Translated from Spanish

Permanent Mission of Colombia to the United Nations

Comments of the Republic of Colombia on General Assembly resolution 75/142 of 15 December 2020, entitled "The scope and application of the principle of universal jurisdiction"

Please find below the comments of the Republic of Colombia in response to paragraph 3 of General Assembly resolution 75/142 of 15 December 2020, in which the Assembly invited Member States "to submit, before 30 April 2021, information and observations on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties and on their national legal rules and judicial practice."

1. In international criminal law, the principle of universal jurisdiction can be used as an instrument for preventing impunity for crimes committed during armed conflicts. The principle allows any international court to prosecute cases, regardless of where the crimes occurred, the nationality of the perpetrators or the participants, or the identity of the victims, provided that the conduct in question affects properties and interests protected by the international community.

2. In Colombia, the principle of universal jurisdiction is protected by the "bloc of constitutionality", which allows treaties that recognize human rights and contain clauses related to the principle of universal jurisdiction to be applied in the country as constitutional norms, in line with article 93 of the Constitution.

3. There is no explicit provision in Colombian law that reflects the principle of universal jurisdiction. However, the country's Constitutional Court and Supreme Court have recognized it as a treaty obligation, encapsulated in the various international instruments to which Colombia is a party that provide for the exercise of the principle.

For example, the Constitutional Court, in its judgment No. C-1189 of 2000, described universal jurisdiction as follows:

> "The principle of universal jurisdiction gives all States of the world the power to exercise jurisdiction over the perpetrators of certain crimes that have been specifically condemned by the international community, such as genocide, torture and terrorism, provided that such perpetrators are present in their national territories, even if the act was not committed there. This principle, whose customary nature has not been generally accepted, has nevertheless been

expressly enshrined in several international conventions binding Colombia. It can therefore be said that, at the present stage of development of international law, the principle of universal jurisdiction operates when it is enshrined in a treaty. Considering the assertions of the applicant and certain interveners, it is important to make two clarifications in respect of the principle of universal jurisdiction.

First, the principle of universal jurisdiction is essentially a mechanism for international cooperation in the fight against certain activities repudiated by the international community; in this regard, it exists alongside – and is not superior to – the ordinary jurisdictional competencies of States. This is expressly stated in the many treaties in which the principle is enshrined. Second, the universal jurisdiction of States covered by this principle should not be confused with the jurisdiction of the recently created International Criminal Court. These are two different manifestations of international cooperation against crime which, while being complementary, operate in different ways. Once it becomes operational, the International Criminal Court will be a body with areas of jurisdiction and competence that are autonomous, independent and distinct from those of its States parties."

After considering the constitutionality of article 78 of Act No. 906 of 2000, through which the Code of Criminal Procedure was adopted, the Constitutional Court stated as follows in its judgment No. C-979 of 2005:

"In international criminal law, international bodies or mechanisms have also been set up to investigate and punish the perpetrators of or participants in the most serious violations of human rights and international humanitarian law, in cases where domestic systems have failed, resulting in the promotion of impunity. These international criminal law mechanisms operate on the basis of the principles of universal jurisdiction and international jurisdiction. Under the principle of universal jurisdiction, it is in the interest 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. That interest provides any State with legitimate grounds to exercise jurisdiction on behalf of the international community to investigate, prosecute and punish the perpetrators of these crimes."

On the other hand, in its judgment No. C-007 of 2008, the Constitutional Court defined the principle of universal jurisdiction as one by which "judges of other States have the power to prosecute

serious violations of human rights or breaches of international humanitarian law that have been committed outside their territory by non-nationals against non-nationals".

According to the judgment, this principle has to do with the international obligations under international human rights law, international humanitarian law and international criminal law which allow for the direct punishment of those responsible for the most serious human rights violations and grave breaches of international humanitarian law, owing precisely to the transcendental and potentially harmful nature of such universal offences. This means that the prosecution of such offences transcends national borders and that the sovereignty of States is mitigated in an effort to prevent impunity.

The Constitutional Court also contended that the principle of universal jurisdiction is based on the obligation of States to investigate, punish and prosecute serious human rights violations, and that this obligation "transcends national borders and requires a conception of sovereignty that is compatible with the universal nature of human rights, thus making it possible for certain violations of dignity to be prosecuted by other States or by bodies established by the international community when this is impossible within a State owing to a lack of capacity or willingness".

4. Given the manner in which the principle of universal jurisdiction operates, its application may well conflict with the principle of *non bis in idem*, set out in article 29 of the Colombian Constitution, which establishes that no legal action can be instituted twice for the same cause of action.

Nonetheless, the Colombian Criminal Code recognizes the principle of extraterritoriality of criminal law (art. 16) and the exception to the prohibition of double jeopardy, to the extent that there are international instruments that relativize it (art. 8).

The principle of *non bis in idem* is therefore not absolute since it may be limited when weighed against other constitutional rights or principles if such rights or principles stem from international human rights law. This is consistent with article 17 of the Criminal Code, which recognizes the value of foreign judgments, and with article 9 of the Constitution, which provides that the international relations of Colombia are based on the recognition of the principles of international law accepted by Colombia.

The Constitutional Court, in its judgment No. C-979 of 2005, thus affirmed that, by virtue of

the principle of universal jurisdiction, it is possible to reopen cases where defendants had been acquitted or convicted for crimes against human rights and international humanitarian law "if an international body issues a ruling showing that the State had failed to investigate such violations in a serious and impartial manner."

5. Universal jurisdiction has been expressly enshrined in several international conventions binding Colombia and in numerous judicial cooperation agreements signed by the State. Such agreements have been endorsed by the Constitutional Court (in judgments Nos. C-404 of 1999, C-406 of 1999, C-1259 of 2000 and C-554 of 2001) on the understanding that cooperation in investigations does not per se entail a violation of the principle of *non bis in idem.*

In its judgment No. C-554 of 2001, the Constitutional Court stated that "an international criminal justice system operates on the basis of cooperation and mutual assistance agreements between States in respect of investigations or judicial proceedings concerning crimes falling within the jurisdiction of domestic authorities" which do not violate the prohibition of double jeopardy.

The international instruments binding on Colombia over which universal jurisdiction is expressly recognized are the following:

- Convention on the Prevention and Punishment of the Crime of Genocide, 1948
- The four Geneva Conventions of 12 August 1949 (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention relative to the Treatment of Prisoners of War; and Convention relative to the Protection of Civilian Persons in Time of War)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- American Convention on Human Rights
- International Covenant on Civil and Political Rights
- Inter-American Convention to Prevent and Punish Torture
- International Convention on the Suppression and Punishment of the Crime of Apartheid

Colombia is also party to the following instruments containing the obligation to investigate, prosecute and punish international crimes:

- Inter-American Convention on Forced Disappearance of Persons
- Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against

Persons and Related Extortion that are of International Significance

6. The Constitutional Court, in its judgment No. C-1189 of 2000, limited the scope of universal jurisdiction in Colombia by affirming that the principle applies in Colombia only when it is expressly enshrined in a treaty, and that the persons who are subject to such jurisdiction, by virtue of the relevant international treaty, must be in the country, even if the act was not committed there.

7. The Supreme Court has also taken a stance similar to that of the Constitutional Court concerning the application of the principles of extraterritoriality of criminal law and universal jurisdiction by limiting the legal effects of the principle of *non bis in idem* when interests of inestimable social value are involved, in order to protect the general welfare of humanity.

The decisions of these courts show clearly that a State, by virtue of the obligations enshrined in the relevant international conventions, must prosecute, extradite or refer a person accused of a crime under international law to a universal court, as is the case with drug trafficking. With regard to this crime in particular and on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Supreme Court held in its judgment of 12 December 2012 that universal jurisdiction is binding on Colombia when it affirmed that each State party must declare itself competent to prosecute crimes linked to drug trafficking, regardless of whether the prohibited acts were committed outside its territory, provided that the subject of the criminal investigation, whether a national of the State or a foreign national, has not been extradited. The State therefore has the obligation to prosecute, extradite or refer a person accused of drug trafficking to a competent universal court.

Specifically, the Supreme Court stated as follows in respect of a national of Colombia in a foreign territory who violates norms set out in treaties signed by Colombia: “by virtue of the universal jurisdiction contained in such instruments, the State is entitled to consider the case if the person is present within its geographical boundaries – owing to the pre-eminence of the axiom of national sovereignty – regardless of the nature of the foreign judicial decision, nor its time of execution. This is precisely because of the principle (...) of extraterritoriality aimed at criminal conduct such as drug trafficking, since the economic and social order is also understood to be violated with the commission of such crimes”.

Lastly, in a judgment of 2 August 2001 (Criminal Cassation Chamber, Case No. 16274), the Supreme Court of Justice held as follows in relation to the principle of universal jurisdiction:

"(...) What is at issue is that if individuals who have committed this type of crime prosecuted by the international community happen to be in a country other than that of their nationality, that country may prosecute them for the offence, even if it was not committed there, or refer them to an international court accepted and recognized by the States parties. This is what justifies the need for the existence of a treaty, since what is being sought is greater effectiveness in the prosecution of crimes against humanity, or crimes that threaten the peace and security of the community of nations. Hence, in some treaties, such as the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Convention on the Prevention and Punishment of the Crime of Genocide, the contracting States recognize the jurisdiction of an international court for this kind of prosecution."

8. Conclusions

- The principle of universal jurisdiction is based on the obligation of States to investigate, punish and prosecute crimes under international law, regardless of where they were committed or the nationality of the perpetrator.
- The Constitutional Court defines universal jurisdiction as an international cooperation mechanism in the fight against certain activities repudiated by the community of nations. The principle exists alongside – and is not superior to – the ordinary jurisdictional competencies of States.
- Under the principle of universal jurisdiction, it is possible to reopen cases where the defendant had been acquitted or convicted for crimes against human rights and international humanitarian law if an international body issues a ruling showing that the State had failed to investigate such violations in a serious and impartial manner, in accordance with the exception to the prohibition of double jeopardy set out in article 8 of the Criminal Code.
- According to the Constitutional Court and Supreme Court of Colombia, the principle of universal jurisdiction only applies in the country when it is expressly enshrined in a treaty, and when the person being prosecuted is present within the geographical boundaries of the State, even if the crime was not committed there.
- Colombia has signed various international treaties that expressly recognize universal jurisdiction for the prosecution and punishment of crimes against international law, such as genocide, torture, apartheid, terrorism and illicit drug trafficking.