

**The International Criminal Court, Drug Trafficking and Crimes
against Humanity: A local Interpretation of the Rome Statute**

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The International Criminal Court (ICC) represents the culmination of decades of work of the international community to establish a permanent entity that would prosecute and sanction the worst behaviors human being are capable of. This exercise was developed in three stages; (1) the negotiation of a comprehensive treaty that establishes a final catalog of international crimes: the Rome Statute, (2) the establishment of an international criminal tribunal that has the ability of prosecuting individuals, the International Criminal Court, and (3) the implementation of a new international organization that could monitor the fulfillment of the two previous steps, the Organization of States Parties.

Given it was such an ambitious project the process occurred relatively rapidly since the start of the negotiations of the Statute, establishing a record regarding how fast the international community managed to build this consensus compared to other courts (such as e.g. The International Tribunal for the Law of the Sea). This speed may be a sign of the growing maturity of international community to face fundamental challenges such as establishing a new criminal jurisdiction on a global scale.

As Thomas Boudreau argues in his essay “Law of Nations,” the “state-centric” paradigm of international law is no longer an accurate description or adequate explanation of emergent legal development and practices. However, the paradigmatic shift that the establishment of this International Criminal Court represents has required State Parties to take certain actions that could not be simply limited to the signing of the respective treaty, as if it were one more in the long list of multilateral obligations and that could be solved with the sole approval of the respective legislative powers and the international collaboration to ensure compliance with the functions of the Court. The “state-centric” legal paradigm, broken since World War II, is further shattered with the approval of the Rome Statute since it forsakes the nation- state as the sole owner of international responsibility, compel member states to adapt their criminal systems to incorporate these new features and avoid contradictions among the domestic and international systems. The international criminal responsibility of the individual before

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the International Criminal Court represents a profound shift on the development of the International Law paradigm. Thus, many states modified their legislation to make them compatible with this new legal paradigm like Argentina, (Ley No. 26.200, January 2007); Brasil, (Projeto de lei No. 301 2007); Canada (Crimes against Humanity and War Crimes Act 2000). Other states have approved special laws to allow compliance of these new legal responsibilities, without changing any further structure of the legal framework like Uruguay (Ley N° 18.026 October 2006) and the German International Criminal Code.²

Yet, a large group of states have neither modified internal laws nor approved special norms, leaving the causal interpretation and jurisdictional reach of the Rome Statute for now limited largely to a case by case bases. Even so, enlightening and educational examples can be found of national jurisdictions taking juridical measures to interpret and incorporate the provisions of the Statute.

The present article refers to the approval of the Supreme Court of Justice of the Bolivarian Republic of Venezuela judgments that determines drug trafficking related crimes to be within the definition of crimes prosecuted by the International Criminal Court. This decision has been confirmed in several opportunities by both the Criminal Appellate Chamber and the Constitutional Chamber of that Court, creating a, as will be argued below, dangerous precedent for the development of international criminal law as well as the fight against drug trafficking.

The aim of the article is to analyze this local interpretation of the Bolivarian Republic of Venezuela Supreme Court of Justice and to stress the way in which these local decisions, trying to locally interpret an international treaty, may cause serious problems for the future of the International Criminal Court.

1. The local interpretation

In March 2000, the Supreme Court of Justice of the Bolivarian Republic of Venezuela addressed the issue of Crimes against Humanity through a decision of the Criminal Appellate Chamber that was then confirmed by the Constitutional Chamber. In these decisions, drug related crimes were qualified as Crimes against Humanity.

²Information taken from, International Coalition for the International Criminal Court. <http://www.iccnw.org/?mod=romeimplementation&idudctp=20&show=all&lang=en> Accessed July 2012.

There is not an internationally recognized qualification that interprets drug related crimes or terrorism as crimes against humanity. The Rome Statute, in Article 7, does not include such an interpretation in any of its eleven parts. Neither do the Elements of Crimes approved for the Rome Statute.

There is a generous amount of treaties and agreements that show the will of the international community to eradicate crimes related to drugs, that spans through various countries and which stages and consequences exceed the simple fact of the consumption of a banned product that damages a population. But there is no unanimous qualification of this crime or consensus in the international community to qualify certain drugs related conducts as a criminal conduct, like drug trafficking.

This position of the highest Venezuelan court was built in two clearly defined stages. First, through the decision of the Criminal Appellate Chamber that referred to elements eminently internal and the Constitutional Chamber that used the elements contained in the Rome Statute to give ground to such argument of the criminal chamber. We will briefly go through both decisions.

In the Criminal Appellate Chamber the reporting judge, Angulo Fontiveros, in decision No.359 of March 28, 2000³, related to the case against two Venezuelan citizens condemned for the possession of 49.9 grams of cocaine, presents his argument into two great pillars: the constitutional regulation and the theory of legally protected assets.

To begin with, the Court bases its first argument in the eminently constitutional nature of the extension of the definition of crimes against humanity to include drugs related offenses. The decision cites Articles 29 and 271 of the current Venezuelan constitution as the basis for its argument and proposes them as a dialectic unity.

Article 29 of the 1999 Venezuelan Constitution establishes a special description of crimes listed within the same Article to which no statute of limitation is applicable. Thus, the constitution protects the victim of the crime from the passage of time that could protect the individual responsible of those crimes.

This is a breach of the general principle of the statute of limitations. Exceptions must be restrictively interpreted, as general principle of law.

³ <http://www.tsj.gov.ve/decisiones/scp/Marzo/359-280300-C99098.htm>. Accessed in July, 2011.

The crimes expressly listed in Article 29 of the Constitution are:

1. Crimes against humanity
2. Serious violations of human rights
3. War crimes

This paper is not going to analyze any further the content of the crimes previously mentioned and that are established in Article 29 previously cited, because it is not part of what we seek. However, it is important to clarify that the court decision takes advantage of the lack of definition of certain concepts like crimes against humanity that could be qualified as an open type of crime to match it with article 271 of the Venezuelan Constitution that has no direct relation with the previously mentioned.

With the exception of war crimes, established in the Geneva Convention and that are the basis of International Humanitarian Law, the drug related are not expressly defined as crimes against humanity or considered “serious” human rights violations.

When are we facing a serious violation? There is no legal definition for this assertion and jurisprudence of the Inter-American Court of Human Rights or the European Court of Human Rights have not made a scale on which actions are serious violations and which are less serious.

Moreover, Article 271 of the Constitution of the Bolivarian Republic of Venezuela establishes three direct mandates to the Legislative Branch:

First, it regulates the general principle of asylum, established in Article 69 of the constitutional text, preventing the state’s protection to those people responsible for crimes listed as: money laundering, drugs, International organized crime, acts against public property of other States and against human rights.

Second, it decrees the non-applicability of the statute of limitations to prosecutions against human rights violations, drug trafficking or actions against public assets, establishing seizure of the goods arising from those crimes as additional penalty to such activities.

Third, it establishes the judicial procedure to be applied in cases provided in this article.

Thus, it is important to stress that the Constitution approved but did not integrate all drug related crimes into Article 69. On the contrary, it described each criminal basic definition in a specific way. Moreover, it went back to

Article 29 and expands the list of crimes that are not affected by passage of time, adding to the list of crimes against patrimony that of drug-trafficking and reiterating violations of human rights.

In our opinion, this interpretation by the Supreme Court threatens legal certainty and the principle that penalties must be lawful, established in Article 1 of the Criminal Code. The decision casts aside the criteria expressed by International Criminal Law and human rights treaties signed and ratified by Venezuela, which we will comment on later in this essay.

However, we would like to mention two comments that have been published in Venezuela regarding this matter.

First, the former president of the Supreme Court of Justice, Cecilia Sosa Gomez, has expressed:

Viewed the arguments content in the decision transcribed we can affirm that the Criminal Appellate Chamber neither has constitutional nor legal basis to support its arguments, except for stressing the seriousness of drug-trafficking crime. Constitutional Articles 29, 271 and 257 at no time mentioned or addressed drug-trafficking crime, defined in the Organic Law of Narcotics and Psychotropic Substances (OLNPS), as a crime against humanity and neither the Rome Statute establishes it as such⁴

Furthermore, professors Jose Malagueña Rojas and Francisco Ferreira, denied that such crimes could have any relation to crimes provided in the Organic Law of Narcotics and Psychotropic substances (OLNPS) due to the fact that the source within international law is totally different and cannot be linked or mixed.⁵

This first part represents the local argument that could be debated, as we previously mentioned. It only uses domestic legal instruments and does not make any interpretation of International Law, which will happen in the decision of the Constitutional Chamber.

The reporting judge of the Constitutional chamber, Jesus Eduardo Cabrera Romero, drafted a strong argument in which he defines in a doctrinal way

⁴ Sosa Gómez, Cecilia. (2004) Crímenes de Lesa Humanidad . Page 454. En, *Fundación Venezuela Positiva*. (2004) Lesa humanidad. Editorial Gráficas Armitano. Caracas. Translated by the author?

⁵ Malagueña Rojas, José L. y Ferreira de Abreu, Francisco. (2004) *Los Crímenes de Lesa Humanidad y el Delito de Tráfico de Drogas Ilícitas*. Revista CENIPEC 23. Mérida.

drug-trafficking crime as a crime against humanity and then, as an example, introduces provisions that in the Rome Statute regulate the matter of crimes against humanity.

The Constitutional Chamber directly interpreted the text of the Rome Statute when it stated that "... Article 7 lists crimes against humanity, and letter K of such law, defines conducts that in the opinion of this chamber encompasses the illicit traffic of drugs." The transcription of Article 7, letter K reads as follows:

"k) Other inhuman acts of similar character intentionally causing great suffering or serious injury to body or to mental or to physical health".

This quotation, directly extracted from the Rome Statute, is a law that in its context of application and given the human cruelty adapts to the times; it is the best way to keep the door open for the possibility of new heinous acts, perhaps involving new technologies. In short, the emphasis of the Statue is on *actions*, not *substances*.

The Elements of the Crimes included on the annexed to the Rome Statute for that Article are five:

1. That the author has caused through an inhuman act great suffering or serious injury to body or mental or physical health.
2. That such act had a similar character as to that of any other act referred to in paragraph 1, Article 7 of the Statute.
3. That the author was aware of the factual circumstances that determined the nature of the act.
4. That the conduct was performed as part of widespread or systematic attack against civilians.
5. That the author was aware that the behavior was part of a widespread or systematic attack against civilians or that he had the intention that such conduct was part of an attack of that kind.

In none of those five elements can subsume typical premises of drug trafficking or any of its related crimes. Particularly, number 4 and 5 require offenses being part of a "widespread or systematic attack" against civilians. A constitutive element of the crime of drug trafficking, by its very nature, however, is that is it selective; it does not seek a general harm to civilians. Its main engine is profit seeking by the drug dealer. It is not a direct attack to the population. We will develop this idea later.

Moreover, this interpretation of the Venezuelan Supreme Court of Justice contradicts the general rules of interpretation of International Law established in the Vienna Convention on the Law of Treaties, which is the result of the codification of the International Law Commission (ILC)⁶ of the United Nations. It contains international practices on the subject, as e.g. explained in Article 31 concerning the need of entirely interpreting the treaty, taking into account its object and purpose.

The object of the Rome Statute, per Article 1, is to establish an International Criminal Court to “exercise its jurisdiction over persons **for the most serious crimes of international concern**, as referred to in this Statute.”⁷

Thus, this court will only try crimes of the greatest international significance. Article 5 expressly lists: genocide, crimes against humanity, war crimes and the crime of aggression. Article 7 defines the scope of this crime:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

The Article expressly defines as its general denominator, what signatory States defined as “attack to civilians”, which shall be understood as a line of conduct that implies multiple commission of acts mentioned in paragraph 1 against civilians, in accordance with the policy of a State or organization of committing such acts or to promote such policy.

Since the Constitutional Chamber refers to this Treaty, we must quote those interpreting rules that this International Agreement has. These rules are provided in Article 22 and to the effects of this paper, we will cite number 2:

Crime definition shall be strictly interpreted and shall not be extended or apply by analogy. In case of ambiguity, it shall be interpreted favoring the subject object to the investigation, trial or sentence.

⁶ Watts, Sir Arthur. (1999) *The International Law Commission. 1949-1998*. Volume I. y II The Treaties. Oxford University Press. First Edition 1999.

⁷ Emphasis added.

This would suggest that the argument that the Constitutional Chamber of the highest Venezuelan court tries to establish does not follow the spirit of the Rome Statute. and, moreover, it is actually in open contradiction with the provisions of the Statute of Rome.

Following the Rome Statute, we consider that qualifying drug trafficking crime as a worldwide scourge, and one that may cause serious harm to the population, cannot be framed as among the objectives of the International Criminal Court as a crime of the greatest gravity and importance for the international community, as we will see later.

Also, it is important to stress what professors Malagueña and Ferreira mentioned in the quoted article regarding the argument that supports the decision:

Premise A: Actions to sanction crimes against humanity have non-applicability of the statute of limitation (Article 29 of the Constitution).

Premise B: judicial actions towards sanctioning drug trafficking crimes have no statute of limitation. (Article 271 of the Constitution).

Conclusion: therefore, crimes provided in Article 34 of the Organic Law of Narcotics and Psychotropic substances are crimes against humanity.⁸

This line of reasoning of the highest court have in practice led regular courts and the Criminal Chamber of the Supreme Court of Justice to dismiss any “prosecuting benefits” that may apply to those involved in any drug related crime, such as “community service”, or home confinement, especially for minors.

Ratification of the Supreme Court’s position

This position of the Venezuelan Supreme Court is not isolated. On the contrary, it has been recurrently sustained in different ways. For example, the Constitutional Chamber of the Supreme Court of Justice, answering a court remedy against the decision of the Appellate Chamber of the Criminal Judicial Circuit of the State of Vargas, in August 2003, a little less than a year after the decision that laid the foundations for the binding

⁸ Malagueña y Ferreira. Ob. Cit. Page 102.

constitutional interpretation on crimes against humanity and treatment of “benefits during the process,” confirmed its position.

The latest interpretation modified the adopted criteria. However, the Constitutional Chamber subsequently denied such a change, thus creating a great deal of confusion about its application

Corollary of what has been presented, it is hard for this Chamber to overturn the decision of the Court of Appeals of the Criminal Judicial Circuit of the State of Vargas, on December 19, 2002, in which the petition for the court remedy was ruled out of order in *limine litis* for being part of the inadmissibility grounds provided in Article 6.5 of the Organic Law of Court Remedies on Constitutional Rights and Guarantees. So is decided.

However, this Chamber by constitutional mandate urges the Fifth Court of Control of the Criminal Judicial Circuit, State of Vargas, to hold a hearing in the presence of the accused with their respective attorneys and the prosecutor, with the purpose of considering the application of preliminary injunctions replacing the measure involving deprivation of liberty, as provided in Article 244 of the Organic Criminal Procedural Code. Such mandate is not contrary to what has been said in decision No.1712/2001 of 12.09, case: Rita Alcira Coy, Yolanda Castillo Estupiñan and Miriam Ortega Estrada. Even though all measure, coercive or preliminary injunctions, ceases when two (2) years elapse without having held trial and the accused, in principle, are automatically released from the investigated crime. In the present case, illicit traffic of narcotic and psychotropic substances, as a multi offense crime that injures various legal assets, as example: health, life.⁹

To begin with, it is important to stress that both decisions that started the involvement of drug crimes by the Supreme Court of Justice, first the Criminal Court and then the Constitutional Chamber, were perfectly aligned in their argument.

However, this new decision changes the line of argument, establishing a great deal of confusion on the hierarchy of the sources of Venezuelan law, the application of International Law in Venezuela, the nature of the

⁹ Venezuelan official web site for the Supreme Court of Justice <http://tsj.gov.ve/decisiones/scon/Agosto/2398-280803-03-0051>. Accessed in March 2005.

Constitutional Chamber and the monitoring of its criteria by the rest of the courts of the Republic. But in its substance, it confirms that the highest body of the judicial branch in Venezuela considers drug related crimes as crimes against humanity.

Three years later, the Criminal Appellate Chamber of the same court confirmed its standing in a decision dated December 18, 2006. Again, drug related crimes are qualified as crimes against humanity through the argument of the two criteria previously presented in the following manner:

The investigated crimes are related to the traffic and transportation of illicit narcotic and psychotropic substances, so they are pluri offensive because they seriously threaten physical, mental and economic integrity of an unknown number of people. It similarly generates social violence in the areas where such criminal action takes place. In this regard, the Chamber considers such crimes as crimes against humanity, impunity for which should be avoided in agreement with the principles and statements provided in the United Nation Single Convention on Narcotic Drugs (1961); Convention on Psychotropic Substances (1971), and Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).¹⁰

It is interesting to point out that the decision does not expressly quote the Rome Statute, but in general mixes the will of the international community in rejecting drug trafficking related crimes marking them as crimes against humanity contained within the Statute of Rome. In any case, the argument and the core of the decision were sustained.

2.3. Why drug trafficking related crimes cannot be considered as a crime against humanity

In this paper we have tried to point out some issues that we consider relevant from the perspective of constitutional law, but at the same time we intended to refer to some of the aspects that have to do with International Criminal Law.

In this vein, we consider that highlighting those aspects that contribute to clarifying the definition of crimes against humanity would be useful for everybody.

¹⁰ Decision N° 568 Criminal Appellate Chamber, File N° A06-0370 dated 18/December/2006.

In this regard, drug related crimes are certainly a worldwide scourge that may cause serious harm to the population. But it cannot be considered a crime against humanity, nor can it be subsumed under the competence of the International Criminal Court as part of the most serious and significant crimes, as defined by the international community.

The Statute of Rome described the active subject of Article 7, number 2, as a State or an organization; it is very difficult to fit into the element of crime organizations engaged in drug related business, even though some drug cartels operates in a regional or global scale. Drug trafficking crimes, described in internal laws and international treaties, were approved with the idea of repressing criminal groups or illegal gangs to produce profit. Those are not within the express provisions established by the Rome Statute.

In short, drug trafficking is a multi-dimensional crime that involves the will of the producer, a trader and a consumer. But in no case we may include it, as suggested by the Constitutional Chamber, as a crime against humanity; in particular, since a “buyer” is also involved, who acts with some presumed degree of volition, it cannot simply be construed broadly as a *widespread or systematic attack directed against any civilian population. The reality appears to be more complex since a voluntary act of purchase, or the subsequent recreational use of a drug, while potentially harmful, can't really be regarded in the same category as an “attack.”*

Furthermore, the general definition of “other inhuman acts” is not in agreement with the spirit in which the article is based. In particular, it is difficult to locate the passive subject, as explained by Magistrate Judge Angulo Fontiveros, when he referred to the legally protected interest. In the same consequence of drug trafficking crimes, in relation to the drug dependence arising from the regular consumption of prohibited substances, there is the individual's own and personal decision. This own, free and personal decision of each human being, will be then treated by the internal legislator as a disease, but not as a crime.

Therefore, considerations concerning distribution of prohibited substances to the people as part of a systematic attack or that such action is deliberately seeking for the destruction or to cause suffering to the people are simply not aware of the commercial nature of the transactions entail in the drug exchange in the international market. And there is a difference in the actions typified by the Statute and the conducts prosecuted by the national legislator; most importantly, drug related crimes have monetary profits on as a primary motivation. On the contrary, international crimes have a primary political objective.

Thus, we consider that the Supreme Court of Justice of the Bolivarian Republic of Venezuela has erroneously applied the concept of crimes against humanity. Furthermore, this misconception may result in legal situations that may affect the foreign policy of the Government in the future.

The international fight against drugs related crimes has been permanently informed by the segmentation of the problem: 1. Traditional consumers and growers. 2. Drugs related crimes, and 3. Drugs trafficking and money laundering, as a more complex and international stage of the crime.

The reason why international treaties on this matter have built a broad framework of cooperation, allowing each state to adopt the rules that best fit into their national legislation, is because of the complexity and dispersion of the various activities that make up these crimes. In particular, international relations in this regard has been characterized by the conscious avoidance of creating a supranational body endowed with monopoly powers of investigating punishing such crimes. On the other side, it is important to remember that states, unilaterally, may establish accomplishment levels of the cooperation agendas against international crime.

This diversity and complexity has special aspects in the Americas because the Andean countries are considered among the main producers of drugs in the world. This production of narcotic drugs is closely related to aspects of internal order, ranging from ancestral practices of indigenous peoples concerning the uses of these prohibited or limited substances, but also involves the free use in some countries as is the case of the coca leaf in Bolivia or Peru.

In sharp contrast, the various situations that have been arising in Colombia with the different stages of drug trafficking, ranging from terrorism related with drugs in the eighties and nineties with infamous characters such as Pablo Escobar Gaviria or, more recently, the participation of former revolutionary groups like the Fuerzas Armadas Revolucionarias de Colombia (FARC) in growing and distributing the prohibited substances to use the resources arising from its trade in financing the armed conflict. Similarly, in Mexico groups that control drug distribution are developing a

wide display of operations that made US Secretary of State, Hilary Clinton, compare the country with the Colombia of the eighties.¹¹

All these circumstances that we have briefly addressed are part of the sovereignty of each country and the way that each society faces its problems. However, the qualification as a crime against humanity of these national crimes could provide a basis for an international action in the solution of internal problems. So, defining the international drug trade as an internal “crime against humanity” could lead to much misunderstanding and tension; such a construction could easily lead to more contentious international relations. Hence, there is a very real danger in this regard of creating more problems than solutions.

Some conclusions

Local interpretation of international criminal law is becoming a new phenomenon in the judicial field around the globe. The case log of courts everywhere feature environmental issues, economic negotiations and contested human rights. In some cases, local interpretation is positive if the objectives achieved are related to the punishment of criminals or avoiding impunity. In other cases, that interpretation could be new and help to open a new path for the law, as it happened with the Colombian¹² interpretation of political genocide. This has created confrontations among specialists, because it opens the criminal definition of the Convention for Prevention and Punishment of the Crime of Genocide of 1948.

In the case of crimes against humanity, defined first in the Nuremberg Charter, it represents a significant advance of public international law; it defines intolerable actions and attacks, aimed at civilian populations, in order to create a judicial category and ensuing national or international jurisdiction. By doing so, this historic innovation helps to prevent more serious behaviors that affect the international communities, guaranteeing punishment and preventing its repetition.

The International Criminal Court has been established to try those crimes whose customary consensus among the international community does not leave doubts about the need for their eradication and prosecution. These crimes are: genocide, war crimes, crime of aggression and a broader category such as crimes against humanity.

¹¹ <http://www.queenslatino.com/mexico-esta-como-colombia-hillary-clinton/> Accessed in July 2012.

¹² Decision of the Colombian Constitutional Court No. C-177 of 2001

These crimes against humanity, namely infringing on the core values of civilization and that may endanger international peace, according to the first paragraph of Article 7 of the Statute of Rome: Murder, extermination, enslavement, deportation or forced transfers, Incarceration in Violation of the fundamental Rules of International Law, Torture, Rape, Political Persecution, Racial, National, Ethnic, Cultural, Religious, Disappearance Crime, the Crime of Apartheid and other similar acts.

The international community has not reached a consensus to include drug-related crimes in the list of crimes against humanity.

It has been argued here that the decision of the Supreme Court of the Bolivarian Republic of Venezuela, considering drug-related crime as a crime against humanity does not fit the conceptual definition of that crime or even further the useful evolution of customary international law and existing treaties in the field. Finally, it could open a gateway to the intervention of international courts, on issues like drugs that have not been solved within national societies, let alone within the international community as a whole.

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