

The scope and application of the principle of universal jurisdiction

**Oral report of the Chairman of the Working Group,
7 November 2014**

Chair: Ms. Georgina Guillén-Grillo (**Costa Rica**)

I. Introduction

1. Pursuant to General Assembly resolution 68/117 of 16 December 2013, the Sixth Committee decided, at its 1st meeting, on 7 October 2014, to re-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. At the 12th meeting, on 15 October, the Sixth Committee elected Ms. Georgina Guillén-Grillo (Costa Rica) as Chair of the Working Group, replacing Ambassador Eduardo Ulibarri (Costa Rica), whose stewardship of the Working Group from 2011 to 2013 was greatly appreciated by the Working Group.

3. The Working Group had before it the 2014, 2013, 2012, 2011 and 2010 reports of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/69/174, A/68/113, A/67/116,

A/66/93 and Add.1 and A/65/181), as well as the oral reports of the Chairman on the work of the Working Group in 2013 (A/C.6/68/SR.23) and 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, commonly referred to as the “Roadmap”. 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, pursuant to an understanding reflected in the 2010 report of the Sixth Committee on the item (A/65/474, para. 4).

II. Proceedings of the Working Group

4. The Working Group proceeded with its discussions, bearing in mind resolution 68/117. The Working Group held three meetings, on 16, 17 and 23 October 2014. It conducted its work in the framework of informal consultations. The Working Group was convened against the backdrop of the plenary debate at the 11th and 12th meetings of the Sixth Committee, held on 15 October 2014.

5. This summary is for reference purposes only and is not an official record of the proceedings. At its first meeting, on 16 October, in my capacity as Chairperson, I recalled the progress that had been made by the Working Group in its previous sessions. I distributed to delegations an informal working paper for the purpose of facilitating further discussion in the light of previous exchanges of views within the Working

Group. This informal working paper merged the previously distributed informal papers developed in the course of the work of the Working Group from 2011 to 2014. As is set out in the informal working paper, I emphasized our shared understanding concerning the issues raised therein.

6. The Working Group proceeded to discussion over each section of the informal working paper, and I will now present an informal summary of the major points of discussion and changes to the text that occurred through the three sessions we conducted together. The sections correspond to sections identified in the Roadmap. It bears stating at the outset that following our discussions in the Working Group I prepared an Informal Working Paper for discussion in the Working Group, which has been circulated for ease of reference. This Informal Working Paper is for the purpose of facilitating further discussion, in the light of previous exchanges of views within the Working Group. It merges various informal papers developed in the course of the work of the Working Group (2011, 2012, 2013, 2014). It is understood that the issues raised in the Informal Working Paper are illustrative and without prejudice to future written or oral proposals made by delegations. Furthermore, the document is without prejudice to the positions of delegations; does not reflect consensus among delegations; and is expected to be subject to further discussion. In developing this document, account has been taken of the sources set out in the “Agreements on methodology” section of the Roadmap; the informal compilations prepared by the Secretariat (A/C.6/66/WG.3/INF.1 and INF.2); the compilations of information shared by Governments, included in the reports of the Secretary-General on this topic (A/65/181, A/66/93 and Add.1., A/67/116, A/68/113 and A/69/174); and oral statements made by delegations to the Sixth Committee and in the Working Group on this topic. The wording chosen attempts to attain a best-possible balance between precision and flexibility, given the stage of the discussions and it is

recognised that the various elements that have been identified are interlinked.

I first turn to section A, Definition of the concept of universal jurisdiction.

A. Definition of the concept of universal jurisdiction

7. The Working Group last discussed this aspect of the Roadmap at the sixty-seventh session of the General Assembly in 2011. The text included in sub-section (a) on “The role and purpose of universal jurisdiction” had not been discussed by the Working Group previously; it included the elements of “To combat impunity” and “To protect the rights of victims”. Furthermore, on the suggestion of some delegations, an additional aspect was included therein, namely that of “Achieving international justice/promoting justice”. Delegations acknowledged that further refinement and suggestions in this sub-section could occur – a common refrain across all sub-sections and sections of the Informal Working Paper.

8. The Working Group then discussed the previously examined “essential elements of a working concept of universal jurisdiction”, as set out under sub-section (b) on “Relevant components”. While some delegations raised the question of whether the Working Group should include an examination of universal civil jurisdiction, it was felt best to maintain the Working Group’s previous understanding to remain focused on criminal matters. Conflicting views were reiterated concerning the current text which states that universal jurisdiction is “exercised exceptionally/exceptional character”; this phrasing thus

captures a spectrum of views, but remains subject to further elaboration and clarification.

9. The Working Group devoted some time on the fourth of the essential elements as initially set out. It attempts to weld together the two definitional components of universal jurisdiction that delegations have pointed to as the core of the concept: namely, the nature of certain crimes under international law warranting the exercise of such jurisdiction, and universal jurisdiction's distinctive form with respect to the other classical grounds of jurisdiction. On the basis of some delegations seeking further clarification on the wording used in this element, the text now embodies these components in the following way, utilizing the common nomenclature of jurisdiction recognized under international law: "Based on the nature of certain crimes under international law, and not on any other jurisdictional connection to the State exercising universal jurisdiction (including territoriality, nationality, passive personality or protective principles, as recognized under international law)." A similar concern for definitional clarity led to the substitution, within sub-section 1(c) of the Roadmap – entitled "Distinction from other related concepts" – of "Other forms of extra-territorial jurisdiction" for "Other forms of jurisdiction (including, territoriality, nationality, passive personality or the protective principles, as recognized under international law)."

Let me now turn to the section on the scope of universal jurisdiction.

B. Scope of universal jurisdiction: crimes under universal jurisdiction

10. As has become apparent through previous sessions of the Working Group, the discussion of the crimes which may be subject to universal jurisdiction remains a lively and engaging one. Given the addition of a number of understandings about the nature of the Informal Working Paper at this stage – understandings that are now clearly attached to each and every element of the Working Paper – we were able to alter the chapeau to the preliminary list of crimes. In addition, some delegations emphasized the need to include two further understandings with respect to this preliminary list. Firstly, the question of the appropriateness of composing a list at all remains an open one. Secondly, discussions over the scope of universal jurisdiction are not a matter of preference: they are a matter of rights and/or obligations under treaty law and/or customary international law. Discussions should therefore proceed with this foundation in mind.

11. Although the content of the preliminary list did not alter at this session from that which was distributed at the sixty-eighth session, delegations did provide viewpoints on specific crimes or on the nature of this exercise in general. Delegations raised questions concerning the sources of international law that could support inclusion of a crime within such a list. They also questioned whether certain crimes were really on the same level of seriousness as others that were listed, while other delegations noted that some in the list were specific crimes, while other items were more aptly characterized as “categories” of crimes, for example “terrorism”. It was also suggested that instead of having a list of specific crimes, general reference alluding to obligations arising under customary international law and treaty law could be developed.

I now turn to the application of the principle of universal jurisdiction.

C. Application of the principle of universal jurisdiction

12. During the Working Group's session at the sixty-eighth session of the General Assembly last year, Ambassador Ulibarri, at the request of the Working Group, prepared and distributed an informal paper on the question of the "Application of the principle of universal jurisdiction". Given the limited time available to discuss that informal paper at that time, it was very helpful this year for the Working Group to have an opportunity to delve more deeply into its various components.

13. I feel it important to stress the difficulty of the task of attempting to place elements within the respective sub-sections, sub-sections whose headings had been determined several sessions ago and are included in the Roadmap following consensus reached in the Working Group. Neither at the time of their adoption in the Roadmap, nor in subsequent sessions, has the Working Group clearly and sufficiently clarified what each sub-section's heading is intended to include. It is therefore difficult to discuss the appropriate or even more suitable placement of certain elements within the different sub-sections, with the titles of the sub-sections themselves still open to divergent interpretation. Some comments focused on suggestions for merging sub-sections within section 3, or moving elements around, or even the creation of a new sub-section (g) on "Abuse of universal jurisdiction". As set out in the Roadmap itself, the sub-sections are descriptive and open, not prescriptive or closed, and they may be added to or built upon. It is understood that the issues identified in sub-sections (a) to (f) of Section 3 on Application are interlinked and could benefit from

further development and elaboration in order to appreciate their intended import and normative scope.

14. During the discussions, delegations presented several suggestions and engaged in a meaningful dialogue. In sub-section (a), entitled “Conditions for application”, the elements of good faith and judiciousness were moved to sub-section (b) entitled “Criteria for exercising jurisdiction”. The question over the discretionary or obligatory nature of universal jurisdiction, a question that will have different answers depending on the applicable surrounding factors, was introduced to sub-section (a). Sub-section (b) remained unchanged with the exception of the addition of the two elements just mentioned.

15. Within sub-section (c), on “Procedural aspects”, modifications to the Informal Working Paper were primarily intended to seek enhanced clarity. On the suggestion of some delegations, examples of what was encapsulated within “international due process guarantees” were included, drawing on elements recognized within international human rights law. “Prima-facie case” was expanded to the “Establishment of a prima-facie case before proceeding” to alter the uncertain wording previously used. Finally, some delegations had raised the very special and unique challenges involved with evidence gathering and preservation in the exercise of universal jurisdiction, and therefore this element was introduced. Sub-section (d), on the “Role of national judicial systems”, was also subject to some general improvement in the wording and order chosen for the elements, all in the search for greater clarity and consensus. In addition, some delegations had stressed the importance of highlighting and in turn discussing the complementary role that courts exercising universal jurisdiction should play in contrast to courts exercising other forms of jurisdiction; this element was thus introduced in this sub-section.

16. In sub-section (e), entitled “Interaction with other concepts of international law”, some delegations urged the inclusion here, as well as in other sub-sections, of the question of the interaction of universal jurisdiction with questions of immunity, which were viewed as critical to such delegations, while others stressed the importance of recognizing that jurisdiction and immunity were different, even though interrelated, concepts. With respect to the principle of *aut dedere aut judicare*, the view was expressed that the core of the discussion with respect to its interaction with the principle of universal jurisdiction focused on the distinction between these two concepts. These suggestions led to appropriate modifications of the Informal Working Paper. Finally, delegations presented differing views on alterations to what had been set out as ‘State responsibility for abuse’. Some delegations recalled the importance of the role of abuse of universal jurisdiction to the introduction of this topic into the agenda of the Sixth Committee and emphasized that it was a continuous concern, whilst other delegations highlighted that “abuse” of the principle, left undefined, may not necessarily lead to nor be synonymous with State responsibility under international law. Attempting to accommodate these viewpoints, the Informal Working Paper incorporates this element as “Questions of State responsibility for wrongful acts in the exercise of universal jurisdiction, including, as appropriate, its abuse”. Some delegations drew attention to the importance of discussing possible abuses of the principle of universal jurisdiction; in order to reflect these concerns, “abuse” has been added to sub-section (e).

17. Finally, in sub-section (f), entitled “International assistance and cooperation”, delegations suggested expanding the areas in which assistance and cooperation should be focused, specifically into also listing “technical assistance and cooperation in the conduct of criminal

matters”, as well as further elaborating the listing within each set of parentheses.

18. Delegations also raised points concerning the meaning of footnote 5, which relates to the element of “immunity” as set out in sub-section (a) on “Conditions for application”, and which states “It is recognized that there are multiple dimensions to this tier.” It is to be recalled that the origins of this footnote lie in their suggestion that while “immunity” had been included in sub-section (a), it would be possible to include and discuss this element in a number of the sub-sections. Some delegations stressed concern that the wording of the footnote suggested a particular substantive interpretation of the content of the immunity of State officials from foreign criminal jurisdiction, one that they do not share. Alternatively, other delegations noted first that any discussion of this topic would inevitably have multiple dimensions, and secondly that this topic was currently on the agenda of the International Law Commission, and the Working Group on this topic should not prejudge the work that was to come out of the ILC. At this stage, given the nature of the Informal Working Paper and the origins of the inclusion of the footnote, it was thought best to retain it.

III Way forward

19. During the discussions within the Working Group on the question of the way forward, several delegations once again raised the possibility of making a request to the ILC to undertake a study of certain aspects of the item that could assist the Sixth Committee and the Working Group to continue its work. It was emphasized that this proposal would complement and run in parallel with the continued discussions within the Sixth Committee, noting that the ILC was well-placed to address some of the

technical aspects of this topic. On the other hand, several delegations once again expressed the view that such a proposal remained premature at this stage of the discussions, and that the discussion in the Sixth Committee should continue as the exclusive avenue for examination of this topic given that they found this year's debate substantive and fruitful.

20. There is no doubt that substantial progress has been made by the Working Group since commencing discussions on this topic in the Sixth Committee and since its first establishment in 2011. This year the Working Group undertook a further reading of the text developed in the previous years, modifying and clarifying various elements as identified. In the process the Working Group has deepened its understanding of the issues at stake. We now have an Informal Working Paper that I have prepared with a view to facilitating further discussion. The various understandings captured in the Informal Working Paper suggest that there is more that can be done to further advance our work. It seems to me though that a picture is emerging. It is my sincere hope that the inter-sessional period could meaningfully be used by delegations to exchange views on how our work could be further progressed. It would be a pity if we were to come back next year to have another reading of the Roadmap.

21. We could be asking ourselves: Could it be feasible, putting our collective heads together, to develop a normative text that could be the basis of discussion from the work that has been accomplished thus far? In other words, could a third column be developed from the Informal Working Paper that could translate the various elements that have been identified and discussed following our Roadmap into corresponding text that could then form the basis of our work next year?

22. I remain firmly committed to working closely with all delegations to further our work and cooperation on this vital topic. And I pose these

questions in that spirit and in the hope that in the days to come we can together seek to find answers to them in order to contribute to the progressive development of international law and its codification. I say all this, with optimism, because I was encouraged by the substantive nature of our discussion at this session.

Thank you.