

THE OBLIGATION TO LEGISLATE CRIMES AGAINST HUMANITY IN THE COLOMBIAN CRIMINAL CODE

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Introduction

The Republic of Colombia has suffered the struggles of an internal armed conflict for more than forty years. Through time, different Colombian governments have tried to negotiate peace and begin the process of demobilization with various illegal guerrilla and paramilitary groups. The most successful peace process with a guerilla group has been the reincorporation into civilian life of the rebel group M19 in 1990. However, since then little has been achieved in terms of peace.

Since 1990, various governments have attempted to conduct peace negotiations with other illegal armed groups. The most relevant of such efforts were the peace negotiations of 1998 to 2002 between the administration of former Colombian president Andrés Pastrana and the Armed Rebel Forces of Colombia (FARC, the biggest guerrilla group). Unfortunately, these negotiations failed and in the meanwhile the FARC gained territorial power. In fact, since then both the FARC and paramilitary groups increased their numbers. In 2002, the government of former president Álvaro Uribe initiated a process of transitional justice. Its principal goal was the demobilization of the paramilitary group AUC (Colombian United Self-defense Group) and achieved justice. Little has been done in this regard. Poor results have been achieved throughout the prosecutions which have been done until now.

Colombia has introduced into its legislation some provisions regarding war crimes as part of its duty to structure the national legislation in accordance with the Rome Statute provisions. However, no provisions on crimes against humanity

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were enacted. The lack of legislation around these types of crimes was a result of the decision made by the Colombian Congress back in 2000. It concluded that the inclusion of crimes against humanity in the Criminal Code could generate judicial insecurity and affect fundamental rights.

Colombia has ratified some of the principal human rights conventions such as the International Covenant for Civil and Political Rights and the American Convention on Human Rights. According to both legal instruments, the state parties have the duty to ensure the rights recognized in them. The purpose of this thesis is to illustrate the importance of implementing into the Colombian Criminal Code a chapter on crimes against humanity. This thesis will (1) discuss the state of international law regarding the obligation to ensure and respect human rights in order to (2) show that Colombia's current legislation does not comply with its international obligations on these matters, and that as a consequence it does not have effective mechanisms to handle prosecutions with observance of the rights of victims and the principle of legality.

In order to explain the first aforementioned issue, four points will be discussed. First, The obligations to ensure and respect human rights under the International Covenant on Civil and Political Rights, the UN guidelines on reparation and Principles on impunity, and the American Convention on Human Rights. The purpose of underlying the development of these obligations based on these binding and non-binding norms is to show that the enactment of appropriate legislation is part of States' duty to ensure the exercise of the rights contained in the abovementioned international instruments. Secondly, it will be explained that the enactment of norms is also seen as a mean of compliance of States to make judicial remedies available, which is a step in the fulfillment of the obligation to ensure human rights. Thirdly, it will be mentioned that the obligation to take legislative measures has also been seen as mean of reparation and a guarantee of non-repetition. Fourthly, the States' duty to avoid the adoption of legislative measures, such as statutory limitations, tending to ban the prosecution of perpetrators of crimes against humanity will be also addressed. The purpose of all four points is to show that even though States are allowed to determine the way how their domestic legislation can be designed, legislative measures have to be circumscribed to the guidelines developed by the States' international obligations under the treaties which they have ratified.

The second issue will be addressed in the last two chapters. It will be seen that a way to assess a civil law State's compliance –such as Colombia- with its duties to ensure and respect human rights is throughout the evaluation of their criminal legislation. Any gap may lead to serious problems for the vindication of the rights of victims and inditees in a criminal process. In order to explain the importance of this point, chapter II will address the negative incidence that the lack of legislation has had on the way how the executive branch understands when a crime against humanity has been committed and the judiciary's limitations to do effective prosecutions. The last section of the chapter will explain that the available crimes are characterized for being underinclusive of international norms. The consequen-

ce is that the judiciary's job becomes ineffective and sometimes exceeds the international framework on the definition of crimes. Meanwhile, chapter III will focus exclusively on the way how the described legislative deficiency has triggered an imbalanced administration of justice. In order to do this, it will explain how the judiciary has faced the prosecutions of militaries involved in extrajudicial killings, and the effects of the contradictory rulings of the Supreme and Constitutional courts in relation to the application of statutes of limitations in certain prosecutions.

1 General obligations of the colombian state to take legislative measures as means of compliance with its duty to ensure human rights

This chapter will analyze the obligations of Colombia under article 2 the International Covenant on Civil and Political Rights¹ (hereinafter “the ICCPR” or “the Covenant”), and under articles 1.1 and 2 of the American Convention on Human Rights (hereinafter “the American Convention”, “the Convention”, or “the ACHR”)².

1.1 Obligations to Ensure and Respect Human Rights

1.1.1 ICCPR

On the word of article 2 of the ICCPR, States have the obligations to ensure and protect human rights.³ Accordingly, paragraph 1⁴ determines the first stage of these obligations towards the promotion of human rights with respect to all individuals within the territory of the States and who are subject to their jurisdiction.⁵ Article 2(2) goes further when it specifies that the abovementioned obligations can be achieved at first by implementing legislative measures when they do not exist: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary

¹ See status of ratification in United Nations Treaty Collection: Status of Treaties: Chapter IV: Human Rights: Ratification of the Covenant, at <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en> (Last visited February 3 2011).

² See status of ratification in Organization of American States: Multilateral Treaties: American Convention on Human Rights “Pact of San José, Costa Rica”, <at <http://www.oas.org/juridico/english/signs/b-32.html>> (Last visited February 14 2011).

³ See UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* [General Comment 31],3.

⁴ “Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” ICCPR, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967), art.2(1).

⁵ Oscar Schachter, *THE OBLIGATION TO IMPLEMENT THE COVENANT IN DOMESTIC LAW, IN THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, 311, Columbia University Press, 1981.

to give effect to the rights recognized in the present Covenant.” Manfred Nowak explains that during the discussions to approve the treaty “[a] compromise was reached with the understanding that Art. 2(2) of the Human Rights Committee’s (hereinafter “the HRCComm”) draft version constituted a minimum compromise requiring States Parties to implement the Covenant as soon as possible.”⁶ Paragraph 3 ends explaining the scope of the States’ obligations regarding remedies for the individuals whose rights have been violated.⁷

The actions that States parties to the Covenant have to take in order to comply with their international obligations are explained in paragraphs 2 and 3 of article 2. The wording of article 2(2) is that States should adopt laws or any other measures to comply with their obligations to give effect to the rights recognized in this instrument; however, it is not quite clear whether the incorporation of the Covenant in national law is a requirement.⁸ A good understanding on this regard might give clues on how the implementation should be done, and how the dispositions of the Covenant can be fully developed.

Cecilia Medina-Quiroga, who is a former judge of the Inter-American Court on Human Rights, gives a good explanation of the ways that States have to comply with their duties to protect human rights. Her analysis is based on the dispositions of the American Convention on Human Rights. Nevertheless, given the similarities between this treaty and the ICCPR, her study would give some light to understand how States may fulfill their international obligations under the Covenant. She says that States comply with their obligation to protect human rights throughout positive actions tending to the assurance that international norms are applied within their jurisdictions.⁹ This goal may be achieved either by directly incorporating the international norms or by creating norms which reproduce the content of the international dispositions.¹⁰ She also explains that when international treaties are in force, in certain jurisdictions it is understood that they may derogate national laws.¹¹ However, she also expresses that problems may rise when interpretation of national and international norms is left solely to the judicial branch, so efficient and adequate legal remedies are deemed necessary.¹²

⁶ Manfred Nowak, Article 2: Domestic Implementation and Prohibition of Discrimination, in U.N. Covenant on Civil and Political Rights: CCPR Commentary, 1993, 31.

⁷ “Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.” ICCPR, art. 2(3).

⁸ OSCAR SCHACHTER, *supra* note 5, 313.

⁹ Cecilia medina quiroga, las obligaciones de los estados bajo la convención americana sobre derechos humanos, in la corte interamericana de derechos humanos – un cuarto de siglo: 1979-2004 [thstates’ obligations under the american convention on human rights, in the inter american court of human rights – 1979-2004] 248 (2005).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Some comments related to article 2(2) of the ICCPR illustrate how incorporation should be. Nowak refers to the discussions held by some State agents before the adoption of the Covenant about whether according to this treaty there is any obligation to incorporate it in domestic law. He argues that although there is no express obligation to incorporate the Covenant, there is a “tendency to promote the *direct applicability* of the Covenant.”¹³ Ramcharan points out that with respect to international human rights treaties, States have the duty to ensure that national legislation is in accordance with international human rights laws.¹⁴ He also adds that State Parties to the ICCPR “are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant.”¹⁵ Joseph, Schultz, and Castan also get to the conclusion that “States must change their laws so as to conform to their ICCPR obligations.”¹⁶

Some other good points regarding to the duty of implementation of the IC-CPR are found in the commentaries of Schachter. He points out the fact that the implementation requirement of article 2 has to be read in accordance to article 40 of the Covenant.¹⁷ The aforementioned disposition establishes in its first paragraph that “State Parties to the Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights: a) within one year of the entry into force of the present Covenant for the States Parties concerned; b) Thereafter whenever the Committee so requests.” Schachter says that the one-year period is an indicator “of the extent of the elasticity” of the requisite to reach any results.¹⁸ He adds that “[...] the elastic principle [cannot] be stretched to justify a period of many years of delay [...]”¹⁹

The former considerations are reinforced by the fact that during the drafting discussions the idea of progressiveness in the national implementation of the covenant was rejected by the understanding of its immediate character.²⁰ The Human Rights Committee, which is the Treaty-body monitoring the implementation of the Covenant,²¹ was clear in this respect when it expressed in its General Comment 31 that “unless Covenant rights are already protected by their domestic laws or practices, State Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant.”²²

¹³ Manfred Nowak, *supra* note 6, 54.

¹⁴ Bertrand G. Ramcharan, *The International Responsibility to Protect Human Rights*, 39 HK L.Y. 366 (2009).

¹⁵ *Id.*, 372.

¹⁶ Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant On Civil And Political Rights, Cases, Materials And Commentary* 10 (2Nd Ed. 2004).

¹⁷ Oscar Schachter, *supra* note 5, 324.

¹⁸ *Id.*, 324.

¹⁹ *Id.*, 325.

²⁰ See UN Doc. A/2929, chapter V, (7 Jul 1955), *Annotations on the Text of the Draft International Covenant on Human Rights*, 10, at <http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/A-2929.pdf> (Last visited February 4 2011).

²¹ UN Human Rights Committee, <<http://www2.ohchr.org/english/bodies/hrc/index.htm>> (last visited Feb. 24/2010).

²² General Comment 31, *supra* note3, 13.

The Human Rights Committee stated in one of its reports to the General Assembly with respect to Mongolia that any proposed legislation and any kind of procedure should be based on the Covenant and other international instruments on human rights to guarantee that any changes be made in compliance with its obligations.²³ Analogous reasoning is held by this body in respect to Sweden when it says that it should ensure that its legislation “gives full effect to the rights embodied in the Covenant.”²⁴ Pertaining to New Zealand, the Committee expresses its concern about the non-inclusion of certain rights guaranteed by the Covenant but not by the New Zealand’s Bill of Rights.²⁵ When analyzing the situation of Zimbabwe, the Committee observes that the State needed to accommodate its international legislation with the provisions of the Covenant and ensure that its rights are not superseded by incompatible legislation.²⁶

The current chapter is trying to explore the understanding of how people’s rights may be threatened when States do not take the necessary legislative measures to comply with their duty to ensure human rights. This is why a brief analysis of the importance of implementation according to the ICCPR has been made. However, in order to have a better insight on this issue, this thesis now turns to study how some UN guidelines and the ACHR address it.

1.1.2 UN Guidelines and the ACHR

The “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”²⁷ (hereinafter “the UN Guidelines”) and the “Updated Set of Principles for the Protection and Promotion of Human Rights through action to combat Impunity”²⁸ (hereinafter “the Principles to combat Impunity”) provide broader explanations of what obligations States have. These two documents are not considered to be binding; however, their relevance for the purposes of the current thesis is given by their clarity about the steps that States should take in order to comply with their duties to ensure human rights. Hence, the UN Guidelines include the incorporation or implementation of human rights and international humanitarian law norms as part of States’ duties.²⁹ The Updated Set of Principles goes beyond the wording of the aforementioned guidelines when it remarks the States’ obligation to enact legislation in order “to ensure protection of human rights and to safeguard democratic institutions [...]”³⁰

²³ See UN Doc. A/47/40 (1994), *Report of the Human Rights Committee*, 602, at <http://www.bayefsky.com/general/a_47_40_1992.pdf> (Last visited February 4 2011).

²⁴ See UN Doc. A/57/40 Vol. I (2002), *Report of the Human Rights Committee*, 79(6); also UN Doc. A/52/40 Vol. I (1997), *Report of the Human Rights Committee*, 134.

²⁵ See UN Doc. A/57/40 Vol. I (2002), *Report of the Human Rights Committee*, 81(8).

²⁶ See UN Doc. A/53/40 Vol. I (1998), *Report of the Human Rights Committee*, 213.

²⁷ See A/Res/60/147 (21 March 2006).

²⁸ See E/CN.4//2005/102/Add.1 (8 February 2005).

²⁹ *Supra note 27*, art 3.

³⁰ “[...] Legislative measures necessary to ensure protection of human rights and to safeguard democratic institutions and processes must be enacted [...]”, *supra note 28*, principle 38.

A more precise definition on how States may comply with their international obligations is found in the American Convention of Human Rights. It establishes the two States' general obligations under article 1.1: obligation to respect human rights and guarantee their exercise.³¹ The first obligation requires States to abstain from violating the human rights recognized in the American Convention.³² The Inter American Court has said that whenever there has been an infringement of any of the rights of the Convention, there is a violation of article 1.1.³³ As stated by the Inter American Court in the Velásquez-Rodríguez case, the second obligation demands States to ensure the rights recognized in the Convention to any person subject to their jurisdiction.³⁴ On the word of the Court, the duty to guarantee the rights of the Convention embodies the existence of norms and an appropriate State conduct which guarantees the free exercise of human rights.³⁵

Like in the ICCPR's interpretation with regard to its implementation in national jurisdictions, the first obligation that the American Convention puts on States is to make international norms compulsory within their jurisdictions. Although the first stage to satisfy the duties to prevent and investigate human rights violations is found in article 1.1, article 2 states that the adequacy of domestic norms to guarantee the rights or freedoms not already ensured is the next step to be taken.³⁶ Cecilia Medina-Quiroga reflects that States are the ones entitled to decide upon the enforcement of international norms within their boundaries³⁷ and that "once an international norm has been ratified, the State has to adequate its laws to the first."³⁸

What has been stated so far is that States fail to comply with their duty to ensure human rights when they do not enact legislation in accordance to the international legal instruments to which they are parties. Additionally, States also fail to stick to their international obligations when they enact norms brea-

³¹ "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 397, Art. 1.

³² Cecilia Medina Quiroga, *supra* note 9, 246-247.

³³ Godínez-Cruz v. Honduras, merits, judgment, Inter-Am. Ct. H. R. (ser. C) No.5, 171 (Jan. 20, 1989).

³⁴ Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (Ser.C) No. 4, 166 (Jul. 29, 1988); Godínez-Cruz v. Honduras, *supra* note 33, 175.

³⁵ Velásquez-Rodríguez v. Honduras, *supra* note 33, 167 (Jul. 29, 1988); Godínez-Cruz v. Honduras, *supra* note 33, 176.

³⁶ "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms." American Convention on Human Rights, *supra* note 31, Art. 2.

³⁷ CECILIA MEDINA QUIROGA, *supra* note 9, 248.

³⁸ *Id.*, 248 (NO AUTHORIZED TRANSLATION); See, "The Last Temptation Of Christ" (Olmedo-Bustos Et Al.) v. Chile, Merits, Reparations And Costs. Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 73, 87 (Feb. 5, 2001) (The Court holds that according to customary international law State-parties to a human rights treaty must take the necessary legislative measures (modifications) to ensure the compliance with their obligations. Domestic legislation must have *effect utile*); Hilaire v. Trinidad and Tobago, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 80, 112 (Sep. 1, 2001).

ching them. Accordingly, the Inter American Court underlies that States may be responsible for the violation of human rights as a result of any omissions of the legislative branch.³⁹ The Court's decision in "The Last Temptation of Christ" is good example of the responsibility of States derived from the enactment of laws contrary to the American Convention. The Court states in this case that Chile was internationally responsible because article 19(1) of its constitution allowed the censorship of cinematographic films.⁴⁰ Similar reasoning is found in the Yatama case where the Court expresses that "[t]he general obligation that the State should adapt its domestic laws to the provisions of the Convention to guarantee the rights it embodies [...] includ[ing] the issuance of rules (...)"⁴¹ Likewise, the tribunal sustains in Cesti-Hurtado that States cannot stop taking the necessary legislative measures to give effect to the rights and freedoms in terms of article 2.⁴² It also explains that such measures are necessary to ensure the exercise of rights and freedoms under article 1.1 of the Convention.⁴³

The former explanations correspond to States' obligations to respect and ensure human rights. Now this thesis turns to the explanation of States' duties when violations of human rights have been committed in consideration to the Covenant and the American Convention dispositions.

1.2 Obligations to provide judicial remedies

Implementation of international norms of human rights in domestic jurisdictions is not the only step necessary to satisfy the obligation to ensure human rights. States are also bounded to provide redress when any individual's rights have been harmed according to Article 2(3) of the ICCPR. The Committee has said that States comply with what this paragraph states when they determine the judicial and administrative mechanisms to repair any violations of the Covenant's rights.⁴⁴ Nowak explains that even sometimes "[t]he mere enactment of a *statue* or general decree, however, may also qualify as an effective remedy."⁴⁵ He cites two cases decided by the Committee pertaining to this issue. First, in *Installa Costa v Uruguay* the Committee argued that the implementation of an Act tending to reincorporate public servants, whose rights under article 25(c) were breached throughout their dismissal based on political, ideological or trade-union grounds during the *defac-*

³⁹ 19 *Merchants v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, 140 (Jul. 05, 2004); *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No 70, 210 (Nov. 25, 2000); "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, *supra note* 38, 72; "Street Children" (Villagrán-Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, 220 (Nov. 19, 1999).

⁴⁰ "The Last Temptation of Christ" (Olmedo-Bustos Et Al.) V. Chile, *supra note* 38, 72.

⁴¹ *Yatama V. Nicaragua*, Preliminary Objections, Merits, Reparations And Costs, Judgment, Inter-Am.Ct. H.R. (Ser. C) No. 127, 170 (Jun. 23, 2005).

⁴² *Cesti-Hurtado v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 56, 166 (Sep. 29, 1999).

⁴³ *Id.*

⁴⁴ General Comment 31, *supra note* 3, ¶15.

⁴⁵ MANFRED NOWAK, *supra note* 6, 59

to government, can be regarded as a remedy.⁴⁶ Secondly, in *Mbenge v Zaire* the Committee stated that an amnesty law enacted by this State did not provide an effective remedy to the unlawful death penalties pronounced before the aforementioned law.⁴⁷ The Committee has also specified in its General Comment 31 that States comply with what this article establishes when they determine the judicial and administrative mechanisms to address any violations.⁴⁸ With this respect Nowak explains that even though administrative and even political remedies are allowed, priority is given to the enforcement of the judicial ones.⁴⁹ The UN Guidelines set that victims' right to remedies include equal and effective access to justice, prompt reparation of the harm suffered, and access to significant information relating to the violations and reparation.⁵⁰

1.3 Obligation to legislate as a measure of reparation

When States do not comply with their obligations either by the non-enactment of laws implementing international human rights dispositions or by the lacking of judicial remedies, the adoption of legislative measures is considered a measure of reparation. The Updated Set of Principles dedicates several of its dispositions to this right, but principle 34 determines its scope. It states that reparation “shall cover all injuries suffered by victims” and “shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law.”⁵¹ Principle 35 includes between the guarantees of non-recurrence of violations the “enactment of legislative and other measures necessary to ensure respect for human rights and humanitarian law (...)” In this line of argumentation, the Committee says that effective remedy is not provided without reparation.⁵² It further explains that reparation may involve “restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non –repetition, and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”⁵³

As stated by the previous binding and non-binding norms, reparations include a wide range of measures, which have been considered and amplified by the Inter American Court of Human Rights in several of its decisions. A particular characteristic of the Inter American Court jurisprudence pertaining to reparations is that it expands them beyond just economic measures.⁵⁴ For instance, the *Myrna Mack Chang* case lists a broad number of reparations that the State of Guatemala

⁴⁶ See *Stalla Costa v. Uruguay*, Communication No. 198/1985, 10 (9 July 1987), <http://www.bayefsky.com/pdf/148_uruguay198vws.pdf>.

⁴⁷ See *Mbenge v. Zaire*, Communication No. 16/1977, 18 (25 March 1983), <http://www.bayefsky.com/pdf/100_zaire16vws.pdf>.

⁴⁸ General Comment 31, *supra* note 3, 15.a

⁴⁹ Manfred Nowak, *supra* note 6, 59.

⁵⁰ *Supra* note 27, art. 11. Articles 12 - 24 are more specific in the explanation of each type of remedy.

⁵¹ See E/CN.4/2005/102/Add.1 (8 February 2005), principle 38.

⁵² General Comment 31, *supra* note 3, 16.

⁵³ *Id.*, 16. [Emphasis added]

⁵⁴ Sergio García Ramírez, *La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Reparaciones* in *La Corte Interamericana de Derechos Humanos – Un Cuarto*

had to comply with.⁵⁵ So, they included the payment of certain amount of money for the concept of pecuniary and non-pecuniary damages.⁵⁶ The judgment also included other forms of reparation such as the investigation and punishment of the responsible, official reproval of the human rights violations, and undertaking of measures to avoid the future occurrence of human rights violations.⁵⁷ Likewise, the decision explained the importance of the right to the truth in its individual and collective dimension as a relevant mean of reparation.⁵⁸ The State's public acknowledgment of its responsibility was also explained as a guarantee of non-recidivism.⁵⁹

Other types of reparative measures were decided in this case, but the more pertinent one for the purpose of this thesis relates to the argument held by the Court about that States must refrain from “the establishment of measures designed to eliminate responsibility.”⁶⁰ In a decision made the same year than the Myrna Mack case, the Court established that the guarantee of non-repetition includes the adoption of legislative measures to adjust the domestic legal system to international human rights standards.⁶¹ The Court decided in another case that the Guatemalan State had to make legislative and administrative measures in order to guarantee fair criminal procedures in favor of inditees to death.⁶² The Barrios Altos judgment on reparations is also relevant because it shows the State's agreement to include a definition of the crime of extra-judicial execution and ratify the International Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁶³ The Molina-Thiessen case includes as a non-pecuniary measure of reparation the adoption of legislation to establish a procedure “to allow the statement of absence and presumption of death due to forced disappearance (...)”⁶⁴ In *Hilaire v. Trinidad & Tobago* the Court turns to impose as reparation not the creation but the change of the wording of the *Offences Against the Person Act* “into compliance with the American Convention and other international human rights norms.”⁶⁵ In *Trujillo-Oroza v.*

de Siglo: 1979-2004 The Jurisprudence of the Inter American Court of Human Rights regarding Reparation, in *The Inter American Court of Human Rights – 1979-2004* 3 (2005)

⁵⁵ *Myrna Mack-Chang v. Guatemala*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, 250-286 (Nov. 25, 2003).

⁵⁶ *Id.*, 250-266.

⁵⁷ *Id.*, 268.

⁵⁸ *Id.*, 274 – 275.

⁵⁹ *Id.*, 278.

⁶⁰ The court expresses that “[...] the State must ensure that the domestic proceeding to investigate and punish those responsible for the facts in this case attains its due effects and, specifically, it must abstain from resorting to legal concepts such as amnesty, extinguishment, and the establishment of measures designed to eliminate responsibility(...)”*Id.*, ¶ 276.

⁶¹ *Bulacio v. Argentina*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 100, ¶162.5 (Sep. 18, 2003).

⁶² *Fermín Ramírez v. Guatemala*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 126, ¶130(d) (Jun. 20, 2005).

⁶³ *Barrios Altos v. Peru*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 87, ¶144(b)(c) (Nov. 30, 2001).

⁶⁴ *Molina-Theissen v. Guatemala*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 108, ¶91 (Jul. 3, 2004).

⁶⁵ *Hilaire v. Trinidad and Tobago*, *supra* note 38, ¶1212; *See*, *Blanco-Romero et al v. Venezuela*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 138, ¶104 (Nov. 28, 2005) (The Court holds that the State must adopt the necessary legislative measures to make the writ of *habeas corpus* granted in cases of forced disappearances).

Bolivia the Court sustains that since Bolivia had not defined the forced disappearance as a crime in its legislation, effective investigations to clarify the crimes against Mr. Trujillo had not been done, so it ordered to take the necessary legislative measures as part of the State's reparation duties.⁶⁶

1.4 Statutes of Limitations

The States' compliance with their international legal obligations is also related to the non-establishment of statutory limitations regarding crimes against humanity. The Colombian legislation has statutory limitations regulated, which pose some questions on its acquiescence with international standards in terms of its duties to ensure, respect human rights, and provide effective remedies. In order to better understand the applicable international legal framework pertaining to this topic, the decisions made in this regard by the Inter American Court in Velásquez-Rodríguez, Almonacid-Arellano, and Barrios Altos are going to be briefly studied.

The Court states in the Velásquez-Rodríguez case that any investigation must be directed by the State "as its own legal duty"⁶⁷ and that the effectiveness of its actions is evaluated in consideration of its efforts towards the punishment of crimes.⁶⁸ Following this reasoning, the Court decides in the Goiburú case that the State had the obligation to carry out investigations in order to determine the intellectual and material responsibilities in the human rights violations.⁶⁹ The compliance of States with these responsibilities is certainly questioned when there are no effective legislative measures. As mentioned before, States start creating legal guarantees either by annulling laws which imply a violation of the rights protected, or by passing laws tending to guarantee the observance of human rights.⁷⁰

The Almonacid and Barrios Altos cases have some provision related to the prohibition of statutes of limitations. The Barrios Altos judgment is particularly relevant. It states that the existence of statutory limitations, and any measures to eliminate responsibility are prohibited.⁷¹ The Court holds in the same decision that such measures are prohibited when human rights violations such as extrajudicial, summary or arbitrary executions, among other crimes, have been committed. The Almonacid decision goes further. The Court states that the non-application of statutory limitations to these crimes is a norm of jus cogens.⁷² The aforementioned decisions are not the only sources which underlie Colombia's obligations on the non-applicability of statutes of limitations on crimes against humanity.

⁶⁶ Trujillo-Oroza v. Bolivia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶¶96 – 98 (Feb. 27, 2002).

⁶⁷ Velásquez-Rodríguez v. Honduras, *supra* note 33, 177 (Jul. 29, 1988).

⁶⁸ *Id.*

⁶⁹ Goiburú et al. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, 192.5 (Sep. 22, 2006).

⁷⁰ Almonacid-Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No 154, 118 (Sep. 26, 2006).

⁷¹ Barrios Altos v. Peru, *supra* note 63, 41.

⁷² Almonacid-Arellano et al. v. Chile, *supra* note 70, 153.

Even though the ICCPR does not have any provision pertaining to the prohibition of these types of measures, the Human Rights Committee has made some observations with this respect. Hence, the Committee mentions in its concluding observations related to the crimes committed by the military junta in Argentina that “[g]ross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability as far back in time as necessary to bring their perpetrators to justice.”⁷³ In its General Comment 31 it also says that States obligations to initiate prosecutions “arise notably” with respect to the responsible perpetrators of the crimes of summary and arbitrary killing, enforced disappearance, torture and similar cruel, inhuman and degrading treatment, recognized as such either by domestic or international law.⁷⁴ It also mentions that when the former crimes are “committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity.”⁷⁵

Ruth A. Kok mentions that there is international case law which recognizes the imprescriptibility of international crimes.⁷⁶ She cites some decisions held by the former European Commission on Human Rights (EComHR) and the European Court of Human Rights (ECtHR) supporting the former assessment. Thus, she mentions that in *Touvier v. France* the EComHR states that crimes against humanity are imprescriptible.⁷⁷ She also says that the ECtHR then takes the same approach than the Commission in *Papon v. France* and *Kolk and Kislyiy v. Estonia* where it states that “there is no individual right to statutes of limitation to international crimes.”⁷⁸

The Rome Statute, to which Colombia is part of,⁷⁹ has a provision on this matter. Article 29 states that “[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”⁸⁰ Cassese mentions that “[i]t appears to be a sounder view that specific customary rules render statutes of limitations inapplicable with regard to some crimes: genocide, crimes against humanity, torture.”⁸¹ Van den Wyngaert and Dugard follow the same reasoning. They say that there is enough evidence to the view that the prohibition of core crimes, which are the ones included in the Rome Statute, is a *jus cogens* norm, “and that a necessary consequence of such a characterization is the inapplicability of statutory limitations.”⁸²

⁷³ See UN Doc. CCPR/CO/70/ARG (3 November 2000), *Concluding Observations of the Human Rights Committee: Argentina*, 9.

⁷⁴ General Comment 31, *supra* note 3, 18.

⁷⁵ *Id.*, 18.

⁷⁶ RUTH A. KOK, STATUTORY LIMITATION IN INTERNATIONAL CRIMINAL LAW 358 (2001).

⁷⁷ *Id.*

⁷⁸ *Id.*, 359.

⁷⁹ See status of ratification in United Nations Treaty Collection: Status of Treaties: Rome Statute, at http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTS&tabid=1&mtsg_no=XVIII-10&chapter=18&lang=en#Participants.

⁸⁰ Rome Statute, art. 29.

⁸¹ Antonio Cassese, *International Criminal Law* 319 (2003).

⁸² Christine Van den Wyngaert & John Dugard, *Non-Applicability of Statute of Limitations in The Rome Statute of the International Criminal Court: A Commentary* (Vol 1) 887 (Antonio Cassese et. al. eds., 2002).

The Rome Statute also pushes for the prevalence of States' work to criminally prosecute the perpetrators of international crimes over the International Criminal Court's jurisdiction. The preamble of the Rome Statute, which according to the Vienna Convention on the law of the treaties plays an important role in the interpretation of a treaty,⁸³ states that effective prosecutions of international crimes "must be ensured by taking the necessary measures at the national level."⁸⁴ It also recalls that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."⁸⁵ Thus, State Parties to the Statute are the ones which have to undertake all necessary criminal proceedings in order to achieve justice when serious international crimes have been perpetrated.⁸⁶ This duty entails the obligation to take the necessary legislative measures to be able to do effective prosecutions. If States do not carry out their responsibilities, the International Criminal Court can enter into play.⁸⁷

The responsibility to ensure human rights is posed on States. They are the ones who are entitled to determine the legislation throughout which the administration of justice becomes feasible. Hence, the judicial apparatus is able to work efficiently when it has the necessary legal tools to do prosecutions for crimes against humanity. When there is no legal inclusion of all of these crimes and the ordinary national criminal types do not reach the minimum international standards to determine individual criminal responsibilities, as it is going to be evidenced in the next chapters, the lack of legislation negatively impacts the possibility to comply with the obligation to ensure human rights. This deficiency prompts the inclusion of statutory limitations without distinction of the crimes to which they are not applicable, which prevent victims to have access to judicial remedies. These insufficiencies impede States to give effect to the Rome Statute, the complementarity principle and provisions on the principle of legality, which open the door to question their willingness or inability to undertake effective criminal proceedings.

The principle of legality is regulated in the ICCPR, the ACHR and the Rome Statute. Article 15 of the Covenant establishes that no individual can be held guilty of criminal offences which at the moment of the act or omission were not considered as such by national or international law.⁸⁸ Article 9 of the American Convention states that no one can be sentenced for any act or omission that was not considered to be criminal under the applicable law at the time of commission.⁸⁹ Article 22 of the Rome Statute states a similar definition of the principle and adds that a crime has to be "strictly construed" and that in cases of ambiguity such definition "shall be interpreted in favour of the person being investigated, prosecuted or convicted."⁹⁰ The Inter-American Court has developed in its jurisprudence a

⁸³ Vienna Convention on the Law of Treaties [VCLT], UN Doc.A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969).

⁸⁴ *Id.*, Preamble.

⁸⁵ *Id.*

⁸⁶ Rome Statute, art. 17.

⁸⁷ Rome Statute, art. 17(1)(a)(b).

⁸⁸ ICCPR, *supra note* 4, art. 15.

⁸⁹ American Convention on Human Rights, *supra note* 31, art. 9.

⁹⁰ Rome Statute, art. 22 (2).

similar understanding as the one that the Rome Statute has in regard to this principle. This Court says that criminal norms have to be clear and precise. In *Castillo-Petruzzi* the Court states that in order to fully comply with the aforementioned principle, “crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense.”⁹¹ The Court further states that any ambiguity in the description of crimes may lead to the abuse of power.⁹² In *De La Cruz-Florez v. Peru*, the Court reiterates its former assertions and adds that democratic systems have to be cautious and “ensure that punitive measures are adopted with absolute respect for the basic rights of the individual, and subject to careful verification of whether or not an unlawful behavior exists.”⁹³

The legislative incorporation or implementation by States of each one of the rights included in the treaties which have been evaluated does not have any efficacy when there are no feasible ways of enforcement. The most likely mean to guarantee the full realization of the rights of all the individuals involved in, and affected by criminal acts, is the codification of crimes with their correspondent penalties. The victim finds redress when the offense against him is punished. The indictee finds justice when his prosecution is in accordance with the principle of legality. Any fissure in the determination of criminal offenses may imbalance the fairness of the process. When such a thing happens, the victim might find a barrier to judicially dismantle the truth and the indictee would see that his right to a fair trial is not respected because of the fissures in the compliance with the principle of legality. This point is developed in a more extensive way in chapter 2, point 2.4.

The following chapters will evidence that the absence of legislative provisions about crimes against humanity breaches the possibility to establish criminal responsibilities and as a result, the effective protection of victims’ rights. It will be also seen that the non-legislation of these crimes fosters misunderstandings within the executive and judiciary branches which have repercussions in the way how justice is administered. The result is that the rights of all parties in the criminal processes are not fully protected. These insufficiencies impede States to give effect to the Rome Statute’s complementarity principle. As such, by understanding all international obligations derived from the instruments to which Colombia is a State Party, the conclusion is that this State has the duty to legislate crimes against humanity.⁹⁴

⁹¹ *Castillo-Petruzzi et al. v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 52, 121 (May. 30, 1999); Cantoral-Benavides v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 69, 157 (Aug. 18, 2000).*

⁹² *Castillo-Petruzzi et al. v. Peru, supra note 91, 121; Cantoral-Benavides v. Peru, supra note 91, 157.*

⁹³ *Baena-Ricardo et al. v. Panama, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 72, 81 (Feb. 2, 2001).*

⁹⁴ Werle points out that the Rome Statute’s goal is to “serve as a source of norms and legal standards that would provide states themselves with the basis to effectively investigate and prosecute the most serious crimes under international law themselves. Gerard Werle, *Principles of International Criminal Law*, 118 – 119 (2nd ed. 2009).

2 Breaches of the International Obligations of Colombia due to the Lack of National Legislation Typifying Crimes Against Humanity

The purpose of the current section is to explain how the legislature and the judiciary have addressed the definition of crimes against humanity. In order to do this, the debates held by Congress about whether to typify or not these types of crimes will be briefly explained. The approach of the executive branch to this topic and some holdings of the Constitutional and Supreme Courts on the qualification given to certain conducts as crimes against humanity will also be included. The goal of these explanations is to show that the omission of the legislative branch has repercussion over the way how the executive approaches the existence of a human right or humanitarian law violation, and the manner throughout which the judiciary has qualified certain criminal offenses as crimes against humanity.

Law is supposed to be characterized for its clarity. The determination of clear legal concepts allows people to have security on what the law provides. In this regard Cacciaguidi-Fahy and Wagner say that “[c]larity at law is customarily equated to certainty.”⁹⁵ Language is obscure when it does not have an understandable meaning: “texts may be considered incoherent where different possible meanings suggest themselves, but are excluded because they lead to contradiction.”⁹⁶ The need for certainty becomes central in the administration of justice. When criminal matters are under consideration, precision is vital. War crimes and crimes against humanity are legal concepts whose particularities should be clearly defined in the law and jurisprudence.

The following explanation regards to the debates which were held by Congress between 1998 and 1999 about the codification of crimes against humanity. It is noteworthy the fact that those discussions developed mainly after the Rome Statute was signed by Colombia. Thus, Government and Congress already knew how the crimes, which are under the competency of the International Criminal Court, were defined in the Rome Statute. The purpose of the next description is to highlight the ambiguity evidenced in the understanding of the legislative body, the government, and also the Constitutional and Supreme Courts about the differences between both types of crimes.

2.1 Legislative debates about the definition of crimes against humanity

Congress started the debates about the codification of crimes against humanity after the government presented a proposal to legislate on forced disappea-

⁹⁵ Sophie Cacciaguidi-Fahy & Anne Wagner, *Searching for Clarity*, in *LEGAL LANGUAGE AND THE SEARCH FOR CLARITY, PRACTICE AND TOOLS* 19, 19 (Wagner & Cacciaguidi-Fahy ed., 2006).

⁹⁶ Ross Charnock, *Clear Ambiguity*, in *Legal Language and the Search for Clarity, Practice and Tools* 65, 69 (Wagner & Cacciaguidi-Fahy ed., 2006).

rance, genocide, and torture under a section named “crimes against humanity.”⁹⁷ Government justified the necessity to legislate the aforesaid three crimes due to their gravity.⁹⁸ Both, government and Congress made good general explanations about what crimes against humanity are and how they have evolved after World War II.⁹⁹ It was also explained how the Rome Statute defines such crimes, their widespread and systematic elements, and their independence in regard to the existence of an armed conflict to determine that any of them have been committed.¹⁰⁰ Nevertheless, Congressmen showed lack of understanding about the difference between war crimes and crimes against humanity.

Their misunderstanding about this distinction led Congress to exclude the possibility to group the three crimes under study in a specific section of the Code named crimes against humanity. It is worth mentioning the fact that their analysis was mainly based on the differences between the description of crimes in the Rome Statute and the Colombian Criminal Code. They explained that due to the connection between war crimes and crimes against humanity, it was difficult to make a clear differentiation between both of them.¹⁰¹ Another difficulty that they found was that the expression “widespread or systematic” regarded only to a state policy or political organization and not to plans determined by illegal armed groups.¹⁰² They added that because the sanction imposed due to crimes against humanity could be lower than the one imposed due to a conviction for multiple crimes, the punishment of the first would not have relation with its gravity.¹⁰³ Here are some excerpts of their comments:

“Tal concepción de los Crímenes de Lesa Humanidad resulta de difícil prueba en el caso colombiano y podría conducir a que solo los agentes del Estado sean considerados autores de tales conductas. Adicionalmente, presenta dificultades de orden dogmático, como la de que la pena por del delito de lesa humanidad podría ser inferior a la correspondiente a un concurso material de delitos. Por estas razones es que en el proyecto se prefirió la exclusión de un título especial denominado “Lesas Humanidad” y en su lugar busca sancionar estas conductas como delitos graves, gravedad que viene determinada por la pena imponible.”¹⁰⁴

The former argumentation demonstrates the lack of understanding of international human rights law and international humanitarian law.¹⁰⁵ This inappropriateness is also evidenced in the categorization that they do of crimes against

⁹⁷ Gaceta del Congreso 126, Proyecto de Ley No 20 de 1998, 22 de julio de 1998, p. 23 – 27.

⁹⁸ *Id.*

⁹⁹ Gaceta del Congreso 185 Proyecto de Ley No 20 de 1998, 17 de septiembre de 1998; Gaceta del Congreso 369, Proyecto de Ley No 20 de 1998, 23 de diciembre de 1998; Gaceta del Congreso 37, Proyecto de Ley No 20, 7 de abril de 1999; Gaceta del Congreso 450, Proyecto de Ley No 20, 18 de noviembre de 1999.

¹⁰⁰ Gaceta del Congreso 185, *supra note* 99, p. 6.

¹⁰¹ Gaceta del Congreso 450, Proyecto de Ley No 20 de 1998, 18 de noviembre de 1999, p. 6.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*, p. 6. [Emphasis added].

¹⁰⁵ See International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

humanity under international humanitarian law: “[L]os delitos que buscatipificaresta ley son denominados por el Derecho Internacional Humanitario, “Crímenes de Lesa Humanidad”.¹⁰⁶ This classification suggests that for the legislature there is no distinction between war crimes and crimes against humanity.

2.2 The executive approach on crimes against humanity

The government made the same mistake. The “Presidential Program of Human Rights and International Humanitarian Law” wrote a document whose purpose was to guide the judicial officers in their daily practice. It was called “*Protocolo para el reconocimiento de casos de violaciones a los Derechos Humanos e infracciones al Derecho Internacional Humanitario, con énfasis en el homicidio en persona protegida*” (hereinafter “the Protocol”).¹⁰⁷ The Protocol contains some considerations on crimes against humanity and describes when an action constitutes a human rights or an international humanitarian law violation. Nevertheless, the said purpose to instruct judicial personnel about how to recognize a human right and a humanitarian law violation is not reached.

The language used in the Protocol is confusing. For instance, it wrongly describes the crimes contained in the Colombian Criminal Code as if they had the characteristics of war crimes and crimes against humanity: “*en Colombia existe un Código Penal que contiene delitos concebidos por el Estatuto de Roma como delitos de lesa humanidad, o aquellos definidos como crímenes de Guerra.*”¹⁰⁸ The Colombian Criminal Code has only ordinary crimes and war crimes legislated. The document also shows the same conclusion than Congress about the undetermined character of crimes against humanity and how this undetermination makes their prosecution difficult: “*el peligro de la consagración de tipos penales extremadamente indeterminados, en blanco [...] condujo a los legisladores a incorporarlas conductas dentro de aquellos títulos que consagran bienes jurídicos tradicionales.*”¹⁰⁹ This kind of conclusion does not suggest how an effective prosecution of perpetrators of war crimes and/or crimes against humanity can be done. Neither does it instruct the juridical personnel about the differences between a human right violation and breaches to international humanitarian law norms. This type of assessment does not either help to understand the way how the norms of the Criminal Code, about which the protocol says that protect “bienes jurídicos tradicionales”, can be employed to vindicate the rights of victims of crimes against humanity.

¹⁰⁶ *Supra* note 101.

¹⁰⁷ See <http://www.derechoshumanos.gov.co/LuchaImpunidad/Documents/2010/Protocolo_para_reconocimiento_de_casos.pdf> (Last visited March 7, 2011).

¹⁰⁸ Vicepresidencia de la República de Colombia – Programa Presidencial de Derechos Humanos y DIH, *Protocolo para el reconocimiento de casos de violaciones a los Derechos Humanos e infracciones al Derecho Internacional Humanitario, con énfasis en el homicidio en persona protegida* [Protocolo], Julio de 2008, p. 16.

¹⁰⁹ *Id.*, p. 18.

2.3 The judiciary's approach on the definition of crimes against humanity

The same kind of misperception can be found in the jurisprudence of the Constitutional and Supreme Courts of Colombia. Now this section turns to the analysis of how these tribunals have addressed the characteristics of crimes against humanity in some of their decisions. The purpose of this explanation is to show that an improper use of certain terms may sometimes be just a matter of form, but in other cases it may have consequence on substantial issues.

In the judgment SU-1184 of 2001 the Constitutional Court of Colombia analyzed the cases concerning members of the military forces, when they can be held criminally responsible due to their official position.¹¹⁰ The court first explains that soldiers cannot be prosecuted by criminal military judges when the crime that they had committed goes beyond the fulfillment of their military functions.¹¹¹ In these cases the prosecution has to be done by judges of the ordinary criminal jurisdiction.¹¹² This holding was well founded; however, there is a section in which the qualification of the crime used to prosecute the army members is not clear.

The Court asserts that unless juridical or factual obstacles impede military officers to prevent human rights violations, they may be held responsible for crimes against humanity. However, the qualification that the Court makes of these types of offenses is unclear. It cites as examples of crimes against humanity torture, forced prostitution, forced displacement, and other crimes contained in article 7 of the Rome Statute. However, offenses which are categorized as warcrimes under international humanitarian law rules are also considered as crimes against humanity by the Court: “*conductas calificables de lesa humanidad, como i) las violaciones a las prohibiciones fijadas en el protocolo II a los acuerdos de Ginebra -y en general al derecho internacional humanitario- o a los tratados sobre restricciones al uso de armas en la guerra [...] ii) las acciones contra bienes culturales durante la guerra y los conflictos armados internos.*”¹¹³ The Court concludes that the qualification of the criminal conduct has to be as crime against humanity: “*el título de imputación se hace por el delito de lesa humanidad, o en general por las graves violaciones a los derechos humanos.*”¹¹⁴ This reasoning does not lead to an indisputable conclusion about how the denomination of the criminal charge should be done. This confusion is caused by the fact that while the omission to prevent a human right violation is described by the Court as a crime against humanity, the offenses that the Court lists under this denomination are mainly war crimes. The analysis of the way how army members may be held responsible due to their negligence to prevent human rights violations needs more precision. The context of the crime plays an important role on this point. Thus, the consideration of the

¹¹⁰ Corte Constitucional de Colombia [C.C.] [Constitutional Court] noviembre 13, 2001. Sentencia SU-1184 de 2001, M.P: E. Montealegre (Colom.).

¹¹¹ *Id.*, Whereas 18 – 19.

¹¹² *Id.*

¹¹³ *Id.*, Whereas 17.

¹¹⁴ *Id.*, Whereas 18.

widespread and/or systematic nature of crimes against humanity in contrast to the necessary link of war crimes with an armed conflict is relevant.¹¹⁵

Another decision of the Constitutional Court is Judgment C-291 of 2007, which is referred to the study of the war crime of homicide of a protected person.¹¹⁶ In this judgment the Court first explains how the interpretation of international norms has to be done in accordance to the Colombian Constitution. It then characterizes the war crime of homicide against a protected person.

With respect to the first point, the tribunal describes that the constitutional block [*bloque de constitucionalidad*] is the mean throughout which international treaties acquire constitutional hierarchy within the national jurisdiction.¹¹⁷ It clarifies that human rights treaties and customary and conventional norms on international humanitarian law are part of the constitutional block.¹¹⁸ It further explains that the Court has the duty to give effect to the limits determined by the constitutional block when the legislature has not taken them into account.¹¹⁹ The Court also mentions that the rules of the block have to be considered by the judges in their different decisions and that national legislation has to be adjusted to the content of the Constitution and the constitutional block.¹²⁰

After this analysis, the tribunal evaluates the crime of homicide on a protected person based on the constitutional block. Hence, it first explains how the evolution of international humanitarian law and the applicable rules of internal armed conflicts with respect to the treatment of combatants and civilians.¹²¹ It mentions that attacks against civilian populations during armed conflicts may constitute not only war crimes but crimes against humanity.¹²² It also states that the crime of homicide of a protected person constitutes a war crime and may also configure other crimes under international humanitarian law: genocide and the crimes against humanity of persecution and attacks against civilians.¹²³ It may be

¹¹⁵ Ximena Medellín, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional* 186 (2009).

¹¹⁶ "HOMICIDIO EN PERSONA PROTEGIDA. El que, con ocasión y en desarrollo de conflicto armado, ocasione la muerte de persona protegida conforme a los Convenios Internacionales sobre Derecho Humanitario ratificados por Colombia, incurrirá en prisión [...] multa [...] PARÁGRAFO. Para los efectos de este artículo y las demás normas del presente título se entiende por personas Protegidas conforme al derecho internacional humanitario: 1. Los integrantes de la población civil. 2. Las personas que no participan en hostilidades y los civiles en poder de la parte adversa. 3. Los heridos, enfermos o náufragos puestos fuera de combate. 4. El personal sanitario o religioso. 5. Los periodistas en misión o corresponsales de guerra acreditados. 6. Los combatientes que hayan depuesto las armas por captura, rendición u otra causa análoga. 7. Quienes antes del comienzo de las hostilidades fueren considerados como apátridas o refugiados. 8. Cualquiera otra persona que tenga aquella condición en virtud de los Convenios I, II, III y IV de Ginebra de 1949 y los Protocolos Adicionales I y II de 1977 y otros que llegaren a ratificarse." Código Penal [C.Pen.] [Criminal Code] art. 135 (Col.).

¹¹⁷ [C.C.] abril 22, 2007. Sentencia C-291 de 2007, M.P: M. Cepeda (Colom.) Whereas III(c); see also Sentencia C-225 de 1995, Sentencia C-067 de 2003, Sentencia C-028 de 2006, Sentencia C-047 de 2006, Sentencia C-488 de 2009.

¹¹⁸ [C.C.] Sentencia C-291 de 2007, *supra note* 117, Whereas III(c).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*, Whereas 2.

¹²² *Id.*, Whereas 3.4.1.

¹²³ *Id.*, Whereas 5.4.3.

observed that the Court fails again in the characterization of independent offenses as crimes under international humanitarian law:

[I]ndependientemente de la posible configuración del crimen de guerra de homicidio en persona civil o en persona fuera de combate [...] el acto material subyacente, v.g. el de tomar la vida de una persona amparada por el principio de distinción, puede dar lugar a la configuración de otros tipos de delitos bajo el Derecho Internacional Humanitario, entre los cuales se cuentan el genocidio y los crímenes de lesa humanidad de exterminio, persecución, ataques contra civiles o violencia contra la persona; depende en cada caso del contexto en el cual se cometió el acto y de la presencia de las distintas condiciones específicas para la configuración de estas figuras delictivas.¹²⁴

Even though the Court makes a distinction between crimes against humanity and war crimes, the cited judgments do not succeed in explaining how the protection of civilians in regard to both regimes individually considered should be. Crimes against humanity are categorized as crimes under international humanitarian law in the second decision, while the first judgment situates international humanitarian norms as a category of crimes against humanity. This confusion raises doubts about how the protection of victims of a murder as a crime against humanity can be effective if there is no clear differentiation between these two different types of crimes. The common widespread and systematic elements to all crimes against humanity are neither described in the crime of homicide of a protected person nor in the common crime of murder under the applicable Colombian law.¹²⁵ The same happens with the mental element of the crime against humanity of murder, which is the awareness of the perpetrator about the crime's widespread or systematic nature.¹²⁶ The relevance of these judgments is that they have had repercussion on the way how the Supreme Court of Colombia has dealt with prosecutions where the responsibility of massive murders is at issue.

Two cases which were decided by the Cassation Criminal Chamber of the Supreme Court exemplify the difficulty to reach an accurate decision. The first judgment is from September 21st of 2009,¹²⁷ and the second one is from January

¹²⁴ *Id.*, Whereas 5.4.3. (Emphasis added)

¹²⁵ "HOMICIDIO. El que matare a otro, incurrirá en prisión de doscientos ocho (208) a cuatrocientos cincuenta (450) meses." C.Pen. art. 103 (Col.). "CIRCUNSTANCIAS DE AGRAVACIÓN PUNITIVA. La pena será de cuatrocientos (400) a seiscientos (600) meses de prisión, si la conducta descrita en el artículo anterior se cometiere: [...] 9. En persona internacionalmente protegida diferente a las contempladas en el Título II de éste Libro y agentes diplomáticos, de conformidad con los Tratados y Convenios Internacionales ratificados por Colombia." C.Pen. art.104 (Col.). The Supreme Court has said that public servers who represent the State in other countries and their families are the international protected persons contemplated in the cited paragraph. Corte Suprema de Justicia [C.S.J.] [SupremeCourt], Sala. Pen, Enero 27, 2010, M.P: J. Bustos, Proceso No. 29753 (Colom.).

¹²⁶ Antonio Cassese, *International Criminal Law* 54 (2nd Ed. 2008).

¹²⁷ [C.S.J.] Sala. Pen, Septiembre 21, 2009, M.P: S. Espinosa, Proceso No. 32022 (Colom.).

27th of 2010.¹²⁸ Both decisions are about processes pertaining to the prosecution of former paramilitaries.

In the first judgment the Court decides an appeal of the lawyers of the victims (hereinafter “the lawyers”) against a decision made by the Justice and Peace Chamber of the Superior Tribunal of Bogota.¹²⁹ The indictee, Gian Carlo Gutiérrez, was part of the Calima block of the United Self-Defenses of Colombia (AUC) for three years.¹³⁰ He confessed his participation in more than 20 homicides, 5 kidnappings and illegal use of weapons and official uniforms.¹³¹ He was sentenced to imprisonment for the former crimes amongst others.¹³² He was declared guilty of homicide on protected persons.¹³³

The lawyers appealed the qualification of the crimes arguing that they do not show how their perpetration was a response to a predetermined plan and how the criminal organization was structured.¹³⁴ Thus, one of them mentions that the charge for war crimes does not recognize the fact that Gutiérrez was well known for creating terror within the population in the area where the crimes were committed.¹³⁵ The lawyers also say that because the crimes perpetrated by the indictee were crimes against humanity, their qualification had to be under such denomination and not as war crimes.¹³⁶

The Court analyzes the arguments of the lawyers and points out the differences between war crimes and crimes against humanity based on the jurisprudence of the Constitutional Court; however, it does not give an appropriate response to the allegations of the appellants. The tribunal argues that the multiple perpetration of crimes against the population affected by the acts of Gutiérrez have the category of crimes against humanity.¹³⁷ Nonetheless, the Court then contradicts itself. It states that the legal issue at study is complex because its solution has to deal between the application of norms which sanction violations of international humanitarian law and common crimes which may become crimes against humanity.¹³⁸

¹²⁸ [C.S.J.] Sala. Pen, Enero 27, 2010, M.P: J. Bustos, Proceso No. 29753 (Colom.).

¹²⁹ [C.S.J.] *supra* note 127.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*, Whereas 7.

¹³³ *Id.*, Whereas 7.

¹³⁴ *Id.*, Whereas. 12.2 (1.3) - (1.4).

¹³⁵ “[T]enia dominio sobre quién y a quién se debía asesinar, y cuáles eran las motivaciones. El hecho de haber sido policía le permitía tener una relación permanente con los miembros de esa institución en El Tambo y coordinar operativos con las estructuras paramilitares, situaciones que no son mencionadas por el postulado en ninguna de las versiones libres.” (C.S.J.) *Id.*, Whereas. 12.2 (1.3).

¹³⁶ *Id.*, Whereas. 12.2 (1.3) - (1.4).

¹³⁷ “Los asesinatos, torturas, masacres, desapariciones, desplazamientos forzados, violaciones, y en fin, las múltiples violaciones sistemáticas a los derechos humanos confesadas hasta el momento por los desmovilizados de esos grupos armados que han sido escuchados [...] no dejan duda de que se configuran las características esenciales que delinear los delitos de lesa humanidad.” [C.S.J.] *Id.*, Whereas 4.

¹³⁸ “[A]unque no son incompatibles, no puede a la hora de efectuarse la adecuación típica de los hechos juzgados, ubicarse unas conductas dentro del contexto del Título II, Capítulo I del Código Penal, y otras, ocurridas en el mismo contexto, por fuera de él, sin una argumentación válida que lo justifique.” [C.S.J.] *Id.*, Whereas 4.

The unclear explanation of the Court might be the result of the fact that none of the crimes of murder typified in the Criminal Code have the widespread or systematic elements of homicide as a crime against humanity. The Court probably doubts about the way how the indictment should be done now that its limits to declare the criminal responsibility of someone are established by the legislated national offenses. This is an obstacle to meet international standards. The same difficulty is also evidenced in the second judgment of the Supreme Court.

The second decision relates to the killing of members of the Kankuamo's indigenous community in December of 2002 by 60 paramilitaries.¹³⁹ The Court acts in this judgment as a court of cassation. The indictees were two siblings: Mario and Geiber Fuentes.¹⁴⁰ The first one was declared responsible for the crimes of homicide on protected persons, the common crime of murder aggravated for the killing of an international protected person, and qualified onspiracy.¹⁴¹ Geiber Fuentes was sentenced for the perpetration of the third aforementioned crime.¹⁴²

The Court studies the charges and says that the sentence against Fuentes is incorrect.¹⁴³ The tribunal argues that civilians are not considered protected individuals under the ninth aggravating cause of this crime in the Colombian Criminal Code.¹⁴⁴ The Court decides that he should not be guilty of that criminal offense but of the war crime of homicide.¹⁴⁵ It then characterizes this crime by explaining that it may be done in the context of a combat, but also in places when there is not armed confrontation.¹⁴⁶ It further explains that the killings of the Kankuamo community members were a component of the paramilitaries' strategy against people who were supposed to be guerrilla aiders.¹⁴⁷ The tribunal also mentions that when an illegal armed group invades a town and the criminal organization is present in the region, under the orders of a command, and its members perpetrate homicides against the civilian population, such crimes fit the characteristics of the war crime of murder:¹⁴⁸

¹³⁹ [C.S.J.] *supra* note 128.

¹⁴⁰ *Id.*

¹⁴¹ “**CONCIERTO PARA DELINQUIR.** Cuando varias personas se concierten con el fin de cometer delitos, cada una de ellas será penada, por esa sola conducta, con prisión de cuarenta y ocho (48) a ciento ocho (108) meses. Cuando el concierto sea para cometer delitos de genocidio, desaparición forzada de personas, tortura, desplazamiento forzado, homicidio, terrorismo, tráfico de drogas tóxicas, estupefacientes o sustancias sicotrópicas, secuestro, secuestro extorsivo, extorsión, enriquecimiento ilícito, lavado de activos o testaferrato y conexos, o Financiamiento del Terrorismo y administración de recursos relacionados con actividades terroristas, la pena será de prisión de ocho (8) a dieciocho (18) años y multa de dos mil setecientos (2700) hasta treinta mil (30000) salarios mínimos legales mensuales vigentes. La pena privativa de la libertad se aumentará en la mitad para quienes organicen, fomenten, promuevan, dirijan, encabecen, constituyan o financien el concierto para delinquir.” C.Pen. art.340 (Col.).

¹⁴² [C.S.J.] *supra* note 128.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

“En consecuencia, no existe duda alguna que se cierna acerca de la autoría y responsabilidad de estos crímenes en cabeza de los miembros de las Autodefensas que participaron en la toma de Atánquez, con independencia del rol que cada uno cumpliera [...] todos esos actos apuntan en una misma dirección: hacer posible la ejecución del plan criminal que los condujo a tomarse el Corregimiento de Atánquez, con miras a matar a varios de sus pobladores [...]

[E]l mismo testigo fue claro en mencionar que vio a MARIO y a GEIBER FUENTES MONTAÑO, junto con alias EL PAISA, como parte de un grupo de al menos sesenta paramilitares, el día en que mataron a ABEL ALVARADO MAESTRE y a otros tres habitantes de Atánquez [...] explicando que pudo reconocerlos porque le hicieron abrir la tienda de su propiedad para que le vendieran gaseosa, momento en que llevaban con ellos al Mamo indígena en cuestión.”¹⁴⁹

The former argumentation about why the crime of homicide of a protected person was the applicable criminal offense to the specific case suggests that such qualification does not fit the circumstances under which it was committed. The analysis of the wording of the crime as described in the Criminal Code shows that the only individual who may be held responsible is its direct perpetrator.¹⁵⁰ There is no mention of whether Geiber Fuentes committed a crime of murder. It seems that he was indicted due to his involvement in the criminal organization. The description that the Court does of his participation in criminal acts against the Kankuamos relates more to the elements of the crime against humanity of attack directed against a civilian population as described in article 7 of the Rome Statute,¹⁵¹ but not to any of the crimes contained in the national legislation.

2.4 Under and over inclusion of international norms in national offenses

It may be observed from what have been described that although Colombian high Courts have tried to characterize criminal actions which amount to international crimes by making constant reference to international law, the results of such activity sometimes trigger an unfair administration of justice. Even when the interpretation of national norms by making use of the constitutional block tries to push for the compliance of the State with its international obligations, a barrier is found on the fact that a civil law system restricts the possibility to do any indictments by going beyond the constitutive elements of national crimes typified in the criminal statutes.

¹⁴⁹ *Id.*

¹⁵⁰ “*El que, con ocasión y en desarrollo del conflicto armado, ocasione la muerte de persona protegida conforme a los Convenios Internacionales sobre Derecho Humanitario ratificados por Colombia[...]*” [C.Pen.] art 135 (Col.).

¹⁵¹ “[...] 2. For the purpose of paragraph 1: (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population pursuant to or in furtherance of a State or organization policy to commit such attack.” Rome Statute art.7, para.1(a), 2 (a).

This situation may lead to two obstacles which have been called by Ferdinandusse as underinclusion and overinclusion of core international crimes.¹⁵²

The Colombian case shows that there is in fact underinclusion. This becomes evident in the misapplication of the crime of murder as a crime against humanity under the Rome Statute vis a vis the common crime of murder and the war crime of homicide in the Colombian legislation. XimenaMedellín explains that when national crimes do not have any of the constitutive elements of core international crimes, there is no way to make any equivalence between both kinds of offenses.¹⁵³ Hugo Relva makes an analysis in this regard by saying that when treaties compel states to prevent and punish crimes, such acts are punishable within domestic jurisdictions when a national rule has been established; this has not happened in Colombia:

“In Latin American countries [...] if instead of recognizing rights the treaty prohibits certain acts, and imposes on states parties an obligation to prevent and punish them, it cannot be asserted that such acts are punishable under domestic legislation unless a subsequent legal rule has been passed expressly punishing them [...] this principle always involves the enactment of additional domestic laws to criminalize such acts and specify penalties.”¹⁵⁴

The aforesaid states' duty to legislate crimes and their correspondent penalties is linked to the to the principle of *nullum crime sine lege, nullapena sine lege*.¹⁵⁵ In this respect, it is important to remember, as the previous chapter mentioned, that the Inter-American Court has expressed the importance that precision and clarity have in the delimitation of criminal norms. For instance, in Castillo-Petruzzi, and subsequent judgments, the Court said that the principle of legality pushes towards a narrow and unambiguous definition of crimes¹⁵⁶ as a measure to avoid the abuse of power. In *De La Cruz-Florez v. Peru*, the Court adds the obligation of any democratic system to ensure that all punishments be adopted with careful observance of the rights of the individuals.¹⁵⁷

As it can be seen, there is a legislative gap in the national jurisdiction which creates doubt about how any effective redress for victims may be provided without affecting the rights of indictees. This situation has made the judiciary, when trying to comply with its duty to impart justice, to end up creating a situa-

¹⁵² This author explains that “[u]nderinclusion can obviously thwart or at least complicate core crimes prosecutions that a State wants to conduct. It can also lead to a violation of the State’s international obligations to criminalize the core crimes in its national legislation and to prosecute them. Overinclusion, on the other hand, can cause a State to prosecute acts as core crimes that cannot be categorized as such under international law.” WARD N. FERDINANDUSSE, *DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS* 117 – 124, 117 (2006).

¹⁵³ “Por último, se aclara que existen tipos penales domésticos que pueden compartir algunos elementos con las definiciones internacionales de genocidio, crímenes de lesa humanidad o de Guerra; sin embargo, ante la ausencia de los elementos que definen estos crímenes, los delitos no serán equiparables.” XIMENAMEDELLÍN, *Supra* note 115, 186 (2009).

¹⁵⁴ Hugo Relva, *The Implementation of the Rome Statute in Latin American States*, 16 *Leiden J.I.L* 331, 333 (2003).

¹⁵⁵ Organization of American States, American Convention on Human Rights art.9; ICCPR, art. 15.

¹⁵⁶ Castillo-Petruzzi et al. v. Peru, *supra* note 91, 121; Cantoral-Benavides v. Peru, *supra* note 91, 157.

¹⁵⁷ Baena-Ricardo et al. v. Panama, *supra* note 93.

tion throughout its interpretative labor of over inclusion of international crimes. A good example on this regard relate to certain decisions in respect to the crime of qualified conspiracy, which is going to be explained in the following pages.

One decision which raises some doubts about the judicial understanding of what crimes against humanity are, is the judgment held in 2010 about Law 1312 of 2009.¹⁵⁸ This law broadened the cases when the “*principio de oportunidad*” could be applied in criminal proceedings.¹⁵⁹ One of the articles of this law stated that demobilized members of illegal armed groups could obtain the benefits of the aforementioned principle if the following eligibility requirements were met: i) the individual had manifested his intention to reintegrate to civilian life, ii) had not demobilized under the law of justice and peace, and iii) had no investigations opened against him due to the perpetration of crimes before or after his demobilization, except for his membership to the criminal organization.¹⁶⁰

The Constitutional Court in a 5 to 4 decision ruled that article 17(2) of the aforementioned law was not constitutional and that the approach of the Supreme Court about the crime of qualified conspiracy was acceptable.¹⁶¹ The holding was that the legality principle was breached by the aforementioned disposition because the conditions under which the “*principio de oportunidad*” could be applied and the individuals to whom the benefits could be given were not clear.¹⁶² Even though this statement seems clear, the division between the judges was related to their appreciation of whether individuals declared guilty for qualified conspiracy could get any of the law’s judicial benefits. Hereisanexcerpt of theruling:

*“[E]n la causal acusada se presenta ambigüedad en cuanto a los destinatarios y en relación con las condiciones para su aplicación, puesta de manifiesto en los diferentes conceptos expuestos por los intervinientes en el proceso de constitucionalidad. Para algunos, serían los autores del delito de concierto para delinquir simple [...] para otros cobijaría únicamente a los autores del concierto para delinquir agravado [...] y para otros se aplicaría a todos los autores del concierto para delinquir.”*¹⁶³

The dissenting judges said that the crime of qualified conspiracy is not a crime against humanity, and that even if it were so, the “*principio de oportunidad*” would apply to paramilitaries:

¹⁵⁸ Corte Constitucional [C.C.] [Constitutional Court] noviembre 23, 2010. Comunicado de Prensa No 59. Sentencia C-936 de 2010, M.P. L. Vargas (Colom.) Whereas 4.

¹⁵⁹ “*El principio de oportunidad es la facultad constitucional que le permite a la Fiscalía General de la Nación, no obstante que existe fundamento para adelantar la persecución penal, suspenderla, interrumpirla, o renunciar a ella, por razones de política criminal, según las causales taxativamente definidas en la ley, con sujeción a la reglamentación expedida por el Fiscal General de la Nación y sometido a control de legalidad ante el Juez de Garantías.*” L. 1312/09, art.1, 2.

¹⁶⁰ *Id.*, art.2 (17), 2.

¹⁶¹ [C.C.] Comunicado de Prensa No 59, *supra note* 158, Whereas 4.

¹⁶² *Id.*

¹⁶³ *Id.* It is important to point out that until the time of writing there was no access to the formal judgment but to a communiqué were the main points of the decision were stated. This is the reason why a more clear statement of the holding about why the majority said that the aforementioned crime is a crime against humanity was not available.

“A diferencia de lo acogido por la jurisprudencia de la Corte Suprema de Justicia y finalmente acogido en la sentencia de la cual nos apartamos, consideramos que el delito de concierto para delinquir agravado, objeto de la aplicación del principio de oportunidad para los desmovilizados, no es un delito de lesa humanidad [...] además, aun si en gracias de discusión se aceptara que el concierto para delinquir fuera, que no lo es, delito de lesa humanidad, eso no implicaría la inconstitucionalidad de la disposición acusada, pues cabe recordar que el artículo 53 del Estatuto de Roma le otorga facultades similares al Fiscal para decidir sobre el inicio de la investigación.”¹⁶⁴

The understanding that the crime of qualified conspiracy is a crime against humanity does not have any international support. This situation is an example of jurisprudential overinclusion. As the dissenting judges pointed out, the consideration that such crime has the aforesaid qualification was first expressed by the Supreme Court in a decision which will be addressed.

The aforementioned Supreme Court’s holding dates back to 2009 when it sentenced Salvador Arana-Sus, who was a former governor of the department of Sucre.¹⁶⁵ Arana was condemned because of his involvement in a criminal enterprise (paramilitarism) which directed the perpetration of the crimes of forced displacement, qualified homicide, and qualified conspiracy in the aforementioned department of the country.¹⁶⁶ This tribunal also ordered that investigations were initiated in regard to Arana’s involvement in crimes against humanity committed by the paramilitary group.¹⁶⁷

The relevance of this judgment relies on the explanation that it gives about why qualified conspiracy is a crime against humanity. This decision changes a previous consideration of the same tribunal which stated that the crime of qualified conspiracy is a common crime.¹⁶⁸ The Court explains that when a criminal enterprise is organized in order to commit crimes such as forced disappearance, forced displacement, homicide due to political reasons amongst other crimes against humanity, this denomination has to be extended to the crime of qualified conspiracy.¹⁶⁹ The Tribunal cites the Rome Statute in order to explain that not only the criminal conducts but the existence of purposes tending to commit crimes against humanity have to be punished in the same way:

¹⁶⁴ *Id.*

¹⁶⁵ Corte Suprema de Justicia [C.S.J.] [SupremeCourt], Sala, Pen. Diciembre 3, 2009, M.P: J. Socha, Proceso No. 32672 (Colom.).

¹⁶⁶ *Id.*, p. 113.

¹⁶⁷ *Id.*, p. 114.

¹⁶⁸ The Supreme Court argued in a case against the paramilitary Orlando César Montalvo that pardons could only benefit individuals declared guilty of political crimes but not of qualified conspiracy, which it characterized as a common crime. Corte Suprema de Justicia [C.S.J.] [SupremeCourt], Sala, Pen. Julio 11, 2007, M.P: Y. Ramírez & J. Socha, Proceso No. 26945 (Colom.).

¹⁶⁹ “Cuando una empresa criminal se organiza con el propósito de ejecutar delitos como desaparición forzada, desplazamiento forado, torturas, homicidios por razones políticas, etc., punibles que se entienden comprendidos dentro de la calificación de delitos de lesa humanidad, dicha valoración se debe extender al denominado concierto para delinquir agravado en tanto el acuerdo criminal perfeccionó con tales propósitos.” [C.S.J.] Proceso No. 29753, *supra* note 128, p. 30.

“Destaca la Sala que el Estatuto de Roma que dio origen a la Corte Penal Internacional ha tenido en cuenta no sólo la conducta del autor o de los partícipes sino que también ha considerado en especial la existencia de propósitos dirigidos a cometer delitos de lesa humanidad, lo cual significa que también deben ser castigadas en igual medida aquellas conductas preparatorias para la comisión de delitos que incluyen tanto el cuerdo como el tomar parte en una actividad dirigida a ese fin, como ocurre con el *concierto para delinquir agravado*.”¹⁷⁰

The Court further states that the crime of qualified conspiracy is a crime against humanity.¹⁷¹ This tribunal explains that in order to determine whether individuals responsible for this crime may be considered authors of crimes against humanity, the following requirements have to be met: i) the activities of the organization include some crimes against humanity, ii) the membership were voluntary, and iii) most of their members had had knowledge about the nature of the criminal organization.¹⁷²

The former ruling is not sustained in solid legal arguments. There are four main reasons to reject such jurisprudential analysis. First, there are no international instruments which had included the crime of conspiracy as a crime against humanity. Secondly, the Rome Statute does not criminalize the sole membership of an individual to a criminal group.¹⁷³ Thirdly, the Rome Statute only states that the contribution of an individual with others to commit or attempt to commit a crime is the basis to hold him liable.¹⁷⁴ Fourthly, the drafters of the Rome Statute decided to drop any conspiracy provision from this instrument.¹⁷⁵

The effect of the Supreme Court’s approach is that when it has acted as the judging Court of politicians apparently involved with paramilitary groups, the allowance of statutes of limitations are banned. A presumption of culpability starts dominating the indictments. It is possible that the members of these criminal organizations be indicted for the commission of other crimes where they did not have any involvement. The only basis to proceed in this way is the suspect membership of the individual to the group. One of the judges of the Supreme Court said in relation to this point that if the organization is financed by drug trafficking, politicians linked to paramilitary groups would have to be prosecuted for their participation

¹⁷⁰ *Id*, p. 30-31.

¹⁷¹ *Id*, p. 32. [Emphasis in the original text].

¹⁷² “Para llegar a considerar a los responsables del concierto para delinquir como autores de delitos de lesa humanidad deben estar presentes los siguientes elementos: i) Que las actividades públicas de la organización incluyan algunos de los crímenes contra la humanidad; ii) Que sus integrantes sean voluntarios; y iii) Que la mayoría de los miembros de la organización debieron haber tenido conocimiento o ser conscientes de la naturaleza criminal de la actividad de la organización.” [C.S.J.] *Id*, p. 31.

¹⁷³ Rome Statute art. 25.

¹⁷⁴ Rome Statute art. 25(3).

¹⁷⁵ Beth Van Schaack & Ronald C. Slye, *International Criminal Law and Its Enforcement* 756 – 757 (2007).

in this crime: “[s]i el aparato de guerra se lucraper el narcotráfico, obviamente, los vinculados a la para política podrían ser juzgados por ese delito”.¹⁷⁶

3 Incidence of the Lack of Legislation of Crimes Against Humanity on the Labor of the Judiciary

This chapter will show that the lack of legislation of crimes against humanity has repercussion on the effectiveness of criminal prosecutions. It will be evidenced that the existent crimes in the Colombian Criminal Code such as the ordinary crime of murder and homicide as a war crime do not have the widespread and systematic elements of murder as a crime against humanity. It will be observed that the consequence of this deficiency is that the judiciary has restricted possibilities to determine criminal responsibilities beyond the involvement of individuals in single acts of murder. The incidence for victims is the inexistence of effective judicial remedies and impunity in the long term.

It will be also observed that besides the fact that crimes against humanity are not legislated, the Colombian legal order states that there are statutes of limitations in respect to all crimes. It will be seen that while the Constitutional tribunal has reinforced the existence of such provisions, contrariwise the Supreme Court has said that these measures are not compatible with Colombia’s international obligations. This situation creates judicial uncertainty about the criteria that lower courts should apply. This condition together with the legal uncertainty about which crimes fall under the denomination of crimes against humanity has repercussion on the way how the judicial branch applies the Supreme tribunal’s approach to deal with crimes which are not crimes against humanity. Hence, it will be evidenced that the failure of the legislative branch has as consequence that the administration of justice becomes imbalanced.

Thus, this section will explain two main points. First, the prosecutions done against militaries involved in the extrajudicial killings known as “*falsospositivos*” [False Positives] based on the ordinary crime of murder and the war crime of murder. Secondly, some legal provisions and judicial decisions in respect to the existence of statutory limitations in the Colombian legal order will be explained.

3.1 Extrajudicial Killings: False Positives & the Legislated Crime-of Murder

Legislative distinctions between war crimes, ordinary crimes, and crimes against humanity are necessary in the Colombian legal order. As it was mentioned in Chapter II, Colombia has war crimes in its criminal Code. It also has four

¹⁷⁶ Verdadabierta.Com Paramilitares y Conflicto Armado en Colombia, *Los Parapolíticos y los Crímenes de Lesa Humanidad*, Jul. 14, 2010, at <<http://www.verdadabierta.com/parapolitica/antioquia/2564>> (Last visited April 3, 2011).

other core international crimes: genocide,¹⁷⁷ forced disappearance,¹⁷⁸ forced displacement¹⁷⁹ and torture.¹⁸⁰ However, crimes against humanity are not typified. This gap and also the fact that ordinary crimes and war crimes, which have been employed to indict people involved in the commission of crimes against humanity, do not have the elements of latter, is that prosecutions are not able to reach a successful outcome. This situation is called by Ferdinandusse, as cited in Chapter II, underinclusion of international norms.

This author explains in regard to the underinclusion problem that States tend to miscalculate the way how their criminal statutes cover international crimes.¹⁸¹ He cites the German case described by Bremer in order to show that “the reliance of Germany on ordinary crimes prior to the adoption of the 2003 Code on International Crimes failed to ensure the prosecution of all war crimes.”¹⁸² Ezequiel Malarino also explains some deficiencies in the same regard in Argentina.¹⁸³ He states that prosecutions need to be done based on ordinary crimes in order to comply with the principle of *nullum crime, nulla poena sine lege praevia*.¹⁸⁴ Following this reasoning, he argues in respect to the crime of genocide that its absence in the Argentinian Criminal Code has to be supplied by making use of ordinary crimes.¹⁸⁵ The problem which he finds on this point is that the subjective element of genocide, which according to article 6 of the Rome Statute is the intention to destroy racial, ethnic, national or religious groups, is not included in any of the ordinary crimes.¹⁸⁶

The importance to legislate crimes in accordance to international standards is found in one holding of the Constitutional Court of Colombia. Its judgment C-171 of 2001 contains some considerations on this matter.¹⁸⁷ It mentions the relevance of doing the legislative adequacy of international crimes in accordance to the wording of international dispositions.¹⁸⁸ This specific holding declares that the crime of genocide, which was legislated in 2000, was contrary to the Convention on Genocide that the Colombian State ratified in 1959.¹⁸⁹ The Court states that the definition of the crime in the Criminal Code restricted the protection of the rights to life, personal integrity, and freedom.¹⁹⁰ The sphere of protection of the crime was limited to people who had not been involved in illegal acts:¹⁹¹

¹⁷⁷ [C.Pen.] art 101 (Col.).

¹⁷⁸ *Id.*, art 165.

¹⁷⁹ *Id.*, art 180.

¹⁸⁰ *Id.*, art 178.

¹⁸¹ Ward N. Ferdinandusse, *supra note* 152, 118.

¹⁸² Ward N. Ferdinandusse, *supra note* 152, 118.

¹⁸³ Ezequiel Malarino, *Argentina*, in *Persecución Penal Nacional de Crímenes Internacionales en América Latina*, 61 - 63 (Kai Ambos & Ezequiel Malarino ed., 2003).

¹⁸⁴ *Id.*, 61.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ [C.C.] febrero 14, 2001. Sentencia C-171 de 2001, M.P: F. Morón (Colom.)

¹⁸⁸ *Id.*, Whereas 5.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

“[L]ejos de adoptar las medidas de adecuación legislativas consonantes con las obligaciones internacionales que el Estado Colombiano contrajo, en particular, al suscribir la Convención de las Naciones Unidas para la Prevención y Sanción del Delito de Genocidio [...] desvirtuó el propósito que con su consagración normativa se perseguía, pues se restringió la protección de los derechos a la vida, a la integridad personal y a la libertad de las personas, al concederla únicamente en tanto y siempre y cuando la conducta atentatoria recaiga sobre un miembro de un grupo nacional, étnico, racial, religioso o político “que actúe dentro del margen de la Ley”.¹⁹²

The same reasoning can be applied to crimes against humanity. In order to better understand the priority which should be given to this point, the crime of murder as a war crime, as an ordinary crime, and as a crime against humanity will be considered. This chapter will focus on this specific type due to the fact that prosecutions in regard to the *false positives* have been done based on the first two denominations. As it was mentioned, the Colombian Criminal Code has the crime of homicide legislated under two different titles: war crimes and ordinary crimes. Under the first denomination, the crime is known as homicide of a protected person.¹⁹³ The other type is known just as homicide.¹⁹⁴

The spheres of applicability of the two aforementioned crimes differ now that each one of them has different constitutive elements. Moreover, as it was stated in the previous chapter, none of them have the elements of the crime of murder as a crime against humanity. The war crime of murder is defined in the Colombian law under the context of an armed conflict: “[e]l que, con ocasión y en desarrollo del conflicto armado [...]”.¹⁹⁵ The common crime of murder is described just as the action of killing someone: “[e]l quematareaotro [...]”.¹⁹⁶ As Ximena Medellín recalls, there are some basic elements to each one of the international crimes.¹⁹⁷ In regard to genocide, she says that it has -as it was also explained in the aforementioned judgment of the Constitutional Court C-171 of 2001- the genocidal intention.¹⁹⁸ Crimes against humanity have the widespread or systematic nature against civilian populations.¹⁹⁹ War crimes have the link with an armed conflict.²⁰⁰ Cassesse says that the crime of murder as a crime against humanity requires not only the objective element of causing the death to someone, but “a broader objective context” which is the widespread or systematic attack on the civilian population in time of either war or peace, and a mental element which is the “awareness of the existence of such broader context.”²⁰¹ Neither the widespread nor the systematic nature of crimes against humanity is con-

¹⁹² *Id.* [Emphasis added].

¹⁹³ [C.Pen.] art. 135 (Col.).

¹⁹⁴ *Id.*, art. 104.

¹⁹⁵ *Id.*, art. 135.

¹⁹⁶ *Id.*, art. 104.

¹⁹⁷ Ximena Medellín, *Supra* note 115, 186.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Antonio Cassesse, *supra* note 126, 54.

tained in the aforementioned crimes of murder in the Colombian law. The mental element of the offense is not evidenced either.

It is true that the judiciary cannot abstain from seeking justice by prosecuting the perpetrators of crimes based on the deficiencies of the legal order. However, a complete administration of justice would be in compliance with international criteria. The following paragraphs will show how legislative deficiencies in the determination of crimes have repercussions on the effectiveness of the prosecutions done until now in regard to the *false positives*.

The *false positives* are extrajudicial killings committed by members of the armed forces against civilians.²⁰² They presented the dead bodies of civilians as if they were of guerrilla members who died in combat.²⁰³ The technique used to commit these crimes consisted on three stages. First, a recruiter, who was often a civilian, recruited other civilians under tricks such as the offering of an employment. Secondly, the recruiters deprived them of physical liberty for a short period of time. Lastly, militaries arrived to the place where the civilians were and killed them.²⁰⁴

The extrajudicial killings phenomenon is not new;²⁰⁵ however, since 2002 it significantly increased.²⁰⁶ Philip Alston, who is a former UN Special Rapporteur on extrajudicial executions, went on a mission to Colombia in June of 2009 and explained that usually the killers were rewarded “for the results they have achieved in the fight against the guerrillas.”²⁰⁷ This situation might have had relation with the enactment of a secret resolution by the Ministry of Defense in 2005, which stated compensations for detention or murder in combat of members of illegal armed groups.²⁰⁸ As it was mentioned, the killings had been primarily of civilians.

²⁰² Hernando Salazar, *Colombia: ejecuciones “muy alarmantes”*, BBC Mundo, Colombia, Nov. 1, 2008, <http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7704000/7704520.stm>.

²⁰³ *Id.*

²⁰⁴ This information was provided in a meeting, by the mothers of some of the *false positives* who resided in Soacha, which is a municipality close to Bogota-Colombia; also Philip Alston explains that “[t]he victim is lured under false pretenses by a “recruiter” to a remote location. There, the individual is killed soon after arrival by members of the military. The scene is then manipulated to make it appear as if the individual was legitimately killed in combat. The victim is commonly photographed wearing a guerrilla uniform, and holding a gun or grenade.” Press Release, Statement by Professor Philip Alston, UN Special Rapporteur on extrajudicial executions, Mission to Colombia 8-18 June 2009, [Press Release Philip Alston] at <<http://www.hchr.org.co/documentoseinformes/documentos/relatoresespeciales/2009/Colombia%20Press%20statement%20EN.pdf>> (Last visited April 10, 2011).

²⁰⁵ See Michael Evans, *Body Count Mentalities, Colombia’s “False Positives” Scandal, Declassified*, National Security Archive – George Washington University (Jan. 7, 2009), <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB266/index.htm>> (Last visited April 10, 2011).

²⁰⁶ The newspaper El Espectador reported in 2010 that the organization “Coordinación Colombia-Europa” revealed that there have been 3,796 registered extrajudicial executions since 1994 and that 3,084 of them were perpetrated since 2002. El Espectador, *Denuncian más de 3 mil ejecuciones extrajudiciales entre 2002 y 2009*, May. 24, 2009, <http://www.elespectador.com/ejecuciones-extrajudiciales/articulo-204807-colombia-hubo-mas-de-3-mil-ejecuciones-extrajudiciales-> (Last visited April 10, 2011).

²⁰⁷ Press Release Philip Alston, *supra* note 204.

²⁰⁸ “ASUNTO: Política ministerial que desarrolla criterios para el pago de recompensas por la captura o abatimiento en combate de cabecillas de las organizaciones armadas al margen de la ley, material de guerra [...]” [Emphasis Added] Article 3 of this resolution established payments between ~ US\$1,907.5 and ~ US\$2,500,000, which were dependent of the level within the illegal

Alston pointed out that he could not “rule out the possibility that some of the *falsos positivos* were, in fact, guerrillas, but apart from sweeping allegations, I have been provided with no sustained evidence to that effect by the Government.”²⁰⁹

Alston also said that while he did not find that the killings were the response of a Governmental plan, he did observe that the executions were committed in a systematic fashion.²¹⁰ However, the systematic character of the extrajudicial killings and its possible primary causes has not been object of study in the prosecutions which have been conducted. Instead, the information available about them shows that the investigations have not gone beyond the determination of responsibilities of the direct perpetrators and officials in a supervisorial position in respect to the first ones.²¹¹

The aforesaid limitations may be a consequence of the fact that the prosecutions have been done based on either the common crime of murder or the war crime of homicide of a protected person.²¹² These offences do not have the widespread and systematic elements of that the crimes against humanity have. Even if authorities considered the context of the killings, their number since 2002,²¹³ and the fact that there are 1,487 cases and 791 individuals under investigation,²¹⁴ there is no legal possibility to indict someone beyond the framework of the abovementioned crimes. The obstacle that this situation creates is that the judicial disclosure of the context of crimes against humanity is not possible.²¹⁵

Besides the general deficiencies under the legislated crimes of murder, the fact that a country has an ongoing war cannot lead to the presumption that all crimes committed by the parties in the conflict are war crimes. The prosecutions of *falsos positivos* under the war crime of murder may also fail due to this reason. This gap was explained by the representatives of the victims in the Supreme Court’s judgment analyzed in Chapter II against Gian Carlo Gutiérrez, who was a member of the Calima Block of the AUC.²¹⁶ The lawyers said that the charge for war crimes does not open any judicial path to either recognize the influence of the

armed group of the members captured or killed.” *Ministerio de Defensa Nacional, Secreto, Directiva Ministerial Permanente No. 29/2005*, 17 Nov. 2005. Theresolutionwasdistributedto 16 differentstate agencies: *Comando General FFMM, Comando Fuerza Aérea, Comando Armada Nacional, Policía Nacional, Departamento Administrativo de Seguridad, Cuerpo Administrativo de Investigación, Dirección Inteligencia Ejército Nacional, Dirección Inteligencia DAS, and others.*

²⁰⁹ Press Release Philip Alston, *supra* note 204.

²¹⁰ “I have found no evidence to suggest that these killings were carried out as a matter of official Government policy, or that they were directed by, or carried out with the knowledge of, the President or successive Defence Ministers [...] The sheer number of cases, their geographic spread, and the diversity of military units implicated, indicate that these killings were carried out in a more or less systematic fashion by significant elements within the military.” *Id.*

²¹¹ See news on *falsos positivos* in *Semana.com*, at <http://www.semana.com/wf_Buscador.aspx?Buscar=falsos%20positivos> (Last visited April 11, 2011); also in *El Espectador*, at <http://www.elespectador.com/search/apachesolr_search/falsos%20positivos> (Last visited April 11, 2011).

²¹² *Id.*

²¹³ See *supra* note 81.

²¹⁴ *Semana.com, Lentos positivos*, Jan. 29, 2011, <<http://www.semana.com/noticias-nacion/lentos-positivos/150992.aspx>> (Last visited April 11, 2011).

²¹⁵ Ward N. Ferdinandusse, *supra* note 152, 173 – 220, 206.

²¹⁶ [C.S.J] Proceso No. 32022, *supra* note 127.

indictée on the population under the influence of his paramilitary block nor the dismantling of predetermined plans behind the criminal acts committed by the block. The same point of Ferdinandusse in regard to the deficiencies of prosecuting core international crimes based on ordinary offenses can be used in regard to the use of the war crime of murder. He says that: “[to] prosecute a core crime as an ordinary crime is quite unsatisfactory. It ignores important aspects of the prosecuted act, like its broader context and the particular intent of the perpetrator [...] Ordinary offenses do simply not express the criminality of the conduct to be prosecuted in an adequate manner.”²¹⁷

3.2 Statutory Limitations and Crimes Against Humanity

Now this chapter turns to explain that the lack of legislation of crimes against humanity reinforced by the fact that the legislature established that all crimes are prescriptible leads to an unfair administration of justice. First, it will be seen that while the Constitutional Court has denied that the Rome Statute’s provision about the inexistence of statute of limitations for crimes against humanity is acceptable in the Colombian legal system, the Supreme Court has supported the opposite point of view and the result is the lack of judicial certainty. Secondly, the application of the contradictory rulings of both Courts in addition to the legal gap about what crimes against humanity are, has led to i) the application of statutes of limitations to crimes which could be considered to be crimes against humanity, and ii) the denial of prescription terms to crimes which are not crimes against humanity.

Statutory limitations are allowed in the internal juridical order. Article 82 of the Criminal Code establishes the existence of statutory limitations of the criminal action.²¹⁸ This same article further clarifies that the minimum and maximum years of statutes of limitations are 5 and 20.²¹⁹ The only cases when the maximum limit increases is in relation to the crimes of genocide, forced disappearance, forced displacement, torture, and homicides of members of a legally recognized trade union organization, human rights defenders, and journalists.²²⁰ In the aforesaid cases the time is 30 years.²²¹ Article 84 goes further by explaining when statutory limitations’ time starts running. Thus, in criminal actions of immediate execution the time period starts counting as soon as the offense is committed.²²² In regard to conducts of permanent execution, the period of time starts running since the last criminal act is perpetrated.²²³

The Constitutional Court has analyzed the nature and applicability of statutory limitations. Three of its holdings will be briefly mentioned. The first one is

²¹⁷ Ward N. Ferdinandusse, *supra* note 152, 173 – 220, 206.

²¹⁸ [C.Pen.] art 82 (Col.).

²¹⁹ [C.Pen.] art 83, ¶1 (Col.).

²²⁰ [C.Pen.] art 83, ¶2 (Col.).

²²¹ [C.Pen.] art 83, ¶2 (Col.).

²²² “En las conductas punibles de ejecución instantánea el término de prescripción de la acción comenzará a correr desde el día de su consumación.” [C.Pen.] art 84, 1 (Col.).

²²³ “En las conductas punibles de ejecución permanente o en las que solo alcancen el grado de tentativa, el término comenzará a correr desde la perpetración del último acto.” [C.Pen.] art 84, 2 (Col.).

judgment C-578 of 2002, which contains the analysis of the Rome Statute after it was approved by Law 742 of 2002.²²⁴ The second judgment is C-580 of 2002, which relates to the study of the treaty on enforced disappearance after it was ratified by Colombia.²²⁵ The last one is judgment C-801 of 2009, which studies the rules of procedure and elements of the crimes²²⁶ contained in the Rome Statute.²²⁷

The Constitutional Court states in its judgment C-578 of 2002 that international criminal regulations such as the ones of the Rome Statute have to be interpreted in relation to the provisions of the national order.²²⁸ It further establishes that there is some imprecision in the description of certain crimes in the Rome Statute and that this situation suggests that its standards of the principle of legality are less strict than in the national legal system.²²⁹ This tribunal then mentions that even though this lower level of precision is admissible in international law, the national constitution demands more accuracy.²³⁰ After doing the former clarifications, the Court enters into the study of the general principles of international law described in the Statute and compares them to the internal legal order. Statute of limitations is one of the points under examination.

The constitutional tribunal ignores in its assessment on statutory limitations the Barrios Altos judgment, which was decided by the Inter American Court on Human Rights the year prior to the ratification of the Rome Statute, about the non-acceptance of this criminal benefit when dealing with crimes against humanity.²³¹ The Court says that even though the Rome Statute recognizes the imprescriptibility of crimes, Colombia has to comply with its international obligations under the ICCPR and ACHR.²³² Thus, it expresses that the permission of statutory limitations violates article 2(1) of the ICCPR and 24 of the ACHR.²³³ The Court explains that the State is under the duty to do investigations without delay.²³⁴ It further says that society cannot wait for a long period of time the determination of those who are guilty or not guilty.²³⁵ The constitutional tribunal ends up explaining that the non-existence of statutory limitations in the ICC's Statute is accepted just in cases handled by the ICC. The inclusion of imprescriptibility provisions does not have any incidence in the Colombian legal system: “[s]e trata de un tratamiento distinto respecto de una categoría constitucional [...] que opera exclusivamente dentro del ámbito regulado por dicho Estatuto.”²³⁶ The Constitutional Court finishes its

²²⁴ [C.C.] julio 30, 2002. Sentencia C-578 de 2002, M.P: M. Cepeda (Colom.).

²²⁵ [C.C.] julio 31, 2002. Sentencia C-580 de 2002, M.P: R. Escobar (Colom.).

²²⁶ See UN Doc. PCNICC/2000/1/Add.2 (2000), International Criminal Court, Elements of Crimes.

²²⁷ [C.C.] noviembre 10, 2009. Sentencia C-801 de 2009, M.P: G. Mendoza (Colom.).

²²⁸ [C.C.] Sentencia C-578 de 2002, *supra* note 224, Whereas 4.1.4.2.

²²⁹ *Id.*, Whereas 4.1.4.2.

²³⁰ *Id.*, Whereas 4.1.4.2.

²³¹ Barrios Altos v. Peru, *supra* note 63, 41.

²³² [C.C.] Sentencia C-578 de 2002, *supra* note 224, Whereas 4.5.2.3.

²³³ *Id.*

²³⁴ [E]l principio de celeridad debe caracterizar los procesos penales. Ni el sindicado tiene el deber constitucional de esperar indefinidamente que el Estado califique el sumario o profiera una sentencia condenatoria, ni la sociedad puede esperar por siempre el señalamiento de los autores o de los inocentes de los delitos que crean zozobra en la comunidad.” [C.C.] *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

analysis clarifying that the Rome Statutes dispositions do not replace or modify national laws.²³⁷ Therefore, the individual who commits a crime in the country has to be prosecuted based on Colombian law.²³⁸

The only exception to the prescription rule of criminal actions in the Colombian legal order is found in the decision C-580 of 2002.²³⁹ The Court says that limitations to begin any criminal actions have to be examined according to two main points: i) the gravity of the crime and ii) the necessity to stop impunity when the gathering of proofs or prosecutions of criminals are difficult.²⁴⁰ This tribunal justifies the non-existence of statutes of limitations to begin any action against the crime of forced disappearance due to four main reasons. First, it does not affect the freedom of the individual nor puts any extra weight against him.²⁴¹ Secondly, it allows victims and society to get to know the truth and achieve justice.²⁴² Thirdly, victims may exercise their rights to reparation.²⁴³ Lastly, since getting the necessary evidence in a limited time is difficult, the imprescriptibility of the criminal action helps to avoid this barrier.²⁴⁴ The Court concludes that while the criminal action is not restricted by the existence of statutory limitations, once the indicted is subject to criminal prosecution, the prescription terms of the criminal action start running.²⁴⁵

The former reasoning creates some doubts about why the criteria to deny statutory limitations for the crime of forced disappearance were not considered in the judgment where the Rome Statute was analyzed. There is no basis to think that victims and society want truth and justice to come out in regard to all crimes against humanity in a lower degree compared to the crime of forced disappearance. It will be seen that the Court has not changed its appreciation on statutory limitations for crimes under the jurisdiction of the ICC. In fact, the same reasoning

²³⁷ *Id.*, Whereas 4.16.

²³⁸ “*Del análisis material anterior se aprecia que las normas del Estatuto surten efectos dentro del ámbito de la competencia de la Corte Penal Internacional. Las disposiciones en él contenidas no reemplazan ni modifican las leyes nacionales de tal manera que a quien delinca en el territorio nacional se le aplicará el ordenamiento jurídico interno y las autoridades judiciales competentes al efecto son las que integran la administración de justicia colombiana.*” [C.C.] *Id.*

²³⁹ [C.C.] Sentencia C-580 de 2002, *supra* note 225.

²⁴⁰ “[E]llo no significa que el único criterio razonable para fijar el término de prescripción de la acción penal sea la gravedad de la conducta, pues dentro del diseño de la política criminal del Estado el legislador puede determinar el término de prescripción a partir de otros criterios valorativos [...] [e]ntre ellos, pueden considerarse la necesidad de erradicar la impunidad frente a delitos en los cuales resulta especialmente difícil recopilar pruebas o juzgar efectivamente a los responsables.” [C.C.] *Id.*, Whereas 3.2 (article 7)

²⁴¹ “[L]a imprescriptibilidad de una acción penal no tendría como consecuencia automática prolongar en el tiempo la ejecución de una actividad material concreta del Estado tendiente a privar de la libertad individual a un sujeto determinado, ni a agravar la carga que tiene que soportar.” [C.C.] *Id.*

²⁴² “[P]or el interés de erradicar la impunidad, para lo cual es necesario que la sociedad y los afectados conozcan la verdad, que se atribuyan las responsabilidades [...] y en general que se garantice el derecho de las víctimas a la justicia.” [C.C.] *Id.*

²⁴³ “[P]or el derecho de las víctimas a recibir una reparación por los daños.” [C.C.] *Id.*

²⁴⁴ “[D]ebido a la dificultad que suponen las recopilación de las pruebas necesarias y el juzgamiento efectivo quienes habitualmente incurrir en tales conductas.” [C.C.] *Id.*

²⁴⁵ “[L]a imprescriptibilidad de la acción penal resulta conforme a la Carta Política, siempre y cuando no se haya vinculado a la persona al proceso a través de indagatoria. Cuando el acusado ya ha sido vinculado, empezarán a correr los términos de prescripción de la acción penal, si el delito está consumado.” [C.C.] *Id.*

of judgment C-578 of 2002 is found in the holding where this tribunal analyzes the rules of procedure and elements of the crimes of the Rome Statute.

Indeed, the Constitutional Court reiterates in its judgment C-801 of 2009²⁴⁶ what it had stated in the decision of 2002 about the fact that differentiated criminal treatments are allowed just in cases where the ICC exercises its jurisdiction.²⁴⁷ The Court repeats the holding of 2002 about the permission of statute of limitations in the Colombian criminal order.²⁴⁸ It does not take into consideration the fact that the Inter-American Court stated in the Almonacid case in 2006, three years before the Constitutional tribunal had rendered the decision under analysis, that the non-applicability of these types of measures for crimes against humanity is a *jus cogens* norm.²⁴⁹

The prior holdings of the Constitutional Court demonstrate that this institution has reinforced the legislature's failure to restrict the applicability of statutory limitations. This situation is an example of the State's violation of its international obligation to establish the imprescriptibility of crimes against humanity. They infringe the Inter-American approach to this matter, the Rome Statute's inclusion of the imprescriptibility of the crimes that it typifies and also contradicts the *opinion juris* in this respect. They challenge the Barrios Altos and Almonacid decisions by leaving aside the fact that the non-applicability of statutory limitations to crimes against humanity is, according to the second aforesaid judgment, a *jus cogens* norm. This consideration has been reiterated by the scholars mentioned in chapter I such as Kok, Cassesse, Van Den Wynegaert, and Dugard. Their insight supports the view that there are customary rules and *jus cogens* norms which reject the existence of statutory limitations for crimes against humanity.

The next is a Supreme Court's decision examined in chapter II, from September 21st of 2009.²⁵⁰ In this holding the Supreme tribunal paraphrased the Constitutional Court's judgment C-580 of 2002 to argue that the understanding of statutes of limitations in regard to force disappearance is applicable to crimes against humanity.²⁵¹ This tribunal did not mention the Constitutional Court's aforesaid decisions of 2002 and 2009 about the Rome Statute and elements of the crimes in the ICCs statute. Instead, the Supreme Court arrived to two main conclusions. First, investigation of crimes against humanity does not have statutory limitations.²⁵² Secondly, imprescriptibility is not legitimate when someone has already been indicted.²⁵³ A general idea of what the Court stated is:

Es factible, entonces, que un delito de lesa humanidad reporte como tal la condición de imprescriptibilidad en su investigación, pero acerca de personas determinadas -individualizadas y formalmente vinculadas- exija el cumplimiento de los términos de in-

²⁴⁶ [C.C.] Sentencia C-801 de 2009, *supra* note 227.

²⁴⁷ *Id.*, Whereas 2.2.14.

²⁴⁸ *Id.*, Whereas 5.1.3.

²⁴⁹ See Almonacid-Arellano et al. v. Chile, *supra* note 70, ¶153.

²⁵⁰ [C.S.J] Proceso No 32022, *supra* note 127.

²⁵¹ *Id.*, p. 217.

²⁵² *Id.*, p. 216.

²⁵³ *Id.*, p. 216.

*investigación y juzgamiento[...] en los casos de delitos permanentes –como la desaparición forzada–, ese término prescriptivo no corre hasta que se sepa del destino del desaparecido[...] Desde luego, reitera la corte que esos fundamentos perfectamente son válidos para atender en el caso concreto la evaluación de cualquier delito de lesa humanidad y los efectos que sobre el mismo pueda traer la prescripción de la acción penal y la pena.*²⁵⁴

This ruling was well received by NGOs and some public characters.²⁵⁵ However, it poses some questions about the way how justice may be administered by lower courts if the judgment of two of the highest Courts in the country, the Supreme and the Constitutional Courts, are contradictory on this matter. There are two main difficulties. On the one hand, the prosecution of crimes which could be categorized as being crimes against humanity has been hampered by the use of statute of limitations based on legal provisions and the Constitutional Courts decisions which have reinforced the first ones. On the other hand, crimes which even though might have a big impact in society but their gravity do not amount to the one of crimes against humanity, have been prosecuted without respect to these type of limitation based upon the Supreme Court's ruling.

An example to the first difficulty is the Rochela Massacre, which occurred in January 1989.²⁵⁶ Many criminal tribunals have analyzed the case throughout the years, and this discontinuity has delayed the possibility to achieve justice.²⁵⁷ The *Grupo de Memoria Histórica* [Historical Memory Group] explains that investigations have been opened against some of the people involved in the crime after the prescription term had been reached, based on international jurisprudence.²⁵⁸ Nevertheless, prior to that initiative, statutes of limitation had always been a risk to the continuity of the process.²⁵⁹ In fact, one district court declared in 2008 that statutes of limitation had entered into force after so many years of the commission of the massacre had passed.²⁶⁰ It said that the direct participation of the indicted in

²⁵⁴ *Id.*, p. 216.

²⁵⁵ Michael Reed Hurtado, who is Chief Director of the ICTJ-Colombia, said that the judgments of the Supreme Court are valuable and coherent with international human rights standards: "Los últimos fallos de la Corte Suprema [...] son valiosos y coherentes. No sólo se ajustan a los estándares del derecho internacional, sino que abren la puerta para que satisfaga un clamor político y social nacional e internacional que existe desde hace décadas." ICTJ, *Procesos bajo Justicia y Paz pueden ser juzgados por delitos de lesa humanidad*, Oct. 5, 2009, at <<http://www.ictj.org/es/news/coverage/article/3121.html>> (Last visited April 9, 2011); also León Valencia, who is Director of the Nuevo Arco Iris corporation, said that one of the most relevant consequences of the ruling of the Supreme Court is that crimes against humanity are imprescriptible. *Verdad Abierta. Coom Paramilitares y Conflicto Armado en Colombia, Los Parapolíticos y los Crímenes de Lesa Humanidad*, Jul. 14, 2010, at <<http://www.verdadabierta.com/parapolitica/antioquia/2564>> (Last visited April 9, 2011).

²⁵⁶ CNRR, Informe del Grupo de la Memoria Histórica de la Comisión Nacional de Reparación y Reconciliación, *La Rochela: Memorias de un Crimen contra la Justicia*, 2010.

²⁵⁷ *Semana.com*, *La Rochela: Parábola de la Injusticia*, September 18, 2010, <<http://www.semana.com/nacion/rochela-parabola-injusticia/144762-3.aspx>> (Last visited 25 April 2011).

²⁵⁸ CNRR, Informe del Grupo de la Memoria Histórica de la Comisión Nacional de Reparación y Reconciliación, *La Rochela: Memorias de un Crimen contra la Justicia*, 2010, p. 86.

²⁵⁹ *Id.*, p. 136.

²⁶⁰ *Id.*, p. 138.

the massacre had not been proven and that since the only charge against them was the crime of qualified conspiracy, the criminal action had prescribed.²⁶¹

An example of the second difficulty is the use of international standards to avoid the prescription term of the criminal action against crimes such as drug trafficking and qualified conspiracy.²⁶² Michael Reed Hurtado, who is the director of the ICTJ in Colombia, denounced the situation in regard to drug trafficking prosecutions.²⁶³ He said that the General Attorney's Office should not qualify drug trafficking offenses as crimes against humanity in order to begin prosecutions after the criminal actions had expired.²⁶⁴ The same has happened in relation to prosecutions against individuals indicted for qualified conspiracy. Chapter II mentioned that the Supreme and Constitutional Courts declared that this crime is a crime against humanity. This chapter showed the Supreme Court's ruling about that statutory limitations are not applicable to crimes against humanity. The consequence of these two premises is that prosecutions based on the evidence that someone could have had relation with a criminal organization might be opened at any moment. The indicia of the involvement of the individual in what international law has defined as crimes against humanity would not be necessary.

Legislative determinations should not be based on judicial assumptions but explicit legal provisions. A fair administration of justice should be based upon the protection of human rights of all parties involved in a process. It means that appropriate legislation has to be adopted in compliance with the State's international duties to guarantee the effective access of victims to judicial remedies and compliance with the principle of legality. The Colombian case shows that the enactment of national rules is a necessity. This type of measure becomes a priority due to, as Cecilia Medina Quiroga explains, the emergence of problems when the interpretation of national and international norms by the judicial branch puts in risk the access to adequate and efficient legal remedies.²⁶⁵

The prior examples demonstrate that national legal provisions about the offenses which could be qualified as crimes against humanity are a necessity. This would be the first step to then clearly specify the cases when the imprescriptibility of the criminal action is permitted. The codification of precise crimes would be the basis for effective prosecutions. The Trujillo-Oroza case, which was mentioned in chapter I, illustrates this point.²⁶⁶ The Inter-American Court explains in the aforementioned judgment that the lack of legislation of the crime of forced disappearance becomes an obstacle to do effective investigations.²⁶⁷ The same happens in Colombia in regard to crimes against humanity. By taking the necessary legislative measures, an effective administration to justice in favor of victims and

²⁶¹ *Id.*

²⁶² Michael Reed Hurtado, *Sobre los delitos de lesa humanidad*, International Center for Transitional Justice, January 7, 2010, at <<http://www.ictj.org/en/news/coverage/article/3362.html>> (Last visited 25 April 2011).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Cecilia Medina Quiroga, *supra* note 9, 246-247.

²⁶⁶ Trujillo-Oroza v. Bolivia, *supra* note 66, 96 - 98.

²⁶⁷ Trujillo-Oroza v. Bolivia, *supra* note 66, 96 - 98.

indictees would be guaranteed. This would allow victims to get access to effective judicial remedies. It would also allow indictees not to be subject of judicial extralimitations. The existence of appropriate norms would be the basis for an appropriate State conduct,²⁶⁸ which would lead to the full realization of the rights embodied in the ICCPR and the ACHR.

CONCLUSION

Colombia has to take the necessary legislative measures in order to comply with the obligations that it has acquired under the ICCPR and the ACHR, and also with its duty to make its juridical apparatus work with efficiency, as the complementarity principle of the Rome Statute requires. The practical implications of the absence of crimes against humanity in the Criminal Code already described and which are going to be briefly summarized, reinforce the need to adapt its legislation to international standards.

The absence of crimes against humanity in the Colombian legislation has raised difficulties for the administration of justice. This deficiency has had negative impact on the way how the highest Courts in the country have addressed the definition of these crimes, and whether juridical measures such as statutory limitations are applicable, or not. The Constitutional Court has analyzed the definition of crimes against humanity and how their punishment should be. However, it has not succeeded in establishing clear distinctions between the spheres of protection of these types of offenses, ordinary crimes, and war crimes. The holdings of the Constitutional tribunal have been taken into consideration by the Supreme Court in some of its decisions on criminal matters. The result is that the practical application of the constitutional analyses on criminal cases has repercussion on the balance that should be maintained for all parties in a judicial process.

The lack of legislation on crimes against humanity has created some obstacles to do efficient prosecutions. On the one hand, this legislative gap has left the judicial branch with the responsibility of making decisions that integrate international instruments and national legislation. The problem is that by doing this activity it has sometimes trespassed the boundaries established by international law about the qualification of crimes as crimes against humanity. This is a complicated task as the Colombian criminal legal system is built upon the principle of *nullum poena sine lege, nullum crimen sine lege*. The only tools that the judiciary has, for instance, to prosecute an individual for the commission of murder as a crime against humanity are the ordinary crime of murder and the war crime of homicide. The difficulty that arises is that the effectiveness of their applicability is not clear when considerations of the contextual elements of the crimes against humanity are not present in the aforementioned ones.

Another obstacle is related to the fact that statutory limitations are regulated in the Criminal Code. However, the two highest Courts in the State, the Supreme and the Constitutional Courts, have contradictory case law on when

²⁶⁸ Velasquez-Rodriguez v. Honduras, *supra* note 33, 167; Godinez-Cruz v. Honduras, *supra* note 33, 176.

statutory limitations are applicable. While the Constitutional Court has reinforced the national legal rules throughout its jurisprudence, the Supreme Court has taken the opposite point of view in relation to international crimes. The lack of legislation and the differing judicial interpretations have hampered the possibility to do effective prosecutions. This means that some criminal processes have not been carried out due to the application of these kinds of criminal measures, affecting the rights of victims. Other processes have instead continued due to their misapplication in regard to crimes which do not amount to crimes against humanity, affecting the rights of defendants.

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