Translated from Spanish

Legal considerations concerning the scope and application of the principle of uns00682.08 Tm0 Tc0 Tw()Tj0 -1.2048 59005

Article 17 of the Constitution provides that:

> 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:

> 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 sh.Tc.0054 r appT*-.000-0.808ionTD.0

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.

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 alr.31

3) Article 135: Homicide of a protected person

[…] Article 135. Homicide of a protected person. Anyone who, in a situation of

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

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

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.

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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 0ia co the nltter 42.17(,)3(i)-6.37n eoersl ft-1.8(a)tes-6.3(e, as)]TJ-17.9629201.1976 TD.0

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> 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 crimes[16] 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]

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[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,

(6) Many of the crimes which are severely punished under domestic criminal law