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Chair: Mr. Bonifaz (Vice-Chair)..... (Peru)

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In the absence of Mr. Sergeev (Ukraine), Mr. Bonifaz (Peru), Vice-Chair, took the Chair.

The meeting was called to order at 10.10 a.m.

Agenda item 84: The scope and application of the principle of universal jurisdiction (*continued*)
(A/65/181, A/66/93 and Add.1 and A/67/116)

1. **Mr. Gaspar Martins** (Angola) said that his delegation welcomed the report of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/67/116) but shared the concerns expressed in it. The African Union had a clear and unequivocal mandate to combat impunity and his delegation strongly supported the model law on universal jurisdiction for international crimes, adopted by the Assembly of the African Union in July 2012, which would allow African countries to overcome constraints in exercising such jurisdiction.

2. In his delegation's view, the scope of application of the principle of universal jurisdiction should be limited by absolute respect for the sovereignty and national jurisdiction of States. It should not be applied arbitrarily, in order to decrease respect for a State's national jurisdiction or for the purpose of advancing interests other than those of justice. The principles established in the Charter of the United Nations must be strictly respected during judicial proceedings resulting from the exercise of universal jurisdiction, which must be subsidiary to action taken at the national level and must be exercised only where there was no other way to prevent impunity. It must not violate the immunity granted to Heads of State, diplomatic personnel and other incumbent high-ranking officials under international law and must not be confused with international criminal jurisdiction, which was exercised by international criminal tribunals established through treaties or by the Security Council. In that connection, he noted that 33 African States were currently parties to the Rome Statute of the International Criminal Court, thus constituting the largest regional block of States parties. He hoped that at the sixty-eighth session of the General Assembly, the Committee would be able to address more specific issues relating to universal jurisdiction.

3. **Ms. Steenkamp** (South Africa) said that the validity of the principle of universal jurisdiction was not in question, but rather its scope and application. Her delegation supported the proposals contained in

the report of the Secretary-General (A/67/116) and agreed that application of the principle should be exceptional and supplementary in nature and should be limited to cases where the State in which the alleged atrocities had occurred and/or the State of nationality of the alleged perpetrator were unable or unwilling to investigate and prosecute and to a small number of crimes to be agreed upon by the international community, such as slavery, genocide, war crimes and crimes against humanity.

4. The crucial question to be considered by the Committee and the Working Group was the extent to which immunities constituted an exception to application of the principle of universal jurisdiction, a view expressed by some of the judges of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. In that context, it might be necessary to consider the scope of the immunities concerned by asking who was entitled to immunities under international law, whether the nature of the crime in question affected those immunities and, if so, to what extent. Answering those questions would go a long way towards addressing the concerns of some Member States about the potential for abuse of the principle of universal jurisdiction. Her delegation was willing to consider all options in order to expedite work on the topic, including requesting the International Law Commission to consider some or all aspects of it.

5. **Mr. Gumende** (Mozambique) said that the agenda item was of particular concern to African States because they had been the major target of attempts by individual judges, especially from some European countries, to apply the principle of universal jurisdiction. His delegation was alarmed by unilateral moves to prosecute some African leaders in clear violation of the norms of international law. All Member States should reflect on the political and legal implications of such actions.

6. In order to gain legitimacy and universal acceptance, the application of universal jurisdiction should be regulated at the international level and should be consistent with the relevant international legal instruments and with the Charter of the United Nations, in particular its non-negotiable provisions relating to the sovereign equality of all States, non-interference in the internal affairs of States and the immunity of State officials, in particular Heads of State. The international community must establish the criteria for the

application of universal jurisdiction and identify the crimes that were subject to it and the circumstances in which it could be invoked.

7. While strongly condemning any politically motivated application of the principle of universal jurisdiction, his delegation recognized that it was an important tool for the prosecution of perpetrators of certain serious crimes under international treaties and that its proper application would strengthen the rule of law at the national and international levels; impunity should not be condoned or accepted. His delegation remained open to sharing information and practices with other Member States.

8. **Mr. Petrosyan** (Russian Federation) said that his delegation recognized the importance of universal jurisdiction in combating impunity. However, until a clear legal framework was established, extreme caution should be exercised; in a number of cases, its application or abuse by national judicial authorities had caused serious complications in relations between States. There were other, less controversial, tools that could be used to combat impunity for the most serious international crimes. It should be borne in mind that the work of the international criminal justice system, in particular the International Criminal Court, was unrelated to the topic of universal jurisdiction, which must be exercised in accordance with the rules of customary international law concerning the immunity of State officials. The many attempts to expand universal jurisdiction at the national level, including by restricting the immunity of officials in foreign rather than international courts, had caused political tension and had not served the interests of justice.

9. The Committee's discussions in recent years had helped to clarify a number of important theoretical and practical aspects of the application of universal jurisdiction, and the reports prepared by the Secretariat had shed light on the variety of practices in different States. The International Law Commission was also considering the principle of universal jurisdiction under the topics of the immunity of State officials from foreign jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*). All of those were welcome developments; however, differences of opinion remained and there was no consensus even on the question of whether the Committee should continue detailed work on the topic, much less on the development of uniform standards and criteria for the application of universal jurisdiction. The debate had

not advanced significantly in the past year, and it was unlikely that further progress could be made on the basis of the material currently at the Committee's disposal. Nevertheless, the possibilities for reconciling positions had not been exhausted and his delegation looked forward to discussing the topic further in the Working Group.

10. **Ms. Ren Xiaoxia** (China) said that the debate of the past few years and the written comments submitted by Member States revealed the wide variety of their legislative and judicial practices with regard to universal jurisdiction and their divergent views on issues such as its definition, legal status, scope and conditions of application. A continued exchange of views on the topic would help to narrow those differences. Universal jurisdiction and the principle of "extradite or prosecute" were two distinct concepts. The exercise of universal jurisdiction was supplementary to the territorial, personal and protective jurisdiction of a State and arose only in the absence of a link between the prosecuting State and the place where the crime had been committed, the nationality of the perpetrator or the victim or the interests of the injured State. Under current international law, States had the right to exercise such jurisdiction over piracy on the high seas; in all other cases, there were notable differences of opinion.

11. Universal jurisdiction should be exercised only in respect of crimes against the common interests of the international community as established in international treaties and universally recognized rules of customary international law. Territorial, personal or protective jurisdiction should be given priority over such jurisdiction. The rule of immunity under international law, including that enjoyed by Heads of State and other high-level officials and diplomatic and consular personnel, should be respected during judicial proceedings and the fundamental principles of international law, such as the sovereign equality of States and non-interference in their internal affairs, should be respected.

12. Universal jurisdiction had complex legal, political and diplomatic dimensions and was a controversial issue on which a common understanding had yet to be achieved. It was important to clarify its meaning and to define the scope of and conditions for its application in order to prevent politically motivated abuse and to safeguard the stable and healthy development of international relations. Her delegation

therefore welcomed the establishment of the Working Group and stood ready to participate in its work.

13. **Ms. Mogami** (Botswana) said that, while the principle of universal jurisdiction had been generally recognized at the international level, the report of the Secretary-General (A/67/116) revealed that there was no consensus on its definition, scope and application. The absence of a common understanding on such matters undermined the rule of law at the international level and led to concerns about the abuse of universal jurisdiction; its selective, inconsistent or arbitrary application must be avoided. Her delegation was studying the information submitted by States, as reflected in the report, in order to identify areas of convergence and those that required closer study.

14. Her delegation strongly opposed selectivity in the application of universal jurisdiction. Until agreement on a definition could be reached, it was important to focus on avoiding inconsistency in its application. The rationale for such jurisdiction was the need to ensure that serious crimes, including crimes against humanity, did not go unpunished; she therefore urged all States to fully investigate war crimes and other serious crimes allegedly committed in their territory or by their nationals so that the principle of universal jurisdiction could become a measure of last resort.

15. **Ms. Quidenus** (Austria) said that while her Government supported the basic idea of universal jurisdiction in the interests of the common effort to combat impunity, the concept had given rise to concern and, at times, tension in the international community and there was considerable confusion surrounding it. Her delegation commended the efforts of the Working Group but considered that the Committee was not the right forum for such a complex legal issue; detailed analysis was needed in order to avoid certain misunderstandings that still prevailed in the discussions. It therefore supported the idea of requesting the International Law Commission to consider the topic.

16. **Mr. Mahmood** (Bangladesh) said that the principle of universal jurisdiction could be a useful tool for the prosecution of heinous crimes under international treaties; however, caution should be exercised in order to ensure that it was not misused for political or other purposes. The Committee's discussions on the topic were going in the right

direction, and his delegation supported the establishment of the Working Group.

17. The principles enshrined in the Charter of the United Nations, in particular the sovereign equality and political independence of States and non-interference in their internal affairs, must be respected when the principle of universal jurisdiction was applied. In addition, extreme care must be taken not to violate the immunity granted under international law to Heads of State, diplomatic personnel and other incumbent high-level officials.

18. **Mr. Kohona** (Sri Lanka) said that universal jurisdiction was an area of international justice that was still evolving and had complex legal, political and diplomatic implications that had yet to be clarified. Its increasing exercise by some national courts had caused other States to enact legislation in an effort to limit its use. As the legislation in that area evolved, it was important to hear all views on the matter. Universal jurisdiction should be applied not in a selective and arbitrary fashion in order to achieve political goals, but with due regard for established principles of international law, including the sovereign equality of States, territorial jurisdiction, non-interference in the internal affairs of States and the immunity of officials.

19. The sovereign right of States to address incidents of impunity through their own mechanisms must be respected. The immunity of State officials and diplomatic agents had been recognized historically for good reason; the practice of targeting them had been shown to hinder diplomatic dialogue and constituted a disturbing attempt to test the scope of diplomatic privileges and immunities. Universal jurisdiction should not be used as a tool to erode the legitimacy that was the foundation of democratically elected Governments as they sought to establish domestic mechanisms to address infringements of the law or to formulate reconciliation processes. Many confusing situations in history required time to heal rather than the messianic pursuit of retributive justice.

20. If a country's judicial mechanisms were already dealing with a case, universal jurisdiction should not be exercised in another jurisdiction. Because it enjoyed readier access to the evidence and was closer to the aggrieved parties, the country where a crime was alleged to have taken place was best suited to investigate and prosecute it. It was disturbing that a small number of jurisdictions and certain judges were

attempting to apply the principle of universal jurisdiction without any significant input from the majority of countries. Moreover, it was disheartening that, in certain cases, the judicial officers of countries carrying out investigations had proceeded on a unilateral basis rather than cooperating with the State concerned and had ignored the rulings of national courts. Any State choosing to exercise universal jurisdiction *in absentia* must introduce safeguards to prevent abuse of the principle.

21. As Henry Kissinger had noted in an article published in the July/August 2001 edition of *Foreign Affairs* and entitled “The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny”, a system that “would arm any magistrate anywhere in the world with the power to demand extradition, substituting the magistrate’s own judgment for the reconciliation procedures of [other countries, would] subject the accused to the criminal procedures of the magistrate’s country, with a legal system that may be unfamiliar to the defendant and that would force the defendant to bring evidence and witnesses from long distances. Such a system goes far beyond the explicit and limited mandates established by the [Security Council for war crimes tribunals]”.

22. In order to ensure that universal jurisdiction remained available to States as a tool in the effort to combat impunity for the most heinous international crimes, checks and balances must be put in place. His Government was pleased that several countries had tightened their legislation on arrest warrants relating to crimes covered by universal jurisdiction. The development and application of the principle must be guided by international consensus, not by advocacy groups with narrow, short-term objectives, and was a topic that the International Law Commission could usefully begin to examine.

23. **Mr. Hill** (United States of America) said that, despite the importance of the principle of universal jurisdiction and its long history as a part of international law relating to piracy, basic questions concerning its exercise in respect of universal crimes remained. Those questions included the definition and scope of the principle, its relationship to treaty-based obligations and the law of immunity, and the need to ensure that decisions to exercise universal jurisdiction were made in an appropriate manner, including in cases where other States had a claim to exercise jurisdiction. The practical application of universal jurisdiction,

including the circumstances and frequency of its exercise; the question of whether alternative bases for jurisdiction could be relied upon simultaneously; and the available safeguards to prevent inappropriate prosecution also merited further examination. His delegation would welcome information on the practice and views of additional States and looked forward to considering the issues in as practical a manner as possible.

24. **Mr. Ramirez-Gaston** (Peru) said that it could be deduced from the information provided by States, including Peru, over the past three years that all States recognized universal jurisdiction as a valid tool for combating impunity; that it was a supplementary institution of last resort where other bases for jurisdiction, such as territoriality and active or passive personality, could not be applied; that the accused must be present in the territory of the forum State; and that immunities under international law must be respected. There were differences of opinion, however, on the crimes to which universal jurisdiction applied and the sources of law for those crimes; the question of whether a State could exercise such jurisdiction where not envisaged in its domestic law; which officials enjoyed immunity from such jurisdiction under international law; and the lack of cooperation and assistance mechanisms to facilitate its exercise.

25. Peru’s Penal Code established the obligation to punish criminal conduct in accordance with international treaties; therefore, it could exercise universal jurisdiction in respect of crimes recognized under treaties to which Peru was a party and which provided for universal jurisdiction, such as the four Geneva Conventions of 1949, Additional Protocol I thereto and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

26. The Committee was the appropriate forum in which to consider the scope and application of universal jurisdiction. However, in order to pursue that task properly, the input of the International Law Commission was required. The report of the Commission on its sixty-fourth session (A/67/10) indicated that a number of its members agreed on the need for the Commission to consider universal jurisdiction in view of its relationship to the topics of immunity of State officials from foreign criminal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*), which were already on its agenda.

27. **Mr. Baghaei Hamaneh** (Islamic Republic of Iran) said that the information received from States on the concept of universal jurisdiction made it clear that a common understanding of its scope and application had yet to be developed; a step-by-step approach was required. The Working Group would provide a useful platform for discussion of the key question of whether and to what extent the Committee should engage in codification and development of the topic.

28. Iranian law granted the State's courts jurisdiction in respect of any offence committed within Iranian territory, territorial waters or airspace. The State's Penal Code also established its courts' jurisdiction over crimes committed partly inside the national territory; crimes whose result occurred inside the national territory, regardless of the place of commission; crimes committed outside the national territory where the alleged perpetrator was present in or extradited to the Islamic Republic of Iran; and crimes committed on board Iranian aircraft outside the national territory where the alleged perpetrator was not extradited to another State for prosecution. Domestic law did not deal specifically with universal jurisdiction and it had never been invoked by Iranian courts. However, the Penal Code recognized the jurisdiction of national courts over crimes punishable under international treaties to which the Islamic Republic of Iran was a party, irrespective of the location of the crime or the nationality of the accused, provided that the accused was present in Iranian territory.

29. The Islamic Republic of Iran was a party to a number of international counter-terrorism instruments, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the United Nations Convention against Corruption, almost all of which established the "extradite or prosecute" principle. However, that principle should not be confused with the concept of universal jurisdiction.

30. The main concern with regard to the concept of universal jurisdiction was that its application could conflict with certain fundamental principles of international law, in particular the immunity of State officials from foreign criminal jurisdiction, which emanated from the sovereign equality of States. It was also said that the doctrine had been used selectively. There was a continuing debate over the nature of the crimes to which such jurisdiction might apply, the conditions for and limits on its application and the possible need for a link between the suspect and the

prosecuting State and for the presence of the alleged offender in the forum State.

31. Criminal jurisdiction over foreign nationals should be exercised without bias and in good faith. It should not be applied in an arbitrary manner or violate the immunity granted under international law to Heads of State and Government, diplomatic personnel and other incumbent high-ranking officials. The scope of universal jurisdiction and the conditions for its application should be determined in accordance with the relevant international treaties, taking into account the fundamental principles of international law. In the *Arrest Warrant* case, several judges of the International Court of Justice had pointed out that universal jurisdiction in absentia was unknown to international law. In their view, the exceptional cases where international treaties provided for universal jurisdiction applied only if the alleged offender was present in the territory in question.

32. **Mr. Silva** (Brazil) said that the aim of universal jurisdiction was to deny impunity to individuals allegedly responsible for extremely serious crimes defined by international law, which, by their gravity, shocked the conscience of all humanity and violated imperative norms of international law. It constituted an exception to the more consolidated principles of territoriality and active and passive personality as a basis for jurisdiction. Although the exercise of jurisdiction was primarily the responsibility of the territorial State in accordance with the principle of the sovereign equality of States, combating impunity for the most serious crimes was an obligation contained in numerous international treaties. Universal jurisdiction should only be exercised in accordance with international law and principles; it should be subsidiary to domestic law and limited to specific crimes; and it must not be exercised arbitrarily or to fulfil interests other than those of justice.

33. His delegation supported an incremental approach to discussion of the issue and the Working Group's attempt to arrive at an acceptable definition, which, together with a shared understanding of the scope and application of universal jurisdiction, was necessary in order to avoid improper or selective application. The Working Group should then consider the kinds of crimes to which such jurisdiction would apply and its subsidiary character vis-à-vis territoriality and personality as bases for jurisdiction. At the appropriate time, it should also consider whether the

formal consent of the State where the crime had taken place and the presence of the alleged perpetrator in the territory of the State wishing to exercise jurisdiction were required. It would be advisable to avoid prosecution in multiple forums, which could violate the rights of the accused. One of the most contentious issues was how to reconcile universal jurisdiction with the jurisdictional immunities of State officials. His delegation hoped that Member States could show flexibility in agreeing on some core elements in due course. At the current stage of discussion, it would be premature to consider the adoption of uniform international standards on the matter.

34. Brazil's legislation recognized the principles of territoriality and active and passive personality as a basis for criminal jurisdiction. Its courts could exercise universal jurisdiction over the crime of genocide and other crimes, such as torture, which Brazil had a treaty obligation to suppress. Such jurisdiction must be envisaged in a State's domestic law; it could not be exercised on the basis of customary international law alone without violating the principle of legality.

35. Brazil was currently amending its criminal law to ensure compatibility with its obligations under the Rome Statute of the International Criminal Court. Although there was a difference between universal jurisdiction and the exercise of criminal jurisdiction by international tribunals, the two institutions shared a common objective: to deny impunity to those accused of serious international crimes.

36. **Ms. Schonmann** (Israel) said that the broad range of opinions concerning the definition and scope of the principle of universal jurisdiction demonstrated the need for further study of the topic. Her delegation shared the view that there was a distinction between universal jurisdiction and the treaty-based obligation to extradite or prosecute. In addition, universal jurisdiction was a mechanism of last resort; priority should be afforded to States with primary jurisdictional links.

37. Under international law, States had an obligation to place safeguards on the exercise of universal jurisdiction in order to prevent its abuse. Such safeguards, already in place in a number of States, included limiting the right to initiate criminal proceedings to the public prosecution authority or requiring the authorization of a senior legal official before initiating an investigation on the basis of

universal jurisdiction. It would be useful for the Working Group to obtain information on additional States' practice in that regard.

38. **Mr. Jafarov** (Azerbaijan) said that in recent years, important steps, including the development of international jurisprudence, had been taken at the national and international levels in order to prevent impunity. It was incontrovertible that no official or political status conferred immunity in respect of the most serious crimes of concern to the international community. The principle of universal jurisdiction was an important tool in ensuring accountability for violations of fundamental norms and principles of international law, and its application helped to strengthen the rule of law at the national and international levels.

39. Azerbaijan had incorporated the application of universal jurisdiction into its domestic law and had ratified a number of international instruments that supplemented those provisions. Under the Criminal Code, national courts had jurisdiction over certain crimes committed abroad, including grave violations of international humanitarian and human rights law and the crimes established in the international treaties to which the State was a party, regardless of the nationality of the perpetrator.

40. The primary responsibility for investigating and prosecuting serious violations of international law lay with States themselves; universal jurisdiction should be regarded as a supplementary tool when the State in which the crime had occurred or the State of nationality of the alleged perpetrator or victim was unable or unwilling to prosecute.

41. **Mr. Mokhtar** (Malaysia) said that the principle of universal jurisdiction was a sensitive issue; regulation of its application might be seen as curbing the exercise of States' sovereignty, but failure to do so could allow such application to encroach on the territorial sovereignty of another State. While his delegation did not favour international regulation, it considered that States should exercise care and caution when applying such jurisdiction or enacting related legislation.

42. It was misleading to assert that all international treaties provided for universal jurisdiction; for example, States parties' obligation under the relevant treaties on terrorism and drug trafficking was to establish criminal jurisdiction on the basis of

nationality and territoriality. In Malaysia, implementing legislation must be adopted in order to give effect to treaty obligations, including those relating to universal jurisdiction. The principle of universal jurisdiction must not be confused with the obligation to extradite or prosecute. In addition, the exercise of such jurisdiction was closely related to the question of immunity, which, in some cases, prevailed only for incumbent ministers; thereafter, it applied only to acts carried out in an official capacity.

43. Universal jurisdiction was not the only means of combating impunity. Territoriality and personality should remain the main bases of jurisdiction; for instance, States must investigate and prosecute war crimes allegedly committed on their territory or by their own nationals. The application of universal jurisdiction or recourse to international criminal tribunals should be measures of last resort, to be used only where the State in question had failed to act. A proper national legal framework, consistent with obligations under international humanitarian law and provided with the necessary resources, must be in place.

44. The issue of universal jurisdiction should be approached with caution since opinions on its scope and application remained divided. A clear definition of the concept must be agreed upon before further progress could be made.

45. **Ms. Elyahou** (Observer for the International Committee of the Red Cross) said that the information provided by States showed a trend towards recognition of the obligation to exercise universal jurisdiction over the most serious international crimes. That trend implied a resounding endorsement of the conclusions of the third Universal Meeting of National Committees for the Implementation of International Humanitarian Law, hosted by the International Committee of the Red Cross (ICRC) in Geneva in October 2010, and of later developments in that regard.

46. Universal jurisdiction was central to the system set forth in the main texts of international humanitarian law. The four Geneva Conventions of 1949 and Additional Protocol I of 1977 stipulated that States had a legal obligation to search for persons alleged to have committed grave breaches of those instruments and to bring such persons before their own courts, regardless of their nationality and of where the crime was committed; States parties had a duty to act as soon as

they became aware that a person who had committed such a breach had entered their territory. Other international instruments contained a similar obligation.

47. State practice had helped to consolidate a customary rule whereby States were entitled to exercise universal jurisdiction over war crimes, including serious violations of common article 3 of the Geneva Conventions and Additional Protocol II and other crimes set forth in the Rome Statute of the International Criminal Court, whether they occurred during international or non-international armed conflicts. Her delegation was pleased to note that, when States incorporated the crimes set forth in the Rome Statute into their domestic law in order to be in a position to prosecute them, they did not usually make a distinction between the various bases of jurisdiction that could apply. It was also encouraging to note the emergence of positive practices that had overcome some of the obstacles associated with the implementation of universal jurisdiction; for example, several States had opted to centralize and specialize their know-how at each stage of the process. A national strategy for improving the investigation and prosecution of international crimes, including through application of the principle of universal jurisdiction, must include a comprehensive approach to the protection of witnesses and victims.

48. Universal jurisdiction was not the only way to tackle impunity; it was part of a wider system that aimed to enhance the deterrent effect of punitive measures and should be exercised only where courts that could exercise jurisdiction on the basis of territoriality or active or passive personality were unable or unwilling to do so. Investing in national capacity-building was vital in order to enable the courts closest to the place where a crime had been committed to try the case in full compliance with the applicable provisions of international law.

49. ICRC would continue to contribute to the Committee's discussions on the scope and application of the principle of universal jurisdiction and to provide support to States that requested it through its Advisory Service on International Humanitarian Law.

The meeting rose at 11.40 a.m.