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Chair: Mr. Jaiteh (Vice-Chair) . . . . . (Gambia)

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19-17915 (E)

In the absence of Mr. Mlynár (Slovakia), Mr. Jaiteh (Gambia), Vice-Chair, took the Chair.

The meeting was called to order at 12.10 p.m.

Agenda item 75: Responsibility of States for internationally wrongful acts (*continued*) (A/74/83 and A/74/156)

1. **Mr. Molefe** (South Africa) said that the States remained divided on the question of the development of an international convention based on the articles on responsibility of States for internationally wrongful acts, even though international and national courts and tribunals had referred to those articles in many of their decisions. His delegation supported the elaboration of a convention but considered that the focus of the Committee's deliberations should be shifted from the appropriateness of developing a convention to substantive aspects of the matter. Discussions concerning the substance of the articles might ultimately allay the concerns of States that had reservations about the development of a convention.

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

2. **Mr. Molefe** (South Africa) said that since diplomatic protection was a means of implementation of States responsibility, the agenda items on diplomatic protection and responsibility of States for internationally wrongful acts were interlinked. In particular, the prevailing view was that the question of the elaboration of a convention on State responsibility should be resolved before a decision was taken on the development of a convention on diplomatic protection.

3. His delegation supported the articles on diplomatic protection adopted by the International Law Commission, but had reservations about the scope of some of them, especially article 19 (Recommended practice), which provided that States should give due consideration to the possibility of exercising diplomatic protection. Such provisions could establish a general obligation for States to provide such protection. That conflicted with the finding of South African courts that the obligation of the State of South Africa was limited to a constitutional duty to rationally consider requests for diplomatic protection. South Africa supported the development of a convention on diplomatic protection, as that process would take into account contributions from Member States and result in legal certainty. In the absence of a convention, there was a risk that the articles on diplomatic protection as they stood could come to be considered customary international law.

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

4. **Mr. Košuth** (Slovakia) said that universal jurisdiction had been a firm part of international law for centuries, first in relation to piracy and subsequently in relation to crimes against humanity, war crimes, genocide, torture and other crimes. The inclusion of the concept in article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in draft article 7 of the draft articles on prevention and punishment of crimes against humanity adopted by the International Law Commission were strong evidence of its existence and acceptance.

5. His delegation welcomed the Committee's decision to establish a working group on the topic of universal jurisdiction and hoped that a legal debate would help to alleviate the political sensitivities associated with the principle. The consideration by the Commission of the topic "Universal criminal jurisdiction", which was currently on its long-term programme of work, would promote the objective, unpoliticized examination of the topic.

6. The application of universal jurisdiction should not in any way call into question traditional jurisdictional links based on territoriality or personality. However, it did complement those jurisdictional approaches by helping to prevent impunity, especially in situations where alleged perpetrators had evaded the States having territorial or personal jurisdiction. In the absence of a truly universal framework for mutual legal assistance and of universal acceptance of the Rome Statute of the International Criminal Court, universal jurisdiction remained a guarantee against impunity of such perpetrators. The development of a treaty on mutual legal assistance or a convention on the prevention and punishment of crimes against humanity would not strip the principle of universal jurisdiction of its relevance or narrow the scope of its application. Efforts to develop such agreements, together with the application of universal jurisdiction and the strengthening of the International Criminal Court, could complement and reinforce each other, creating a strong legal framework aimed at ensuring accountability.

7. **Mr. Xu** Chi (China) said that the scope and application of the principle of universal jurisdiction had been included in the agenda of the Committee to ensure that Member States defined universal jurisdiction in a prudent manner and guarded against abuses, in order to prevent the destabilization of international relations. Member States had widely divergent views on the applicability of universal jurisdiction and on the

conditions for its application in respect of crimes other than piracy, and there were significant differences in State practice and *opinio juris* on the issue. Most situations that had been invoked as examples of the exercise of universal jurisdiction concerned *aut dedere aut judicare* obligation enshrined in treaties or the exercise of extraterritorial jurisdiction. However, in all of those cases, either the State exercising jurisdiction had links to the perpetrator or the offence, or the jurisdiction in question was that of an international judicial body. Thus, they did not concern true universal jurisdiction and should not be considered evidence in support of the exercise of universal jurisdiction.

8. Certain States, in the name of universal jurisdiction, exercised extraterritorial jurisdiction, which was incompatible with existing international law and was not widely accepted. They also brought vexatious litigation for political purposes against foreign State officials, in violation of their immunity. Those abuses of universal jurisdiction and international law jeopardized the stability of international relations. A State establishing and exercising universal jurisdiction must comply with the purposes and principles of the Charter of the United Nations and the fundamental principles of international law, such as sovereign equality of States and non-interference in the internal affairs of States, and respect the principle of immunity recognized under international law.

9. **Mr. Zukal** (Czechia) said that universal jurisdiction was an important tool for bringing the perpetrators of serious crimes under international law to justice. It was in the interest of all States to prosecute and punish such persons, regardless of where the crime was committed, as the crimes in question violated universal values. The exercise of universal jurisdiction not only ensured that perpetrators were held accountable but also provided justice for victims and strengthened respect for international law. The principle of universal jurisdiction had been incorporated into the domestic law of Czechia.

10. Universal jurisdiction was a generally recognized principle of international law. The question of its scope and application was a purely legal one, and discussions should not be burdened by the political considerations that inevitably came into play in the debates of the Committee. His delegation commended the work of the Committee's working group on the topic but considered that its debates could continue ad infinitum, given the widely diverging views of States on key aspects and the difficulty of making substantive progress when so little time was devoted to working group discussions. The thorough legal analysis required to achieve legal certainty would best be carried out by an independent expert body such as the International Law Commission. His delegation therefore wished to propose once again that the topic be referred to the Commission, which could allocate adequate time to the matter and draw on its other relevant work. The Commission itself had, at its seventieth session, noted the lack of meaningful progress by the Sixth Committee and had decided to include the topic "Universal criminal jurisdiction" in its long-term programme work. Referring the topic to the Commission would not only further the debate on controversial aspects of the topic but also demonstrate the Committee's commitment to strengthening its interaction with the Commission.

11. **Mr. Verdier** (Argentina) said that the most serious crimes affecting the international community as a whole must not go unpunished. It was the duty of States to exercise their criminal jurisdiction against those responsible for such crimes. The primary responsibility for investigation and prosecution lay with the States in whose territories crimes had been committed or with other States that had a connection to the crimes because of the nationality of either the perpetrator or the victims. Nonetheless, in circumstances where States could not or did not wish to exercise jurisdiction, other States without a direct link to the crime could fill the void through the exercise of universal jurisdiction. It was, however, an exceptional and supplementary tool that must be used in accordance with the relevant treaties and rules of international law. Although the principles of universal jurisdiction and *aut dedere aut judicare* might overlap in some cases, they were distinct concepts and should not be conflated.

12. Universal jurisdiction was a critical component of the international criminal justice system. However, its application without restrictions could generate conflicts of jurisdiction between States and subject individuals to possible procedural abuses or give rise to politically motivated prosecutions. It would therefore be useful to develop clear rules to guide the exercise of universal jurisdiction. His delegation welcomed the decision of the International Law Commission to include the topic in its long-term programme of work, as the Commission's examination of the topic should shed light on various significant aspects of the matter.

13. **Ms. Weiss Ma'udi** (Israel) said that it was of critical importance to combat impunity and to ensure that the perpetrators of the most serious crimes of international concern were brought to justice. To that end, it was essential for States to agree on a definition of universal jurisdiction and a shared understanding of its scope and application. Given the broad range of diverging views among States, it would be more appropriate for the topic to be considered by the Sixth

Committee, which operated on the basis of consensus, than by the International Law Commission. Her delegation reiterated its view that the decision by the International Law Commission to include the topic of universal criminal jurisdiction in its long-term programme of work was premature and counterproductive. It was particularly ill advised at the current time, since the Commission's work on the closely related topics of peremptory norms of general international law (*jus cogens*) and immunity of State officials from foreign criminal jurisdiction might overlap with or influence its work on universal jurisdiction. Only after the Commission's work on those topics was finished and States had completed a thorough examination of the scope and application of universal jurisdiction would it be appropriate to consider referring the topic of universal jurisdiction to the Commission.

14. In addition, identifying State practice in relation to universal jurisdiction presented a major challenge because most cases never reached the formal deliberation stage and, consequently, the vast majority of the relevant legal data – including information about whether a complaint had also been filed in the State with closer jurisdictional links, the current status of complaints and the outcome of complaints – remained confidential. There was thus a significant risk that reliance on publicly available material, which was the only material available to the International Law Commission, would present a distorted picture of State practice and provide a poor basis for proper legal analysis. Deliberations on the topic should therefore remain within the purview of the Sixth Committee.

15. Certain key principles must be borne in mind in the debate on universal jurisdiction. In the interests of justice and also effective prosecution, criminal jurisdiction should be asserted by the State with the closest jurisdictional links to the crime. The principle of subsidiarity should be honoured, and universal jurisdiction mechanisms should be used only as a last resort if the State with closer jurisdictional link refused to act. Safeguards should be adopted to prevent the political abuse of universal jurisdiction. Such measures might include a requirement that prosecution be undertaken only by the relevant authorities of the State with the closest jurisdictional link to the crime, or a requirement that inquiries be made at the preliminary stages of the investigation to determine whether an equivalent complaint had been filed in another jurisdiction and, if so, what the outcome had been.

16. **Mr. Dixon** (United Kingdom) said that his delegation understood universal jurisdiction to refer to national jurisdiction established over a crime irrespective of the alleged place of perpetration, the nationality of the alleged perpetrator, the nationality of the victim, or other links between the crime and the prosecuting State. Universal jurisdiction should be distinguished from the jurisdiction of international judicial mechanisms established by treaty, including the International Criminal Court, and from the extraterritorial jurisdiction enjoyed by States under their domestic laws, such as that exercised by a State's courts to prosecute crimes committed by its nationals overseas. It also appeared to be distinct from the jurisdiction established under treaties that provided for an "extradite or prosecute" regime, which usually required the presence of the accused in the territory of the contracting State in order for jurisdiction to be exercised.

17. The primacy of the territorial approach to jurisdiction reflected the practical reality that the authorities of the State in whose territory an offence was committed were generally best placed to prosecute that offence, as it was easier for them to secure the evidence and witnesses necessary for a successful prosecution. Accordingly, there were only a small number of offences for which courts of the United Kingdom could exercise jurisdiction when there was no apparent link to the country. His delegation had provided a non-exhaustive list of those offences and more detail on its position to the Office of Legal Affairs.

18. The lack of consensus concerning the nature, scope and application of universal jurisdiction indicated that it would be premature to take a definitive stance on the crimes in respect of which universal jurisdiction should be exercised or on a methodology for determining such crimes. The adoption of a list or methodology would risk undermining the ability of States to agree on how best to deal with a particular crime by limiting the options available to them. The question of whether universal jurisdiction or another form of extraterritorial jurisdiction should apply to particular crimes should be addressed collaboratively by States, as had been done so far through treaties, with a focus on determining how best to contribute to efforts to combat the crime in question. Given the issues that States had to address in relation to universal jurisdiction and the diversity of views with regard to its scope and application, his delegation doubted that the topic would best be addressed by the International Law Commission.

19. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan) said that the Committee was the most appropriate forum in which to discuss universal jurisdiction and to seek to reconcile the differing views of States, particularly with regard to its scope. The lack of consensus regarding universal jurisdiction would continue to cause crises, particularly when such jurisdiction was applied to Heads of State

and Government, Ministers for Foreign Affairs and senior officials who benefited from immunity *ratione personae*. The relevant reports of the Secretary-General should be analysed and discussed objectively in order to determine the best way forward. In view of the prevailing lack of legal certainty, a comprehensive and transparent debate should take place with a view to providing clarity and ensuring that universal jurisdiction was not applied arbitrarily or for political purposes. The application of the principle must be consistent with the principles established in international law and the Charter of the United Nations, in particular the sovereignty, sovereign equality and political independence of States and non-interference in their internal affairs. The General Assembly's work on the subject should be focused on ensuring that those principles were respected, and that universal jurisdiction remained a complementary mechanism rather than a substitute for national jurisdiction.

20. His delegation considered universal jurisdiction to be a secondary jurisdiction exercised when no other court with stronger jurisdictional ties (such as territoriality or nationality) could try an alleged offender. Under Sudanese law, universal jurisdiction could be exercised in two situations: whenever a treaty binding on the State provided for such jurisdiction, and whenever a treaty binding on the State provided for an obligation to extradite or prosecute. Its exercise was subject to a number of conditions: the alleged offender must be present on the national territory, must not have been extradited to another competent jurisdiction, must not have been finally sentenced in the country where the offence was committed, and must not be in the process of being extradited to the requesting State. The offence must be criminalized both in the Sudan and in the State where it was committed. As a general rule, the State in which a crime took place (the territorial State) and the State of nationality of the perpetrator (the State of nationality) bore the primary jurisdiction and responsibility over the perpetrators. Nonetheless, each State should prohibit serious crimes under its domestic law and exercise effective jurisdiction over those crimes when they were committed on its territory or by its nationals.

21. The unilateral and selective application of universal jurisdiction by the national courts of certain States could lead to international conflict. Universal jurisdiction could not replace jurisdiction based on territoriality or nationality, and should be restricted to the most serious and heinous of crimes: on no account should its scope be expanded to cover lesser crimes, nor should it be invoked in isolation from the other relevant principles of international law, such as sovereignty, territorial integrity and the immunity of State officials from criminal prosecution. His delegation recalled that, in the opinion of the International Court of Justice, the immunity granted to Heads of State and Government and other government officials under international law was beyond question. The African Union had repeatedly reaffirmed that view in the outcome documents of the ordinary and extraordinary sessions of its Assembly.

22. It was important to continue discussing the question of universal jurisdiction within the Sixth Committee with a view to achieving a common understanding of the concept and ensuring that it was applied in a manner consistent with its original objectives and not in the service of political agendas or as a pretext for intervening in the internal affairs of States. His delegation remained of the view that it was too soon to request the International Law Commission to conduct a study on various aspects of the principle of universal jurisdiction. The principle would be seen as legitimate and credible only to the extent that it was invoked responsibly and in accordance with international law.

23. **Mr. Al Arsan** (Syrian Arab Republic) said that the disparities in application of the principle of universal jurisdiction posed an imminent threat to the stability of the global system, making it impossible to fulfil the aims of universal jurisdiction: achieving justice and fighting impunity. Moreover, there was no process to build confidence or transparency among States, whether at the United Nations or in bilateral or multilateral relations more generally.

24. It was clear from the report of the Secretary-General (A/74/144) that there was a tendency on the part of some Governments to broaden the scope of universal jurisdiction to serve their national interests or to advance their narrow political agendas, with scant regard for the promotion of what was referred to as "international criminal justice". In its resolution 73/208, the General Assembly had expressed concerns in relation to the abuse or misuse of the principle of universal jurisdiction, acknowledging the need for continuing discussions on the scope and application of the principle in the Sixth Committee. Accordingly, his delegation continued to believe that the International Law Commission should not play a part in discussing such a controversial topic and should prepare no reports or studies in that connection, whether as part of its current or as part of its long-term programme of work.

25. The core task entrusted to the Sixth Committee was to defend the concept of justice and protect the principles of law from any political whims reflected in the conduct of all Governments, without exception.

Syria therefore continued to reject the suspicious or ill-considered tendencies of certain Member States to broaden the scope of universal jurisdiction in a politicized manner and to introduce such new and controversial concepts as the responsibility to protect, which were intended to facilitate certain Governments' endeavour to undermine the sovereignty of other States and tarnish the reputation of their national judicial institutions, all under the pretext of fighting impunity.

26. With regard to the comments submitted by Germany and set forth in the report of the Secretary-General, his Government rejected and refused to recognize the arrest warrants served on Syrian officials by German courts. Such warrants constituted an abuse of the concept of universal jurisdiction. Their purpose was merely to promote policies that were baffling and unjustifiable. His delegation urged the German Government, and any other Government that had embarked on such an irresponsible course of action, to assume its responsibility by repatriating foreign terrorist fighters and their families, who had travelled to Syria in full view of their countries' intelligence services in order to commit acts of terrorism. The fighters and their families should be held accountable and prosecuted, then rehabilitated and reintegrated in their own societies. According to the German Government's own estimates, between 480 and 1,050 German citizens, not including family members, had travelled to Syria or Iraq to join terrorist groups. The German Government had persistently refused to tackle that issue in an earnest and responsible way.

27. Some delegations continued to promote the so-called 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, as an instrument that would supposedly help to fight impunity, achieve justice and support national judicial bodies seeking to apply universal jurisdiction. His delegation invited the legal experts in the Sixth Committee to examine several letters from his Permanent Mission addressed to the Secretary-General or to the President of the General Assembly (A/71/799, A/72/106, A/73/562 and A/74/108), all of which presented a sound legal assessment that exposed the serious legal flaws in General Assembly resolution 71/248, by which the Mechanism had been established. Owing to those flaws, the so-called International, Impartial and Independent Mechanism could not be considered a subsidiary body established by the General Assembly. Consequently, the Secretary-General could not take any decision to appoint a chair or vice-chair of the Mechanism, and no secretariat could be allocated to it.

28. Moreover, the Mechanism could not be granted any legal status or personality. It had no capacity to conclude agreements with Member States and other entities, and the United Nations could not accept voluntary contributions or budget allocations to support its establishment and functioning. Accordingly, any information or evidence collected, consolidated, preserved and analysed by the Mechanism would be ineligible for future criminal proceedings, especially given that its mandate had not been defined in terms of place and time or subject to any restrictions or standards consistent with the Charter of the United Nations or the established rules of conduct of the Organization. The Mechanism was merely the result of a manipulative interpretation of international law and the Charter of the United Nations in the light of such controversial principles as universal jurisdiction and the responsibility to protect.

29. His delegation therefore deplored, rejected and would resist any attempt to have the Mechanism funded from the regular budget of the United Nations. The Organization was currently facing the worst financial crisis since its establishment, but that bitter reality had not prevented certain delegations from engaging in irresponsible conduct by attempting to foist onto Member States the burden of financing an aberrant and illegal body that had no future.

30. The political process in the Syrian Arab Republic would continue, despite all obstacles and challenges. That process, which was owned and led by Syrians alone, without foreign interference, would address transitional justice and accountability through national judicial and legal bodies, not an aberrant entity that was based in Geneva and collected purported evidence without respecting or even acknowledging standards related to the chain of custody.

The meeting rose at 1.10 p.m.