
[Translated from Spanish]

Permanent Mission of El Salvador to the United Nations

DNU-0055

A.550.AG

New York, 3 May 2010

Sir,

I have pleasure in writing to you concerning resolution 64/117 on the scope and application of the principle of universal jurisdiction, adopted by the General Assembly of the United Nations at its sixty-fourth session, on 15 January 2010.

Please find annexed hereto the response of El Salvador to the request contained in the resolution for States to provide information and observations on the subject from a national perspective.

Accept, Sir, the assurances of my highest consideration.

Carmen María Gallardo Hernández
Ambassador
Permanent Representative

Mr. Vaclav Mikulka
Secretariat of the Sixth Committee of the General Assembly
New York

MINISTRY OF FOREIGN AFFAIRS

Department of Legal Affairs

Report under resolution 64/117 adopted by the General Assembly
of the United Nations on 15 January 2010

The Government of the Republic of El Salvador,

1. Bearing in mind resolution 64/117 adopted by the General Assembly of the United Nations on 15 January 2010, at its sixty-fourth session, on the scope and application of the principle of universal jurisdiction, in particular its first paragraph, which reads:

1. Requests the Secretary-General to invite Member States to submit, before 30 April 2010, information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice, and to prepare and submit to the General Assembly, at its sixty-fifth session, a report based on such information and observations";

II. Took appropriate steps, in particular by requesting reports from the judiciary, for the purpose of preparing the document referred to in the aforementioned resolution, on the scope and application of the principle of universal jurisdiction in the State of El Salvador;

III. Having completed the necessary inquiries, submits herewith its report on the subject.

Context of the principle of universal jurisdiction

Universal jurisdiction refers to the capacity to try the perpetrators of specific crimes irrespective of their nationality or the place where the crimes were committed. It is thought to apply to a series of crimes that States may or must punish, on grounds of international interest.

Universal jurisdiction may be exercised through the enactment of a domestic law (universal legislative jurisdiction) or the investigation and trial of accused persons (universal contentious legislation). The former is much more common in the State's practice and is generally necessary for investigation and trial. It is possible, however, at least in principle, for a court to determine its jurisdiction directly on the basis of international law and for it to exercise universal contentious jurisdiction without relying in any way on domestic legislation.

Scope and application of the principle of universal jurisdiction

Taking up this idea, it should be said that El Salvador makes use of universal legislative jurisdiction based on article 10 of the Penal Code in force, which stipulates that: "...Salvadoran criminal law shall also apply to offences committed by anyone in a place not subject to Salvadoran jurisdiction, provided that they affect property internationally protected by specific agreements or rules of international law or seriously undermine universally recognized human rights".

It follows from this basis in law that national courts are empowered to apply the principle in question as a matter of jurisdiction.

However, as will be pointed out further on, even if there were no legislative basis in domestic law to underpin the viability of universal jurisdiction, there exists an international normative framework that authorizes El Salvador to observe this principle.

In general, the potential scope of the universal principle of criminal jurisdiction is determined by law, whether it be domestic or international. The Salvadoran legal system provides for this principle from both angles, in accordance with the ideas set out below.

Applicable international treaties

International legal instruments can regulate questions of universal jurisdiction. However, in practice, there is a tendency to consider that the provisions of international law are not self-applicable and that it necessary to legislate in order to define the jurisdiction applicable to any given offence.

In the State of El Salvador, the provisions of international law do not form part, *per se*, of the legal system. Article 144 of the Constitution stipulates that international treaties concluded by El Salvador with other States or international organizations "shall constitute the laws of the Republic once they have entered into force, in conformity with the provisions of the treaties in question and of this Constitution".

Accordingly, international treaties must undergo a process of ratification by all those who are instrumental in the determination of legislative will, according to the nature of the rule. In this specific case, after negotiations between the executive branch and the entity serving as the source of the international instrument, the Legislative Assembly must issue the corresponding decree of ratification before taking the measures laid down by that instrument for it to enter into force.

Thus it is that, when the conditions have been met for the ratification and entry into force of international instruments, they are considered in El Salvador to be laws of the Republic.

Taking up this point, and reviewing the international norms in force in our country, it is noted that neither the International Covenant on Civil and Political Rights nor the Inter-American Convention against Torture contains any mention of universal jurisdiction.

However, the webpage of the International Committee of the Red Cross offers a consolidated review of the application of universal jurisdiction over war crimes,¹ and from this the interesting fact emerges that, in accordance with the four Geneva Conventions, States parties are required to apply universal jurisdiction to war crimes. As a State party, El Salvador is bound by that rule.

¹ ICRC information kit on the national punishment of violations of international humanitarian law

In other words, **the Geneva Conventions, in addition to article 10 of the Penal Code reproduced above, provide a legal basis for the application of legal jurisdiction.**

Provisions of domestic law

The primary source of law in the Salvadoran normative system is the Constitution. It follows that the provisions of the Constitution are of fundamental importance in determining the place of customary law or treaty law in the national legal system.

In El Salvador, the principle of universal jurisdiction is not expressed in provisions of constitutional rank. There does exist, however, a criminal normative framework (secondary law) that explicitly provides for the exercise of universal jurisdiction when permitted or demanded by international law. Accordingly, the sole requirement for possible application of the principle in question is to determine that it is not to the detriment of the precepts of the Constitution.

So far as domestic law is concerned, it should be noted that article 11 of the Salvadoran Constitution establishes the rule that no one shall be tried twice for the same offence (*ne bis in idem*), which is a condition for the application of the principle of universal jurisdiction and which in turn would be a limit not entertained by the Penal Code (article 10), but which prevails by virtue of its being enshrined at the pinnacle of the legal order. Hence, either universal jurisdiction may properly be applied only to cases where the accused person has not been tried for the same offence,

at either the national or the international level, or account must be taken at least of penalties already imposed abroad for an offence of which a judicial body wishes to take cognizance in the name of universal jurisdiction.

In any event, provision is usually made for universal jurisdiction in the ordinary criminal code of several States, in their codes of criminal procedure, in independent military criminal codes or in laws on judicial powers. El Salvador provides for it as a principle in its Penal Code.

As already mentioned, the Salvadoran Penal Code regulates the principle of universality in its article 10, according to which "Salvadoran criminal law shall also apply to offences committed by anyone in a place not subject to Salvadoran jurisdiction, provided that they affect property internationally protected by specific agreements or rules of international law or seriously undermine universally recognized human rights".

In connection with this principle, article 11 lays down that "in the cases referred to in the preceding two articles, the law in force shall apply in the place where the punishable act has been committed if its provisions are more favourable to the accused person than those contained in Salvadoran criminal law; however, preference shall be given to the claim of the State in whose territory the offence has been committed, if that State calls for prosecution before criminal proceedings have been initiated".

That being said, commentators on the Penal Code offer no guidance on the subject, since they simply note that the principle is one that applies to crimes against human rights protected by the international treaties ratified by El Salvador.

The wording of article 10 of the Salvadoran Penal Code is broad in that it authorizes prosecution for any act. It can thus be stated that our courts can take cognizance of matters unrelated to our country or our citizens. In this connection, and by way of a judicial benchmark, the Spanish Constitutional Court² demanded that there should be a linking point with Spain in order for the courts in that country to be able to apply universal jurisdiction.

Domestic judicial practice

To complement the foregoing information, recourse was had to the Supreme Court of Justice, which was requested to inquire into the application of the principle of universal jurisdiction by the relevant courts. After studying the matter, on the basis of replies received from San Salvador magistrate's courts, trial courts throughout the country and the Constitutional Chamber, the Supreme Court specified that, to date, none of the aforesaid judicial bodies had applied the principle in question.

² STC 237/2005 of 5 October 2005.

Moreover, out of a sample of some 35 criminal courts throughout the country (trial courts country-wide and magistrate's courts in San Salvador), more than **half sent in reports and all stated that, to date, none had applied article 10 of the Penal Code.**

To sum up, all the reports received contained negative replies. In other words, although the Penal Code provides for the principle of universal legislation, in practice there have been no cases that would serve to show how it is applied.

Conclusion

The wording of the Salvadoran Penal Code reflects a recognition of criteria of universal justice: *any crime*, committed by *anyone*, in *any territory*.

In addition to the Penal Code, the Geneva Conventions on international humanitarian law also provide for this principle, but they have never been applied for that purpose.

Application of the principle of universal jurisdiction is legally viable in El Salvador, under both domestic law and international law. However, up to now the relevant courts have not had recourse to it. It is possible that the criterion of a linking point between elements of the crime and the Salvadoran State (e.g. territory, nationality, legally protected interest) may come to serve as a material cause of the effectiveness of article 10 of the Penal Code.

