The Principle of Legality of Crimes in Colombia and Germany: Difference in Similarity?

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Abstract 1

This essay analyses how Colombian and German law has treated the principle of legality of crimes. From a comparative perspective, it is shown that the scope of this principle is closely related to the system of legal sources of each jurisdiction while also addressing some of the discussions that have occurred concerning the constitutional development of the principle that has led to a qualification of its manifestations. The essay concludes that studies on criminal law in Colombia and, indeed, in Latin America in general, must take into account the relationship of the region's various legal systems with those of continental Europe, but they must not lose sight of the important particularities of the Latin American law.

I. Introduction

The traditional notion of the principle of legality of crimes (*nullum crimen sine lege*) has significant consequences for judicial decision-making in criminal matters. The scope of this principle is closely related to the understanding of the legal sources in a given legal system.[1] In civil-law tradition, the principle of legality is connected with the idea of codification and it tends to minimise the importance of judges in the development of criminal law.[2] 2

In this context, the principle of legality has four main corollaries.[3] First, the prohibition of retroactivity, according to which no one should be pun- 3

1 Gustavo Cote, *Rückwirkung und die Entwicklung der internationalen Verbrechen: Elemente einer allgemeinen Konzeption der nullum-crimen-sine-lege-Prinzips im Völkerstrafrecht* (Duncker & Humblot 2018) 129.

2 Kenneth Gallant, *the Principle of Legality in International and Comparative Criminal Law* (CUP 2009) 237–238.

3 Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (OUP 2021, 2nd ed.) 146.

ished unless the relevant conduct has been previously defined as criminal (*lex praevia)*. Second, this definition must be established through a written law in a formal sense, i.e., through a decision of the legislative organ (*lex scripta)* and, third, its formulation must be as precise as possible (*lex certa)*. The fourth and final corollary is that it is prohibited for judges to extend its scope through analogy (*lex stricta)*. The foregoing means that so-called common law[4] offences are excluded and judicial law-making[5] in criminal matters should play a very restricted role.

4 The principle of legality can nonetheless lead to some practical, or even political, difficulties because legislation, in both its abstraction and generality, tends to be static and not always capable of reflecting social complexities. Subsequently, three problems arise: First, the definitions that the legislature uses cannot always be clear enough;[6] laws alone sometimes prove to be insufficient to give prior and fair notice about prohibited conduct. The second problem is that the definitions employed, even when they are clear, cannot always completely coincide with the full scope of a given legislature's aims, either because a given definition falls short or because it goes beyond its purpose. The final problem manifests itself in that the observance of the principle of legality may collide with some demands for (substantive) justice by not imposing a punitive response that is considered adequate. The question, when it comes to understanding the principle of legality in a civil law system such as that used in Colombia, is how that system deals with these kinds of problems and how close or distant is the system to the traditional conception of the principle of legality.

5 The main purpose of this essay is to present some elements to answer these questions. To begin with, however, one needs to be aware that this is not a profound study on the principle of legality, the Colombian judicial practice or the historical development of Colombian Criminal Law; the scope and aims of this essay preclude such an endeavour. The modest aim is to present general explanations from the viewpoint outlined above, so that readers, especially English-speaking readers who are not familiar with Colombian and Latin American criminal law, may gain some insight into some recent developments in this area.

4 Paul Dobson, Nigel Gravells, Phillip Kenny and Richard Kidner, *Bloy and Parry's Principles of Criminal Law* (4ed edn, Cavendish Publishing, 2000) 3.

5 ibid 15.

6 H.L.A. Hart, *The Concept of Law* (3rd edn, OUP 2012) 135.

This essay also presents some explanations about the principle of legality 6
in German criminal law. The aim insofar is to offer a comparison between Colombia's system and one of the major legal systems recognised as having contributed to shaping the civil law tradition,[7] especially regarding criminal law and the principle of legality.[8] It is also worth noting that the German approach to criminal law has been particularly influential in Colombia, at least since the 1980s. This is evident from the so-called 'General Part' of the Colombian criminal codes of 1980 and 2000 which reflect German theories in many ways, while the Colombian legal doctrine follows the approaches proposed by some of the most popular German scholars.[9] The historic (although relatively recent) connection between Colombian and German criminal law justifies the comparison which, while being largely descriptively presented in this chapter, allows the illustration of how the principle of legality in these two legal systems that belong to the same tradition faces similar problems and reacts similarly. However, this comparison also shows how the development of the principle of legality in both contexts departs from its classical characterisation in that tradition.

This essay has three parts and follows the conception of the functional 7
method of comparative law.[10] The first part explains general aspects of the principle of legality of crimes in Colombia and ends by showing three issues in particular that highlight Colombian nuances applied to the traditional notion of the principle. The second part gives a general overview of the principle of legality in German criminal law, showing three similar issues. The third part provides a summary of the analysis and some final remarks. As such, the essay is not intended to be an abstract explanation of the principle of legality in a normative sense, i.e. as it should be adopted

7 John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin América* (3rd edn, Stanford University Press 2007) 31–33, 61–67.

8 Markus Dubber, 'Comparative Criminal Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP 2008) 1296–1299; Gallant (n 2) 47, 82.

9 Fernando Velásquez, *Fundamentos de Derecho Penal Parte General* (Universidad Sergio Arboleda 2017) 269–270.

10 Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (3rd edn, J.C.B. Mohr 1996) 33–35; Kai Ambos, 'The Current State and Future of Comparative Criminal Law – A German Perspective' (2020) *UCLA Journal of International Law and Foreign Affairs* 24, 9–47; Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 346.

in positive law, and begins by identifying a supposedly common problem as *tertium comparationis*.[11] From here, it then establishes how the compared legal systems deal with this problem, a process that allows the identification of similarities and differences. Ultimately, the goal is to contribute to the understanding of the addressed legal issue.[12] Having said that, one must bear in mind that the emphasis of the text is on the legality of crimes, not on penalties, criminal procedures, or judges which means, in essence, the chapter addresses the legality regarding the determination of criminal conduct.

I. The principle of legality in Colombian Criminal Law

8 The principle of legality is deeply rooted in Colombian criminal law. Since the passing of New Granada's Criminal Code in 1837 through to Law 599/2000 (current Colombian Criminal Code, henceforth CCC), Colombia has adopted this principle in all its relevant codifications throughout its republican history. Although the principle's legal definition has changed over time, the core concept has endured. For example, the definitions adopted in 1837, 1936 and 1980 referred explicitly to the corollaries of *lex praevia* and *lex scripta*. These precepts established that nobody could be punished for engaging in certain conduct if that conduct was not previously characterised as a criminal offence by a law (*ley*).[13] In other (Colombian) Codes, the principle of legality's definition has also provided the application of the most favourable legislation in case of conflicting provisions[14] and the prohibition of analogy, as is the case with the current Criminal Code.

9 The actual definition of the principle of legality of crimes (Article 6 CCC) defines it in three paragraphs. The first paragraph refers to the prohibition of *ex post facto* law, not just regarding crimes and penalties, but also in connection with the pre-existence of judges, courts and criminal procedures.[15] Further, it clarifies that the *lex praevia* principle similarly

11 Nils Jansen, 'Comparative Law and Comparative Knowledge' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (2nd edn, OUP 2019) 299.

12 Mathias Siems, *Comparative Law* (2nd edn, CUP 2018) 23–26.

13 Article 4 New Granada's Criminal Code of 1837.

14 See Article 12 CCC of 1890.

15 Article 6 CCC: *"Nadie podrá ser juzgado sino conforme a las leyes preexistentes al acto que se le imputa, ante el juez o tribunal competente y con la observancia de la*

applies to other rules that must be taken into account to apply the so-called '*tipos penales en blanco*': criminal offences with normative elements defined in other areas of the legal system.[16] The second paragraph of Article 6 CCC establishes the application of the most favourable legislation, as an exception to the prohibition of retroactivity, even for convicted people.[17] Finally, the third paragraph allows the application of criminal rules by analogy, but only when this technique favours the accused.[18] All in all, the regulation of the principle of legality in Colombian criminal law has become more detailed over the years.

In the Colombian legal system, the principle of legality is determined by 10
the legal sources recognised for criminal matters. Given that the Colombian Constitution confers to judicial decisions a secondary character as sources of law,[19] despite their practical importance—, only the legislature can decide which types of conduct are criminal and what are the consequences of engaging in these types of behaviour (*reserva legal*).[20] This means that since Colombia's birth as an independent State, notions such as those of common law offences or offences *mala in se*, as known in the common law tradition,[21] have been rejected. In this matter, civil law tradition has exerted a strong influence in Colombia, as seen by the fact that both the Spanish Criminal Code of 1822 and the French Criminal Code of 1810 served as sources of inspiration for the CCC of 1837. In this sense, it is

plenitud de las formas propias de cada juicio (…)" ["No one may be punished except in accordance with the laws that pre-exist the act that is imputed to him, before the competent judge or court and with the observance of all procedural rules (...)"] (Own translation).

16 Pursuant to the second part of Article 6 CCC, first paragraph: *"La preexistencia de la norma también se aplica para el reenvío en materia de tipos penales en blanco"*.

17 *"La ley permisiva o favorable, aun cuando sea posterior se aplicará, sin excepción, de preferencia a la restrictiva o desfavorable. Ello también rige para los condenados"* ["The permissive or favorable law (…) will be applied, without exception, in preference to the restrictive or unfavorable law (…)"] (Own translation).

18 *"La analogía sólo se aplicará en materias permisivas"* ["The analogy will only be applied in permissive matters"] (Own translation).

19 Article 230 Colombian Political Constitution: "*Los jueces, en sus providencias, sólo están sometidos al imperio de la ley (…) La equidad, la jurisprudencia, los principios generales del derecho y la doctrina son criterios auxiliares de la actividad judicial"* ["Judges, in their rulings, are only subject to the empire of the law (...) Equity, case law, general principles of law and the opinion of legal scholars are auxiliary criteria of judicial activity"] (Own translation).

20 Colombian Constitutional Court, Decision C-559/1999, para. 14.

21 Dobson, Gravells, Kenny and Richard Kidner (n 4).

worthwhile mentioning the two former codes had similar provisions on the principle of legality.[22] According with the civil law tradition, the instrument for coherently and systematically designing criminal legislation is a codification, which should not be understood as a simple volume or compendium of laws but as a comprehensive work that is intended to organise, with a recognisable internal logic, all the substantial and/or procedural rules needed to adjudicate in criminal cases.

11 The 'ideology'[23] of codification that was supported at the beginning of Colombia's republican history even with Jeremy Bentham's utilitarian ideas[24], notwithstanding the influence of various continental legal systems, especially the above-cited Spanish and French, assumed that the margin for the judicial construction of written law should be as narrow as possible. This approach has impacted the consequences that the principle of legality has for both judges and the legislature in Colombia. For that reason, as prescribed in Article 10 CCC, the Colombian legislature must describe criminal conduct with precision, pointing out explicitly all elements of the crimes (*principio de tipicidad*).[25] This is a consequence of the *lex certa* principle.

12 This understanding of the principle of legality does not lead to a strictly formalistic approach[26] in statutory construction. The Colombian Civil Code's general rules on interpretation, which are also relevant for criminal law,[27] work as an illustrative starting point. For example, although Article 27 of this code does not allow ignoring the literal meaning of a statutory provision when it is clear (not even to follow the alleged 'spirit' of the

22 Article 3 of the Spanish Criminal Code of 1822: *"A ningún delito ni culpa se impondrá nunca otra pena que la que le señale alguna ley promulgada antes de su perpetración"* (Article 4 of the New Granada's Criminal Code of 1837 is almost a verbatim transcription of this provision); Article 4 of the French Criminal code of 1810: *"Nulle contravention, nul délit, nul crime, ne peuvent être punis de peines qui n'étaient pas prononcéés par la loi avant qu'ils fussent commis"*.

23 Merryman and Pérez-Perdomo (n 7) 27–33.

24 Aura Peñas, *Génesis del Sistema Penal Colombiano: Utilitarismo y Tradicionalismo en el Código Penal Neogranadino de 1837* (Ediciones Doctrina y Ley 2006) 70–78.

25 Article 10 CCC: *"La ley penal definirá de manera inequívoca, expresa y clara las características básicas estructurales del tipo penal"* ["Criminal laws will define in an unequivocal, express and clear manner the basic structural characteristics of criminal offences"] (Own translation).

26 Scott Shapiro, *Legality* (Belknap Press 2011) 239.

27 Alfonso Reyes, *Derecho Penal Parte General* (Temis 1987) 53–57.

law),[28] Article 32 of the very same codification recognizes that sometimes the legislature's wording is vague and, therefore, it may be necessary to consider aspects such as the "general spirit of the legislation" and "natural equity".[29] Furthermore, the Colombian Constitutional Court (created in 1991) analysed Article 27's constitutionality and established that it does not imply that judges are allowed to set aside constitutional principles to attend to the literal meaning of a legal rule.[30] Besides, the principle of strict construction is not valid in Colombia, in the sense that judges must always choose the most lenient interpretation of a criminal norm when multiple approaches are possible; it only prohibits the extension by analogy of criminal norms. Indeed, Article 31 of the Civil Code stipulates that the scope of a legal norm does not depend on the positive or negative effects of each plausible interpretation but on its 'true meaning' according to the interpretative methods mentioned in the same code.[31]

The relationship between the principle of legality and the sources of criminal law responds also to political factors. The ideas of democracy and division of power, linked with the need for legal certainty (*seguridad jurídica*), are the main rationales behind the specific view and use of the principle of legality in Colombian criminal law.[32] Because the principle is understood as a bulwark establishing respect for an individual's right to liberty, it is thus closely related to the legitimacy of the State's right to punish or *ius puniendi*.[33] Accordingly, the principle of legality has been embraced in Colombia not just as rule of the different criminal codes but also as a constitutional principle. In the various political constitutions that

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28 Article 27 Colombian Civil Code: *"Cuando el sentido de la ley sea claro, no se desatenderá su tenor literal a pretexto de consultar su espíritu".*

29 Article 32 Colombian Civil Code: *"En los casos a que no pudieren aplicarse las reglas de interpretación anteriores, se interpretarán los pasajes oscuros o contradictorios del modo que más conforme parezca al espíritu general de la legislación y a la equidad natural".*

30 Colombian Constitutional Court, Decision C-054/2016, para. 13.

31 Article 31 Colombian Civil Code: *"Lo favorable u odioso de una disposición no se tomará en cuenta para ampliar o restringir su interpretación. La extensión que deba darse a toda ley se determinará por su genuino sentido, y según las reglas de interpretación precedentes".*

32 C-599/1999 (n 20), para. 13; on the distinction between the creation and application of law see José Vicente Concha, *Tratado de Derecho Penal y Comentarios al Código Penal Colombiano* (4th edn, Paul Ollendorff 1890) 34–35.

33 C-599/1999 (n 20), para. 13; Bernardo Gaitán, *Curso de Derecho Penal General* (Lerner 1963) 13; Luis Carlos Pérez, *Tratado de Derecho Penal, Tomo I* (Temis 1967) 317–319; Velásquez (n 9) 76–77.

Colombia has had during its history as an independent State (nine in total), the need for the principle of the legality of crimes has been foreseen, even though different definitions were enshrined in the Constitution of 1821 and the versions that followed when compared to the definition used in the current Constitution enacted in 1991. All of these constitutions, with just one exception,[34] refer to the prohibition of retroactivity and to the law (*ley*) as the only legal source to establish criminal offences and criminal sanctions.[35] In fact, in the last two constitutions (1886 and 1991), the definition of the principle of legality also mentions the obligation to apply the most favourable law when a legislative reform occurs. In general terms, Colombia's legislative treatment of the principle of legality coincides with its constitutional development.

14 At present, the Colombian Constitutional Court uses the principle of legality, especially in the sense of *lex praevia* and *lex certa,* as one of the criteria for the abstract control of constitutionality concerning legislative norms. The Court has said that the Colombian legislature is granted a very wide margin of discretion in criminal matters,[36] but it must always respect the expressly provided constitutional prohibitions[37] relevant to criminal law as well as a set of constitutional principles, among them the principle of legality, the scope of which must be determined on a case-by-case basis.[38] In this sense, in recent years the constitutional development of the principle of legality has led to the recognition that the traditional (more or less strict) approach has limits, especially regarding three key aspects.

15 First, the Constitutional Court holds that the *lex certa* principle does not mean that the legislature must describe criminal offences with absolute precision because both the ordinary and technical language always have some level of indeterminacy.[39] Consequently, there is a recognition and acceptance of criminal offences' open texture,[40] within certain bounds.[41]

34 Article 169 constitution of 1853.
35 See Article 167 Constitution of 1821; Article 145 Constitution of 1830; Article 191 Constitution of 1832; Article 5 Constitution of 1853; Article 56 Constitution of 1858; Article 15 Constitution of 1863; Article 26 constitution of 1886; Article 29 constitution of 1991.
36 Colombian Constitutional Court, Decision C-239/2014, para. 3.2.2. and 3.2.8.
37 Colombian Constitutional Court, Decision C-091/2017, subheading 15.
38 C-239/2014 (n 36) para. 3.2.3 – 3.2.8.
39 Colombian Constitutional Court, Decision C-442/2011, subheading 6.
40 Hart (n 6).
41 Colombian Constitutional Court, Decision C-442/2011, subheading 6.

This is something of a double-edged sword concerning the unavoidable vagueness or ambiguity of some legal terms[42] as sometimes this is desirable because it allows the legal system to maintain some degree of adaptability. For the Court, the important point is that the relevant offence cannot be more precisely defined due to its very nature and, irrespective of this, that the norm allows a general recognition of the prohibited conduct and an opportunity for other sources to be brought into play to help overcome the indeterminacy (*"otros referentes normativos"*).[43] That is why the so-called 'open offences' (*tipos penales abiertos*) are not *per se* contrary to the Constitution.[44] These criteria were established, for example, in the Constitutional Court Sentence C-091/2017.

In this decision, the Constitutional Court analysed the constitutionality 16
of the offence of harassment (*hostigamiento*). According to the original wording of Article 134B CCC, "anyone who promotes or instigates acts or behaviour that [constitutes harassment], aimed at causing physical or moral harm to a person, group of people or community, due to their race, ethnicity, religion, nationality, political or philosophical ideology, sex or sexual orientation or disability and other reasons of discrimination will incur a prison sentence ranging from 12 to 36 months"[45]. The plaintiff in the case that gave rise to this decision questioned this rule because it allegedly did not describe any specific conduct and violated the principle of legality.

For the Court, while holding that the expression "constitute harassment" 17
was redundant and therefore should be eliminated from the definition (as the Court did), the verbs "promotes" and "instigates" were not indeterminate enough to invalidate the whole norm.[46] The interpretation of all the elements of the definition (aims of the behaviour, victims' groups and even the motives) allows adjudicating bodies and citizens to recognise prohibited conduct.[47] In this particular case, the Court took into account that these kinds of verbs are common and well-defined in the General Part of crim-

42 Colombian Constitutional Court, Decision C-297/2016, para 23.
43 C-091/2017 (n 37), para. 81; C-297/2016 (n 42), para. 24.
44 C-297/2016 (n 42), para. 22.
45 Article 134B CCC: *"El que arbitrariamente impida, obstruya o restrinja el pleno ejercicio de los derechos de las personas por razón de su raza, nacionalidad, sexo u orientación sexual, discapacidad y demás razones de discriminación, incurrirá en prisión de doce (12) a treinta y seis (36) meses (…)".*
46 C-091/2017 (n 37), para. 91–98.
47 ibid.

inal law and that the international law of human rights gives orientation about the acceptable limits of the freedom of expression.[48]

18 Second, the Constitutional Court has accepted that it is possible to depart from the literal meaning of a legal definition of a particular criminal offence, based on a teleological interpretation. This kind of interpretation has been used *only* to limit the scope of offences when their wording (even clear) goes beyond the aims sought by the legislature (similar to the so-called *mischief rule* of English criminal law[49]). To support this approach, the Constitutional Court has taken into account different elements, such as documents produced through the legislative process, its view on constitutional principles and even international norms and instruments.[50] While contrary to the wording of Article 27 of the Colombian Civil Code (mentioned above),[51] it shows how the conception of legality and its implications for the sources of criminal law has changed through the years.

19 The Constitutional Court Decision C-297/2016, which concerns a reduction of an offence's scope, offers a good example of this kind of teleological interpretation. The Court analysed the constitutionality of Article 104A CCC on femicide. From a literal point of view, the definition of femicide has two (alternative) parts. According to the first part, whoever causes the death of a woman, "for being a woman or because of her gender identity"[52] shall be sentenced to a period of imprisonment of between 250 to 500 months. According to the second part, whoever causes the death of a woman in any of the six circumstances listed in the aforementioned Article shall be subjected to the same penalty. These circumstances include, for example, previous or concurrent restrictions of the victim's liberty or taking advantage of positions of power or authority over the victim.[53] For the Colombian Constitutional Court, the essence of femicide is that the conduct is motivated by discriminatory feelings towards women, which is

48 ibid 104.

49 Bryan Garner (eds), *Black's Law Dictionary* (11th edn, Thomson Reuters 2019) 1195.

50 C-297/2016 (n 42), para. 42, 54.

51 Article 27 Colombian Civil Code (n 28).

52 Article 104A CCC says: *"por su condición de ser mujer o por motivos de su identidad de género"*.

53 Article 104A (f) CCC says: *"Que la víctima haya sido incomunicada o privada de su libertad de locomoción, cualquiera que sea el tiempo previo a la muerte de aquella"*; Article 104A (c): *"Cometer el delito en aprovechamiento de las relaciones de poder ejercidas sobre la mujer, expresado en la jerarquización personal, económica, sexual, militar, política o sociocultural"*.

captured in the first part of the definition, but not in the second.[54] For that reason, when a woman is murdered and some or all of the listed circumstances in the second part of Article 104A CCC are involved, femicide has not necessarily been committed.[55] According to the Court, these circumstances should not be interpreted as autonomous modalities of the criminal conduct of femicide (this would be the literal interpretation) but as contextual elements that *may* be used to infer, on a case-by-case basis, if a woman was murdered because she was a woman or because of her gender identity (teleological interpretation).[56]

Also based on a teleological interpretation, the Colombian Supreme 20
Court of Justice has reduced the scope of some criminal offences too. This was done, for example, with crimes related to the possession of narcotics (Article 376 CCC) regarding the verb "carry" (*"llevar consigo"*)[57] as well as with crimes involving pornography with "children" under the age of 18 and as a form of sexual exploitation over the age of 14.[58] Concerning these two offences, the Supreme Court requires that the perpetrator has an economic intention (as a special intent) so that the objective performance of the conduct is not sufficient by itself to deem that a crime was committed. This intention is not one of the elements that the legislature uses to define these types of criminal offences, nevertheless, the Supreme Court includes it to avoid the punishment of conduct that do not correspond to the situations that the legislature wanted to prevent.

Phenomena such as the recognition of the open texture of criminal of- 21
fences, or even of the possibility to construct criminal offences by departing from the literal tenor of their legal definition, undermine legal certainty. However, and as previously mentioned, this also brings some positives in terms of the adaptability of the legal order and the provision of substantive justice. This has been compensated for with a sort of *stare decisis* rule, according to which higher courts' decisions (e.g. from the Constitutional Court or the Supreme Court) are binding for lower courts and judges in

54 C-297/2016 (n 42), para. 58–59.
55 ibid 54.
56 ibid 59.
57 Colombian Supreme Court of Justice, Chamber of Criminal Cassation, Decision 57266, 11 August 2021.
58 Colombian Supreme Court of Justice, Chamber of Criminal Cassation, Decision 56656, 19 May 2021.

general as these must follow the criteria that the higher courts establish or give sufficient reason to explain why they did not.[59]

22 Last but not least, the Constitutional Court has accepted that *in transitional justice contexts*, the principle of legality is not an obstacle to the national prosecution of international crimes using international norms and sources. In other words, the Court accepts that criminal liability can be established by international treaties and customary international law.[60] Following this, the Constitutional Court declared that the norms issued for the implementation of the Peace Agreement with the FARC guerrilla group that created the so-called 'Special Jurisdiction for Peace' did not violate the Constitution of Colombia by allowing the judges of this jurisdiction to directly apply international norms.[61] In this context (and just in this context) the idea of *nullum crimen sine jure* was adopted instead of the notion of *nullum crimen sine lege*.[62] This adaptation of the principle of legality deviates from the *reserva de ley* principle and weakens the principle of *lex certa*, integrating the national and the international legal orders so that the 'transitional' judges can more accurately characterise the crimes committed during the armed conflict.

23 Thanks to this development, the 'Special Jurisdiction for Peace' has brought charges related to some international crimes (against former members of the Colombian army), such as murder and enforced disappearances, treating them as crimes against humanity based on the Rome Statute of the International Criminal Court.[63] Even though the current CCC provides for these individual crimes (Articles 103 and 165 CCC), it does not include a definition of crimes against humanity. As a consequence, applying the principle of legality in the traditional sense, Colombian judges presiding in such cases could only characterise these types of conduct as murder or enforced disappearance, but not as crimes against humanity, a limitation of the 'Special Jurisdiction for Peace' did not have to contend with. Something similar happens with the legal characterisation of kidnappings that the FARC perpetrated. The current CCC deals with the taking of hostages as an offence against persons and goods protected under international humanit-

59 Colombian Constitutional Court, Decision C-335/2008, subheading 8.1.
60 Colombian Constitutional Court, Decision C-080/2018, subheading 4.1.10.
61 ibid.
62 ibid.
63 Special Jurisdiction for Peace, Chamber for Recognition of Truth, Responsibility, and Determination of Facts and Conducts, Decision 125/2021, subheading D.4.

arian law (Article 148 CCC), but that norm is only enforceable concerning these types of crimes committed from 24 July 2001 onwards (prohibition of retroactivity). In these cases, the 'Special Jurisdiction for Peace' has turned to the Rome Statute and the notion of customary international law to characterise the relevant conduct committed before that date as war crimes.[64] Due to the notion of *nullum crimen sine iure*, in this particular (transitional) context, the legal sources have been expanded and, as a result, the identification of the content of the applicable criminal law is more complex.

2. The principle of legality in German criminal law

In German criminal law, the principle of legality also has a strong and long tradition dating back to the 18th century. The so-called 'enlightened codifications' had some antecedents; for example, § 1 of the Austrian General Code of Crimes and its Punishment of 1787 (*Allgemeines Gesetzbuch über Verbrechen und derselben Bestrafung*, also known as *'Josephina'*) provided for that only acts declared criminal by this Code could be treated as such.[65] Even though this norm did not explicitly establish the prohibition of retroactivity, it made clear that only the Code, not judges, could decide with general validity which types of conduct could be classed as criminal. 24

The prohibition of *ex post facto* law appeared in the Introduction, § 14, of the General State Laws for the Prussian States (*Allgemeines Landrecht für die Preußischen Staaten* or ALR) of 1794. According to that norm, new laws could not be applied to situations that had already occurred.[66] Moreover, the code adopted a radical separation between the creation and application of laws as part of the principle of legality's classic conception in the civil law tradition operable at the time. Indeed, § 6 (Introduction) ALG prohibited courts from considering scholarly commentaries or past judicial decisions to apply the code.[67] To paraphrase Montesquieu, this code responded to the 25

64 Special Jurisdiction for Peace, Chamber for Recognition of Truth, Responsibility, and Determination of Facts and Conducts, Decision 125/2021, subheading D.1.

65 Hans-Ludwig Schreiber, *Gesetz und Rinchter: Zur geschichtlichen Entwicklung des Satzes nullum crimen, nullum poena sine lege* (Alfred Metzner Verlag 1976) 76.

66 §. 14: „*Neue Gesetze können auf schon vorhin vorgefallene Handlungen und Begebenheiten nicht angewendet werden*".

67 § 6: „*Auf Meinungen der Rechtslehrer, oder ältere Aussprüche der Richter, soll, bey künftigen Entscheidungen, keine Rücksicht genommen werden*".

idea that "judges should be no more than the mouth that pronounces the words of the law".[68]

26 However, it was only during the second part of the 19th century that the principle of legality started to be codified in Germanic territories in a general way. Several provisions on the principle of legality appeared in territorial criminal codes as well as in territorial constitutions.[69] In this context, the Bavarian Criminal Code of 1813 played a special role as its Article 1 abolished all criminal laws and customs existing in Bavaria until 1 October of that year and, according to Article 2, that code had to be applied to all forms of criminal conduct that were committed before this date when the penalties provided for in the newer code were more beneficial for the accused.[70] The Bavarian Criminal Code of 1813 was drafted by Anselm von Feuerbach, who is known especially for his contribution to the justification of the principle of legality.[71] Feuerbach supported the need to prosecute crimes according to pre-existing laws using criminal policy arguments. He defended the idea that the threat of legal penalties could prevent citizens from committing crimes (theory of psychological coercion).[72] It is a perspective that ties the principle of legality with general prevention aims (deterrence) as the aim of punishment.

27 Currently, § 1 of the German Criminal Code (*Strafgesetzbuch* or StGB) defines the principle of legality where it states that "an act can only incur a penalty if criminal liability was established by law before the act was committed".[73] This provision comes from § 2 of the Prussian Criminal Code of 1851, which was subsequently adopted on 31 May 1870 as the code of the North German Confederation.[74] On 15 May 1871, it became the Criminal

68 Charles de Secondat (Montesquieu), *The Spirit of Law* (Batoche Books 2001), 180.
69 Schreiber (n 65) 118–121.
70 See Bavarian Criminal Code of 1813 <https://opacplus.bsb-muenchen.de/Vta2/bsb11086639/bsb:BV010890296;jsessionid=DE8A176A2117114CD729952EDA9E0853.touch04?lang=en> last accessed 15 March 2022.
71 Thomas Vormbaum, *Einführung in die Strafrechtsgeschichte* (2nd edn, Springer 2011) 43.
72 Paul Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (5th edn, Georg Friedrich Heyes 1812) 14–16, 22.
73 English translation in <https://www.gesetze-im-internet.de/englisch_stgb/> last accessed 15 March 2022.
74 Vormbaum (n 71) 81, 85.

Code of the German Reich following Germany's unification into a single State after the Franco-German War (1870–1871).[75]

28 The provision on the principle of legality adopted in § 1 StGB has some elements from which it is possible to identify three of the four corollaries of the principle of legality. The prohibition of *ex post facto* law arises from the expression "before the act was committed"; the principle of legal certainty comes from the verb *bestimmen* (*bestimmt*),[76] which is translated to the English version of the StGB as 'established'; and the *lex scripta* principle from the adverb *gesetzlich*,[77] that is to say 'legally', although the version of the StGB quoted here uses the expression "by law". The principle of legality of crimes is defined in § 1 StGB in a general way; this norm doesn't have a specific regulation on the application of the most favourable law or the prohibition of analogy. However, § 2 StGB regulates the temporal validity of the Code and makes provision for the so-called 'favourability principle'. Furthermore, it is generally accepted that the prohibition of analogy also exists in German criminal law[78] and the German legal doctrine recognises that corollaries, such as the principles of *lex certa* and *lex stricta,* also apply to legal rules that must be taken into account to interpret criminal offences with normative elements (*Blankettstrafgesetze*).[79]

29 The principle of legality in German criminal law also has constitutional rank. It was adopted in Article 116 of the Weimar Constitution and has been provided for since 1949 in Article 103 (2) of the current Constitution (*Grundgesetz)* of the Federal Republic of Germany. This norm's definition is the same as in § 1 StGB. In this context, the principle of legality and all criminal laws fulfil a guarantee function.[80] As such, they protect the confidence of the citizenry in the State's power to punish (*Vertrauensschutz*), which is an essential part of the rule of law,[81] while still preserving the divi-

75 ibid 86.
76 Claus Roxin, *Strafrecht Allgemeiner Teil, Band I: Grundlagen – Der Aufbau der Verbrechenslehre* (4th edn, C.H. Beck 2006) § 5 B para 11.
77 ibid §5 B para 9.
78 Hans Welzel, *Das Deutsche Strafrecht in seinen Grundzügen* (De Gruyter 1949) 16; Uwe Murmann, *Grundkurs Strafrecht Allgemeiner Teil, Tötungsdelikte, Körperverletzungsdelikte* (4th edn, C.H. Beck 2017) §10 para 5, § 20 para 7a.
79 Roxin (n 76) § 5 para. 40
80 Günther Jakobs, *Strafrecht Allgemeiner Teil* (De Gruyter 1983) 4 Abschn 9.
81 Roxin (n 76) § 5 D para. 19.

sion of powers.[82] Together with deterrence, the very notion of democracy is at the heart of the principle of legality.[83]

30 The principle of legality, as developed in Germany, has also been moulded by the legal sources that subordinate the judiciary to the legislative. That is why it is common to find the concept of *Gesetzesbindung* (legally bound) linked with the foundations of the principle of legality and, at times, even used in an almost synonym-like manner.[84] This is in line with Article 97.1 of the German Constitution, according to which, judges shall be independent and subject only to *Gesetze* (the law),[85] though it must be noted that this rule does not explicitly say that judicial decisions are an auxiliary legal source as Article 230 of the Colombian Constitution does.[86]

31 In Germany, the principle of legality has also been discussed from a constitutional point of view. This has led to clarifying some consequences of the said principle in judicial interpretation, especially regarding the maxim of *lex certa*. Moreover, it has shown how the prosecution of human rights violations challenges the classic conception of the principle of legality, which also affects its other corollaries. It has been recognised that the precision of the criminal offences' definitions has limits that cannot be overlooked from the perspective of the principle of legality. The wording used in the StGB concerning offences has actually a high degree of indeterminacy and it is common to find vague or ambiguous concepts in many places.[87] For example, the so-called *wertausfüllungsbedürftige Begriffe* (legal concepts whose interpretation imply a value judgment) are especially problematic as they appear in various precepts.[88]

32 Anyway, the idea that the principle of legality is incompatible with judicial interpretation was abandoned long ago and, as a consequence, there is now acknowledgement of the significant relationship between the theory of interpretation and the principle of legality.[89] However, in the German legal order, there are no expressly provided legal rules on interpretation applicable in criminal matters. Neither the StGB nor the German Civil

82 ibid §5 D para. 20–21.
83 ibid.
84 Jakobs (n 80) 4 Abschn 1–8.
85 Also § 25 Deutsches Richtergesetz, however, see art. 31 Bundesverfassungsgerichtsgesetz, but not in the sense of stare decisis.
86 See n 19.
87 Uwe Murmann, *Grundkurs Strafrecht Allgemeiner Teil, Tötungsdelikte, Körperverletzungsdelikte* (4th edn, C.H. Beck 2017) § 10 para 7.
88 Roxin (n 76) §5 H para. 69.
89 ibid § 5 E para. 26–27.

Code contain provisions in this sense as, for example, the Colombian Civil Code does. In any case, both from the doctrinal and jurisprudential approaches, several elements within the German system correlate with the existing regulation in Colombia.

33 The German Constitutional Court established that the possible meaning of a law's wording marks the outer limit of permissible judicial interpretation.[90] Criminal offences' literal definition is simultaneously the beginning and the limit of statutory construction. In the light of the principle of legality, a particular legal word can be used, or a concept constructed, in different fashions without violating this principle. An interpretation, therefore, can be restrictive or extensive, but it has to be plausible in connection with the rule's aims and the words that the legislature used.[91] In light of this, indeterminacy concerning a given legal term does not necessarily imply a more lenient construction;[92] however, an application of a legal rule to a situation that does not fit with any of the possible meanings of its wording is prohibited as doing so would extend the rule by analogy and violate the principle of legality.[93]

34 An example of how the wording of an offence definition conditions the judicial decisions and simultaneously leaves a certain margin of interpretation is the case of Nikola Jorgić. On 26 September 1997, the Higher Regional Court at Düsseldorf sentenced Jorgić for genocide based on the former § 220a StGB (now *§ 6 Völkerstrafgesetzbuch*).[94] The Court held in this decision that an intention to destroy a given group of people, as an element of genocide, is fulfilled when a perpetrator pursues the destruction of the group as a social unit, in its particularity or specificity and its sense

90 German Constitutional Court (1 BvR 150/03), Decision of 1 June 2006, para. 9.

91 Urs Kindhäuser, *Strafrecht Allgemeiner Teil* (8th edn, Nomos 2017) § 3 para 7.

92 Roxin (n 76) § 5 E para. 28; Murmann (n 87) § 20 para 6.

93 See n 78.

94 "(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group: 1. kills a member of the group, 2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code, 3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part, 4. imposes measures intended to prevent births within the group, 5. forcibly transfers a child of the group to another group shall be punished with imprisonment for life. (2) In less serious cases referred to under subsection (1), numbers 2 to 5, the punishment shall be imprisonment for not less than five years" (English translation in https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html#p0029, last accessed 17 October 2022).

of identity.[95] Jorgić's defence claimed that this (extensive) interpretation violated the principle of legality because the term "destroy", according to the development of international law, referred to the group's physical destruction. However, both the German Supreme Court and the German Constitutional Court upheld the regional court's decision. Indeed, the Constitutional Court concluded that the interpretation of the "intent to destroy", as the destruction of the unity or social cohesion of the group, was reasonable from the literal point of view, not only because there is nothing in the definition of genocide that expressly excludes it (literally the word "destroy" can encompass physical and/or cultural destruction), but also because the same definition refers to the destruction of the group "as such".[96] This construction was also supported considering the object of protection of the crime of genocide,[97] which shows that the teleological criteria may play a role to decide which is the most plausible interpretation of an offence.[98]

35 According to the German Constitutional Court, the principle of legality and the maxim of *lex certa*, taken together, do not imply a duty of absolute clarity in the drafting of legal rules. The Court holds that the legislature can delegate the task of specifying the meaning of offences' legal elements to judges (*Präzisierungsgebot*).[99] Of course, the degree of indeterminacy cannot be such that the wording does not allow the identification of the general meaning of the prohibition, rather, it is about accepting that case law plays a complementary role to legislation by facilitating the understanding of legal texts.

36 As a result, from the constitutional point of view, a certain degree of indeterminacy does not violate Article 103 (2) *Grundgesetz*. Actually, the standard remains relative, that is, the level of certainty that the legislature provides when drafting a law is commensurate with the intensity of the penalty that corresponds to the crime in question: The more drastic the

95 Higher Regional Court at Dusseldorf (IV – 26/96, 2 StE 8/96), Decision of 27 September 1997, 161.

96 German Constitutional Court (2 BvR 1290/99), Decision of 12 December 2000, para. 21–25, 27–28, 31–34.

97 German Federal Court of Justice, Decision of 30 April 1999, in NStZ 1999–8, 402.

98 Murmann (n 87) § 20 para 13–14 (regarding teleological reduction); with further examples Roxin (n 76) § 5 E para. 35.

99 German Constitutional Court (2 BvR 2559/08), Decision of 23 June 2010, para. 80, and (2 BvR 2558/14), Decision of 28 July 2015, para. 64.

penalty, the more precise the formulation should be.[100] In any case, it must be possible to overcome the indeterminacy or vagueness through case law; thus, constitutionally, judges and courts should contribute to reducing the uncertainty about the content of legal rules. Hence, extensive construction is not allowed when it increases the ambiguity of the constructed legal term,[101] even though the difference between an allowed extensive interpretation and an extensive interpretation that increases the degree of indeterminacy of an offence is not clear under German law.

This happened with the interpretation of the offence of coercion (§ 240 StGB) by the German Supreme Court and the cases of sit-in blockades. According to the Court, this kind of blockade was a form of violence (*Gewalt*), provided for in § 240 (1) StGB.[102] However, the German Constitutional Court considered that construing the word violence to encompass only a physical presence (e.g. when sitting on a road and thus impeding free transit) and the exertion of psychological pressure was an extension of the offence of coercion that did not offer sufficient clarity about the boundaries of that legal term. Moreover, the Constitutional Court noted that the lower court's ruling corresponded more to the judge's convictions rather than the will of the legislature.[103] 37

In addition, there has been a discussion in Germany about the implications of the principle of legality when the case law on a given subject change. The question is whether the prohibition of retroactivity also applies to case law so that judges could not unexpectedly change how they have so far constructed a particular legal rule. The majority opinion tends to reject that possibility,[104] however, the German Constitutional Court seems to have left the door open here by saying that this would require that a significant body of case law was stable enough to create public confidence about the scope of the relevant prohibition.[105] 38

Finally, the prosecution of (massive) human rights violations has had further consequences on the understanding of the principle of legality. The paradigmatic cases to illustrate this point in the German context are those 39

100 German Constitutional Court (2 BvR 238/68), Decision of 14 May 1969, para. 12.
101 German Constitutional Court (2 BvR 2558/14), Decision of July 28, 2015, para. 64.
102 German Constitutional Court (1 BvR 718, 719, 722, 723/89), Decision of 10 January 1995, para. 7–23.
103 ibid 43–48, 61–63.
104 Roxin (n 76) § 5 G para. 61; Cote (n 1) 69–73.
105 German Constitutional Court (2 BVR 1230/10), Decision of 16 May 2011, para. 20; German Constitutional Court (n 101) 64.

of the shootings at the Berlin Wall. Regarding the prosecution of East German border guards that supposedly acted under the authorisation of § 27 (2) of the German Democratic Republic Border Law, the Supreme Court of Germany held that once East and West Germany were reunified, a rule like that could be ignored when there is a great contradiction with justice and the very idea of humanity (based on the Radbruch's formula).[106] The standard for this kind of assessment of the domestic legal order would be international human rights law, drawing on texts such as the International Covenant on Civil and Political Rights.[107] From this perspective, the border-shooting cases could be prosecuted after the reunification of Germany under the StGB of the German Federal Republic, even though this code did not apply to the guards at the time of the crimes' commission. Holding that the prohibition of retroactivity does not protect the expectation that an authoritarian legal rule will be applied in the future, the German Constitutional Court accepted this thesis in the light of Article 103 (2) *Grundgesetz*.[108] In other words, the citizens' reliance on the State's power to punish and the legal certainty principle do not justify the observance of a law that negates the values of the rule of law.[109]

3. Final remarks: difference in similarity?

40 Colombia has a legal system that belongs to the civil-law tradition. Therefore, Colombian criminal law has commonalities with other legal systems that not only belong to the same tradition but have also been strongly influential in its development, such as German criminal law. Both the Colombian and German contexts discussed here show, in general terms, the classical conception of the principle of legality as it is usually associated with said tradition. A closer look at the treatment of the principle of legality in these two legal systems, however, shows that this classical conception is indeed nuanced, with similarities developing because both face similar problems, but also with differences arising because each system independently developes ways to deal with them.

106 German Federal Court of Justice, Decision of 3 November 1992, para. 39.
107 ibid 40.
108 German Constitutional Court (2 BvR 1851/94), Decision of 24 October 1996, para. 134–137.
109 ibid 137.

Both in Colombian and German criminal law, the value of the principle of the legality of crimes has been appreciated and employed in a legal and constitutional sense since the beginning of the 19th century. In both systems, there is a connection between this principle and the emergence of a unified national criminal law code as an element of a modern State. The rationales of the principle of legality in the two legal systems are subsequently related to the value of legal certainty as a condition of the citizens' liberty, to assure the division of powers and, ultimately, democracy. However, in terms of general prevention, the German legal doctrine emphasises more the idea of trust in State actions and the criminal policy dimension of this principle. 41

Nevertheless, in both Colombia and Germany, the classical notion of the principle of legality has not prevented recognising that its effects depend on the theory of legal interpretation. For this reason, the principle of *lex certa* has been nuanced by each State to suit its needs. In both countries, it is accepted that the indeterminacy of criminal law rules is unavoidable, giving judges a relatively broad margin of interpretation and this has led to both the Colombian and German Constitutional Courts developing different criteria to establish when such indeterminacy violates their respective constitutions. Although the literal formulation of criminal laws plays a major role in guaranteeing legal certainty, in neither of the two contexts is the literal tenor the only parameter of statutory construction. 42

The constitutional dimension of the principle of legality has also led to a recognition that judges play an essential role in strengthening legal certainty. It is recognised as both imprudent and impractical to rely solely on the legislature and minimise the role of case law as a legal source in criminal law, rather there is value in combining different strategies to contribute to the unity and predictability of the legal system, which is the ultimate goal of the principle of legality. While in Colombian criminal law this explains (albeit only partially) the adoption of an incipient system of judicial precedents, in German criminal law this explains the extension of the maxim of *lex certa* to judges (*Präzisierungsgebot*) and the discussion on the applicability of the prohibition of *ex post facto* law to judicial decisions. 43

Furthermore, in both Colombia and Germany, the prosecution of human rights violations has presented important challenges to the principle of legality. These are *exceptional situations* in which the values embodied in the principle of legality yield to the notion of substantive justice that is tied to the effective enforcement of human rights. In Colombia, the maxim of *lex scripta* and the idea that national judges should only apply criminal norms created by the legislative branch have been exceptionally set aside. 44

Although this is done only in the very specific context of transitional justice, this expands the sources of criminal law available to judges by opening the domestic legal system to international law. In Germany, as part of the process of addressing the activities of the defunct East German authoritarian regime, the prohibition of retroactivity (*lex praevia*) has been relativised to prosecute past crimes.

45 This brief comparison of the treatment of the principle of legality in Colombia and Germany raises questions about the scope of the principle within civil law systems. These examples also show that the principle itself can be changed, leaving room for differences within the same legal tradition.[110] Although the two countries belong to the same legal tradition, and German criminal law has been significantly influential in Colombian criminal law in the last few decades, some particularities must be considered to avoid artificial generalisations. The study of criminal law in a country such as Colombia, and in Latin America as a whole, must then include these two dimensions: its closeness to the legal systems of continental Europe, but also the fact it has followed its own evolutionary path.

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