

*Translated from Spanish*

## **Report of the Republic of El Salvador pursuant to United Nations General Assembly resolution 66/103**

### **The scope and application of the principle of universal jurisdiction**

With regard to the scope and application of the principle of universal jurisdiction, El Salvador is submitting the present report pursuant to resolution 66/103, by which Member States were invited to submit, before 30 April 2012, information and observations on the topic, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice.

By way of introduction, it may be useful to reiterate briefly the observations made by El Salvador in the reports submitted at previous sessions, in order to present the relevant conceptual and regulatory basis before describing recent developments with regard to this important topic.

- First, attention is drawn to the report submitted in 2010 pursuant to General Assembly resolution 64/117, which stated that El Salvador has recognized the principle of universal jurisdiction in its criminal legislation, as follows:

Penal Code of El Salvador.

*Article 10. — Salvadoran criminal law shall also apply to offences committed by any person in a place not subject to Salvadoran jurisdiction, provided that they impair legal rights internationally protected by specific agreements or rules of international law or entail a serious breach of universally recognized human rights.*

Based on this provision, it was recognized that national courts are empowered to apply the principle of universal jurisdiction at the domestic level, not merely to an exhaustive list of crimes but to any crimes the commission of which impairs rights internationally protected by international agreements or universally recognized human rights. However, according to the responses provided by the judiciary upon consultation, in practice there had been no cases giving rise to the application of the said principle as of the date of the aforementioned report.

- The report submitted by El Salvador in 2011 pursuant to General Assembly resolution 65/33 focused on analysing the nature of the principle of universal jurisdiction with the aim of distinguishing it from other similar concepts, and on describing certain basic principles — of which there had at that time been little discussion in the Sixth Committee — that might be useful for determining its scope once a decision had been taken to exercise it in specific cases.

Thus, with regard to the nature of the principle, it was stated that universal jurisdiction, unlike other principles that determine the jurisdiction of a State, is founded exclusively on the nature of the offence, the magnitude and particular gravity of which affect the very foundation of the national and international legal order and, in particular, the recognition of and respect for dignity as a basic value. In that regard, in order for universal jurisdiction to be applied it is not necessary for the crime to have been committed on Salvadoran territory or for persons of Salvadoran nationality to be involved as perpetrators or victims. Consequently, it

was stated that there would be no justification for equating universal jurisdiction with other ways of exercising jurisdiction, or for requiring the presence of elements inherent to the territoriality principle or the personality principle in order for it to apply.

In particular, the requirement for crimes to impair internationally protected legal rights was examined with regard to Salvadoran legislation, which does not establish an exhaustive list of crimes. That requirement entails prior recognition of the principle of infringement, by virtue of which no punishment or security measure may be imposed if the act or omission does not infringe upon or jeopardize a protected legal right; in other words, a good that is fundamental for the individual and society, which must be protected notwithstanding any deficiencies in international law.

In addition, it was clarified that universal jurisdiction is a power exclusive to States, which, in order to prevent impunity for the most serious crimes under international law, exercise this jurisdiction as a last resort in cases where the States of primary jurisdiction fail to act. Consequently, international tribunals — whether they are permanent, such as the International Criminal Court, or ad hoc — do not at present exercise the principle of universality, given that their authority is derived not from this principle but from the consent of the States that created them and are parties to them under specific treaties, though this does not diminish their importance or effectiveness as entities created to advance justice and truth.

With regard to the basic principles that are essential for the application of the principle of universal jurisdiction, attention was firstly drawn to the principle of *ne bis in idem*, or the prohibition of double jeopardy, as an essential guarantee recognized at the national and international levels, the purpose of which is to prevent double or multiple prosecutions and to offer a person who has been tried the legal certainty that, once a final judgement has been issued, he or she will not be tried again on the same grounds. For that principle to apply, however, the trial must have been conducted in accordance with the requirements of the rule of law, with the aim of achieving justice and with respect for due process guarantees. Thus, the principle of *ne bis in idem* would not be violated if the true purpose of the first trial was to help the accused to circumvent his or her criminal responsibility or to subject the accused to conditions that violated any basic rights or guarantees.

Secondly, emphasis was placed on the importance of human dignity and its relationship to the State's right to punish (*ius puniendi*) in all its manifestations, since human dignity constitutes the fundamental purpose of all State activity and serves as the basis for all essential human rights. Consequently, the State applying the principle of universal jurisdiction may not act in a discriminatory manner or infringe in any way upon the human rights of the accused. This entails, inter alia, the prohibition of torture and the general obligation to try the accused in accordance with the minimum standards of due process rights and guarantees established by international law and, in particular, international human rights law.

Lastly, the importance of reparation measures within the framework of the principle of universal jurisdiction was analysed, since it is the persons or groups of persons who have been harmed by the commission of serious international crimes who must, ultimately, see their rights fully restored, regardless of where the criminal proceedings are conducted.

In light of the above considerations, and with a view to the inclusion of additional information on the scope and application of the principle of universal jurisdiction in the report to be prepared by the Secretary-General, as requested by the United Nations General Assembly in resolution 66/103, the most recent developments in relation to this topic are set out below:

- As indicated in reports to previous sessions, article 10 of the Salvadoran Penal Code expressly provides for universal jurisdiction, though without establishing an exhaustive list of crimes, since the key element for application of the principle is the commission of crimes that impair legal rights internationally protected by specific agreements or rules of international law or entail a serious breach of universally recognized human rights.

This requirement, however, does not diminish the importance of prior work to define international crimes within the domestic legal system, since such definition is also a prerequisite for ensuring that the conduct of criminal proceedings is characterized by legal certainty, in that it links the activity of the State to the principle of legality, thereby assuring those subject to the law that their conduct cannot be penalized other than by virtue of a law issued and promulgated prior to the commission of the act deemed to be an offence. For example, according to the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice of El Salvador, this principle “constitutes a guarantee [...] for the individual that he or she may not be subject to any penalty or punishment that has not been previously established, thereby preventing abuses of power”.<sup>1</sup>

In line with the foregoing, the recent reform of the Salvadoran Penal Code, by which the crime of torture was included as a crime against humanity, should be highlighted as a major step forward in the context of universal jurisdiction. The reform is based on the provisions of the Constitution of the Republic that recognize the human person as the origin and purpose of the activity of the State, which is organized to attain justice, legal certainty and the common good, and, furthermore, recognize that every person has the right to physical and psychological integrity.

The reform also derives from the State’s obligation to align national legislation with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the Salvadoran State by means of Legislative Decree No. 833 of 23 March 1994. That instrument requires that its provisions be implemented in good faith, including article 4 thereof, which requires each State Party to ensure that all acts of torture, as well as any attempt to commit torture and any act by any person which constitutes complicity or participation in torture, are offences under its criminal law.

In drafting the reform, particular attention was therefore paid to the definition contained in article 1 of the Convention, according to which the term “torture” means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain

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<sup>1</sup> Constitutional Chamber of the Supreme Court of Justice of El Salvador, Judgement No. 471-2005 (*amparo* proceedings), 22 January 2010.

or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

With respect to the prior regulation of the crime of torture in the Salvadoran legal system, it is important to point out that torture was previously criminalized in article 297 of the Penal Code, under the title “Offences relating to the fundamental rights and guarantees of the person”, the legal right protected being linked primarily to the individual rights of persons and the constitutional provisions establishing that no person shall be subjected to any condition that undermines his or her dignity or involves any form of torture; thus the definition of the crime did not yet incorporate sufficiently clearly its international dimensions. The article in question read as follows:

*Article 297. — Any official or public employee, law enforcement officer or public authority who, in the performance of his or her duties, subjects another person to physical or psychological torture or who, having the power to hinder or prevent it, fails to do so, shall be sentenced to three to six years’ imprisonment and shall be disqualified from holding the corresponding public office or employment for the same period (repealed).*

Following the reform, the crime of torture was moved to title XIX of the Penal Code relating to “crimes against humanity”. Its inclusion under that title could bring about the future application of the principle of universal jurisdiction in specific cases, since it is now possible to link it to legal rights protected internationally, in this case, in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as to the violation of universally recognized rights such as the right to personal integrity.

Moreover, the wording of the article was modified with the aim of broadening its scope and adapting it to cover different means of commission. One of the main changes introduced was the express prohibition of grave acts such as coercing, instigating or inducing others to commit torture and using torture as a means of coercion or intimidation.

Furthermore, the reform increased the statutory penalty for the crime of torture — which had previously been 3 to 6 years’ imprisonment — to 6 to 12 years’ imprisonment, to which is added the accessory penalty of disqualification from the corresponding public office or employment for the same period. Following the legislative reform, the crime is now defined as follows:

*Article 366-A. Any official or public employee, public authority or law enforcement officer who, in the performance of his or her duties, intentionally inflicts severe pain or suffering, whether physical or mental, on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, or who instigates, induces or consents to such acts or does not prevent their commission, shall be subject to 6 to 12 years’ imprisonment and disqualification from the corresponding public office or employment for the same period.*

*Any person who is instigated or induced to act by, or acts on behalf of, the persons referred to in the above paragraph or acts as an accomplice shall be subject to the general regime of perpetration and participation provided for in book I, title II, chapter IV, of this Code.*

*The definition of torture shall not include physical or mental pain or suffering arising from or inherent in legal measures.*

In conclusion, El Salvador maintains its interest in strengthening the fundamental role played by the principle of universal jurisdiction in combating impunity for crimes that affect humanity as a whole. This is reflected both in its express recognition of the principle and in its review of those criminal offences that could give rise to its application, as demonstrated by the aforementioned reform relating to the crime of torture.

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