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The Permanent Mission of El Salvador to the United Nations presents its compliments to the Codification Division of the United Nations and transmits herewith the report of El Salvador on the scope and application of the principle of universal jurisdiction, as requested by the United Nations General Assembly in its resolution 65/33, dated 6 December 2010.

The Permanent Mission of El Salvador to the United Nations takes this opportunity to convey to the Codification Division of the United Nations the renewed assurances of its highest consideration.

Codification Division
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Scope and application of the principle of universal jurisdiction

In 2010, the State of El Salvador submitted a general report to the United Nations on the application of the principle of universal jurisdiction at the domestic level. That report, which was prepared in collaboration with the judiciary, made reference to the power accorded to criminal courts under the principle of universal jurisdiction to hear specific cases. However, given the absence of the requisite conditions, that power has never been exercised.

In view of the above, and in recognition of the importance of advancing universal jurisdiction as a mechanism that enhances the rule of law and prevents impunity for the most serious crimes at the international level, El Salvador hereby submits, via the present report, a set of additional observations on the scope and application of the principle of universal jurisdiction. This submission is pursuant to General Assembly resolution 65/33, by which the Assembly invited Member States to submit, before 30 April 2011, information and observations on the issue, including on the relevant applicable international treaties and domestic legal rules and judicial practice.

Current status of the principle of universal jurisdiction in El Salvador

As established in the report submitted last year, the principle of universal jurisdiction is not provided for in Salvadoran constitutional law at the level of domestic legislation. However, the principle has been recognized in secondary legislation within the current Criminal Code, which has not been amended for several years. The provision reads as follows:

Principle of universality

Article 10 — Salvadoran criminal law shall also apply to offences committed by anyone in a place not subject to Salvadoran jurisdiction, provided that they affect rights that are internationally protected by specific agreements or norms of international law or seriously violate universally recognized human rights.

Based on the wording of this article, under the principle of universality, national criminal courts are authorized to investigate certain offences, regardless of where they were committed or of the nationality of either the perpetrators or the victims of the offences. It is apparent that the principle of universality was formulated very broadly, and will no doubt be the object of judicial interpretation in due course. However, we believe that the nature and basic context of the principle of universal jurisdiction must be analysed, independently of its eventual application by national courts. We have also identified several elements that, in our view, are closely related to the application of the principle and which may function as useful tools in defining its scope.

The nature of universal jurisdiction

First, we note that a satisfactory analysis of universal jurisdiction should begin with the essence or core of the concept, which then leads to the identification of certain particular characteristics that distinguish the principle from similar concepts with which it is often confused, such as the obligation to extradite or prosecute.

The concept of universal jurisdiction necessarily leads us to the central idea of “jurisdiction”, which is understood in general terms as a power derived from State

sovereignty, and which is exercised exclusively by independent courts, as determined by law, that are charged to apply the law to a specific case, issue a judgment and enforce it.

However, this power is not simply an expression of State power, but also reflects a specific dimension related to the human individual, who constitutes the origin and purpose of State action, by virtue of which the State is obligated to provide jurisdictional protection. This means that every person is entitled to report any violation of his or her rights to the competent State authority by filing a claim. The State is then obligated to provide protection in response to arbitrary and illegal acts within its legal domain by means of the mediation instrument designed for this purpose: judicial proceedings at all jurisdictional levels and at every stage of the process.

Furthermore, owing to the fact that jurisdiction derives from sovereignty, it has the undeniable qualities of being unique and exclusive, thus permitting the investigation of all conflicts occurring within its territory, in which, as a general rule, foreign jurisdictions may not intervene. However, it is clear that this exclusively territorial criterion considerably limits the ability to prosecute and adjudicate certain offences, which, if not tried in the State where they were committed, would otherwise go unpunished. This is why most legal systems also recognize State jurisdiction when other elements connected to the crime are present, such as the nationality of the perpetrator or the victim of the crime, or more recently, the nature of the crime and its international significance.

With regard to the geographic area that is covered by criminal legislation, Salvadoran law defines the scope of its jurisdiction by applying three basic principles, as follows:

The first criterion determining the exercise of State jurisdiction is the *principle of territoriality*, stipulated in article 8 of the Criminal Code, which states that: “Salvadoran criminal law will be applied to criminal acts committed entirely or in part in the territory of the Republic, or in places subject to its jurisdiction”. Thus, territoriality is a guiding principle that, based on State sovereignty, recognizes the application of Salvadoran law to any criminal act committed on national territory.

The principle of territoriality is complemented by a second criterion called the *personal principle* or *nationality principle*, also known in legal doctrine as the active personality principle. This principle is provided for in national legislation in closed list form, i.e., the law stipulates the specific cases in which the perpetrator of the offence may be tried by Salvadoran courts when the criminal act was not committed on State territory. In that regard, article 9 of the Salvadoran Criminal Code provides that “Salvadoran criminal law shall also apply: (1) To offences that were committed abroad by an individual in the service of the State, when the individual has not been indicted in the place the offence was committed, owing to the privileges attached to his or her position; (2) To offences that were committed by a Salvadoran abroad or in a place not subject to the particular jurisdiction of a State; and [when such an offence] infringed upon the legal rights of another Salvadoran; and (3) To offences committed abroad by Salvadorans, when extradition is requested and denied on account of their nationality, or by foreigners, [when such offences] infringed upon the legal rights of Salvadorans”.

The first case stipulated in this article clearly aims to prevent impunity that may result when Salvadoran citizens who have committed criminal acts abroad are not investigated in that territory by virtue of the rules of international law that provide for the immunity of certain individuals. The provisions of Nos. 2 and 3 of article 9 of the Criminal Code also seek to obtain judgment, under Salvadoran law, of crimes over which a sovereign foreign State is not exercising its jurisdiction.

Finally, the *principle of universality* is the third means used to determine the scope of jurisdiction of Salvadoran law. Needless to say, this principle does not align with the other principles outlined, given that an offence does not need to have been committed on Salvadoran territory for this principle to apply, nor do Salvadoran citizens need to have been involved, whether as perpetrators or victims of the act.

This is the concept referred to in article 10 of the Criminal Code when it states that the application of criminal law, in this case, refers to offences committed “by anyone” and “in a place not subject to Salvadoran jurisdiction”, thus excluding the principle of territoriality and the extraterritorial active personality principle.

Based on the exclusion of these principles, it may be concluded that universal jurisdiction, in contrast to the other principles, is founded exclusively on the nature of the offence, given that the magnitude and particular gravity of the offence affects the very foundation of the national and international legal order, that is, the recognition of and respect for dignity as a basic value, which must not be disregarded under any circumstances. Precisely this rationale was recognized in the Princeton Principles on Universal Jurisdiction drafted in 2001,¹ which state that universal jurisdiction does not take into account where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim or any other connection to the State exercising such jurisdiction.

Specifically, under the Criminal Code, the principle of universality applies not only to the commission of “offences”, but also to the infringement of specific legal

¹ Princeton Principles on Universal Jurisdiction, Principle 1: “For purposes of these Principles, universal jurisdiction is criminal jurisdiction *based solely on the nature of the crime*, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction. 2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such a judicial body. 3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1), provided that it has established a prima facie case of the person’s guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings. 4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as ‘international due process norms’). 5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law”.

rights. This is in line with the Principle of Infringement,² which is explicitly recognized in Salvadoran law, and under which “no punishment or security measure whatsoever shall be imposed if the act or omission does not infringe upon or jeopardize a legal right protected by criminal law”.³

This phrasing reflects the idea that under democratic criminal legislation, a punishment should not simply be based on failure to obey a law, but instead on the real infringement or jeopardizing of a legal right. This is why the commission of the offence must affect “rights that are internationally protected by specific agreements or norms of international law or seriously violate universally recognized human rights”⁴ in order for universal jurisdiction to apply.

Based on the foregoing analysis, it may be concluded that universal jurisdiction cannot, under any circumstances, be equated with other ways of exercising jurisdiction, nor should the exercise of universal jurisdiction require the presence of elements inherent to other principles, such as the principle of territoriality or the active personality principle. We therefore reaffirm that the special and distinguishing quality of the principle of universality is that its application is determined not by the location in space or the subjects involved in an offence, but rather by the nature of the offences to which it is applied, as determined under international law.

In addition, we are of the view 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 recourse in the face of the inaction of States that are legally qualified in the first instance to carry out investigations. Consequently, international tribunals — whether they are permanent, such as the International Criminal Court, or ad hoc tribunals — do not at present exercise the principle of universality, given that their authority is not derived from this principle, but instead is derived from the consent of the States that created and adhere to them, in accordance with specific treaties, which does not diminish their importance or effectiveness as entities created to advance justice and truth.

Analysis of the application and scope of universal jurisdiction

We attach special importance to this topic as we believe that there are several issues closely tied to the principle of universal jurisdiction that have, to date, been little discussed in the Sixth Committee of the United Nations General Assembly.

First, we have noted an emphasis on the idea that it is incumbent on each State to prohibit particularly grave offences within its domestic legal system, as well as on the consequent obligation of the State to exercise its jurisdiction when such offences are committed on its territory. Furthermore, the recognition of the principle of universal jurisdiction has established the possibility that one State may exercise its jurisdiction in the face of the inaction or ineffectuality of another. However,

² “In democratic criminal law, failure to obey a law cannot constitute the basis for the punishment, although it may denote unethical behaviour, which is certainly significant, it must be complemented by an infringement of legal rights. Thus, the requirement that a legal right must have been infringed upon or jeopardized is linked to the concept of material illegality, which implies that the act is illegal not only because it goes against a criminal precept, but also because it jeopardizes it; if this risk is not present, it is not a legal criminal offence”.

³ Criminal Code of El Salvador, article 7.

⁴ Criminal Code of El Salvador, article 10.

based on this point, we note that little attention has been paid to such principles as have the effect of limiting the State's right to punish (*ius puniendi*) and that should guide the judgment of grave crimes that lead to the application of universal jurisdiction.

This does not deny that the State in whose territory the crime has been committed presents the best conditions for conducting the legal proceeding required, as, obviously, the evidence may be more easily obtained in the place the crime was committed and a sentence can be enforced. Most importantly, this course of action has the advantage of generating a feeling in the general population that justice has been served, owing to their proximity to the proceedings, and, even more so, in the victims, who are able to see the violation of their rights redressed.

In that regard, the present analysis applies to the moment when the need to exercise the principle of universal jurisdiction in specific cases has already become apparent, requiring the development of a process that, owing to the criminal nature of the issue and its *ultima ratio*, must include a whole series of rights and guarantees that mark the limits of State power, regardless of where the process is conducted.

- ***Ne bis in idem***

As noted in the report of the Secretary-General prepared on the basis of comments and observations of Governments of 2010, El Salvador has observed that universal jurisdiction may be properly applied only to cases where the accused had not been tried for the same offence, at either the national or international level.⁵

We would like to take the opportunity to add that a basis for the principle of *ne bis in idem* or the prevention of double jeopardy is not only stipulated in the domestic legislation of El Salvador, but the principle in itself constitutes an essential guarantee recognized in the majority of laws.

This recognition has been extended to the international level and may be found in international human rights instruments, such as the American Convention on Human Rights, which stipulates in its article 8.4 that “an accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause”. This provision is more suitable than the one provided in the International Covenant on Civil and Political Rights, which instead of referring to “the same cause” uses the term same “offence”, thus reducing the scope of this important guarantee.

The Constitutional Division has issued a similar opinion, noting that: “*ne bis in idem* is a constitutional guarantee, the purpose of which is to prevent double or multiple prosecutions and to offer the legal certainty to the person who has been tried once a definitive sentence has been issued, that he or she will not be tried again on the same grounds. The term ‘same cause’, which is preferable to the concept of the ‘same offence’, defines the protective purpose of the guarantee, which is to safeguard the person who has been tried from the risk of being subjected to a new ruling based on the same cause — which encompasses the identity of the subject,

⁵ United Nations General Assembly; report A/65/181: “The scope and application of the principle of universal jurisdiction”, report of the Secretary-General prepared on the basis of comments and observations of Governments, para. 79.

the object and the factual context, as well as the legal background of the case — that would definitively affect his or her legal status”.⁶

In light of the foregoing, we are of the view that universal jurisdiction must be exercised while respecting the prohibition of double jeopardy, which involves analysing in all cases the *eadem res*. This would assume a limit to the exercise of the jurisdiction if the acts investigated are the same as those attributed to the person involved in a prior trial, in which case “the fact that the past act could be prosecuted using different legal concepts would be irrelevant”.⁷

However, this does not imply that the principle of *ne bis in idem* should be considered absolute in nature, as it does not apply to the conduct of any formal trial, but rather requires the conduct of a legal trial in accordance with the requirements of the rule of law, and that was aimed at achieving justice and that respected due process guarantees. The principle of *ne bis in idem* would therefore not be violated if the true purpose of the prior trial was to help the accused to circumvent his criminal responsibility or to subject the accused to conditions that violated his basic rights and guarantees.

- **Principle of human dignity**

The recognition of human dignity is closely related to the human being as such, for, as stipulated in article 1 of the Universal Declaration of Human Rights: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Thus, the principle of human dignity has an ontological dimension that reflects the intrinsic condition of the nature of all human beings and not their actions. This dimension applies to all persons, regardless of their personal or social conditions. For this reason, human dignity must be recognized, promoted and protected by the national and international legal order. This is the fundamental purpose of all State activity.⁸

Inasmuch as punitive activities or the right to punish (*ius puniendi*) constitute a part of the large sum of State powers, they are also closely tied to the principle of human dignity. All agents of the justice system must therefore act within the boundaries of this principle, which means respecting the human condition in all circumstances, including in the context of legal proceedings that concern offences infringing on internationally protected rights or that seriously violate universally recognized human rights.

⁶ Constitutional Division of the Supreme Court of Justice of El Salvador; Habeas Corpus Sentence 198-2005 of 4 September 2006.

⁷ Ibid.

⁸ Constitutional Division of the Supreme Court of Justice of El Salvador; Sentence on Unconstitutionality Ref.1-92 of 19 July 1996: “[...] the Constitution speaks figuratively of the State’s objectives [...] since such State objectives can only have as their end purpose the realization of the ethical goals of the human person, State organs should therefore not lose sight of the fact that their activities must always be oriented toward the realization of the human person, both in the individual and social capacity, without placing ahead of this supreme goal supposed ‘objectives’ of the community as an organic whole, or of the State, as an entity superior to the human person, as in such an event, its actions would be unconstitutional [...].”

The recognition of human dignity therefore serves as the basis for a series of constraints that must be respected with regard to the person who has been charged with a crime, regardless of where the person is tried.

In that respect, we note that the first limitation on a State's right to punish should be the *prohibition of discrimination* which, in line with the development of international human rights law, has been recognized in the vast majority of international human rights instruments, and has even been recognized as a *jus cogens* norm, implying that its non-derogable quality has been recognized.

For example, article 24 of the American Convention for Human Rights stipulates that "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law". This precept is also asserted, specifically with regard to detained persons, in the "Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas", which states: "Under no circumstances shall persons deprived of liberty be discriminated against for reasons of race, ethnic origin, nationality, colour, sex, age, language, religion, political or other opinion, national or social origin, economic status, birth, physical, mental, or sensory disability, gender, sexual orientation, or any other social condition."⁹

In the same vein, we find it especially important to establish the *prohibition of torture*¹⁰ (primarily any act that undermines the right to life) as a limitation on the actions of the State exercising universal jurisdiction, given that, by virtue of the principle of human dignity, anyone who is tried or even found guilty must not be exploited by the State or be subjected to measures that violate his or her human rights.

In that respect, the jurisprudence of the Inter-American Court of Human Rights has consistently indicated that "[t]he prohibition of torture is absolute and non-derogable, even in the most difficult circumstances, such as war, the threat of war, the fight against terrorism, and any other crime, martial law or state of emergency, civil war or commotion, suspension of constitutional guarantees, internal political instability, or any other public disaster or emergency".¹¹

Furthermore, although the prohibition of torture assumes the inability to impose penalties that materially constitute cruel, inhuman or degrading treatment or punishment, fulfilment of this principle is not limited to this final stage of the legal

⁹ Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas; Principle II, Equality and non-discrimination: "Under no circumstances shall persons deprived of liberty be discriminated against for reasons of race, ethnic origin, nationality, colour, sex, age, language, religion, political or other opinion, national or social origin, economic status, birth, physical, mental, or sensory disability, gender, sexual orientation, or any other social condition. Therefore, any distinction, exclusion, or restriction that is either designed to or has the effect of undermining or impeding the recognition, enjoyment, or exercise of the internationally recognized rights of persons deprived of liberty, shall be prohibited."

¹⁰ Inter-American Convention on Human Rights; Article 5, the Right to Personal Integrity: "2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

¹¹ Inter-American Court of Human Rights, Case of Maritza Urrutia v. Guatemala; Merits, Reparations and Costs; Judgment of 27 November 2003; Series C No. 103; para. 89.

process. Rather, the prohibition of torture is enforceable at all times, including while a trial is under way and especially when the person is under detention.

In criminal matters, this broad scope is required in order for the prohibition of torture to be respected, given that, as noted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, “most acts of torture, and certainly the most cruel and egregious, happen in the first few hours or days after a person’s arrest, and while he/she is technically under preventive detention”.¹²

Based on the foregoing analysis, we conclude that, to the extent that universal jurisdiction may be used by any State in application of a unique legal interest shared by all other States to prosecute those responsible for serious crimes that affect the interests of the international community in general, the conduct of a trial to determine the guilt of a given individual must maintain a minimum standard of rights and guarantees in line with international law, particularly international human rights law.

Thus, although universal jurisdiction may be formulated in national legislations as a principle that recognizes certain cases of international significance, it must be exercised in tandem with other requirements inherent to a just and impartial criminal trial, and observe full respect for the dignity of the person, regardless of his or her status as the accused or the victim of the crime.

- **Reparation measures**

Reparation measures are another important issue related to the prosecution of serious crimes of international significance, given that any attempt to bring justice through a criminal trial,¹³ both at the national and international level, must be accompanied by due reparation to the victims of the specific crime. It is the person or groups of persons that have suffered damage or injury — in this case, of a grave nature — who must see their rights restored.¹⁴

For this reason, we believe that, as undeniable as the grounds for the exercise of universal jurisdiction may be, such as the gravity of the crime and its international significance, any judgment would be incomplete, and its outcomes purely symbolic, if the direct or indirect victims of the given offence are forgotten. Furthermore, such victims should be treated with humanity and respect for their dignity and human rights, and their and their families’ physical and psychological well-being, privacy and security must be guaranteed.

¹² United Nations Human Rights Council; sixteenth session; A/HRC/16/52: Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: Juan E. Méndez; 3 February 2011; para. 64.

¹³ “El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI: Memoria del Seminario”, preface by Antônio Cançado Trindade, 2nd ed., San José, Costa Rica: Inter-American Court of Human Rights, 2003. Presentation by Sergio García Ramírez, p. 129: “When a violation occurs without penalty, or damage without reparation, the law is in crisis, not only as an instrument for resolving a particular dispute, but as a means of resolving them all, that is, to ensure peace through justice.”

¹⁴ *Ibid.*, p. 141: “A violation is a creditable and declarable normative assumption; reparation is its legal consequence. The nature and characteristics of the first will determine those of the second, which can be and is often expressed under different terms: thus, the reparation will reflect the nature of the interest that has been violated or will adopt another, always compensatory, quality.”

In that regard, we would highlight General Assembly resolution 60/147 of 16 December 2005, which includes the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, as well as General Assembly resolution 40/34, which contains the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”. These documents should serve as the foundation for handling cases of great import, such as those in which the exercise of universal jurisdiction would apply.

For example, the first of these documents recognizes a broad concept of “victim”, defining the term as referring to “persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law”; the term also includes, where appropriate, “the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization”.

In accordance with this approach, victims require adequate reparation, which should be determined primarily by the principle of *restitutio in integrum* or full restitution, given that the fundamental objective is to re-establish the situation the person was in before the crime was committed, although in some cases this may not be entirely possible.

For each case, reparation as a generic right of victims may take various forms depending on the nature of the damage caused and is not limited to compensation for material or immaterial damage caused, but may also involve adequate reparation in other areas, such as provision of adequate psychological care or measures to offset the damage caused to the victim’s life plans. Furthermore, all reparations should aim to help survivors to overcome their feelings of pain, isolation and stigmatization.

In view of the fact that many States concur in their designation of genocide, torture, slavery and crimes against humanity in general as offences subject to universal jurisdiction, we believe that, in addition to providing adequate reparation to victims through the measures outlined above, it is also critically important to issue guarantees of non-repetition, evidently within the limits established by State sovereignty.

Finally, we reiterate the importance of working to develop a principle of universal jurisdiction that is in accordance with the guiding principles of the various branches of international law, as well as the study, in this context, of effective prevention, suppression and reparation measures concerning the most serious crimes against humanity, which is the obligation of all States.
