a last resort, and with respect for the limits of a State's *ius puniendi* and for the rights and guarantees accompanying any criminal proceedings, including the presumption of innocence and the human dignity of the accused person. Similarly, respect for the rule of *non bis in idem* ensured that no one could be tried twice for the same offence, except where due process and the rule of law had not been observed in the first instance. The victims' right to compensation must also be respected since, however unimpeachable the motives for applying universal jurisdiction, including the seriousness and international scope of the crime, the outcome would be merely symbolic if the direct and indirect victims were forgotten.

32. **Mr. Bonifaz** (Peru) said that the discussions of the Working Group should be based on the legal aspects of the scope and application of universal jurisdiction; there must be no targeting of specific cases and no assumption that only specific regions had an interest in the topic. The work must be guided by a spirit of consensus, using a step-by-step process focusing first on those areas in which consensus emerged before moving to areas that required more thorough discussion. Sufficient time must be provided to allow careful examination of the information contained in the wealth of documentation provided by the Secretariat, Member States, observers and civil society. Furthermore, as States did not generally maintain databases recording their exercise of universal jurisdiction, care must be taken not to draw premature conclusions from any lack of response to requests for information. Lastly, the work of other United Nations bodies must not be duplicated but should be used, as appropriate, to enrich the discussion, which, in turn, should guide decisions concerning the outcome of the work and future steps to be taken.

33. As to the substantive aspects of the topic, the focus should remain on the sources of universal jurisdiction in international treaty and customary law. Universal jurisdiction was exercised by States; its ultimate purpose was to combat impunity and serve as a deterrent to certain crimes. It was a complementary mechanism for the exercise of jurisdiction and had an exceptional character, meaning that preference should be given to such other criteria as territoriality or nationality. Generally speaking, amnesty laws could not be invoked to prevent its exercise, which must, however, respect the immunity regimes of *ratione materiae* and

*ratione personae*. The link between the exercise of universal jurisdiction and the prohibitions embodied in *jus cogens* norms also required further analysis. States must first take into account due process guarantees and mechanisms for international cooperation in criminal matters. Cooperation and assistance mechanisms for promoting full compliance with international obligations by States should be considered and the civil dimension of universal jurisdiction must not be overlooked.

34. **Mr. Delgado Sánchez** (Cuba) reiterated the points made in his Government's contribution to the report of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/66/93/Add.1). No State could arrogate the right to exercise universal jurisdiction unilaterally whenever it chose, nor should universal jurisdiction be confused with the extraterritorial jurisdiction provided for in a State's domestic law, the obligation to extradite under a treaty, or international criminal jurisdiction.

35. **Mr. Osman** (Sudan) said that universal jurisdiction had long been associated with crimes of piracy, but the efforts to expand its scope had given rise to a number of legal reservations, particularly in view of the direct link between the exercise of universal jurisdiction and the sovereignty of States. Discussion of the topic should continue within a limited framework only; a definition of universal jurisdiction must be agreed and the relevant judicial procedures must be consistent with the principles set forth in the Charter of the United Nations, notably the equal sovereignty and political independence of States and non-interference in their internal affairs.

36. The principle of universal jurisdiction must continue to complement the primary role of national jurisdiction; where unilaterally applied by one State in the absence of a common understanding with the State within whose borders the crime had been committed or without the consent of the State of which the suspect was a national, it constituted a violation of international laws. The lack of international agreement concerning the scope of universal jurisdiction was a pivotal issue. The fact that it was left to the discretion of individual States to determine its scope allowed them to broaden the range of crimes qualified as "most serious". Wide differences of opinion and variations within application were the result.

37. While appreciating the importance of the principle of universal jurisdiction, African leaders had found that

double standards and selectivity were so frequently at play that it was interpreted and applied in a manner contrary to international law, the rulings of international legal bodies and the agreed customary law enshrined in international practice and conventions. In that context, the immunity granted to senior officials and heads of State under international law had been violated by the issuance of indictments and arrest warrants against them on the basis of universal jurisdiction as interpreted by certain States, in accordance with selective and politicized criteria reflecting their own interests. Dialogue must continue with a view to ending impunity for the most serious crimes on the basis of fair criteria and international understanding founded in the principles of international law and recognized legal practice that protected the territorial sovereignty of States, their judicial systems and their officials and leaders. The goal was to create confidence in justice systems untainted by politics.

38. **Ms. Habtemariam** (Ethiopia) said that the African Union decisions relating to abuse of the principle of universal jurisdiction reflected concern at the prosecutions instituted and arrest warrants issued by foreign courts against sitting African heads of State or Government or high-ranking officials, in violation of their immunity. Her delegation was committed to ensuring that individuals who committed grave offences against the international community as a whole were brought to justice through application of the principle of universal jurisdiction, which was enshrined in the Ethiopian Criminal Code as a complementary instrument in the fight against impunity for such crimes. The exercise of that jurisdiction must, however, be in keeping with recognized rules of international law.

39. A generally accepted definition of universal jurisdiction was lacking, as was a consensus concerning the offences subject thereto. The effect was to widen the scope of the principle, which in turn provided for wider jurisdiction on the basis of subjective considerations. The issues involved were sensitive and highly political in that abuse of the principle could undermine the common resolve to uphold international law, order and security. It was essential to strike a balance between ending impunity and limiting the scope, application and politicization of the principle of universal jurisdiction.

40. As a prerequisite to the exercise of such jurisdiction, the presence of an alleged offender in the territory of a prosecuting State, and other forms of

control over the said offender, had implications for the functional immunity of officials of another State who were accused of international crimes falling within its scope. States exercising such jurisdiction were legally bound to take into account all the immunities to which officials of other States were entitled under international law while representing their Governments; consequently, they were duty-bound to refrain from prosecuting those officials. The scope and application of the principle of universal jurisdiction must therefore be regulated in order to avoid arbitrary use, politicization, and a fatal loss of credibility.

41. **Mr. Igor A. Panin** (Russian Federation) said that his country acknowledged the importance of universal jurisdiction in combating impunity for the gravest international crimes. In his country, the courts were authorized by international treaties, the rules of customary international law and, to some extent, national legislation to institute proceedings for acts of genocide, war crimes and piracy. Application of the principle of universal jurisdiction was, however, regarded as exceptional owing to the absence of a clear and generally accepted definition. Russian international lawyers defined “universal criminal jurisdiction” as the exercise by a State of jurisdiction in respect of a crime committed outside its territory by a person not of its nationality, where the interests of the State or of its citizens or legal persons were not affected. In exercising universal jurisdiction under those circumstances, Russian courts were, however, required to meet certain additional conditions. He recognized that there were other views on the matter, as was evident from the report of the Secretary-General (A/66/93 and Add.1).

42. A clear distinction must be drawn between the exercise of universal jurisdiction, where national courts prosecuted individuals guilty of crimes under international law, and the exercise of criminal jurisdiction within the framework of international law, for example by the International Criminal Court on the basis of its Statute.

43. If exercised arbitrarily, and especially if abused, the principle of universal jurisdiction complicated relations between States. It must be exercised in accordance with the rules of customary international law, particularly those concerning the immunities of State officials. His delegation valued judicial independence but would not welcome a situation in which the decision of a court called into question a State’s compliance with its international obligations. It

should also be borne in mind that States and the international community had other instruments, apart from universal jurisdiction, for combating impunity.

44. His delegation did not object to further discussion of the topic in the Sixth Committee, provided that there was no duplication of the work of other bodies, such as the International Law Commission. The Committee’s efforts would be worthwhile if it succeeded in reconciling views and developing uniform approaches to the question.

45. **Mr. Mukongo Ngay** (Democratic Republic of the Congo) said that the general reluctance of States to include universal jurisdiction in their domestic law or to exercise it after so doing was a result of the imprecision concerning the modalities for its application, the difficulty of applying it effectively and the “customary” immunity of foreign high-ranking officials, even after they had left office. Only a tiny minority of States had conferred universal jurisdiction on their national courts by law and the modalities for its application also varied. Under those circumstances, abuse of the principle of universal jurisdiction was highly probable. The Committee’s newly formed Working Group should therefore be mandated to set clear rules governing the exercise of such jurisdiction and the use of mechanisms to ensure even-handedness, in keeping with the general rules of customary international law.

46. While universal jurisdiction undeniably played a role in combating impunity for serious crimes, some legal experts believed that it had been rendered obsolete by the existence of the International Criminal Court. The increasing extent to which it was exercised, however, was proof of its continued importance, although recent instances had given rise to passionate reactions by States and to diplomatic tensions indicative of a genuine and deep-rooted malaise.

47. Full agreement on a number of prerequisites was essential to facilitating the exercise of universal jurisdiction. It would be an abuse of the principle of universal jurisdiction, for example, to regard the obligation to extradite or prosecute *aut dedere aut judicare* as a panacea for all the shortcomings of extradition. Cooperation between States in such matters was also complicated by the fact that domestic law, including that of his own country, often made no provision for the prosecution of international crimes. A way must be found in order to destroy the illusion that



certain States had a monopoly on the exercise of universal jurisdiction to the detriment of others. In the recent past, some 30 high-ranking officials, most of them from the southern hemisphere, had been subjected to criminal investigation by a judge exercising universal jurisdiction; there would be a huge outcry if all 194 Member States were to exercise such jurisdiction. It was therefore more crucial than ever to bring order to relations that were becoming increasingly internationalized as an unavoidable consequence of globalization.

48. The question of immunities raised further complications in that it was often a sensitive matter for a State exercising universal jurisdiction to violate the immunities granted by a third State. In that regard, the clarification provided by judgment of the International Court of Justice on 14 February 2002 in the *Arrest Warrant* case was a milestone in the history of international law. Some standardization of universal jurisdiction was imperative, however, and should be achieved through international consensus as to the components of that jurisdiction. In a spirit of flexibility, his delegation remained open to all proposals aimed at establishing once and for all the legal criteria and fair modalities for its application.

49. **Mr. Mnisi** (Swaziland) said that the Jekyll and Hyde character of the principle of universal jurisdiction had ignited a debate that could change the face of international law. Justice was ethical and necessary; it implied responsibility and could never achieve its impact when executed as a vendetta, which, as in the case of universal jurisdiction, merely exacerbated acrimony and deepened international discord. The wide variety of national judicial systems testified to the fact that justice existed within a well-prescribed political and cultural setting. Extraterritorial judicial intervention was nonetheless an unswerving attack on the sovereignty conferred by the Charter of the United Nations. Moreover, the credibility of evidence derived from such indictments was doubtful. Ending abuse of the principle of universal jurisdiction would also help conserve vital resources, in particular for the purposes of the International Criminal Police Organization (INTERPOL).

50. Individuals from the developing world were increasingly subject to judicial interventions by judges from the developed world. In that the reverse situation was implausible and would have far-reaching implications for the country concerned, the principle of

universal jurisdiction might be fairly described as one that characteristically singled out and prosecuted individuals from developing countries in violation of the principle of *erga omnes*. Leaders and high-ranking officials had not been spared, and even the scope of crimes covered under the principle was not definitive. Legal guidelines on its execution were therefore needed in order to inform the actions of practising judges.

51. The immunities and privileges extended to public officials were intended solely to facilitate their successful performance of State duties. The pursuit of serving officials through universal jurisdiction was tantamount to the indictment of a country and its people, in disregard of the principles set forth in the Charter of the United Nations, whereas the fundamental ideals of justice and fairness could be achieved by waiting out their tenure. Indictments stemming from grave violations of international human rights law could not, however, be precluded by the cloak of immunity. Breaches of that law and deliberate abuse of the international judicial system were equally intolerable and specific safeguards were needed.

52. **Mr. Janssens de Bisthoven** (Belgium) said that the information contained in the Secretary-General's report on the topic (A/66/93 and Add.1) confirmed the generally agreed view among States that universal jurisdiction was to be exercised in the interests of the international community in order to end impunity for certain crimes under international law and without prejudice to the rules of international law, particularly those relating to immunities. The groundwork was therefore laid for consensus with respect to the scope and application of the principle of universal jurisdiction.

53. The newly formed Working Group could assist by identifying key issues for consideration, such as the crimes concerned, diplomatic immunity and the relationship between universal jurisdiction and the obligation to extradite or prosecute. Aspects of the Committee's work on the topic would also be informed by the work of the International Law Commission on the obligation to extradite or prosecute (*aut dedere aut judicare*) and the immunity of State officials from foreign criminal jurisdiction, as well as by the active contribution of States. Inclusion of the topic in the Commission's programme of work would be appropriate.

54. **Mr. Chilekwa** (Zambia) said that when used in good faith, the principle of universal jurisdiction was a

powerful tool for preservation of the fundamental values of the international community, protection and promotion of the rule of law and human rights, and the effort to combat impunity. While such jurisdiction was valuable as a mechanism for dealing with heinous crimes such as war crimes, genocide, piracy and torture, the lack of clarity concerning its scope and application was perturbing as it provided the opportunity for abuse and selective exercise of the principle in the absence of mutually agreed parameters.

55. Universal jurisdiction must not be used as a political weapon by a select few or exploited for the advancement of self-interest; it was intended to serve the collective needs of the international community, not the caprices of individual States. To that end, a universally acceptable and shared understanding of its application was essential in order to avoid the serious risks posed by its continued use under the current international legal regime and the potential infringement of other vitally important principles of international law.

56. It was critical to strike a balance between the principle of universal jurisdiction and other principles of international law, including State sovereignty, the sovereign equality of States, the immunity of State officials and, indeed, the rule of law. To do otherwise could destabilize international relations and erode efforts to maintain international peace and security under the Charter of the United Nations. States should have an obligation to exercise universal jurisdiction in good faith in order to prevent any misapplication; it must always be a last resort after all other avenues had been pursued. They should likewise establish domestic legal frameworks that facilitated the legitimate exercise of universal jurisdiction. A swift conclusion to the Committee's work on the agenda item would enable them to modify their statutes accordingly.

57. **Ms. Cabello de Daboin** (Bolivarian Republic of Venezuela) said that in order to ensure that universal jurisdiction was applied in an impartial and objective manner, clear and transparent definitions and mechanisms must be devised. Judgements stemming from biased interpretations could result in interventions that violated the principle of non-interference in the internal affairs of States. Universal jurisdiction must be exercised in accordance with the general principles of international law, especially non-interference in internal affairs and respect for the sovereignty of States, which were of first importance to the maintenance of international peace and security.

58. Universal jurisdiction was the invocation by a State of its criminal jurisdiction over a crime alleged to have been committed by nationals of another State on the territory of another State and against nationals of that State, without directly threatening the vital interests of the State exercising the jurisdiction. Consequently, there was no need for an effective link of territoriality, nationality or sovereignty with the latter State. For that reason, universal jurisdiction must be carefully analysed and discussed in light of the legal implications in order to ensure full respect for the important principles and rules of international law. At present, there were more questions than answers surrounding its application and it was not clear whether the term "universal jurisdiction" referred to a principle, a norm or a rule.

59. The concept must not be confused with the obligation to extradite or prosecute under various international treaties, which was intended to improve cooperation in combating international crimes. The two concepts, although related, differed in their origins and were not applied in the same way. Universal jurisdiction must be applied with due regard for the immunity of State officials under international law. Its scope and application were quite unlike those of the jurisdiction of the International Criminal Court and should not be discussed in the same context. Those questions must be carefully weighed so as to avoid politicized or selective treatment.

60. Lastly, she welcomed the establishment of the Working Group to deal with the question. However, in view of its technical and legal aspects, the findings of the Working Group should, at a later stage, be referred to the International Law Commission.

61. **Ms. Ahmad Tajuddin** (Malaysia) said that the most common definitional approach to the concept of universal jurisdiction was a focus on the crimes to which it applied. There was general agreement that the most serious crimes of international concern were subject to universal jurisdiction owing to their heinous nature, whereas the justification of any extension of that group of crimes was unclear. With the exception of piracy, universal jurisdiction applied irrespective of whether an international crime was committed within a State's territory or beyond its jurisdiction; in the case of piracy, it applied primarily because the offence was committed outside any particular State's territory and had serious economic and security repercussions for all States. In keeping with the practice of most other States, her Government had recently prosecuted Somali

pirates for events involving a Malaysian vessel on the high seas by asserting extraterritorial criminal jurisdiction on the basis of territoriality, nationality and the protective principle under its domestic law.

62. In most cases, it was misleading to assert that universal jurisdiction was established by a treaty in the absence of express language to that effect. The mandatory obligation under treaties on terrorism and drug trafficking, for instance, was to establish criminal jurisdiction on the basis of nationality and territoriality, while the discretionary obligation was based on the other generally accepted principles of passive personality and protection; it also arose in cases where the offence was committed by a stateless person who habitually resided in the State concerned. Nor must the principle of universal jurisdiction be confused with that of *aut dedere aut judicare*, which did not in itself establish universal jurisdiction for a treaty-based offence any more than the inclusion of such a provision in domestic extradition legislation or bilateral extradition treaties would do.

63. Universal jurisdiction must be exercised through a State's domestic law, but in a manner consistent with international law and without violating national sovereignty. Also to be borne in mind in establishing the conditions governing that exercise were the goals of creating an effective mechanism for prevention and suppression of the most serious crimes against humanity and of providing an avenue of justice for the victims.

64. It might be timely for the General Assembly to undertake a detailed study of State practice with respect to universal jurisdiction and of governments' interpretation of its scope and application. In that regard, she noted that in the *Arrest Warrant* case, the International Court of Justice had advised States to consider the consequences should other States follow their lead in attempting to steer public international law in a direction conflicting with the principles that governed contemporary international relations. Her delegation advocated a cautious approach to the possible elaboration of a new instrument on universal jurisdiction. Further study of the topic should be entrusted to the International Law Commission, which was already considering other topics closely related to it.

65. **Mr. Dahmane** (Algeria) said that the principle of universal jurisdiction must be exercised solely in good faith and in accordance with international law, without

abuse or selectivity. As a complementary and subsidiary mechanism, it was generally applied on the basis of the criminal law principle of territoriality and, in some legal systems, on those of nationality, passive personality and protection. Recourse to universal jurisdiction should be only a last resort, where other existing legal measures could not be effectively applied. The crimes within its scope should be clearly defined and it should not be exercised in situations where to do so would be incompatible with international law. State sovereignty and the immunity of State officials must also be respected; he therefore welcomed the work of the International Law Commission on related topics.

66. The nature of a crime should determine whether it fell within the scope of the principle of universal jurisdiction. It was largely agreed that piracy qualified for inclusion on that basis, as did crimes against humanity, war crimes, genocide, slavery and torture. Views differed, however, with respect to expansion of the range of crimes falling under such jurisdiction and the circumstances under which it could be invoked. Limitation of the scope *ratione materiae* of universal jurisdiction and of the modalities for its exercise would limit its abuse and politicization. The establishment of regulations, and perhaps a mechanism, for reviewing such abuse was an idea that merited further consideration. An approach aimed at tightening application of the principle of universal jurisdiction from the legal standpoint would enhance the credibility of and confidence in international criminal justice, thereby promoting greater cooperation among States in that sphere.

67. **Mr. Diallo** (Senegal) said that the controversies surrounding the principle of universal jurisdiction attested to the potential for disagreement on the matter. Unregulated application of the principle had had an impact on the conduct of international relations that explained the failure of the international community as a whole to take the concept on board. It was therefore vital to reach a common understanding of universal jurisdiction by clearly defining its essence, scope, application and limits and setting guidelines for its application with a view to ending impunity for the perpetrators of serious crimes. In the interests of credibility and functionality, the principle must be applied judiciously and responsibly in strict conformity with international law. The ambiguities currently

associated with it gave rise to misunderstandings that hindered its application.

68. The immunities of State officials must be respected in the exercise of universal jurisdiction, which was an exception to the traditional international law principles of territoriality and immunity, *ratione personae* and *ratione materiae*. The credibility of the principle was undermined by double standards and selectivity driven by political considerations. The exercise of universal jurisdiction must be regulated in order to curtail such abuses in the interests of maintaining the equal sovereignty of States and safeguarding international peace and security.

69. **Mr. Nduhungerehe** (Rwanda) said that his Government was not opposed to the principle of universal jurisdiction, which was valuable as a subsidiary tool in countering impunity, particularly for crimes such as the genocide suffered by Rwanda. The often politically motivated abuse of that principle was a problem, however, and had been inadequately addressed in the Committee's debates on the subject. On that score, he cited the example of a European examining magistrate who, without visiting the scene of the crime, had heard only prosecution witnesses; disregarded convictions handed down on the same matters by national courts and opened new investigations in flagrant violation of the *non bis in idem* principle; and issued some 40 international arrest warrants against officials of one country without so much as informing the authorities of that country in the interests of cooperation.

70. His delegation stood ready to contribute actively to the debate on the topic, including within the framework of the new Working Group. In the interim, however, it supported the repeated call of the African Union for a moratorium on the execution of arrest warrants abusively issued against African officials by non-African States, pending the issuance of appropriate recommendations. It would be regrettable if abuse of the principle of universal jurisdiction by non-African judges were to jeopardize the effort to combat impunity for the most serious crimes and the harmony of inter-State relations.

71. **Ms. Millicay** (Argentina) said that the primary responsibility for the investigation and prosecution of international crimes lay with the States in which the crimes were committed or with other States having a connection with the crime, such as the State of

nationality of the perpetrator or victims. Any impunity gap arising in circumstances where those States were unable or unwilling to prosecute could be significantly narrowed through use of the exceptional tool of universal jurisdiction. Its unlimited use could, however, lead to conflicts of jurisdiction between States, procedural abuse and politically motivated prosecutions. It could also be perceived as a tool for interference in the internal affairs of other States or as a hegemonic jurisdiction exercised by developed countries against nationals of developing countries. Clear rules would therefore ensure that it was exercised reasonably.

72. Using a step-by-step approach, the Working Group should address, inter alia, the concept of universal jurisdiction, its status in international law and the conditions for its exercise. However, the possibility of referring the issue to the International Law Commission should not be excluded. Often confused with such principles as complementarity and *aut dedere aut judicare*, the concept of universal jurisdiction was also associated — not always correctly — with concepts such as *jus cogens* and *obligatio erga omnes*. In the case of *aut dedere aut judicare*, the two principles were not identical, but there was some overlap where a State unconnected with an offence other than through the mere presence of the offender in its territory decided, in accordance with the *aut dedere aut judicare* principle, not to grant extradition but to prosecute solely on the basis of universal jurisdiction. The examination of international treaties, internal legislation and judicial practice must therefore take into account that difference between the two notions.

73. The inclusion of universal jurisdiction in multilateral treaties was limited to the few that expressly provided for it and others that did so implicitly by not excluding any criminal jurisdiction exercised in accordance with national law. The *aut dedere aut judicare* principle was included in many of the same instruments, including those that dealt with terrorism and transnational crime. The Working Group should thus recognize and explore the relationship of universal jurisdiction to other concepts but focus on its characteristic elements.

74. **Ms. Schonmann** (Israel) said that the broad range of views concerning the conceptual, substantive and procedural aspects of universal jurisdiction underscored the need for further study of the topic, to which end States that had not yet done so could usefully submit information on their practice in those

areas. The principle of universal jurisdiction was an important tool in strengthening the rule of law, but it should be used only as a last resort and with respect for the priority of States with primary jurisdictional links.

75. Safeguards were essential to ensuring that universal jurisdiction was exercised responsibly. In many States, including Israel, the practice was to require the consent of a senior government authority as a prerequisite to the initiation of criminal proceedings on the basis of such jurisdiction. Another common practice was for the principle of universal jurisdiction to be applied only where the accused was present in the territory of the forum State. It was conceptually distinct from the State's obligation to extradite or prosecute, which arose from specific treaty provisions and did not, in and of itself, imply that the offence in question was subject to universal jurisdiction. Given the existing uncertainties with respect to interpretation of the principle of universal jurisdiction and the inconsistencies in State practice, the Working Group should focus initially on defining the concept before considering other related aspects.

76. **Mr. Válek** (Czech Republic) reiterated his delegation's view that the principle of universal jurisdiction was a legal issue best entrusted to the International Law Commission. In that regard, it shared the view expressed by Switzerland in paragraph 149 of the Secretary-General's report on the current agenda item (A/66/93 and Add.1). The Commission would have a lighter agenda in 2012 and would thus be in a position to prepare a study on the issue.

77. His delegation was nonetheless prepared to participate in the work of the Working Group, although the possible outcomes were unclear and the process involved risks. It was not prepared, however, to support any conclusions proposing the establishment of an international commission on universal jurisdiction as a subsidiary body of the General Assembly to serve as a regulatory body on the exercise of universal jurisdiction, as proposed by the African Union in paragraph 168 of the Secretary-General's report, which would be incompatible with the rule of law and with the obligations imposed under international human rights law; any involvement of an international executive mechanism in criminal proceedings would inevitably interfere with the independence and impartiality of courts and judges.

*The meeting rose at 1 p.m.*