International (Criminal) Law as Applicable Law in the Special Jurisdiction for Peace: Bloque de Constitucionalidad and the Principle of Legality

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Abstract

This chapter explains how international (criminal) law enters the Colombian domestic legal order by way of the so-called '*bloque de constitucionalidad*'. It then explains the principle of legality (in its international sense) and enquires as to how far this principle limits the *bloque* and thus the international (criminal) law applicable to the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz,* JEP).

Introduction

The 2016 signing of a Peace Agreement between the Colombian government and the FARC ("Fuerzas Armadas Revolucionarias de Colombia") guerrilla made it possible, for the first time, for domestic judicial processes in Colombia to apply international norms to cases involving grave human rights violations (HRV).[1] The creation of the Special Jurisdiction for Peace (*Jurisdicción Especial para la Paz*, JEP), designed as a judicial mechanism for transitional justice (TJ), permits the application of different normative frameworks to the legal characterisation of conduct, i.e. for the purposes of defining which criminal offences are applicable to the events under investigation. Colombia's Constitution was modified to pave the way for the JEP, via the introduction of various new articles.[2] The modifications make explicit reference to, first, the Colombian penal code (*Código Penal*), and, second, the body of international law made up by international human

1 See final Peace Agreement text, paras. 4 and 19 (pp. 144 and 147).

2 Colombia allows for its political Constitution to be modified by Congress, by the use of what are known as 'legislative acts' (*actos legislativos*). In order to create the JEP, Congress passed Legislative Act 01, dated 4 April 2017, incorporating certain transitory articles into the text of the Constitution.

rights law (IHRL), international humanitarian law (IHL), and international criminal law (ICL), as the substantive law that is to be applied by the JEP. The wording, confusingly, uses the conjunction "and/or".[3] This concurrence of different normative frameworks generates a range of questions which affect legal certainty,[4] and thus involve the principle of legality.

According to the principle of legality usually referred to by the expression *nullum crimen sine lege*, no person may be convicted of a criminal offence except on the basis of a law that existed before the events that constitute the alleged offence took place. This principle therefore prohibits the retroactive application of criminal law norms, i.e., their application to past events. The decision to allow the use of ICL, as well as domestic criminal law, to judge international crimes committed *during* the period of the armed conflict with the FARC-EP guerrilla, was taken *at the end* of that conflict. We must therefore ask ourselves whether this is in line with the principle of legality, particularly if we bear in mind that the reference to international law entails the possible application of unwritten norms.

The question addressed by this chapter is, accordingly, whether the use of ICL to try international crimes committed during the armed conflict leads to the retroactive application of criminal law norms that were not valid in Colombia at the time of commission of such crimes. It is important to point out at the outset that we are dealing here with the principle of legality with regard to the *crimes*, and not with regard to possible sentences, the criminal process, or the adjudicator (judge). A discussion of these latter three aspects is meaningless, at least for the purposes of this

3 According to paragraph 6 of Transitory Article 5, Legislative Act 01 (2017): "On adopting its resolutions or sentences, the JEP will make its own legal classification […] regarding the conduct at issue. This classification will be made on the basis of the Colombian Criminal Code and/or the norms of international law as they pertain to Human Rights, International Humanitarian Law, or International Criminal Law. The principle of the most favourable law must always be applied" ("*La JEP al adoptar sus resoluciones o sentencias hará una calificación jurídica propia del Sistema respecto a las conductas objeto del mismo, calificación que se basará en el Código Penal colombiano y/o en las normas de Derecho Internacional en materia de Derechos Humanos (DIDH), Derecho Internacional Humanitario (DIH) o Derecho Penal Internacional (DPI), siempre con aplicación obligatoria del principio de favorabilidad*."). Here and throughout, unless otherwise stated, translations into English from Spanish-language texts are the authors' own.

4 The final text of the Peace Agreement (supra n. 1, p. 128) refers to legal certainty as "an essential element in the transition to peace" ("*elemento esencial de la transición a la paz*"). For specific reference to the JEP and the concession of benefits such as amnesty, see ibid. pp. 143 (para. 2), 146 (para. 15), 147 (para. 18), and 148 (paras 26 and 29).

paper, given that we are dealing with an ad hoc TJ mechanism[5] which imposes specially-designed sanctions and is in essence retroactive, having been created as a result of political negotiation with one particular armed group.

The central contention of the brief explanations that follow is that judging international crimes committed during the Colombian armed conflict on the basis of ICL does not violate the principle of legality. This is for two reasons. First, the international norms that form the basis for prosecution of this type of crime already formed part of the Colombian legal order, in particular owing to what is known as the 'bloc of constitutionality' (*bloque de constitucionalidad).* Second, the international definition of the principle of legality – which has been particularly developed in international human rights law – permits the domestic criminal prosecution of international crimes on the basis of existing international law at the moment of their commission. Accordingly, existing international law must be taken into consideration by the judges of the JEP.

The remainder of this chapter is divided into three sections. The first discusses the incorporation of the Rome Statute of the International Criminal Court (ICC) into the Colombian legal order, and the relationship of the Statute to the *bloque de constitucionalidad.* As we will see, the importance of the Rome Statute for the Colombian legal order mainly has to do with the failure of the Colombian legislator to codify the core crimes contained in Art. 5–8*bis* of the Statute. Thus, a direct application of the Rome Statute would close this gap. The second section offers a general discussion of the international standard of the principle of legality, with particular reference to the national prosecution of international crimes. The third and final section of the chapter offers a brief summary of its principal argument.

I. The Rome Statute, the Colombian Legal Order and the Bloque de Constitucionalidad

In order to establish whether or not the application of ICL by the JEP violates the principle of legality, it is useful to first consider the relationship between ICL and the Colombian domestic legal order, with particular reference to the constitutional framework. As Art. 93 of the Colombian Con-

5 On the *ad-hoc* nature of the JEP and the guarantee of the 'natural judge' see Constitutional Court Sentence C-674, 14 November 2017, section 5.5.2.

stitution makes express reference to the Rome Statute,[6] it is useful to enquire whether the Rome Statute forms part of the *bloque de constitucionalidad.* To this end, it is important to note that the dominant understanding in Colombia is that the Constitution is not made up solely of its written articles. Rather, it is generally accepted that certain other norms, particularly international ones, enjoy constitutional rank by express referral (*reenvio*) of the Constitution.

Article 93 of the Colombian Constitution integrates international human rights norms into the domestic legal order. According to its first paragraph, "those international treaties and conventions ratified by Congress which recognise human rights and which prohibit the limitation of such rights during states of exception, prevail *(prevalecen)* in the internal [legal] order".[7] The second paragraph states, in a similar vein: "those rights and duties that are enshrined in [the Constitution] shall be interpreted according to the international human rights treaties that Colombia has ratified".[8] For the Colombian Constitutional Court (CC), the *bloque de constitucionalidad* is, then, made up of all those norms that act "as parameters to carry out control of constitutionality of legislation".[9] In other words, the *bloque* is not only "what the Constitution enunciates, but also includes, *inter alia*, the international treaties to which Art. 93 makes reference".[10] As part of the process of Colombia's ratification of the Rome Statute, two new paragraphs were moreover added to this same article.

Determining whether the Rome Statute belongs to the *bloque de constitucionalidad* -which would afford the Statute constitutional rank in Colombia – allows us to identify the status that the Colombian internal legal order affords to ICL. In order to correctly understand the reference to the Rome Statute in Art. 93 of the Constitution, we must consider the various stages in the process of Colombia's adoption of the Statute. First of all, in

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6 See Uprimny, *El bloque*.

7 "[l]os tratados y convenios internacionales ratificados por el Congreso [colombiano], que reconocen los derechos humanos y que prohíben su limitación en los estados de excepción, prevalecen en el orden interno". Colombian Constitution, Art. 93, para.1.

8 "[l]os derechos y deberes consagrados en [la Constitución Política de Colombia] se interpretarán de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia" Colombian Constitution, Art. 93, para.2.

9 "como parámetro para llevar a cabo el control de constitucionalidad de la legislación". Constitutional Court Sentence C-191, 6 May 1998, para. 5.

10 "[no solo por] /el articulado de la Constitución sino, entre otros, por los tratados internacionales de que trata el artículo 93". Constitutional Court Sentence C-191, op. cit.

2001, two new paragraphs – paras. 3 and 4[11] – were added to the existing text of Art. 93 of the Constitution.[12] This was done in order to pre-empt possible constitutional objections to the Rome Statute, as it contains certain provisions that might conflict with the domestic legal order (such as life imprisonment).[13] Congress subsequently (in 2002) introduced Law 742, approving the Rome Statute as a necessary prelude to its ratification.[14] The Constitutional Court examined the constitutionality of Law 742 in Sentence C-578, 2002, making reference for the first time to Art. 93 of the Constitution, including its two new paragraphs.

The modification to Art. 93 of the Constitution as initially proposed would have integrated the Rome Statute into the Constitution.[15] Changes

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11 Art. 93, para. 3 of the Constitution reads: "the Colombian State may recognise the jurisdiction of the International Criminal Court in the terms contemplated by the Rome Statute, adopted on 17 July 1998 by a [Conference of Plenipotentiaries] of the United Nations, and may, in consequence, ratify said treaty in accordance with the procedures set down in this Constitution": ("*[e]l Estado Colombiano puede reconocer la jurisdicción de la Corte Penal Internacional en los términos previstos en el Estatuto de Roma adoptado el 17 de julio de 1998 por la Conferencia de Plenipotenciarios de las Naciones Unidas y, consecuentemente, ratificar este tratado de conformidad con el procedimiento establecido en esta Constitución*"). Paragraph 4 of the same Article reads: "Where the Rome Statute treats substantive matters in a manner that differs from guarantees contained in the Constitution, [this treatment] will be admitted and will have effect exclusively in respect of the issues that [the Statute] regulates": (*"La admisión de un tratamiento diferente en materias sustanciales por parte del Estatuto de Roma con respecto a las garantías contenidas en la Constitución tendrá efectos exclusivamente dentro del ámbito de la materia regulada en él"*).

12 This reform to Article 93 of the Constitution was carried out by Congress via Legislative Act (AL) 02, 27 December 2001.

13 See Art. 77(1) of the Rome Statute.

14 Constitution of Colombia, Art. 224.

15 The initial proposed modification of Art. 93 of the Constitution to facilitate the adoption of the Rome Statute consisted of the incorporation of a new paragraph, which would have read: "incorporate to this Constitution, the Rome Statute of the International Criminal Court" ("*[i]ncorpórese a la Constitución el Estatuto de Roma de la Corte Penal Internacional*"): see Legislative Draft Bill (Proyecto de Acto Legislativo) no. 14, 2001 (Senate), published in Gaceta del Congreso, AÑO X – № 77, 20 March 2001, p. 1, and Constitutional Court sentence C-578, 30 July 2002, p. 44–55). The proposal was motivated above all by pragmatism. The desire was to avoid having to initiate ordinary legislation, the process of which would open the door to detailed debate of the content of the Rome Statute. It was anticipated that such an eventuality (which did, in the end, come about) might cause problems for approval of the Statute. In any case, it was specified that the proposed incorporation of the Statute into the Constitution would be "for the purposes of [the Statute's] own functions" ("*para efecto de sus propias funciones*"). The

were however introduced to the text of the proposed Constitutional reform during the legislative process. The final version as approved simply authorised the Colombian State to accept the competence of the International Criminal Court (ICC) – i.e. to ratify the Rome Statute.[16] Accordingly, paragraph 3 of Article 93 of the Constitution, added to the Article by this constitutional reform, simply reads: "the Colombian State *may recognise ('puede reconocer')* the jurisdiction of the International Criminal Court […] and in consequence [may] *ratify* this treaty" (emphasis added). Paragraph 4 only indicates that the form in which certain issues are treated in the domestic legal order is not changed merely by virtue of the fact that the Rome Statute treats them differently. Neither paragraph speaks to the legal status of the Rome Statute in domestic law. The Constitutional Court accordingly ruled, in 2002, that the purpose of modifying Article 93 of the Constitution had not been to directly incorporate the Rome Statute into the Constitution, nor to render ratification of the Statute obligatory.[17] Instead, the Court concluded, the modification had simply served to authorise the ratification.[18] Thus, if the Rome Statute does form part of the *bloque de constitucionalidad*, this is not as a direct result of the introduction of paras. 3 and 4 to Article 93 of the Constitution.[19]

A case might be made that the Rome Statute forms part of the *bloque de constitucionalidad* as a direct consequence of para. 1 of Art. 93 of the Constitution. This position is however difficult to sustain if we consider the wording of the paragraph, and other rulings by the Constitutional Court. Para. 1 refers to: "those international treaties and conventions ratified by Congress which *recognise* human rights and which *prohibit* the limitation of such rights during states of exception" (emphasis added). One obvious example of a treaty of the kind referred to is the American Convention on

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impact on the domestic legal order was not spelled out. See report (*Informe de ponencia*) for the first debate of Draft Legislative Act (Proyecto de Acto Legislativo) No. 14, 2001 (Senate), available in Spanish from Gaceta del Congreso, AÑO X – Nº 114, 9 April 2001, pp. 5–6, 10.

16 See texts of Draft Legislative Acts (Proyectos de Acto Legislativo) No. 14, 2001 (Senate); and No. 227, 2001 (Lower Chamber (*Cámara*)), in: Gaceta del Congreso AÑO X – Nº 293.

17 Constitutional Court Sentence C-578, 2002, *supra* n. 15.

18 Constitutional Court Sentence C-578, 2002, *supra* n. 15, p. 45 ("given that the final purpose of the legislative act was not to directly incorporate the treaty into the Constitution nor to make its ratification imperative"), ("*ya que el propósito final del acto legislativo no fue incorporar directamente el tratado a la Constitución ni hacer imperativa su ratificación*").

19 See Sentencia C-578, 2002, *supra* n. 15, pp. 215–217.

Human Rights (ACHR). Articles 3 to 25 of the ACHR recognise a range of individual rights, while Article 27(2) prohibits the suspension of certain of them during states of emergency.[20] Despite the strong relationship that exists between human rights law and ICL, the Rome Statute neither recognises rights nor prohibits their suspension. Given that the Statute is dedicated to the definition of rules of individual criminal responsibility, the creation of an international tribunal to implement them, and the delimitation of its competences, etc., it cannot be considered an international treaty that (explicitly) recognises human rights. This is true even though its existence owes much to the international community's desire to strengthen respect for such rights.[21]

The Constitutional Court has on occasion, albeit with a certain ambiguity, seemed to suggest that the Rome Statute does in effect form part of the *bloque de constitucionalidad.*[22] More usually, however, it has adopted a nuanced approach, preferring to analyse each norm of the Statute separately. In line with this approach, only some of the dispositions of the Statute can be considered part of the *bloque,* based on their content rather than the nature of the Statute *per se.* In other words, these specific norms must be directly and materially connected to IHRL and IHL. Working along these lines, the Court has suggested that the Rome Statute constitutes "probably the principal international instrument for the *protection* of human rights

20 On Article 27 (2) of the ACHR see Rodríguez, "*Artículo 27…*", pp. 838 ff.

21 See Sentence C-578, 2002, *supra* n. 15, p. 115 ("the definitions of crimes of humanity contained in the Statute protect the effectiveness of the right to life; the prohibition of torture and of disappearance; equality, and the prohibition of slavery"), ("*las definiciones sobre crímenes de lesa humanidad que trae el Estatuto protegen la efectividad del derecho a la vida, la prohibición de torturas y desapariciones, la igualdad y la prohibición de la esclavitud*"), p. 120 ("the definitions of war crimes protect the effectiveness of the right to life (Art. 11), physical integrity rights; respect for the prohibition of disappearances and torture (art. 12), and prohibition of slavery (Art. 17)", ("*las definiciones sobre crímenes de guerra protegen la efectividad del derecho a la vida (artículo 11), a la integridad física; el respeto a la prohibición de desapariciones y torturas (artículo 12), y a la prohibición de la esclavitud (artículo 17)").* On the ideals that inspired the creation of the Rome Statute and the values that it seeks to protect (paras. 1 and 3 of its Preamble), see Triffterer, Bergsmo and Ambos, "*Preamble*", p. 1, notas marginales (nm.) 7, 9 and ff.

22 See for example reference to Art. 6 of the Rome Statute in Sentence C-291 of 25 April 2007, p. 44, in which the Court explains its previous discussion, in Sentence C-148, 22 February 2005, of the term "grave" as it appears in Art. 101 of the Penal Code.

and International Humanitarian Law".[23] Whether or not one agrees with this assertion, the Court itself goes on to say that this "does not imply that all the norms of the Rome Statute form, *per se*, part of the *bloque de constitucionalidad*".[24] Thus, we can conclude that the Rome Statute is an instrument for the protection of such rights that pre-exist in international law, without however amounting to an instrument of recognition of rights within the meaning of Article 93 para. 1 of the Constitution. Therefore, for the Constitutional Court, the only Rome Statute norms that form part of the *bloque de constitucionalidad* are those which "are *directly related* to the protection of human rights and international humanitarian law" (emphasis added).[25] This must be determined on a case-by-case basis.[26]

Article 6 of the Rome Statute, which defines the crime of genocide, is a good example of a norm that does, in the view of the Constitutional Court, form part of the *bloque de constitucionalidad*. The Court explained that the norm belongs to the *bloque* not because it is contained in the Rome Statute but principally because it "incorporates the entire content of the Convention on the Prevention and Punishment of the Crime of Genocide" (hereinafter, Genocide Convention).[27] It was on the basis of these same criteria that the Court affirmed that Arts. 6, 7, 8, 19(3), 20, 65(4), 68, 75 and 82(4) of the Rome Statute formed part of the *bloque de constitucionalidad* (without saying which articles do not belong to the *bloque*).[28] In this decision the Court reiterates that for a Rome Statute

23 See Constitutional Court Sentence C-370, 18 May 2006, p. 240 ("*constituye probablemente el mayor instrumento internacional de protección a los derechos humanos y al Derecho Internacional Humanitario*", emphasis added).

24 See Constitutional Court Sentence C-488, 24 July 2009, p. 24. The Court has also affirmed that the Rome Statute as a whole cannot *a priori* be considered to constitute *ius cogens*: Constitutional Court Sentence C-240, 1 April 2009, p. 48.

25 See Sentence C-488, 2009, *supra* n. 24, p. 24 ("…*que guardan una relación directa con la protección de los derechos humanos y del derecho internacional humanitario*" [emphasis added]).

26 Ibid.

27 Ibid. ("*recoge integralmente el contenido de la Convención para Prevenir y Sancionar el Genocidio*"). This formulation by the Constitutional Court lends itself to confusion, since in fact the Rome Statute only incorporates the crime of genocide as codified in the Genocide Convention, without incorporating the entire Convention.

28 See Constitutional Court, Sentence C-290, 18 April 2012, pp. 35–36: "in particular, the following dispositions have been applied as parameters for exercising control of constitutionality: the Preamble (C-928, 2005); Art. 6, with reference to the crime of genocide (C- 488, 2009); Art. 7, with reference to crimes against humanity (C-1076, 2002); Art. 8, which typifies war crimes (C-291, 2007, C-172, 2004 and

norm to be considered part of the *bloque*, the norm in question must "be oriented toward the effective protection of the dispositions that make up international human rights law and international humanitarian law",[29] dispositions which include definitions of international crimes.

Whether or not the Rome Statute norms mentioned by the Constitutional Court in Sentence C-290 belong to the *bloque de constitucionalidad* accordingly depends on their human rights-protective function and the Colombian state's obligation to criminally prosecute grave violations of human rights. As the Court has previously stated these norms equip "the system of human rights protection with an additional tool in the struggle against impunity";[30] guarantee that rights not susceptible to suspension even during states of exception prevail and are effectively enjoyed;[31] and, in general, restate various of the obligations taken on by the Colombian State by subscribing to treaties such as the ACHR, the International Covenant on Civil and Political Rights (ICCPR), the Geneva Conventions, and their Additional Protocols.[32] All of these instruments form part of the *bloque de constitucionalidad* under the direct effect of para. 1 of Article 93 of the Constitution.[33]

C- 240, 2009); Art. 20, with reference to the relativisation of the principle of *res judicata* (C-004, 2003 and C-871, 2003). Likewise, articles 19.3, 65.4, 68, 75 and 82.4, concerning the rights of victims (C-936, 2010). In consequence, the Court has preferred to determine on a case by case basis which articles of the Rome Statute form part of the *bloque de constitucionalidad*, and with what effects" ("*de manera puntual, han sido tomados como parámetros para ejercer el control de constitucionalidad las siguientes disposiciones: el Preámbulo (C-928 de 2005); el artículo 6, referido al crimen de genocidio (C- 488 de 2009); artículo 7, relacionado con los crímenes de lesa humanidad (C-1076 de 2002); artículo 8, mediante el cual se tipifican los crímenes de guerra (C-291 de 2007, C-172 de 2004 y C- 240 de 2009); el artículo 20, referido a la relativización del principio de la cosa juzgada (C-004 de 2003 y C-871 de 2003), al igual que los artículos 19.3, 65.4, 68, 75 y 82.4, concernientes a los derechos de las víctimas (C-936 de 2010). En consecuencia, la Corte ha preferido determinar, caso por caso, qué artículos del Estatuto de Roma, y para qué efectos, hacen parte del bloque de constitucionalidad*").

29 See Constitutional Court, Sentence C-290, 18 April 2012, p. 34 ("…*se oriente a la protección efectiva de las disposiciones que conforman el derecho internacional de los derechos humanos y el derecho internacional humanitario*").

30 See Sentence C-578, 2002, *supra* n. 15, p. 114 ("…*una herramienta adicional para la lucha contra la impunidad*").

31 Ibid.

32 Ibid.

33 See, for example, Constitutional Court Sentence C-582, 11 August 1999, p. 9.

II. The Principle of Legality and the Application of International Law to the Domestic Prosecution of International Crimes

We have already seen that the norms implementing the Peace Agreement contemplate the possible application of international norms for the legal characterisation of conduct to be tried before the JEP. In this regard it should first be noted that, as explained in the preceding section, these implementing norms do not alter the status that the Colombian domestic legal order affords to norms such as the Rome Statute. At any rate, ICL has different, and less formal, sources than domestic criminal law. Thus, arguably, the application of ICL at the national level may conflict with the principle of legality, since it would entail the application of unwritten norms of criminal law. The problem becomes more acute if we bear in mind that custom and general principles of law both constitute sources of ICL,[34] but not of Colombian criminal law, whose main source is the Penal Code. This is grounded in the fundamental principle of *lex scripta*, and the need for a legal (parliamentary) basis to law. In other words, from the perspective of ordinary Colombian criminal law, not only can criminal law not be applied retroactively (*nullum crimen sine lege praevia*), but the respective norms must also be written, and have been issued by the country's parliamentary legislature.[35]

Nonetheless, as we will see below, the principle of legality does not have the same consequences normally attributed to it, when it is applied at the domestic level to the prosecution of international crimes. It is also important to acknowledge that the application of ICL, while not "ordinary" or "traditional", is not, either, completely new to the Colombian legal tradition either. In addition the JEP is in any case bound, in general terms, to respect the principle of legality.

34 On custom and general principles of law as a source of international law see Thirlway, *The Sources*, pp. 53 ff. and 93 ff.; on sources in ICL see Ambos, *Treatise ICL, Volume I*, pp. 124 ff.; on sources in the framework of the Rome Statute see Cryer, "*Royalism…*", pp. 390–405.

35 See Constitutional Court Sentence C-091, 15 February 2017, p. 54 and Sentence C-297, 8 June 2016, pp. 19 ff; and see Velásquez, *Fundamentos*, 2020, p. 75 ss.

1. The Principle of International Legality in the Domestic Prosecution of International Crimes

The principle of legality is contemplated by various international human rights treaties, including the ICCPR, the ACHR, and the European Convention on Human Rights (ECHR), being singled out moreover as one of the guarantees that may not be suspended even during states of exception.[36] As the Constitutional Court has rightly affirmed, each of these instruments recognises that criminal responsibility may be attributed on the basis of international norms, whether contained in treaties, or pursuant to customary international law or general principles of law.[37] Thus, the principle of legality as understood in international law is clearly not limited to the notion of codified (written) law within the meaning of the *lex scripta* principle.[38] What matters, as the European Court of Human Rights (ECtHR) has made clear, is that the respective criminal law norm was *accessible*, and thus the possibility of punishment was *foreseeable*, at the time of commission of the offence.[39] This standard also applies when international norms or definitions are applied in the framework of a domestic prosecution. Let us take a closer look at ECtHR case law on this point[40].

The ECtHR has accepted the retroactive application of national norms (i.e. their application to acts committed before the existence of the relevant provision in criminal law) for the purposes of judging grave human rights violations or grave infractions of IHL which amounted to international crimes at the time of commission. This can be seen, for example, in the two cases of *Kolk and Kislyiy v. Estonia*, and *Kononov v. Latvia*. In the former, the applicants had been convicted in 2003, by a first instance domestic court, of participating in the deportation of Estonian families during the 1948 Soviet occupation. They were convicted despite the fact that Estonian criminal law did not specifically recognise the category of crimes against humanity until 1994.[41] Nonetheless, the ECtHR decided that the conviction did not breach the principle of legality, because the deportation of civilians was considered a crime against humanity in Art. 6(c) of the Nuremberg Statute (Charter of the Nuremberg International Military Tribunal). This position was subsequently re-stated by the United Nations

36 See Art. 4 (2) ICCPR; Art. 27 (2) ACHR, and Art. 15 (2) ECHR.
37 Sentence C-080, 15 August 2018, p. 31.
38 Cote, *Rückwirkung*, p. 333.
39 Ibid., pp. 322, 333, 379.
40 Ferdinandusse, *Direct Application*, pp. 267–268.
41 Ibid.

General Assembly in Resolution 95 (I) of 1946, adopting what are commonly known as the Nuremberg Principles.[42] The facts in *Kononov* are largely similar. Here, the ECtHR was to adjudicate a case involving a national conviction imposed in the year 2004 for war crimes.[43] The crimes dated from 1944, whereas Latvian domestic law had incorporated war crimes only in 1993.[44] The ECtHR once again held that there had been no violation of Article 7 of the ECHR, since the execution of civilians had constituted a war crime at least since the Fourth Hague Convention, of 1907 (Regulations Concerning the Laws and Customs of War on Land).[45] The criteria of accessibility and foreseeability have been reiterated by the ECtHR in other decisions relating to the national prosecution of international crimes,[46] and have contributed to defining the contours of the principle of legality within the framework of ICL.[47]

However, the subsequent national criminal law provision, when applied retroactively, must not contain elements additional to those that defined the international crime at the time of its commission. Moreover, the international definition of the respective crime must be interpreted in the same fashion as at the time of its commission. This was confirmed by the ECtHR's Grand Chamber in *Vasiliauskas v. Lithuania*, where the matter at hand was a conviction for genocide issued in 2004 by the Lithuanian courts regarding the 1953 killing of two nationalist partisans.[48] The Grand Chamber determined, by a slim majority of 9 to 8 votes, that the principle of legality had been violated because the national definition of genocide, adopted in 1998, added political groups to the list of protected groups, whereas 1948 Genocide Convention definition does not include political groups.[49] The Chamber also challenged the Lithuanian tribunal's qualitative interpretation of the "in whole or in part" element of genocide, to the effect that the intention to destroy a distinct or prominent part of the group under attack was considered sufficient to meet the high subjective (special intent) threshold. This was rejected by the Chamber's majority

42 Ibid., p. 9.
43 ECtHR, *Kononov v. Latvia*, para. 38.
44 Ibid., para. 12 ff and 30 ff., 47.
45 Ibid., para. 205 ff.
46 See, for example, ECtHR, *Vladimir Penart v. Estonia*; ECtHR, *Korbely v. Hungary*; ECtHR, *Ould Dah v. France*; ECtHR, *Šimšić v. Bosnia and Herzegovina*.
47 See ICTY, *Prosecutor v. Hadzihasanovic et al.*, Interlocutory Appeal, para. 15; ICTY, *Prosecutor v. Hadzihasanovic et al.*, Decision on Joint Challenge, para. 62; ICTY, *Prosecutor v. Milutinovic et al.*, para. 39; ICTY, *Prosecutor v. Vasiljevic*, paras. 193 ff.
48 ECtHR, *Vasiliauskas v. Lithuania*, para. 15 ff.
49 Ibid., para. 165 ff.

on the grounds that the domestic interpretation had been developed only from the 1990s onward, whereas the subjective element had previously been interpreted quantitatively, as requiring the intent to destroy a substantial part of the respective group.[50]

These decisions by the ECtHR allow us to sum up the scope of the principle of legality in the national prosecution of international crimes by way of five propositions:

(i) IHRL does not allow the renunciation, in such cases, of the principle of legality;
(ii) yet, the principle of legality as applied to international crimes acquires particular and distinctive characteristics when compared to the prevailing notion of legality in Colombian domestic law;
(iii) one of these characteristics is, precisely, the possibility that national criminal norms may be applied retroactively;
(iv) for this to occur, the content of these norms must coincide with the scope and definition of the respective offences recognized under international law at the time of commission;
(v) in such cases, the question of whether the principle of legality has been violated or not will depend on an analysis of criminal law provisions, pursuant to international law at the time of commission, (including international treaty law, custom, and general principles of law).[51]

The adoption of this conception of legality within the framework of the Colombian TJ system would not be in contradiction with obligations arising from the ACHR. The Inter-American Court of Human Rights (IACtHR) has not explicitly supported the retroactive application of national norms on the basis of international law. However, Article 9 of the ACHR, which deals with the principle of legality, refers only to "applicable law" as the respective standard, i.e., using a term which covers both national and international law.[52] In fact, the Inter-American Commission

50 Ibid., para. 176–177; see Ambos, "*The Crime of Genocide…*", p. 175 ff.; in Spanish in InDret 3/2016.

51 In a subsequent decision, in a case whose facts were in essence identical to those of *Vasiliauskas*, the ECtHR nonetheless decided that there had been no violation of Art. 7, finding that the Lithuanian courts had provided convincing reasoning for the conviction and that this was sufficient to satisfy the criterion of foreseeability; see ECtHR, *Drėlingas v. Lithuania,* para. 97–111; for a critique see Ambos/Rackow, "*Rspr…*", in: NStZ (2020), p. 401.

52 This can be derived from the preparatory work toward the ACHR itself: on this point see Cote, *Rückwirkung*, p. 328 ff. On Art. 9 ACHR and the prosecution of international crimes, see also Antkowiak/Uribe, "*Artículo 9…*", pp. 337–338.

on Human Rights (IACHR) has drawn attention to States' obligation to take such measures and/or undertake such reforms as may be necessary to enable them to investigate and adjudicate international crimes.[53] Along these same lines, the IACtHR has maintained that States have a duty to adopt such measures as may be necessary to avoid impunity for massive human rights violations, which implies activating their criminal jurisdictions to apply both national and international law.[54] In *La Cantuta v. Perú*, and in *Almonacid-Arellano et. al. v. Chile*, the Court went so far as to hold that States could not adduce the prohibition on retroactivity as an excuse for non-compliance with these obligations.[55]

2. *Application of the International Principle of Legality in Colombian Law*

Given Colombian case law to date, it is fair to say that there is some precedent for the application of the international conception of legality explained above. Thus, the JEP is not moving in completely uncharted waters. Indeed, the Supreme Court recognised that conduct can be characterised in accordance with international law where grave human rights violations are concerned. Thus, for example, the Court made reference to the "flexibilisation of the principle of legality", as it is known in IHRL, in the context of the Justice and Peace Law (another, pre-JEP, judicial transitional justice mechanism).[56] On this basis, the Court held that it was possible to apply penal provisions from IHL, introduced in the year 2000, to conduct prior to this date.[57] The Court reasoned, inter alia, that the

53 See IACHR Resolution 1/03, 24 October 2003: "[S]tates must respect and ensure the human rights of all persons under their jurisdiction. They are therefore obligated to investigate and punish any violation of these rights, especially when such violations also constitute crimes against international law."

54 See IACtHR, *La Cantuta v. Peru*, para. 160; IACtHR, *Goiburú et al. v. Paraguay*, para. 131.

55 La Cantuta v. Perú, *supra* n. 54, para. 226; IACtHR, *Almonacid-Arellano et al v. Chile*, para. 151.

56 The Justice and Peace Law is a previous TJ mechanism, adopted in 2005 (Law 975). This mechanism aimed to demobilise paramilitary groups (*Autodefensas Unidas de Colombia* – AUC) and allow prosecution of their grave crimes.

57 See, for example, Corte Suprema de Justicia (CSJ) Radicado: 44462, p. 32 ff.; also CSJ, Radicado: 33039, p. 25 ff.

four Geneva Conventions, and their Additional Protocols I and II, were incorporated into domestic law in 1960.[58]

It should be noted that certain pronouncements by the Colombian Supreme Court might seem to suggest that the aforementioned "flexibilisation of the principle of legality" requires only that the conduct should be prohibited in some international instrument.[59] However, this approach does not correspond to the actual development of the principle of legality in international law. The "flexibilisation of the principle of legality" does not operate in the face of any and every human rights violation, no matter how grave. It is reserved for international crimes such as genocide, crimes against humanity, war crimes, and the crime of aggression, as the Supreme Court has itself made clear on several occasions.[60] In other words, it is not sufficient that the conduct appears in some international instrument such as a declaration or resolution. Nor is it sufficient for it to have been defined in an international treaty, or for there to be a clear international prohibition forbidding the carrying out of such conduct, or obliging States to criminally prosecute it on the basis of treaty law. Rather, individual criminal responsibility based on international law presupposes that the conduct is not only prohibited, but criminal, under international law.[61]

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58 CSJ, *supra* n. 57, Radicado: 44462, p. 39 (the four Conventions of 1949 were approved by Law no. 5 of 1960. Additional Protocol I was implemented by Law 11, of 1992 and Additional Protocol II by Law 171, of 1994).

59 CSJ, *supra* n. 57, Radicado: 44462, p. 32 ("both this postulate [the principle of legality] and that of the non-retroactivity of criminal law, are to be considered satisfied if the act or omission is prohibited under international treaty or customary law at the moment of its commission.") ("*tanto este postulado [el principio de legalidad] como el de irretroactividad de la ley penal, se encuentran satisfechos con la prohibición de la acción o de la omisión en tratados internacionales o en el derecho consuetudinario al momento de su comisión*").

60 Ibid., p. 42; CSJ, Radicado: 38957, p. 83; CSJ, *supra* n. 57, Radicado: 33039, p. 34 ("We must be emphatic in pointing out that said flexibility in regard to the principle of legality applies exclusively to the four categories of what are commonly referred to as international crimes, that is, crimes of genocide, aggression, crimes against humanity and crimes against international humanitarian law"; ("*Hay que ser enfáticos en señalar que dicha flexibilidad al principio de legalidad es atendible exclusivamente a las cuatro categorías de los llamados delitos internacionales, vale decir a los crímenes de genocidio, agresión, de lesa humanidad y contra el derecho internacional humanitario*").

61 See Cote, *Rückwirkung*, p. 378 ff.; and along these lines, CSJ, Radicado: 33118, ("it would be possible to apply the content of an International Treaty recognised by Colombia in respect of any crime there *prohibited* and *sanctioned*, even in the absence of a pre-existing domestic law to that effect, without contravening the principle of legality." [emphasis added] ("*sería posible aplicar el contenido de un Tratado*

The enforced disappearance of persons represents a useful example in this regard. While it is true that this conduct may amount to a crime against humanity, this requires, in line with modern ICL (e.g. Article 7 of the ICC Statute), that it must have been committed as "part of a widespread and systematic attack on the civilian population".[62] Only if this so-called context element is fulfilled, does an enforced disappearance amount to an international crime. In other words, while a single case of enforced disappearance would constitute a grave human rights violation, it would not as such be elevated to the category of an international crime. Accordingly, ICL could not serve as a basis for its domestic prosecution. For this reason, it is problematic to affirm that enforced disappearance *per se* – without reference to discussion of the particular structure of crimes against humanity – constituted, by the mid-1980s, an example of an international crime. Notwithstanding, the Supreme Court advocated this very position in a judgment of 16 December 2015, offering as its justification three resolutions: Resolution 33/173, 1978, of the UN General Assembly, and resolutions 666 (1983) and 742 (1984) of the General Assembly of the Organisation of American States (OAS).[63] This is not convincing. In the first place, only the latter two resolutions affirm that enforced disappearance "constitutes a crime against humanity", (without, moreover, offering an explanation). Secondly, it is doubtful that just two resolutions – i.e., soft law from a regional organisation – can be considered a sufficient basis for a position which has, after all, no other basis in general international law. Nor can such resolutions define, with binding force, the legal nature of particular conduct.[64] Once again: the international concept of the principle of legality that emerges from international human rights law requires *detailed and careful analysis of the sources of international public law,* in order to establish whether particular conduct constituted an international crime, and can therefore be treated as such in Colombian domestic law.

Internacional reconocido por Colombia respecto de algún delito allí prohibido y sancionado, aún sin existir ley interna previa en dicho sentido, sin atentar contra el principio de legalidad").

62 In this regard see Ambos, *Treatise ICL, Vol. II: The Crimes and Sentencing*, p. 50 ff.; Ambos, Article 7, in Ambos, *Commentary*, mn. 15 ff., 200 ff.; see also Ambos, *Informe Jurídico*.

63 See CSJ, Radicado: 38957, p. 86 ff.

64 On the criminalisation of conduct in international law, and the identification of international customary law in this area, see Cote, *Rückwirkung*, p. 378 ff. On the elements that make up international customary law (state practice and *opinio iuris*), and various aspects of proving these elements, see Arajärvi, *The Changing Nature*, p. 16 ff.

3. The Obligation to Observe the Principle of Legality in the JEP

The fact that the JEP can apply international norms does not give it, as a judicial TJ mechanism, the right to violate the principle of legality or to consider itself exempt from the need to respect this principle. In fact, the JEP is bound by Art. 29 of the Colombian Constitution, which specifically provides for the principle of legality.[65] This is also acknowledged by the special norms that were adopted to create the JEP, such as Art. 10 of its Statutory Law, and Art. 1 of its Procedural Law.[66] However, it is also true that, in light of the complexity of the JEP's normative frameworks, the *scope* of the principle of legality cannot be the same as it is in the context of ordinary justice.[67]

Thus, the Constitutional Court has recognised that the application of ICL in the JEP does not contradict the Constitution, and that this has implications for a correct understanding of the principle of legality. According to the Court, although "the JEP's duty to administer justice in all cases is subject to the principle of legality",[68] the JEP must also take into account the fundamental parameters of the Constitution, and international law insofar as it is binding for Colombia.[69] These two points of reference constitute, in the Court's view, "a kind of mediator, to resolve the tension between the rule of law, or prevailing legality, [on the one hand], and the new normative expressions proper to transition [on the other]".[70]

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65 See Art. 29 of the Colombian Constitution ("No-one will be judged except on the basis of laws that predate the act of which they are accused").("*Nadie podrá ser juzgado sino conforme a leyes preexistentes al acto que se le imputa*").

66 Respectively, 'Ley Estatutaria de la JEP', (LE-JEP) and 'Ley de Procedimiento' de la JEP, (LP-JEP). Art. 10 of the LE-JEP reads "the JEP will carry out its functions while guaranteeing the application of the principle of legality 29 of the Political Constitution", ("*[l]a JEP cumplirá sus funciones garantizando la aplicación del principio de legalidad consagrado en el artículo 29 de la Constitución Política*"). See also Art. 1 (a) of Law 1922, of 2018 (LP-JEP): "the decisions that will bring procedures before the JEP to an end, as well as complying with the principle of legality […]" ("*las decisiones que pongan término a los procedimientos ante la JEP, además de cumplir con el principio de legalidad*").

67 On the tension between two notions of legality within the JEP see Cote, *"El carácter abierto…"*, p. 73–113.

68 Constitutional Court, Sentence C-080 of 2018, *supra* n. 37, p. 319 ☯"el deber de la JEP de administrar justicia en todos los casos está regido por el principio de legalidad"☸.

69 Constitutional Court, Sentence C-112, 13 March 2019, p. 83.

70 Ibid. ["*una especie de mediadores para resolver la tensión entre el Estado de Derecho o la legalidad vigente y la nueva expresión normativa de la transición*"].

Although the JEP, as an "extremely complex integration of multiple instruments, of different natures",[71] must consider a range of types of sources, the principle of legality must be complied with. The principle however, needs to be understood from a broader perspective,[72] at least when compared with the traditional, strict, notion of legality that prevails in the domestic legal order of Colombia (and other civil law jurisdictions). In other words, when the JEP classifies certain conduct and subsumes it under the definition of a particular criminal offence, it must do so on the basis of a norm that is valid in Colombia and existed before the acts in question took place.[73] This norm need not, however, be drawn necessarily or exclusively from the Colombian Penal Code.[74] What is required is only that the conduct was clearly prohibited before it was carried out, *irrespective of the source*, and was moreover criminal under international law. Accordingly, where the Penal Code is not operating as the point of reference, the JEP must carefully examine the relevant sources of international law in order to determine, in the words of the Constitutional Court, "the date from which an international crime that cannot be amnestied or pardoned, and in respect of which criminal prosecution may not be renounced exists".[75] The JEP's judicial practice is thus not only based on the domestic constitutional and other norms that regulate it, but also on the international definition of the principle of legality.

III. Conclusion

Judging international crimes committed during the Colombian armed conflict in accordance with ICL does not necessarily entail the retroactive application of criminal law norms that were not in force in Colombia at the time of commission. Rather, the international norms on which such prosecutions can be founded – for example Arts. 6, 7 and 8 of the Rome Statute (defining genocide, war crimes, and crimes against humanity) – already form part of the Colombian domestic legal order, in particular

71 Constitutional Court, Sentence C-674, 14 November 2017, p. 330 ("[U]*na muy compleja integración de múltiples instrumentos de distinta naturaleza*").
72 Constitutional Court, Sentence C-080 of 2018, *supra* n. 37, p. 319.
73 Ibid., p. 313.
74 Ibid., p. 311.
75 Constitutional Court, Sentence C-007, 1 March 2018, p. 172, ("*la fecha desde la cual existía un crimen internacional no susceptible de amnistía, indulto [o] renuncia a la persecución penal*".)

pursuant to the '*bloque de constitucionalidad*'. Although the Rome Statute is not part of the *bloque* in its entirety, the definitions of international crimes that it contains do form part of the *bloque* insofar as they are directly related to norms of IHRL or IHL, which in Colombia enjoy constitutional rank. In any event, the concrete legal status of each crime will be determined by the analysis of the individual acts that gave rise to, for example, war crimes or crimes against humanity. Even when the respective conduct took place before the adoption of the Rome Statute, customary ICL norms will be applicable, in line with the *bloque*.

Further, it must be borne in mind that the international definition of the principle of legality, particularly developed in IHRL, allows for the domestic criminal prosecution of international crimes on the basis of international law valid at the time of commission. Accordingly, from the perspective of IHRL, the retroactive application of national norms is admissible as long as their content coincides with pre-existing international law. These assertions are bolstered by the jurisprudence of the Colombian Constitutional Court and must therefore be observed by the JEP, in line with the legality principle.

The international conceptualisation of the principle of legality that has developed from IHRL therefore demands *detailed* analysis of the sources of international law. This is to be done in order to establish whether particular conduct constituted an international crime at the time of commission, and consequently whether it can be treated as an international crime in Colombian domestic law. In so doing, the JEP, and thereby the Colombian State, comply with the minimum standards established by the principle of legality and with its international responsibilities with regard to the obligation to investigate and prosecute grave human rights violations.

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