

## **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 67/98 of 14 December 2012, the Sixth Committee decided, at its 2nd meeting, on 7 October 2013, 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 should be open to all Member States and that relevant observers to the General Assembly would be invited to participate in the work of the Working Group.

2. Also at the 2nd meeting, the Sixth Committee re-elected Mr. Eduardo Ulibarri (Costa Rica) as Chair of the Working Group.

3. The Working Group had before it the 2013, 2012, 2011 and 2010 reports of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/68/113, A/67/116, A/66/93 and Add.1 and A/65/181), as well as the oral report of the Chairman on the work of the Working Group in 2012 (A/C.6/67/SR.24). The Working Group also had before it the Informal Paper of the Working Group (A/C.6/66/WG.3/1), which contains agreements on the methodology,

as well as an enumeration of issues for discussion. Also before the Working Group was the non-paper by Chile (A/C.6/66/WG.3/DP.1). 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.

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

4. The Working Group proceeded with its discussions, bearing in mind resolution 67/98. The Working Group held three meetings, on 23, 24 and 25 October 2013. 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, 13th and 14th meetings of the Sixth Committee, held on 17 and 18 October 2013.

5. At its first meeting, on 23 October, as Chairman, I recalled the progress made by the Working Group during the sixty-seventh session of the General Assembly (2012), and also reported on the discussions I had held with some delegations since last year’s session. I mentioned the continuing relevance of the roadmap outlined in the Informal Paper of the Working Group (A/C.6/66/WG.3/1), and the need to continue with a step-by-step methodological consideration of the items on the roadmap. Accordingly, the Working Group proceeded first with a preliminary consideration of the scope of universal jurisdiction and then its application. The informal discussion papers prepared by the

Chairman that had been presented as annexes to my oral report of the sixty-seventh session, one reflecting the stage of consideration of the preliminary elements for a working concept of universal jurisdiction, and the other containing an informal list of crimes falling within the scope of universal jurisdiction were re-circulated. The latter informal discussion paper formed the basis of discussions on the scope of universal jurisdiction. Following a preliminary discussion on the application of universal jurisdiction, I prepared and circulated an informal discussion paper to identify relevant elements corresponding to each of the six sub-sections set out in the roadmap, in relation to the application of the principle of universal jurisdiction. It was emphasized that these documents were intended to serve as guidance to the discussions to be conducted within the Working Group and did not prejudge possible outcomes. Both documents, given their informal and working character, have undergone adjustments to reflect the stage of discussions that had been reached and suggestions made by delegations. These and other informal discussion papers prepared by the Chairman for discussion are preliminary, illustrative and without prejudice to positions of delegations; they do not reflect any agreement among delegations; and will be subject to further examination at any future discussions.

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

### **1. Scope of application: crimes under universal jurisdiction**

7. During the informal consultations at the General Assembly's sixty-seventh session, the Working Group requested the Chairman to prepare,

also as an informal discussion paper, a list of crimes under universal jurisdiction under Part 2 of the roadmap (“Scope of universal jurisdiction”). As part of the record of the discussions, the requested list was included as an Annex to the Oral Report of the Chairman. Due to lack of time, the list was not subject to any discussion in the Working Group last year. Therefore, the Working Group commenced its discussion on the scope of universal jurisdiction by turning to that list at its first informal meeting on 23 October, and continued the discussion at the following two meetings on 24 and 25 October. Throughout the discussion, and given its preliminary and informal character, the list was revised on several occasions to reflect comments by delegations. The revised versions of the list were made available to delegations and placed in the e-Room. To fully reflect the discussions undertaken, the last revised version of the preliminary and informal list compiled at the present session is made available as an informal paper of the Chairman.

8. The last revised version of the list presents a set of possible crimes that could form part of the scope of the principle of universal jurisdiction, it being understood that the listed crimes did not reflect consensus among delegations and was without any prejudice to their positions. It was further understood that the list of crimes was merely preliminary and illustrative as opposed to being indicative and/or exhaustive, and that discussion will resume at a later stage. To present this informal and preliminary list in this way appeared preferable to the approach taken in the first revised version of the list which had put several crimes in brackets to indicate that there had been a particular number of comments on those crimes on whether or not to include them in the list. A number of delegations had pointed to possibilities of confusion if brackets were retained in the text. As a general comment on the scope of the principle of universal jurisdiction, several delegations noted that this issue

was closely interlinked with and dependent on other elements of the roadmap. It was recognized that the separation of the different elements in the roadmap was due to the preliminary character of the discussion, and was mainly intended as a method to better organize the exchange of positions.

9. The last revised version of the informal list of the Chairman presents the crimes in alphabetical order. This approach was preferred to two other alternatives which had been discussed throughout the informal consultations, but which both posed difficulties to some delegations. One alternative was to put the crimes into chronological order based on their emergence under international law. This approach was however considered by some delegations as potentially difficult to determine, as some crimes were already recognized under customary international law before they were incorporated in an international treaty. The other alternative had been to divide the crimes into the categories of “core crimes” and “treaty-based crimes”, based on a classification that the International Law Commission used in the elaboration of the Statute of the International Criminal Court. The former category had been constructed on the basis of crimes possessing a greater level of support for inclusion under customary law. The latter category had been intended to refer to those crimes which are present in treaties which possess an “extradite or prosecute” (*aut dedere aut judicare*) clause which, in certain circumstances, may allow or oblige a treaty party to exercise a form of what some commentators consider quasi-universal jurisdiction. The initial treaty crimes listed were intended as examples from a potentially voluminous list of such treaties. Both categories enumerated certain crimes in an illustrative rather than indicative and/or exhaustive manner. In the discussion, there was a suggestion to merge the list, given the fact that some of the listed “core crimes” – such as, for example, genocide, torture or apartheid – also had a basis in an international treaty

specifically addressing those crimes, and could therefore likewise be regarded as “treaty-based”.

10. The enumeration of crimes on the list bears the heading “crimes under universal jurisdiction” corresponding to the roadmap. Given that the crimes previously grouped had been merged into one list in alphabetical order, some delegations stated a preference for the heading of the list to refer to “*international* crimes under universal jurisdiction” to better reflect the international character of those crimes. It was understood that future discussions of the Working Group would reflect further upon the nature of the sources of the crimes in the list.

11. It was noted that there may be a certain overlap and consequent redundancy in the list, as certain crimes were in fact clusters of crimes and comprised other crimes which were listed individually. As examples, “transnational organized crime” as including “corruption” and “crimes against humanity” as including “torture” were cited. Some delegations however suggested that “corruption” deserved to be mentioned in its own right, given the fact that it is addressed by the United Nations Convention against Corruption. Likewise, it was pointed out that “torture” deserved to be listed as a separate item, as that crime would only reach the threshold of a “crime against humanity” if it was widespread or systematic.

12. As regards specific crimes on the list, delegations expressed diverging views. While delegations viewed “piracy” as a crime that fell within the scope of universal jurisdiction on the basis of both the United Nations Convention on the Law of the Sea and customary international law, with the view expressed by some of them that universal jurisdiction may only apply to the crime of piracy, several delegations suggested that the list should encompass more than merely that crime. Some delegations argued for the list to be as inclusive as possible to demonstrate the diversity of already

existing State practice, whereas other delegations emphasized that the list should reflect as much as possible common agreement. In this regard, several delegations expressed the view that to elaborate an exhaustive list would be inappropriate. Some delegations recalled that not all States were parties to the international treaties which address in a specific manner certain crimes enumerated on the list. The suggestion was also made that the principle of universal jurisdiction would not necessarily encompass all crimes for which international criminal tribunals have jurisdiction. It was also noted that the concept of universal jurisdiction was not yet reflected in international treaties, but was rather an expanding doctrinal concept which should not serve as panacea for “all evils in the world”.

13. Some delegations expressed concern about the inclusion of the item “crimes against peace/crime of aggression”. These delegations noted in particular that the 2010 amendments on the crime of aggression to the Rome Statute of the International Criminal Court had not yet entered into force, and that the nature of the latter as an international criminal tribunal was in any event to be distinguished from universal jurisdiction as a principle that was exercised by domestic courts. Moreover, concern was expressed that the possibility for domestic courts to exercise universal jurisdiction over the crime of aggression could undermine the powers of the Security Council. Other delegations however supported “crimes against peace/crime of aggression” to be part of the list, given that several States already had established universal jurisdiction for that crime in their national laws. A preference was expressed for the descriptor “aggression” instead of “crimes against peace”.

14. The inclusion of “transnational organized crime” was questioned by some delegations as being too broad a concept as a crime, while others suggested the removal of “terrorism” in the absence of an all-encompassing

international treaty on that crime. Other delegations however were supportive of those crimes remaining on the list.

15. Given the preliminary nature of the list and that delegations reserved their positions on the list as a whole, further discussion of the scope of the principle of universal jurisdiction will continue at future sessions of the Working Group.

## **2. Application of the principle of universal jurisdiction**

16. During the informal consultations on 23 and 24 October, delegations raised issues that should be subject of the Working Group's discussions of the question of the application of universal jurisdiction. In this context, several delegations stressed that the issue of what they described as the abuse or misuse of the principle of universal jurisdiction, as well as its potential application in an arbitrary, politically motivated or selective manner, had played a central role in the original impetus to the bringing of this topic to the Sixth Committee, and should be discussed in depth. Many delegations further recalled the need for universal jurisdiction to be applied with due regard to international law, including the Charter of the United Nations, human rights law and international humanitarian law, the principles of judiciousness and good faith, as well as due process guarantees. Attention was also drawn to the relevance of the rules on the immunity of foreign officials when considering this topic, even though some delegations noted that the question of immunity was distinct from universal jurisdiction and as such should not be singled out because immunity could be considered and/or invoked in respect of jurisdiction generally.



17. Questions surrounding the interaction of States seeking to exercise universal jurisdiction with other States possessing overlapping jurisdictional ties to an alleged offense were raised by some delegations, and the connected issues comprising international assistance and cooperation were also noted. The importance of understanding the relationship between international and national law was underlined.

18. Delegations also raised the need for future discussions on the interrelationships and distinctions of the principle of universal jurisdiction from other concepts of international law, including: the concept of *aut dedere aut judicare*; the complementary but distinct role of the jurisdiction of international criminal tribunals to provide accountability and fight impunity for international crimes; the potential role that the international settlement of disputes may play in the practical exercise of universal jurisdiction; and the international legal responsibility that States may accrue for the abuse or misuse of universal jurisdiction.

19. As Chairman, I subsequently circulated an informal discussion paper that set out issues that had been raised during the discussions on the application of universal jurisdiction. This informal discussion paper was prepared by reference to comments made by delegations during this session of the Working Group, as well as comments and observations made by delegations in previous sessions of the Working Group, of the Sixth Committee in plenary, and through written contributions. The informal discussion paper intended to place all of the raised issues within the corresponding sub-sections of Part 3 of the roadmap, namely the six identified headings of sub-sections (a) to (f). This preliminary and informal list, which was subject to refinement in

the light of the discussions on 25 October, is made available as a second informal paper from the Chair.

20. I hope that this discussion paper on the application of universal jurisdiction, which constitutes the third and final part of the roadmap, serves to provide a marker of issues for further discussions. It does not pretend to reflect consensus and does not preclude further examination and debate on all components of the roadmap.

### **3. Referral to the International Law Commission**

21. During the discussions within the Working Group, the delegations of Switzerland, Czech Republic, Guatemala and Liechtenstein proposed that the International Law Commission (ILC) be requested to undertake a study of certain aspects of the item that could assist the Sixth Committee and the Working Group to continue its work. Several delegations were supportive of or open to this proposal, with some delegations highlighting that it would complement and not supersede the role of the Sixth Committee. Other delegations considered the proposal interesting but suggested that it was premature at this stage of the discussions. Several delegations noted that much more time would be needed to consider and discuss the proposal in future sessions. Other delegations stressed that discussion of the item needed to remain within the Sixth Committee exclusively at this point. Different viewpoints were raised as to whether the presence of other related topics on the current agenda of the ILC, including that of immunities of State officials from foreign criminal jurisdiction and of the obligation to extradite or prosecute (*aut dedere aut judicare*), argued for or against requesting the assistance of the ILC on this topic. This remains an issue that is within the prerogative of delegations to consider.

22. The Chair is once again strongly encouraged by the level of interest and participation shown by delegations during the discussions. I am grateful to all delegations for their useful, insightful and helpful comments. It is strongly believed that the Working Group is proceeding well at a considered but productive pace. It is my sincere hope that in the future the Working Group will build further upon the work undertaken thus far. Since the Working Group has undertaken a preliminary discussion of all issues identified in the roadmap, the intersessional period could be used to concretize the views of delegations on the way forward. Having a text that deals with the issues highlighted in a normative way would certainly help to advance discussions, and it is my hope that delegations, in their wisdom, can meaningfully work towards that goal.

Thank you.

## INFORMAL PAPER BY THE CHAIRMAN 1

### Working Group on the scope and application of universal jurisdiction

#### Informal discussion paper

Part 2 (A/C.6/66/WG.3/DP.1): Scope of universal jurisdiction

#### *Chairman's preliminary list of crimes under universal jurisdiction*<sup>1</sup>

This preliminary list of crimes is illustrative, not indicative and/or exhaustive; it is without prejudice to positions of delegations; does not reflect consensus among delegations; and is expected to be subjected to further discussion at a later stage. The list is organized in English alphabetical order and was provided to stimulate discussion.

- a. Apartheid
- b. Corruption
- c. Crimes against humanity
- d. Crimes against peace/crime of aggression
- e. Enforced disappearances
- f. Genocide
- g. Piracy
- h. Slavery
- i. Terrorism
- j. Torture
- k. Transnational organized crime
- l. War crimes

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<sup>1</sup> These proposed set of elements arise from the sources set out in the "Agreements on methodology" section of the Informal Paper of the Working Group (A/C.6/66/WG.3/DP.1): the informal compilations prepared by the Secretariat (A/C.6/66/WG.3/INF.1 and INF.2); the compilations of the list of crimes referred to by Governments, included in the reports of the Secretary-General on this topic (A/65/181, A/66/93 and Add.1. and A/67/116); and oral statements made by delegations to the Sixth Committee on this topic.

## INFORMAL PAPER BY THE CHAIRMAN 2

### Working Group on the scope and application of universal jurisdiction

#### Informal discussion paper

Part 3 (A/C.6/66/WG.3/DP.1): Application of universal jurisdiction (UJ)

This is a preliminary and descriptive, not indicative and/or exhaustive, informal document. It was presented by the Chairman with the aim of providing references for better organizing the exchange of views. It is without prejudice to positions of delegations; does not reflect consensus among delegations; and will be subject to further discussion at a later stage. It is provided with the aim of better reflecting the record of the discussions.

<i>3. Application</i>	
	<i>Issues raised</i>
(a) Conditions for application	<ul style="list-style-type: none"><li>- International law, including the Charter of the United Nations</li><li>- Good faith</li><li>- Judiciousness</li><li>- <i>Nulla poena sine lege/nullum crimen sine lege</i></li><li>- International human rights/IHL obligations</li><li>- Immunity<sup>2</sup></li></ul>
(b) Criteria for exercising jurisdiction	<ul style="list-style-type: none"><li>- Fight impunity</li><li>- Avoidance of abuse/ misuse</li><li>- Not politically motivated, arbitrary or discriminatory/selective</li><li>- Last resort/complementary/exceptional</li><li>- Jurisdictional links (with territoriality, nationality, etc.)/conflict of competing jurisdiction</li><li>- Consultations among concerned States.</li><li>- Inability and/or unwillingness to prosecute</li></ul>

<sup>2</sup> It is recognized that there are multiple dimensions to this tier.

	<ul style="list-style-type: none"> <li>- National amnesties</li> <li>- Prosecutorial fiat and discretion</li> </ul>
(c) Procedural aspects	<ul style="list-style-type: none"> <li>- Presence/absence of alleged offender</li> <li>- <i>Ne bis in idem</i>/double jeopardy</li> <li>- Statute of limitations</li> <li>- International due process guarantees</li> <li>- Prima-facie case</li> <li>- Judicial independence</li> <li>- Prosecutorial independence</li> <li>- Prosecutorial discretion</li> </ul>
(d) Role of national judicial systems	<ul style="list-style-type: none"> <li>- Exercisable by national judicial systems</li> <li>- Need for national legislation</li> <li>- Implementation of treaty obligations</li> <li>- Relationship between international law and domestic law</li> </ul>
(e) Interaction with other concepts of international law	<ul style="list-style-type: none"> <li>- Interaction with <i>aut dedere aut judicare</i></li> <li>- Complementary to jurisdiction of international criminal tribunals</li> <li>- Role of settlement of disputes</li> <li>- State responsibility for abuse</li> </ul>
(f) International assistance and cooperation	<ul style="list-style-type: none"> <li>- Mutual assistance and cooperation in criminal matters (investigations, evidence, judicial cooperation)</li> <li>- Extradition</li> </ul>