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Chair: Mr. Gafoor . . . . . (Singapore)

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17-18014 (E)

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

Agenda item 85: The scope and application of the principle of universal jurisdiction (*continued*) (A/72/112)

1. **Mr.** Stephen **Smith** (United Kingdom) said that his delegation understood universal jurisdiction to refer to national jurisdiction established over a crime irrespective of the nationality of the victim, place of perpetration or other links between the crime and the prosecuting State. Universal jurisdiction should be distinguished from the jurisdiction of international judicial mechanisms established by treaty, including the International Criminal Court, and from the extraterritorial jurisdiction exercised by a State's courts to prosecute crimes committed by its nationals overseas. It should also be distinguished from the jurisdiction established under treaties that provided for an "extradite or prosecute" regime, although some States, including the United Kingdom, might establish universal jurisdiction under domestic law in order to implement such treaties.

2. Universal jurisdiction had been established only for a small number of specific crimes, including the most serious international crimes, such as grave breaches of the Geneva Conventions, and crimes such as piracy where there was a significant risk that, if not subject to universal jurisdiction, perpetrators would fall outside the jurisdiction of any State. There was a lack of international consensus on whether a small number of other crimes could be subject to universal jurisdiction. The territorial approach to jurisdiction reflected the general rule that the authorities of the State in whose territory an offence was committed were best placed to prosecute that offence because of the availability of evidence and witnesses. However, the exercise of territorial jurisdiction was not always possible or appropriate. In such cases, universal jurisdiction could be an important and necessary tool. Procedural safeguards should be in place, however, to ensure that it was exercised responsibly.

3. Establishing universal jurisdiction before the courts of the United Kingdom was not legally complex, as Parliament had legislated to confer such jurisdiction in relation to certain offences. Before deciding to prosecute, the authorities assessed whether the accused person enjoyed immunity under international law, and they also took account of practical considerations, such as difficulties in obtaining evidence. In circumstances where the same facts had been subject to criminal proceedings in another jurisdiction, albeit for a lesser offence, difficulties might also arise in relation to whether the principles of *autrefois convict* and *autrefois acquit* prevented criminal proceedings in the United Kingdom.

4. **Ms. Pierce** (United States of America), welcoming the Committee's continued consideration of the topic, 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 remained concerning its exercise in respect of universal crimes. Previous discussions and reports on the subject had been useful in identifying points of consensus and differences of opinion. Her delegation looked forward to hearing the views of other delegations regarding possible new, practical approaches for further work on the topic.

4. **Mr. Habib** (Indonesia) said that it was critical to close legal gaps in order to end impunity and protect the rights of victims. Lack of clarity and consensus as to the scope and application of universal jurisdiction could lead to inconsistent, inappropriate and even abusive application of domestic law in respect of foreign nationals and could undermine fundamental principles of international law, such as that of immunity of State officials from foreign criminal jurisdiction. A cautious approach was therefore required. It was important to clarify all conceptual ambiguities, identify the crimes falling under universal jurisdiction and establish the conditions for its application.

6. Universal jurisdiction should be complementary to national and territorial jurisdiction and should be exercised only on an exceptional basis, when no State was able or willing to exercise its jurisdiction. Furthermore, universal jurisdiction should be exercised with full respect for the principles enshrined in the Charter of the United Nations, including those of good faith, sovereign equality of States and territorial integrity.

7. International consensus on the matter would foster cooperation in legal proceedings involving two or more jurisdictions. To ensure due process of law and fair trials, State officials applying universal jurisdiction must be able to obtain evidence and testimony from authorities in other jurisdictions. They would also require assistance in dealing with other practical considerations, and they might wish to request the appearance of the alleged perpetrator, although that could only occur with the consent of the State where the crime had taken place or the individual's State of nationality. His delegation supported continued discussion of the topic in the General Assembly.

8. **Ms. Rugwabiza** (Rwanda) said that there was a crisis of credibility in international criminal justice, which the Committee should not ignore. The principle

of universal jurisdiction had both political and legal dimensions and both deserved consideration. It had often been said that universal jurisdiction was vital to the fight against impunity. In that regard, she wished to point out that many of the masterminds of the 1994 genocide in Rwanda not only remained at large but had been given safe haven in countries that were permanent members of the Security Council.

9. While her delegation did not question the legality of the principle, it did reject its use for political reasons. It was important to strike the right balance between the need to end the culture of impunity and the need to guard against abuse of the principle of universal jurisdiction. No judge anywhere in the world should have the power to use that principle against an independent sovereign State for political reasons. To avoid political manipulation, international arrest warrants should only be issued after an opinion on the available evidence had been sought from the International Criminal Police Organization (INTERPOL). No State should feel obliged to comply with a warrant issued by a judge from another State if INTERPOL had not endorsed its issuance. In addition, there should be a review system whereby a decision by a judge to issue an international arrest warrant or an indictment against a leader of another country could be appealed to another judge or to another court. Until the review process was completed, individuals and States should be permitted to conduct their business normally.

10. The international justice system should be based on shared values and mutual respect between States, without double standards or abuse in the application of the noble principle of universal jurisdiction.

11. **Mr. Eiermann** (Liechtenstein), noting that almost two thirds of Member States had ratified the Rome Statute of the International Criminal Court, said that significant progress had been made in the fight against impunity for the most serious crimes under international law. Nevertheless, a large number of perpetrators continued to operate beyond the Court's jurisdictional reach. Universality of the Rome Statute thus remained an important goal, although it would not be an easy one to achieve. The impunity gap was all the more dramatic, as the Security Council found itself largely unable to refer situations of mass atrocities to the Court, owing in particular to the use or threat of the use of the veto.

12. States had the primary responsibility to investigate and prosecute the worst crimes under international law. However, in situations where a State was unwilling or unable to do so, and where international efforts had failed, other States might wish to exercise universal jurisdiction in order to prevent impunity. Prosecution in accordance with the principle of universal jurisdiction was an increasingly important part of international efforts to hold perpetrators of atrocities accountable and show that there was broad agreement on the importance and the objective of the principle of universal jurisdiction: to provide justice to victims, to deter future crimes and to eradicate safe havens for human rights abusers. While there was agreement on the principle, however, States continued to disagree on its modes of implementation, as was evident from the Secretary-General's report (A/72/112). For example, a State might wish to exercise jurisdiction only if it had custody of the alleged perpetrator, or it might elect to do so regardless of where the individual was located. In the past, such an exercise of universal jurisdiction had led to disputes, but it had also yielded successes, as illustrated by the recently concluded case against Hissène Habré.

13. The importance of universal jurisdiction had become evident in the recent past as a response to the crimes committed in the context of the armed conflict in the Syria. The Syrian national judiciary had the primary responsibility to investigate and prosecute crimes committed on its territory, but it was unwilling and unable to do so, as had been noted in the report (A/HRC/28/69) of the Independent International Commission of Inquiry established by the Human Rights Council. Furthermore, a Security Council resolution to refer the situation to the International Criminal Court had been vetoed in 2014. The exercise of universal jurisdiction was therefore one of the few means by which States could at least put some cracks in the impunity wall. His delegation welcomed all efforts to that end, including the increasing number of prosecutions against Syrian perpetrators in various European courts.

14. He also wished to highlight the important role of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, and to encourage all States to cooperate with the Mechanism and support it politically and financially. With respect to the topic under discussion, it was worth noting that the Mechanism would generally not share information in circumstances in which a trial might be held in absentia on the basis of universal jurisdiction. While the scope of the principle of universal jurisdiction remained limited, States should be encouraged to continue making use of it in cases of atrocities where all other national or international efforts had failed.

15. **Ms. Horňáčková** (Czechia) said that universal jurisdiction was an important tool in the fight against impunity for the most serious crimes. However, the

question of its scope and application was of a predominantly legal nature and merited a thorough legal analysis. The potential of the current format of the Committee's work on the topic had already been exhausted, and her delegation therefore remained of the view that it should be referred to the International Law Commission for study. The Commission was an expert body that could allocate adequate time to the matter and could also apply the knowledge garnered from its study of other closely related topics in addressing it. Moreover, referring the topic to the Commission would demonstrate the Committee's commitment to strengthening its interaction with that body.

16. **Mr. Umasankar** (India) said that the perpetrators of crimes should be brought to justice and should not be allowed to go unpunished because of procedural technicalities, including lack of jurisdiction. Criminal jurisdiction was generally exercised on the basis of territoriality, nationality or the protective principle, the common feature of which was the connection between the State asserting jurisdiction and the crime committed. In the case of universal jurisdiction, however, there was no link between the State claiming jurisdiction and the offence or the offender. The justification for universal jurisdiction lay in the nature of certain offences that affected the interests of all States.

17. Universal jurisdiction in relation to piracy on the high seas had been codified in the United Nations Convention on the Law of the Sea, and it was thus the only crime over which claims of universal jurisdiction were undisputed. Various international treaties provided for universal jurisdiction in respect of certain other crimes, such as genocide, war crimes, crimes against humanity and torture, but it remained unclear whether the jurisdiction provided for under those treaties could be converted into a commonly exercisable jurisdiction, irrespective of whether the other State or States concerned were parties to them. Questions also remained concerning the basis for extending universal jurisdiction; the relationship between such jurisdiction and laws on immunity, pardon and amnesty; and harmonization with domestic law.

18. As there was not an agreed definition of the concept of universal jurisdiction, care must be taken to ensure that it was not misused in any criminal or civil matter. Furthermore, universal jurisdiction should not be confused with the widely recognized obligation to extradite or prosecute (*aut dedere, aut judicare*).

19. **Ms. Piiskop** (Estonia) said that an open, transparent and constructive discussion was the key to progress in the deliberations on the scope and application of universal jurisdiction. While her delegation recognized the difficulties that arose when the principles of sovereignty of States, immunity of State officials and subsidiarity were in question, it believed that universal jurisdiction was an essential tool in the fight against impunity. It should, however, be a last resort and should be applied only in respect of the most heinous international crimes. An attempt to develop an exhaustive list of crimes to which the principle of universal jurisdiction applied would be premature; rather, conditions or guidelines for its application were called for. The exchange of information on national experiences was of utmost importance in that regard. It might also be wise to request the International Law Commission to prepare a study on the topic.

20. Under Estonian law, the country's Criminal Code applied to any act committed outside its territory that was punishable in accordance with an international obligation binding on Estonia. Prevention and prosecution of serious violations of international law were the moral duty of all States.

21. **Ms. Ahamad** (Malaysia), recalling that Malaysia had submitted extensive comments on the principle of universal jurisdiction and had shared relevant information on its applicable domestic legislation, said that a common understanding of the principle of universal jurisdiction must be achieved, not only to narrow the gap between Member States' diverging views on its scope and application, but also to ensure full respect for the sovereignty and territorial integrity of States. The lack of constructive discussion in the Committee regarding the list of offences to which universal jurisdiction was applicable was a matter of concern. While continued fact-finding efforts to gain a clearer understanding of its scope and application were important, the Committee should consider taking more concrete action, such as commencing an in-depth analysis of the comments and information provided by Member States and relevant observers, or referring the topic to the International Law Commission. However, before any such steps could be taken, the Committee must agree on clear criteria for defining the concept of universal jurisdiction. In addition, due consideration should be given to practical matters, such as the handling of physical evidence and evidence given by witnesses in different jurisdictions.

22. **Mr. Mukongo Ngay** (Democratic Republic of the Congo) said that universal jurisdiction unquestionably contributed to the fight against impunity. The limitations of the jurisdiction of the International Criminal Court and the various ad hoc tribunals, coupled with the rising number of complaints lodged with the domestic courts of States exercising universal jurisdiction, demonstrated

the central role that it played in combating impunity. However, the principle had been applied in a haphazard manner that had given rise to abuses and to practices that were *contra legem*. In the recent past, criminal investigations had been launched against some 30 current or former high-level State officials — the majority of them, curiously, from States in the southern hemisphere — by a judge from another State exercising universal jurisdiction. If all 193 Member States of the United Nations were to exercise such jurisdiction, chaos would ensue; in a globalized world, it was more necessary than ever to ensure order in relations between States.

23. His delegation therefore welcomed the Sixth Committee's continued examination of the scope and application of universal jurisdiction. However, the Committee's work on the topic should be harmonized with that of other United Nations bodies in order to avoid a fragmentation of approaches that could further complicate the effort to arrive at a sound understanding of the concept. Little progress had been made in more than eight years of deliberations, and his delegation therefore called upon the Working Group on the topic to redouble its efforts to steer the discussions towards the establishment of a set of agreed and universally applicable rules or, better yet, a non-binding international legal instrument that was objective and respected the principle of non-selectivity in the application of universal jurisdiction, in order to put an end to double standards and politicization in its use. Universal jurisdiction must be applied with respect for the principles of sovereign equality of States, non-interference in their internal affairs and immunity of State officials, particularly Heads of State and Government, from foreign criminal jurisdiction.

24. **Mr. Nguyen** Nam Duong (Viet Nam) said that universal jurisdiction should be defined and applied in keeping with the principles enshrined in the Charter of the United Nations and in international law, including sovereign equality of States, non-interference in the internal affairs of other States and the immunity of State officials. Only the most serious international crimes should be subject to universal jurisdiction, and it should apply only as a last resort and as a complement to the exercise of national or territorial jurisdiction by a State with a stronger link to the crimes. Furthermore, universal jurisdiction should be exercised by a State only when the alleged perpetrator was present in its territory, and only after the possibility of extradition had been discussed with the State in which the crime had occurred and with the alleged perpetrator's State of nationality, subject to the principle of dual criminality.

25. His Government viewed universal jurisdiction as an important tool for combating the most serious crimes and preventing impunity. Its Criminal Code as amended in 2015 provided for universal jurisdiction in the case of certain crimes, in accordance with the international treaties to which Viet Nam was a party. Viet Nam had thus demonstrated its commitment to ensuring that perpetrators of the most serious international crimes were brought to justice and that the rule of law was upheld at the national and international levels.

26. To ensure that universal jurisdiction was exercised in good faith and in an impartial manner, his delegation supported the development of common standards relating to its scope and application. It also believed that the Committee's discussions would benefit from a review of the decisions and judgments of the International Court of Justice and the relevant work of the International Law Commission in order to help resolve unsettled issues regarding the scope and application of the principle, its definition, the list of serious international crimes subject to universal jurisdiction and the conditions for its application.

27. **Mr. Hitti** (Lebanon) said that, at a time when the international community was being confronted with atrocities and other egregious violations of international law, it was essential to pursue the common goals of achieving accountability, upholding international justice and preventing impunity. The principle of universal jurisdiction was key to attaining those goals. However, it was essential to agree on a common list of the crimes to which the principle should apply and on the definitions of those crimes. Selective or abusive application of the principle could reduce it to a political instrument. Consistent with the principle of complementarity, States had the primary responsibility for prosecuting alleged perpetrators on the basis of territorial or national jurisdiction, and only when they were unable or unwilling to do so should universal jurisdiction apply.

28. **Mr. Bagherpour Ardekani** (Islamic Republic of Iran) said that the rationale for universal jurisdiction appeared to be that certain particularly grave crimes must be considered as being committed against the community of nations as a whole, rather than against a specific State, and that, in order to avoid impunity, the accused should be prosecuted in the country of arrest, regardless of where the crime had been committed. However, Member States did not have a common legal and conceptual understanding of universal jurisdiction or of the crimes to which it could be applied. If the interpretation of the applicability of universal jurisdiction remained subject to the discretion of national judicial authorities, the conditions of its

implementation would become even more fragmented and diverse. Indeed, as indicated by one of the judges of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, conferring jurisdiction upon the courts of every State in the world to prosecute such crimes, irrespective of where the alleged perpetrator was located, would risk creating total judicial chaos. Moreover, the President of the Court and the majority of the judges had indicated that the application of universal jurisdiction in absentia was unknown to international conventional law.

29. In Iran, there was a legislative basis for the exercise of universal jurisdiction. The new Iranian Criminal Code provided for the trial and punishment of perpetrators of crimes recognized as international crimes under an international treaty or a special law, namely a domestic statute that provided for prosecution of the perpetrators of the crime, regardless of the nationality of the accused or the victim, and no matter where the crime had been committed. However, in order for such prosecution to take place, the alleged perpetrator must be in Iran. The Iranian Civil Code provided that treaties concluded between Iran and other States in accordance with the Constitution had the force of domestic law. Thus, all clauses in treaties concerning the right to implement universal jurisdiction, such as article V of the International Convention on the Suppression and Punishment of the Crime of Apartheid, to which Iran was a party, were considered to be part of Iranian law once they had been adopted and incorporated within the national body of law.

30. His Government viewed universal jurisdiction as a treaty-based exception in the exercise of criminal jurisdiction. It should not replace territorial jurisdiction, which was central to the principle of sovereign equality of States, and it should only be asserted for the most heinous crimes. Its application to less serious crimes could call its legitimacy into question. Moreover, universal jurisdiction should not be exercised selectively or in a manner that was inconsistent with relevant principles of international law, including State sovereignty and territorial integrity and the immunity of State officials from foreign criminal jurisdiction.

31. **Mr. Atlassi** (Morocco) said that the purpose of universal jurisdiction was to combat impunity. However, those applying it must respect the principles enshrined in international law and the Charter of the United Nations, including those of sovereign equality and territorial integrity of States. Moroccan law contained several provisions that came within the scope of the principle of universal jurisdiction. For example, the Constitution and the draft revised Criminal Code recognized a number of crimes covered by universal jurisdiction, including genocide, crimes against humanity, war crimes and enforced disappearance, while the draft revised Code of Criminal Procedure established the non-applicability of statutory limitations to serious crimes.

32. Moroccan legislation regulated the acts and offences giving rise to universal jurisdiction, but it did not contain any provisions that prevented its application or that might lead to impunity. In Morocco, universal jurisdiction was considered an optional principle, not a binding rule; national courts were deemed a priori to have such jurisdiction, but were not bound to exercise it. Universal jurisdiction was also seen as a preventive principle, in that it was used to make up for shortcomings in national judicial systems with regard to the prosecution of serious crimes. As a party to the four Geneva Conventions of 1949 and their Additional Protocols I and II, and having withdrawn its reservation to article 20 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Morocco recognized the obligation to extradite or prosecute as a basis for jurisdiction other than that deriving from the principle of universal jurisdiction under the Rome Statute.

33. **Mr. Maope** (Lesotho) said that the principle of universal jurisdiction was an integral part of international law that enabled the realization of justice in places where it would otherwise be unimaginable. However, the definition of the principle itself was not the issue before the Committee. The topic had been placed on its agenda with the sole aim of arriving at a definition of the scope and application of universal jurisdiction in the wake of abuses thereof. It was his delegation's hope that the deliberations on the topic would return to a focus on the real issues before the Committee.

34. If applied appropriately, universal jurisdiction was an effective way to combat impunity internationally, but if abused for purposes of political manipulation or exploitation, it could endanger international law, order and security. His delegation categorically rejected such abuse, which was contrary to the principles of sovereign equality and independence of States. It was essential to avoid arbitrary or selective application of the principle of universal jurisdiction. His delegation noted in that regard the oft-repeated criticism of universal jurisdiction, namely that it was open to misuse by States to usurp the sovereign integrity of other States, particularly African States. It further noted the various resolutions of the African Union expressing grave concerns about misuse of the principle of universal

jurisdiction in violation of the immunity of State officials.

35. **Mr. Fernández Valoni** (Argentina) said that the most serious crimes affecting the international community as a whole must not go unpunished. It was the duty of States to exercise their criminal jurisdiction against those responsible for such crimes. The primary responsibility for investigation and prosecution lay with the States in whose territories crimes had been committed or with other States that had a connection to the crimes because of the nationality of either the perpetrator or the victims. Nonetheless, in circumstances where States could not or did not wish to exercise jurisdiction, other States without a direct link to the crime could fill the void through the exercise of universal jurisdiction, which was specifically provided for under treaties and rules of customary law. It was, however, an exceptional and supplementary tool that must be used in accordance with the relevant rules of international law.

36. The application of universal jurisdiction without restrictions could generate conflicts of jurisdiction between States and subject individuals to possible procedural abuses or give rise to politically motivated prosecutions. It would therefore be useful to develop clear rules to guide the exercise of universal jurisdiction. His delegation supported the step-by-step approach followed thus far within the Working Group to clarify various issues and arrive at a better understanding of the principle of universal jurisdiction. Nevertheless, it would also be in favour of requesting the International Law Commission to study the topic.

37. **Ms. Fernándes Júarez** (Bolivarian Republic of Venezuela) said that universal jurisdiction was an institution of international law that served to prevent impunity and strengthen justice. Hence, it was international law that determined the scope of its application and enabled States to exercise it as a complement to their sovereign jurisdiction based on territoriality or nationality. Universal jurisdiction was an exceptional measure that should not be confused with international criminal jurisdiction or with the obligation to extradite or prosecute. Her delegation considered it essential to continue studying the categories of crimes that could be subject to universal jurisdiction in order to avoid inappropriate interpretations that might lead to injustices. It believed that the best way to institutionalize the principle at the international level would be through the conclusion of a treaty that harmonized the elements necessary for its application.

38. Despite the past debates on universal jurisdiction within the United Nations, there was still a lack of legal clarity regarding its definition and scope. Clear and transparent definitions and mechanisms were needed in order to ensure that the principle was applied in an impartial and objective manner. Until it was clear what acts could be deemed crimes that fell within the scope of universal jurisdiction, no prosecutor should have the authority to apply it, nor should its application be considered to have prevented impunity, thereby justifying the imposition of a penalty. Of particular concern was the unchecked application of universal jurisdiction by politically motivated prosecutors against public officials from other countries for reasons that had nothing to do with the quest for justice. Such actions undermined the rule of law at the international level by violating well-established principles, such as the sovereign equality of States, non-interference in the internal affairs of States and respect for State sovereignty, which were fundamental for the maintenance of international peace and security.

39. In order to prevent politicization of the principle of universal jurisdiction, it should not be applied without regard for the immunity granted to State officials under international law. In that connection, her delegation did not believe that the question of the scope and application of the principle of universal justice should be approached in accordance with the same conceptual framework that guided the work of the International Criminal Court, which did not recognize the immunities granted to senior State officials. In any case, the application of universal jurisdiction should always be considered supplementary to that of national courts. Consequently, universal jurisdiction could be exercised only in those cases where courts with a jurisdictional link of nationality or territoriality were unable or unwilling to exercise their jurisdiction.

40. The principle of universal jurisdiction should be invoked by a country only on the basis of a rule of international law; reference to domestic legislation was not sufficient in such cases. Likewise, crimes for which national courts might invoke universal jurisdiction must be sufficiently established at the international level and should be limited to those of serious concern to the international community as a whole.

41. Lastly, her delegation considered that it would be premature to request that the International Law Commission carry out a study of the features of universal jurisdiction. A consensus of views should first be reached within the General Assembly.

42. **Mr. Sabga** (Observer for the International Committee of the Red Cross (ICRC)) said that the principle of universal jurisdiction remained one of the key tools for ensuring that serious violations of

international humanitarian law were prevented or, when they did occur, punished. The Geneva Conventions of 1949 and Protocol I additional thereto stipulated that States parties had a legal obligation to search for persons alleged to have committed acts defined therein as grave breaches and to either bring such persons, regardless of nationality, before their own courts or hand them over for trial by another State party. Other international instruments placed a similar obligation on States parties to vest in their courts some form of universal jurisdiction over serious violations of the rules set out therein. In addition, State practice and *opinio juris* had helped to consolidate a customary rule whereby States had the right to exercise universal jurisdiction over serious violations of international humanitarian law, in particular war crimes.

43. States had the primary responsibility for investigating and prosecuting alleged perpetrators of serious violations of international humanitarian law. When they failed to do so, however, the assertion of universal jurisdiction by other States could serve as an effective mechanism to ensure accountability and prevent impunity. ICRC had identified more than 110 States that had established some form of universal jurisdiction over serious violations of international humanitarian law, while others had operationalized the principle of universal jurisdiction through national court decisions or by other means, such as the establishment of special judicial units to investigate and prosecute alleged war crimes and the development of mutual legal assistance mechanisms. There had been a steady increase in such prosecutions, which demonstrated that States were using universal jurisdiction effectively to address impunity gaps.

44. ICRC continued to promote the prevention and punishment of serious violations of international humanitarian law by supporting States in strengthening their national criminal legislation and in establishing universal jurisdiction over such violations, including through the production of practical tools and technical documents, such as its commentaries on the Geneva Conventions of 1949. ICRC encouraged States to ensure that any conditions they attached to the application of universal jurisdiction were aimed at increasing its effectiveness and predictability and that they did not unnecessarily restrict the possibility of bringing suspected offenders to justice.

45. **Monsignor Grysa** (Observer for the Holy See) said that his delegation was grateful to the Committee for the important work it was doing to further the cause of justice in the world and to prevent impunity, the consequences of which were suffered mostly by those living at the margins of society, such as the poor and ethnic or religious minorities. The creation of universally agreed jurisdictional norms to ensure that the worst violations of fundamental human rights could be prosecuted and thus deterred was a laudable goal. Moreover, such norms were needed to resolve the complex tension between States' time-honoured right to preserve and defend their sovereignty and the need to hold civil and military authorities accountable for horrific abuses.

46. Any set of norms developed, however, should be consistent with both fundamental principles of customary international law and of criminal justice, including those of *nullum crimen*, *nulla poena sine lege*, due process, presumption of innocence and non-refoulement. The norms should also be firmly rooted in subsidiarity: to the extent that States were willing and able to prosecute, the community of nations should defer to them. Particular attention should be given to the jurisdictional immunities of public officials and to the procedural conditions that must be met in order to set aside such immunities. In addition, mechanisms should be put in place to prevent abuses of universal jurisdiction.

47. His delegation supported further work on the topic, including through the Working Group, to create a rule-based system for the application of universal jurisdiction. The work of the International Law Commission on the draft articles on crimes against humanity and on the immunity of State officials from foreign criminal jurisdiction might make a useful contribution to the development of the law concerning universal jurisdiction.

48. Lastly, his delegation wished to highlight the increasing need to consider extending the application of universal jurisdiction in the context of the current migration and refugee crises. The use of threats of atrocity crimes against populations or the actual commission thereof as a strategy to forcibly displace them must be condemned and stopped.

49. **Mr. Al Arsan** (Syrian Arab Republic), speaking in exercise of the right of reply, said that the representatives of Liechtenstein, encouraged by another State whose identity was well known, appeared to be attending the Committee's meetings for the sole purpose of touting the so-called International, Impartial and Independent Mechanism for the Syrian Arab Republic. His delegation would continue to reject such tawdry attempts to promote an illegal mechanism and would also continue to call attention to the illicit actions and the underlying financial interests that had led to its creation. The representative of Liechtenstein was using the Committee to mount a defamatory propaganda

campaign against the legitimate Government of the Syrian Arab Republic. The Syrian delegation could assure that representative that, despite the many challenges it had faced as a result of terrorism, the Syrian judicial system continued to operate with transparency and integrity.

50. The same could hardly be said of the illegal financial and banking systems of Liechtenstein, which had assisted in laundering millions of dollars from the oil and gas industry; those dollars had been used to procure arms that had then been handed over to terrorist groups operating in the Syrian Arab Republic, who had used them to destroy its infrastructure and kill its citizens. A recent documentary film had revealed that the banks in Liechtenstein were also involved in laundering money from the drug trade. Liechtenstein, which was such a staunch supporter of the fight against impunity, would eventually be held to account for the money-laundering and arms procurement activities of its citizens. Those who pretended to defend truth and justice while forming partnerships with States that flouted Security Council anti-terrorism resolutions were guilty of political hypocrisy and duplicity, practices that had nothing to do with the principles that the United Nations had been created to uphold.

Agenda item 82: Expulsion of aliens

51. **The Chair** recalled that the topic of expulsion of aliens had been included in the agenda of the current session pursuant to General Assembly resolution 69/119, adopted following the Sixth Committee's discussion of the report of the International Law Commission concerning the draft articles on the expulsion of aliens (A/69/10, chapter IV), which the Commission had adopted in 2014. No advance documentation on the matter had been produced.

52. **Mr. Jensen** (Denmark), speaking on behalf of the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden), said that those countries remained unconvinced that the topic of expulsion of aliens lent itself to the drafting of a convention. Although the draft articles provided a useful description of the challenges in the area of expulsion of aliens, there were divergences of opinion on many aspects and, furthermore, significant and detailed regional rules on the matter already existed. In the light of current global and regional processes relating to migration, including the work on a global compact for safe, orderly and regular migration, the Nordic countries considered that the best approach would be for the General Assembly to note the work that had been done by the International Law Commission and to return to the consideration of the topic in some years' time.

53. On a more general note, and without prejudice to the future status of the draft articles, the Nordic countries wished to emphasize that a possible future convention or any other type of instrument on expulsion of aliens should clearly stipulate the obligation of States under international law to readmit their own nationals who did not have legal residence in another country, an obligation that applied in cases of both voluntary and forced return.

54. **Mr. Arrocha Olabuenaga** (Mexico) said that in the three years since the International Law Commission had concluded its work on the draft articles on the expulsion of aliens, global challenges with regard to the treatment of migrants and refugees had grown substantially. The policies adopted recently by some countries, which had affected nationals of Mexico and numerous other countries, were completely contrary to international human rights standards. Indeed, the United Nations High Commissioner for Human Rights had highlighted his concern about increases in the detention and deportation of migrants in 2017 in comparison with 2016. Against that backdrop, the topic of expulsion of aliens had taken on particular relevance, as had the need to strengthen the international legal system to provide effective protections for the basic human rights of migrants in the face of national policies characterized by discrimination on the basis of national or ethnic origin.

55. The draft articles contained provisions that were relevant to the current challenges in several respects. All of those provisions had a sound basis in international treaties and in the jurisprudence of the International Court of Justice and various regional human rights courts. They included the requirement that the expulsion should only take place pursuant to a reasoned decision taken by the competent authority in conformity with law and with the obligations of the State under international law; the prohibition against States expelling refugees living lawfully in their territory, except for reasons of national security or public order, and the prohibition of collective expulsion; the requirement that the expulsion of aliens should be carried out in conformity with international human rights standards and without discrimination on the basis of race or national, ethnic or social origin; the obligation to respect the right to family life and not to interfere arbitrarily or unlawfully with the exercise of that right; the prohibition of arbitrary or punitive detention of an alien for the purpose of expulsion; and the procedural rights of aliens subject to expulsion.

56. His delegation considered that it would be advisable for the General Assembly to take note of the draft articles, but also to give serious consideration to what form they might eventually be given in order to

reinforce the international standards on the matter. The Assembly might also wish to reconsider the provision in the second paragraph of draft article 22 concerning the expulsion of an alien to the State from which he or she had entered the expelling State. His delegation did not believe that there was sufficient State practice or *opinio juris* to affirm the existence of customary international law in that regard.

57. Lastly, his delegation wished to note that the Constitution of Mexico had been amended in 2011 in order to guarantee the right to a hearing and to due process for aliens who might be subject to expulsion and in order to bring the provisions of the Constitution into line with international treaties that enshrined those rights.

58. **Mr.** Elsadig Ali Sayed **Ahmed** (Sudan) said that the topic of expulsion of aliens remained highly relevant in the current globalized world. The draft articles aimed to strike a balance between a State's sovereign right to expel aliens and the need to protect the human rights of aliens subject to expulsion. States had an unquestionable right to expel aliens, but they must do so in line with the provisions of international conventions and international customary law as well as their national legislation. In some cases, however, the draft articles seemed to go beyond the provisions of relevant multilateral conventions and the general principles of international law. For example, draft articles 6 (Prohibition of the expulsion of refugees), 11 (Prohibition of expulsion for purposes of confiscation of assets) and 13 (Obligation to respect the human dignity and human rights of aliens subject to expulsion) expanded the scope and coverage of the protections envisaged, but diminished the reasons for limitations thereon.

59. In other cases, the draft articles seemed imbalanced. Paragraph 2(b) of draft article 19 (Detention for the purpose of expulsion), for instance, stated that the length of detention of an alien could be decided upon only by a court or by another competent authority, subject to judicial review, which seemed to impose a single model on all countries. Paragraph 2 of draft article 23 (Obligation not to expel an alien to a State where his or her life would be threatened) raised similar concerns, as there was no international consensus on the abolition of the death penalty. At the same time, the draft articles in their current form clearly distinguished between the expulsion of aliens and the extradition of criminals, thus eliminating an ambiguity that had existed in an earlier version.

60. In his delegation's view, the International Law Commission had a tendency to give too much weight to the practice of treaty bodies when it identified rules, some of which were inconsistent with those set out in the treaty in question. Rules governing the expulsion of aliens should be established by national lawmakers in national legislation, which should stipulate the conditions for either voluntary or involuntary entry into, stay in and departure from the State's territory. National legislation should also recognize, however, that aliens had certain minimum human rights that must be upheld in conformity with the principles of international law. In exercising its right to expel an alien, a State must not do so arbitrarily and must act in good faith. Expulsion should never be used as a punishment, but only as a measure aimed at ensuring that the alien's presence did not pose a threat to national security.

61. **Mr. Tang** (Singapore) said that the topic of expulsion of aliens was challenging because it had to do both with a State's sovereign right to expel aliens from its territory and with its obligation to comply with applicable international human rights law. While his delegation applauded the Commission's efforts to tackle the topic, it remained of the view that progressive development of laws and practices applicable to the expulsion of aliens must be approached with caution. It had expressed concerns in the past regarding the draft articles and the extent to which the Commission had sought to achieve progressive development through them, and it had consistently opposed the expanded principle of non-refoulement articulated in draft article 23 (Obligation not to expel an alien to a State where his or her life would be threatened). There was no customary international law obligation to the effect that a State that had abolished the death penalty was automatically bound not to expel a person to another State where the death penalty might be imposed. His delegation had also expressed concern over the lack of distinction, in both the draft articles and its commentaries, between codification and progressive development. It therefore did not support their recognition as draft articles and would suggest that the General Assembly should simply take note of them and of the concerns and reservations raised by delegations.

62. **Mr. Celarie Landaverde** (El Salvador) said that the topic of expulsion of aliens was of special relevance in the current context of mass human displacements. His delegation found it regrettable that the International Law Commission had decided to conclude its work on the draft articles when a number of substantive issues remained unresolved. It believed that States had an obligation to protect the rights of persons subject to expulsion, in accordance with the rules of international human rights law. It was therefore a matter of concern

that the draft articles disregarded those fundamental rules.

63. The Inter-American Commission on Human Rights had repeatedly indicated that, in order to fulfil the obligations established under articles I and XXV of the American Declaration of the Rights and Duties of Man and under article 7 of the American Convention on Human Rights, States must establish migration policies, laws, protocols and practices based not on a presumption of detention but on a presumption that migrants had a right to remain at liberty while immigration procedures were pending. It was particularly important to regard detention as an exceptional measure in the case of migrants because immigration offences could not be considered criminal offences. Nevertheless, draft article 19 maintained a presumption of detention for all migrants without distinction. In that regard, he noted that the Inter-American Court of Human Rights, in its advisory opinion OC-21/14, had indicated that States should not resort to the deprivation of liberty of children, irrespective of whether they were with or separated from their parents, as a precautionary measure in immigration proceedings.

64. The draft articles also failed to take due account of the procedural rights of persons subject to expulsion. Draft article 26 (Procedural rights of aliens subject to expulsion) provided for differential treatment of aliens who were unlawfully present in the territory of a State for a brief duration, which his delegation found particularly problematic. Procedural safeguards were intended to protect human dignity, and they should not be determined by a person's migratory status or length of stay in a State's territory. In addition, although the draft articles recognized an alien's right to seek consular assistance, they did not acknowledge the obligation of the detaining State to inform the alien of that right, in line with the provisions of the Vienna Convention on Consular Relations.

65. It was his delegation's view that some of the draft articles represented a step backwards with respect to rights already enshrined in international human rights law, and that some provisions might also be contrary to recent United Nations resolutions, such as the New York Declaration for Refugees and Migrants (A/RES/71/1) and the 2030 Agenda for Sustainable Development (A/RES/70/1). Consequently, it was not appropriate to include the draft articles in the annex to a resolution or to disseminate them without first addressing the issues that remained problematic.

66. **Ms. Horňáčková** (Czechia) said that the draft articles, which summarized relevant practices and provided a detailed and coherent explanation of current development in the commentary, represented an important contribution as guidance to States. Her delegation remained convinced, however, that the issue of expulsion of aliens was sufficiently covered under existing sources of international law and that there was therefore no need for a convention based on the draft articles. It preferred that the draft articles should be accepted as a set of legally non-binding guidelines.

67. **Mr. Simonoff** (United States of America) said that he did not believe it would be appropriate to pursue the development of a convention based on the draft articles. There were well-settled rules of law in broadly ratified human rights and refugee conventions that provided the legal basis for achieving the objectives of the draft articles. Furthermore, his delegation believed that key aspects of the draft articles might generate confusion by combining, in the same provision, elements from existing rules of law with elements that reflected proposals for progressive development of the law.

68. **Mr. AlSharif** (Saudi Arabia) said that States had a sovereign right to take necessary measures to protect themselves, including the expulsion of some aliens, in line with national legislation. Saudi Arabia had enacted laws that protected the rights and prohibited cruel treatment of aliens. Its legislation established sharia law as the basis for protection of human rights. His Government respected international law and practice with regard to the expulsion of aliens and believed that they should be expelled only in certain urgent cases and only if they posed a threat to national security. It was striving to put in place laws that guaranteed as many rights and procedural safeguards as possible for aliens. Existing legislation guaranteed the right to access to the justice system for all residents of Saudi Arabia and stipulated that the property of an alien could be confiscated only pursuant to a judicial decision.

69. His delegation considered that the draft articles should serve as guidelines for Member States.

70. **Mr.** Stephen **Smith** (United Kingdom), noting that the domestic legal framework of the United Kingdom showed its commitment to the protection of the rights of aliens faced with expulsion, said that his delegation remained of the view that the topic of the expulsion of aliens was a difficult and complex subject that intruded directly into the domestic sphere of States and was not suitable for a convention at the present time. His delegation did not accept that the draft articles reflected customary international law, nor did it agree with the content of those draft articles that claimed to represent the progressive development of international law.

Moreover, it considered the subject to be insufficiently developed or coherent for codification.

71. Individual States should enjoy considerable discretion with regard to the expulsion of aliens, particularly in the current context of global migration. States must be able to manage migration for their benefit and secure their borders against those who would seek to undermine effective immigration control. Migrants were expected to comply with the laws of host States. If they did not, then the host State should be able to take appropriate, reasonable measures to promote compliance.

72. His delegation had further, detailed comments which represented the formal position of the United Kingdom on the draft articles; those comments were contained in an annex to his written statement, which was available on the PaperSmart portal of the Sixth Committee.

73. **Mr. Bagherpour Ardekani** (Islamic Republic of Iran) said that the nine reports prepared by the Special Rapporteur on the topic of the expulsion of aliens clearly reflected the challenging nature of the issue. With regard to the final outcome of the work on the topic, his delegation believed that, for several reasons, it would be premature to convene a diplomatic conference with a view to drawing up a convention based on the draft articles. The Special Rapporteur had recognized that not all the provisions of the draft articles had a foundation in customary international law or in treaty law and that, in certain respects, State practice with regard to the expulsion of aliens was still limited. For that reason, the draft articles reflected both the codification and the progressive development of international law. However, international realities and the sensitivity and importance of the issue required that the provisions should be based on *lex lata* rather than on *lex ferenda*. To that end, the predominant State practice in the field, as crystallized in customary international law, should have been considered in relation to all of the draft articles.

74. His delegation appreciated the careful consideration given to refugee matters in the draft articles, but the approach set out in the commentary, particularly to draft article 6 (Prohibition of the expulsion of refugees), was not underpinned by sufficient State practice. According to the commentary, the term “refugee” should be understood not only in the light of the general definition set out in article 1 of the 1951 Convention relating to the Status of Refugees, but also in the light of subsequent developments in the matter, including the practice of the Office of the United Nations High Commissioner for Refugees. However, that Office’s practice did not necessarily reflect State practice, and many States were of the view that refugee status should be determined strictly in accordance with the parameters outlined in the 1951 Convention.

75. The Commission should be cautious in generalizing rules set out in regional or subregional treaties or mechanisms, which might not necessarily be representative of State practice or *opinio juris*. Moreover, the Commission tended to overvalue the practice of treaty bodies, such as the Human Rights Committee, in identifying rules, sometimes at the price of overriding the very rule that the treaty in question was meant to establish.

76. The draft articles in their current form did not appear to reflect a well-struck balance between the rights of individuals and those of the State in relation to national security. A State had the right not only to expel aliens on its territory who posed a threat to its national security or public order, but also to determine the components of those two concepts on the basis of its national laws and the prevailing circumstances. It was therefore not necessary to draw up an exhaustive list of grounds that might be invoked to justify the expulsion of aliens, nor was it necessary for States to specify the grounds for expulsion in all cases. Nonetheless, it was an established legal fact that expulsion must be conducted with due respect for the fundamental human rights of the person being expelled, who must be protected against any inhuman or degrading treatment. The property rights of all persons subject to expulsion must also be respected.

77. The advisability of placing refugees present lawfully and those present unlawfully on an equal footing, as in draft article 6, was questionable. While his delegation did not challenge the general prohibition of collective expulsion, it disagreed with the Commission’s methodology, which had also been used in identifying other rules, such as those set out in draft article 26 on the procedural rights of aliens subject to expulsion. The Commission should instead have based its codification exercise on State practice as manifested, inter alia, in the provisions of international treaties, which could not be supplanted by subsequent developments.

78. His delegation believed that the draft articles could serve as guidelines for inter-State cooperation and the formulation of national legislative measures regarding the expulsion of aliens. They did not seem to be ripe enough, however, for the General Assembly to engage in a codification exercise, since the national and regional jurisprudence regarding expulsion of aliens was still evolving.

79. **Ms. Guardia González** (Cuba) said that her delegation considered it useful to codify the rights of aliens subject to expulsion, provided that such codification was inspired by the principle of comprehensive protection of aliens' human rights and did not violate State sovereignty. Protection of the human rights of aliens subject to expulsion could not constitute a limit on a State's right to expel aliens from its territory for reasons of national security. In general, Cuba considered it appropriate that the expelling State should notify the destination State prior to the expulsion in order to expressly protect the right of persons subject to expulsion to communicate with their consular representatives.

80. It was necessary to clarify, from the point of view of *ratione materiae* and *ratione personae*, the international authority that would be competent to determine the existence of grounds for expulsion as set forth in draft article 5 (Grounds for expulsion). In relation to the readmission of an alien to the expelling State where the expulsion had been unlawful, it should be specified that it must be the competent authority of the expelling State that rescinded the expulsion decision.

81. Cuban criminal law provided for the expulsion of aliens as one of the ancillary sanctions that the sanctioning court could impose on individuals when a competent tribunal found that the nature of the offence, the circumstances of its commission or the personal character of the defendant indicated that his or her continued presence in the country would be harmful. It further provided that the expulsion of an alien might be imposed, as an ancillary measure, once the primary sanction had been carried out, and it granted the Ministry of Justice discretion to order the expulsion of a convicted alien prior to the completion of the primary sanction, in which case the criminal responsibility of the individual would be extinguished.

82. **Mr. Bawazir** (Indonesia) said that the draft articles illustrated the important role of the International Law Commission in the codification and progressive development of international law. His delegation commended the Commission's efforts to strike a balance between upholding the prerogative rights of States in respect of aliens on their territories and protection of aliens' rights and dignity. His delegation also saw the merit of the draft articles, especially in the light of recent massive flows of migrants as a result of humanitarian crises, on the one hand, and a trend towards States becoming more protective as a response to terrorism and other national security concerns, on the other.

83. His delegation supported many elements in the draft articles, including the prohibition of expulsion to circumvent ongoing extradition procedures and the obligation to respect certain procedural rules. He noted, however, that some elements broadened the scope of concepts that had been agreed in other instruments, such as the principle of non-refoulement in the 1951 Convention relating to the Status of Refugees and the prohibition of collective expulsion in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. His delegation understood that the Commission's intention had been to accommodate recent developments, but it was not convinced that the draft articles would achieve a wide level of acceptance by States, since the provisions of the legal instruments on which they were based were not universally accepted or applied.

84. With regard to the territorial scope of the draft articles as set out in draft article 1, his delegation believed that greater clarity was required, particularly in relation to the phrase "present in its territory" and the situation of aliens who arrived by sea, as had been the case with many recent groups of migrants. It was not clear whether the draft articles would be applicable to vulnerable aliens outside the territorial waters of a State, where expulsion might put them in imminent danger in the middle of the sea, or whether such a situation would be considered one of non-admission, which was excluded from the scope of the draft articles. With respect to the commentary to draft article 2 indicating that an omission on the part of a State could result in the departure of an alien from its territory, his delegation required clarification of how actions carried out by private parties might generate State responsibility.

85. Concerning the prohibition of expulsion to a State where the alien had been sentenced to death, there was currently no international law that prohibited the death penalty. Therefore, that prohibition inappropriately limited States' legal sovereignty. Draft article 26, on the procedural rights of aliens subject to expulsion, might be seen as creating an obligation for States not only to ensure that aliens had the right to seek counsel or assistance, but also to notify the State of nationality of the impending expulsion. In that regard, it should be borne in mind that many aliens were not well informed of their consular rights, and in some cases they were not even aware that their country had diplomatic representation in the expelling State. Paragraph 4 of draft article 26 provided that the procedural rights of aliens subject to expulsion were without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens, which raised questions about the underlying rationale for granting

protections to aliens under international law while at the same time allowing significant flexibility for States to apply their national law, which might be less favourable to aliens.

86. His delegation believed that the draft articles could serve as a good basis for negotiating a convention. Nevertheless, considerable work was needed to ensure that the rights of aliens were appropriately protected while at the same time ensuring that the prerogative rights of States were respected.

The meeting rose at 12.50 p.m.