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***Information and Observations on the
Scope and Application of Universal Jurisdiction***

Resolution 65/33 of the General Assembly

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International Committee of the Red Cross

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Contribution by the International Committee of the Red Cross
(Geneva, April 30th 2013)

This submission focuses on the legal basis and requirement of establishing Universal Jurisdiction over serious violations of international humanitarian law, and provides an overview of relevant State practice based on information collected and available to the International Committee of the Red Cross (ICRC). It also provides information about ICRC efforts, through its Advisory Service on International Humanitarian Law, to assist States in putting in place the proper domestic legal framework to enforce international humanitarian law (IHL), including by establishing Universal Jurisdiction for war crimes in their national legislation.

Closing the 'Impunity Gap'

The International Criminal Tribunals for Rwanda and for the former Yugoslavia and their International Residual Mechanism (MICT), and the International Criminal Court (ICC) continue to be instrumental in breaking the cycles of impunity. In the view of the ICRC, Universal Jurisdiction also remains an essential tool to bring to justice perpetrators of serious violations of international humanitarian law, as well as of Crimes against Humanity and Genocide.

It should be recalled that, in accordance with the Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005, it remains the responsibility of States to bring to justice those who commit serious violations of IHL. In some instances though, States may be neither able nor willing to prosecute their citizens, or individuals who committed such crimes on their territory. For States Party to the ICC, this institution may seize some of the cases. However, for other cases falling outside the mandate or capacity of the ICC, recourse to Universal Jurisdiction may close the impunity gap.

The exercise of Universal Jurisdiction can be effective in holding individuals accountable for serious violations of IHL by bridging any impunity gap that may exist between criminal process at the domestic level, and the work of international courts such as the International Criminal Court.

Universal Jurisdiction in international humanitarian law (treaties and custom)

The basis for Universal Jurisdiction over serious violations of international humanitarian law is to be found in both treaty and customary international humanitarian law.

The treaty basis of Universal Jurisdiction was introduced in the four Geneva Conventions of 1949 for the protection of war victims in relation to those violations of the Conventions defined as grave breaches. Grave breaches are particularly serious violations of IHL listed in the four Geneva Conventions (Arts 50, 51, 130 and 147 respectively) and Additional Protocol I (Arts. 11 and 85) thereto. Under the relevant article of each Convention (Article 49 of the Geneva Convention I, Article 50 of the Geneva Convention II, Article 129 of the Geneva Convention III and Article 146 of Geneva Convention IV), each "High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring

such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case." Article 85 of Protocol I of 1977 additional to the Geneva Conventions of 1949 extends the principle of Universal Jurisdiction to grave breaches of, inter alia, the rules relating to the conduct of hostilities. It also qualifies all grave breaches as war crimes.

As the ICRC noted in its previous reports, while the Conventions do not expressly state that jurisdiction is to be asserted regardless of the place of the offence, they have been generally interpreted as providing for Universal Jurisdiction and the Geneva Conventions are as such among the earliest examples of Universal Jurisdiction in treaty law.

Moreover, while the relevant treaty law provisions are restricted to grave breaches, State practice has confirmed as a norm of customary international law the rule that States have the right to vest Universal Jurisdiction in their national courts over violations of the laws and customs of war that constitute war crimes (Rule 157, ICRC Customary International Humanitarian Law, 2005, available at <http://www.icrc.org/customary-ihl/eng/docs/Home>). This includes serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II of 1977 committed in non-international armed conflict, as well as other war crimes, such as those recognized in article 8 of the Statute of the International Criminal Court.

A number of other instruments provide a similar obligation for States to vest Universal Jurisdiction over certain crimes when they are committed during armed conflict. These include the Article 16 of the Second Protocol (1999) to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and Article 9 of the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

State practice

The Geneva Conventions have been ratified by 195 States. With ratification comes the obligation of States Parties to establish Universal Jurisdiction in their legal order over grave breaches defined in these instruments and to exercise such jurisdiction when a specific case arises. This applies to all States. For the 173 States Parties to Additional Protocol I of 1977, the same obligation extends to the grave breaches defined in that Protocol. The 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance provide for another, more limited approach to Universal Jurisdiction, obliging States to take action when the alleged offender is present in their territory and they do not extradite him or her. The right of States to vest Universal Jurisdiction in their national courts for war crimes (beyond grave breaches) is also supported extensively by national legislation.

Numerous States have given effect to their obligations in national legislation and practice has shown that the exercise of Universal Jurisdiction may take the form of either the enactment of national law (legislative Universal Jurisdiction) or the investigation and trial of alleged offenders (adjudicative Universal Jurisdiction). The former is more commonly found as part of State practice and is generally a necessary basis for investigation and trial. It is however feasible, at least in principle, for a court to base its jurisdiction directly on international law and to exercise adjudicative jurisdiction without any reference to national legislation. In this regard, constitutional provisions are of central importance in determining the status of international customary or treaty law in the domestic legal system.

According to information collected by the ICRC, more than 100 States have vested their national courts with Universal Jurisdiction to a certain degree over serious violations of international humanitarian law. This legislation provides for Universal Jurisdiction for any or a combination of the following:

- Grave breaches of the Geneva Conventions and their 1977 Additional Protocol I (mostly States members of the Commonwealth).
- Crimes specified under Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006) (e.g.: Cyprus, Japan and Netherlands).
- Other violations of international humanitarian law where no treaty requires Universal Jurisdiction such as war crimes committed in non-international armed conflict (e.g.: Belgium, Canada, New Zealand and Philippines) and violations of treaties that either prohibit or regulate the use of certain weapons, (e.g.: South Africa).
- The war crimes list contained in article 8 of the Statute of the International Criminal Court (e.g.: Argentina, Belgium, Canada, Germany, New Zealand, South Africa, United Kingdom).

In terms of prosecutions, in recent years an increasing number of suspected perpetrators of war crimes committed in international armed conflict have been tried in national courts on the basis of Universal Jurisdiction. The ICRC was able to collect information on such prosecutions in at least 16 countries. Several suspects have also been tried by national courts for war crimes committed in non-international armed conflicts on the basis of Universal Jurisdiction, including in Belgium, France, Netherlands and Switzerland. It is significant that the States of nationality of the accused generally did not object to the exercise of Universal Jurisdiction in these cases.

When establishing Universal Jurisdiction for war crimes in their legal order, some States opted for attaching conditions to the exercise of this type of jurisdiction, such as the existence of a particular link to the forum State. Usually, this is understood to require that the suspect or alleged perpetrator be present in the territory before proceedings are instituted. There is, however, national legislation and case law that does not require this link providing for the possibility of commencing proceedings against a suspected war criminal that is not present in the territory of the prosecuting States (e.g.: Austria, Canada, Italy, Germany, Luxembourg, New Zealand, United Kingdom).

The ICRC recognises that States may want to attach conditioning factors to the application of Universal Jurisdiction. It believes however, that it is necessary that in each context such conditioning factors be aimed at increasing the effectiveness and predictability of Universal Jurisdiction, and that they do not unnecessarily restrict the possibility of prosecuting suspected offenders. Moreover, whilst there may be national policy considerations in the application of Universal Jurisdiction, the ICRC recalls that the independence of the judiciary and fair trial guarantees must be respected at all times.

The ICRC and Universal Jurisdiction

Since its establishment in 1996, the Advisory Service on International Humanitarian Law of the ICRC has placed a particular focus on encouraging States to establish proper sanctions for serious violations of international humanitarian law within their domestic legal framework in line with the requirements of the relevant treaties and has assisted States authorities in this effort. It has provided assistance in the form of legal advice – in particular by commenting on draft laws – in organizing seminars and meetings of experts, in compiling fact sheets and other specialized documents and in collecting and supplying information on laws and regulations that have been adopted and on the case

law relating thereto. It has done so in cooperation with governments, National Red Cross and Red Crescent Societies, national inter-ministerial committees for the implementation of international humanitarian law, academic institutions and international and regional organizations.

The ICRC Advisory Service has produced numerous tools to aid States in their efforts to implement an efficient system for the repression of serious violations of IHL, which includes the principle of Universal Jurisdiction. These include:

- Fact sheets on particular international humanitarian law topics, including Universal Jurisdiction (available on the ICRC Website);
- Reports of experts meetings and Meetings of National Committees on International Humanitarian Law ;
- Ratifications kits to facilitate State adherence to IHL treaties;
- Model laws and guidelines;
- Questionnaires listing obligations deriving from IHL instruments and other issues States should consider when enacting national law to implement IHL;
- The Manual on Domestic Implementation of IHL, a comprehensive guide to domestic implementation designed for policymakers, legislators and other stakeholders; and
- A database of national laws, judgments and customary international humanitarian law.

In 2008, a paper entitled, "Elements to Render Sanctions More Effective" was issued. In the same year, an edition of the International Review of the Red Cross was entirely devoted to "sanctions" (International Review of the Red Cross, 2008, No. 870 – Sanctions, available at <http://www.icrc.org/eng/resources/international-review/review-870-sanctions/index.jsp>).

In 2009, there were a number of regional and national meetings on the project, including through national Red Cross and Red Crescent Societies. Exchanges with concerned stakeholders were held on the bases of jurisdiction for prosecuting serious international humanitarian law violations, including Universal Jurisdiction.

In October 2010, the ICRC Advisory Service organized the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law that aimed, among other things, to explore the important role of domestic law in preventing and responding to serious violations of IHL, and more particularly the legal measures and mechanisms required to support an "integrated system" for the repression of these violations. Members of National Committees for the implementation of IHL and government representatives from around 100 States worldwide, as well as representatives of international and regional organisations and experts discussed, among other issues, different aspects of Universal Jurisdiction for war crimes.

In December 2012, the ICRC Advisory Service hosted an Expert Consultation on Universal Jurisdiction. The Expert Consultation assessed developments in the field of Universal Jurisdiction since the establishment of the International Criminal Court, and the relationship between Universal Jurisdiction and the principle of Complementarity under the 1998 Rome Statute.

The ICRC continues to gather further information and insight into good practices relating to Universal Jurisdiction as to identify good practices and lacunas in the application of Universal Jurisdiction.

In fine, the ICRC stands ready to contribute to future reports of the Secretary-General relating to the application of the principle of Universal Jurisdiction.