
Translated from Spanish

Scope and application of the principle of universal jurisdiction

Report of the Republic of El Salvador in response to United Nations General Assembly resolution 71/149

The Republic of El Salvador transmits the present report in response to resolution 71/149, in which Member States are invited to submit, before 28 April 2017, information and observations on the scope and application of universal jurisdiction, including, where appropriate, information on the applicable international treaties and their national legal rules and judicial practice.

El Salvador has indicated previously that universal jurisdiction, because its purpose is to prevent impunity for serious international crimes including genocide, torture and war crimes, is an essential instrument within the rule of law.

In relation to recent national judicial practice, one important example is decision No. 44-2013/145-2013, of 13 July 2016, by which the Constitutional Chamber of El Salvador declared several articles of the General Amnesty (Consolidation of the Peace) Act, applicable in the country for crimes committed during the Salvadoran armed conflict from 1980 to 1992, to be unconstitutional.

The main considerations of the Constitutional Chamber in that unconstitutionality decision are set out below:

“Crimes against humanity. Such international crimes deeply shock the moral conscience of humanity and human dignity on a universal scale. They are particularly serious inhuman acts that show cruelty towards human life; the debasement of dignity; and the destruction of human values and non-derogable fundamental rights or international jus cogens norms. As a result, they truly are State crimes and international crimes, because they cause serious harm to humankind.

“In particular, they cause harm to the fundamental rights of victims, their relatives and society as a whole, in view of the harm they cause to individual and collective rights and to vital social interests, which are legitimately protected in a democratic society. By their nature, such crimes are not subject to any statute of limitations

under international law, and national legal measures, whether legislative or of any other kind, cannot be used to prevent investigation, establishment of the truth or the application of independent justice, or to deny victims justice and full reparation, leaving such crimes unpunished, crimes which in all cases must be subject to prosecution, extradition, trial and punishment of perpetrators, and therefore cannot be the object of an amnesty or pardon.

“Furthermore, pursuant to international law and doctrine and under international jurisprudence, such crimes are crimes against humanity. Consequently, it is in the national and international public interest to prevent and investigate them, identify those materially and intellectually responsible and punish those perpetrators under criminal law, in proportion to the severity and impacts of their crimes.

“The inapplicability of any statute of limitations to such crimes, which is recognized in international law, makes it possible to invoke universal jurisdiction to combat and end impunity, and to ensure justice, truth and full reparation for victims.

...

“For its part, the Inter-American Court of Human Rights has ruled that ‘crimes against humanity include the commission of inhuman acts, such as murder, committed in a context of generalized or systematic attacks against civilians. A single illegal act as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise.’ For the Court, ‘according to the International Law *corpus iuris*, a crime against humanity is in itself a serious violation of human rights and affects mankind as a whole.’ (Judgment of 26 September 2006, *Case of Almonacid-Arellano et al. v. Chile*, paras. 96 and 52).*

“In that case, the Court also stated that ‘the obligation that arises pursuant to international law to try, and, if found guilty, to punish the perpetrators of certain international crimes, among which are crimes against humanity, is derived from the duty of protection embodied in Article 1(1) of the American Convention. This obligation implies the duty of the States Parties to organize the entire government

* *Translator's note*: The Spanish original refers to paragraph 52, but according to the text of the judgment on the Court's website, the correct number is 105..

system, and in general, all agencies through which the public power is exercised, in such manner as to legally protect the free and full exercise of human rights. As a consequence of this obligation, the States must prevent, investigate, and punish all violations of the rights recognized by the Convention and, at the same time, guarantee the reinstatement, if possible, of the violated rights, and as the case may be, the reparation of the damage caused due to the violation of human rights. If the State agencies act in a manner that such violation goes unpunished, and prevents the reinstatement, as soon as possible, of such rights to the victim of such violation, it can be concluded that such State has not complied with its duty to guarantee the free and full exercise of those rights to the individuals who are subject to its jurisdiction' (para. 110).

...

“The adoption of such legislative measures as absolute, unrestricted and unconditional amnesties, or ones likely to deny justice and reparations for victims, hide the truth and encourage impunity, is incompatible with obligations arising from constitutional law and international fundamental rights law because these are crimes and violations of non-derogable fundamental rights, responsibility for which cannot be evaded on the pretext that trying such crimes would be an obstacle to the attainment of peace in the country.

...

“This decision provides a guarantee of legal security and justice for the most serious crimes against fundamental rights committed by both parties, and ensures that an amnesty is consistent with the Constitution and the norms of international law, so that it contributes to national forgiveness and reconciliation. Therefore, for the reasons described and based on article 10 of the Constitutional Procedure Act, in the name of the Republic of El Salvador, this Chamber rules as follows:

“1. Article 1 of the General Amnesty (Consolidation of the Peace) Act, in the part that reads: “A broad, absolute and unconditional amnesty is granted to all those persons who in whatever way might have participated in the commission of crimes...”, is hereby declared, in a general and mandatory ruling, unconstitutional

because that objective and subjective scope of the amnesty violates the right to access to justice and to legal protection – protection of fundamental rights – and the right to full reparations for the victims of crimes against humanity and war crimes that are serious violations of international humanitarian law, since it prevents compliance with the obligations of the State to prevent, investigate, try, punish and ensure full reparations, and therefore violates article 2, paragraph 1, and article 144, paragraph 2 of the Constitution, in relation to articles 1.1 and 2 of the American Convention on Human Rights, article 2.2 of the International Covenant on Civil and Political Rights and article 4 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) of 8 June 1977.

“2. Article 4, paragraph (e), of the General Amnesty (Consolidation of the Peace) Act, in the part that provides: “The amnesty granted through this Act in all cases extinguishes civil responsibility” is hereby declared, in a general and mandatory ruling, unconstitutional, because it prevents full reparations to victims, in particular the right to compensation for moral damages recognized in article 2, paragraph 3 and article 144, paragraph 2, of the Constitution, in relation to articles 1.1 and 2 of the American Convention on Human Rights.

...

“5. For the purposes of this decision, it shall be understood that: (i) The crimes excluded from this amnesty are those imputed to either party that can be classed as crimes against humanity and war crimes that are serious violations of international humanitarian law. The parties to the conflict agreed to exclude them from the amnesty in the peace accords (chapter I, armed force, paragraph 5, ending impunity), and the Legislative Assembly subsequently excluded them in the text of the National Reconciliation Act of 1992 (art. 6), which reads “this amnesty shall not apply to the serious acts of violence that occurred after 1 January 1980, whose mark on society demands with the greatest urgency public knowledge of the truth, wherever they were committed by”; accordingly the crimes excluded from the amnesty after the end of the armed conflict are those cases contained in the Report of the Commission on the Truth, and any of equal or greater seriousness and importance that could be

imputed to both parties and that were investigated and tried by the competent authorities.

...

“(iii) Passages rendered null and void because they are unconstitutional have been removed from the Salvadoran legal order and shall not be applied by any administrative or legal authority, nor be used in defence by any private person or public servant, nor continue to have any effect in proceedings, procedures, trials or actions related to acts that could be classed as crimes against humanity or war crimes that are serious violations of international humanitarian law.

“(iv) The time during which such provisions were in effect shall not be invoked in order to impede, delay or deny the effective and immediate exercise of the rights recognized in the constitutional and international norms examined in this decision. None of their clauses, or others similar in content and effects, shall ever be included by the Legislative Assembly in future subsequent legislation related to measures of Salvadoran transitional justice”.

This decision of unconstitutionality is of special importance because it recognizes the obligation of the State to protect, respect and safeguard individuals and their fundamental rights; and its duty to try those responsible for serious international crimes. One of the main challenges of the processes set in motion after the end of internal armed conflicts or non-international armed conflicts is the attainment of peace, social harmony, national reconciliation and the restoration of constitutional normality. Another challenge is the determination of legal responsibility for crimes against humanity and war crimes that are serious violations of international humanitarian law.

This is also an important precedent in the matter of the principle of universal jurisdiction because it is recognized expressly as a legal concept applicable to serious international crimes and as a means to guarantee justice, truth and full reparations for victims. Such considerations reflect the nature of universal jurisdiction as a principle that does not require national or territorial links, only the existence of crimes that, owing to their seriousness for the international community, must not go unpunished.

In conclusion, and consistent with national judicial practice, the Republic of El Salvador reiterates its commitment to contribute to the study of the topic in the work of the Sixth Committee of the United Nations General Assembly.
