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The scope and application of the principle of universal jurisdiction

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Report of the Secretary-General

Summary

The present report has been prepared pursuant to General Assembly resolution 70/119, by which the Assembly requested the Secretary-General to prepare a report on the basis of information and observations received from Member States and relevant observers, as appropriate, on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties and their national legal rules and judicial practice.

* A/71/50.

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I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 70/119. It reflects comments and observations received since the issuance of the report of 2015 (A/70/125) and should be read together with that and prior reports (A/65/181, A/66/93 and Add.1, A/67/116, A/68/113 and A/69/174).

2. In accordance with resolution 70/119, section II of the present report, together with tables 1 to 3, focuses on specific information regarding the scope and application of universal jurisdiction on the basis of relevant national legal rules, applicable international treaties and judicial practice. Information received from observers is provided in section III and section IV contains a synopsis of issues raised by Governments for possible discussion.

3. Responses were received from Australia, Cuba, Finland, Georgia and Spain.

4. Responses were also received from the African Union, the International Civil Aviation Organization,[1] and the International Committee of the Red Cross.

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

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

A. Basic legal rules

1. Constitutional and other domestic legal frameworks[2]

Australia[3]

6. Australia reiterated its implementation of the principle in Australian law, separated into offences grouped into: (a) genocide, crimes against humanity, war crimes and torture offences; (b) slavery offences; and (c) piracy and other acts of violence at sea. Australia reiterated that in relation to all of the above offences, the general principles of Australian law relating to individual criminal responsibility apply.

Finland[4]

7. Finland reported that point 13 (b) on international crimes, of the decree on the implementation of article 7 of the Criminal Code had been amended to include infringement of the prohibition of anti-personnel mines, as defined in the Convention on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997.

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[1] The International Civil Aviation Organization submitted a nil return.

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

[3] For previous comments submitted by Australia, see A/65/181 and A/68/113.

[4] For previous comments submitted by Finland, see A/65/181 and A/67/116.

Georgia

8. Georgia reported that it exercises criminal jurisdiction on the basis of territoriality and extraterritoriality. The latter, under article 5 of the Criminal Code is based on principles of active personality (with due regard paid to the double criminality requirement), the protective principle and the principle of universal jurisdiction. Universal jurisdiction is stipulated in paragraph 2 of article 5, which states that "a foreign citizen or a stateless person shall be criminally liable for a crime committed abroad, if criminal liability for committing the crime is established by an international treaty to which Georgia is a State party". Georgia set out a number of universal instruments to which it is a party, which can be found in table 3 below.

9. Georgia further indicated that in accordance with article 6 of the Law on International Treaties, treaties shall be an integral part of the legislation of Georgia. The same provision further stipulates that international treaties to which Georgia is a party shall prevail over domestic normative acts unless they contradict the Constitution, constitutional law or constitutional concordat of Georgia and that provisions of duly published treaties determining specific rights and obligations, and not requiring transposition into domestic legislation by adopting specific acts, shall be directly applicable.

10. Georgia submitted a list of crimes included in the Criminal Code, transposing its international obligations on crimes against humanity and international humanitarian law into domestic legislation, which can be found in table 2 below.

Spain[5]

11. Spanish law provides for the principle of universal jurisdiction, although its scope has been limited in recent times as a result of the legislative reforms adopted in 2009 and 2014. In its original formulation, article 23, paragraph 4, of Organic Act No. 6/1985 of 1 July on the Judiciary recognized the jurisdiction of Spanish courts over offences committed by Spanish nationals or foreigners outside the national territory, where those acts were classified as one of the following offences under Spanish criminal law: genocide; terrorism; piracy or unlawful seizure of aircraft; counterfeiting of foreign currency; crimes related to prostitution; trafficking in psychotropic, toxic or narcotic drugs; or any other crime which should be prosecuted in Spain pursuant to an international treaty or agreement.

12. Spain reported that article 23, paragraph 4 of Organic Act No. 6/1985 has undergone six amendments. The purpose of the initial amendments was simply to include new offences in the list of acts that could be prosecuted on the basis of universal jurisdiction. The amendments made after 2009 also redefined the scope of universal jurisdiction by introducing restrictions on its exercise. With respect to the first set of reforms, Organic Act No. 11/1999, Organic Act No. 3/2005 and Organic Act No. 13/2007 expanded the material scope of the provision to include crimes related to the corruption of minors or legally incompetent persons, female genital mutilation and trafficking or smuggling of persons. With regard to female genital mutilation, Spanish jurisdiction is affirmed only in cases where the perpetrators are present in Spain. Organic Act No. 1/2009 and Organic Act No. 1/2014 also expanded the list of offences covered by article 23, paragraph 4, of Organic Act No. 6/1985 but at the same time reduced the scope of the provision.

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

13. In Organic Act No. 1/2009, the offence of counterfeiting foreign currency was removed from the list, while crimes against humanity were added; the Act also introduced an explicit reference to treaties on international humanitarian law and the protection of human rights in the subparagraph relating to the treaty-based obligations assumed by Spain.

14. Organic Act No. 1/2014 once again increased the number of offences subject to prosecution under the principle of universal jurisdiction, for instance by extending the list of offences involving violence against women beyond genital mutilation and adding offences involving the corruption of public officials or organized crime.

2. Applicable international treaties

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

3. Judicial and other practice

Finland[6]

16. Finland reported that in order for the Finnish courts to base their competence on universal jurisdiction, they need to ascertain that the pretrial stage and the court proceedings are capable of being completed in Finland and that there would not be more substantial grounds for handling the case in another State. The majority of cases in which that principle has been applied are for crimes relating to narcotic substances, but the principle has also been applied by the judiciary for war crimes (chapter 11 of the Criminal Code), terrorist offences (chapter 34 (a) of the Criminal Code) and aggravated cases of human trafficking (article 3 (a) of chapter 25 of the Criminal Code). Only a few judgments have so far been delivered relating to those crimes, but Finland reported that 12 cases were at the pretrial stage.

17. Finland updated the information previously provided on the first case tried under the principle in their judicial system.[7] The case has proceeded through the district court and the Court of Appeal. The Court of Appeal gave its final judgment on 30 March 2012, upholding the decision of the district court, where the defendant was found guilty of the crime of genocide in his country of origin. The defendant was sentenced to life imprisonment. The judgment is final as the Supreme Court did not grant leave of appeal to the defendant.

18. Finland additionally reported that three judgments for terrorism-related crimes and war crimes had been delivered recently. On 23 March 2016, the Helsinki Court of Appeal dismissed the charges against four persons sentenced by the district court for financing terrorism; the judgment is not yet final. The Pirkanmaa District Court and the Kanta-Hame District Court on 18 and 8 March 2016, respectively, issued suspended prison sentences for war crimes. Both of those judgments are final.

Spain

19. Spain reported that Spanish judges and courts have applied the principle with some frequency. It further noted that criminal proceedings in many cases did not

[6] For previous comments submitted by Finland, see A/65/181 and A/67/116.
[7] See A/67/116.

progress very far because of three types of circumstances: (a) the accused persons enjoyed immunity from jurisdiction by virtue of their status as current or former heads of State, heads of Government or ministers for foreign affairs (as in the cases of Paul Kagame, Fidel Castro, King Hassan II, Teodoro Obiang Nguema Mbasogo and Hugo Chávez); (b) the Spanish Government decided to extradite the accused to their own countries, where criminal proceedings against them were under way (as happened with Ricardo Cavallo and Juan Carlos Fortea, for example); or (c) a third country decided not to comply with an extradition request issued by Spain (as happened with Augusto Pinochet and the military personnel implicated in the Guatemala case).

20. Spain noted that at times the application of the principle of universal jurisdiction had been a source of tension and disagreement between the National High Court and the Supreme Court. It further noted that under Organic Act No.1/2014, "[proceedings] relating to the offences referred to in this Act that are in progress at the time of its entry into force shall be stayed until it can be verified that the requirements established therein have been met." Accordingly, a number of proceedings pending before the Spanish courts were stayed rather than definitively closed, as proceedings could be reopened in the event that the requirements set out in the new version of article 23, paragraph 4, of Organic Act No. 6/1985 were met.

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

Constitutional and domestic legal framework

Spain

21. Spain reported that Organic Act No.1/2009 for the first time limited the scope of article 23, paragraph 4, of Organic Act No. 6/1985 by establishing that there must be a link with Spain, which had not previously been stipulated (except with regard to the offence of female genital mutilation), and by introducing the principle of subsidiarity. As a result, the jurisdiction of the Spanish courts became dependent on the existence of a link with Spain, which could be based on the presence of the perpetrator on the national territory, the Spanish nationality of the victims or any other "relevant link" with Spain. In addition, taking into account the doctrine established by the Constitutional Court and the case law of the Supreme Court, the principle of subsidiarity was established, according to which the Spanish courts may exercise jurisdiction only if the offences in question are not being investigated and prosecuted effectively by another country or by an international court. Moreover, proceedings already initiated in Spain must be temporarily stayed if proceedings connected with the same offences are initiated by a court in another country or an international court.

22. Organic Act No.1/2014 maintained the requirement of a link with Spain (to be established on a case-by-case basis), with specific conditions applicable to different offences. It also upheld the principle of subsidiarity, which is implemented by specifying to which country's courts the Spanish courts would cede jurisdiction (the State where the offence was committed or the State of nationality of the accused, under specific circumstances), unless the State in question is unwilling or unable genuinely to carry out the investigation; provided that Spain would cede jurisdiction where proceedings to investigate and prosecute an offence have been initiated by an international court established in accordance with a treaty or

agreement to which Spain is a party; and introduced a new procedural restriction according to which the legal standing to initiate proceedings is limited to the victim and the Public Prosecution Service.

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

African Union

23. The African Union once more drew attention to the African Union Model National Law on Universal Jurisdiction over International Crimes, adopted in July 2012 at the twenty-first Ordinary Session of the Executive Council of the African Union.[8]

International Committee of the Red Cross

24. The International Committee of the Red Cross (ICRC) reiterated its comments on several aspects of universal jurisdiction in international humanitarian law, as set out in previous documents (A/66/93, A/68/113, A/69/174 and A/70/125).

25. The Committee highlighted additional initiatives undertaken to support the efforts of States to implement an efficient system for the criminal repression of serious violations of international humanitarian law by engaging the judiciary in various contexts, for instance by providing training on international humanitarian law, inclusive of the principle and use of universal jurisdiction. The Committee continues, in its various activities related to international humanitarian law throughout the world, to address the prevention and repression of serious violations of such law and to promote the application of universal jurisdiction over war crimes. In addition, in an issue of the *International Review of the Red Cross* entitled "Generating respect for the law", various matters relating to the enforcement of international humanitarian law and the use of the principle of universal jurisdiction were discussed. The Committee also recalled the adoption, by consensus, of resolutions 3 and 4 of the thirty-second International Conference of the Red Cross and Red Crescent on the prevention of and response to sexual violence in armed conflict and the protection of health care in armed conflict, respectively. It stressed the viewpoint that universal jurisdiction is an effective tool, among others, for States in preventing and responding to acts of sexual violence in armed conflict, as well as attacks on the wounded and sick, health-care personnel and facilities and medical transport in armed conflict.

26. As noted in previous reports of the Secretary-General, ICRC is in the process of updating its commentaries on the 1949 Geneva Conventions and their Additional Protocols.[9] The updated commentary on the First Geneva Convention of 1949 was launched on 22 March 2016 and contains material on universal jurisdiction within the framework of articles 49 and 50 of the Convention. The new commentary on article 49 (penal sanctions) of the First Geneva Convention contains a detailed

[8] See decision EX.CL/Dec.708 (XXI). See also previous comments from the African Union, A/66/93 and A/68/113. The model law is on file with the Codification Division of the Office of Legal Affairs of the Secretariat and the full text is available on the website of the Sixth Committee of the General Assembly.

[9] See, for example, A/70/125.

explanation of the various methods available to States to fulfil the obligation to enact the legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches listed in the Conventions.

27. The commentary also considers, in detail, the principle of universal jurisdiction contained in the "grave breaches" regime and the ways that States parties have implemented it in recent decades. The Committee noted that the practice since 1949 shows that some States have made the prosecution of war crimes conditional on the presence — temporary or permanent — of the alleged offenders on their territory. Another condition, sometimes also found in domestic legislation, is that of special prosecutorial discretion. The Committee stated that while States may attach conditions to the application of universal jurisdiction to "grave breaches" or other war crimes, such conditions must, in every context, seek to increase the effectiveness and predictability of universal jurisdiction and must not unnecessarily restrict the possibility of prosecuting suspected offenders.

28. The new commentaries also address other fundamental issues, such as the time frame for fulfilling the obligation to investigate those alleged to have committed a grave breach and either prosecuting or extraditing those responsible; the challenges encountered by States when implementing universal jurisdiction; the state of international law today with regard to the potential immunities from jurisdiction and prosecution for alleged perpetrators of war crimes; and the possible applicability of the grave breaches regime in non-international armed conflict.

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

Australia[10]

29. Australia reiterated its comments previously submitted on the scope and application of the principle of universal jurisdiction.

Cuba[11]

30. Cuba reiterated its specific comments pertaining to the principle of universal jurisdiction, as set out in A/69/174, paragraphs 79 to 87, and emphasized that any decision on the matter must be adopted by consensus.

[10] For previous comments submitted by Australia, see A/65/181 and A/68/113.

[11] For previous comments submitted by Cuba, see A/65/181, A/66/93/Add.1, A/67/116, A/68/113, A/69/174 and A/70/125.

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

Crime	*State*
Human trafficking	Finland, Spain
Extortive abduction, slave trade, slavery	Australia
Sexual crimes against children	Spain
Enforced disappearance of a person	Spain
Prostitution	Spain
Piracy	Australia, Spain
Terrorism-related acts	Finland, Spain
Crimes concerning radioactive materials	Spain
Attacks against civil aviation and maritime traffic	Spain
Domestic violence or violence against women	Spain
Illicit trafficking in narcotics and dangerous drugs	Spain
Crimes related to prostitution	Spain
Financial crimes	Spain
Counterfeiting of foreign currency	Spain
Environmental offences	Georgia
Genocide	Australia, Georgia, Spain
Crimes against humanity	Australia, Georgia, Spain
War crimes	Australia, Finland, Georgia, Spain
Aggression	Georgia
Torture (and other cruel, inhuman or degrading treatment or punishment)	Australia, Georgia, Spain
Use of mines	Finland
Transnational organized crime	Spain

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

Category	*Legislation*	*Country*
Aggression (planning, preparation, commencement or execution of such an action and calling for any such actions)	Article 404 and 405 of chapter XLVII of the Criminal Code	Georgia
Slavery, slave trade or traffic in slaves	Division 270 of the Criminal Code	Australia
Genocide	Division 268 of the Criminal Code	Australia
	Article 407 of chapter XLVII of the Criminal Code	Georgia
	Organic Act No. 1/2014, article 23	Spain
Crimes against humanity	Division 268 of the Criminal Code	Australia
	Article 408 of chapter XLVII of the Criminal Code	Georgia
	Organic Act No. 1/2014, article 23	Spain
War crimes	Division 268 of the Criminal Code	Australia
	Chapter 11 of the Criminal Code	Finland
	Organic Act No. 1/2014, article 23	Spain
Intentional breach of the provisions of international humanitarian law during armed conflicts	Article 411 of chapter XLVII of the Criminal Code	Georgia
Intentional breach of provisions of international humanitarian law during armed conflicts between States or within a State, by endangering health or by mutilation	Article 412 of chapter XLVII of the Criminal Code	Georgia
Other violations of the provisions of international humanitarian law	Article 413 of chapter XLVII of the Criminal Code	Georgia
Participation of mercenaries in armed conflicts or military actions	Article 410 of chapter XLVII of the Criminal Code	Georgia
Torture	Division 274 of the Criminal Code	Australia
	Organic Act No. 1/2014, article 23	Spain
Piracy (and other acts of violence at sea)	Part IV of the Crimes Act 1914	Australia
	Crimes (Ships and Fixed Platforms) Act 1992	
	Organic Act No. 1/2014, article 23	Spain

Category	*Legislation*	*Country*
Use of mines	Decree on the implementation of article 7 of chapter 1 of the Criminal Code	Finland
Human trafficking	Article 3 (a) of chapter 25 of the Criminal Code	Finland
	Organic Act No. 1/2014, article 23	Spain
Manufacturing, purchasing or selling weapons of mass destruction	Article 406 of chapter XLVII of the Criminal Code	Georgia
Terrorism	Chapter 34 (a) of the Criminal Code	Finland
	Organic Act No. 1/2014, article 23	Spain
Ecocide	Article 409 of chapter XLVII of the Criminal Code	Georgia
Enforced disappearance	Organic Act No. 1/2014, article 23	Spain
Trafficking in toxic, narcotic or psychotropic substances	Organic Act No. 1/2014, article 23	Spain
Attacks against civil aviation and maritime traffic	Organic Act No. 1/2014, article 23	Spain
Crimes concerning radioactive materials	Organic Act No. 1/2014, article 23	Spain
Transnational organized crime	Organic Act No. 1/2014, article 23	Spain
Sexual crimes against children	Organic Act No. 1/2014, article 23	Spain
Financial crimes	Organic Act No. 1/2014, article 23	Spain
Counterfeiting of medical products	Organic Act No. 1/2014, article 23	Spain
Domestic violence or violence against women	Organic Act No. 1/2014, article 23	Spain

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

Universal instruments

Use of mines	Convention on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 1997	Finland
International criminal law	Rome Statute of the International Criminal Court, 1998	Georgia
International humanitarian law	Geneva Conventions of 1949 and the Additional Protocols thereto	Georgia

Torture	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984	Georgia
Attacks against civil aviation and maritime traffic	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988	Australia
	Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf	Australia