

Translated from Spanish

Permanent Mission of Costa Rica to the United Nations

New York, 30 April 2010
ECR-431-2010

Sir,

I have the honour to transmit herewith, pursuant to General Assembly resolution A/64/117, information and observations on the scope and application of the principle of universal jurisdiction in Costa Rica.

Accept, Sir, the renewed assurances of my highest consideration.

(Signed) Jairo **Hernández M**
Ambassador, Deputy Permanent Representative
Chargé d'affaires

His Excellency
Mr. Ban Ki-moon
Secretary-General
United Nations
New York

On the application of the principle of universal jurisdiction in Costa Rica

The legitimacy of the principle of universal jurisdiction in Costa Rica is linked directly to the support which our country provided from the outset to the process of domestic approval of the Rome Statute and the International Criminal Court.

The Rome Statute of the International Criminal Court is par excellence a fundamental instrument for the development of international law and the elimination of massive violations of human rights and international humanitarian law.

Costa Rica acceded to the Rome Statute on 7 October 1998, following which the Legislative Assembly submitted the draft law of that international legal instrument to the Costa Rican Constitutional Chamber for an advisory opinion on its constitutionality. The Chamber voted in favour, by a resolution adopted at 2.56 p.m. on 1 November 2000. In that resolution, in addition to procedural aspects on the part of the Legislative Assembly, the Chamber reviewed some substantive issues of the Rome Statute and its application in the light of Costa Rica's domestic laws.

The Rome Statute was approved finally by the Legislative Assembly pursuant to Law No. 8083 of 7 February 2001 and the ratification instrument was deposited with the Secretary-General of the United Nations on 7 June 2001.

As indicated at the time, and pursuant to article 96, paragraph (a) of the Constitutional Jurisdiction Act and article 10 of the Political Constitution, the draft law for the approval of the Rome Statute had to be submitted to the Constitutional Chamber of the Supreme Court of Justice for an advisory opinion on its constitutionality. This is a prerequisite for the legislative approval of any international convention or treaty.

The purpose of this advisory opinion, as outlined in article 1 of that law, is to guarantee supremacy of the regulations and principles of the Constitution and those of international and community law in force in the Republic, the uniform interpretation and application of such regulations and principles, and the basic rights and freedoms enshrined in the Constitution or in the international human rights instruments in force in Costa Rica. Pursuant to article 98 of the Constitutional Jurisdiction Act, the advisory opinion shall be issued following approval of the draft law on first reading and before final approval.

While it is clear that Costa Rica completed the ratification phase without major obstacles, and that, according to constitutional jurisprudence, international instruments not only have a value similar to the Political Constitution but, to the extent that they provide greater rights or guarantees to people, take precedence over the Constitution (Decision No. 2313-95), some vitally important topics contained in the Rome Statute warranted special attention from our constitutional judges, particularly concerning immunities and life imprisonment.

With regard to immunities or the applicability of the Statute to all persons without distinction as to their official functions, contrary to article 110 of the Constitution concerning the immunity of members of the Legislative Assembly, the Constitutional Chamber considered that the existence of such a privilege does not prevent the simultaneous introduction of proceedings in the International Criminal Court along with *desafuero* (immunity and impeachment) proceedings in domestic courts. As a result, the International Criminal Court does not need to wait for a

pronouncement from the Costa Rican Legislative Assembly in order to initiate its own proceedings.

In this regard, the Constitutional Chamber considered that the immunity which members of the Legislative Assembly enjoy, while constituting an obstacle to the normal conduct of criminal proceedings at the national level, could not be considered so sacrosanct as to impede the proceedings of an international tribunal such as the International Criminal Court. Thus, there would be no need to wait for a pronouncement by the Legislative Assembly in order to initiate proceedings.

It should be noted, however, that the International Criminal Court cannot convict an “accused” in absentia, because that would violate the constitutional guarantees set forth in international human rights instruments, particularly the guarantee of due process. This guarantee implies the need for the accused to be present to defend himself or herself against the charges or to exercise control over the deposition of witnesses. Apart from that, nothing prevents the International Criminal Court from initiating proceedings even when the accused is not physically present.

Concerning the penalty of life imprisonment referred to in articles 77 and 78 of the Statute of the International Criminal Court, the Constitutional Chamber pointed out the conflict between article 40 of our Political Constitution, which proscribes life imprisonment, and article 80 of the Statute, which stipulates that nothing in this Part affects the application by States of penalties prescribed by their national law.

In this regard, the Chamber reasoned that this process must be subordinated to the Costa Rican system in that it cannot be applied if our constitutional laws do not provide for life imprisonment. The previous interpretation was undoubtedly based on the fact that in order to proceed with the surrender of persons requested by the International Criminal Court, it should also be understood that this surrender shall take into account the nationality of the person, and that the possible penalty to be imposed if the person is found guilty of the alleged charges shall not be life imprisonment or other penalties — such as capital punishment — that are not recognized in Costa Rican law, otherwise it would violate constitutional principles and thus would not be possible.

Regarding article 89 of the Rome Statute, which empowers the Court to request from States Parties the arrest and surrender of an accused person for trial before the International Court and which is not compatible with article 32 of the Constitution, whereby “no Costa Rican may be compelled to abandon the national territory”, the Chamber placed the law in the historical context in which the Constitution was drafted. It considered that the purpose of the law was to protect citizens from expatriation for political reasons, which is why it now constitutes a guarantee against the arbitrariness of government authority. The Constitutional Chamber then went on to consider the evolution of the Political Constitution in terms of fundamental rights and noted that, while it obviously strengthens guarantees such as that contained in article 32, at the same time it frames it, in this unfinished struggle for freedom and human dignity, as a guarantee whose effectiveness cannot be so sacrosanct as to impede, in and of itself, the achievement of the goals of this struggle. It frames and limits the guarantee, so it is not an absolute guarantee as mentioned above, but one that must coexist with other instruments for the protection of fundamental rights, and could even be stripped of

its literal meaning of unlimited extendibility in favour of the need to maintain the underlying values and principles of justice.

Based on this reasoning, the Constitutional Chamber concluded that, when construed in the light of these considerations, article 89 of the Statute is not incompatible with article 32 of the Constitution. This means, in other words, that the constitutional guarantee laid down by article 32 is not an absolute guarantee, but a limited one, and that in order to determine its extent, it is necessary to look at what would be reasonable and proportionate to uphold the guarantee. In the spirit of the Constitution, recognition of this guarantee should be compatible with the development of international human rights law.

In this process of implementing the Rome Statute of the International Criminal Court, the executive branch submitted the draft law “Criminal Repression: Punishment of War Crimes and Crimes against Humanity”.

Through this draft law, which was approved by the Legislative Assembly on 2 May 2002 and passed as Act No. 8272, Costa Rica established two types of penalties under articles 378 and 379 of the Penal Code dealing with war crimes and crimes against humanity (the crime of genocide has been recognized in the Penal Code since it was adopted in 1970).

It should be noted that articles 378 and 379 do not define war crimes and crimes against humanity, but refer to international treaties and instruments on the subject to which Costa Rica is a party, including the Rome Statute, which is mentioned expressly in article 379.

Likewise, Act No. 8272 amended article 7 of the Penal Code by characterizing as an international crime the commission of any act that is contrary to international humanitarian law under international treaties signed by Costa Rica and established that Costa Rican courts have jurisdiction over such crimes even if they are committed beyond the borders of Costa Rica and regardless of the nationality of the perpetrator.

The principle of universal jurisdiction was therefore recognized in 2002; prior to the Penal Code amendment, acts contrary to international humanitarian law committed outside Costa Rican borders were not subject to domestic jurisdiction owing to the principle of territoriality in criminal law.

The work of the Costa Rican Committee of International Humanitarian Law (CRCIHL), created by Executive Decree No. 32077-RE of 21 May 2004, as part of the Ministry of Foreign Affairs and Worship continues the process of incorporating the Rome Statute into Costa Rican legislation.

Since its creation, the CRCIHL has worked to align the country’s legislation on the subject to higher standards of protection and to bring greater precision to criminal offences using appropriate legal techniques.

On 17 July 2007, in an act to commemorate the IX anniversary of the adoption of the Rome Statute, the CRCIHL submitted to the Legislative Assembly a proposal to complement draft law No. 16272, “Addition to Book II of the Penal Code, Act No. 4573, of a new Title XVIII, Crimes against Persons and Property Protected by International Humanitarian Law”. The draft in question is now before the Special Human Rights Committee of the Legislative Assembly for review and report.

The draft characterizes the crimes contained in the Rome Statute and amends the above-mentioned articles 375, 378 and 379, which do not describe the illegal act but refer to the text of the Rome Statute. Instead, the draft describes, exhaustively, crimes against humanity and war crimes.

In the draft, stiffer penalties are imposed for the commission of the crimes of genocide, crimes against humanity and war crimes. Currently, the terms of imprisonment range from 10 years to 25 years; with the amendment, the penalties will range from 25 years to 40 years:

Article 378. Genocide. A sentence of between 10 and 25 years' imprisonment shall be imposed on any person who, with the intent to destroy, in whole or in part, a national, ethnic, racial, religious, political or trade union group or any identifiable group based on gender, sexual orientation, culture, social status, age, disability or health, commits any of the acts mentioned below:

- (1) Killing of one or more members of the group.
- (2) Torture, enforced disappearance, deprivation of liberty, rape, forced pregnancy with intent of changing the ethnic composition of the group, inflicting of inhumane or degrading treatment or serious injury on the physical or mental integrity of a member or members of the group. For the purpose of this paragraph, deprivation of liberty and rape shall be determined as stipulated in the Code, based on their seriousness.
- (3) Deliberately depriving a member or members of the group of resources indispensable to their survival; causing serious health problems; systematic exploitation of their households or conditions of life which may jeopardize their lifestyle or bring about the destruction in whole or in part of the group.
- (4) Measures intended to prevent births within the group.
- (5) Transfer by force or under threat of one or more members of the group to another group, or displacement of the group from its place of settlement.

For the purpose of this article, killing, torture, enforced disappearance and forced pregnancy shall be understood as defined in the following article.

Article 379. Crimes against humanity. A sentence of between 25 and 40 years' imprisonment shall be imposed on any person who, as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, commits or gives orders for the commission of any of the following acts:

- (1) Murder, which means that which is stipulated for this crime in conformity with the present code.
- (2) Extermination, which includes the intentional infliction of conditions of life, inter alia, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.
- (3) Enslavement, which means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.
- (4) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.

(5) Torture, which means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

(6) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity; for the purpose of this article, “forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant.

(7) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender grounds. “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

(8) Enforced disappearance of persons, which means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. The offence of enforced disappearance shall be considered a continuing offence as long as the fate or whereabouts of the victim has not been established. The judge may consider the following mitigating circumstances for the crime of enforced disappearance: (a) that the victim was released unharmed in less than 10 days; (b) that information was provided or actions were taken to facilitate the safe return of the missing person.

(9) Deportation or forcible transfer of population, which means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

(10) The crime of apartheid, which means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.

(11) Other inhumane acts of a character similar to those established in this article that intentionally cause great suffering, or serious injury to body or to mental or physical health.

For the purpose of this article, “attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in this article against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

War crimes

Article 380. Killing of protected persons

A sentence of between 25 and 40 years’ imprisonment shall be imposed on any person who, in connection with or during the course of an armed conflict, causes the death of a protected person under international conventions on humanitarian law ratified by Costa Rica.

For the purpose of this article and the other rules of this title, protected persons shall be defined in accordance with international humanitarian law, as follows:

- (1) Members of the civilian population;
- (2) Persons who do not participate in hostilities and civilians in the hands of the opposing side;
- (3) Wounded, sick or shipwrecked persons located outside the combat area;
- (4) Medical or religious personnel located outside the combat area;
- (5) Journalists on assignment or war correspondents;
- (6) Combatants who have put down their weapons following their capture, rendition or other similar cause;
- (7) Persons who before the start of hostilities were considered stateless or refugees;
- (8) Any other person who meets this condition under the 1949 Geneva Conventions (I, II, III and IV) and Additional Protocols I and II of 1977, as well as others that have been ratified on the subject.

Similarly, **cooperation** with the International Criminal Court is contemplated under the amendment, as follows:

Article 415. Scope — Conditions of Extradition

- (1) The crimes and offences listed in articles 375, 378 and 379 and in Title XVIII shall apply to:
 - (a) Crimes and offences committed or whose effects shall be felt in the territory of the Republic or in areas under its jurisdiction or which have been committed against Costa Rican nationals.
 - (b) Crimes and offences committed abroad by Costa Rican nationals, whether they are public officials or not, civilians or military, provided the accused has not been absolved or convicted abroad or, in the latter case, has not completed his or her sentence.
- (2) When a person suspected of committing one of the crimes or offences listed in articles 375 and 378 to 411 of this Code is present in the territory of the Republic or in places under its jurisdiction, the State of Costa Rica has the obligation to take the necessary measures to exercise its jurisdiction in respect of the said crime or offence, unless it has received a request for surrender to the International Criminal Court or unless it has agreed to extradite the individual, and it shall prosecute the latter as if the crime or offence had been committed in the territory of the Republic, regardless of where it was committed and of the nationality of the suspect or the victims.
- (3) National jurisdiction shall not be exercised in the following cases:
 - (A) In the case of crimes or offences that fall under the jurisdiction of the International Criminal Court if:
 - (a) The surrender is requested by the International Criminal Court.

(b) The extradition is requested by the competent State under international treaties or conventions in force for the Republic.

(c) The extradition is requested by the competent State, there being no treaties or conventions in force with the Republic; in such a case, without prejudice to the other legal requirements, the requesting State must have ratified the Rome Statute of the International Criminal Court in order for the extradition to be granted.

(C)* In the event that competing requests are received for surrender to the International Criminal Court and for extradition to third States, the process to be followed shall be set forth in article 90 of the Rome Statute.

(D) In the case of crimes or offences that are not under the jurisdiction of the International Criminal Court if extradition is requested by the competent State.

(4) The crimes or offences listed in articles 375 and 378 to 411 of this Code shall not be considered political crimes or ordinary crimes related to political crimes or crimes for which punishment is being sought for political reasons.

(5) Pardons or amnesties shall not be applicable to international crimes as defined in this Code or to crimes committed against persons or property protected by international law in accordance with articles 375 and 378 to 411 of this Code.

The **assistance** to the Court is also contemplated in the Code as follows:

Article 416 — Any request for assistance or cooperation or surrender received from the International Criminal Court or any of its organs shall be submitted to the Supreme Court of Justice within 48 hours.

Oversight of the formal requirements of a request for cooperation or assistance shall fall under the responsibility of the executive branch and the Supreme Court of Justice, with the Supreme Court of Justice having the final say on the matter.

Lastly, the draft will add an article to the Code of Criminal Procedure which will indicate that criminal proceedings for the crimes listed in articles 375, 378 and 379 (and in the Rome Statute) shall be imprescriptible, regardless of when they were committed.

In the elaboration of the previous draft, we were assisted by the International Committee of the Red Cross (ICRC). We also had formal and informal consultations with experts of specialized agencies, independent consultants, national experts in criminal law, among others. The International Committee of the Red Cross provided assistance on the subject of war crimes, while an expert from Amnesty International provided informal assistance on the subject of crimes against humanity.

To promote the Rome Statute, Costa Rica also participates in regional meetings and other forums where States are called upon to ratify the instrument and to pass laws for its implementation.

* *Translator's note:* There is no subpara. (B) in the Spanish text, nor is there any missing page.