

Translated from Spanish

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The Permanent Mission of Peru to the United Nations presents its compliments to the Secretary-General and has the honour to refer to communication LA/COD/59 of 8 January 2010, in which States are invited, in accordance with General Assembly resolution 64/117, to submit information on the scope and application of the principle of universal jurisdiction.

Accordingly, the Mission wishes to transmit herewith the report of the Government of Peru, so that it may be taken into account by the Secretary-General in the preparation of the report to be submitted to the General Assembly at its sixty-fifth session.

The Permanent Mission of Peru to the United Nations takes this opportunity to convey to the Secretary-General the renewed assurances of its highest consideration.

New York, 18 May 2010

United Nations Secretariat
Office of Legal Affairs
New York

The scope and application of the principle of universal jurisdiction

In its resolution 64/117, the General Assembly requested the Secretary-General to invite Member States to submit “information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice, and to prepare and submit to the General Assembly, and its sixty-fifth session, a report based on such information and observations”.

In the light of the fact that universal jurisdiction can involve any State, it is of interest to all Member States. Given the legal complexities that may arise, as several delegations pointed out during the debates in the Sixth Committee at the sixty-fourth session of the General Assembly, Peru is in favour of beginning the discussion of the scope and application of universal jurisdiction forthwith.

(a) Work of the International Law Commission on the topic of universal jurisdiction

Universal jurisdiction is not a new topic for the Sixth Committee for it has been dealt with indirectly in connection with other matters. Therefore, when reviewing universal jurisdiction, it will be necessary to take into account the documents and reports in which the issue has been considered in order to avoid duplication of effort and enhance the Committee’s efficiency.

The International Law Commission has been considering the issue of universal jurisdiction in connection with the following:

Draft Code of Crimes Against the Peace and Security of Mankind

In its resolution 177 (II), of 21 November 1947, the General Assembly directed the International Law Commission, to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and also to prepare a draft code of offences against the peace and security of mankind.

The International Law Commission confirmed its recognition of the fact that a number of crimes, owing to their particular seriousness, should be regulated under a special legal regime in order to ensure their prevention and to punish those who committed such crimes.¹ The draft code set forth five crimes: aggression (art. 16); genocide (art. 17); crimes against humanity (art. 18); crimes against United Nations and associated personnel (art. 19); and war crimes (art. 20).²

The special rapporteur, Mr. Doudou Thiam, said that in the absence of an international jurisdiction, the system of universal jurisdiction must be accepted for offences against the peace and security of mankind which, because of their nature,

¹ Mr. Alain Pellet, speaking during the 2345th meeting of the International Law Commission. ILC yearbook (1994), Vol. I, p. 113.

² The draft, which was adopted at the first reading, in 1991, recognized the existence of 12 crimes: aggression; threat of aggression; intervention; colonial domination and other forms of alien domination; genocide; apartheid; systematic or mass violations of human rights; serious war crimes; recruitment, use, financing and training of mercenaries; international terrorism; illicit traffic in narcotic drugs; and wilful and severe damage to the environment.

clearly affect the human race wherever they are committed and irrespective of the nationality of the perpetrators or the victims.³

According to the comments on the draft code, the exercise of universal jurisdiction is determined firstly, on the basis of international law, and secondly, on domestic legislation. It was stated that, “As regards international law, any State party is entitled to exercise jurisdiction over an individual allegedly responsible for a crime under international law set out in articles 17 to 20 who is present in its territory under the principle of ‘universal jurisdiction’ set forth in article 9. The phrase ‘irrespective of where or by whom those crimes were committed’ is used in the first provision of the present article to avoid any doubt as to the existence of universal jurisdiction for those crimes.”⁴

In its resolution 51/160, the General Assembly expressed its appreciation to the International Law Commission for the completion of the draft Code of Crimes against the Peace and Security of Mankind and drew the attention of the States participating in the Preparatory Committee on the Establishment of an International Criminal Court to the relevance of the draft Code to their work.

The obligation to extradite or prosecute (*aut dedere aut judicare*)

At its fifty-sixth session, in 2004, the International Law Commission, on the basis of the recommendation of a Working Group on the long-term programme of work, identified the topic “Obligation to extradite or prosecute (*aut dedere aut judicare*)” for inclusion in its long-term programme of work.

The Special Rapporteur, Zdzislaw Galicki, has submitted three reports on the topic and in all of them he has addressed the relationship between the obligation to extradite or prosecute (*aut dedere aut judicare*) and universal jurisdiction.⁵ In addition, the General Assembly has invited Governments to provide information to the International Law Commission regarding practice with regard to the topic.⁶ Various States have responded to that invitation.⁷

An open-ended Working Group was established under the chairmanship of Mr. Alain Pellet; it has produced a general framework for the International Law Commission’s consideration of the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*)”. It has prepared a list of questions or issues to be addressed, containing a section on the relationship between the obligation to extradite or prosecute and universal jurisdiction.

³ Fourth report on the draft code of offences against the peace and security of mankind, by Mr. Doudou Thiam, Special Rapporteur. A/CN.4/398, ILC yearbook (1986), vol. II, part 1, p. 73, para. 176.

⁴ Comments on the draft code of crimes against the peace and security of mankind, ILC report, A/51/10, p. 46.

⁵ Preliminary report on the obligation to extradite or prosecute (A/CN.4/571, paras. 31-34); second report on the obligation to extradite or prosecute (A/CN.4/585, para. 34); third report on the obligation to extradite or prosecute (A/CN.4/603, paras. 105 and 106).

⁶ General Assembly resolutions 61/34 and 62/66.

⁷ A/CN.4/612; A/CN.4/599; A/CN.4/579/Add.4; A/CN.4/579/Add.3; A/CN.4/579/Add.2; A/CN.4/579/Add.1; A/CN.4/579.

(b) Universal jurisdiction in Peruvian legislation

The Peruvian Penal Code (Legislative Decree No. 635) establishes the principle of territoriality in article 1, which states that “Peruvian criminal legislation shall apply to anyone who commits a punishable offence within the territory of the Republic, subject to the exceptions laid down in international law”. It also applies to crimes committed aboard (1) Peruvian public vessels or aircraft, wherever they may be; and (2) Peruvian private vessels or aircraft on the high seas or in airspace over which no State exercises sovereignty.

Article 2 of the Code provides that “Peruvian criminal legislation shall apply to any offence committed abroad if (1) the perpetrator is an official or public servant acting in the course of his duties; (2) the offence constitutes a threat to public peace or security, provided that its effects are felt within the territory of the Republic; (3) it constitutes an offence against the State and national defence, the State authorities and the constitutional or monetary order; (4) The offence is perpetrated against or by a Peruvian citizen and is classified as extraditable under Peruvian law, provided that it is also punishable in the State in which it was committed and the perpetrator enters the territory of the Republic in some way; and (5) Peru is under an obligation to punish the offence pursuant to an international treaty”.

As may be seen, Peru primarily applies the principle of territoriality to attribute jurisdiction, because it is the criterion best suited to the exercise of jurisdiction in criminal law.⁸ Without prejudice thereto, other (complementary) criteria for the attribution of jurisdiction are also used; as was recognized by the Permanent Court of International Justice when it ruled “Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all the systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law ...”.⁹

In that regard, universal jurisdiction may be applied pursuant to article 2, subparagraph 5 of the Penal Code which establishes that “Peru is under an obligation to punish the offence pursuant to an international treaty”.

Furthermore, article 55 of the Constitution states that “Current treaties to which Peru is a party form part of domestic legislation”. In addition, as regards the criteria for interpretation, the Fourth Final Provision provides that “Laws relating to the rights and liberties recognized by the Constitution are interpreted in accordance with the Universal Declaration of Human Rights and with international treaties and agreements on the subject ratified by Peru”.

As may be seen from the legal provisions quoted above, the law in Peru allows for the exercise of universal jurisdiction in respect of crimes referred to in current treaties to which Peru is a party and which mention for universal jurisdiction as a criterion for the attribution of jurisdiction.

⁸ General Assembly resolution 3074 (XXVIII); Inter-American Commission on Human Rights resolution 1/03 (on trial for international crimes).

⁹ The Case of the S. S. Lotus (France v. Turkey), Permanent Court of International Justice.

(c) The exercise of universal jurisdiction by national courts

There have been no cases in which universal jurisdiction has been exercised by national courts in Peru.

There have been no cases in Peru in which extradition (passive or active) has been requested on the basis of universal jurisdiction.

Nevertheless, the Constitutional Court of Peru has said, in a general reference to the exercise of universal jurisdiction, that "... it is a jurisdiction that does not take into account the nationality of perpetrator or victims, or the place where the crime was committed, when determining the competence of a given State's courts to prosecute acts considered to be contrary to the interests of mankind as a whole".¹⁰

(d) Comments on universal jurisdiction

With a view to contributing to the examination of universal jurisdiction and of the conditions for its effective exercise in accordance with international law, Peru would like to make the following preliminary comments, without prejudice to further development of the topic in the discussions to be held in the Sixth Committee.

– *Definition of universal jurisdiction*

Universal jurisdiction is arrived at by excluding the other criteria for the attribution of jurisdiction. Accordingly, universal jurisdiction implies a criterion for the attribution of jurisdiction that is recognized by international law whereby States may prosecute certain international crimes without having to prove a normal link, either to the territory where the crime was committed, the nationality of the perpetrator or the nationality of the victims.

– *Distinction between universal jurisdiction and international criminal jurisdiction*

Peru considers that universal jurisdiction is distinct from the international criminal jurisdiction exercised by international criminal courts. Although the two have the same aim — namely, to ensure that perpetrators of certain international crimes do not have impunity — and, can, as a result, complement each other in that task, they are not interchangeable for, whereas States exercise universal jurisdiction, international criminal jurisdiction falls to international tribunals (for example, the International Criminal Court).

– *Distinction between universal jurisdiction and the obligation to extradite or prosecute (aut dedere aut judicare)*

Peru feels that universal jurisdiction is quite different from the obligation to extradite or prosecute (*aut dedere aut judicare*). For, universal jurisdiction involves a criterion for attribution of jurisdiction, whereas the obligation to extradite or prosecute is an obligation that is discharged once the accused is extradited or once the State decides to prosecute the accused based on any of the existing criteria for attribution of jurisdiction. The obligation to extradite or prosecute can be established in a treaty for any type of crime, without such crimes necessarily being subject to universal jurisdiction.

¹⁰ Constitutional Court judgement of 8 August 2008, File 01271-2008-PHC/TC.

– *The regulation of concurrent jurisdictions*

International law provides for a variety of criteria for the attribution of jurisdiction (territoriality, active personality, passive personality, protection of interests and universal jurisdiction) which makes it possible to determine whether a court is competent to prosecute an individual who has committed international crimes.

However, the fact that these various criteria exist side by side can lead to disputes between States wanting to bring an accused before their courts. In such cases, Peru feels that consideration should be given to setting an order of preferences for the criteria for the attribution of jurisdiction based on the most appropriate venue.¹¹

– *Determining what crimes are subject to universal jurisdiction*

One of the main questions posed by the exercise of universal jurisdiction is how to determine which crimes should be subject to such jurisdiction. Peru believes that it is wrong to generalize and that each individual crime should be studied, to see how it is dealt with under international law, both under customary law and in treaties.

– *Relationship between universal jurisdiction and jus cogens*

Peru believes that greater attention should be given to the relationship between universal jurisdiction and acts defined as crimes under the rules of *jus cogens*. To do this it will be necessary to determine whether such crimes give rise to the exercise of universal jurisdiction by States, and whether exercise of such jurisdiction is optional or compulsory.

– *The optional or compulsory nature of universal jurisdiction*

As to whether the exercise of universal jurisdiction is optional or compulsory, that will depend on how it is regulated by the source of law, whether international customary law or treaties.

Under international customary law application of universal jurisdiction may be said to be either optional or compulsory, and the same is true with regard to treaties. Therefore, Peru believes that the treatment of universal jurisdiction in each of these sources must be examined in the context of the crimes for which its application is envisaged.

– *The exercise of universal jurisdiction and international law*

Peru believes that universal jurisdiction must be exercised in accordance with the rules recognized by international law, especially with respect to the fundamental guarantees provided for in international human rights law.

¹¹ See the Code of Private International Law (Bustamante Code), contained in the Convention on Private International Law (to which Peru is a party).

– *Amnesty laws and the exercise of universal jurisdiction*

International law limits the establishment of amnesty laws that cover certain international crimes.¹² Peru believes that amnesties granted by a State for crimes subject to universal jurisdiction are not binding on other States.

(e) Future work on the topic

Bearing in mind the wide-ranging and substantive debate in the Sixth Committee during the sixty-fourth session of the General Assembly, when various views were expressed regarding future work on the topic and where best to pursue it, Peru believes that for the time being, universal jurisdiction should be discussed in the Sixth Committee. Therefore, consideration should be given to the establishment of a working group to identify the similarities in how States treat universal jurisdiction, based primarily on the information they provide in response to General Assembly resolution 64/117.

¹² Security Council resolution 1674 (2006); S/2004/616 and Commission on Human Rights resolution 2003/72.