Annex I

UNIVERSAL CRIMINAL JURISDICTION

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Introduction

1. The principle of "universal jurisdiction" or the "universality principle" is a unique ground of jurisdiction in international law that may permit a State to exercise national jurisdiction over certain crimes in the interest of the international community. There is no single globally accepted definition of the concept but, for working purposes, it can be described as *criminal* jurisdiction based solely on the nature of the crime, without regard to the territory where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the State exercising such jurisdiction.[1] This means that a State may exercise universal jurisdiction regarding a crime committed by a foreign national against another foreign national outside its territory. Such jurisdiction differs markedly from the traditional bases of jurisdiction under international law, which typically require some type of territorial, nationality or other connection between the State exercising the jurisdiction and the conduct at issue.

2. Due to the definitional and other ambiguities surrounding the universality principle, which has in its past application strained and today continues to strain relations among States, it is submitted that the International Law Commission should include this topic in its programme of work, as this could enhance clarity for States and thereby contribute to the rule of law in international affairs.

3. In the modern context, especially since the Nuremberg trials after the Second World War, the principle of universal jurisdiction increasingly has been invoked by States in the fight against impunity for heinous international crimes.[2] These include war crimes, crimes against humanity, and genocide, which are among the most serious crimes of concern to the international community as a whole.[3] In fact, in addition to establishing various *ad hoc* international[4] or hybrid[5] criminal tribunals, as well as the International Criminal Court, to pursue those most responsible for such crimes in various conflicts around the world, States in the past have relied on the principle of universal jurisdiction to justify the exercise of national criminal jurisdiction, as Israel did in respect of Adolf Eichmann.[6] However, without a definition of the permissible scope under international law of a State's national criminal jurisdiction in such circumstances, there is a risk that a State will either infringe the sovereignty of another State in violation of international law or decline to exercise its criminal jurisdiction even where universal jurisdiction might allow it to do so.

4. Several rationales are offered by proponents of universal jurisdiction. First, the existence of universal jurisdiction is said to reflect the desire of the international community to promote the punishment by States of criminals acting outside the jurisdiction of any State—such as the classic example of piracy *jus gentium*, which as a crime affecting the *communis juris*, is *delicta juris gentium* (a "crime against the law of nations").[7]

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[1] See principle 1 (1) of the Princeton Principles on Universal Jurisdiction, adopted on 27 January 2001, S. Macedo (ed.), *The Princeton Principles on Universal Jurisdiction*, Princeton University, Program in Law and Public Affairs, 2001; and S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, Philadelphia, University of Pennsylvania Press, 2004. Here, by the title of this topic, we implicitly distinguish between universal criminal jurisdiction and universal civil jurisdiction. However, we note that the body of this paper refers to the former principle using the more common phrase "universal jurisdiction" or the "universality principle".

[2] See the report of the Secretary-General on the scope and application of the principle of universal jurisdiction (A/65/181), paras. 10–11.

[3] See the preamble to the Rome Statute of the International Criminal Court, which uses this language. But this was by no means the first expression of this same concept. In fact, that phrasing can be traced back to the work of the Commission, which, in its draft Code of Crimes against the Peace and Security of Mankind, determined that universal jurisdiction attaches to such crimes (see *Yearbook … 1996*, vol. II (Part Two), para. 50).

[4] The United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, established the International Tribunal for the Former Yugoslavia (resolution 827 (1993) of 25 May 1993) and the International Criminal Tribunal for Rwanda (resolution 955 (1994) of 8 November 1994).

[5] The United Nations also entered into agreements with Sierra Leone, Cambodia and Lebanon to establish special "hybrid" courts for those countries. Regional bodies have taken up the issue; for example, the African Union has entered into an agreement with one of its member States to establish a hybrid court within the national courts of Senegal to prosecute torture and crimes against humanity, while the European Union has also collaborated with one of its members to do the same. For assessments of some of these tribunals, see C. C. Jalloh (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge University Press, 2014; and S. M. Meisenberg and I. Stegmiller (eds.), *The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law*, The Hague/Berlin, Asser Press/Springer, 2016.

[6] *Attorney-General of the Government of Israel v. Adolf Eichmann*, Supreme Court of Israel, 1962, ILR, vol. 36 (1968), pp. 277 *et seq*.

[7] *Attorney-General of the Government of Israel v. Adolf Eichmann*, District Court of Jerusalem, 1961, *ibid.*, p. 26, which speaks to piracy as an example of that crime. The *Adolf Eichmann* case reflected this. Eichmann was a senior official in Nazi Germany responsible for organizing the arrest, deportation, internment and extermination of Jews during the Second World War. Israeli secret agents kidnapped him from Argentina on 11 May 1960. Argentina complained to the Security Council, claiming a breach of its sovereignty and of international law. The Security Council adopted resolution 138 (1960) on 23 June 1960. The Security

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5. Second, the exercise of universal jurisdiction for certain crimes is said to be justified because these crimes violate universal values and humanitarian principles. These fundamental values are at the root of the systems of criminal law of all States. Thus, according to the Commission in its past work, the interest in imposing punishment for acts comprising international crimes that are condemned by all States—especially when they are perpetrated on a very large scale—must necessarily extend beyond the borders of the single State which has jurisdiction based on the location of the crime or the nationality of the perpetrators or victims, and which may have even passively tolerated or encouraged the outrages; for such acts can undermine the foundations of the international community as a whole.[8]

6. Lastly, it has long been felt, and certainly since the Nuremberg trials and judgment in 1946, that some crimes are so serious and the magnitude of their impact so great that their commission shocks the conscience of all humanity.[9] That is why States carved out certain conduct as gross violations which would entail the individual criminal responsibility of the perpetrator. Their heinous nature, coupled with the potential to undermine the peace and security of all States, in turn entitles every State to investigate and prosecute those who carry them out.[10] Much like the pirates of earlier eras, the perpetrators of such crimes are deemed to be *hostes humani generis*—enemies of all humankind—who do not deserve safe haven anywhere in the world. In sum, when taken together, the logic underpinning the exercise of universal criminal jurisdiction is that States can and should act against individuals who may not otherwise be held accountable by anyone. That is one of the only ways to dispense justice and to help achieve some deterrence for certain crimes condemned under international law.[11]

7. Nevertheless, despite the above and other related justifications, State practice regarding the exercise of universal jurisdiction reveals that aspects of the nature and substantive content of the principle are mired in legal controversy. States appear generally to agree on its legality, at least in certain circumstances, and on the fact that it is, in principle, a useful and important tool in combating impunity. Numerous treaties[12] require States to establish and exercise national jurisdiction in respect of particular offences with which the State may have no connection, such as genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, "grave breaches" (war crimes) under the 1949 Geneva Conventions and the 1977 Additional Protocol I, and torture under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The universality principle also appears to be the basis for regional treaties and for the domestic legislation of many States. But this is where general agreement on universal jurisdiction appears to end.

8. Disagreements among States on the universality principle, as may be seen in an informal paper developed within the framework of a working group of the Sixth Committee of the General Assembly, include three aspects, namely: (*a*) *the definition of the concept of universal jurisdiction*, including its distinction from other related concepts; (*b*) *the scope of universal jurisdiction*, including the list of crimes under international law subject to such jurisdiction, and how long or how short that list

(*Footnote 7 continued.*)

Council declared that such acts could cause international friction, and may, if repeated, endanger international peace and security. It asked Israel to make appropriate reparation. Israel expressed regrets and considered that this constituted such reparation. Argentina expressed dissatisfaction with Israel's expression of regret, and expelled the Israeli Ambassador. After diplomatic discussions behind the scenes, the two States issued a joint communiqué declaring the incident closed.

[8] These sentiments are expressed in the draft Code of Crimes against the Peace and Security of Mankind and the commentaries thereto, adopted by the Commission at its forty-eighth session, in 1996, and submitted to the General Assembly as part of the Commission's report covering the work of that session, *Yearbook … 1996*, vol. II (Part Two), para. 50; see especially articles 8 and 9 and the commentaries thereto, *ibid.*, pp. 27–32. The Commission provided for the broadest form of jurisdiction for the crimes at the national level based on the universality principle alongside the jurisdiction of an international criminal court.

[9] A/65/181 (see footnote 2 above), paras. 10–11.

[10] Rome Statute of the International Criminal Court, preamble ("most serious crimes of concern to the international community"). See also L. Benavides, "The universal jurisdiction principle: nature and scope", *Anuario Mexicano de Derecho Internacional*, vol. I (2001), pp. 19–96, at pp. 26–27.

[11] Draft Code of Crimes against the Peace and Security of Mankind, *Yearbook … 1996*, vol. II (Part Two), para. 50; see especially articles 8 and 9 and the commentaries thereto, *ibid.*, pp. 27–32.

[12] See, e.g., the 1979 International Convention against the Taking of Hostages, arts. 5 and 8; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 5, para. 3; the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (with Regulations), art. 28; the 1884 Convention for the Protection of Submarine Telegraph Cables, arts. VIII–IX; the 1923 International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, art. 2; the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, art. 3; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 3; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, art. VI; the 1994 Convention on the Safety of United Nations and Associated Personnel; the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 7, paras. 4–5; Protocol I Additional to the 1949 Geneva Conventions, art. 85, para. 1; the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art. 49; the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 146; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4, para. 3; the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, art. 9, paras. 2–3; the 1994 Inter-American Convention on the Forced Disappearance of Persons, arts. IV and VI; the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1; the 1929 International Convention for the Suppression of Counterfeiting Currency, art. 17; the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, art. 3; the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), art. 50; the 1961 Single Convention on Narcotic Drugs, art. 36, para. 2; the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted by the Security Council in its resolution 827 (1993) and contained in the report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) (S/25704 and Corr.1 [and Add.1]), annex; and the 1949 Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 129. Further, the complementarity principle of the 1998 Rome Statute of the International Criminal Court, arts. 17–20 and 53, envisages the possibility of States' exercising jurisdiction at the national level for crimes within the jurisdiction of the Court.

is; and (*c*) *the parameters for the application of universal jurisdiction*, including the conditions for its application; criteria for the exercise of such jurisdiction; procedural and practical aspects, including whether the presence of a suspect in the territory is required before investigations or other measures may be taken against him or her; role of national judicial systems; interaction with other concepts of international law; international assistance and cooperation, including the question of mutual legal assistance and technical and other cooperation in respect of criminal matters at the horizontal level; whether the territorial State should have priority to act as against other States with different connections to the alleged prohibited conduct; the possible applicability of statutes of limitations and international due process standards, including the right to a fair trial and the rule against double jeopardy (*ne bis in idem*); its interaction with the usually treaty-based duty to extradite or prosecute (*aut dedere aut judicare*) in relation to certain crimes; and the relationship of universality with the principle of complementarity, which, for States parties to the Rome Statute of the International Criminal Court, gives primacy to *national* prosecutions of core crimes in relation to the jurisdiction of the permanent Court.[13]

9. That said, the political discretion available to States in their decision whether to invoke universal jurisdiction to initiate criminal proceedings is probably the biggest controversy surrounding the universality principle. The Group of African States, the Group of Latin American and Caribbean States and the Movement of Non-Aligned Countries particularly voice this criticism; they claim that nationals of less powerful States have been the only real targets of universal jurisdiction while nationals of more powerful States have largely been exempt. Conversely, other States, especially some in the Group of Western European and Other States whose domestic courts seem to more frequently invoke universality, such as Belgium, France and Spain, counter that the exercise of universal jurisdiction is consistent with international law and must be understood as part of a vital bulwark in the fight against impunity for certain serious crimes condemned by the international community as a whole, all the more so in circumstances where the territorial State or the State of nationality of the suspect or the State where the suspect may be found proves to be unwilling or unable to submit the matter to prosecution.

10. Perhaps unsurprisingly, attempts to use universal jurisdiction often give rise to legal, political and diplomatic friction among the concerned States at the bilateral, regional and international levels. This occurred, for instance, in the *Arrest Warrant of 11 April 2000* case[14] before the International Court of Justice concerning the validity of a Belgian arrest warrant for the Minister for Foreign Affairs of the Democratic Republic of the Congo, Abdoulaye Yerodia, for alleged war crimes and crimes against humanity.[15] In a subsequent development, following the indictments of certain high-level Rwandese officials in various European States, the Assembly of Heads of State and Government of the 54-member African Union adopted several resolutions[16] in which it affirmed "that universal jurisdiction is a principle of international law whose purpose is to ensure that individuals who commit grave offences such as war crimes and crimes against humanity do not do so with impunity and are brought to justice", consistent with article 4 (*h*) of the Constitutive Act of the African Union.[17] However, in the same and several subsequent decisions, the African Union also expressed serious concern about the potential for political "misuse" and "abuse" of universal jurisdiction.[18] It therefore, *inter alia*, called for a moratorium on the issuance or execution of arrest warrants based on the principle, the establishment of an international regulatory body with competence to review and/or handle complaints stemming from the use of universal jurisdiction by individual States, and a dialogue on the matter at the regional (African Union-European Union) level as well as at the global (United Nations) level.[19]

[13] The scope and application of the principle of universal jurisdiction, informal working paper prepared by the Chairperson for discussion in the Working Group, prepared as a basis for facilitating further discussion in the light of previous exchanges of views among State representatives in the Sixth Committee and merging various informal papers developed between 2011 and 2014.

[14] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3. A more recent set of cases before the International Court of Justice, some of which have not yet been decided but raised similar concerns about immunities and assertions of criminal jurisdiction, involved France on the one hand and the Congo, Djibouti and Equatorial Guinea on the other. The Court has more recently been asked to rule on other cases involving the duty to prosecute or extradite under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in a case involving Belgium and Senegal.

[15] In *Arrest Warrant of 11 April 2000* (see previous footnote), the Court addressed the issue of immunity, not universal jurisdiction.

[16] Assembly/AU/Dec.420(XIX), Decision on the Abuse of the Principle of Universal Jurisdiction, EX.CL/731(XXI), nineteenth ordinary session of the Assembly, Addis Ababa, 15–16 July 2012; Assembly/AU/Dec.335(XVI), Decision on the Abuse of the Principle of Universal Jurisdiction, EX.CL/640(XVIII), sixteenth ordinary session of the Assembly, Addis Ababa, 30–31 January 2011; Assembly/AU/Dec.292(XV), Decision on the Abuse of the Principle of Universal Jurisdiction, EX.CL/606(XVII), fifteenth ordinary session of the Assembly, Kampala, 25–27 July 2010; Assembly/AU/Dec.271(XIV), Decision on the Abuse of the Principle of Universal Jurisdiction, EX.CL/540(XVI), fourteenth ordinary session of the Assembly, Addis Ababa, 31 January–2 February 2010; Assembly/AU/Dec.243(XIII) Rev.1, Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/11(XIII), thirteenth ordinary session of the Assembly, Sirte, Libyan Arab Jamahiriya, 1–3 July 2009; Assembly/AU/Dec.213(XII), Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/3(XII), twelfth ordinary session of the Assembly, Addis Ababa, 1–3 February 2009; and Assembly/AU/Dec.199(XI), Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Assembly/AU/14(XI), eleventh ordinary session of the Assembly, Sharm El-Sheikh, Egypt, 30 June–1 July 2008.

[17] See the letter dated 29 June 2009 from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General (A/63/237/Rev.1). See also Constitutive Act of the African Union, article 4 (*h*): "The Union shall function in accordance with the following principles: … [t]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity").

[18] African Union decisions on universal jurisdiction (see footnote 16 above).

[19] *Ibid*. Note that, in the aftermath of the report of the African Union-European Union Technical *Ad hoc* Expert Group on the Principle of Universal Jurisdiction (document 8672/1/09 Rev.1 of the Council of the European Union, annex), the African Union Commission concluded that it had been "difficult to find a durable solution in further discussions on this matter" with the European Union side. It therefore championed the item in the United Nations General Assembly, which added it as an agenda item in 2009, to make the discussion more global. Significantly, in 2012, the African Union also took a positive step by adopting the African Union Model Law on Universal Jurisdiction

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11. Considering, on the one hand, the views of those States that perceive universal jurisdiction as a valuable legal tool for the international community's ongoing efforts to curb serious violations under international law, and on the other hand, the views of those States that worry about its potential for selective, arbitrary and political abuse and application, as well as its interaction and relationship with other rules of international law, the question arises whether the International Law Commission, as a subsidiary body of the General Assembly charged with the progressive development and codification of international law, should take up a legal study of this important topic. If it decides to do so to potentially assist with guidelines or conclusions derived from the practice of States, this could prove to be of practical utility to States. Indeed, the General Assembly explicitly recognized the need to clarify this legal principle as far back as 2009, when it, by consensus, added the item to the agenda of the Sixth Committee based on a proposal of the Group of African States during the sixty-fourth session, in 2009.[20]

12. The Sixth Committee has been debating the topic annually since 2009.[21] While important progress has been made in clarifying areas of difference of view concerning universal jurisdiction during the last nine years, in other respects, progress has not been as substantial as was initially envisaged. The African Union, as recently as January 2018, adopted a decision in which it expressed regret at the "apparent impasse" in the debate on the universality topic in the General Assembly and consequently called on the Group of African States in New York to "make recommendations to the Summit on how to move this discussion forward".[22] The lack of meaningful progress seems due, at least partially, to the political disagreements concerning the potential for selective and arbitrary application of this jurisdictional principle. Indeed, during the 2017 General Assembly debate on the issue, the overwhelming majority of delegations could agree on the need to advance the discussion on universal jurisdiction, while differing over its definition, nature, scope and limits. The same pattern can be discerned from earlier debates of the Sixth Committee dating back to October 2010.

13. In these circumstances, if focused on a limited set of core legal issues rather than the entire panoply of issues identified by States as areas reflecting their differing views (as noted in paragraph 8 above), the Commission would appear to be particularly well placed to assist States by formulating guidelines or drawing conclusions clarifying the nature, scope, limits and procedural safeguards that guide the proper application of universal jurisdiction.

14. Firstly, a legal study of universal jurisdiction leading to draft guidelines or draft conclusions could assist the Sixth Committee's deliberations over the issue. The topic seems ripe for progressive development and codification, given the availability of extensive State practice, precedent and doctrine. Here, we might note that the Commission has worked extensively in the field of international criminal law and, in close partnership with the Sixth Committee, has in fact made significant contributions to the development of the field.[23] Taking up this topic now would continue that tradition, which includes but is not limited to the formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal in 1950 and the preparation of a draft statute for an international criminal court in 1994.

15. Secondly, the proposed topic continues to be a source of bilateral, regional and international engagement for all States, especially where the universality principle is alleged to have been selectively and arbitrarily applied. The example of the African Union and the European Union creating an *ad hoc* expert group, in January 2009, to inform their discussions of the issue suggests that a technical approach has been found helpful and relevant for States.

16. Thirdly, as discussed below, the topic satisfies the Commission's criteria for placement in its long-term programme of work.

17. The Commission's long-term programme of work already includes a related topic entitled "Extraterritorial jurisdiction,"[24] which has not yet been placed on the Commission's active agenda. Nonetheless, there is no overlap or duplication between the two topics. The syllabus for the topic of extraterritorial jurisdiction, which is in respect of both criminal and commercial matters, explicitly considered and excluded the universality principle from

(*Footnote 1259 continued.*)

over International Crimes (EX.CL/Dec.708(XXI), Decision on the African Union Model National Law on Universal Jurisdiction over International Crimes, EX.CL/731(XXI)c, twenty-first ordinary session, Addis Ababa, 9–13 July 2012), which it commended to its member States for inclusion in domestic legislation (endorsing "universal jurisdiction" for genocide, crimes against humanity, war crimes, piracy, trafficking in drugs and terrorism).

[20] Report of the Sixth Committee on the scope and application of the principle of universal jurisdiction, submitted at the sixty-fourth session of the General Assembly (A/64/452), paras. 1–2.

[21] General Assembly resolutions 64/117 of 16 December 2009; 65/33 of 6 December 2010; 66/103 of 9 December 2011; 67/98 of 14 December 2012; 68/117 of 16 December 2013; 69/124 of 10 December 2014; 70/119 of 14 December 2015; 71/149 of 13 December 2016; and 72/120 of 7 December 2017.

[22] The Group of African States has not, as of this writing, been convened or forwarded such a recommendation. See Assembly/AU/Dec.672(XXX), Decision on the International Criminal Court, EX.CL/1068(XXXII), thirtieth ordinary session, Addis Ababa, 28–29 January 2018, para. 5 (*v*).

[23] The Commission has worked extensively in the field of international criminal law. This began with its first project, that is, the formulation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (*Yearbook … 1950*, vol. II, document A/1316, pp. 374–378, paras. 95–127), and continued with the question of international criminal jurisdiction (*ibid.*, pp. 378–379, paras. 128–145), the question of defining aggression (*Yearbook … 1951*, vol. II, document A/1858, pp. 131–133, paras. 35–53), the draft Code of Crimes against the Peace and Security of Mankind (*Yearbook ... 1954*, vol. II, document A/2693, pp. 150–152, paras. 50–54; and *Yearbook … 1996*, vol. II (Part Two), pp. 17–56, para. 50), the draft statute for an international criminal court (*Yearbook ... 1994*, vol. II (Part Two), pp. 26–74, para. 91), the crime of aggression, and the obligation to extradite or prosecute (*aut dedere aut judicare*) (*Yearbook ... 2014*, vol. II (Part Two), pp. 92–105, para. 65) through to more recent topics such as immunity of State officials from foreign criminal jurisdiction, and crimes against humanity, both of which are currently on the Commission's programme of work.

[24] See the Secretariat proposal on the topic of "Extraterritorial jurisdiction", *Yearbook … 2006*, vol. II (Part Two), annex V, pp. 229–239.

within its scope due to that principle's unique nature.[25] If anything, the addition of universal jurisdiction to the long-term programme of work would complement that topic.

A. The topic satisfies the criteria for addition to the long-term programme of work

18. For a topic to be placed on the Commission's long-term programme of work, it must be shown to satisfy the following criteria set in 1997:

(*a*) the topic should reflect the needs of States in respect of the progressive development and codification of international law;

(*b*) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification;

(*c*) the topic should be concrete and feasible for progressive development and codification.

In this regard, the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.[26] As the subsequent discussion will demonstrate, all these criteria are fulfilled in the present case.

1. A study of universal criminal jurisdiction reflects the needs of States

19. As already noted, the Sixth Committee has been debating the topic of universal jurisdiction since 2009, with only limited progress. The Sixth Committee has concluded that "the legitimacy and credibility of the use of universal jurisdiction are best ensured by its responsible and judicious application consistent with international law".[27] This begs the question regarding what judicious application entails and what consistency with international law requires. Recognizing the lack of substantial progress after years of debate, the modality of a working group, open to all Member States, was identified to facilitate more informal discussions of the topic. The hope was that this might help minimize differences of view between delegations.[28] In addition to the working group, which has generated some progress on the issue but appears to still reflect some of the same divisions in the wider Sixth Committee and General Assembly, it was decided that any consideration should be "without prejudice to the consideration of this topic and related issues in other forums of the United Nations".[29] The explicit purpose of this language was to leave room for other relevant United Nations bodies, such as the Commission, to engage with the issue from the perspective of their respective mandates.

20. From a Sixth Committee perspective, an International Law Commission study of this topic would likely enable the General Assembly to achieve more progress in clarifying the status or at least certain legal aspects of the universality principle under international law. A contribution by the Commission at this stage through a focused legal analysis could assist the present New York debate, as far as possible, and address State concerns on potential abuse or misuse of the principle. It should also help to elaborate concrete proposals rooted in State practice that may better allow States to have a clearer legal basis from which to negotiate a compromise outcome, if not reach consensus on the topic within the General Assembly. The Commission, as a technical subsidiary body, is well poised to undertake such legal analysis of this important principle of international law. The legal study would help to unlock the potential of the principle to fill the current impunity gap in relation to the international community's efforts against serious crimes under international law, while providing much-needed legal certainty for States and national authorities, including courts.

2. The topic is sufficiently advanced in State practice to enable progressive development and codification

21. Regardless of the current doubts among States regarding its scope of application, many States already have legislation providing for a form of universal jurisdiction or quasi-universal jurisdiction based on certain treaty obligations. This is evidenced by the wealth of materials that have been provided by States to the Secretary-General and numerous reports prepared for the General Assembly by the secretariat of the Sixth Committee to facilitate its debate on universal jurisdiction. In addition to municipal legislation and numerous international conventions providing for the *aut dedere aut judicare* obligation,[30] which may be related to but not necessarily coextensive with universal jurisdiction, some States anticipate a form of universal jurisdiction within their internal laws when it comes to certain serious crimes under international law, even where the impugned conduct occurs outside their territory and does not involve their nationals. There is sufficient State practice, given the steady increase in such investigations and prosecutions, all of which are sufficiently widespread and sufficiently advanced to enable progressive development and codification of the law in this area.

22. The added value of such a Commission study is apparent from an examination of: (*a*) the Sixth Committee's extensive debates on universal jurisdiction between

[25] *Ibid.*, p. 231, para. 16, in which it is noted that universal jurisdiction is distinctive compared to other grounds of jurisdiction since its invocation typically is in relation to protection of the interests of the international community rather than exclusively the forum State's own national interest, and thus, that this principle of jurisdiction "would fall outside of the scope" of the topic. Interestingly, as an aside, extraterritorial jurisdiction was among the first cluster of topics selected by the Commission when it reviewed, during its first session, a survey of international law prepared by the Secretariat. Out of 25 topics recommended for possible inclusion in its programme of work, the Commission identified a provisional list of 14, one of which was "Jurisdiction with regard to crimes committed outside national territory", *Yearbook ... 1949*, pp. 280–281, paras. 15–16.

[26] *Yearbook … 1997*, vol. II (Part Two), para. 238.

[27] Draft resolution entitled "The scope and application of the principle of universal jurisdiction" (A/C.6/66/L.19), adopted by the Sixth Committee on 9 November 2011. See also General Assembly resolution 66/103, preamble.

[28] United Nations, General Assembly, Sixth Committee, seventy-second session, "The scope and application of the principle of universal jurisdiction (agenda item 85)", available from www.un.org/en/ga/sixth/72/universal_jurisdiction.shtml.

[29] General Assembly resolution 65/33, para. 2.

[30] See, e.g., the instruments cited in footnote 12 above.

2009 and 2017;[31] (*b*) the wealth of legislative, judicial and executive branch information submitted by individual States and groups of States cataloguing their practices on universal jurisdiction; (*c*) the detailed reports of the Secretary-General on the scope and application of the principle of universal jurisdiction, prepared to assist States in structuring their Sixth Committee debates on the topic;[32] and (*d*) the annual General Assembly resolutions on the matter.[33] To the extent that there might be concern about taking up a topic that the Sixth Committee is presently considering, it should be emphasized that the annual General Assembly resolutions on the scope and application of universal jurisdiction for the past several years have repeatedly underscored that its debate of the issue was always intended to be "without prejudice" to its examination in other forums of the United Nations. Plainly, as a subsidiary body of the General Assembly, this includes the Commission. To the contrary, on repeated occasions over the past few years, States from all geographic regions have in fact suggested at different stages of the debate in the Sixth Committee that the "technical nature" of universal jurisdiction makes the Commission a more suitable forum for its legal clarification.[34]

3. The topic is concrete and feasible and a wealth of State practice on universal criminal jurisdiction has already been collected by the Secretariat

23. Universal jurisdiction is both concrete and feasible as an object of study. Sufficient State practice exists to codify current practice and sufficient controversy exists to necessitate codification and progressive development of the scope of universal jurisdiction. It has already been noted that the State practice, precedent and doctrine available to assist with codification has already been gathered in the nearly ten years during which the scope and application of the principle has been under discussion in the Sixth Committee. This may be a unique situation. Considering the seeming paucity of State responses to the Commission's questionnaires on its topics, the information currently available provides ready raw material which the Commission could take to advance its work.

24. A study of the issue of universal jurisdiction is feasible, additionally, because many conventions widely ratified by States already require States to prohibit certain types of conduct and to extend jurisdiction over such crimes through domestic legislation.[35] There is relevant case law on universal jurisdiction in varied jurisdictions,[36] as well as regional instruments and academic works addressing the topic. These include, for instance, the African Union Model National Law on Universal Jurisdiction,[37] the Cairo–Arusha Principles on Universal Jurisdiction[38] and the Princeton Principles on Universal Jurisdiction.[39] Moreover, without suggesting that there is overlap that would widen the scope of this topic, several other topics currently or recently under consideration by the Commission may enable it to more easily clarify the principle of universal jurisdiction.

4. A study of universal criminal jurisdiction allows the Commission to address a topic that is both traditional and contemporary

25. An examination of universal jurisdiction at this stage, when the question of individual criminal responsibility for international crimes seems to be increasingly important since at least the 1990s, gives the Commission the further opportunity to address not just issues of traditional concern to States and the international community as a whole, but also those of considerable contemporary interest as well as practical utility to States. It also allows the Commission to develop aspects of a traditional topic such as jurisdiction. There is a convenient mix of the

[31] A number of States spoke to the topic in the 2017 debate, including: Algeria, Argentina, Australia, Bangladesh, Brazil, China, Cuba, Czech Republic, El Salvador, Estonia, India, Indonesia, Iran (Islamic Republic of), Israel, Kenya, Lebanon, Lesotho, Liechtenstein, Malaysia, Mexico, Nigeria, Norway, Paraguay, Rwanda, Singapore, Slovenia, South Africa, Sudan, Syrian Arab Republic, Thailand, Trinidad and Tobago, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

[32] A/65/181 (see footnote 2 above), A/66/93 and Add.1, A/67/116, A/68/113, A/69/174, A/70/125, A/71/111 and A/72/112.

[33] See footnote 21 above.

[34] For example, during the 2017 General Assembly debate, the statement by the Community of Latin American and Caribbean States, comprised of 33 States, envisaged the Commission's review of the topic: "if no progress is made at the next meetings of the working group, we should consider request to the International Law Commission to study some or all of the elements of this topic. This would be particularly useful if we take into account that the Commission is currently examining a number of issues linked to the universal jurisdiction principle"; and the Caribbean Community, comprised of 14 States, noted that "we see merit in the possibility of referring this topic to the International Law Commission for its consideration. Given that the ILC is currently examining topics which are related to the principle of universal jurisdiction, we believe that a decision to refer this topic would also be timely". A similar view was expressed in statements by other countries, such as Nigeria ("We also call on the International Law Commission to contribute to the debate, considering its *technical nature**"), Colombia, Guatemala, Liechtenstein, Viet Nam, South Africa and Thailand. The full texts of the statements are available from www.un.org/en/ga/sixth/72/universal_jurisdiction.shtml.

[35] See, in this regard, the references contained in footnote 12 above.

[36] See *Polyukhovich v. The Commonwealth of Australia and Another*, Supreme Court of Australia, [1991] HCA 32; the 1993 genocide law of Belgium (revised in 2003), which led to the International Court of Justice cases *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* in 2002 (footnote 14 above) and, in 2012, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, *p.* 422; the Crimes Against Humanity and War Crimes Act 2000 of Canada, which led to *Her Majesty the Queen v. Désiré Munyaneza*, Quebec Superior Court, Criminal Division, 2009; *Prosecutor v. François Bazaramba*, Porvoo District Court, Finland, 2010; the Code of Criminal Procedure of France, art. 689; the *Völkerstrafgesetzbuch* (VStGB) of Germany, 2002, used in the case of *Ignace Murwanashyaka*, Higher Regional Court of Stuttgart, 2015; the Offences Against the Person Act, 1861 of Ireland, now the Criminal Law (Jurisdiction) Act, 1976; *Attorney General of the Government of Israel v. Adolf Eichmann*, Criminal Case 40/61, District Court of Jerusalem, 1961 (footnotes 6 and 7 above); *Malaysia v. George W. Bush and Others*, 2001 (convicted *in absentia*); the *Hissein Habré* case in Senegal, Extraordinary African Chambers, 2016; the Judicial Power Organization Act 1985 of Spain, art. 23.4; the *Pinochet* case, 1998; *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia and Another*, House of Lords, United Kingdom [2006] UKHL 26 (reproduced in ILR, vol. 129 (2007), p. 713); and the Justice Against Sponsors of Terrorism Act of 2016 (S.2040) of the United States, which led to litigation against Saudi Arabia.

[37] African Union Model National Law on Universal Jurisdiction over International Crimes, 2012 (see footnote 19 above).

[38] The Cairo–Arusha Principles on Universal Jurisdiction in respect of Gross Human Rights Offences: An African Perspective. The Principles were adopted at two expert meetings held under the auspices of Africa Legal Aid in Cairo in 2001 and in Arusha in 2002.

[39] Princeton Principles on Universal Jurisdiction (see footnote 1 above).

classic with the modern preoccupations of international law. Indeed, such a study could serve to bolster the Commission's engagement in fields that evidence international law's ongoing concern with the advancement of human rights. The rights of victims of atrocity crimes to some form of justice are further recognized by the Commission's previous work on the draft Code of Crimes against the Peace and Security of Mankind,[40] as well as its more recent work on the draft statute for an international criminal court[41] and topics such as crimes against humanity.

B. Potential scope of the study and guidelines or conclusions as possible outcomes

26. Regarding the possible scope of the study, and consistent with deliberations of States in the Sixth Committee which already identified many key gaps in the informal paper mentioned in paragraph 8 above, it is suggested that the Commission should not try to be comprehensive in addressing all the issues where there is a lack of clarity among States. It could rather concentrate on a more limited set of legal concerns on which it can, through its work and engagement with the Sixth Committee, provide further guidance.

27. First, it would seem important to consider identifying a basic definition of the concept of universal jurisdiction, its role and purpose, classification of the "types" of universal jurisdiction and the conditions or the criteria reflected in the practice of States for its application.[42] This could include whether the forum State can or tends to act only if the subject of the investigation is present on its territory, and distinguishing the legal basis for such assertions of jurisdiction under international law in terms of sources (i.e., treaties and custom) and whether or not the decision to prosecute is discretionary/permissive as opposed to obligatory/mandatory in nature.

28. A second aspect of the study, which could be pursued in a second or later report, would identify the scope and limits of universal jurisdiction, including potentially drawing up a non-exhaustive list of crimes subject to such jurisdiction.[43] It would, for instance, be useful to consider whether there is in the practice of States universal jurisdiction for war crimes, genocide and crimes against humanity. Additional issues that may arise between States, and might therefore be worth addressing, include the possible resolution of disputes over competing claims of jurisdiction, which are possible in situations of concurrent jurisdiction.[44]

29. Finally, regarding the universality principle's relationship with and possible intersection with the work of international courts and tribunals, the scope of the project could also include identification of a set of guidelines or conclusions to prevent conflict between the exercise of universal jurisdiction by States parties to the Rome Statute and the jurisdiction of the International Criminal Court, as well as the exercise of universal jurisdiction by all States in situations of Security Council referrals to the International Criminal Court of situations involving non-party States or in situations involving the creation of other international criminal tribunals. A detailed study should help to bring greater certainty to this relational aspect of the universal jurisdiction matter at the national level with the work of the international criminal tribunals that might have overlapping jurisdiction in respect of a limited set of core international crimes. This includes the complementarity principle and the duty to prosecute or extradite.

C. Conclusion

30. In its past work, the Commission has spoken highly of the important place of universal jurisdiction in a two-level system of prosecutions at the national and international levels in relation to the 1994 draft statute for an international criminal court and the 1996 draft Code of Crimes. In this regard, the Commission and, more recently, States in the Sixth Committee, as well as other institutes, writers of international law and publicists, all agree on the potentially useful role that universal jurisdiction can play in the prosecution of serious crimes condemned by international law. This enhances the prospects for more justice within the international community and will likely help States to better balance the imperatives of sovereignty and the fight against impunity. If many States can rely on such a principle, and do so based on clearer rules of the road, such crimes can be better punished and perhaps even deterred.

31. Regarding the final outcomes of the project, the output could take the form of draft guidelines or draft conclusions on the scope and application of the principle of universal criminal jurisdiction. Other forms of outputs could also be considered, depending on the suggestions of States in the Sixth Committee.

32. In sum, it is suggested that part of the answer to the universal jurisdiction conundrum rests in helping States locate the principles that can assist them to better balance the imperatives of sovereignty, on the one hand, and the fight against impunity, on the other. This necessarily requires illuminating the proper contours of the principle from the perspective of codification of existing international law as well as its progressive development. The conclusions and commentaries envisaged as a result of the consideration of this topic will also be useful for international organizations, courts and tribunals, as well as scholars and practitioners of international law. The Commission, considering its unique statutory mandate in that regard and drawing on its prior and ongoing work on related topics of international criminal law, would make a useful contribution.

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[40] *Yearbook ... 1954*, vol. II, document A/2693, pp. 150–152, paras. 50–54; and *Yearbook … 1996*, vol. II (Part Two), pp. 17–56, para. 50.

[41] *Yearbook ... 1994*, vol. II (Part Two), pp. 26–74, para. 91.

[42] See paragraph 8 and footnote 13 above.

[43] See the summary record of the 12th meeting of the Sixth Committee, on 20 October 2008 (A/C.6/64/SR.12), para. 21.

[44] *Ibid.* Most cooperation takes place pursuant to agreements concluded by States on a bilateral basis. See T. R. Salomon, "Mutual legal assistance in criminal matters", *Max Planck Encyclopedia of Public International Law* (online edition: https://opil.ouplaw.com/home/MPIL). See also the joint initiative by Belgium and other countries, "Towards a multilateral treaty for mutual legal assistance and extradition for domestic prosecution of the most serious international crimes", supported by 49 States Members of the General Assembly as at 16 March 2016.

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