***Translated from Spanish***

Reply of Colombia

Scope and application of universal jurisdiction

February 2013

In accordance with paragraphs 1 to 5 of General Assembly resolution 67/98 on the scope and application of the principle of universal jurisdiction, Colombia would like to reply to the Secretary-General's request for information and observations on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties, their domestic legal rules and judicial practice.

These matters are addressed below in this order: (i) General observations on the principle of universal jurisdiction; (ii) The scope of the principle of universal jurisdiction in Colombia; (iii) The relevant applicable international treaties; (iv) The relevant provisions of domestic law; and (v) The relevant domestic judicial practice. In every section, the focus is on information that is relevant to criminal policy.

## (i) General observations on the scope of the principle of universal jurisdiction

The principle of universal jurisdiction has been the subject of in-depth discussion from both the conceptual perspective and the political and legal

perspective (in the latter case, this includes the uncertainty as to its scope and application).[1] The original purpose of the principle of universal jurisdiction was to combat piracy on the high seas in cases where it was unclear which court had jurisdiction; it was a tool for prosecuting serious crimes and ensuring that they did not go unpunished.[2] This principle is established in various instruments of international human rights and humanitarian law, which have expanded its scope by gradually incorporating other offences. For example, universal jurisdiction is particularly relevant to genocide, crimes against humanity and war crimes, for which there is an extensive normative framework in both "soft" and "hard" law; the 1949 Geneva Conventions made universal jurisdiction applicable to the serious crimes established therein.[3] Clearly, the debate regarding this principle is related to the tension between impunity, and the loss of State sovereignty as a result of its exercise.[4] Critics of the principle have noted that it is instrumental and selective in nature and is used to interfere in or exert political control over certain regimes. Its supporters have justified it by the need to combat impunity and ensure that justice is done.

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[1] International Council on Human Rights Policy, *Hard cases: bringing human rights violators to justice abroad* (London, International Council on Human Rights Policy, 1999). p. 4. Available from http://www.ichrp.org/files/reports/5/201_report_en.pdf (consulted on 6 February 2013).

[2] Philippe, Xavier, "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?", *International Review of the Red Cross* No. 262, June 2006. Available from http://www.icrc.org/eng/resources/documents/article/review/review-862-p375.htm (consulted on 5 February 2013).

[3] For further consideration of universal jurisdiction in the context of international humanitarian law, see International Committee of the Red Cross, "Jurisdicción universal sobre crímines de guerra", available from http://www.icrc.org/spa/resources/documents/misc/5tdmr2.htm (consulted on 5 February 2013).

[4] For the debate on the principle of universal jurisdiction, see A/C.6/64/SR.12 and SR.13. Available from www.un.org/News/Press/docs/2011/gal3415.doc.htm (consulted on 6 February 2013).

The limits imposed by international law have led to the recognition of five forms of criminal jurisdiction: (1) territorial jurisdiction; (2) active personality jurisdiction; (3) passive personality jurisdiction; (4) jurisdiction that protects the State; and (5) universal jurisdiction.

Universal jurisdiction is residual in nature and is exercised in respect of offences that are alleged to have been committed in the territory of another State, by nationals of another State and against nationals of another State and that pose no direct threat to the vital interests of the State that purports to exercise jurisdiction. Consequently, it functions where there is no territorial, active personality or passive personality jurisdiction and where the interests of the State are not at stake. As stated in the report of the Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction:

> [...] Universal criminal jurisdiction is the assertion by one state of its jurisdiction over crimes allegedly committed in the territory of another state by nationals of another state against nationals of another state where the crime alleged poses no direct threat to the vital interests of the state asserting jurisdiction. In other words, universal jurisdiction amounts to the claim by a state to prosecute crimes in circumstances where none of the traditional links of

territoriality, nationality, passive personality or the protective principle exists at the time of the commission of the alleged offence.

Thus, the general understanding of the principle of universal jurisdiction is that it enables any national judge or court to institute proceedings in respect of an act which, in most cases, involves a serious human rights violation, regardless of where it was committed and of whether the perpetrator is a national or an alien.[5] This jurisdiction arises in connection with situations of relevance or interest to the State that investigates and prosecutes the case and may be based on domestic law (universal legislative or prescriptive jurisdiction) or on the investigation or prosecution of an alleged perpetrator (universal contentious jurisdiction). In most cases, it is understood that the institution of proceedings against the perpetrator or alleged perpetrator of an offence requires the existence of a legal framework that provides for and grants such jurisdiction. In the absence of such a domestic legal framework, the decision to institute proceedings may be based on international law.[6]

[5] On the concept of universal jurisdiction, see, inter alia, Carmen Márquez Carrasco and Magdalena Martiín Martínez, "El principio de jurisdicción universal en el ordenamiento juridico español: pasado, presente y futuro", *Anuario Mexicano de Derecho Internacional*, vol. XI (2011), pp. 251-307, available at: http://biblio.juridicas.unam.mx/estrev/pdf/derint/cont/11/art/art9.pdf; Xavier, "The principles of universal jurisdiction and complementarity: how do the two principles intermesh?" (see note 2 above); and Asociación Pro Derechos Humanos de España (APDHE), "La justicia universal en el derecho internacional: Mesa redonda de expertos", available from http://www.apdhe.org/Index/documentos/justicia_universal_derecho_internacional_apdhe.pdf.

[6] For further information on Colombia's understanding of the principle of universal jurisdiction, see A/C.6/64/SR.12 and SR.13, available from www.un.org/News/Press/docs/2011/gal3415.doc.htm (consulted on 5 February 2013).

The principle of universal jurisdiction should be distinguished from other institutions, such as international jurisdiction under the Rome Statute of the International Criminal Court and States' obligation to extradite or prosecute (*aut dedere aut judicare*), which constitute the various existing complementary strategies for combating impunity.

The primary issues that arise in the context of universal jurisdiction are the question of how to deal with competing jurisdictions, the importance of *jus cogens* for the study of this principle, the question of whether the exercise of international jurisdiction is optional or compulsory (a debate that relates to the source of law) and the relationship between amnesty or pardon and universal jurisdiction. The understanding of this principle in Colombia is presented below.

**(ii) The scope of the principle of universal jurisdiction in Colombia**

The Constitutional Court [7] has indicated that 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

[7] The judgements to be consulted in connection with this principle are Constitutional Court judgements C-1189, Carlos Gaviria Díaz (2000); C-554, Clara Inés Vargas Hernández, M.P. (2001); and C-979, Jaime Córdoba Triviño, M.P. (2005).

the treaties in which it is established.[8] It is different from international jurisdiction since the latter arose with the adoption of the Rome Statute.

The Constitutional Court has also stated that the principle of universal jurisdiction empowers any of the world's States to exercise jurisdiction over any perpetrator of certain crimes that have been specifically condemned by the international community, such as genocide, torture and terrorism, provided that the person is present in its national territory, even if the act was not committed there. While there is no consensus on the customary nature of this principle, it is enshrined in various international conventions that are binding on Colombia. Thus, at this stage of the development of international law, the principle of universal jurisdiction can be said to apply where it is established in a treaty.

The Constitutional Court has also stated that this principle, which refers to the universal jurisdiction of States, should [not] be confused with the jurisdiction of the recently established International Criminal Court; they are two different forms of international cooperation in combating crime, which, while complementary, are different in nature. Thus, once the latter Court becomes operational, it will be a body with jurisdiction independent of that of its States parties and with a scope of jurisdiction that is independent and different from theirs.

[8] Constitutional Court judgement C-1189, Carlos Gaviria Díaz (2000).

With respect to international criminal law, the Constitutional Court has stated that it is in the interests of all States to investigate and punish the most serious violations of human rights and international humanitarian law, such as genocide, torture and enforced disappearance; it is in the legitimate interest of any State to exercise jurisdiction on behalf of the international community in order to investigate, prosecute and punish the perpetrators of such crimes.[9]

On this matter, the Colombian Government has had occasion to comment:[10]

> 10. In the legislation of Colombia, there is no express provision concerning the application or existence of universal jurisdiction. However, Colombia is a 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.
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> 11. Article 93 of the Constitution provides that international treaties and

[9] Constitutional Court judgment C-979, Jaime Córdoba Triviño, M.P. (2005).

[10] As background to these comments, see the information submitted by Colombia in its report to the General Assembly on 20 June 2011 (A/66/93), which provides a brief outline of each State's observations on the scope and application of universal jurisdiction. The full document is available from http://www.un.org/Docs/journal/asp/ws.asp?m=A/66/93.

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 the Constitution shall be interpreted in accordance with the international human rights treaties ratified by Colombia. In addition, since the Constitution provides that no person shall be subjected to enforced disappearance or to torture or cruel, inhuman or degrading treatment or punishment and prohibits all forms of slavery, servitude and trafficking in human beings, it reflects the level and type of protection that the State must provide in order to suppress and punish, inter alia, violations of such rights, which also constitute international crimes; hence, it reflects the ability of Colombia, in principle, to exercise its jurisdiction in order to punish such acts and thereby safeguard the fundamental rights enshrined in the Constitution.

12. Moreover, criminal law recognizes the growing concern about the suppression of violations that seriously compromise human rights, a situation which the application 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.

13. Thus, in accordance with 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 universal jurisdiction.

14. The Constitutional Court has indicated that 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.

15. Many of the crimes punished under domestic criminal law (especially violations of human rights and of international humanitarian law) (see table 1) are fully in line with crimes punished under 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.

16. With regard to crimes that threaten the existence and security of the State (see table 1), domestic criminal legislation is clear about the ability to exercise universal jurisdiction. Crimes contained in title XVII of the 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.

17. With regard to drug trafficking and the global drug problem, the 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*.[11]

The Colombian Constitutional Court's position on universal jurisdiction is that its exercise requires that the act in question be criminalized in its domestic law, whether in substantive or procedural criminal law or in a treaty, signed and ratified by Colombia and incorporated into domestic law, which establishes such jurisdiction as a means of combating specific offences owing to their nature. This shows that Colombia endorses the dualist theory of international law.

Universal jurisdiction is considered to be a form of criminal jurisdiction, as are territorial jurisdiction, personal jurisdiction (active or passive) and protective jurisdiction (the State). Therefore, its defining characteristics are the basic principles and guarantees of criminal law, both substantive and procedural: the principles of *non bis in idem*; *nullum crimen sine lege* and *nulla poena sine lege*. This is Colombia's position in the debate as to whether, in order for legal proceedings to be initiated, the act in question must be established as a crime in the legal system of the State in which it was committed.[12]

[11] Idem.

[12] This is consistent with views expressed in the final report of the Advisory Committee on the development of the Colombian Government's criminal policy.

Furthermore, from a procedural standpoint, it is recognized that it is difficult to gather material and physical evidence and that the accused person must be present in the territory [of the prosecuting State]; therefore, systems for mutual cooperation in judicial matters must be strengthened and [States] should provide each other with substantial assistance in such matters.

**(iii) The relevant applicable international treaties**

Some of the relevant hard-law and soft-law instruments adopted by Colombia are:

- Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948)
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (7 September 1956)
- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (26 November 1968)
- Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes Against Humanity (3 December 1973)

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984)
- Rome Statute of the International Criminal Court (17 July 1998)
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (15 November 2000)
- United Nations Convention against Transnational Organized Crime (15 November 2000)
- United Nations Convention against Corruption (31 October 2003)
- International Convention for the Protection of All Persons from Enforced Disappearance (20 December 2006)

**(iv) The relevant provisions of domestic law**

*The Political Constitution of Colombia*

With respect to the Political Constitution, two points must be made. First, due process and all relevant criminal-law guarantees are established in article 29, which applies to legal proceedings and stipulates that no one may be prosecuted except under legislation adopted prior to commission of the alleged offence, before a competent judge or tribunal and with respect for all the procedures that govern any trial (legality, legal security, *nullum crimen sine lege* and *nulla poena sine lege*). It

also requires favourable treatment and prohibits retroactivity in criminal matters. Lastly, it includes the presumption of innocence, the technical and material rights associated with a defence, and all relevant rules of evidence.

Second, articles 93 and 94 of the Constitution describe the relationship between domestic law and international law. Article 93 establishes that international human rights treaties and conventions that have been ratified by Congress and prohibit the restriction of such rights during states of emergency prevail over domestic law and that the rights and duties enshrined in the Constitution are to be interpreted in accordance with the international human rights treaties ratified by Colombia.

Article 94 states that the rights and guarantees enshrined in the Constitution and in the international conventions that are currently in force shall not be understood as negating other rights and guarantees which, because they are inherent to humanity, are not expressly mentioned therein.

*The Code of Criminal Procedure (Act No. 906 of 2004)*

Articles 24, 28 and 29 of the Code of Criminal Procedure use substantive criminal law as a basis for establishing the scope of criminal jurisdiction, which is exclusive, national and covers both offences committed in the national territory and

those committed abroad as provided in international treaties signed and ratified by Colombia and in domestic law. Thus, universal jurisdiction may be exercised pursuant to a signed and ratified treaty or to the provisions of domestic law that establish such jurisdiction.

*The Penal Code (Act No. 599 of 2000)*

Article 2 of the Code establishes the principle of incorporation, stating that both international treaties and conventions ratified by Colombia and the Political Constitution are part of the Penal Code. Article 6 establishes the principle of legality; it stipulates that no one may be prosecuted except under legislation adopted prior to commission of the alleged offence, before a competent judge or tribunal and with respect for all the procedures that govern any trial. This stipulation also means that overly broad definitions of offences are inadmissible. In addition, legislation adopted subsequent to the commission of an offence is applicable only if it benefits the defendant; the same is true of legal precedents. Article 8 prohibits double jeopardy except as established in international instruments.

Articles 14 to 18 deal with matters relating to jurisdiction, including territorial, extraterritorial and personal jurisdiction, and establish the general rules governing jurisdiction. Article 14 deals with territorial jurisdiction; it states that, subject to the

exceptions enshrined in international law, criminal proceedings may be instituted in respect of any act committed on Colombian territory. This provision would fully authorize the exercise of international jurisdiction, provided that the rights and guarantees of the accused were respected during the criminal proceedings.

Article 16 deals with extraterritorial aspects of criminal law and, as noted above, authorizes the prosecution of offences against certain legally protected interests (offences against the existence and security of the State; offences against the Constitution and the legal order; offences against the economic and social order, with the exception of money-laundering; offences against the public administration; counterfeiting; the financing of terrorism; and the handling of funds related to terrorist activities, even where the accused person has been acquitted or convicted by a foreign court and has been sentenced to a lesser penalty than that envisaged in Colombian law), regardless of the nationality of the perpetrator. In addition, it authorizes the prosecution of Colombian officials who enjoy immunity and commit offences while abroad.

Article 16 also provides for the prosecution of an alien who commits an offence against another alien and is in Colombian territory in cases where the sentence provided for in Colombian law is longer than three years, the offence is not political in nature or a request for extradition has been denied by the Government of

Colombia. This helps to clarify Colombia's legal situation in the context of the numerous debates on the principle of universal jurisdiction.

**(v) The relevant domestic judicial practice**

There are no known cases in which universal jurisdiction has been exercised in Colombia in respect of a violation of human rights committed by an alien in another country or in which extradition has been requested in the exercise of universal jurisdiction.