

Translated from Spanish

Permanent Mission of the Argentine Republic to the United Nations

No. N.U. 141/2011

MLR/mim

The Permanent Mission of the Argentine Republic to the United Nations presents its compliments to the Codification Section of the Office of Legal Affairs, of the United Nations Secretariat, and is pleased to offer its comments on the scope and application of the principle of universal jurisdiction, as follows below.

I. General considerations:

Today, it is universally accepted that the most serious crimes of concern to the international community as a whole must not go unpunished and, to that end, international law affirms that every State has the obligation to exercise its criminal jurisdiction against those responsible for such crimes.

The responsibility to conduct an investigation and prosecute a crime lies primarily with the State in whose territory the crime has been committed, or else with other States that may be connected to the crime in some way, as for example, the perpetrator's State of nationality or the victims' State of nationality. Nevertheless, under some circumstances, when a State is not able or willing to exercise its jurisdiction, other States that are not directly connected to the crime may fill this legal gap by invoking universal jurisdiction. Thus, it may be said that universal jurisdiction offers an additional tool for the exercise of criminal jurisdiction which may be used as a means of significantly reducing impunity. This function of universal jurisdiction makes it a critical component of the international criminal justice system.

At the same time, it should be recalled that the exercise of universal jurisdiction without limitations could create jurisdictional conflicts between States, subject individuals to abuse of process or give rise to politically motivated legal prosecutions. The unwarranted exercise of universal jurisdiction could also create tension between States, as it could be perceived as a means of interfering in the

II. The Argentine Republic considers that the working group of the Sixth Committee that will be entrusted with undertaking a thorough study of the issue should consider, among others, the following issues:

1. The concept of universal jurisdiction;
2. The conditions that must govern the exercise of universal jurisdiction;
and
3. The status of universal jurisdiction within international law and the legislative and judicial practice of States.

In view of the complexity of the issue, the Argentine Republic believes that the study undertaken by the working group should be conducted in stages. In that regard, the first stage of the study could focus on clarifying the concept of universal jurisdiction.

1. *Concept of universal jurisdiction*

Universal jurisdiction is often confused with other jurisdictional solutions, such as those evoking the principle of complementarity or the principle of *aut dedere aut judicare*. Universal jurisdiction is also often inextricably — and not always correctly — associated with other concepts, such as *jus cogens* or obligations *erga omnes*. Of all these issues, we find it important in this case to note the differences between universal jurisdiction and the principle of *aut dedere aut judicare*, given that the two concepts are currently being considered within the United Nations.

Although, in some cases, there are some areas of overlap between these two concepts, from a strictly theoretical perspective, they are distinct. The principle of *aut dedere aut judicare* is intended to prevent impunity for crimes when a State denies the extradition of the suspect from its territory. The principle of *aut dedere aut judicare* does not in itself stipulate which jurisdictional grounds need to be invoked when the requested State chooses to refer the case to its own judicial authorities. In contrast, universal jurisdiction does in itself constitute grounds for jurisdiction, based solely on the nature of the crime, regardless of where it has been committed, the nationality of the victim or of the alleged perpetrator, or any other aspect that may relate to the national interests of the State exercising the jurisdiction. In view of the foregoing, it is accepted that the principle of *aut dedere aut judicare* may overlap with universal jurisdiction when a State has no connection to a crime other than the mere presence of the suspect in its territory and, in application of the principle of *aut dedere aut judicare*, chooses not to grant extradition and consequently must base its prosecution of the case on the principle of universal jurisdiction. It is understood that it is only in such a case that the two concepts overlap, or, in other words, it is in this case that universal jurisdiction plays a decisive role in the full application of the principle of *aut dedere aut judicare*.

Analysis of international treaties, domestic legislation and judicial practice on these issues must take into account the distinction between universal jurisdiction and the principle of *aut dedere aut judicare* to avoid risking erroneous conclusions.

Explicit references to universal jurisdiction in its full sense within treaty law are limited. Multilateral instruments that expressly entertain the notion of universal

jurisdiction include: the Geneva Conventions of 1949 (articles 49, 50, 129 and 146, respectively), the Convention for the Protection of Cultural Property in the Event of Armed Conflict (article 28), the United Nations Convention on the Law of the Sea (article 105) and the International Convention on the Suppression and Punishment of the Crime of Apartheid (article V).

Other treaties implicitly authorize the exercise of universal jurisdiction when they provide that: “the present Convention does not exclude any criminal jurisdiction exercised in accordance with national law”. Thus, treaties implicitly allow States to establish universal jurisdiction in their domestic legislation. Such provisions appear in the following multilateral treaties: the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, the 1979 International Convention against the Taking of Hostages, the 1994 Convention on the Safety of United Nations and Associated Personnel, the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, among others.

The principle of *aut dedere aut judicare* is included in the majority of multilateral treaties on combating transnational crime, as, for example, in the 13 international conventions on counter-terrorism, the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption, among others. It is worth noting that the treaties that implicitly allow for universal jurisdiction, such as those mentioned in the preceding paragraph, also make provision for the principle of *aut dedere aut judicare*.

With regard to this issue of the distinction between universal jurisdiction and the principle of *aut dedere aut judicare*, it should be noted that the latter is currently the subject of a study by the International Law Commission. Making a clear distinction between the two concepts had previously been a salient issue for the Commission. Although it was understood that in some cases both concepts could apply, the Commission decided to focus on the principle of *aut dedere aut judicare* and not universal jurisdiction. Similarly, while the study undertaken by the working group created by General Assembly resolution 65/33 should recognize and explore the relationship between universal jurisdiction and other concepts, it should focus on the elements inherent in the principle of universal jurisdiction.

III. The preceding comments are preliminary in nature and in line with the step-by-step approach that should be taken in the study of universal jurisdiction to be undertaken by the working group of the Sixth Committee. The Republic of Argentina reserves the right to submit additional comments on other aspects of this issue on future occasions.

The Permanent Mission of the Argentine Republic to the United Nations takes this opportunity to convey to the Codification Section of the Office of Legal Affairs, United Nations Secretariat, the assurances of its highest consideration.

New York, 29 April 2011
