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*Translated from Spanish*

## **Permanent Mission of the Republic of Paraguay to the United Nations**

### **Information and observations submitted by the Republic of Paraguay on the scope and application of the principle of universal jurisdiction**

#### **(1) Principle of universal jurisdiction**

According to the principle of universal jurisdiction, some crimes are so serious that they affect the international community as a whole and, as a result, all States have the right, if not the obligation, to prosecute the perpetrators thereof, regardless of their nationality or that of their victims, or of the location where the crimes were committed. This is an exception to the usual rules of jurisdiction that is enshrined in the Paraguayan Constitution, which recognizes a supranational legal order that guarantees human rights, peace, justice, cooperation and the political, economic, social and cultural development of peoples.

#### **(2) Recognition of a supranational legal order in the Constitution of Paraguay**

Article 145 of the Constitution provides:

“About a supranational legal order

“The Republic of Paraguay, on an equal footing with other States, recognizes a supranational legal order which guarantees human rights, peace, justice, cooperation and political, economic, social and cultural development. Such decisions may be adopted only by an absolute majority of each house of Congress.”

The following commentary in the book entitled “Constitución de la República del Paraguay. Comentada, concordada y comparada” (Constitution of the Republic of Paraguay, commented, aligned and compared) explains the relationship between supranationality and the principle of universal jurisdiction:

“Supranationality and fundamental rights: These concepts were reconciled with the emergence of the concept of fundamental rights in international law.

“The promotion of human rights gained impetus in the second half of the last century, following the horrors of the Second World War. The Universal Declaration

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of Human Rights helped to revive the principle of respect for the human person and the inalienable rights of human beings as proclaimed by the United Nations, though it had been preceded by the 1776 United States Declaration of Independence and had also been strongly and universally influenced by the French Revolution of 1789. With the Universal Declaration, those rights acquired a new, international dimension, since they had been proclaimed and made a rallying banner in all countries of the world by the United Nations, an organization established to ensure the peace and security of nations.

“The force and ethical dimension of the Universal Declaration is reflected in the very first sentence of the document: ‘All human beings are born free and equal in dignity and rights’. As Bobbio rightly noted, although the words of the Declaration are not new, the scope of validity of its provisions is.

“This seems so obvious to us, yet it gave rise to drawn-out disputes. However, I believe that nobody would dare to dispute today that the rights contained in the Declaration take precedence over any positive law, and that they exist because the human person exists, as an immediate consequence of ‘being’ human; in other words, they are ontologically innate in human beings. Yet it must not be forgotten that many Governments in fact based their modus operandi on the violation of fundamental human rights.

“These human rights are the first to have acquired a supranational dimension; this means that their implementation and protection are above States, and that States have ceded part of their sovereignty to make that possible. There are instruments, such as human rights conventions of the United Nations and the Organization of American States, and recently, the Treaty of Rome establishing the International Criminal Court, in which **the signatory countries clearly cede their jurisdiction** concerning the prosecution of a certain category of crimes specified therein.

“The paradigmatic case of former President Pinochet of Chile clearly shows how the concept progressively evolved until it reached the legal arena. In that unique case, one country, Spain, requested that Pinochet be extradited by a third country, Great Britain, where he was located, so that he could be tried for crimes committed in another

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location, Chile. This would be considered legal heresy according to traditional doctrine and legislation.

“Crimes, according to this school of thought, must be prosecuted at the location where they were committed, or where they had any consequence. However, based on **the concept of the supranationality of human rights, any judge who might have an interest in prosecuting a crime (in this case there were Spanish citizens and the judge requesting the extradition was Spanish) could hear the case.** The matter was finally resolved through diplomatic channels, but it marked quite a revolution in the rubric of criminal jurisdiction” (emphasis added).<sup>1</sup>

The recognition of universal jurisdiction is not, however, tied to the recognition of supranationality, as shown by comparative constitutional law. The constitutions of other States do not contain provisions similar to our article 143, but that does not prevent those countries from recognizing the type of universal jurisdiction exercised by the International Criminal Court, as Paraguay has done.

### (3) International Criminal Court

The Rome Statute was ratified by Paraguay on 14 May 2001. On 10 December 2002, through Decree No. 19,685, an executive branch inter-agency committee, whose members were appointed by the relevant ministries and other government entities, was established to consider and assess the adoption of legislation to ensure the proper functioning of the system and compliance with the obligations under the Rome Statute, with subsequent input from the Supreme Court of Justice and the Office of the Public Prosecutor. The efforts of that inter-agency committee resulted in the draft bill for the implementation of the Rome Statute of the International Criminal Court, which was submitted to the legislature by the executive branch under Note No. 938 of 7 January 2013.

The draft bill comprises three chapters and 83 articles and, with regard to national and universal jurisdiction, provides:

Article 6 of the draft bill

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<sup>1</sup> Evelio Fernández Arévalos, José Antonio Moreno Ruffinelli and Horacio Antonio Pettit, *Constitución de la República del Paraguay. Comentada, concordada y comparada*, Ed. Intercontinental, 2012. p. 545-546.

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**National jurisdiction and universal jurisdiction. Criminal investigation**

When the commission of an act criminalized under the present Act is brought to the attention of the Office of the Public Prosecutor either ex officio or through a complaint, lawsuit or preliminary police action, the Office shall conduct an investigation in accordance with its functions as they pertain to the act in question, in accordance with national criminal procedure. Paraguayan courts shall also be competent to prosecute crimes committed outside Paraguayan territory by Paraguayan nationals or by foreign nationals, in accordance with the criminal law of Paraguay or international treaties or conventions to which the Republic of Paraguay is a party and is required to implement in its territory.

Article 7 of the draft bill

**“Limitations on national jurisdiction**

National jurisdiction shall not be exercised in the following cases:

1. When an appropriate request is made by the International Criminal Court for the surrender of the person;
2. When an appropriate extradition request is made by the State considered competent in the light of relevant legislation”.

The draft bill had been submitted by the executive branch under Note No. 938 of 7 January 2013 to Congress, where it is currently under consideration.

The adoption of the draft bill would therefore prevent potential jurisdictional conflicts between foreign courts or the International Criminal Court and Paraguayan courts when the latter attempt to exercise universal jurisdiction under article 8 of the Criminal Code of Paraguay and various international treaties ratified by the country.

**(4) Prosecution of offences committed abroad in respect of legal assets enjoying universal protection under the Criminal Code of Paraguay**

The principle of universal jurisdiction is reflected in article 8 of the Criminal Code, which states as follows:

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Article 8- Offences committed abroad in respect of legal assets enjoying universal protection:

- “1. Paraguayan criminal law shall also apply to the following offences committed abroad:
  - “(1) Offences involving explosives, as set out in article 213, subparagraph 1 (2);
  - “(2) Attacks against civil aviation and maritime traffic, as set out in article 213;
  - “(3) Human trafficking, as set out in article 129;
  - “(4) Illicit trafficking in narcotics and dangerous drugs, as set out in articles 37 to 45 of Act No. 1,340/88;
  - “(5) Offences involving the authenticity of currency and securities, as set out in articles 264-268;
  - “(6) Genocide, as provided for in article 319;
  - “(7) Offences that Paraguay is required to prosecute under an international treaty currently in force, even when committed abroad.
- “2. Paraguayan criminal law shall apply only when the perpetrator of such an offence has entered the national territory.
- “3. Punishment under Paraguayan criminal law shall be excluded when a foreign court:
  - “(1) Has found the perpetrator not guilty in a final judgement; or
  - “(2) Has sentenced the perpetrator to a term of imprisonment and the sentence has been served or has prescribed, or the perpetrator has been pardoned”.

The Paraguayan criminal code therefore expressly provides for the criminal prosecution of certain offences committed abroad, such as genocide, human trafficking and illicit drug trafficking. Nevertheless, the list contained in article 8, mentioned above, is not exhaustive, because subparagraph (7) refers to all “offences that Paraguay is required to prosecute under an international

treaty currently in force, even when committed abroad.” Some international treaties containing such an obligation to extradite or prosecute (the *aut dedere aut judicare* principle) are mentioned below.

**(5) Treaties to which Paraguay is a party containing the *aut dedere aut judicare* principle**

Universal jurisdiction can be applied through the *aut dedere aut judicare* principle, under which if the perpetrator of an offence that is so serious that it merits prosecution outside the territory of the State in which it was committed is apprehended in the territory of another State, that State shall be obligated to extradite the suspect to the State claiming jurisdiction to prosecute him or her, or to bring proceedings against that person in its courts. Although this is not the application of the principle of universal jurisdiction *strictu sensu*, because States can decide not to prosecute but to extradite, it is unquestionably one mechanism through which States can cooperate with one another in order to combat impunity for serious offences and to achieve the goal of universal jurisdiction. The following is a brief list of some international conventions in force in the Republic of Paraguay containing the principle of *aut dedere aut judicare*:

The four 1949 Geneva Conventions, which contain the following provision:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.<sup>2</sup>

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

Article 7

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<sup>2</sup> Art. 49 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Art. 50 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Art. 129 of the Geneva Convention relative to the Treatment of Prisoners of War.

The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

The *aut dedere aut judicare* principle is also present in the following provisions of treaties ratified by Paraguay:

- Article 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft – The Hague, 1970
- Article 5 of the International Convention against the Taking of Hostages
- Article 5 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Article 10 of the Convention on the Safety of United Nations and Associated Personnel
- Article 9 of the International Convention for the Protection of All Persons from Enforced Disappearance
- Article 7 of the International Convention for the Suppression of the Financing of Terrorism
- Article 8 of the Convention on the Physical Protection of Nuclear Material (IAEA)
- Article 9 of the International Convention for the Suppression of Acts of Nuclear Terrorism
- Article IV of the Inter-American Convention on the Forced Disappearance of Persons (OAS)
- Articles IV and V of the International Convention on the Suppression and Punishment of the Crime of Apartheid

**(6) Application of the principle of universal jurisdiction in Paraguay, judicial practice<sup>3</sup>**

Under its Constitution of 1992 and its criminal legislation, the Republic of Paraguay is empowered to exercise universal jurisdiction pursuant to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights

<sup>3</sup> Report of the Human Rights Directorate of the Supreme Court of Justice.

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Law and Serious Violations of International Humanitarian Law, annexed to resolution 60/147 adopted by the General Assembly on 16 December 2005.

From a doctrinal standpoint, it should be noted that the approach taken by Paraguay, a State member of the Rio Group, regarding the exercise of such jurisdiction by national courts is similar to that presented by the Permanent Representative of the Republic of Chile, on behalf of the Rio Group, to the Sixth Committee of the General Assembly at its sixty-sixth session in New York, on 12 October 2011, under agenda item 84, “The scope and application of the principle of universal jurisdiction”.

In that regard, it should be reiterated that, for Paraguay, universal jurisdiction is a legal institution of exceptional character with respect to the exercise of criminal jurisdiction, which serves to combat impunity and strengthen justice. Therefore, insofar as universal jurisdiction is a legal institution of international law, the framework for its application and exercise by States is necessarily defined by international law.

Although States have clearly stated that universal jurisdiction, international criminal jurisdiction and the obligation to extradite or prosecute (*aut dedere aut judicare*) are different legal institutions that should not be confused with one another, Paraguay, like the Rio Group as a whole, considers them complementary institutions in the effort to end impunity.

In the domestic law of Paraguay, article 5 of the Constitution provides that “statutes of limitations shall not apply to genocide, torture, the enforced disappearance of persons, kidnapping and murder for political reasons [...]”. That provision reflects Basic Principle IV contained in the annex to resolution 60/147, which states that “statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.”

Similarly, the legislature of Paraguay is currently considering a draft law to amend articles 236 and 309 of the Criminal Code, which should bring the country’s criminal offences into line with those set out in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons, in order to protect human rights and punish and eradicate these practices that violate human rights. The draft law was tabled at the end of May 2009 and submitted for consideration to the Senate committees dealing with human rights;



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constitutional affairs; defence and public security; legislation, codification, justice and employment; and equity, gender and social development.

It should also be noted that Paraguay is a State party to the Rome Statute of the International Criminal Court, pursuant to Act. No. 1,663 of 17 April 2001. On 10 December 2002, by Decree No. 19,685, an executive branch inter-agency committee was established to consider and assess the adoption of legislation to ensure the proper functioning of the system and compliance with the obligations under the Rome Statute. Paraguay has also ratified the International Convention for the Protection of All Persons from Enforced Disappearance. Through Act No. 3,941/10 and pursuant to the hierarchy of laws established in the Constitution, duly ratified and exchanged international instruments take precedence over domestic legislation, thus ensuring that people are protected against such offences.

By its Act No. 3,458/08, the Paraguayan Congress ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted on 26 November 1968, in New York, United States of America, which had also been ratified by the executive branch and incorporated into the country's legal order.

Decision and Judgement No. 195 of 5 May 2008 is emblematic of the manner in which the Supreme Court of Justice applies these principles. In the judgement, the Court ruled that "a State party cannot, under any circumstances, overlook the motives or legal grounds of a plea entered in relation to this type of punishable offence, or contrast the affirmation under examination with the intention of article 5 of the Constitution, which provides for the protection of victims of terrible and reprehensible crimes, a situation based on the position of the international community, which exempts both the substantive and procedural regulations in criminal matters and limits the imprescriptibility of criminal action and of the penalties incurred in relation to such crimes solely and exclusively to 'genocide and torture, in addition to enforced disappearance, kidnapping and murder for political reasons'". On the question of whether statutes of limitations apply to criminal action or to the penalties incurred in relation to such crimes, the Supreme Court determined that no statute of limitations applied in either case. By establishing the imprescriptibility of torture, Paraguay has ensured a high standard of human rights protection and has reaffirmed the principle that the violation of fundamental human rights must not go unpunished.

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