

Translated from Spanish

Legal considerations concerning the scope and application of the principle of universal jurisdiction

Ministry of Foreign Affairs

Department of International Legal Affairs

Internal Working Group on Concepts

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I. Preliminary considerations

With regard to the item entitled “The scope and application of the principle of universal jurisdiction” included in the report of the sixty-fifth session of the General Assembly* and with a view to the forthcoming debate on the item at the sixty-sixth session, pursuant to General Assembly resolution 65/33 of 6 December 2010, the Government of Colombia submits the following information and observations concerning the scope and application of the principle of universal jurisdiction in Colombia, in order to contribute to the analysis to be carried out and to the report which the Secretary-General has been requested to submit.

In the legislation of the Republic of Colombia there is no express provision concerning the application or existence of the principle of universal jurisdiction; however, Colombia is a State party to various treaties which, in principle, provide for the exercise of national jurisdiction over certain acts that are contrary to international law, generally on the basis of a treaty obligation and the observance of customary international law.

Having made this initial clarification, cases, norms and situations will be described that reflect Colombia’s position on this principle, bearing in mind that there is no legal precedent in Colombia of a specific act or case where a person was tried and/or convicted in exercise of the principle of universal jurisdiction.

II. Legal considerations

A. The Constitution

Colombia’s Constitution (hereinafter “the Constitution”), in the chapter dealing with the fundamental rights of persons (nationals and aliens), provides as follows:

[...] Article 12

No one shall be subjected to enforced disappearance or to torture or cruel, inhuman or degrading treatment or punishment. [...]

* *Translator’s Note:* The text refers erroneously to the sixty-fifth session of the International Law Commission.

Article 17 of the Constitution provides that:

[...] All forms of slavery, servitude and trafficking in human beings are prohibited. [...]

The acts mentioned in these two articles of the Constitution reflect the level and type of protection that the Colombian State must provide in order to suppress and punish, inter alia, violations of these rights, which also constitute international crimes, hence the ability of the Colombian State, in principle, to exercise its jurisdiction in order to punish such acts and thereby safeguard the fundamental rights enshrined in the Constitution.

In line with the aforementioned fundamental constitutional rights, the legal rights being protected can be linked with rights that have special hierarchy in international criminal law, including:

(i) **Enforced disappearance:** International Convention for the Protection of All Persons from Enforced Disappearance, signed at New York on 20 December 2006.¹

(ii) **Torture and other cruel, inhuman or degrading punishment:** Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, signed on 10 December 1984.²

(iii) **Slavery:** Slavery Convention, signed at Geneva on 25 September 1926.

(iv) **Servitude:** Abolition of Forced Labour Convention, adopted at Geneva on 25 June 1957.³

(v) **Trafficking in persons:** Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at Palermo on 15 November 2000.⁴

Given the above list and corresponding international instruments, that reflect the special significance that such acts have in both domestic (constitutional) law and international law, it is useful to refer to article 93 of the Constitution, which provides that:

International treaties and agreements ratified by Congress which recognize human rights and prohibit their restriction during states of emergency shall take precedence over domestic legislation. The rights and obligations enshrined in this Constitution shall be interpreted in accordance with the international human rights treaties ratified by Colombia.

Addendum. Act No. 2/2001, article 1. The State of Colombia may recognize the jurisdiction of the International Criminal Court as established in the Rome Statute adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries and may therefore ratify this treaty in accordance with the procedure established in this Constitution.

¹ Colombia is a signatory to the Convention (27 September 2007).

² Colombia has been a State party since 8 December 1987.

³ Colombia has been a State party since 7 June 1963.

⁴ Colombia has been a State party to both the Convention and the Protocol since 4 August 2004.

The acceptance of treatment of substantive matters under the Rome Statute which is at variance with the guarantees contained in the Constitution shall have effect only within the scope of the matters regulated in the Statute. [...]

B. Criminal legislation and its development through constitutional jurisprudence

Colombia's Penal Code (Act No. 599 of 2000) and Code of Criminal Procedure (Act No. 906 of 2004) have been relevant to the debate on the applicability of the principles of international criminal law in the context of domestic law, even though they do not expressly refer to the principle of universal jurisdiction. Since they are relatively new (one was adopted in 2000 and the other in 2004), they reflect the international commitments that the Colombian Government has made through treaties and customary international law and the rights and obligations enshrined in the Constitution and *ius puniendi*.

Colombian criminal law therefore recognizes the growing concern about the suppression of violations that seriously compromise human rights, a situation which the application of the international principle of universal jurisdiction is intended to mitigate, on the understanding that universal jurisdiction enables States to prosecute and punish acts that are contrary to international law within the limits established in domestic law.

The efforts to establish a universal criminal justice system are fully in line with this stance, as evidenced by the negotiation, adoption, accession to and ratification of transnational criminal law instruments which, in many cases (as will be analysed later), are harmoniously incorporated into national criminal law.

This transnational criminal law reflects the interest that States have in expanding their jurisdiction beyond their national territories (and their own nationals) in order to effectively implement international law within the context of domestic criminal and constitutional obligations and guarantees.

The following articles of Colombia's Penal Code are significant in this regard:

[...] Article 14: Territoriality. Colombian criminal law shall apply to all persons that infringe it in the national territory, with the exceptions established in international law.

A punishable act shall be deemed to have occurred:

1. In the place where the act took place, in whole or in part.
2. In the place where the act should have taken place but did not.
3. In the place where the result occurred or should have occurred. [...]

Colombia's Constitutional Court, in judgment No. C-554 of 2001, case D-3231, with judge Clara Inés Vargas Hernández presiding, noted that:

[...] Based on this analysis, article 17 of the new Penal Code allows for this possibility in accordance with article 9 of the Constitution, which establishes that Colombia's foreign relations are based on, inter alia, the principles of international law accepted by Colombia, in particular what is referred to as the *principle of universal jurisdiction*.

4.8. This principle, which is of a customary nature, is expressly set out in various international conventions to which Colombia is a party, such as the conventions against torture, genocide, apartheid and illicit traffic in narcotic drugs. It is also set out in numerous judicial cooperation agreements entered into by Colombia, which have been endorsed by this Court, on the understanding that cooperation in investigations does not, in and of itself, violate *non bis in idem*. In this regard, it should be noted that this Court has already indicated that *the principle of universal jurisdiction is a mechanism for international cooperation in combating certain activities which are repudiated by the international community and that it coexists with, but does not supersede, the ordinary jurisdictional competencies of States, as expressly stated in the treaties in which it is established.* [...].⁵ (Emphasis added).

With respect to “territoriality by extension” in Colombia’s criminal law, the Penal Code provides:

[...] Article 15. Territoriality by extension. Colombian criminal law shall apply to any person who engages in punishable acts on board a ship or aircraft belonging to or operated by the State while it is away from the national territory, with the exceptions established in international treaties or agreements ratified by Colombia.

It shall also apply to any person who engages in such acts on board any other Colombian ship or aircraft while on the high seas, unless criminal proceedings have been initiated abroad. [...].

With regard to “extraterritoriality”, the Penal Code stipulates that:

[...] Article 16. Extraterritoriality. Colombian penal law shall apply:

1. To any person *who commits a crime abroad against the existence or security of the State, against the constitutional regime, or against the economic and social order*, with the exception of the actions defined in article 323 of this Code, or against the public administration, or who *counterfeits the national currency or is guilty of financing terrorism and administering resources linked to terrorist activities*, even if such person has been acquitted abroad or convicted, and given a lesser sentence than is provided for under Colombian law.
2. To any person who is in the service of the State of Colombia, enjoys immunity under international law, and commits a crime abroad.
3. To any person who is in the service of the State of Colombia, does not enjoy immunity under international law, and commits abroad a crime that is not mentioned in paragraph 1, unless he has been tried abroad.

⁵ The Constitutional Court further noted that [...] based on the principle of modified monism, international norms have limited primacy in domestic law, in that they cannot negate the validity of national provisions simply because they conflict with those provisions; what happens is that, in each specific case, national law will have to yield to the higher-ranking law. See judgment No. C-1189 of 2000. [...].

4. To any national to whom the preceding paragraphs do not apply and who is present in Colombia after having committed a crime abroad where the penalty under Colombian criminal law is a term of imprisonment of at least two (2) years and such person has not been tried abroad.
5. To any alien to whom paragraphs 1, 2 and 3 do not apply and who is present in Colombia after having committed a crime abroad against the State or against a Colombian national which is punishable under Colombian law with a term of imprisonment of at least two (2) years, unless the alien has been tried abroad.
6. To any alien who has committed a crime abroad against another alien, provided that the following conditions apply:
 - (a) The alien is present in Colombian territory;
 - (b) In Colombia the crime is punishable by a term of imprisonment of at least three (3) years;
 - (c) The crime is not political; and
 - (d) A request for extradition has been denied by the Colombian Government. If extradition is not approved, a criminal trial shall be conducted. [...] (Emphasis added).

In accordance with the aforementioned article, Colombia's Penal Code applies to nationals who commit a crime abroad even when they enjoy diplomatic immunity, or who, without being entitled to such protection, are abroad in the service of the Colombian State.

It also applies to nationals who commit a crime punishable under national law with a penalty of more than two (2) years and who have not been tried abroad, since the incorporation into domestic law of certain categories of crimes derived from international instruments has paved the way for the criminalization of this category of offences.

The Penal Code also applies to aliens who commit a crime in Colombia or who enjoy diplomatic immunity while in the service of a foreign State, in accordance with international law.

With regard to universal jurisdiction, the possibility of extending national jurisdiction is essentially predicated on the international obligation of States to cooperate in the punishment and suppression of crimes recognized by international law, regardless of the place where they are committed.

In this regard, crimes (depending on their definition, gravity and relationship to international instruments) which are committed partially in a State, beyond the borders of a State, or in a third State, take on a general-interest character, in accordance with the aforementioned criteria. As a result, every effort must be made to safeguard internationally protected legal rights by prosecuting perpetrators who seek impunity by escaping from a State.

In the light of the foregoing, a criminal who is apprehended in a third State must be prosecuted or extradited if the territorial State refuses to initiate criminal proceedings.⁶

Article 16 of Colombia's Penal Code makes a distinction between the application of universal jurisdiction and the obligation to prosecute or extradite, in that universal jurisdiction allows any State to prosecute a perpetrator once it has established a violation, whereas extradition is essentially the power of a State to request or deliver a perpetrator to the State that has been injured by the latter's conduct, according to the limitations set out in its [positive] domestic law.

As for the issues raised in the context of document A/65/181 of 29 July 2010 in relation to the application of criminal "extraterritoriality" and universal jurisdiction when the perpetrator has already been convicted in another State, Colombia's Constitutional Court has said that:

[...] The disputed phrase does not limit the application of the principle of non bis in idem capriciously, but seeks to protect the judicial sovereignty and primacy of domestic law, to the extent that it authorizes the State of Colombia to reach agreement with other States whereby, in certain cases, each country that has acceded to an international instrument reserves the right to prosecute and punish certain acts, even if they have been the subject of proceedings initiated abroad.

It is also useful to bear in mind that, as the Court has indicated on many occasions, notwithstanding their enshrinement in the Constitution and their importance, fundamental rights are not absolute; they must therefore be harmonized with one another and with the other rights and values protected by the Constitution, because, without this indispensable balancing exercise, social coexistence and institutional life would be impossible. Indeed, what the legislator does in articles 8 and 17 of Act No. 599 of 2000 is precisely to harmonize the guarantees of *res judicata* and *non bis in idem* with the underlying principle of State sovereignty.

Before the establishment of the disputed rule, the Constitutional Court had already recognized the possibility of granting exceptions to the principle of res judicata and non bis in idem in international law, as envisioned in its judgment No. C-264 of 1995.

Constitutionally valid exceptions to the principle of *res judicata* include those set out in article 16, paragraph 1 of Act No. 599 of 2000, which indicates that *the crimes set out therein constitute violations of economic, political and legal sovereignty or in other words, of national legal rights which Colombia's legal*

⁶ With regard to universal jurisdiction and *aut dedere aut judicare*, it was mentioned in the report in document A/65/181 that some Governments had cautioned against confusing universal jurisdiction with the obligation to extradite or prosecute (*aut dedere aut judicare*). As a general matter, it was noted that universal jurisdiction was a basis for jurisdiction only and did not itself imply an obligation to submit a case for potential prosecution. In that sense, universal jurisdiction was quite distinct from the obligation to extradite or prosecute, whose implementation, according to some comments, was subject to conditions and limitations set out in a particular treaty containing the obligation. Universal jurisdiction involved a criterion for the attribution of jurisdiction, whereas the obligation to extradite or prosecute was an obligation that was discharged once the accused was extradited or once the State decided to prosecute an accused based on any of the existing bases of jurisdiction.

authorities, as guardians of such rights, undoubtedly have every interest in punishing.

The denial of the status of res judicata in this case is based on the special relationship of subsidiarity which exists between the State and its representative who is involved in a crime abroad, as well as on the recognition of diplomatic immunity which per se prevents full investigation and prosecution by an authority of a foreign country.

Lastly, the conditions in which international conventions on the topic are negotiated and their conformity with the Constitution are aspects that will be analysed at the appropriate time when they come up for review by the Constitutional Court. However, it is not a violation of article 29 of the Constitution, for public treaties to determine certain situations in which judgments of the signatory States do not have the status of *res judicata* in domestic law. [...].⁷ (Emphasis added).

It may therefore be seen that, even though the principle of universal jurisdiction is not expressly stated, Colombia's penal law and constitutional jurisprudence confirm its interpretative character and value. Thus, to continue the analysis of domestic penal law in order to contribute to the international debate that is to take place, one aggravating circumstance may be identified as:

[...] Article 58

3. When the punishable act is attributable to intolerance and discrimination based on the race, ethnic origin, ideology, religion, beliefs, gender or sexual orientation, illness or handicap of the victim. [...]

As for specific crimes⁸ and in accordance with internationally recognized categories of crimes, which may include crimes of international law and, ultimately, the possible application of universal jurisdiction, the following may be noted:

1) Article 101: Genocide

Judgment No. C-177 of 2001 of the Constitutional Court:

[...] This Court finds that the expanded protection against genocide for political groups which is established by the disputed rule cannot be called into question, since it is well known that the regulations contained in international treaties and covenants provide only a minimum level of protection, so that States cannot be prevented from providing expanded protection in their domestic legislation.

Hence, national laws are not precluded from applying a broader concept of genocide, provided that they retain the essence of the crime, which consists in the systematic and deliberate destruction of a human group that has a specific identity, as political groups undoubtedly do.

Rather, in the opinion of this Court, and before issues of constitutionality are raised, criminalization of the systematic annihilation of a political group by the extermination of its members is fully supported by the values and principles

⁷ Judgment No. C-554 of 2001, case No. D-3231 of the Constitutional Court. Judge Clara Inés Vargas Hernández presiding.

⁸ These crimes are covered in book II of Colombia's Penal Code.

that inform the 1991 Constitution, including coexistence, peace and unrestricted respect for human life and the existence of human groups as such, regardless of their ethnic origin, nationality or political, philosophical or religious beliefs. It should be borne in mind that the work of the Constituent Assembly aimed precisely to institutionalize constructive strategies of political coexistence, in response to the situation of violence and armed conflict. As a result, many of the provisions of the Constitution derive from and attempt to satisfy Colombians' yearning for the consolidation of peace.

In the opinion of this Court, the strict and specific suppression in Colombia's Penal Code of acts that constitute crimes against humanity will undoubtedly contribute to that effort, because it must be recognized that many cases of extermination in Colombia that could be regarded as genocide are of a political nature.

The Court believes that the applicant is right in raising the issue of the disputed phrase of the regulation — which was included in article 322^a of Act No. 589 of 2000 that amended the Penal Code in order to criminalize genocide in Colombian penal law — since that phrase is clearly at variance with article 93 of the Constitution, which states that:

International treaties and agreements ratified by Congress which recognize human rights and prohibit their restriction during states of emergency shall take precedence over domestic legislation. The rights and obligations enshrined in this Constitution shall be interpreted in accordance with the international human rights treaties ratified by Colombia.

Indeed, this Court finds that the Colombian State, far from adopting relevant legislative measures consistent with the international obligations which it had undertaken — in particular upon acceding to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, which, as has already been indicated, it approved through Act No. 28 of 1959 — that required it to criminalize and severely punish acts considered to be crimes against humanity, undermined the very objective sought by its accession by restricting the protection of the right to life, personal integrity and individual freedom to situations where the victim of the impugned actions is a member of a national, ethnic, racial, religious or political group “acting within the limits of the law”. By so doing, it sacrificed the full force and unrestricted protection afforded to such rights by both international humanitarian law and international human rights law and the treaties and international conventions codifying that law. [...] ⁹ (Emphasis added).

2) Article 104. Aggravating circumstances of the crime of homicide

[...] 9. *Of an internationally protected person* other than those persons envisaged in title II of this book and diplomatic agents, in accordance with the international treaties and conventions ratified by Colombia. [...] (Emphasis added).

⁹ “Advocation of genocide” is also penalized as a *crime of international law* in article 102 of Colombia's Penal Code.

3) Article 135: Homicide of a protected person

[...] Article 135. Homicide of a protected person. Anyone who, in a situation of and in furtherance of an armed conflict, *causes the death of a person who is protected in accordance with the international humanitarian law conventions ratified by Colombia*, shall be liable to a term of imprisonment of four hundred and eighty (480) to six hundred (600) months, a fine of two thousand, six hundred and sixty-six point sixty-six (2,666.66) to seven thousand, five hundred (7,500) times the current minimum statutory monthly wage, and disqualification from exercising civic rights and holding public office for a period of two hundred and forty (240) to three hundred and sixty (360) months.

The penalty set forth in this article shall be increased by between one third and one half when the act is committed against a woman by reason of her gender.

Paragraph. For the purposes of this article and the other provisions of this title, the persons protected in accordance with international humanitarian law shall be:

1. Members of the civilian population.
2. Persons who do not participate in hostilities and civilians held by the opposing side.
3. Wounded, sick or shipwrecked persons who are hors de combat.
4. Medical or religious personnel.
5. Journalists on mission or accredited war correspondents.
6. Combatants who have laid down their arms in the context of capture, surrender or for other similar reasons.
7. Persons who prior to the commencement of hostilities were considered to be stateless or refugees.
8. Any other person who has that status under Geneva Conventions I, II, III and IV of 1949 and Additional Protocols I and II of 1977 and others that may be ratified subsequently. [...] ¹⁰ (Emphasis added).

4) Article 136: Injuries to persons protected by international humanitarian law

5) Article 137: Torture of protected persons

Judgment No. C-148 of 2005 of the Constitutional Court:

[...] In this regard, the Court finds that, as indicated in the preliminary sections of this judgment, there is no contradiction between the international norms that define the crime of genocide — which are contained in the Convention on the Prevention and Punishment of the Crime of Genocide and in article 6 of the Rome Statute of the International Criminal Court — and article 101 of Act No. 599 of 2000 with regard to the inclusion in that legal text of the word “grave” to describe the type of injury that would be considered to constitute such conduct.

¹⁰ In particular, book II, title III, of Colombia’s Penal Code includes a single chapter entitled “Crimes against persons and rights protected by international humanitarian law”.

It is clear that both the aforementioned international texts and article 101 which contains the word in question refer to the gravity of the injuries inflicted on members of a group as a means of defining the crime of genocide. In this regard, it can hardly be said that the legislator was unaware, in this case, of the mandate contained in article 93 of the Constitution, which provides that international treaties and agreements ratified by Congress which recognize human rights and prohibit their restriction during states of emergency take precedence over domestic legislation, and that the rights and obligations enshrined in the Constitution are to be interpreted in accordance with the international human rights treaties ratified by Colombia.

In this regard, it should be borne in mind that the legal right to be protected by means of the criminalization of genocide is not only the life and integrity of human groups but also their very right of existence, regardless of their nationality, race, or religious or political beliefs. The crime of genocide also entails a special element of intent, namely the total or partial destruction of the human group in question. [...] (Emphasis added).

- 6) Article 138: Rape of a protected person**
- 7) Article 139: Sexual assault against a protected person**
- 8) Article 141: Forced prostitution or sexual slavery**
- 9) Article 142: Use of unlawful means and methods of war**
- 10) Article 143: Perfidy**
- 11) Article 144: Acts of terrorism**
- 12) Article 145: Acts of barbarism**
- 13) Article 146: Inhuman and degrading treatment and biological experiments on a protected person**
- 14) Article 147: Acts of racial discrimination**
- 15) Article 148: Taking of hostages**
- 16) Article 150: Forced combat**
- 17) Article 151: Plundering of a battlefield**
- 18) Article 152: Failure to take emergency and humanitarian assistance measures**
- 19) Article 153: Obstruction of health-related and humanitarian tasks**
- 20) Article 154: Destruction and appropriation of protected property**
- 21) Article 155: Destruction of health-related property or facilities**
- 22) Article 156: Destruction or unlawful use of cultural goods and places of worship**
- 23) Article 157: Attack against sites and facilities that contain dangerous forces**
- 24) Article 158: Retaliation**
- 25) Article 159: Deportation, expulsion, transfer or displacement by force of civilian population**

26) Article 160: Attacks on subsistence and devastation**27) Article 161: Failure to take measures to protect the civilian population****28) Article 162: Unlawful recruitment****29) Article 165: Ecocide**

These crimes accord with, and, indeed, were drawn from international law. Thus, the ability to prosecute acts that violate international humanitarian law and constitute *crimes of international law* not only makes it possible to extend national jurisdiction to include the exercise of universal jurisdiction, but also resolves the issue of *non bis in idem*, since, in Colombia, express referral to domestic law (the Penal Code) is analogous to referral to an international instrument. Therefore, domestic courts have the jurisdiction and competence to prosecute such crimes without putting the individual in a situation of double jeopardy.¹¹

With respect to the acts indicated in the first part of this document, and in connection with the report of the Secretary-General in document A/65/181, of 29 July 2010, and the request contained in General Assembly resolution 65/33 of 10 January 2011, it is relevant to note that the crimes of: (i) *enforced disappearance*, (ii) *torture, cruel, inhuman or degrading treatment or punishment*, (iii) *slavery*, (iv) *servitude* and (v) *trafficking in persons*, were incorporated into the Constitution and legally established as serious acts over which the Colombian State could exercise its jurisdiction, with the goal of prosecuting and punishing them.

In that regard, the Colombian Penal Code stipulates:

a. Article 165. Enforced disappearance:

[...] Anyone who deprives another person of their liberty in any way, followed by concealment and refusal to acknowledge the deprivation of liberty or to give information on the person's whereabouts, thereby placing such a person outside the protection of the law, shall be liable to a term of imprisonment of twenty (20) to thirty (30) years, a fine of one thousand (1,000) to three thousand (3,000) times the current minimum statutory monthly wage and disqualification from the exercise of rights and the holding of public office for ten (10) to twenty (20) years.

¹¹ 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 (A/65/181). Double criminality: "81. In some jurisdictions, there was a requirement for double criminality (e.g., Austria, Cameroon, Denmark, Slovenia, Tunisia). For an act to be punishable in the forum State, it should also be punishable under the law in force in the territory where it was committed (e.g., the Czech Republic). However, there were other countries where double criminality did not apply (e.g., Iraq) or did not apply with respect to certain crimes such as torture (e.g., Cameroon), genocide, terrorism, piracy, crimes against humanity, war crimes, ecocide, the production or proliferation of weapons of mass destruction and the application of prohibited methods of war (e.g., Armenia, Slovenia), financing of terrorism and money-laundering (e.g., Tunisia)."

Translator's Note: Footnote 11 refers to double criminality, whereas the main text is concerned with double jeopardy.

The same penalty shall apply to any public servant, or anyone acting at the instigation or with the acquiescence of a public servant, who commits the act described in the preceding paragraph. [...] ¹²

b. Article 178. Torture:

[...] Anyone who inflicts grave physical or mental pain or suffering on a person with a view to obtaining information or a confession, from that person or from a third person, punishing the person for an act that he or she has committed or is suspected of having committed, or intimidating or coercing the person for any reason involving discrimination of any kind shall be liable to a term of imprisonment of 8 to 15 years, a fine of eight hundred (800) to two thousand (2,000) times the current minimum statutory wage and disqualification from the exercise of rights and the holding of public office for the same period as the term of imprisonment.

The same penalty shall apply to anyone committing such acts for reasons other than those described above. [...]

c. Article 180. Forced displacement:

[...] Anyone who arbitrarily or by means of violence or other coercive acts directed against a sector of the population causes one or more members of that population to change their place of residence shall be liable to a term of imprisonment of six (6) to twelve (12) years, a fine of six hundred (600) to one thousand, five hundred (1,500) times the current minimum statutory monthly wage and disqualification from the exercise of rights and the holding of public office for six (6) to twelve (12) years.

Forced displacement shall not be deemed to include the movement of a population by State security forces to protect the security of the population or for imperative military reasons, in accordance with international law. [...]

Crimes such as forced displacement, for which strict recourse may be made to international law, may therefore be prosecuted by means of extraterritorial application of national jurisdiction, in exercise of universal jurisdiction. In that regard, it should be noted that an international legal regime for human rights has been developing in the form of universal international treaties, wherein the legal commitments assumed are general, imprescriptible and non-derogable in nature, and indeed, may be required from States that are not party to such instruments.

As a State party to most of these international instruments (see the first part of the present document), and having incorporated into its domestic criminal law the crimes punishable under such instruments, Colombia is able to exercise the principle of universal jurisdiction, in particular in cases involving forced displacement. ¹³

¹² The article previously included the phrase “*Anyone belonging to an illegal armed group*”, which was declared to be unenforceable by the Constitutional Court in judgment C-317 of 2002, with a view to keeping the scope of the law from being limited exclusively to specific perpetrators.

¹³ International Convention on the Elimination of All Forms of Racial Discrimination (1965), International Covenant on Civil and Political Rights (1966), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1985), Inter-American Convention to Prevent and Punish Torture (1985), Geneva Conventions (1949) and their Additional Protocols (1977).

d. Article 188. Trafficking in migrants:

[...] Anyone who promotes, instigates, forces, facilitates, finances, collaborates or in any other way participates in the entry or exit of persons to or from the country without fulfilling the legal requirements, with the intention of gaining profits or any other form of benefit, whether personal or for another person, shall be liable to a term of imprisonment of six (6) to eight (8) years and a fine of fifty (50) to one hundred (100) times the minimum statutory monthly wage in force at the time of sentencing. [...] ¹⁴

e. Article 188 A. Trafficking in persons:

[...] Anyone who detains, transports, harbours or receives a person within the national territory or abroad for the purpose of exploitation shall be liable to a term of imprisonment of thirteen (13) to twenty-three (23) years and a fine of eight hundred (800) to one thousand, five hundred (1,500) times the current minimum statutory monthly wage.

For the purposes of this article, exploitation is understood to mean obtaining economic gain or any other benefit for oneself or for another person by exploiting the prostitution of another person or other forms of sexual exploitation, forced labour or services, slavery or practices akin to slavery, servitude, exploitation of another person's mendicancy, marital servitude, extraction of organs, sex tourism or other forms of exploitation.

Consent by the victim to any form of exploitation defined in this article shall not constitute grounds for exoneration from criminal responsibility. ¹⁵

f. Article 323. Money-laundering

[...] Anyone who acquires, protects, invests, transports, converts, safeguards or administers assets originating, directly or indirectly, from *activities of trafficking in migrants, trafficking in persons, extortion, illicit enrichment, extortive kidnapping, rebellion, arms trafficking, the financing of terrorism or administering of resources related to terrorist activity, trafficking in toxic or narcotic drugs or psychotropic substances, crimes against the financial system or crimes against public administration, or assets linked to the proceeds of crimes that are part of a conspiracy to commit an offence, or gives assets derived from such activities the appearance of legality or legalizes them, conceals or disguises the true nature, origin, location, destination, movement or rights to such assets, or commits any other act for the purpose of concealing or disguising their illicit origin shall, by that act alone, be liable to a term of imprisonment of eight (8) to twenty-two (22) years and a fine of six hundred and fifty (650) to fifty thousand (50,000) times the minimum statutory monthly wage. [...] (Emphasis added).*

¹⁴ It should be noted that this crime was included in the Colombian Penal Code following the adoption and ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol) of 15 November 2000.

¹⁵ Ibid.

g. Article 328. Violation of borders for the purpose of exploiting natural resources:

[...] An alien who conducts an unauthorized activity to exploit natural resources within the national territory shall be liable to a term of imprisonment of four (4) to eight (8) years and a fine from 100 to 30,000 times the current minimum statutory monthly wage. [...]

h. Article 343. Terrorism:

[...] Anyone who provokes or maintains a state of anxiety or terror within the population, or a segment of the population, through acts that endanger the lives, physical integrity or freedom of persons or buildings or means of communication, transport, processing or conveyance of fluids or motive power, making use of means capable of causing destruction, shall be liable to a term of imprisonment of ten (10) to fifteen (15) years and a fine of one thousand (1,000) to ten thousand times the current minimum statutory monthly wage, without prejudice to the penalty to which such person may be liable for other offences committed in connection with such acts.

If the state of anxiety or terror is caused by a telephone call, a tape recording, a video, a cassette or an anonymous document, the penalty shall be two (2) to five (5) years and a fine of one hundred (100) to five hundred (500) times the current minimum statutory monthly wage. [...]

In terms of the debate regarding the definition of the crime of “terrorism” and its reflection in international legal instruments, the applicability of universal jurisdiction and/or the obligation to prosecute or extradite, Colombia’s position on this matter is focused more on the latter, in line with the opinion of several States, as expressed in document A/65/181 of 29 July 2010, as follows:

“[...] 20. Stemming from the above, divergent conclusions were drawn in the comments. On the one hand, the point was made that, on a closer examination of relevant treaties, it was misleading to assert that universal jurisdiction was established by treaty in all instances, in particular for offences such as terrorism and drug trafficking, where there was an obligation to extradite or prosecute. State parties to such treaties were under a mandatory duty, as a treaty obligation, to establish criminal jurisdiction on the basis of the territoriality or nationality principle, and, even where there was a discretion, the instruments in question founded jurisdiction on the basis of the passive personality principle, the protective principle, or because the offences were committed by a stateless person who had habitual residence in the State in question. The obligation to extradite or prosecute could be established in a treaty for any type of crime, without such crimes necessarily being subject to universal jurisdiction. Thus, although, under the relevant treaty, there was an obligation on a State party where an offender was found to prosecute or extradite an offender, the jurisdictional basis arose from the obligation to criminalize the treaty offences and establish jurisdiction on the basis of established grounds as specified in the treaty. The principle of *aut dedere aut judicare* did not in itself establish universal jurisdiction for that particular treaty-based offence.”

i. Article 376. Trafficking, manufacture or possession of narcotic drugs:

[...] Anyone who, without permission from the competent authority, except as provided in respect of doses for personal use, brings into the country, including in transit, or removes from the country, transports, carries in person, stores, keeps, makes, sells, offers, acquires, finances or provides for whatever reason a drug that causes dependence, shall be liable to imprisonment for a term of eight (8) to twenty (20) years and a fine of one thousand (1,000) to fifty thousand (50,000) times the current minimum statutory monthly wage.

If the quantity of the drug does not exceed one thousand (1,000) grams of marijuana, two hundred (200) grams of hashish, one hundred (100) grams of cocaine or a cocaine-based narcotic substance or twenty (20) grams of a poppy-derived substance, or two hundred (200) grams of methaqualone or a synthetic drug, the penalty shall be four (4) to six (6) years of imprisonment and a fine of two (2) to one hundred (100) times the current minimum statutory monthly wage.

If the quantity of the drug exceeds the maximum limits provided in the paragraph above but does not exceed ten thousand (10,000) grams of marijuana, three thousand (3,000) grams of hashish, two thousand (2,000) grams of cocaine or a cocaine-derived narcotic substance or sixty (60) grams of a poppy-derived substance, or four thousand (4,000) grams of methaqualone or a synthetic drug, the penalty shall be six (6) to eight (8) years of imprisonment and a fine of one hundred (100) to one thousand (1,000) times the current minimum statutory monthly wage. [...]

An interesting debate concerning this last article took place in the Colombian Constitutional Court, wherein it was postulated that, although there are treaties that regulate and penalize illicit drug trafficking, and several States in the international community (including Colombia) have argued that this crime should be linked to terrorism, armed groups and others responsible for violations of human rights and international humanitarian law, penalization of the use and possession of narcotics is modified by the individual's *freedom of personal development*. Since a person's individual actions (such as the consumption and possession of narcotics in small or personal doses) do not necessarily constitute a serious crime, it may be argued that, beyond the existence of universal jurisdiction over this crime, drug trafficking is essentially an offence against public health and not against peace and international security. It is therefore possible that, depending on the circumstances, the applicable principle would be *aut dedere aut judicare*.

In that regard, in its judgement C-689 of 2002, the Colombian Constitutional Court indicated:

[...] Non-infringement of the right to peace.

[...]

the criminalization of drug trafficking results in the commercialization of narcotics coming under the control of criminal organizations that make exorbitant profits, which enables them to corrupt public agencies while inciting social conflict and armed action. In that regard, [the Court] considers that the regulations in question define and punish activities related to the production and commercialization of narcotics as violating the right to peace.

In that regard, the Court recalls that the essential purposes of the State, as established in article 2 of the Constitution, are, inter alia, to serve the community, promote general prosperity and guarantee the effectiveness of the principles, rights and duties enshrined in the Constitution and to ensure peaceful coexistence and the maintenance of a just order.

Article 2 also provides that the authorities of the Republic are established to protect all people residing in Colombia, and *their life*, dignity, property, beliefs and other rights and freedoms, and to *ensure the fulfilment of the social obligations of the State and of individuals*. [Emphasis added.] It is clear that the regulations in question constitute an expansion of this article of the Constitution, particularly in respect of protecting the life and ensuring the social obligations of individuals, the latter of which are also covered by the concept of the social State governed by the rule of law.

Lastly, it should not be forgotten that the criminalization of activities, such as those indicated in the regulations in question, has the objective of protecting public health as a legal good, a goal that, far from infringing on the right to peace, is fully compatible with it. [...]

In accordance with the concept of the State as a subject of international law and by virtue of the protection of State sovereignty, title XVII of the Colombian Penal Code is concerned with crimes designated as crimes that threaten the existence and security of the State.

In this regard, it is clear that the universal jurisdiction of any State can be exercised with a view to guaranteeing the very existence and security of the State, which is why the crimes contained in this section would be initially subject to the jurisdiction and authority of domestic law, in line with international law, particularly as regards, inter alia, peace and security, autonomy, legal equality and integrity.

The following crimes are included under this title:

- (a) Article 455. Undermining of national integrity
- (b) Article 456. Military hostility
- (c) Article 457. Diplomatic treason
- (d) Article 458. Instigation to war
- (e) Article 460. Acts against national defence
- (f) Article 463. Espionage

C. Colombia and the complementarity of international jurisdiction

Colombia is a party to the Rome Statute of the International Criminal Court which was adopted on 17 July 1998 by a vote of the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, convened in Rome. This instrument, the first international criminal code, established the International Criminal Court, the first universal, permanent court.

The Rome Statute entered into force on 1 July 2002 when the number of ratifications required in article 126 was achieved. Colombia became a State party to this treaty on 1 November 2002 and in its instrument of ratification, deposited

several months earlier, it included a declaration that took away the Court's jurisdiction over war crimes; that exemption expired in 2009.

In that regard and in order to comply with the statute with a view to incorporating its provisions and developing or amending domestic penal legislation accordingly, the Constitution of Colombia provides:

[...] Article 93:

International treaties and conventions ratified by Congress which recognize human rights and prohibit their restriction during states of emergency shall take precedence over domestic legislation. The rights and obligations enshrined in this Constitution shall be interpreted in accordance with the international human rights treaties ratified by Colombia.

Addendum Act No. 2/2001, article 1. The State of Colombia may recognize the jurisdiction of the International Criminal Court as established in the Rome Statute adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries and may therefore ratify this treaty in accordance with the procedure established in this Constitution.

The acceptance of treatment of substantive matters under the Rome Statute which is at variance with the guarantees contained in the Constitution shall have effect only within the scope of the matters regulated in the statute. [...]

As a result of Colombia's treaty obligation as a State party to the Rome Statute and in observance of domestic [penal] law, especially with regard to the categories of crimes¹⁶ that have been analysed above as input to the work of the [sixth] Committee, the ability of the International Criminal Court to try crimes of international law defined in the Statute that occurred in Colombia and/or were committed by Colombian nationals is based on the following legal principles:

1. **Principle of complementarity:** In accordance with the principle of the legal sovereignty of States, the Rome Statute established the complementary nature of the Court's jurisdiction, in that it can be activated only when the competent State arbitrarily refrains from prosecuting a case, is unable to do so or does so with leniency.

As a result, a criminal case cannot proceed before the Court if no proceedings have previously been instituted in the competent State party to prosecute the alleged offender. It is therefore necessary to demonstrate that that State has been unwilling to launch an investigation or hold a trial; that it is not able to hold a trial; or that a trial was held in order to absolve the offender of criminal responsibility.

2. **Principle of non-retroactivity:** The Court's jurisdiction is also non-retroactive, which prevents it from investigating crimes committed prior to the entry into force of the Statute, on 1 July 2002, or in accordance with the date of validity for the States parties that ratify or sign it after that date.

3. **Principle of res judicata:** In accordance with this principle, the Court will not try anybody who has already been acquitted or convicted by this court or any other court, unless there is evidence that the previous trial had the goal of

¹⁶ The crimes defined in articles 5, 6, 7 and 8 of the Rome Statute, namely: genocide, crimes against humanity, war crimes and the crime of aggression, are classified — with the exception of the crime of aggression — in the Colombian Penal Code.

absolving the offender of criminal responsibility or other obvious procedural irregularities are found.

With regard to the domestic approval of the Rome Statute and its contents, the Constitutional Court in judgement No. C-578 of 2002, with judge Doctor Manuel José Cepeda Espinoza presiding, indicated the following:

[...] International law recognizes a number of principles through which a State may exercise its jurisdiction to judge criminal acts. The two principles most often applied are those of territoriality (*ratione loci*) and of nationality (*ratione personae*). Under the principle of territoriality, States have jurisdiction to investigate and prosecute crimes committed in their territory. [...]

With regard to the jurisdiction and competence of the State in relation to the complementarity of international criminal law, the same judgement indicated:

[...] the norms in the Statute have effect within the field of competence of the International Criminal Court. The provisions of the Statute do not replace or modify national laws; accordingly, a person who commits a crime in the national territory shall be subject to the domestic legal order and the competent legal authorities in the matter are those of the Colombian justice system. The foregoing does not prevent the Colombian authorities, when they are cooperating with the International Criminal Court and providing it with legal assistance, in accordance with parts IX and X of the Statute and other concordant norms, from applying the provisions of the Statute in the field regulated therein. In some cases, such provisions may require the expansion of domestic norms in order to facilitate cooperation. [...]

Furthermore, and with regard to the comparison of the provisions of title XVII of the Colombian Penal Code, the Constitutional Court continued its analysis of crimes under the jurisdiction of the International Criminal Court and domestic law in relation to acts such as political crimes and indicated that:

[...] None of the provisions of the Rome Statute on the exercise of the competencies of the International Criminal Court prevents the granting of legal amnesties, reprieves or pardons for political crimes by the State of Colombia, provided that such measures are taken in accordance with the Constitution and the principles and norms of international law accepted by Colombia. [...]

Lastly, in the same judgement, while it does not mention the Rome Statute specifically, the Colombian Constitutional Court reiterates its jurisprudence with regard to the existence and application of the principle of universal jurisdiction, and refers to the crimes of piracy and slavery as additional and universal acts over which the Colombia State could potentially exercise universal jurisdiction.¹⁷

¹⁷ “[...] Acquiring international commitments to protect legal values and rights considered by the international community to be particularly important and to criminally punish the offenders is not a recent phenomenon. In the early 19th century, the Final Act of the Congress of Vienna of 1815, regarding slave trade, prohibited slavery and affirmed that the objective sought was that of ‘putting an end to a scourge, which has so long desolated Africa, degraded Europe, and afflicted humanity’, as an eloquent form of expressing respect for universal human values. This rejection was later given shape in the Slavery Convention of 1927. Such acts have been expressly prohibited by the Slavery Convention, the Fourth Geneva Convention of 1949 and

III. Observations

- (1) In the legislation of the Republic of Colombia there is no express provision concerning the application or existence of the principle of universal jurisdiction; however, Colombia is a State party to various treaties which, in principle, provide for the exercise of national jurisdiction over certain acts that are contrary to international law, generally on the basis of a treaty obligation and the observance of customary international law.
- (2) The Constitution of Colombia takes account of the level and type of protection that the Colombian State must provide in order to suppress and punish, inter alia, violations of human rights and of international humanitarian law, which also constitute international crimes, hence the ability of the Colombian State, in principle, to exercise its jurisdiction in order to punish such acts and thereby safeguard the fundamental rights contained in the Constitution.
- (3) Colombian criminal law has been receptive to the growing concern about the suppression of violations that seriously compromise human rights, a situation which the application of the international principle of universal jurisdiction is intended to mitigate, on the understanding that universal jurisdiction enables States to prosecute and punish acts that are contrary to international law within the limits established in domestic law.
- (4) In accordance with the interpretation by the Colombian Constitutional Court, the Penal Code allows for the possibility of exercising extraterritorial jurisdiction in accordance with article 9 of the Constitution, which establishes that Colombia's foreign relations are based on, inter alia, the principles of international law accepted by Colombia, in particular what is referred to as the principle of universal jurisdiction.
- (5) In that regard, the Constitutional Court has indicated that the principle of universal jurisdiction is a mechanism for international cooperation in combating certain activities which are repudiated by the international community and that it coexists with, but does not supersede, the ordinary jurisdictional competencies of States, as expressly stated in the treaties in which it is established.

Common Article 3 of the Geneva Conventions and Protocol II, article 4. See also the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 1968, article III of which establishes the obligation of the parties to 'adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition, in accordance with international law, of the persons referred to in article II of this Convention'. Another example, prior even to the prohibition of slavery, also originating from customary law, was the prohibition of piracy on the high seas, the international punishment of which required not only recognition of a universal jurisdiction (Permanent Court of International Justice, the Case of the S.S. Lotus (France/Turkey), ruling of 7 September 1927, dissenting opinion by Judge Moore. In this case, it was affirmed with regard to the crime of piracy, that 'it is not the right or duty of any nation to police [the high seas] [...] any nation may in the interest of all capture and punish [a pirate]'.), but also the development of instruments of cooperation in order for it to be punished effectively. On the evolution of the international consensus with regard to the need for cooperation between States for the punishment of certain crimes, see: United States v. Smith, 18 US (5 Wheat.) 153, 161-162, 5 L.Ed. 57 (1820), cited in Henkin, Louis, International Law: Cases and Materials, Third Edition, West Publishing Co., St. Paul, Minneapolis, 1993, p. 1083. [...]"

- (6) Many of the crimes which are severely punished under domestic criminal law (especially violations of human rights and of international humanitarian law) are fully in line with international law and, thus, those acts can be prosecuted as *crimes of international law*; this not only makes it possible to extend national jurisdiction to include the exercise of universal jurisdiction, but also resolves the issue of *non bis en idem* since, in Colombia, express referral to domestic law (the Penal Code) is analogous to referral to an international instrument, which is why domestic courts have the jurisdiction and competence to prosecute such crimes without putting the individual in a situation of double jeopardy.
 - (7) With regard to drug trafficking and the global drug problem, the Colombian Constitutional Court has indicated that, although there are treaties that regulate and penalize illicit drug trafficking, and several States in the international community (including Colombia) have argued that this crime should be linked to terrorism, armed groups and others responsible for violations of human rights and international humanitarian law, the penalization of the use and possession of narcotics is modified by the individual's *freedom of personal development*. Since a person's individual actions (such as the consumption and possession of narcotics in small or personal doses) do not necessarily constitute a serious crime, it may be argued that beyond the existence of universal jurisdiction over this offence, drug trafficking is essentially an offence against public health and not against international peace and security. It is therefore possible that, depending on the circumstances, the applicable principle would be *aut dedere aut judicare*.
 - (8) With regarding to crimes that threaten the existence and security of the State, such as attacks against the integrity and the very existence of the sovereignty of the State as an attribute of its international legal status, domestic criminal legislation is clear about the ability to exercise universal jurisdiction, which is why the crimes contained in title XVII of the Colombian Penal Code are subject to the jurisdiction and authority of domestic law, in line with international law, particularly as regards, inter alia, peace and security, autonomy, legal equality and integrity.
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