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Summary record of the 14th meeting
Held at Headquarters, New York, on Tuesday, 15 October 2019, at 4 p.m.

Chair: Mr. Arrocha Olabuenaga (Vice-Chair) . . . . . (Mexico)

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19-17809 (E)

In the absence of Mr. Mlynár (Slovakia), Mr. Arrocha Olabuenaga (Mexico), Vice-Chair, took the Chair.

The meeting was called to order at 4.10 p.m.

Agenda item 80: Diplomatic protection (*continued*) (A/74/143)

1. **Ms. González López** (El Salvador) said that diplomatic protection, which served as the means for a State to take action against another State to demand the due application of international law in relation to a wrongful act that had caused prejudice to its nationals, had the merit of having been developed on the basis of the affirmation of the sovereign equality of States. However, in the light of international practice and studies conducted by the International Law Commission, States sometimes had difficulties exercising diplomatic protection in the case of persons with no genuine link of nationality with the State in which they were habitually resident; in the case of persons with dual nationality; and in the case of legal persons whose nationality could not be determined on the basis of any criterion of incorporation or effectiveness. The articles on diplomatic protection would help States to overcome those difficulties.

2. In response to the invitation from the General Assembly set out in its resolution 71/142, her delegation considered that, in order to clarify the scope of application of the articles, a clearer link should be made between article 2 (Right to exercise diplomatic protection) and article 19 (Recommended practice). It was understood that, in any event, a State had a right to exercise diplomatic protection taking into account the conditions set forth in article 19 concerning the possibility of exercising diplomatic protection, especially when a significant injury had occurred; the taking into account, wherever feasible, of the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and the transfer to the injured person of any compensation obtained for the injury from the responsible State subject to any reasonable deductions.

3. Diplomatic protection had an overriding impact on the recognition of and reparation for injury caused to the nationals of another State, and was therefore an important tool for the protection of human rights. The articles on diplomatic protection should be transformed into a legally binding international instrument. Her delegation would continue to support efforts to develop a convention on diplomatic protection, which would help to further align the practices of States.

4. **Mr. Nasimfar** (Islamic Republic of Iran) said that any legal regime on diplomatic protection must observe a proper balance between the rights of individuals and those of States. It was doubtful that the current articles on diplomatic protection could satisfy that concern. Some of the articles could not be said to reflect customary international law. For instance, articles 7 (Multiple nationality and claim against a State of nationality) and 8 (Stateless persons and refugees) had been formulated on the basis of the case law of regional tribunals or of sui generis tribunals, which could hardly reflect existing general international law.

5. In its commentary to article 7, the International Law Commission explained why it used the word “predominant” instead of “dominant” or “effective” nationality to convey the element of relativity. However, it would be difficult to define a criterion for establishing the predominance of one nationality over another. Thus, instead of proposing a normative solution, article 7 only increased the uncertainty and ambiguity around the topic. It was also contrary to the Constitutions of countries which did not accept dual nationality or did not recognize the legal effects arising from the secondary nationality of their citizens. In those cases, the exercise of diplomatic protection by one State of nationality against another State of nationality would create uncertainty and ambiguity about States’ obligations. Furthermore, article 15 (b) and (d) were vague or hypothetical.

6. Although the Commission had pointed out in its commentaries that the articles would not deal with primary rules, the wording of some provisions suggested otherwise. For instance, it was for each State to decide in accordance with its laws who its nationals were. In that context, the final phrase in article 4, pursuant to which the acquisition of nationality must not be inconsistent with international law, as well as the example cited in the commentary thereto, were not clear. More time was therefore needed to consider the content of the articles and decide on their future. A legally binding instrument could not be drafted until and unless certain concerns of Member States were addressed.

7. **Ms. Fierro** (Mexico) said that efforts should be made to elaborate an international convention on diplomatic protection on the basis of the articles on diplomatic protection. The convention should reflect the principle that actions taken to exercise diplomatic protection in a State that had committed an internationally wrongful act did not constitute interference in the internal affairs of that State. That principle derived from the practice of States and, although not codified in the Vienna Convention on Consular Relations, was referred to in the commentaries

to the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission in 1958.

8. Article 7, which contained the "predominant nationality" principle, was not supported by sufficient State practice and could lead to disputes. Therefore, any new convention should recognize the general principle that a State could not exercise diplomatic protection in respect of a national who was also a national of the State that had committed the internationally wrongful act. In any event, the "predominant nationality" principle should be governed by *lex specialis* in the relations between States that wished to apply it.

9. Her delegation continued to be concerned that the Committee's infrequent consideration of the Commission's outputs was preventing the Committee from making progress on the issue of diplomatic protection and other agenda items. Consideration of the current item should be sped up, particularly given the challenges facing the international community in the field of diplomatic protection.

Agenda item 84: The scope and application of the principle of universal jurisdiction (A/74/144)

10. **Mr. Nasimfar** (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, particularly the sovereign equality and political independence of States and non-interference in their internal affairs, should be strictly observed in any judicial proceedings. The exercise by the courts of another State of criminal jurisdiction over high-ranking officials who enjoyed immunity under international law violated the principle of State sovereignty; the immunity of State officials was firmly established in the Charter and in international law and must be respected. The invocation of universal jurisdiction against officials of some States members of the Non-Aligned Movement raised both legal and political concerns.

11. Universal jurisdiction provided a tool for prosecuting the perpetrators of certain serious crimes under international treaties. However, it was necessary to clarify several questions in order to prevent its misapplication, including the range of crimes that fell within its scope and the conditions for its application; the Committee might find the decisions and judgments of the International Court of Justice and the work of the International Law Commission useful for that purpose.

12. The Movement would participate actively in the work of the working group on the topic. The discussions therein should be aimed at identifying the scope and limits of the application of universal jurisdiction; consideration should be given to establishing a monitoring mechanism to prevent abuse. Universal jurisdiction could not replace other jurisdictional bases, namely territoriality and nationality. It should be asserted only for the most serious crimes and could not be exercised to the exclusion of other relevant rules and principles of international law, including State sovereignty, the territorial integrity of States and the immunity of State officials from foreign criminal jurisdiction.

13. In the view of the Non-Aligned Movement, it was premature at the current stage to request the International Law Commission to undertake a study on the topic of universal jurisdiction.

14. **Mr. Jaiteh** (Gambia), speaking on behalf of the Group of African States, said that the scope and application of the principle of universal jurisdiction had been included in the agenda of the General Assembly since its sixty-third session at the request of the Group, which had been concerned about the abusive application of the principle, particularly against African officials. However, in the 10 years since then, very little progress had been made. It was in the interests of all States to agree on how to address the abuse and misuse of the principle of universal jurisdiction.

15. While the Group respected the principle of universal jurisdiction, which was enshrined in the Constitutive Act of the African Union, it was concerned about the indictment of African leaders and other senior officials, who were entitled to immunity under international law, by non-African judges. African States had engaged constructively and in good faith in the work of the Committee and the relevant working group with a view to clarifying the scope and application of the principle. The Committee could and must take steps to address the propensity of non-African States to invoke the principle of universal jurisdiction in cases involving Africans outside the multilateral processes, without the consent of African States, and without applying the cooperation safeguards of the international system. The Group had evidence, however, of the use of the principle in Africa by non-African States with the consent and cooperation of African States, and in line with their commitment to end impunity for atrocity crimes. Consent and cooperation, when regulated within the multilateral system, could help to limit the abuse and misuse of the principle of universal jurisdiction.

16. The Group had taken note of the inclusion of the topic "Universal criminal jurisdiction" in the long-term programme of work of the International Law Commission.

17. **Ms. Anderberg** (Sweden), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that the principle of universal jurisdiction had been incorporated into many national legal orders and had become part of the international effort to end impunity. For the Nordic countries, universal jurisdiction rested with national prosecutorial offices and any discussion on its scope and application would need to take into account the practices and processes of those bodies, including prosecutorial discretion and mechanisms securing the independence of prosecutorial offices. The principle of universal jurisdiction drew on developments in international law, including State practice and the jurisprudence of courts and tribunals. That ongoing process should be allowed to evolve. It was not advisable to attempt to develop an exhaustive list of crimes for which universal jurisdiction would apply.

18. The International Criminal Court played an important role in combating impunity for the most serious crimes. As a court of last resort, it was intended to complement, not replace, national courts. However, the Court provided an avenue for prosecution when States did not exercise jurisdiction. The development of other bodies at the international level, such as the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, the independent international fact-finding mission on Myanmar, the Independent Investigative Mechanism for Myanmar and the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/Islamic State in Iraq and the Levant, might be helpful for criminal proceedings before national, regional and international entities that had or that might have jurisdiction in the future. Given that those investigative bodies did not have prosecutorial mandates, national prosecutorial offices applying the principle of universal jurisdiction could help to fill the gap at the international level. The contributions of such bodies and other possible future mechanisms could shape the application of the principle of universal jurisdiction.

19. The primary responsibility for exercising jurisdiction over those responsible for international crimes rested with States. To ensure the effective prosecution of such crimes, measures must be taken at the national level, as well as at the international level. The application of the principle of universal jurisdiction was becoming increasingly important in that regard. Holding individuals accountable for their crimes acted as a deterrent and provided justice for victims.

20. **Mr. Alavi** (Liechtenstein) said that the common goal of ending impunity for the most serious crimes of international concern should guide discussions on the principle of universal jurisdiction. It was encouraging to see that more and more States were recognizing universal jurisdiction as an effective tool in the fight against impunity and that national judiciaries were invoking it to hold accountable those responsible for atrocities.

21. The primary responsibility for prosecuting the perpetrators of the most serious international crimes rested with the States on whose territory the crimes had been committed, although other jurisdictional links, such as the nationality of the perpetrator and the nationality of the victims, were also widely accepted. Where those States were unwilling or unable to prosecute the perpetrators, other States that had no direct connection to the crime should be able to do so on the basis of universal jurisdiction, which was thus an important subsidiary tool for ensuring accountability for crimes such as genocide, war crimes and crimes against humanity. Given that such crimes threatened the peace, security and well-being of the world, it was a common goal of all States to ensure that they did not go unpunished. Effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

22. While universal jurisdiction related only to domestic jurisdiction and must be clearly distinguished from the jurisdiction of international courts and tribunals, in particular that of the International Criminal Court, a large number of perpetrators operated beyond the Court's jurisdictional reach. Where the seriousness of the situation warranted, and where domestic prosecution and all other options had failed, the Court should be able to act. However, it was often up to the Security Council to give the Court jurisdiction, which generally did not happen. The dynamic in the Council could not be expected to change in the near future, and alternatives should therefore be sought in order to ensure justice, including the application of universal jurisdiction in domestic proceedings, supported by United Nations accountability mechanisms where possible. Universal jurisdiction was thus a critical component of the international criminal justice system.

23. The International, Impartial and Independent Mechanism, the mandate of which was to prepare cases for prosecution in courts that had jurisdiction over crimes committed in Syria, played an important role in that regard. By invoking universal jurisdiction, a number of European courts had been able to prosecute perpetrators in a limited but still meaningful way. His delegation welcomed that development and encouraged

all States to cooperate with the Mechanism. The recent operationalization of the Independent Investigative Mechanism for Myanmar was a sign of the international community's strong political acceptance of such mechanisms, which helped to ensure accountability and should, therefore, be funded from the regular budget of the United Nations.

24. **Mr. Kanu** (Sierra Leone) said that the possibility of universal jurisdiction for grave breaches of the Geneva Conventions of 1949 and the 1977 Additional Protocols thereto was recognized under the domestic law of Sierra Leone. The offences covered included not just those committed by nationals of Sierra Leone or in that country's territory, but also those committed by persons of whatever nationality, whether within or outside Sierra Leone. The law also allowed the national courts to prosecute violations of international humanitarian law. The Committee had been discussing the scope and application of the principle of universal jurisdiction for a decade, yet little progress had been made. His delegation had welcomed, therefore, the decision of the International Law Commission to place the topic on its long-term programme of work.

25. Like other African States, Sierra Leone continued to be concerned about the inertia that the Sixth Committee currently faced on the topic, a concern echoed by the Assembly of Heads of State and Government of the African Union in two separate decisions adopted in 2018 and 2019.It also shared the concern expressed by other African States about the abuse and misuse of the universality principle. Although his delegation took note of the clarification provided regarding the concern involving the immunity of State officials from foreign criminal jurisdiction in circumstances where States purported to assert any form of criminal jurisdiction over senior African government officials, it believed that a distinction must be made between the issue of immunity and the issue of universality. His delegation was also of the view that the Committee could address abuse and misuse in that context, while allowing for a more suitable forum to study the substantive legal aspects of the universality principle.

26. When rules of international law on a given issue were ambiguous or unclear, there was room for loopholes and abuse, thus increasing the likelihood of the issue being applied in a manner not consistent with international law, which could undermine inter-State relations. Conversely, when rules were clear, it was much harder to exploit any loopholes or to misuse the rules for political gain. Greater clarity would also strengthen collaboration and the provision of mutual legal assistance in the field of universal jurisdiction, which would allow for greater stability in inter-State relations.

27. The International Law Commission was best placed to study the issue of universal jurisdiction, because its working methods were sound and it was composed of independent experts. The material compiled by the Secretariat, including national laws, judicial decisions and other forms of State practice, offered a comprehensive basis for the Commission and the Committee to reach firm legal conclusions on the legal questions surrounding universal jurisdiction. The pending study on the topic offered an opportunity to revitalize the relationship between the two bodies. His delegation hoped that the Commission would move the topic of universal criminal jurisdiction to its current programme of work. More detailed comments could be found in his written statement, available on the PaperSmart portal.

28. **Mr. Scott-Kemmis** (Australia), speaking also on behalf of Canada and New Zealand, said that the three countries recognized universal jurisdiction as a well-established principle of international law that provided a legal basis for States to prosecute the most serious international crimes – including genocide, crimes against humanity, war crimes, slavery, torture and piracy – regardless of where the conduct occurred and the nationality of the perpetrator.

29. Universal jurisdiction offered a complementary framework to ensure that persons accused of such crimes could be held accountable in circumstances where the territorial State was unwilling or unable to exercise jurisdiction. As a general rule, the primary responsibility for investigating and prosecuting serious international crimes rested with the State in which that conduct occurred and the State of nationality of the perpetrator. Those States were in the best position to see justice done, given their access to evidence, witnesses and victims, and their ability to enforce sentences. They were also best placed to make victims and affected communities feel that justice had been served.

30. Universal jurisdiction must be exercised in good faith and in accordance with other principles and rules of international law, including laws related to diplomatic relations and privileges and immunities, to ensure that the goal of ending impunity did not result in further human rights abuses or conflict with other existing rules of international law. Judicial independence and impartiality must be maintained to ensure that the principle of universal jurisdiction was not manipulated for political ends.

31. Australia, Canada and New Zealand all had legislation establishing universal jurisdiction in respect

of the most serious international crimes. Such crimes attacked the interests of all States and, as such, it was in the interests of all States to ensure that perpetrators were prosecuted. They encouraged Member States that had not already done so to incorporate universal jurisdiction into their domestic legislation, thus ensuring that perpetrators did not receive safe haven anywhere in the world.

The meeting rose at 5.05 p.m.