

[Translated from Chinese]

Information from and observations by China on the scope and application of the principle of universal jurisdiction

The Government of the People's Republic of China,

Referring to the request by the United Nations General Assembly in its resolution 64/117 that the Secretary-General invite Member States to submit information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice;

Noting that the debate on the scope and application of the principle of universal jurisdiction that took place in the Sixth Committee during the sixty-fourth General Assembly reflected clear differences of opinion among Member States with regard to the meaning of the concept of universal jurisdiction, its legal status, scope and application;

Noting also that some practices regarding the advocacy and exercise of universal jurisdiction under disputed conditions have aroused serious concerns in the international community;

Endorsing the further exchange of ideas and information among States, the promotion of mutual understanding, and efforts to seek consensus, thereby effecting a

needed balance in promoting the international rule of law and maintaining stability and order in international relations; and

Acknowledging receipt of the letter dated 8 January 2010 from the Secretary-General addressed to its Permanent Representative regarding the foregoing;

Hereby submits the following observations and information:

I. Observations

1. Jurisdiction is an important element of State sovereignty. Under the principle of sovereign equality of States, the establishment and exercise of sovereignty by one State may not impair the sovereignty of other States. Therefore the establishment of a State's sovereignty should have as a prerequisite the existence of valid and adequate connections between that country and the cases involved, and should be limited to a reasonable scope.

2. Under the principle of territorial sovereignty in international law, a State has sovereignty regarding crimes committed on its territory (the territorial principle). Additionally, under specific conditions, a State has the right to establish and exercise extraterritorial jurisdiction on the basis of the suspect's nationality (the principle of positive nationality), the victim's nationality (the principle of negative nationality), and related actions injurious to that State's security and major interests (the principle of protection).

3. The term "universal jurisdiction" lacks a consistently clear definition internationally. By common understanding, it means that States may freely establish and exercise sovereignty in the absence of any of the aforementioned territorial, nationality,

national-security or national-interest factors involved; such universal jurisdiction exists only with regard to dealing with acts of piracy.

4. To ensure that criminals who commit acts of piracy outside the zones of jurisdiction of States are brought to justice, the right of all States to punish acts of piracy is already established in customary international law. This universal type of jurisdiction has also been affirmed in the 1982 United Nations Convention on the Law of the Sea, article 105 of which clearly stipulates that "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed".

5. Other than with regard to acts of piracy, there is clear disagreement and dispute among States over the question of whether or not universal jurisdiction exists in other situations, as well as over the scope and conditions of its application, and the corresponding statutes of customary international law have yet to be formulated.

6. With respect to international treaties, since the Second World War, the international community has adopted a series of international agreements to combat transnational crime and terrorism and to pursue individual criminal responsibility in the areas of human rights and humanitarian law. In addition to the traditional principles of territorial and nationality jurisdiction, these treaties supplement traditional jurisdiction by providing jurisdiction articles that are not based on traditional points of contact in order to ensure the performance of the treaties' obligation to extradite or prosecute ("aut dedere aut

judicare") and ensure effective cooperation among States parties in combating the corresponding crimes. However, clear differences exist in content, scope of application and conditions between this kind of "aut dedere aut judicare" obligation and its corresponding jurisdiction, and the universal jurisdiction aimed at piracy; besides having to abide by the principle of sovereign equality of States and the principle of non-interference in the internal affairs of States enshrined in the Charter of the United Nations, the implementation of "aut dedere aut judicare" rules is also subject to numerous conditions and limitations; in particular,

(1) [Such rules] are applicable only with reference to crimes stipulated under the corresponding international treaties, and the rights and obligations entailed are limited to the States Parties to the corresponding treaties;

(3) [Such rules] are predicated on the presence of the accused persons within the territory of the State Party exercising sovereignty, and are not applicable to persons outside that territory;

(4) [Such rules] respect and to the greatest extent possible prioritize the exercise of sovereignty by the State on whose territory the criminal act occurred or of which the person accused of committing that act is a national. The State within whose territory the accused is found should immediately notify the State on whose territory the crime was committed or of which the accused is a national, providing verification of the relevant facts and cooperating with it on issues regarding the exercise of sovereignty;

(5) [Such rules] take the prior possession of sufficient evidence as a prerequisite for initiating criminal proceedings, and rigorously adhere to proper legal procedures to safeguard all legal procedural rights of the accused;

(6) A State may in no way exercise sovereignty within the territory of another State, nor may it perform the functions that properly belong to the authorities of that other State under its laws;

(7) The regulations governing immunity under international law may not be violated, especially the jurisdictional immunity enjoyed by foreign heads of State, Government leaders and other officials under international law.

Moreover, some States, in carrying out their legislative and judicial functions, have imposed further procedural limitations on the exercise of the aforementioned jurisdiction, for example by requiring the prior approval or authorization of the highest national executive or judicial authorities prior to raising the level at which a case is tried.

7. What needs to be clarified is that the criminal jurisdiction of international judicial organs as presently constituted cannot be termed "universal jurisdiction". The jurisdiction of current international judicial organs over certain crimes is explicitly provided in specific international treaties or other international legal documents; the establishment and exercise of those jurisdictions should be strictly limited to the conditions and scope specifically set out by those international treaties or other international legal documents. The granting of jurisdiction over certain crimes to current international judicial organs does not constitute a legal basis for a State to establish universal jurisdiction over such crimes.

8. Under the present circumstances, in which there is no international consensus on the definition, scope and application of universal jurisdiction, any action that goes beyond current international law, or any claim or exercise of universal jurisdiction, could lead to abuses of sovereignty, damaging the sovereignty and dignity of other countries, triggering international conflict, and jeopardizing the stability and healthy development of international relations. States should therefore exercise caution, avoiding the unilateral establishment or exercise of universal jurisdiction that is not clearly sanctioned under current international law, and conscientiously upholding the basic principles of international law and safeguarding the common interests of the international community.

9. It should be further pointed out that, insofar as no clear permission yet exists under international law, the unilateral exercise of so-called universal jurisdiction against foreign officials by the judicial organs of a State violates the principle of sovereign equality of States, and constitutes a breach of international law. Under the system of State responsibility enshrined in international law, a State is held responsible if its judicial organs damage the sovereignty and major interests of another State through the improper exercise of sovereignty, and has the obligation to desist as soon as possible and offer apologies and restitution to the State affected, eliminate negative consequences, and prevent the re-occurrence of the illegal action.

II. Information

10. Chinese domestic legislation:

Article 9 of the Criminal Law of the People's Republic of China provides that "This Law shall be applicable to crimes which are stipulated in international treaties concluded or acceded to by the People's Republic of China and over which the People's Republic of China exercises criminal jurisdiction within the scope of obligations, prescribed in these treaties, it agrees to perform". This article provides the domestic legislative basis for China to exercise the jurisdiction stipulated under the corresponding international treaties.

11. International treaties ratified or acceded to by China

(1) China has ratified the United Nations Convention on the Law of the Sea, which clearly provides for universal jurisdiction aimed at acts of piracy.

(2) China has also ratified or acceded to a series of international treaties containing "aut dedere aut judicare" provisions and corresponding articles supplementing jurisdiction (see annexed list).

12. Judicial cases:

In February 2003, a piracy case was tried in the Shantou Municipal Intermediate People's Court. During the trial, the Court ascertained that ten Indonesians had hijacked a Thai oil tanker off Malaysia and had been apprehended by Chinese police while disposing of the stolen goods in Chinese territorial waters. In accordance with article 9 of the Criminal Law of the People's Republic of China, the Court exercised the jurisdiction prescribed for the aforementioned crimes on the basis of the United Nations Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, both ratified by China, and convicted and sentenced the aforementioned accused in accordance with the provisions of Chinese criminal law.

Annex:

List of relevant international treaties ratified or acceded to by China

I. Treaty containing articles on universal jurisdiction:

(1) United Nations Convention on the Law of the Sea (1982)

II. Treaties containing "aut dedere aut judicare" articles and supplementary jurisdictional articles:

(1) 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first Geneva Convention)

(2) 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (second Geneva Convention)

(3) 1949 Geneva Convention relative to the Treatment of Prisoners of War (third Geneva Convention)

(4) 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (fourth Geneva Convention)

(5) 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts

(6) 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its first Protocol

(7) 1970 Convention for the Suppression of Unlawful Seizure of Aircraft

(8) 1971 Convention on Psychotropic Substances

(9) 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation

(10) 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961

(11) 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid

(12) 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

(13) 1979 International Convention against the Taking of Hostages

(14) 1980 Convention on the Physical Protection of Nuclear Material

(15) 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

(16) 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the [1971 Montreal] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

(17) 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

(18) 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

(19) 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

(20) 1994 Convention on the Safety of United Nations and Associated Personnel

(21) 1997 International Convention for the Suppression of Terrorist Bombings

(22) 1999 International Convention for the Suppression of the Financing of Terrorism

(23) 2000 United Nations Convention against Transnational Organized Crime

(24) 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

(25) 2003 United Nations Convention against Corruption

(26) 2005 International Convention for the Suppression of Acts of Nuclear Terrorism
