Translated from Spanish

Legal considerations in connection with General Assembly resolution 67/88, entitled "Criminal accountability of United Nations officials and experts on mission"

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I. Introduction

This report examines legal considerations that have arisen in connection with the implementation in Colombia of the General Assembly resolution of 14 December 2012, entitled "Criminal accountability of United Nations officials and experts on mission", pursuant to the request contained in memorandum DAPM/GAIOM No. 2798 from the Multilateral Political Affairs Department.

The legal considerations in the first section of this report concern the classification of crimes in Act No. 599 of 2000 (Colombian Penal Code), in general, and offences characterized as serious crimes under international law, in particular.

The second section includes specific legal considerations with regard to the application of domestic penal law in cases where Colombians have committed serious crimes abroad, and the rules governing legal cooperation in criminal matters. A number of conclusions are set out at the end of the report.

General considerations

General Assembly resolution 67/88 contains recommendations to States regarding the exercise of criminal jurisdiction and legal cooperation in connection with "crimes of a serious nature".

For the purposes of this report, the basis for characterizing offences as serious crimes under international law shall be criminalization as determined under the Rome Statute, article 5[1] and the preamble of which limit the jurisdiction of the International Criminal Court to "the most serious crimes of concern to the international community as a whole" and that "threaten the peace, security and well-being of the world".[2]

It should be noted that, under existing domestic legislation, crimes are classified by topic and, more importantly, by which legal right is infringed. However, there is no specific category for "crimes of a serious nature".

The special part of the Penal Code classifies crimes as follows:

(i) "Book II, Title I. Crimes against life and personal integrity"

(ii) "Book II, Title II. Crimes against persons and goods protected under international humanitarian law"

[1] Article 5 of the Rome Statute provides the following: "1.The jurisdiction of the Court shall be limited to **the most serious crimes of concern to the international community as a whole**. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."
(Highlighting added)

[2] Decision C-578 of 2002,ConstitutionalCourt of Colombia.

(iii) “Book II, Title III. Crimes against individual freedom and similar offences”

(iv) “Book II, Title IV. Crimes against sexual freedom and integrity and sex education”

(v) “Book II, Title V. Crimes against moral integrity”

(vi) “Book II, Title VI. Crimes against the family”

(vii) “Book II, Title VII. Crimes against economic assets”

(viii) “Book II, Title VII Bis. Information and data protection”

(ix) “Book II, Title VIII. Copyright crimes”

(x) “Book II, Title IX. Crimes against the public trust”

(xi) “Book II, Title X. Crimes against the economic and social order”

(xii) “Book II, Title XI. Crimes against natural resources and the environment”

(xiii) “Book II, Title XII. Crimes against public security”

(xiv) “Book II, Title XIII. Crimes against public health”

(xv) “Book II, Title XIV. Crimes against democratic participation mechanisms”

(xvi) “Book II, Title XV. Crimes against the public administration”

(xvii) “Book II, Title XVI. Crimes against the effective and fair administration of justice”

(xviii) “Book II, Title XVII. Crimes against the existence and security of the State”

(xix) “Book II, Title XVIII. Crimes against the constitutional and legal order”

Thus, conduct characterized as serious under international law is contemplated within the aforementioned categories but from the perspective of the legal right that is being protected, as set out below.

1. Genocide

Article 101 of Title I, on crimes against life and personal integrity, of the Colombian Penal Code specifically characterizes genocide as a crime in the following terms:

"whoever, with the intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, causes the death of its members because they belong to that group shall be liable to a prison sentence of between 480 and 600 months and a fine of between 2,666.66 and 15,000 times the current legal minimum monthly wage and shall be prohibited from exercising their civic rights and duties for between 240 and 360 months.

A prison sentence of 160 to 450 months and a fine of 1,333.33 to15,000 times the current legal minimum wage shall be imposed and civic rights and duties shall be suspended for 80 to 270 months when, with the same intent, any of the following acts are committed:

1. Serious bodily or mental harm is caused to members of the group.
2. Forced pregnancy.
3. Conditions of life calculated to bring about the physical destruction of the group, in whole or in part, are inflicted on members of the group.
4. Measures are taken to prevent births within the group.
5. Children of the group are forcibly transferred to another group."

2. Crimes against humanity

Crimes against humanity, which are understood to be inhuman acts committed as part of a widespread or systematic attack directed against a civilian population, are not governed by a single, all-encompassing provision that defines them as such. However, the Colombian State has incorporated into its national legislation the obligations set out in the corpus of international law on protection against such crimes, namely:

a. The International Covenant on Civil and Political Rights (Act No. 74 of 1966)
b. The American Convention on Human Rights; Pact of San José, Costa Rica (Act No. 16 of 1972)
c. The Geneva Conventions of 1949 (Act No. 6 of 1960) and Additional Protocol I and Protocol II of 1977 (Act No. 11 of 1992 and Act No. 171 of 1994)
d. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Act No. 76 of 1986)
e. The International Convention on the Suppression and Punishment of the Crime of Apartheid (Act No. 26 of 1987)
f. The International Convention on the Elimination of All Forms of Racial Discrimination (Act No. 22 of 1981), among others.[3]

[3] Judgement C-578 of 2002of the Constitutional Court of Colombia.

3. War crimes

War crimes are classified in Title III of Book II of the Penal Code as the following types of conduct, which each incur prison sentences of at least two years: wilful killing of a protected person (article 135); rape of a protected person (article 138); violent sexual assault of a protected person (article 139); enforced prostitution or sexual slavery (article 141); the employment of unlawful methods or means of warfare (article 142); perfidy (article 143); acts of terrorism (article 144); acts of barbarism (article 145); subjecting a protected person to inhuman or degrading treatment or to biological experiments (article 146); acts of racial discrimination (article 147); the taking of hostages (article 148); illegal detention and denial of due process (article 149); compelling a person to support war operations (article 150); dispossession of a person's effects on the battle field (article 151); failure to provide relief and humanitarian assistance (article 152); the deportation, expulsion, transfer or forced displacement of civilians (article 159); failure to take measures to protect the civilian population (article 161); and unlawful conscription into the armed forces (article 162).

III. SPECIFIC LEGAL CONSIDERATIONS

1. The application of Colombian penal law to Colombians who commit serious crimes abroad

Under article 4 and article 95, paragraph 2, of the Constitution, all persons in Colombian territory must abide by the laws of the Republic. All persons within the territorial boundaries set forth in article 101 of the Constitution are therefore subject to the laws prescribed by the Colombian legislature.

Accordingly, the Constitutional Court has stipulated, on the premise that a State may dictate and enforce laws within its respective territory, that the territoriality principle shall be the general rule in the application of criminal law.[4]

Regarding the implementation of supra-constitutional norms, article 14 of the Colombian Penal Code governs the application of the territoriality principle as follows:

[4] Judgement C-1189/00 of the Constitutional Court of Colombia.

"ARTICLE 14.TERRITORIALITY. **Colombian penal law shall apply to all persons who infringe that law in the national territory,** subject to the exceptions specified in the international treaties and conventions ratified by Colombia." (Highlighting added)

This provision is in keeping with the position taken by the Permanent Court of International Justice in the *S.S. Lotus* case, according to which, even where international law does not absolutely prohibit the extension of national legislation beyond a State's territorial boundaries, as a general rule, States must refrain from exercising their sovereignty in the territory of other States.[5]

Colombian law nonetheless provides for the application of the principle of extraterritoriality on an exceptional basis, in other words, the extension of the scope of Colombian penal law to acts committed outside the national territory.[6]

a. The extraterritorial application of criminal penal law in the Colombian legal system

Article 29 of the Code of Penal Procedure authorizes, in general, the prosecution and judgement of crimes committed abroad, as follows:

"The jurisdiction of ordinary criminal courts. The criminal courts are responsible for prosecuting and judging crimes committed in the national territory, **as well as those committed abroad as determined by the international treaties signed and ratified by Colombia and national legislation**." (Highlighting added)

Accordingly, situations in which Colombian law would justify the extraterritorial application of penal law are contemplated below:

[5] *Lotus*, Judgment No. 9, 1927, PCIJ series A, No. 10, pp. 16-30.
[6] Velásquez, Fernando, *Manual de Derecho Penal, Parte General.* Ed. Librería Jurídica, COMLIBROS, Medellín Colombia, 2007, p. 148.

Extraterritoriality of penal law in order to defend the State

Whether or not conduct is criminalized in the State in which it occurred, the Colombian legal system contemplates the extraterritorial application of penal law, by virtue of the "effects" doctrine, or protective principle, also known as quasi-territoriality or protection of the State.

The aforementioned doctrine allows for the extraterritorial application of Colombian penal law to punishable conduct that violates the legal rights of the State or its nationals,[7] regardless of the geographic area in which it was perpetrated. In that regard, article 16 of the Colombian Penal Code states the following:

> "Colombian penal law shall apply:
>
> 1. To any person who commits a crime abroad against the existence or security of the State, against the constitutional regime, against the economic and social order, with the exception of the conduct defined in article 323 of this Code, or against the public administration, or who counterfeits the national currency or is guilty of financing terrorism and administering resources linked to terrorist activities, even if such person has been acquitted abroad or convicted, and given a lesser sentence than is provided for under Colombian law.
>
> […]"

In view of the foregoing, the protective principle would allow the Colombian State to exercise jurisdiction over anyone, national or alien, who, as part of a United Nations mission, commits serious crimes abroad, once it becomes clear that his or her conduct affects the interests of the Colombian State.

[7] Edgar Martínez, "La aplicación de la ley penal", in *Comentarios a los códigos penal y de procedimiento penal*, ed. Universidad Externado de Colombia (2002), p. 128.

The extraterritorial application of Colombian penal law to public officials

Under article 16, paragraphs 2 and 3, of the Penal Code, the application of Colombian law can be extended to the extraterritorial conduct of its public officials, as follows:

> "Colombian penal law shall apply to:
>
> […]
>
> 2. Any person who **is in the service of the Colombian State**, enjoys immunity under international law, and **commits a crime abroad**.
> 3. Any person who is in the service of the Colombian State, does not enjoy immunity under international law, and **commits abroad a crime that is not mentioned in paragraph 1, where such person has not stood trial abroad**.
>
> […]"
>
> (Highlighting added)

Similarly, the Military Penal Code states that its scope of application extends to crimes committed by members of the armed forces on active duty outside Colombia:

> "those [crimes] committed by members of the Armed Forces on active duty **inside or outside the country**, when those crimes are the direct result of the military or police duties assigned to them by the Constitution, laws and regulations".
>
> (Highlighting added)

This possibility is recognized by the International Law Commission which, in relation to draft article 7 of the draft articles on the responsibility of international organizations, concerning the conduct of organs of a State or organs or agents of an international organization placed at the disposal of another international organization, notes that the State that seconds its officials to a mission of an international organization retains disciplinary powers and criminal jurisdiction over those officials.

The following paragraph is an excerpt from the commentary of the International Law Commission in this regard:

> "[…] Article 7 deals with the different situation in which the seconded organ or agent still acts to a certain extent as organ of the seconding State or as organ or agent of the seconding organization. **This occurs for instance in the case of military contingents that a State places at the disposal of the United Nations for a peacekeeping operation, since the State retains disciplinary powers and criminal jurisdiction over the members of the national contingent** […]".[8]
>
> (Highlighting added)

(iii) Extraterritorial application of Colombian criminal law to nationals other than public officials

Article 16, paragraph 4, of the Penal Code provides for the extraterritorial application of penal law to Colombians who, after committing a crime on foreign soil, are present in Colombia:

> "Colombian penal law shall apply:
>
> […]
>
> 4. To any national to whom the preceding paragraphs do not apply and who **is present in Colombia after having committed a crime on foreign soil, where the penalty under Colombian penal law is a term of imprisonment of at least two years and such person has not been tried abroad**.
>
> In the case of a lesser penalty, prosecution must be initiated by a request from a private person or the Attorney-General.

It follows that the extraterritorial exercise of penal jurisdiction is contingent upon whether the crime in question is punishable by a term of imprisonment exceeding two years.

[8] International Law Commission, "Draft articles on the responsibility of international organizations, with commentaries" (2011), *Yearbook of the International Law Commission, 2011*, vol. II (Part Two), p. 20.

In this regard, it should be borne in mind that, the crimes set out in the General Considerations of this report, which are characterized as serious under the Rome Statute and criminalized under the Colombian Penal Code, are punishable by terms of imprisonment exceeding two years. Thus, in reference to the recommendations made in paragraph 3 of resolution 67/88, the Colombian State would have the right to prosecute any of its nationals who commit serious crimes while serving as United Nations experts or officials on mission.

It should be further noted that, in extradition cases, Colombia applies this cooperation mechanism only in respect of the most serious crimes. Notwithstanding the foregoing, the crimes currently recognized as serious by the institutions of the Colombian State are those punishable by a minimum sentence of four years in prison.

2. Considerations relating to the rules on legal cooperation in criminal matters

International legal cooperation is largely governed by public treaties, international conventions, agreements between governments, and internationally established practice with a view to ensuring the submission and transfer of evidence.[9] Thus, in the field of international legal cooperation, domestic penal procedural legislation is regarded as secondary.

This premise is substantiated by article 499 of Act No. 600 of 2000 (former Code of Penal Procedure), which states that:

> "For the most part, international rules shall apply, and domestic rules shall be subsidiary. Both shall be interpreted in accordance with international doctrine and practice, giving priority to substantive law".

Thus, in the absence of international instruments, or in situations not covered by legal cooperation treaties signed by Colombia, the provisions of the Code of Penal Procedure shall apply.

[9] Fabio Espitia, *Instituciones de derecho procesal penal*, ed. Legis, Bogotá (2003), pp. 411-412

In this regard and with respect to paragraph 5, subparagraphs (a) and (b), of General Assembly resolution 67/88, it is imperative to note that article 485 of Act No. 906 of 2004 (Code of Penal Procedure currently in force) establishes the possibility of seeking assistance from foreign authorities or international organizations in initiating investigations of crimes committed abroad, as follows:

> "Judges, prosecutors and chiefs of judicial police units may request foreign authorities and international organizations, either directly or through established channels, to provide any material evidence or to undertake any proceedings that may be necessary, within the scope of their jurisdiction, for a case that is being investigated or prosecuted in Colombia. The authorities concerned may communicate directly with each other in order to determine the merits of the actions outlined in the request.
>
> […]"

Similarly, with regard to the transfer of witnesses and experts, article 486 of the Code of Penal Procedure, provides that:

> "Once any possible technical means of transmittal, such as audiovisual or other devices, have been exhausted, the competent authority shall require the appearance of witnesses or experts who are relevant and necessary for the investigation and trial, but the interested party shall bear the costs.
>
> Witnesses and experts shall testify at the oral proceedings, subject to the provisions of this Code.
>
> Proviso. **Prosecutors or judges, pursuant to the rules of this Code and in compliance with the legally established channels, may request the transfer of witnesses or experts to a foreign territory for the purpose of undertaking proceedings within their jurisdiction**. This course of action shall be pursued only

once the technical means of transmittal described in the preceding paragraph have been exhausted. In all cases, the transfer must be requested before the foreign authorities empowered to grant the authorization.

During the investigation and sentencing, judges and prosecutors may, within the limits of their competence, request assistance from diplomatic and consular officials abroad in obtaining evidence or conducting investigations, provided that such measures are consistent with the principles set out in this Code.

The Attorney-General may authorize the presence of foreign judiciary personnel for the purpose of conducting proceedings in the national territory, under the supervision and coordination of an assistant prosecutor and with the assistance of a representative of the Prosecutor's Office".
(Highlighting added)

Notwithstanding the above, it should be noted that, consistent with paragraph 5(d) of the resolution under consideration, article 487 of Act No. 906 of 2004 encourages the exploration of adequate ways and means of responding to requests by host States for support and assistance. In this connection, the Act states:

"In the case of crimes that are international in nature, **the Attorney-General's Office may, along with other institutions, form part of an international commission established to assist with the corresponding enquiry or investigation**.

The Attorney-General may enter into agreements with his or her counterparts in other countries for the purpose of strengthening judicial cooperation and sharing technology, experiences or training or any other activities that have similar aims." (Highlighting added)

3. VICTIM PROTECTION

Paragraph 5(c) of the aforementioned resolution calls upon States, pursuant to their national law, to provide protection for victims of, as well as witnesses to, crimes of a serious nature alleged to have been committed by United Nations officials and experts on mission.

The response to that paragraph in Colombian law is article 133 of Act No. 906 of 2004, whereby the Office of the Attorney- General is obligated to implement the following protection measures for victims and their family members:

"The Office of the Attorney- General shall take such measures as are necessary to attend to the needs of victims and guarantee their personal security, as well as that of their family members, and to protect them against any publicity that may constitute an undue attack on their private lives or dignity.

Measures to care for and protect victims shall not impinge on the rights of accused persons or on the right to a fair and impartial trial, nor shall they be incompatible with those rights."

IV. CONCLUSIONS

Based on a legal analysis of General Assembly resolution 67/88, it may be concluded that:

1. While there is no specific classification of serious crimes under Colombian law, the Colombian State, consistent with its international obligations, has classified as crimes all forms of conduct characterized as serious crimes under international law.

2. With respect to the situations contemplated in this report, the Colombian penal system provides for the extraterritorial application of national criminal law to Colombian nationals who commit crimes abroad, (in particular, the serious crimes listed in the Rome Statute), while serving as United Nations officials or experts on mission.

3. International cooperation in criminal legal matters is governed primarily by international agreements and conventions signed by the Colombian State. Hence, only in the absence of an international instrument does Colombian law apply.

Notwithstanding the above, the Colombian legal system contains the necessary laws and statutes to facilitate and ensure the collection and submission of evidence and to guarantee the incorporation, in any trial in Colombia, of information and evidence obtained by the United Nations.

4. Colombian law obliges the Attorney-General to take the necessary steps to ensure the effective protection of victims of, and witnesses to, crimes in general. National legislation thus provides suitable mechanisms for responding adequately to requests by host States for support and assistance in connection with the commission of serious crimes by United Nations officials and experts on mission.

This report examines a legal concept and, as such, constitutes but one view within the larger body of legal interpretation, in accordance with article 28 of the Code of Administrative Procedure and Action under Administrative Law.