



## **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

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 wa