United Nations A/69/174

General Assembly

Distr.: General
23 July 2014

Original: English

Sixty-ninth session
Item 84 of the provisional agenda*
The scope and application of the principle of universal jurisdiction

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Report of the Secretary-General

Summary

The present report has been prepared pursuant to General Assembly resolution 68/117, by which the Assembly requested the Secretary-General to prepare a report on the basis of information and observations received from Member States and relevant observers, as appropriate, on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties, and their national legal rules and judicial practice.

* A/69/150.

14-58069 (E) 190814

I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 68/117. It reflects comments and observations received since the issuance of the report of 2013 (A/68/113) and should be read together with that and prior reports (A/65/181, A/66/93 and Add.1, and A/67/116).

2. In accordance with resolution 68/117, section II of the present report, together with tables 1 to 3, focuses on specific information regarding the scope and application of universal jurisdiction on the basis of relevant national legal rules, applicable international treaties and judicial practice. Information received from observers is provided in section III, and section IV contains a synopsis of issues raised by Governments for possible discussion.

3. Responses were received from Austria, Cuba, El Salvador, Kenya, Paraguay, Sweden and Togo.

4. Responses were also received from the Council of Europe, the International Maritime Organization, the Organization for the Prohibition of Chemical Weapons (OPCW) and the International Committee of the Red Cross.

5. The complete submissions are available from the website of the Sixth Committee of the General Assembly.

II. Scope and application of universal jurisdiction on the basis of the relevant domestic legal rules, applicable international treaties and judicial practice: comments by Governments

A. Basic legal rules

1. Constitutional and other domestic legal framework[1]

Austria[2]

6. According to section 64 of the Austrian Penal Code, Austrian courts have jurisdiction over certain crimes (e.g. extortive abduction, slave trade, trafficking in human beings, organized crime, drug-related crime, air piracy, terrorism-related acts) committed outside Austria, regardless of locally applicable law, if certain Austrian interests are affected. Under this provision, Austrian courts are also competent for other crimes committed outside Austria, regardless of locally applicable law, if Austria is under an obligation to prosecute under international treaties.

7. In the last two years, the number of crimes listed in section 64 has been increased to include additional crimes, such as rape, sexual coercion and torture.

8. According to section 65, Austrian courts have jurisdiction over crimes committed outside Austria if they are punishable under locally applicable law and if

[1] Table 1 contains a list of crimes contained in various codes, as mentioned in the comments by Governments.

[2] For previous comments submitted by Austria, see A/65/181.

the perpetrator is caught on Austrian territory and cannot be extradited for a reason other than the nature or features of his act.

El Salvador[3]

9. El Salvador reiterated that its domestic penal law expressly recognizes the principle of universal jurisdiction on the premise that some crimes must be condemned internationally (see A/66/93, paras. 19 and 54, and A/67/116, para. 6 and 37).

10. This principle has been incorporated into the Penal Code that has been in force since 1998, as one of the rules determining the application of Salvadoran penal law. The Code permits the prosecution of individuals for the commission of especially serious crimes against another individual where there are consequences that extend beyond the violation of that individual's rights to unlawfully affect the community at large. Article 10 of the Penal Code, on the principle of universality, provides that:

> Salvadoran penal law shall further apply to crimes committed by anyone in a place not subject to Salvadoran jurisdiction, where such crimes could affect rights protected by specific international agreements or rules of international law or seriously impair universally recognized human rights.

11. In accordance with this article, domestic penal law recognizes the specific characteristics of universal jurisdiction in that it involves a principle that sanctions the prosecution of serious crimes and can be applied without territorial or personal links to the perpetrator or the victim.

12. In Salvadoran legislation, the seriousness of a crime for the purposes of applying universal jurisdiction is determined by the extent to which it harms legal rights protected by specific international agreements or rules of international law, or has the potential to seriously impair universally recognized human rights. Unlike the legislation of other countries, Salvadoran law does not specifically enumerate crimes in respect of which universal jurisdiction might be applied; rather, such application would depend on whether the acts committed were sufficiently harmful to the international community as a whole, based on the above criteria.

Kenya[4]

13. The application by Kenya of the principle of universal jurisdiction dates back to the early twentieth century, with the enactment of its Penal Code (chapter 63, Laws of Kenya), in 1930, which criminalized, in section 69 (1), as read with section 69 (3),[5] the act of piracy committed by any person in the territorial waters of Kenya or on the high seas. The particular provisions state as follows:

> 69 (1) Any person who, in territorial waters or upon the high seas, commits any act of piracy *jure gentium* is guilty of the offence of piracy…
>
> (3) Any person who is guilty of the offence of piracy is liable to imprisonment for life.

[3] For previous comments submitted by El Salvador, see A/65/181, A/66/93 and A/67/116.

[4] For previous comments submitted by Kenya, see A/65/181.

[5] Repealed by the Merchant Shipping Act (chapter 389, Laws of Kenya).

Paraguay[6]

14. Further to its previous comments (see A/66/93, paras. 25 and 26), Paraguay confirmed that the principle of universal jurisdiction was reflected in article 8 of the Paraguayan Criminal Code, which states as follows:

> Article 8. Offences committed abroad in respect of legal assets enjoying universal protection
>
> 1. Paraguayan criminal law shall also apply to the following offences committed abroad:
>
> (1) Offences involving explosives, as set out in article 203, subparagraph 1 (2);
>
> (2) Attacks against civil aviation and maritime traffic, as set out in article 213;
>
> (3) Human trafficking, as set out in article 129;
>
> (4) Illicit trafficking in narcotics and dangerous drugs, as set out in articles 37 to 45 of Act No. 1.340/88;
>
> (5) Offences involving the authenticity of currency and securities, as set out in articles 264 to 268;
>
> (6) Genocide, as provided for in article 319;
>
> (7) Offences that Paraguay is required to prosecute under an international treaty currently in force, even when committed abroad.

15. Paraguay also noted that it was party to treaties containing the obligation *aut dedere aut judicare* (see table 3), noting that universal jurisdiction could be applied through the obligation *aut dedere aut judicare*, under which, if the perpetrator of an offence that was so serious that it merited prosecution outside the territory of the State in which it was committed was apprehended in the territory of another State, that State shall be obligated to extradite the suspect to the State claiming jurisdiction in order to prosecute him or her, or to bring proceedings against that person in its courts. Although this was not the application of the principle of universal jurisdiction *strictu sensu*, because States can decide not to prosecute but to extradite, it was unquestionably one mechanism through which States could cooperate with one another in order to combat impunity for serious offences and to achieve the goal of universal jurisdiction.

16. Paraguay also noted that, according to the principle of universal jurisdiction, some crimes were so serious that they affect the international community as a whole and, as a result, all States have the right, if not the obligation, to prosecute the perpetrators thereof, regardless of their nationality or that of their victims, or of the location where the crimes were committed. This exception to the usual rules of jurisdiction was enshrined in the Constitution of Paraguay, article 145 of which reads as follows:

> The Republic of Paraguay, on an equal footing with other States, recognizes a supranational legal order that guarantees human rights, peace, justice, cooperation and political, economic, social and cultural development.

[6] For previous comments submitted by Paraguay, see A/66/93.

Such decisions may be adopted only by an absolute majority of each house of Congress.

17. However, for Paraguay, the recognition of universal jurisdiction was not tied to the recognition of supranationality, as shown by comparative constitutional law. The constitutions of other States did not contain provisions similar to the article above, and that absence had not prevented those countries from recognizing the type of universal jurisdiction exercised by the International Criminal Court, as Paraguay had done.

18. Paraguay ratified the Rome Statute of the International Criminal Court on 14 May 2001. On 10 December 2002, through Decree No. 19.685, an executive branch inter-agency committee, whose members were appointed by the relevant ministries and other government entities, was established to consider and assess the adoption of legislation to ensure the proper functioning of the system and compliance with the obligations under the Rome Statute, with subsequent input from the Supreme Court of Justice and the Office of the Public Prosecutor. The efforts of that inter-agency committee resulted in the draft bill for the implementation of the Rome Statute, which was submitted to the legislature by the executive branch, under note No. 938 of 7 January 2013.

19. The draft bill comprises three chapters and 83 articles. With regard to national and universal jurisdiction, it provides, in articles 6 and 7, as follows:

Article 6
National jurisdiction and universal jurisdiction. Criminal investigation

When the commission of an act criminalized under the present Act is brought to the attention of the Office of the Public Prosecutor either *ex officio* or through a complaint, lawsuit or preliminary police action, the Office shall conduct an investigation in accordance with its functions as they pertain to the act in question, in accordance with national criminal procedure. Paraguayan courts shall also be competent to prosecute crimes committed outside Paraguayan territory by Paraguayan nationals or by foreign nationals, in accordance with the criminal law of Paraguay or international treaties or conventions to which the Republic of Paraguay is a party and is required to implement in its territory.

Article 7
Limitations on national jurisdiction

National jurisdiction shall not be exercised in the following cases:

1. When an appropriate request is made by the International Criminal Court for the surrender of the person;

2. When an appropriate extradition request is made by the State considered competent in the light of relevant legislation.

20. The draft bill was submitted by the executive branch under note No. 938 of 7 January 2013 to Congress, where it is currently under consideration.

21. The adoption of the draft bill would prevent potential jurisdictional conflicts between foreign courts or between the International Criminal Court and Paraguayan

courts when the latter attempt to exercise universal jurisdiction under article 8 of the Criminal Code of Paraguay and various international treaties ratified by the country.

22. The legislature of Paraguay was also considering a draft law to amend articles 236 and 309 of the Criminal Code, which should bring the country's criminal offences into line with those set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons, in order to protect human rights and punish and eradicate those practices that violate human rights. The draft law was tabled at the end of May 2009 and submitted for consideration to the Senate committees dealing with human rights; constitutional affairs; defence and public security; legislation, codification, justice and employment; and equity, gender and social development.

23. Paraguay had also ratified the International Convention for the Protection of All Persons from Enforced Disappearance. Through Act No. 3.941/10 and pursuant to the hierarchy of laws established in the Constitution, duly ratified and exchanged international instruments take precedence over domestic legislation, thus ensuring that people are protected against such offences.

Sweden[7]

24. Sweden exercises universal jurisdiction over crimes against international law (i.e. criminal jurisdiction based on the nature of the crime, irrespective of its location and of the nationality of the alleged perpetrator or victim (chapter 2, section 3.6, Swedish Penal Code. There is no double criminality requirement). The new Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes entered into force on 1 July 2014. The Act replaces the Genocide Act (1964:169) and the provision on international crime in the Penal Code that will cease to apply. The new Act strengthens the protection against war crimes committed in non-international armed conflicts, since the predominant part of the regulation concerning war crimes is applicable in international as well as non-international armed conflicts. The Act also introduces crimes against humanity as a new crime in Swedish legislation. Swedish courts have universal jurisdiction for the crimes covered by the Act.

25. In order to initiate proceedings for international crimes that are not implemented into Swedish national law, the offence in question must fall within the scope of the national criminal law of Sweden. Since 1986, Sweden has been party to the Convention against Torture, and Swedish courts may exercise universal jurisdiction over the crime of torture if the offence in question amounts to, for example, exceptionally gross assault under ordinary Swedish law.

Togo

26. The concept of universal jurisdiction is defined by the Togolese Penal Code, in the context of the jurisdiction of courts (articles 5-7) and, subsidiarily, by the Code of Penal Procedure, in the context of depositions by members of the Government and representatives of foreign Powers. Article 5 of the Penal Code states that:

[7] For previous comments submitted by Sweden, see A/65/181, A/66/93, A/67/116 and A/68/113.

> Criminal penalties may be handed down only by judges competent under the law to try the cases in question in accordance with their powers and geographical jurisdiction.

According to article 6 of the Penal Code:

> The Togolese courts are competent to try any offence committed on Togolese territory, including maritime and air space and ships or aircraft recognized by law, treaties or international custom as having national sovereignty.

27. Article 6 does not specify the treaties on which the jurisdiction of Togolese courts is based. That gap is filled by the draft Penal Code, in the process of being adopted, which gives jurisdiction to Togolese judges by reference to certain international conventions.

28. It may also be noted that the Courts are not competent to try offences committed on board foreign military vessels sailing or berthing in Togolese territorial waters.

29. An offence is deemed to have been committed in Togo if at least part of the *actus reus* or acts of complicity of the principal action took place in Togo. Article 7 of the Penal Code states that:

> The Togolese courts are competent to try any act classified as a crime under Togolese law that is committed by a Togolese national abroad. The courts are also competent to judge any offence committed abroad by a Togolese national if the act is also punishable by the law of the country where it was committed.
>
> The same shall apply if the accused has acquired Togolese nationality only after the act for which he or she is being prosecuted was committed.
>
> Proceedings may be brought only in the event of a complaint filed by the victim or notification of the acts by the authorities of the country where they were committed.
>
> The Togolese courts are also competent to try foreign nationals who, outside the national territory, have perpetrated, or been complicit in, offences against the security of the State, forgery of the State seal or currency counterfeiting, in the event that they have been arrested in Togo or duly extradited.

30. According to article 422 of the Togolese Code of Penal Procedure:

> The President of the Republic may, in criminal proceedings, when called as a witness, and if he deems it useful, provide a written statement following transmission of the case documents by the Minister of Justice.
>
> Members of the Government may serve as witnesses only upon written authorization by the President of the Republic. Such requests shall be transmitted, with the case documents, by the Minister of Justice.
>
> In such cases, the deposition is taken in writing at the witness's residence or office by the President of the Appeals Court.

31. By virtue of the articles cited above, the universal jurisdiction of the Togolese courts requires the offence, or at least part of the *actus reus*, to have been committed on Togolese territory, or else for the offence to have been committed by a Togolese national abroad and for the offence to be punishable under the law of the country

where it was committed. This jurisdiction is limited by international conventions and, in particular, by the principle of reciprocity.

32. The draft Penal Code, based on the provisions of the Penal Code currently applicable, extends the jurisdiction of the Togolese courts to offences committed abroad by any person, provided that the victim is of Togolese nationality at the time the offence was committed (article 10). Furthermore, territorial jurisdiction is affirmed with regard to offences relating to the security of the State (article 11) in cases where the presumed perpetrators have been arrested in Togo or duly extradited.

2. Applicable international treaties

33. A list of the treaties referred to, on the basis of information received from Governments, is provided in table 3.

3. Judicial and other practice

El Salvador

34. Thus far, no specific cases that would give rise to the application of the principle of universal jurisdiction have come before the Salvadoran courts. In the view of El Salvador, however, it was crucial to recognize the important role of universal jurisdiction as a tool for preventing impunity in connection with serious international crimes, such as genocide, torture, war crimes and other crimes which are not prosecuted owing to a lack of capacity or will on the part of the States in which they were committed.

Kenya

35. Kenya has applied the principle of universal jurisdiction, in its judicial practice, in the prosecution of piracy cases on the high seas, with the first trial having been conducted in 2006. The prosecution of a piracy case committed on the high seas has been the only occasion in which the Kenyan courts have successfully invoked the principle of universal jurisdiction.

36. The case involved 10 Somali nationals captured by the United States of America on the high seas, almost 200 miles off the coast of Somalia, in the Indian Ocean. The captured pirates were tried before a Senior Principal Magistrate Court in Mombasa, Kenya, for the offences of jointly attacking a United States vessel, identified as the MV Safina Al Bisaraat–M.N.V-723, on the high seas, 200 miles off the coast of Somalia, on 16 January 2006; threatening the lives of the vessel's crew; and demanding ransom of $500,000 from the vessel captain, contrary to section 69 (1), as read with section 69 (3), of the Penal Code (Chapter 63 Laws of Kenya). At the end of the trial, in October 2006, the Magistrate's Court found the 10 accused persons guilty of the offence of piracy and sentenced them to seven years imprisonment.

37. The accused persons appealed against the judgement of the Magistrate's Court to the High Court of Kenya, contesting, among other issues, the jurisdiction of the Magistrate's Court to try the case, on the grounds that the accused persons were non-nationals of Kenya and that the crimes for which they were convicted were committed outside Kenya, on the high seas of the Indian Ocean.

38. In May 2009, the High Court, in dismissing the appeal and upholding the judgement of the Magistrate's Court, found that the provisions of section 69 (1) of the Penal Code, which, until repealed by the Merchant Shipping Act, provided that any person on the high seas could be found guilty of the offence of piracy, were broad enough to cover the prosecution of non-national suspects captured on the high seas of the Indian Ocean, off the coast of Somalia.

39. Since 2006, when the first piracy case was instituted in the Kenyan courts, the Magistrate's Courts in Mombasa have adjudicated more than 17 piracy cases, involving 143 suspects.

Paraguay

40. In decision and judgement No. 195 of 5 May 2008, the Supreme Court of Justice ruled that "a State party cannot, under any circumstances, overlook the motives or legal grounds of a plea entered in relation to this type of punishable offence, or contrast the affirmation under examination with the intention of article 5 of the Constitution, which provides for the protection of victims of terrible and reprehensible crimes, a situation based on the position of the international community, which exempts both the substantive and procedural regulations in criminal matters and limits the imprescriptibility of criminal action and of the penalties incurred in relation to such crimes solely and exclusively to 'genocide and torture, in addition to enforced disappearance, kidnapping and murder for political reasons'".

B. Conditions, restrictions or limitations to the exercise of jurisdiction

1. Constitutional and domestic legal framework

Paraguay

41. Article 5 of the Constitution provides that "statutes of limitations shall not apply to genocide, torture, the enforced disappearance of persons, kidnapping and murder for political reasons …".

Article 8, paragraphs 2 and 3, of the Paraguayan Criminal Code provide the following restrictions in relation to the prosecution of offences committed abroad in respect of legal assets enjoying universal protection:

> 2. Paraguayan criminal law shall apply only when the perpetrator of such an offence has entered the national territory.
>
> 3. Punishment under Paraguayan criminal law shall be excluded when a foreign court:
>
> (1) Has found the perpetrator not guilty in a final judgement; or
>
> (2) Has sentenced the perpetrator to a term of imprisonment and the sentence has been served or has been prescribed, or the perpetrator has been pardoned.

42. By its Act No. 3.458/08, the Paraguayan Congress ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against

Humanity, which had also been ratified by the executive branch and incorporated into the country's legal order.

Sweden

43. As noted previously (see A/66/93, para. 79; A/67/116, para. 21 and 27; and A/68/113, para. 21), in Sweden, prosecution of crimes against international law that have been committed outside of Sweden requires the authorization of the Government of Sweden or a person designated by the Government. There is no statute of limitations as regards genocide, crimes against humanity, gross war crimes and attempts to commit those crimes.

2. Judicial and other practice

Paraguay

44. On the question of whether statutes of limitations apply to criminal action or to the penalties incurred in relation to such crimes, the Supreme Court determined that no statute of limitations applied in either case. By establishing the imprescriptibility of torture, Paraguay has ensured a high standard of human rights protection and has reaffirmed the principle that the violation of fundamental human rights must not go unpunished.

45. Under the Constitution of Paraguay of 1992 and its criminal legislation, Paraguay is also empowered to exercise universal jurisdiction pursuant to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, annexed to resolution 60/147 adopted by the General Assembly on 16 December 2005.

46. Article 5 of the Constitution, referred to above, reflects Basic Principle IV, which is contained in the annex to resolution 60/147, which states that "statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law".

III. Scope and application of universal jurisdiction: comments by observers

Council of Europe[8]

47. The Council of Europe reiterated its previous comments (see A/66/93, para. 110, and A/68/113, para. 34) under which none of its conventions foresees the establishment of the so-called "universal" criminal jurisdiction, indicating nonetheless that 10 such conventions[9] contain provisions calling upon States to

[8] For previous comments submitted by the Council of Europe, see A/66/93 and A/68/113.

[9] European Convention on the Transfer of Proceedings in Criminal Matters (European Treaty Series (ETS) No. 73), part II; European Convention on the Suppression of Terrorism (ETS No. 90), article 6.1; Convention on the Protection of Environment through Criminal Law (ETS No. 172), articles 5.1 and 5.2; Criminal Law Convention on Corruption (ETS No. 173), article 17.1; Convention on Cybercrime (ETS No. 185), article 22.1; Council of Europe Convention on the Prevention of Terrorism (Council of Europe Treaty Series (CETS) No. 196), articles 14.1 and

ensure that their internal law establishes the jurisdiction of their criminal courts to judge a given conduct. Notwithstanding the foregoing, the Council of Europe conventions do not limit the possibility for the internal law of States party to establish other types of jurisdiction[10] than those contemplated in the conventions. The latter do not, therefore, prevent States party, whose internal law does so, from making use of the so-called "universal" jurisdiction.

48. The explanatory memorandums of Council of Europe conventions that contain provisions of this nature, but also of other conventions, provide additional information in this respect, and at times include direct references to the concept of "universal jurisdiction".[11] The explanatory memorandums are available on the website of the Treaty Office of the Council of Europe: http://conventions.coe.int.

49. The Council of Europe further reiterated its submission relating to the adoption, by the Committee of Ministers, of a reply to recommendation 1953 (2011) of the Parliamentary Assembly of the Council of Europe entitled "The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes", which makes reference to the issue of the "universal jurisdiction" (see A/68/113, para. 34).

50. As regards the case law of the European Court of Human Rights, the Council of Europe recalled that the jurisdiction of that Court extends "to all matters concerning the interpretation and application of the [European] Convention [on Human Rights] (hereafter ECHR) and the protocols thereto"[12] which are referred to it. Accordingly, the Court is not in a position to examine *in abstracto* the question of "universal jurisdiction".

51. The Court can only therefore verify the application of "universal jurisdiction" by the authorities of a State party to the Convention on Human Rights in relation to the examination in a concrete case of the conformity of such an application with the rights and freedoms guaranteed by the Convention and the protocols thereto. The Court has, for instance, been called upon to conduct such a review in the cases *Jorgic v. Germany*[13] and *Ould Dah v. France*,[14] respectively, in light of the

14.2; Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), articles 31.1 and 31.2; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), articles 25.1 to 25.6; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), articles 44.1 to 44.4; Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health (CETS No. 211), articles 10.1 and 10.2.

[10] ETS No. 73, art. 5; ETS No. 90, art. 6.2; ETS No. 172, art. 5.3; ETS No. 173, art. 17.4; ETS No. 185, art. 22.4; CETS No. 196, art. 14.4; CETS No. 197, art. 31.5; CETS No. 201, art. 25.9; CETS No. 210, art. 44.7; CETS No. 211, art. 10.6.

[11] See the explanatory memorandums of the Convention on the Protection of Environment through Criminal Law (ETS No. 172) and the Criminal Law Convention on Corruption (ETS No. 173), as well as that of the European Convention on the International Validity of Criminal Judgments (ETS No. 70).

[12] European Convention on Human Rights, article 32.

[13] European Court of Human Rights, *Jorgic v. Germany*, No. 74613/01, judgment of 12 July 2007, paras. 7, 8, 55, 64-72. For the Council of Europe's previous comments in relation to this case, see A/68/113, para. 35.

[14] European Court of Human Rights, *Ould Dah v. France*, No. 13113/03, decision on admissibility of 17 March 2009. For the Council of Europe's previous comments in relation to this case, see A/66/93, para. 112.

provisions of article 6 of the Convention, which guarantees the right to a fair trial, and the provisions of article 7, which guarantees the principle that offences and penalties must be defined by law.

International Maritime Organization[15]

52. The International Maritime Organization reiterated its previous comments while quoting expressly the provisions of article 6 of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

53. As at 16 April 2014, 164 States were parties to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; 30 States were parties to the 2005 Protocol to the Convention, which entered into force on 28 July 2010; 151 States were parties to the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; and 26 States were parties to the 2005 Protocol to the 1988 Protocol, which entered into force on 28 July 2010.

Organization for the Prohibition of Chemical Weapons[16]

54. The Organization for the Prohibition of Chemical Weapons (OPCW) noted that the number of States parties that had adopted implementing legislation to criminalize activities prohibited under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction had increased from 132 to 136, and that the number of States parties that had included an extraterritorial provision in their legislation had increased from 115 to 121.

55. OPCW stated that it had not found any example of States exercising universal jurisdiction to prosecute individuals for the use of chemical weapons on the basis of their Chemical Weapons Convention implementing legislation. There were instances, however, in which the use of chemical weapons or related offences had been prosecuted as international crimes, and there was at least one instance in which a national court had considered the use of chemical weapons as constituting an international crime in the exercise of its universal jurisdiction.

56. The Supreme Court of the Netherlands and the Iraqi High Tribunal had examined the use of chemical weapons as constituting war crimes and crimes against humanity as well as genocide in the *Van Anraat*[17] and *Anfal* cases.[18] In the *Van Anraat* case, charges of aiding and abetting violations of the laws and customs of war were brought against the defendant, who was determined to have knowingly and intentionally supplied chemicals that were used by the former Iraqi regime to produce chemical weapons that were used against the Islamic Republic of Iran and the Kurdish population. In the *Anfal* case, the Iraqi High Tribunal formally charged

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[15] For previous comments submitted by the International Maritime Organization, see A/66/93, para. 116.

[16] For previous comments submitted by OPCW, see A/66/93, paras. 117-120, and A/67/116, paras. 29-32.

[17] For the text of the judgement, see http://www.haguejusticeportal.net/eCache/DEF/6/411.html.

[18] For reference, see http://trial-ch.org/enactivities/informing-the-public/international-justice-map/international-justice-map/archives/june-2009.html#06; http://jurist.law.pitt.edu/paperchase/2008/03/iraq-pm-says-no-chemical-ali-execution.php; and http://www.nti.org/gsn/article/chemical-ali-sentenced-to-death-again.

six defendants with genocide, crimes against humanity and war crimes for their alleged roles in planning, authorizing and executing the 1988 Anfal campaign, a series of large-scale attacks against the Kurdish population of northern Iraq, which involved the use of chemical weapons. Both of these cases, however, concerned prosecution of nationals of the States exercising jurisdiction.

57. Denmark, relying directly on the principle of universal jurisdiction, brought charges against a foreign national, Nizar al-Khazraji, who was allegedly involved in the use of chemical weapons against Iranian troops and the Kurdish population. The case was not prosecuted on the basis of a violation of the Chemical Weapons Convention but, rather, as a war crime, in violation of the 1949 Geneva Conventions relating to the protection of victims of international armed conflicts, as well as on the basis of various human rights abuses.[19]

58. OPCW submitted that the characterization of the use of chemical weapons as war crimes, crimes against humanity or genocide could provide a basis for the exercise of universal jurisdiction for the prosecution of the use of chemical weapons by national courts in those States that recognize the exercise of universal jurisdiction over the most serious international offences.

59. The prohibition of the use of chemical weapons contained in article I of the Chemical Weapons Convention exists as a principle of customary international law and, thus, is applicable to all States, even to those that have not become parties to the Convention. The Convention does not explicitly require States parties to prosecute the activities prohibited under it on the basis of universal jurisdiction. It only requires States parties to enact legislation to enable them to prosecute such prohibited activities when these are committed anywhere by their nationals or within their territorial jurisdiction.

60. States parties are not prevented from going beyond the requirements of the Convention and providing, in their legislation, for universal jurisdiction as a basis for prosecuting activities prohibited under it. However, only a limited number of States parties have made the commission of activities prohibited by the Convention, such as the use of chemical weapons, crimes of universal jurisdiction in their Convention implementing legislation.

61. While the use of chemical weapons has not been prosecuted by national courts on the basis of universal jurisdiction, its characterization as the material element of war crimes, crimes against humanity or genocide, could provide a basis for the exercise of universal jurisdiction in those States that recognize this principle as a basis for prosecution of international crimes.

[19] The trial in this case was never completed, however. Although Nizar al-Khazraji was placed under house arrest, he escaped from Denmark in 2003. Subsequently, the Danish authorities issued both national and international arrest warrants and indicated their willingness to request an extradition in the event the accused was found abroad. (See “Universal Jurisdiction in the European Union: Country Studies” (Brussels, REDRESS and the International Federation of Human Rights, 2003), available at http://www.redress.org/downloads/conferences/country%20studies.pdf.)

International Committee of the Red Cross[20]

62. The International Committee of the Red Cross (ICRC) reiterated its comments, contained in paragraphs 121 to 140 of A/66/93, regarding the basis for universal jurisdiction.

63. ICRC underlined that it had identified more than 100 States[21] that had established some form of universal jurisdiction over serious violations of international humanitarian law in their national legal order. Most of those States had adopted national legislation granting universal jurisdiction for any or a combination of grave breaches to the Geneva Conventions and Additional Protocol I; crimes under the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict; the 2006 International Convention for the Protection of all Persons from Enforced Disappearance; and the war crimes listed under article 8 of the Rome Statute of the International Criminal Court. A minority of States had investigated and prosecuted suspected criminals, basing their jurisdiction not on specific national legislation, but directly on international law, a practice which requires precise constitutional provisions that determine the status of international customary and treaty law in the domestic system.[22]

64. The laws and measures adopted at the national level have not remained speculative. Indeed, although some States had demonstrated reluctance to, or had limited the exercise of, universal jurisdiction on their territory, recent national court decisions and State initiatives have demonstrated that the exercise of the principle of universal jurisdiction is gaining more acceptance, and that States are willing to prevent and tackle impunity for war crimes perpetrated beyond their borders. In the past two years, investigation and prosecution on the basis of universal jurisdiction has increased, including prosecution for war crimes committed in international and non-international armed conflicts (the Netherlands recently tried an individual for war crimes committed during the Rwandan conflict, on the basis of universal jurisdiction).[23]

65. As for limitations to the exercise of jurisdiction, ICRC commented that, while international humanitarian law provides for absolute universal jurisdiction, the majority of States, when establishing universal jurisdiction for war crimes in their national legal order, have adopted a more pragmatic approach, attaching conditions to the exercise of such jurisdiction.

66. The tendency among such States was to require a link between the accused and the forum country, most often the presence of the accused in the prosecuting State. According to the information collected by ICRC and available on its National Implementation Database,[24] more than 40 States require, in their legislation and

[20] For previous comments submitted by ICRC, see A/66/93 and A/68/113.

[21] "Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based in Domestic Practice, Report of The Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law", Vol. 1 (Geneva, ICRC Advisory Service on International Humanitarian Law, 2013).

[22] This is a particularity of countries with a monist legal tradition, according to which the act of ratifying an international treaty immediately incorporates this international law instrument into national law. By contrast, for States with a dualist legal system, international law must first be translated into national legislation before it can be applied by the national courts.

[23] *Public Prosecutor v. Joseph Mpambara* (12/04592 (ECLI:NL:HR:2013:1420)). Supreme Court of the Netherlands, 26 November 2013.

[24] National Implementation Database, ICRC Advisory Service on International Humanitarian Law. Available at http://www.icrc.org/ihl-nat.

case law, the presence of the presumed perpetrator on their territory before proceedings are instituted (for example, Argentina, Austria, Bosnia and Herzegovina, Canada, Colombia, France, India, the Netherlands, the Philippines, Spain, Switzerland and the United States of America). Some of those States, however, allow prosecution even in the absence of the accused, as long as his or her presence at least once during the investigation or trial phase is demonstrated. In some countries, the presence of the presumed perpetrator is not required (Germany, Italy, Luxembourg, New Zealand and the United Kingdom of Great Britain and Northern Ireland).

67. A number of other limitations have been attached to the implementation of universal jurisdiction. In many States, prosecution for crimes under universal jurisdiction requires the consent of a governmental or legal authority. Universal jurisdiction can, besides, be limited to certain categories of crimes (*ratione materiae* limitation). It is also generally considered that universal jurisdiction is a subsidiary jurisdictional basis that should be invoked only in cases in which national courts, that would be competent to prosecute on the basis of territoriality or nationality, refuse or are not able to do so.

68. Additional conditions may be taken into account. First, because State jurisdictions may be concurrent, the implementation of universal jurisdiction should be subject to judicial guarantees, including, but not limited to, the principles of individual responsibility, non-retroactivity, presumption of innocence and *ne bis in idem*, as well as an independent, impartial and properly constituted court and a fair trial. The implementation of universal jurisdiction should also take into account jurisdiction and penalties already exercised or imposed by another State or an international tribunal. Such guarantees are linked to the necessary existence of independent judicial authorities.

69. The exercise of universal jurisdiction also requires procedural conditions, especially given the difficulties related to the availability and safekeeping of evidence, respect for the rights of defendants and the protection of witnesses and victims, in a context in which the prosecution and trial of offences is occurring abroad. Such procedural guarantees include suitable provisions to facilitate investigations and the collection and evaluation of evidence. In this respect, strengthening of the law and of arrangements for extradition, international judicial cooperation and assistance is essential.

70. ICRC, while recognizing the will of States to frame the application of universal jurisdiction, believes that the conditions for opening criminal proceedings, or for justifying a refusal to do so, must be clearly and precisely defined. In addition, ICRC insists that conditions should enable the principle to gain in effectiveness and predictability, rather than limit its application. When dealing with effectiveness and predictability, judicial specialization and cultural sensitivity, including geographical proximity, may be relevant.

71. Since the Advisory Service on International Humanitarian Law was established, in 1996, universal jurisdiction has been a subject of particular interest to ICRC. Indeed, promoting the prevention and repression of serious violations of international humanitarian law is among the priority activities of the Advisory Service, with a particular emphasis on the means of establishing effective sanctions mechanisms. Universal jurisdiction is considered to be an important aspect of this process. In this context, the Advisory Service has been offering legal and technical advice and assistance to government experts on the national implementation of

relevant international humanitarian law provisions, and has been raising the awareness of States about the application of universal jurisdiction to war crimes.

72. In addition to its general activities, which encompass the issuing of legal opinions on draft laws; facilitating the exchange of information between States and other actors in international humanitarian law; organizing meetings of experts; conducting professional training courses; and developing specialized tools (databases, reports, fact sheets, etc.) that are made available to States and the general public, the Advisory Service undertook, in the past two years, various initiatives aimed at enhancing the efforts of States to efficiently implement the repression of serious violations of international humanitarian law, including by asserting universal jurisdiction.

73. Since December 2012, the Advisory Service has engaged in consultations with experts regarding individual criminal sanctions, with a particular emphasis on universal jurisdiction. These consultations are aimed at assessing the developments in State practice regarding universal jurisdiction since the establishment of the International Criminal Court.

74. In June 2013, *The Domestic Implementation of International Humanitarian Law: A Manual*[25] was updated, offering a practical tool to assist policymakers, legislators and other stakeholders in implementing international humanitarian law and in meeting all their obligations under that body of law, including the repression of serious violations and the application of universal jurisdiction.

75. In August 2013, a report of the Third Universal Meeting of National Committees for the Implementation of International Humanitarian Law, which took place in October 2010, was published. The report, entitled "Preventing and Repressing International Crimes: Towards an "Integrated" Approach Based in Domestic Practice"[26] and based primarily on national practice, explores the prevention and suppression of international crimes, paying particular attention to the role of domestic law and the legal mechanisms required to support an "integrated" system for the repression of these violations. The report also provides reflections on issues such as universal jurisdiction and the role of punishment in the prevention of serious violations of international humanitarian law.

76. ICRC continues to gather information on State practice relating to universal jurisdiction.

77. ICRC recognizes that under international humanitarian law and international criminal law, States are the primary entities in charge of investigating and prosecuting the perpetrators of serious violations of international humanitarian law. When States are unable or unwilling to take legal action against individuals suspected of committing such crimes on their territory or under their jurisdiction, and when international courts cannot exercise their jurisdiction, implementing universal jurisdiction has been revealed to be an effective way to ensure accountability and fight impunity.

78. Given the existing challenges to the efficient exercise of this principle, however, it seems fundamental to ICRC to continue to invest in national capacity-building and to support States in establishing appropriate national legislation to prosecute war crimes on the basis of both national and universal jurisdiction.

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[25] *The Domestic Implementation of International Humanitarian Law: A Manual* (Geneva, ICRC Advisory Service on International Humanitarian Law, 2011).

[26] See note 21 above.

IV. Nature of the issue for discussion: specific comments by States

Cuba[27]

79. Cuba stated that the scope and application of the principle of universal jurisdiction is a matter within the competence of all States Members of the United Nations. The work of defining this principle must therefore be conducted within the framework of the General Assembly, with the participation of all interested Member States. In that regard, Cuba supports the efforts of the working group of the Sixth Committee of the Assembly to examine the topic in a transparent and inclusive manner.

80. Cuba is of the view that the primary objective of the work of the General Assembly relating to universal jurisdiction should be to establish, through consensus, an international norm, or failing that, international guidelines to safeguard international peace and security and prevent the selective and manipulative use of the principle of universal jurisdiction.

81. The norm or international guidelines should be in line with the principles of the Charter of the United Nations and should clearly establish under what conditions or within which limits the principle of universal jurisdiction may be invoked, as well as the offences to which the principle would be applied. Such offences should be restricted to crimes against humanity. The principle should be invoked with the consent of the State in which the act was committed, or of the States of which the accused is a national, and only when it has been determined that there is no other way to bring criminal proceedings against the perpetrators.

82. The utmost respect for the principles enshrined in the Charter of the United Nations, in particular the principles of sovereign equality, political independence and non-interference in the internal affairs of States, is of vital importance in the application of the principle of universal jurisdiction.

83. The application of the principle of universal jurisdiction should be duly limited by absolute respect for the sovereignty, national jurisdiction and legal systems of States. The application of universal jurisdiction should be supplementary to the actions and national jurisdiction of each State, and under no circumstances should preference be given to universal jurisdiction over national jurisdiction. The application of universal jurisdiction should be limited to exceptional situations and to circumstances in which there is no other way to prevent impunity.

84. In addition, the scope of the principle of universal jurisdiction cannot be so far-reaching as to undermine the immunity granted under international law to Heads of State and/or Government, diplomatic personnel and other high-ranking officials. The immunity attached to those offices must not be called into question.

85. Universal jurisdiction cannot be used as a pretext to disparage and discredit the integrity, values and legality of different legal systems. The principle of universal jurisdiction should not be applied in order to diminish respect for a country's national jurisdiction or to distort its legal system.

86. Cuba reiterated its concern about the unwarranted use of this principle and denounced the unilateral, selective and politically motivated exercise of jurisdiction

[27] For previous comments submitted by Cuba, see A/65/181, A/66/93/Add.1, A/67/116 and A/68/113.

by the courts of certain developed countries against natural or juridical persons from developing countries, which has no basis in any international norm or treaty.

87. Cuba condemned the adoption at the national level of politically motivated extraterritorial laws targeting other States. This interventionist application and scope of the principle of universal jurisdiction is detrimental to the norms and principles of international law.

El Salvador

88. El Salvador stated that it would continue to support the consideration of this topic within the framework of the United Nations, since only with the establishment of general guidelines on its implementation in practice will States be prevented from misapplying the principle of universal jurisdiction or distorting it by introducing obstacles to its genuine implementation in cases of extreme importance.

Paraguay

89. Paraguay stated that universal jurisdiction was a legal institution of exceptional character with respect to the exercise of criminal jurisdiction, which serves to combat impunity and strengthen justice. Therefore, insofar as universal jurisdiction is a legal institution of international law, the framework for its application and exercise by States is necessarily defined by international law.

90. Although States have clearly stated that universal jurisdiction, international criminal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*) are different legal institutions that should not be confused with one another, Paraguay considers them to be complementary institutions in the effort to end impunity.

Sweden

91. Sweden stated that the fight against impunity was a common goal shared by the Member States of the United Nations, with the aim of ensuring that individuals who commit international crimes such as genocide, crimes against humanity, war crimes and torture are brought to justice and that redress is provided for the victims.

92. States have a right and an obligation to either prosecute or extradite persons suspected of having committed genocide, crimes against humanity, war crimes or torture. Rights and obligations regarding prosecution and extradition derive from various legal bases for the exercise of jurisdiction. Not all indictments against foreign nationals in national fora are based on universal jurisdiction.

93. Sweden reiterated that it was of utmost importance that the rule of law govern national judicial systems in order to ensure an impartial and fair trial for all parties involved in an investigation or prosecution regarding international crimes.

Table 1
List of crimes mentioned in the comments by Governments concerning which universal jurisdiction (including other bases of jurisdiction) is established by their codes

Crime	*State*
Human trafficking	Austria, Paraguay
Extortive abduction, slave trade	Austria
Organized crime	Austria
Crimes committed by anyone in a place not subject to Salvadoran jurisdiction, where such crimes could affect rights protected by specific international agreements or rules of international law or seriously impair universally recognized human rights	El Salvador
Air piracy	Austria
Maritime piracy	Kenya
Terrorism-related acts	Austria
Offences involving explosives	Paraguay
Attacks against civil aviation and maritime traffic	Paraguay
Drug-related crime	Austria
Illicit trafficking in narcotics and dangerous drugs	Paraguay
Offences involving the authenticity of currency and securities	Paraguay
Genocide	Paraguay
Crimes against international law (i.e. criminal jurisdiction based on the nature of the crime, irrespective of its location and of the nationality of the alleged perpetrator or victim)	Sweden

Note: Paraguay specified that its criminal law also applies to offences that it is required to prosecute under an international treaty currently in force, even when committed abroad, and that the above list is not exhaustive.

Table 2
Specific legislation relevant to the subject, based on information submitted by Governments

Category	*Legislation*	*Country*
Crimes affecting protected rights in the international arena	Penal Code, article 10	El Salvador
Piracy	Merchant Shipping Act (Chapter 289 Laws of Kenya), 2009	Kenya

Category	*Legislation*	*Country*
Genocide	Draft Penal Code, article 143	Togo
War crimes	Draft Penal Code, article 145	Togo
Bacteriological weapons	Draft Penal Code, article 525	Togo
Chemical weapons	Draft Penal Code, article 528	Togo
Conventional weapons	Draft Penal Code, article 531	Togo
Cluster munitions	Draft Penal Code, article 541	Togo

Table 3
Relevant treaties that were referred to by Governments, including treaties containing *aut dedere aut judicare* provisions

A. Universal instruments

Piracy	United Nations Convention on the Law of the Sea, 1982	Kenya
Maritime navigation	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988	Kenya
International humanitarian law	Geneva Conventions of 1949 and the Additional Protocols thereto	Paraguay
Crimes against internationally protected persons, including diplomatic agents	Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973	Paraguay
Aerial navigation	Convention for the Suppression of Unlawful Seizure of Aircraft, 1970	Paraguay
Taking of hostages	International Convention against the Taking of Hostages, 1979	Paraguay
Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	Paraguay
Safety of United Nations and associated personnel	Convention on the Safety of United Nations and Associated Personnel, 1984	Paraguay
Enforced disappearance	International Convention for the Protection of All Persons from Enforced Disappearance, 2006	Paraguay

Terrorism	International Convention for the Suppression of the Financing of Terrorism, 1999	Paraguay
	International Convention for the Suppression of Acts of Nuclear Terrorism, 2005	Paraguay
Nuclear material	Convention on the Physical Protection of Nuclear Material, 1979	Paraguay
Crime of apartheid	International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973	Paraguay

B. Regional instruments

Enforced disappearance	Inter-American Convention on Forced Disappearance of Persons, 1994	Paraguay