

Translated from Spanish

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The Permanent Mission of Chile to the United Nations presents its compliments to the United Nations Secretariat, Office of Legal Affairs, Codification Division and — with reference to the Secretary-General's note LA/COD/59, dated 8 January 2010, referring to General Assembly resolution 64/117, entitled "The scope and application of the principle of universal jurisdiction", and in which he requests that Governments provide information and observations on that topic — is pleased to transmit herewith the following information from the Government of Chile.

The Permanent Mission of Chile to the United Nations takes this opportunity to convey to the United Nations Secretariat, Office of Legal Affairs, Codification Division, the renewed assurances of its highest consideration.

New York, 6 May 2010

(initials)

(ink stamp:) MISSION OF CHILE TO THE UNITED NATIONS

THE PRINCIPLE OF UNIVERSAL JURISDICTION

COMMENTS BY THE GOVERNMENT OF CHILE

The principle of universal jurisdiction confers competent authority upon a State to judge and punish the perpetrator of a crime, regardless of where it was committed or the nationality of the perpetrator or victim. Since universal jurisdiction represents an exception to the principle of territoriality, which generally applies, it is applicable only with regard to grave crimes as defined by international law.

Crimes subject to universal jurisdiction are those that any State is authorized to prosecute, judge and punish, regardless of where they were committed or the nationality of perpetrator or victim. In accordance with international customary law, this type of jurisdiction is applied to crimes such as piracy and slave trafficking. In the case of piracy, the principle of universal jurisdiction was reaffirmed by the United Nations Convention on the Law of the Sea, signed in 1982. That principle has also been incorporated into the Geneva Conventions of 1949 and in Protocol I of 1977, as regards war crimes.

It should be mentioned that Chile is a State party to the international instruments referred to in the preceding paragraph.

With regard to the application of the principle of universal jurisdiction, the Chilean courts have not exercised their jurisdiction over any alleged offender on the basis of universal jurisdiction.

The discussions during the most recent session of the General Assembly demonstrated that, under current international law, the most controversial topic in doctrine and practice is the exercise of jurisdictional functions by the judges of a State with regard to crimes against humanity, war crimes and genocide committed in another State, in the absence of any binding treaty between those States or of any nexus between them such as the nationality of the victim or of the perpetrator of the crime. In other words, the issue is whether current international law allows the exercise of universal jurisdiction for specific crimes, in particular, crimes against humanity, war crimes and genocide and, if so, subject to what requirements or conditions.

This topic is controversial, since there is no consensus among States and in doctrine, and there is no significant international jurisprudence as yet.

In order to facilitate the adoption of certain common elements that the States may find acceptable, the best way to confront the issues raised by universal jurisdiction is to seek to reconcile, on the one hand, the need to help bring an end to impunity for grave crimes with, on the other hand, principles of international law such as the equality of States before the law and the principle of non-intervention. The main points to be taken into consideration when determining the scope and application of the principle of universal jurisdiction are listed below:

1. The first is the explicit recognition that, in matters relating to criminal jurisdiction, the principle of territoriality, i.e., the competent authority of the courts of the State in which the crime was committed, prevails. Hence, as a general rule, it is the courts in the State in which the crime was committed that should first assume

jurisdiction to investigate and punish crimes against humanity, war crimes and genocide.

2. Secondly, in order for universal jurisdiction to apply, a State's competence to establish its jurisdiction and prosecute an individual must have a solid basis in international law — usually in the form of a treaty. International custom can also confer such jurisdiction on a State, provided that the two elements required for a custom to be regarded as international exist, namely, the material element — consistent and widespread observance of similar practices by States — and the subjective or *opinio juris* element, whereby States are convinced that exercise of their jurisdiction outside their territory is permitted by international law and that the other States accept such conduct. Custom is most important as a basis for the establishment of universal jurisdiction over a crime when a treaty defining or categorizing a crime becomes applicable to a third State that is not a party to the treaty, by virtue of customary law.

3. Third, universal jurisdiction cannot be based exclusively on the domestic legislation of the State seeking to exercise it, unless such jurisdiction is also based, as stated above, on a source of international law. Although the universalization of justice has many positive aspects, it cannot be carried out through unilateral acts. Not only do such acts violate the principles of non-intervention and of equality of States before the law, but they can also contribute to international anarchy by allowing the more powerful States to arrogate the right to dispense justice to weaker States on a selective basis.

4. The fourth point that must be taken into consideration is that a State cannot proceed to exercise its jurisdiction unless the State in whose territory the crime was committed has demonstrated that it is unwilling to carry out the investigation or prosecution, or is unable to do so.

By bearing these points in mind it should be possible to combat impunity for grave crimes against humanity, war crimes and genocide, based on the application of recognized standards of international law and, specifically, the treaties sanctioning international crimes, rather than by resorting to controversial unilateral actions based solely on the domestic law of a State.

To quote the International Court of Justice, “[...] where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights [...]” (*Case Concerning Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, para. 267). Hence, human rights must be defended by way of existing treaties and those who violate those rights and commit crimes against humanity, war crimes or genocide must be punished by way of those treaties rather than by way of unilateral actions.
