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Permanent Mission of El Salvador to the United Nations

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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
United Nations
New York

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

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.

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

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
