

## **The scope and application of the principle of universal jurisdiction**

### **Oral report of the Chairman of the Working Group**

*Chair:* Mr. Eduardo Ulibarri (Costa Rica)

#### **I. Introduction**

1. Pursuant to General Assembly resolution 66/103 of 9 December 2011, the Sixth Committee decided, at its 1st meeting, on 8 October 2012, to establish a working group to continue to undertake a thorough discussion of the scope and application of universal jurisdiction. Pursuant to the same resolution, the Assembly decided that the Working Group shall be open to all Member States and that relevant observers to the General Assembly will be invited to participate in the work of the Working Group.

2. Also at the same 1st meeting, the Sixth Committee elected Mr. Eduardo Ulibarri (Costa Rica) as Chair of the Working Group.

3. The Working Group had before it the 2012, 2011 and 2010 reports of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/67/116, A/66/93 and Add.1 and A/65/181). The Working Group also had before it the Informal paper of the Working Group (A/C.6/66/WG.3/1), which contained agreements on the methodology, as well as an enumeration of issues for discussion. Pursuant to an understanding reflected in the 2010 report of the Sixth Committee on the item (A/65/474, para. 4), the Working Group also had before it (a) an informal compilation of “Multilateral and other instruments” and (b) an informal compilation containing “Excerpts from decisions of international tribunals” which may be relevant in relation to the work of the Working Group, both prepared by the Secretariat. Also before the Working Group was the non-paper by Chile (A/C.6/66/WG.3/DP.1), as well as the oral report of the chairman on the work of the Working Group in 2011 (A/C.6/66/SR.17).

## **II. Proceedings of the Working Group**

4. The Working Group proceeded with its discussions, bearing in mind resolution 66/103. The Working Group held four meetings, on 18, 19 and 25 October 2012. It conducted its work in the framework of informal consultations. The Working Group was convened against the backdrop of the plenary debate at the 12th and 13th meetings of the Sixth Committee on 17 and 18 October 2012.

5. At its first meeting, on 18 October, the Chairman recalled the advancements made by the Working Group during the sixty-sixth session of the General Assembly (2011). He mentioned the agreements reached on methodology and issues for discussion. The Working Group reaffirmed the continuing relevance of the methodological understandings reached in that context and proceeded to undertake a step-by-step consideration of the issues on the basis of the outline or roadmap contained in the Informal Paper of the Working Group (A/C.6/66/WG.3/1), beginning with the first item under the “Issues for discussion”, namely the “Definition of the concept of universal jurisdiction”. In undertaking its work, the Working Group was assisted by informal papers for discussion prepared by the Chairman, which evolved in their content to better reflect the discussions. The Chairman presented an informal list for discussion of five “essential elements” for the Working Group’s consideration of the concept of universal jurisdiction. He stressed that, at that level, the idea was not to draft a formal definition, but to identify elements for a working concept of universal jurisdiction. He also, upon request by the Working Group, circulated a preliminary informal list of crimes within the scope of universal jurisdiction, as a basis for further discussion. It was understood that the discussions were preliminary in nature and no formal decisions were going to be taken as to the outcome of the work. This process was being undertaken as a work in progress to help the Working Group advance in its work.

6. The following is an informal summary of the proceedings in the Working Group. It is for reference purposes only and not an official record of the proceedings:

### **1. Definition of the concept of universal jurisdiction**

7. It will be recalled that under the rubric “definition of the concept of universal jurisdiction”, the roadmap identified three areas for discussion: (a) the role and purpose of universal jurisdiction; (b) its relevant components; and (c) the distinction that ought to be made between universal jurisdiction and other related concepts. The

informal paper for discussion presented by the Chairman contained five elements pertaining to universal jurisdiction, to serve as basic points of reference for the discussions of the Working Group and not as such a definition of universal jurisdiction. They sought to emphasize that the focus of the work of the Working Group would be on the criminal aspects of universal jurisdiction; that the bodies in relation to which the principle was exercised were national courts and tribunals; the exceptionality of the circumstances in which it was exercised; its characteristics; and to identify some other related concepts, which the principle was often associated with but concerning which it was distinct. The informal paper, which was intended to frame the essential parameters for debate on the basis of perceived areas of agreement, was generally welcomed. It was suggested that the Working Group should strive to develop the elements by closely tracking the roadmap agreed upon during the sixty-sixth session of the General Assembly, as reflected in the Informal Working Paper of the Working Group (A/C.6/66/WG.3/1).

8. The informal paper containing elements for discussion presented by the Chairman was discussed during the informal consultations on 18 and 19 October. It was subject to further refinement and the revised text was discussed during the informal consultations on 25 October. Although there was support for the general direction of work on the subject, further fine tuning in the light of comments made, as well as future discussion, will be required on the elements. It was also underscored by some delegations that universal jurisdiction was an important tool for combating impunity and for protecting the rights of victims. Some delegations thus expressed the need to make reference to the purpose of the principle, as provided for in the roadmap.

9. The first element, namely “centered on criminal jurisdiction”, and then revised to read “focused on criminal matters”, sought to capture the essence that the work of the Working Group on the scope and application of universal jurisdiction would be focused on universal criminal jurisdiction. Delegations generally acknowledged that the Working Group would focus its work on universal criminal jurisdiction, as opposed to universal civil jurisdiction, and thus welcomed the inclusion of such an element. Several delegations, however, suggested alternative formulations so as to reduce ambiguity and assure precision in drafting. Proposed amendments included “related to criminal jurisdiction”, “confined to criminal matters”, “focused on criminal jurisdiction”, “focused on criminal offences” and “applied to criminal jurisdiction”. It was also suggested that a footnote or other reference should be made which clarified that, although the Working Group was focusing upon universal criminal jurisdiction, this should in no way prejudice other spheres of jurisdiction, including universal civil jurisdiction, nor the relevance of sources from civil statutes and jurisprudence to the

Working Group's consideration of universal jurisdiction. The revised text contained a footnote denoting that other matters, namely civil aspects, were not disregarded, but that the focus of the Working Group was on universal criminal jurisdiction. The proposed revised element, utilizing "focused on criminal matters", led some delegations to perceive this element as possibly combinable with element four, which characterized universal jurisdiction as being based on the nature of the crime, not the territoriality, personality or protective principles. The suggestion was also made to combine the present element with element four, capturing the notion that universal jurisdiction focused on certain offences recognized as such under international law. Some delegations sought to further refine the proposition as, in their view, attention on criminal aspects was the exclusive function to be pursued by the Working Group.

10. The second element stated initially that the principle was exercised as the "exclusive prerogative" of national courts and tribunals, and in the revised text it read simply exercised by national courts/tribunals. In their comments, several delegations had expressed concern regarding the phrase "exclusive prerogative", suggesting that it unnecessarily raised issues regarding the permissive or obligatory nature of universal jurisdiction. Instead, it was proposed that the element be rephrased to read "exercised by national courts/tribunals". This suggestion was generally found to be acceptable. A few additional concerns were also raised regarding the second element, including a suggestion that it would perhaps be better placed under Part 3 of the roadmap dealing with Application of universal jurisdiction. It was also proposed that the element be combined with element five, which proposed distinguishing universal jurisdiction from the jurisdiction of international criminal courts/tribunals. It was generally understood though that universal jurisdiction, in contrast to international criminal jurisdiction, was exercised horizontally in relations between States by national courts and tribunals. Another suggestion was to combine the present element with the third element, reflecting the point that universal jurisdiction was an exceptional jurisdiction which may be exercised by national courts and tribunals.

11. The third element captured the essence that universal jurisdiction was "exceptional"; this was presented initially as jurisdiction of an "exceptional character" and subsequently upon revision as a principle that was "exercised exceptionally". Both formulations were the subject of extensive discussion, as it was considered that there might be need for further clarification. Several delegations suggested that the word "exceptional" was ambiguous, leaving it uncertain whether "exceptional" referred to the frequency of the invocation of universal jurisdiction, the exceptionality of its application, its relationship with other bases of jurisdiction as a form of residual, supplementary or complementary jurisdiction, a form of

jurisdictional basis of last resort or whether the element sought to restrict the exercise of universal jurisdiction to international law violations of an exceptional character. To some of these delegations, the original formulation specifying the “exceptional character” of universal jurisdiction best captured the nuances that were sought to be reflected. The concern was raised, however, that any reference to exceptionality may in fact be irreconcilable with the ordinary exercise of such jurisdiction pursuant to domestic law in some jurisdictions. It was also suggested by several delegations, however, that the element as drafted usefully encompassed the various concerns, and could thus represent a viable compromise solution. Some delegations also pointed to the need to eschew any reference to last resort as it seemed to conjure considerations of hierarchy in international law, though some other delegations maintained that considerations of jurisdictional priority should be included. It was also recalled that the purpose of identification of the essential elements of universal jurisdiction was not to define it as such but rather to assist the Working Group to have a common understanding of its operating and practical parameters. In this context some delegations appealed for accommodation and understanding and suggested that a footnote could denote the fact that there were different understandings in the use of “exceptional”.

12. The fourth element focused on characterizing universal jurisdiction as being based on the nature of the crime, not the territoriality, personality or protective principles. In other words, it was exercisable without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction. The element was thus initially presented to read: “Not based on the territoriality, personality or protective principle, but the nature of the crime”, and subsequently revised to read: “Based on the nature of certain crimes under international law, not on territoriality, personality or protective principles.”

13. Some delegations supported the characterization of this jurisdictional basis in distinction to other jurisdictional bases, while others preferred a simple general reference to the nature of certain crimes under international law. It was also stressed that the principle is only applicable to a certain set of crimes, while some delegations stressed the universality of the crimes at issue, and that these aspects should be reflected in this element. While some other delegations noted that greater clarification of “the nature of the crime” was necessary, and that the question of universality of crimes raised interesting aspects, it was felt that these matters would be further discussed in relation to Part 2 of the roadmap dealing with “Scope of universal jurisdiction”. Some delegations expressed the view that this

element should include an indication that other forms of jurisdiction should be exercised on a priority basis. However, it was also noted that this aspect would be further developed when addressing Part 3 of the roadmap concerning “Application of universal jurisdiction”. It was also suggested that this element could be combined with the second element.

14. The fifth element emphasized that universal jurisdiction was distinct from the jurisdiction of international criminal courts and tribunals, as well as from the obligation *aut dedere aut judicare* and from other bases of extraterritorial jurisdiction. There was support for the inclusion of this element, though it was suggested that specific reference be made to the International Criminal Court. The suggestion was made to also draw attention to the distinct nature of the law of immunities from universal jurisdiction, even though immunity and jurisdiction were related concepts. Some delegations noted that the question of immunity was central to the discussion of the subject, and was in fact one of the reasons why the question of abuse of the application of universal application was highlighted. However, various delegations felt that the question of immunity was more suitably discussed in Part 3 of the roadmap concerning “Application of universal jurisdiction”. In the revised text, a footnote was provided that indicated that the interaction of universal jurisdiction with relevant principles and rules of international law will be addressed in Part 3 (“Application”) of the roadmap approved in 2011. Although the suggestion was made to introduce the treaty-based nature of *aut dedere aut judicare*, several delegations stressed that this would prejudice the current work of the International Law Commission on the topic and it was sufficient, for the purposes of the exercise, to indicate that the obligation to extradite or prosecute was distinct without delving into the source of the obligation.

15. Additional suggestions for items to be included in the elements were made, including a reference to the requirement that universal jurisdiction be exercised in accordance with other relevant rules and principles of international law. Some delegations expressed the view that this element would be better discussed under Part 3 of the roadmap, “Application of universal jurisdiction”. Some delegations also suggested that it was important to characterize universal jurisdiction as a discretionary or voluntary right and not an obligation. Some other delegations, however, were rather cautious in pursuing such an approach, as in some cases the exact nature depended on the content of a treaty provision, and what seemed clear was that universal jurisdiction was a basis for exercising jurisdiction. It was pointed out that this aspect was linked to the substance of the discussion on Part 3

of the roadmap related to application. A suggestion that universal jurisdiction should be subject to other rules of domestic law and procedure was considered by some other delegations as too restrictive and also better discussed in the context of Part 3 of the roadmap. It was further suggested that there was need to reflect an additional element that there was no mandatory priority of jurisdiction, on account that there was no hierarchy of jurisdictional bases in international law, but this was objected to by some other delegations, who pointed out that they would then insist that reference to universal jurisdiction as a jurisdiction of last resort be included.

16. Along the discussions of the five elements, many delegations emphasized on the need of flexibility at this stage of discussions, and the possibility of making preliminary agreements during the step-by-step process, that could be reviewed as a whole at further stages of the proceedings of the Working Group.

17. Although no text on the preliminary elements for a working concept of universal jurisdiction was agreed upon, the broad parameters concerning the elements seemed to reflect the general concerns and agreements of delegations. It is the intention of the Chairman to build upon the discussions that have taken place at the present session. A further revision of the elements will be presented for discussion in future. Also, the Chairman prepared some reflections on the current and further work of the group, to be shared with the delegations.

## **2. Scope of Application: Crimes under universal jurisdiction**

18. During the informal consultations on 19 October, the Working Group requested the Chairman to prepare a list of crimes under universal jurisdiction under Part 2 of the Roadmap, namely “Scope of application”. The list was made available to delegations during the informal consultations on 25 October and also placed in the e-Room. However, due to lack of time, the informal list of crimes, comprising genocide, crimes against humanity, war crimes, torture, slavery, enforced disappearances, crimes against peace, apartheid, piracy and terrorism, was not introduced nor was it the subject of any discussion in the Working Group.

19. The Chair is encouraged by the level of interest shown by delegations during the discussions. He is indebted and grateful to all delegations for their most useful, constructive and helpful comments. It is firmly believed that the Working Group is proceeding well at a deliberative pace.

It is my sincere hope that in the future the Working Group will build further upon the work undertaken thus far.

Thank you.