THE ICC AND ITS NORMATIVE IMPACT ON COLOMBIA'S LEGAL SYSTEM

BY ALEJANDRO CHEHTMAN

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ABOUT DOMAC

THE DOMAC PROJECT focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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EXECUTIVE SUMMARY

This report examines the influence of international criminal tribunals (particularly the International Criminal Court – ICC) and their case law on domestic proceedings for mass atrocity cases in Colombia. Colombia is a party to the ICC since 2002, and has been for a number of years under preliminary examination by the Office of the Prosecutor (OTP) of the ICC. All in all, after providing a brief introduction to Colombia's legal system and main legal institutions, this report argues that Colombia has experienced during the relevant period a process of increasing openness towards international legal standards, particularly in the fields of international human rights law and international criminal law. Moreover, it claims that this process can be weakly traced, albeit neither as the sole nor even as the main causal factor, to the influence of the ICC.

This influence is perceived at different levels. At the structural level, the domestication of the ICC Statute generated a constitutional amendment and relevant jurisprudence by Colombia's highest judicial authority, signaling many doctrinal changes that would unfold in its following jurisprudence. Furthermore, the presence of the ICC in Colombia's legal and political discourse, and the possibility of it opening an investigation were influential in the tailoring of the Justice and Peace Law, Colombia's main transitional justice framework, both in Parliament and when its constitutionality was assessed by Colombia's Constitutional Court.

At the policy level, this report argues that the ICC's influence can be perceived in the changing attitude of Colombia's judiciary vis-à-vis the extradition of paramilitary bosses to the US on drug-trafficking offences. Although extraditions were initially accepted, and even favored, given the consequences this had over the Justice and Peace proceedings, the Supreme Court decided to give prevalence to national proceedings, making explicit reference to the ICC. Similarly, the influence of the ICC may be traced in the decisions of the judiciary first admitting, and then rejecting partial attributions of facts in the context of Justice and Peace processes.

Finally, the ICC has had a considerable impact on Colombia's legal system at a more doctrinal level. Again, the prevailing tendency has been towards internalizing institutes or doctrines available as a matter of international law. In this context, of particular relevance has been the adoption of foreign rules concerning attribution of

criminal liability to military commanders and the use of crimes against humanity despite the fact that they were not explicitly proscribed under Colombian law. These changes helped Colombia may have helped Colombia to comply with its obligations under the Rome Statute and the American Convention of Human Rights. The internalization of foreign or international standards, however, has at the same time created conflations and misapplications of the relevant doctrines before domestic courts.

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LIST OF ABBREVIATIONS

AUC…… Autodefensas Unidas de Colombia

ELN…….. Ejército de Liberación Nacional

FARC……..... Fuerzas Armadas Revolucionarias Colombianas GTZ .....Deutsche Gesellschaft für Technische Zusammenarbeit

ICC…… International Criminal Court

ICtHR……... Inter-American Court of Human Rights

ICTJ……..…… International Center for Transitional Justice

JPL…….…… Justice and Peace Law

OAS……Organization of the American States

OTP…….. Office of the Prosecutor

1. INTRODUCTION

This report is situated in the context of a wider project that looks at the interactions between domestic legal systems and international or internationalized courts, and purports to identify and explain possible impacts and areas of cross-fertilization between institutions at different levels. It focuses on the influence of international criminal tribunals (particularly the International Criminal Court – ICC) and their case law on domestic proceedings for mass atrocity cases in Colombia. Colombia is a party to the ICC and it has been for a number of years under preliminary examination by the Office of the Prosecutor (OTP) of the ICC. This means, under the ICC's complementarity regime, that there are legal mechanisms to tackle impunity if Colombia fails to do this itself.[1] Thus, if Colombia is to avoid direct intervention by the ICC, it must show that it is both willing and able to prosecute individuals for international crimes itself.[2] In the meantime, the ICC has been present in Colombia in different ways. Its Prosecutor has visited the country and made public statements regarding certain developments, such as the passing of Colombia's main transitional justice tool – the Justice and Peace Law (JPL) – or the extradition of Colombian paramilitary bosses to the US on drug-trafficking charges.

All in all, our research suggests that the period under examination has been one of growing influence of international law generally (and international human rights law and international criminal law in particular) in Colombia. Domestic tribunals have increasingly made reference to international treaties or custom, or to decisions reached by their international counterparts. For instance, domestic courts started using international standards to examine issues of complicity or participation in mass-atrocity by, for instance, referring to notions such as conspiracy to perpetrate crimes or perpetration-by-means through an organized structure of power. This doctrine was entirely foreign to Colombia's legal system. In this context, the Supreme Court has explicitly encouraged prosecutors and justices to take into consideration not only national laws, but also international law, in particular those mandates originating from international human rights law and international humanitarian law. Similarly, the

[1] Manuel Ituralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (Bogotá: Siglo del Hombre Editores, 2010), chapter 4.

[2] Article 17, Rome Statute of the ICC.

Constitutional Court has incorporated international law standards mainly through the notion of the block of constitutionality.[3] And yet, this growing influence of international law standards before domestic courts has also created difficulties and significant mistakes in their application. The aim of the present report is to assess this influence and examine the extent to which this general trend can be traced to the influence of the ICC.

This report is structured as follows. Section 2 succinctly portrays Colombia's legal system, with specific attention to applicable substantive law and the structure of the Court's system. Section 3 assesses the normative impact of the ICC by looking more closely into six different areas in which it may be identified. Section 4 provides a conclusion.

2. THE COLOMBIAN LEGAL SYSTEM

The Judiciary in Colombia is composed by the Constitutional Court, the Supreme Court of Justice, the State Council (*Consejo de Estado*), the Supreme Council for the Judiciary (*Consejo Superior de la Judicatura*), the Prosecutor General (*Fiscal General*), the lower Tribunals and Judges and the Military Criminal Justice.[4] The Prosecutor General's main function is to investigate alleged crimes and bring cases before the competent judicial authority.[5] Ordinary courts are organized in a four-tiered hierarchy. At the top of the hierarchy is the Criminal Chamber of the Supreme Court of Justice. District tribunals occupy the second-highest level; they have territorial jurisdiction over districts (the judicial territorial division), which generally coincide with departments – the main executive territorial division in Colombia. Circuit Courts, located in main cities, comprise the third-highest level, and Municipal Courts the lowest level. Most cases on mass-

[3] The "constitutional block" is a doctrine developed under the 1991 Constitution that refers to those rules and principles which, despite not being explicitly provided for in the Constitutional text, are utilized to assess the constitutionality of laws and other provisions. On this doctrine see, inter alia, Constitutional Court, Decision C-225 of 1995 (MP: Alejandro Martínez Caballero); Decision C-578 of 1995 (MP: Eduardo Cifuentes Muñoz); Decision C-358 of 1997 (MP: Eduardo Cifuentes Muñoz); and Decision C-191 of 1998 (MP: Eduardo Cifuentes Muñoz). See also, Alejandro Ramelli, "Sistema de fuentes del derecho internacional público y 'Bloque de constitucionalidad' en Colombia", *Cuestiones Constitucionales* Núm, 11 (2004), 157-175.

[4] See 'Statutory Law for the Administration of Justice', Law 270 (7 March) Official Diary No. 42.745 (15 March 1996), article 11; 'Military Criminal Code', Law 522 (12 August) Official Diary No. 43.665 (13 August 1999) judges from the high-courts (Constitutional Court, Supreme Court of Justice and State Council) are elected for periods of eight years without possibility of re-election (article 233).

[5] It cannot exercise its prosecutorial discretion to decline investigation of alleged cases of grave breaches to international humanitarian law, crimes against humanity, genocide, illegal drug trafficking and terrorism. Constitution of Colombia, article 324(3); see also, Constitutional Court, Sentence C-095/ 2007, (MP: Marco Gerardo Monroy Cabra), § 7.7.6.

atrocity crimes are heard, at the trial level, by *Specialized Circuit Courts* – the heirs of emergency criminal justice often referred to as "faceless justice".

According to the Constitution, military personnel accused of service-related offences may only be tried before military courts. However, the actual jurisdiction of military courts has been reduced progressively since the 1990s as a consequence of a restrictive interpretation of the Constitutional Court regarding the nexus between the relevant offence and the military service.[6] Violations of international humanitarian law and human rights are not regarded as service-related offences.[7] The 2010 Military Penal Code clearly states that military courts do not have jurisdiction over torture, genocide, enforced disappearance, crimes against humanity, breaches of international humanitarian law, and other offences (eg, other deliberate violations of human rights) which by their very nature would run against the constitutional mission of the armed forces.[8]

Two Penal Codes are relevant for the period under investigation: the 1980 Penal Code and the 2000 Penal Code. General principles of the criminal law system, definition of crimes and sentencing are included in this legislation. There is no life imprisonment[9] or capital punishment[10] and the maximum sentence term is sixty years. The 1980 Penal Code included the offences of conspiracy to commit a crime (*concierto para delinquir*)[11] and terrorism.[12] Other mass-atrocity crimes were regulated under different types of homicide,[13] personal injuries,[14] and other offences.[15] Certain international offences were incorporated to the Colombian legal system by Law 589 of 2000. However, the debate regarding their incorporation into Colombia's legal system took place in the context of the

[6] This trend can be linked to the jurisprudence of the Inter-American Court of Human Rights, which has been very influential in Colombia. Unfortunately, the normative impact of human rights bodies or courts is beyond the scope of this report.

[7] Supreme Court, Criminal Cassation Chamber, Decision 21923 (25 May 2006).

[8] Law 1407 of 2010, Articles 1 and 3. On this see, also, Decision *Gustavo Amaya Ruiz et al*, Supreme Court, Chamber of Criminal Cassation, 31091(MP Julio Enrique Socha Salamanca)

[9] Constitution of Colombia, Article 34.

[10] ibid, article 11.

[11] Decree 100 of 1980 (Penal Code), Article 186.

[12] ibid, Article 187.

[13] ibid, Article 323.

[14] ibid, Article 331.

[15] ibid, Article 268 (kidnapping), Article 355 (extortion).

debate concerning the 2000 Criminal Code for Colombia, approved under Law 599.[16] This new Penal Code was enacted in order to put the criminal justice system in line with the rules and principles of the 1991 Constitution.

As a result of the legislative debate, 29 different breaches of international humanitarian law were defined in the new legislation, along with four other international crimes which do not require a situation of armed conflict, ie, genocide,[17] torture,[18] enforced disappearance,[19] and forced displacement.[20] The Constitutional Court brought some of these offences in line with the definitions in international human rights instruments through declaring them only conditionally compatible with the Colombian Constitution.[21] The Court has understood the category of "human rights treaties" to be very broad, including specific conventions against atrocious crimes (e.g. the Inter-American Convention on Forced Disappearance of Persons),[22] international humanitarian law conventions (eg the 1977 Additional Protocols to the Geneva Conventions),[23] and even the Rome Statute and the Elements of Crimes (as evidence of customary international law).[24] These criminal provisions remained largely underused until several prosecutors started introducing them in proceedings under the JPL

[16] 'Criminal Code', Law 599 (24 July) Official Diary 44.097 (24 July 2000). Alejandro Aponte, *El desplazamiento forzado como crimen internacional en Colombia. Reglas, principios y fórmulas de imputación,* Colección monográficos 1, Observatorio Internacional, DDR, Ley de Justicia y Paz, Centro Internacional de Toledo para la Paz, Bogotá, September 2009 (hereinafter, "*El desplazamiento forzado*"), 8.

[17] Law 599 of 2000 (Penal Code), Article 101.

[18] ibid, Article 178.

[19] ibid, Article 165. A crime under Article 7(1)(i) of the Rome Statute, whenever committed as part of a widespread or systematic attack against the civilian population. Also a crime under the 1994 *Inter-American Convention on Forced Disappearance of Persons*, enacted in 1996 and ratified by Colombia in 2005.

[20] ibid, Article 180. Although Law 599 was passed before the entry into force of the Rome Statute, it is still considered a direct influence both on the passing of the law. See, Alejandro Aponte, "Colombia", in: Kai Ambos, Ezequiel Malarino, Gisela Elsner (eds), *Jurisprudencia latinoamericana sobre derecho penal internacional*, (Montevideo: Konrad-Adenauer Foundation and Göttingen University, 2008), 159-211 [hereinafter "Colombia"].

[21] In its Decision C-177 (2001), the Constitutional Court eliminated an element of the crime of genocide which required that the protected national, ethnic, racial, religious or political group acted "within the legal order". (Admittedly, the inclusion of political groups in the definition of genocide makes it broader than that in force under the Genocide Convention, and probably also under customary international law.) In its Decision C-148 (2005), the Court eliminated an element of the crime of torture, requiring "severe" pain and suffering, since this element is not contained in the 1985 Inter-American Convention to Prevent and Punish Torture.

[22] Constitutional Court, Decision C-580 (2002).

[23] Constitutional Court, Decision C-225 (1995).

[24] Constitutional Court, Decision C-291 (2007).

framework.[25] The successive Military Penal Codes enacted in 1988,[26] 1999[27] and 2010[28] include chapters on *crimes against the civilian population*, including devastation, looting, and requisition.

With regards to crimes against humanity, although the introduction of a title explicitly incorporating them into Colombia's legal system was initially envisaged, this position was subsequently abandoned.[29] One explanation for this is the inherent indeterminacy of such crimes under international law and its continuous reliance on international customary law. This would have created possible frictions with the principle of strict legality under Colombian domestic law.[30] What seems clear is that this kind of provision was considered at the time somewhat foreign to the Colombian legal culture and traditions,[31] which previously utilized the notions of acts of "ferocity" or "barbarism" for somewhat similar facts.[32]

There have also been significant changes with regards to criminal procedure law.[33] Before the 1990s, the procedure followed the European inquisitorial model. The 1991 Constitution established a new institution, the Attorney General Office (*Fiscalía General de la Nación*), and instituted a semi-adversarial system. The pre-trial stage still followed a certain inquisitorial model, since individual prosecutors had the power to order the detention and incarceration of individuals without the need of a judicial order. In 2003, through constitutional reform[34], the system changed further towards an Anglo-American adversarial model. Under the 2004 Code of Criminal Procedure, prosecutors'

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[25] Aponte, "*Persecución Penal de Crímenes Internacionales*", 63. See also, Observatorio Internacional, DDR, Ley de Justicia y Paz, Centro Internacional de Toledo para la Paz (CITPax), Segundo Informe, Bogotá, November 2009, Part I.

[26] Decree 2550 of 1988.

[27] Law 522 of 1999.

[28] Law 1407 of 2010.

[29] See Bill 129 (1997) and Bill 40 (1998), which contained a few instances of crimes against humanity.

[30] Aponte, "*El desplazamiento forzado*", 10-11, citing Cámara de Representantes, "Proyecto de ley n°142 de 1998" en: Gaceta del Congreso n° 450, 18 de noviembre de 1999, at 6.

[31] Cámara de la Representantes, "Ponencia para primer debate al proyecto de Ley 142 de 1998" en: Gaceta del Congreso n° 37, de 7 de abril de 1999, 2 (cited in ibid).

[32] Aponte, "Colombia", 164-167.

[33] This has been the case in virtually all of Latin America and with a similar trend. For critical notes on some aspects of this general trend, see Máximo Langer, *"From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure",* 45 HARV. INT'L L.J. 1 (2004).

[34] Legislative Act 002 of 2003.

powers are limited; any pre-trial measures involving the restriction of fundamental rights require authorization by a judge. This procedure is also predominantly oral.[35] Thus, currently in Colombia there are two procedural regimes in operation: for crimes committed before 1 January 2005 Law 600 applies and for crimes committed from said date onwards Law 906 applies.[36]

During the last three decades the various Colombian criminal law institutions have shown two important features. First, Colombian governments have instituted an "emergency criminal justice system" to deal with what has been regarded as exceptional threats to Colombian society, typically dealing with drug-trafficking and terrorism. During the 1980s military tribunals were given jurisdiction to prosecute and sentence civilians for mass-atrocity crimes.[37] During most of the nineties, a system formally known as "Regional Justice", and popularly referred to as "faceless justice" (as proceedings were conducted by anonymous prosecutors and judges), was instituted to deal with the threats of drug cartels, guerrilla and paramilitary groups.[38] The emergency criminal justice system was characterized by the restriction of procedural guarantees and the institution of security measures which arguably violated the human rights of suspects (such as due process, fair trial, and presumption of innocence).[39] Regional Justice was abolished at the end of the 1990s and a permanent, "specialized" justice within the ordinary criminal justice system was created to deal with particularly grave offences – many of them related to the armed conflict.[40] Specialized Circuit Judges are now a much more moderate form of emergency criminal justice.[41] Although they operate under a special,

[35] The semi-adversarial system persists in present time for some procedures, such as criminal trials against high-ranking officials who are entitled to be tried by the Supreme Court of Justice. It also persists for trials on crimes committed before 2005. See the discussion on parapolitics below.

[36] 'New Code of Criminal Procedure', article 533.

[37] The Supreme Court of Justice declared in 1989 that such practice violated the Constitution, and struck down the provisions allowing this practice.

[38] Article 1 of the emergency decree 180 of 1988 (Antiterrorist Statute) defined terrorism as: "The use of action or threats designed to terrorize or cause anxiety to the public or a section of the public", where such action involves "endangering the life, personal integrity or the liberty of a person or a group of persons; threatening buildings, constructions, communication media, means of transport, the processing or transportation of fluids or driving forces; using means capable of wreaking havoc."

[39] See Decrees 2790 of 1990 (also known as the Statute for the Defense of Justice), and Decree 2700 of 1991, which enacted a new Procedural Penal Code.

[40] Law 504 of 1999.

[41] Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (Bogotá: Siglo del Hombre Editores, 2010), ch. 3.

slightly more severe criminal procedure, they have now largely improved their compliance with basic human rights standards. In 2005, the Justice and Peace Law jurisdiction and legal framework was established.[42]

3. THE NORMATIVE IMPACT OF THE ICC IN COLOMBIA

This section examines in what ways the ICC and its supervisory role may have influenced the legal landscape in Colombia. At least six discrete areas of impact may be identified, which have mainly influenced certain structural features of the Colombian legal system, some key policy decisions, and specific doctrinal developments. At the structural level, the influence of the ICC can be perceived in the process of domestication of the ICC Statute and in the enactment of the main transitional justice tool developed in the country, namely, the Justice and Peace Law (JPL). At the policy level, it will be argued that the influence of the ICC may be perceived, albeit if sometimes indirectly, in the doctrinal changes at the Supreme Court regarding the extradition of paramilitary bosses to the US on drug-trafficking charges and the main prosecutorial strategy over crimes of paramilitaries, particularly in the context of the JPL.[43] Finally, at the doctrinal level, it will be suggested that there are certain distinct developments in the application of substantive criminal law which can be linked to some form of influence by the ICC, such as those regarding the attribution of crimes to a specific defendant utilizing doctrines ultimately foreign to the Colombian legal system, and the direct application of the international law regarding crimes against humanity in domestic proceedings.

Before proceeding, however, a point of clarification is in order. Despite many of these developments can be linked, to some extent, to a certain influence of the ICC, it is claimed here that the ICC is neither the sole nor the main causal factor behind them. There are other, perhaps more important elements that have pushed developments in the same direction, ie, towards internalization. Among them we may mention the decisions of the Inter-American Court of Human Rights, the work of civil society and

[42] On the Justice and Peace Law, see section 3.2.

[43] It may be argued, for instance, that the criticism to the extraditions was based on the victims' rights to truth, justice and reparations rather than on consideration of the ICC. However, this does not preclude the possibility that the ICC supervisory role might have also pushed in the same direction and, in fact, been explicitly considered in this regard. I am grateful to Alejandro Aponte for raising this point.

victims' organizations, and certainly some internal dynamics between the Administration, parts of the Colombian judiciary and their favored understanding of victims' rights, and paramilitary groups. In sum, all that is claimed here is that many of the developments examined in the following sections are fully compatible with the direction in which the ICC would have exerted influence.

3.1 THE ICC AND THE COLOMBIAN CRIMINAL RESPONSE TO MASS ATROCITY

Colombia ratified the ICC Statute on 5th August 2002. President Pastrana did so just a few days before handing power over to President-elect Alvaro Uribe. He also appended to the ratification act a declaration under article 124 of the Statute, according to which the ICC would lack jurisdiction over war crimes committed in Colombia for a period of seven years.[44] The reason for the reservation was, arguably, to facilitate the peace negotiations with the FARC and other groups,[45] and had previously been agreed with Uribe.[46] However, this decision was adopted without previous consultations with other political forces or civil society, and it was heavily criticized.[47]

The implementation of the Rome Statute required a rather complex procedure. It was approved by Law 742 (2002), which was, in turn, assessed by the Constitutional Court.[48] Instead of simply stating that the Rome Statute was in accordance with the Colombian Constitution, the Court went further and clarified, in a lengthy and meticulous decision, "the strict limits within which the Rome Statute should be interpreted and applied" before national courts.[49] Because some of the provisions in the Statute did go against certain specific provisions in the Colombian Constitution, an amendment was required. The following text was added to its article 93:

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[44] This period expired in November 2009.

[45] Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

[46] Interview C-5.

[47] The *Procurador General de la Nación*, publicly declared that "this reservation was a significant surprise for the people of Colombia and we believe that with it we have sent the international community an equivocal message stating that our State is prepared not to allow the ICC to exercise jurisdiction, in a residual form, over the grave human rights and international humanitarian law violations perpetrated in the context of the internal armed conflict" ("Piden retirar salvedad", in *El Tiempo* (3 September 2002), available at http://www.eltiempo.com/archivo/documento/MAM-1372926 (last accessed on 20 February 2011)).

[48] Constitutional Court, Decision C-578 of 2002.

[49] For a more detailed analysis, see Alejandro Aponte, "Colombia", 201-256.

> "The Colombian State can recognize the jurisdiction of the International Criminal Court under the terms of the Rome Statute, adopted on 17 July 1998 by the Conference of Plenipotentiary of the United Nations and, as a result, can ratify this treaty in accordance with the procedure established in this present Constitution. Admitting a different treatment in substantive issues regulated by the Rome Statute with respect to the safeguards provided for under this Constitution will have effects exclusively within the ambit of the subject matter regulated in the Statute."[50]

This amendment was introduced in order to avoid certain constitutional difficulties that the ICC Statute might have created within the Colombian legal system, due to the fact that the Statute contained provisions which were "foreign to the national legal tradition".[51] Among them, were the general impossibility of sentencing individuals to life imprisonment, the lack of application of statutes of limitations to certain offences, the modification of *res judicata* and *non bis in idem* principles in the context of a potential intervention by the ICC.[52] Otherwise, the Constitutional Court could have considered certain provisions of the Statute as contrary to the Colombian Constitution.

In any event, the domestication of the ICC Statute through an act of Congress and a lengthy and detailed decision of the Constitutional Court and the amendment of the Constitution somewhat illustrate Colombia's drive towards opening its legal system and incorporating international legal standards. As it will be discussed below, it may have also been a significant first step into the more concrete developments at the doctrinal level, for which the ICC Statute became an obligated point of reference.

3.2 THE JUSTICE AND PEACE LAW (JPL) FRAMEWORK

A second area of impact at the structural level has to do with the influence of the ICC, and in particular the involvement of its Prosecutor, in the enactment of the JPL. The process leading to the JPL began a few years before its actual enactment. In July 2003, less than 3 months after taking office, the Uribe administration reached an agreement with the majority of the *Autodefensas Unidas de Colombia* (AUC), an organization which consolidated the main local paramilitary groups acting in different parts of the country.

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[50] The Spanish texts states: "*El Estado Colombiano puede reconocer la jurisdicción de la Corte Penal Internacional en los términos previstos en el Estatuto de Roma adoptado el 17 de Julio de 1998 por la Conferencia de Plenipotenciarios de las Naciones Unidas y, consecuentemente, ratificar este tratado de conformidad con el procedimiento establecido en esta Constitución. La admisión de un tratamiento diferente en materias sustanciales por parte del Estatuto de Roma con respecto las garantías contenidas en la Constitución, tendrá efectos exclusivamente dentro del ámbito de la material regulada en él*." (Translation by author.)

[51] Constitutional Court, Decision C-578 (2002), 50-52.

[52] ibid, 53 (note 43), and 143.

Many leaders of the AUC agreed a total cessation of hostilities and a gradual demobilization of troops in the following two years. The government offered immunity during negotiations, and it agreed to work with Congress to grant them special treatment regarding their prosecution and punishment for war crimes, crimes against humanity, and drug trafficking offences.[53] The political situation in Colombia and the international context made it impossible for the government to offer the AUC a blanket amnesty. Among other reasons, the fact that "Colombia signed up to the International Criminal Court … meant that if paramilitary leaders [were] not prosecuted in Colombia for war crimes and [crimes] against humanity, they [would be] liable to [be prosecuted by the ICC] sooner or later."[54] It has been suggested, however, that these leaders were in fact offered, short of a blanket amnesty, virtual impunity and full enjoyment of their wealth.[55]

In October 2003, the Uribe administration sent to Congress the Bill of Penal Alternatives (*Ley de Alternatividad Penal*). This bill, however, was strongly resisted by MPs, including Uribe's allies, social movements, NGOs, and external players such as the US and the UN, as it was perceived as a way to "secure the liberty of paramilitaries".[56] Thus, the Uribe Administration presented a new bill in April 2004, known as "Justice, Truth and Reconciliation". This bill was also resisted but it would ultimately turn into Law 975 (JPL). In Congress, several changes were introduced to the bill, such as requirement of full confessions to be eligible to receive the benefits it provided, as well as economic reparations to the victims, which would have to come from assets provided by the paramilitaries. In a clear attempt to influence the direction this process was taking, the ICC Prosecutor sent a public letter to the Colombian Government indicating that the OTP was monitoring the situation and that it was necessary for the JPL to comply with the requirements of "truth, justice and reparations".[57] The JPL was approved by Congress on 20th June 2004, and signed into Law 975 on 22nd July 2005.

[53] This was important as several paramilitary leaders already had important sentences imposed upon them (which they were not serving). See interview C-5.

[54] Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

[55] Two anonymous interviewees.

[56] "Gobierno de Washington insistió ayer en que el proyecto que estudiará el Congreso colombiano no podrá ser excusa para evadir la extradición", *El Tiempo* (05-11-2003).

[57] Interview C-4.

It has been argued that the original project presented by the Administration was tailored to avoid extradition of paramilitaries but also real prison sentences under tight security conditions.[58] Part of civil society never saw the Justice and Peace process as a justice process at all, ie, as a process for making individuals criminally liable for mass atrocities.[59] Rather, it was often viewed as a negotiation between two close parties (the Uribe administration and the paramilitary kingpins[60]) to sort out an uncomfortable situation.[61] In this respect, the JPL stands in striking contrast with the Democratic Security Policy, pursued by the Uribe administration which provided harsh penalties to left-wing guerrillas.[62]

The maximum prison sentence under the JPL is eight years, and the minimum five years, provided that the former combatants keep to the panoply of commitments that the law demands from them. Besides full confession and reparations, those subjected to this type of jurisdiction have also a duty of continued cooperation with the authorities in dismantling the illegal armed group to which they belonged, of not committing any new crimes, and of contributing to their own rehabilitation through work or study.[63] Non-compliance with these commitments is punishable by the imposition of the much higher sentence applicable under the "regular" Penal Code.

Law 975 was eventually reviewed by Colombia's Constitutional Court.[64] In a 6-3 decision, it ruled that the JPL was compatible with Colombia's Constitutional block, thereby preserving the demobilization process with the AUC, but it hardened significantly the law by declaring unconstitutional some of its fundamental provisions and bringing others in line with international human rights standards on truth, justice, and reparations. The Court accepted the conferral of penal benefits to demobilized combatants, though it

[58] Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

[59] Interview C-2 and anonymous interviewee.

[60] In fact, it is pointed out that the President, while he was the governor of the Antioquia Region, had favoured through regulatory measure the creation of paramilitary groups called "Convivir", who were responsible for massacres and other crimes.

[61] Interview C-4.

[62] ibid.

[63] Law 975 of 2005, Article 29.

[64] There have been at least four key decisions on the Law 975 by the Constitutional Court, of which the most relevant one is arguably decision C-370/2006. The other three are decisions C-319, C-531 and C-575. For a more detailed analysis of some of the challenges and the tensions that they involved see, Lisa J. Laplante and Kimberly Theidon, "Transitional Justice in Times of Conflict: Colombia's *Ley de Justicia y Paz*", *Michigan Journal of International Law* 28 (2006), 86-101.

made them conditional to full confession of the crimes perpetrated as members of illegal armed groups, and full disclosure of their unlawful activities.[65] Moreover, the Court held that those convicted by the JPL jurisdiction would have to serve the whole sentence in a penitentiary establishment that fulfilled all the requirements of the ordinary prison regime. Time spent by demobilized paramilitaries in the "concentration zones" would not count towards the final prison sentences. With regards to the JPL procedure, the Court also declared unconstitutional the provision requiring prosecutors to bring charges against defendants "immediately" after the full version unconstitutional. It considered it necessary to allow them more time to build the case before taking the applicant (*postulado*) before a guarantees magistrate.[66] Finally, with regards to victims, the Court ruled that they must have the right to partake in all stages of proceedings, just as in any ordinary criminal case, and not just at the trial stage.[67] And it also established that demobilized members of illegal armed groups would have to compensate victims not only with illegally obtained assets, but also with their lawfully obtained assets.[68]

The ICC was arguably a relevant actor in this process. When the ICC Prosecutor visited Colombia, his message was that Colombia had made significant progress in the right direction, thereby giving the impression that it was very difficult that the ICC would open an investigation.[69] In August 2008, he sent another public letter to the Colombian Government enquiring whether any steps were being taken to ensure that the main responsible for mass atrocity crimes that would potentially be under the subject-matter jurisdiction of the ICC, including politicians and Congressmen, could be tried for their offences.[70] ICC Prosecutor repeated in December 2008 that he "would ensure that there

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[65] Constitutional Court, Decision C-370 (2006), at 211.

[66] In practice, however, the opposite has obtained. Serious delays have been one of the most prominent features of the whole JPL system.

[67] ibid, paras. 6.2.3.2.2.1 – 6.2.3.2.2.10.

[68] ibid, pars. 6.2.4.1 – 6.2.4.1.24. From a different perspective, the Court also declared the unconstitutionality of article 71 which extended the sedition offence to paramilitaries, thereby consolidating the "political" status of their crimes. "[T]his was a significant blow to the paramilitary leaders' aspirations, for it left them exposed to extradition and blocked their direct participation in politics." (Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4).

[69] Interview C-2.

[70] In Ana María Díaz, "La sociedad civil espera la acción de la Corte Penal Internacional en Colombia" *El Monitor* 38, October 2009, 17.

will be justice in Colombia; if it is not pursued by Colombian judges, the Court will intervene."[71]

However, many commentators perceive a more decisive influence of the international human rights law movement.[72] Many interviewees suggested that the clearest impact of the ICC in the JPL context has been in terms of its use by national actors or stakeholders. An important part of HHRR organizations, NGOs, victim groups, etc. used the existence of the ICC to persuade public authorities of the need to strengthen and advance the accountability process.[73] Much of this persuasion, it seems, has been based on the misleading assumption that the ICC could eventually open investigations against a significant number of individuals in Colombia.[74] Furthermore, it is often suggested that the Inter-American court of Human Rights and its decisions on Colombia were crucial.[75] Also, albeit more controversially, the US State Department may have also influenced this process as a result of the fact that each year it has to certify the Colombian state regarding the protection of human rights, and a bad review might seriously limit or even block the economic and military aid.[76] In any event, the "hardening" process that the JPL underwent was clearly in the direction the ICC would have expected and, in that respect, it may have helped delay or avoid a direct intervention.[77]

3.3 EXTRADITIONS AND TRANSITIONAL JUSTICE

From a different perspective, the ICC may have had an impact at the policy level regarding the position of the Supreme Court vis-à-vis the extradition of paramilitaries undergoing process before the JPL jurisdiction to the US on drug-trafficking charges. Since 2006, Colombia extradited to the US a total of 30 paramilitaries who were involved in JPL proceedings. This policy came to its most controversial with the extradition of 14

[71] *Diario Nuevo Siglo*, "O Colombia hace justicia o nosotros lo haremos: CPI", December 9th 2008 (cited in *La metáfora del desmantelamiento*, 292).

[72] ibid.

[73] Interviews C-2, C-5, and C-7 among others.

[74] Interview C-12.

[75] Interviews C-3, C-5, C-, and C-10.

[76] Although the US allegedly supported the Law, they argued that they would insist on the extradition on the AUC top commanders. Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

[77] Interview C-4.

of the most prominent paramilitary leaders on May 12, 2008.[78] The political explanation of these extraditions is arguably connected with the "parapolitics" scandal and a clear decision of the Administration to "silence" these bosses by sending them abroad.[79] This policy has arguably been one of the most sensitive and controversial topics regarding the complementarity test, perhaps because it has been often perceived as a clear form of political interference with the accountability process.[80] The actual consequences for the JPL process are still unclear.

A significant part of the problem with these extraditions has been that access to paramilitaries was subjected to approval by the US judicial and executive authorities. As a result, the Special Unit of Prosecutors for Justice and Peace (JPU) admitted that "there is no schedule of "open confessions" (*versiones libres*) with each of the individuals extradited."[81] This is problematic, inter *alia*, since there is no legal framework that could guarantee that proceedings against the extradited paramilitaries before the Colombian courts would be able to continue.[82] As of February 2010, 15 out of the 20 paramilitaries extradited had not resumed "open confessions" within the JPL framework.[83] For those who did resume them, the delay was between 6 and 13 months after their extradition.[84] The OTP of the ICC received a request to intervene politically after the first extradition was decided (aka Macaco), but it did not take any public steps before the extradition of the 13 "big" ones.[85] Several stakeholders considered its lack of involvement blatantly

[78] "Paras extraditados seguían delinquiendo e incumplían compromisos de ley de Justicia y Paz: Uribe", *El Tiempo* (13-05-2008). In fact, the Uribe Administration authorized the extradition of 240 Colombians to the US (more than all his predecessors together): between 2002 and 2008 it authorized the extradition of 786 individuals, including two top members of FARC, under charges of drug trafficking, terrorism and kidnapping (Leal 2006, 20).

[79] On this, see, eg, A. Chehtman, "The Impact of the ICC on Colombia: Positive Complementarity on trial" (DOMAC Report), section 4.3.1 (forthcoming at http://www.domac.is/reports/).

[80] See, eg, Amanda Lyons and Michael Reed-Hurtado, "Colombia: Impact of the Rome statute and the International Criminal Court", The Rome Statute Review Conference, June 2010, Kampala, 4 (available at http://ictj.org/publication/colombia-impact-rome-statute-and-international-criminal-court, last accessed on June 5 2011).

[81] Cited in *La metáfora del desmantelamiento*, 297. This was confirmed a year later.

[82] The only agreements in force are the Inter-American Convention on Mutual Assistance in Criminal Matters (available at http://www.oas.org/juridico/english/treaties/a-55.html), and the "Exchange of notes" conducted on 11 July 2008, which virtually reiterates the terms of the convention.

[83] At http://www.fiscalia.gov.co/justiciapaz/Versiones.asp (last accessed, 10 January 2011).

[84] For a diligent account of some of the particulars of this situation see, Alejandro Aponte et al, *El proceso penal especial de justicia y paz. Alcances y límites de un proceso penal concebido en clave transicional.* (Centro Internacional de Toledo para la Paz – CITpax, 2011), 365-370.

[85] Interview C-4.

deficient.[86] Although the situation of open confessions of paramilitaries in the US somewhat improved, it still faces serious problems.[87]

More importantly for our purposes, since August 2009 the Supreme Court of Justice has declined to extradite paramilitary leaders requested by the United States charged for drug crimes, when these paramilitary leaders are being tried under the JPL. According to the Court, the extradition of such leaders would jeopardize the Justice and Peace process, and violate victims' rights to truth, justice, and reparation. Extraditing paramilitary chiefs so that they can be tried abroad "for crimes less serious than those which they are admitting to before Colombian magistrates, ends up being a form of impunity."[88] The Supreme Court explicitly indicated that to:

> "give prevalence to the national criminal justice system in these matters shields the Colombian State from the possibility of intervention by the International Criminal Court. Or, put differently: allowing the extradition of a Colombian national … for the crime of drug-trafficking, with full knowledge that this same person must also account for the most serious crimes against humanity, constitutes a form of impunity which the [ICC] repudiates and which authorizes it to intervene…."[89]

Furthermore, denial of extradition was made conditional on the cooperation of the accused with Colombian authorities.

3.4 PARTIAL INDICTMENTS AND FIRST CONVICTIONS

A further issue in which the influence of the ICC may be perceived is the judicially sanctioned policy towards partial attribution of facts in the context of the JPL. The JPL provides that actual attribution of facts would be conducted by prosecutors after the "open confessions".[90] In July 2008, the Supreme Court established that prosecutors

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[86] This relates, particularly, to the issue of the extraditions of paramilitary leaders to the U.S. See, Ana María Díaz, "La sociedad civil espera la acción de la Corte Penal Internacional en Colombia", 17. See also, interviews, C-2 and C-10.

[87] For instance, Decree n 2288, 25 June 2010, "Por medio del cual se reglamenta la Extradición Diferida contenida en los artículos 522 y 504 de las Leyes 600 de 2000 y 906 de 2004", established the possibility of deferring an extradition in relation to JPL proceedings under certain conditions (see article 1).

[88] Supreme Court, Chamber on Criminal Cassation, Decision 29,559, "Carlos Mario Jiménez Naranjo", 22 April 2008.

[89] "Dar prevalencia a la justicia nacional en estos asuntos blinda al Estado colombiano frente a la posibilidad de intervención de la Corte Penal Internacional. O, dicho de otra manera: autorizar la extradición de un nacional colombiano requerido en el extranjero por delito de narcotráfico, conociéndose que esa misma persona también debe responder por los más graves delitos de lesa humanidad, constituye una modalidad de impunidad que se repudia desde el mencionado Tribunal Internacional que lo autoriza a intervenir" (translation by author; footnotes ommitted) *Luis Edgar Medina Flórez*, Supreme Court, Criminal Cassation Chamber, 19 August 2009, Decision 30451, 36.

[90] Article 18, Law 975(2005).

could do partial attribution of facts even before the end of the confession.[91] These were initially envisaged as a way to deal with the already serious delays in JPL processes. Open confessions were still ongoing four years after the JPL was passed, without any one of them reaching the "trial" stage.[92] Moreover, until 2010, only 20% of the 3,635 paramilitaries who had "volunteered" under Justice and Peace had been heard.[93] As a result of this decision by the Supreme Court, then, the same person could both be tried for a certain number of facts and still be declaring about the events he had participated in, or had knowledge of. The Court maintained that this was not only compatible with the interests of victims, but that in fact it may even be required by their right to a prompt decision.[94]

In July 2009 the Supreme Court modified drastically its position regarding partial attributions of facts in its decision quashing the first conviction in the context of the JPL framework, namely, that of Wilson Salazar Carrascal, aka "el Loro".[95] Carrascal had belonged to the Héctor Julio Peinado Becerra front for around twelve years. Although he testified during seven days in an open confession, he only confessed to having been involved in five crimes.[96] In support of its decision, the Supreme Court gave three main reasons. First, the problem with the conviction of Carrascal was that it did not take sufficiently into consideration the widespread and systematic patterns of organized criminality that characterized the paramilitary phenomenon. Second, the Court addressed the fact that Carrascal had not been indicted nor convicted on the basis of the crime of an "aggravated conspiracy to commit a crime" [*concierto para delinquir*].[97]

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[91] Supreme Court, Decision Number 30120 (by Alfredo Gómez Quintero), 23rd July 2008, 32. The strategy of formulating partial attributions was initially proposed by the Colombian government.

[92] *La metáfora del desmantelamiento*, 211. Some, like that of Paramilitary Chief Salvatore Mancuso, lasted more than two years.

[93] ibid, 212.

[94] ibid, 32.

[95] Supreme Court, Criminal Cassation Chamber, Decision 31539 (MP: Augusto Ibáñez Guzmán), 31 July 2009. It is interesting to note, however, that it had been the same Supreme Court which had authorized a year earlier the dismemberment of the case against Carrascal in different processes.

[96] It is both unacceptable that he confessed to such few crimes during twelve years of belonging to a paramilitary organization; but even considering those crimes he did confessed to, such as the homicide of Aída Cecilia Lass, candidate to local mayor, he did not even disclose who had ordered such offence. This, some argue, should have made him un-eligible for the benefits of the Justice and Peace Framework (see, *La metáfora del desmantelamiento*, 223).

[97] In a more recent decision, the Supreme Court added, that when "aggravated agreement to commit a crime" is perpetrated in order to commit gross human rights violations, as is the case with paramilitarism, it should be considered a crime against humanity. See Supreme Court, Criminal Cassation Chamber, 19 August 2009 (MP: Yesid Ramírez Bastidas).

Finally, the Supreme Court suggested that partial charges should be used only as extraordinary measures, not as a generalized practice. Although the Court conceded that partial attributions of facts could be compatible with the JPL proceedings, it emphasized that indictments should ideally be complete, so that all the relevant operators have a complete vision about the activities of the individual in point, and the group to which the defendant belonged.[98]

In truth, the conviction itself seemed somewhat artificial; besides the fact that Carrascal had confessed only to five crimes, and notwithstanding the issue of "partial charges", some other requirements for the application of the JPL framework had been hardly met. There was, for instance, not enough evidence that the paramilitary front had in fact demobilized. Furthermore, he provided for the purposes of compensation a sum which was disproportionately small if compared with the size of the group, and the kind of activities that it performed and for such a long period of time.[99] In sum, it has been claimed that the cases of *El Loro* and *El Iguano* "were full of mistakes".[100] They were the first cases that had reached the trial stage under the JPL framework and it could have been expected that they would entail a "traumatic experience".[101]

This change of policy had significant implications for the JPL process as a whole. But more importantly, the change itself and the particular reasons on which it was advocated, are not only compatible with the duties of Colombia under the complementarity regime, but arguably also explained by them.

3.5 RULES CONCERNING ATTRIBUTION OF CRIMINAL LIABILITY

As suggested above, the ICC also had a certain impact at a doctrinal level over domestic courts. An area in which this can be clearly perceived is that of attribution of criminal responsibility. The particular issue in point is the possibility of attributing principal criminal liability to someone in a position of leadership in a certain organization, such as a paramilitary commander, for the crimes of the organization. This represents a challenge in civil law jurisdictions, in which doctrines such as joint criminal enterprise or command

[98] Supreme Court, Criminal Cassation Chamber, Decision 31539, 31 July 2009, 14.

[99] This was, in fact, even recognized by the Tribunal (Tribunal Superior de Bogotá, Justice and Peace Chamber, internal decision 0197, *Wilson Salazar Carrascal*, 19 March 2009, para. 72).

[100] Interviews C-5, C-9, and C-14.

[101] Interview C-5.

responsibility are not generally accepted.[102] The use by domestic players of the notion of perpetrator-by-means might seem connected to the article 25(3 (a) of the ICC Statute. Ultimately, this section argues that although the drive to apply this kind of notion to ascribe criminal liability to leaders as principals for an offence can be connected to the ICC, the particular institution endorsed is not.

The traditional position in Colombia included the use of instigation [*determinación*], indirect perpetration [*autoría mediata*] and co-perpetration [*coautoría impropia*], under article 23 of the 1980 Criminal Code, and articles 28 and 29 of the 2000 Code. Instigators are those who "through instigation, mandate, induction, advice, coercion, order, agreement or any other … means, effect the commission of the crime by another person who is criminally responsible as a direct perpetrator of the crime."[103] Indirect perpetration, by contrast, entails that the direct or material perpetrator is not fully responsible for the offence, either because the crime has been imposed upon them, or because they are not entirely aware of the relevant circumstance in which their conduct takes place. Finally, co-perpetrators act jointly, in a concerted manner, and simply work on the basis of a division of labour for the pursuit of the common plan.[104] All these modes of liability preclude attributing the crimes of the organization to someone in a position of authority, unless: i) the person who materially or directly committed the offence is not him or herself responsible; or ii) certain very demanding conditions of co-perpetration are fulfilled.

International criminal law, by contrast, favours figures which enable prosecutors and courts to better capture the phenomenon of mass criminality. The Colombian Supreme Court rejected at least three times the possibility of making individuals responsible for acts perpetrated by their subordinate's on the basis of command responsibility.[105] In civil law contexts, however, this function is often performed by the somewhat different (more restricted) notion of "perpetration-by-means through an

[102] Aponte recalls that in a workshop conducted in Bogotá in November 2009, JCE was heavily criticized by domestic legal professionals on the grounds that it provided little legal certainty (see Aponte, *Persecución Penal de Crímenes Internacionales*, 229).

[103] Francisco Munoz-Conde and Hector Olasolo "The application of the notion of indirect perpetration through organized structures of power in Latin American and Spain", 9 (1) *Journal of International Criminal Justice* (2011), 122-123.

[104] ibid. See also, Claudia López Díaz, "El caso colombiano", in Ezequiel Malarino, Kai Ambos, *Imputación de crímenes de los subordinados al dirigente: un estudio comparado* (Bogotá: Editorial Temis, 2008), 169-175.

[105] See La metáfora del desmantelamiento, 219-20.

organized structure of power".[106] Yet the Supreme Court also rejected the possibility of making individuals responsible for acts perpetrated by their subordinates on the basis of the notion of perpetration-by-means in several occasions.[107]

The most important decision in this respect was that regarding the *Machuca massacre*. The case involved the Cimarrón Company of the ELN putting a bomb in the Cusiana-Coveñas oleoduct, in order to harm the oil infrastructure. The explosion ended up destroying many houses and killing over a hundred villagers. The Colombian authorities prosecuted seven members of the Central Command of the *Ejército de Liberación Nacional* (ELN), a guerrilla organization.[108] As the Supreme Court established that the Central Command had no direct control over members of the Cimarrón Company, they could not use the notion of indirect perpetrators. On this factual basis, instigation was not applicable either. Thus, the Supreme Court decided the case on the basis of "co-perpetration by virtue of failing to act in compliance with a legal duty" (*coautoría impropia*). The Court explicitly stated:

> "It is necessary to state that in this case there is no indirect perpetration [*autoría mediata*], there is no 'man in the background',… because the subversives who put the explosives inside the tube were not mere instruments of the Central Command of the ELN, but rather they –the ones who as a matter of fact conducted the detonation– developed their own role in their own offence. Acting in accordance with their own will, they directed themselves with full knowledge and intelligence towards the achievement of the goals which were compatible with their own ideology; they did it on the basis of their own conviction, being neither 'used', nor instrumentalized, or deceived…"[109]

As López Díaz suggests, despite the fact that it recognized that the relevant individuals belonged to a criminal organization, with established hierarchies and identifiable commanders, the Court still decided not to use the notion of perpetration-by-means through an organized structure of power.[110]

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[106] This doctrine was mainly developed by German scholar Claus Roxin in, inter alia, *Autoría y dominio del hecho en derecho penal* (Madrid: Marcial Pons, trad. Joaquín Cuello Conteras and José Luis Serrano Gómez, 2000). See also, Hector Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart Publishing, 2009), 110-112; Harmen van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility' JICJ (2009), 307-314, and the Symposium on indirect perpetration, at JICJ 9(1) (2011), 85-190.

[107] See, eg, *La Gabarra*, Supreme Court, Criminal Cassation Chamber, No 24448, 12 September 2007 (MP: Augusto J. Ibáñez Guzmán); *Massacre of Machuca*, Supreme Court, Criminal Cassation Chamber, Decision No 23825, of 7 March 2007 (MP: Javier Zapata Ortíz); and *Yamid Amat*, Supreme Court, Criminal Cassation Chamber, Decision No 25974 (8 August 2007).

[108] See, Olasolo and Muñoz Conde, "The application of the notion of indirect perpetration through organized structures of power in Latin American and Spain", 123.

[109] Supreme Court, *Massacre of Machuca*, at 51.

[110] López Díaz, "El caso colombiano", 165.

The Human Rights Unit at the Office of the Prosecutor was the first to introduce this doctrine in a number of cases.[111] It explicitly stated that this particular doctrine:

> "reflects what obtains in organizations like FARC, where those at the top … can trust that their orders will be followed without them having to know who will carry them out, without them having to use coercion or deceit, because they know that if one of the members [of the organization] who participates in the commission of certain given crimes fails to fulfill their role, someone else will step in to replace her, without jeopardizing the general plan."[112]

The JPL Unit at the Office of the Prosecutor soon followed.[113]

In 2009, the Criminal Chamber of the Supreme Court timidly started to consider incorporating this doctrine into its case law.[114] In a separate opinion, Magistrates Yesid Ramírez Bastidas, Alfredo Gómez Quintero, María del Rosario González de Lemos and Augusto J. Ibáñez Guzmán referred to the type of organization that congressman Ricardo Elcure Chacón integrated, as one:

> "conformed by a number of several individuals organized in a hierarchical and subordinate way to a criminal organization, who through the division of labour and concurrent contributions … conduct criminal conducts, can be understood through the metaphor of a chain."[115]

The judges added, citing the doctrine of the "perpetrator-behind-the-perpetrator" that the "congressman-paramilitary must also be brought to account for the whole of the crimes attributed to the commanders or bosses of the … fronts or units which conformed the criminal organization."[116] In this particular case, as in several others,[117] the Court only argued that politicians who had promoted paramilitary groups were part of the criminal

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[111] See, Unit of Human Rights, process No. 1556, 14 May 2005, 24 and process No. 2000, 3 October 2005, 136 and ff. (both cited in Aponte, *Persecución Penal de Crímenes Internacionales*, 241).

[112] Fiscalía General de la Nación, Human Rights and International Humanitarian Law Unit, proceedings No. 1556 (13 May 2005), at 24 (cited in ibid, translation author).

[113] Alejandro Aponte, *Fórmulas de imputación de conductas delictivas que constituyen crímenes internacionales en el ámbito de Justicia y Paz* (Madrid-Bogotá: Centro Internacional de Toledo para la Paz, November 2009), 76-77.

[114] Supreme Court, Criminal Cassation Chamber, Decision 29640, 16 September 2009.

[115] ibid. "integrada por un número plural de personas articuladas de manera jerárquica y subordinada a una organización criminal, quienes mediante división de tareas y concurrencia de aportes (los cuales pueden consistir en órdenes en secuencia y descendentes) realizan conductas punibles, es dable comprenderlo a través de la metáfora de la cadena." (Translation by author.)

[116] ibid. "[E]l congresista-paramilitar también debe responder penalmente por el conjunto de crímenes que se le atribuyen a los comandantes o jefes de los bloques, frentes o unidades que hacían parte de la asociación criminal." (Translation by author.)

[117] See, eg, Supreme Court, Criminal Cassation Chamber, Decisions 32672 (3 December 2009); 27941 (14 December 2009), and 27032 (18 March 2010), 32712 (5 May 2010), among others.

structure of the organization and, as a result, were criminally liable for the crimes perpetrated by said organization.

It was only in 2010 that the Supreme Court applied the notion of perpetration-by-means through and organized structure of power to convict former Senator and paramilitary leader, Álvaro Alfonso García Romero, for the Macayepo massacre. The Court considered García Romero an indirect perpetrator on the basis that this massacre was a normal activity of the group he had co-founded, and that he contributed to the massacre by ensuring that the Colombian military were sent away. It made explicit its change of position by arguing that:

> "the doctrinal debate and the developments of foreign case-law, together with a better solution towards the criminal policy issue, takes this Court to modify its previous doctrine.… Certainly, when we face the criminal phenomenon arising from structures of organized criminal apparatus, the crimes are attributable both to their leaders … as indirect perpetrators, to their coordinators to the extent that they control the relevant function as co-perpetrators; and to the direct perpetrators or subordinates, since the whole chain acts with true knowledge and control over the events, and it would be unreasonable that any of their roles could be benefited with a conceptual criterion that entails impunity."[118]

Olasolo and Muñoz Conde have suggested that this approach was taken because García Romero appeared to have participated neither "in the design", nor in the "setting into motion of the operation."[119] A reason they give for this interpretation is the treatment he received, in that same decision, regarding the killing of Georgina Narváez. García Romero had ordered her execution directly, to secure the results of a local election. Yet, he was considered a mere instigator vis-à-vis that particular crime. Paradoxically because García Romero in the instance of the massacre did not fully control the actions of the group and "did not appear to have set in motion the [larger] operation" for which he was being tried, "the application of the notion of indirect co-perpetration (or even co-perpetration) … would have been more adequate."[120] By contrast, the killing of Narváez is "precisely the type of situation that the notion of indirect perpetration through

[118] *Alvaro Alfonso García Romero*, Supreme Court, Criminal Cassation Chamber, Decision No 32805 (23 February 2010). This doctrine, however, is not obviously compatible with the text of article 29 of the Colombian 2000 Criminal Code which stipulates that someone can be considered the perpetrator of a particular offence when she "utilizes someone else as a mere instrument" in that it allows for the direct perpetrator to be fully responsible.

[119] Muñoz Conde and Olasolo, "The application of the notion of indirect perpetration through organized structures of power in Latin American and Spain", 126.

[120] ibid, 127.

organized structures of power is designed to cover[, namely,] when superiors use their organizations to secure the commission of the crimes."[121]

Notwithstanding any form of criticism towards this jurisprudential line and other significant mistakes in the application of international law standards,[122] it is clear that the Colombian judiciary has experienced a drive towards the incorporation of modes of liability that are foreign to its civil-law tradition. Part of this drive towards openness and internationalization may be plausibly connected to the ICC. This connection can be described mainly as providing a reason for local courts to change their attitude towards new and foreign developments that require a less traditional approach towards the linkage of an individual's position to a particular set of facts. Nonetheless, it is argued here that this exhausts the claimed influence of the ICC in this context. That is, despite the fact that perpetration-by-means has been explicitly provided for in the Rome Statute in article 25(3)(a) for the first time in international criminal law, and explicitly constructed by the Court as perpetration-by-means through an organized structure of power in its jurisprudence.[123] The doctrinal development adopted by the Colombian judiciary seems, by contrast, to have been taken from other Latin American countries.[124] That is, the concrete tools utilized by the Prosecutors and, subsequently, by the tribunals themselves were explicitly taken from the *Fujimori* decision in Peru,[125] and the references utilized there were to German Professor Claus Roxin, the Eichmann decision in Israel, the Wall shootings decision in Germany, and the Juntas decision in Argentina.[126]

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[121] ibid, 126.

[122] See, eg, Supreme Court of Justice, Criminal Cassation Chamber, Decision 33039, of 16 December 2010 (MP. José Leonidas Bustos Martínez) misapplying the Rome Statute for the definition of international crimes; and the Justice and Peace Chamber, of the Superior Tribunal of the District of Bogotá, in its decision against "El Iguano" with mistakes vis-à-vis the relevant sources of international criminal law (see, Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, 2 December 2010, Decision 110016000253200680281).

[123] See Decision on the Confirmation of Charges in *Porsecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, par. 494 and ff; and Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, in *Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09), Pre-Trial Chamber I, 4 March 2009, par. 213-216.

[124] See Supreme Court, Criminal Cassation Chamber, Decision 29640, 16 September 2009, citing cases from Argentina, Chile, and Peru applying this doctrine. See Eduardo Bertoni et al, *Digest of Latin American jurisprudence on international crimes* (Washington DC: Due Process of Law Foundation, 2010), 81-99, citing also cases from Bolivia and Uruguay.

[125] Interview C-4. Several Colombian magistrates had travelled to Peru to discuss technical aspects of the Fujimori decision with their local counterparts (Interview C-9). See, also, K. Ambos and I. Meini (eds.), "La autoría mediata. El caso Fujimori" (Lima: Ara, 2010).

[126] *Alvaro Alfonso García Romero*, Supreme Court, Criminal Cassation Chamber, Decision No 32805 (23 February 2010), at 78-79.

3.6 CRIMES AGAINST HUMANITY

A final area in which the impact of the ICC can be traced is the application by local authorities of the international law on crimes against humanity.[127] As it was stated above, there had been attempts to create a chapter on crimes against humanity in the domestic Criminal Code. This idea was ultimately abandoned "because the vagueness and ambiguity of many of these provisions at the international level" collided against a "firm" understanding of the principle of legality.[128] Yet, in a relatively short period of time the Colombian legal system changed drastically its approach towards crimes against humanity.[129] Interestingly, it was the Supreme Court, which was previously the toughest defender of the more traditional and restrictive views regarding the application of international criminal norms, which took the first steps. It explicitly stated that judicial bodies should not only apply "domestic laws, but that they should use that belonging to the constitutionality block and the decisions rendered by international bodies, such as the Human Rights Committee, the Inter American Commission of Human Rights and the Inter-American Court of Human Rights." [130]

Moreover, in their decisions in the case against "*El Iguano*", both the Criminal Chambers in Bogotá (*Tribunal Superior de Distrito Judicial de Bogotá*) and the Supreme Court considered that paramilitary forces committed certain actions considered grave in the light of IHL, including forced displacement, homicide and torture of protected persons, as well as other generalized or systematic offences that reach the level of crimes against humanity.[131] This particular understanding of the criminal phenomenon

[127] Interview C-6.

[128] See *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* (available at http://www.derechoshumanos.gov.co/LuchaImpunidad/Paginas/publicaciones.aspx, last accessed 7 June 2011).

[129] The same has obtained with prosecutions for war crimes (see Aponte, *Persecución Penal de Crímenes Internacionales*, 88). Admittedly, there are still not enough cases dealt with by the Supreme Court, and most of its involvement has been in the context of conflicts of competence between different branches of the judiciary. Unlike its previous doctrine, after 2007 the Supreme Court started to decide these conflicts in favour of homicide against protected person (against aggravated forms of homicide which do not constitute a war crime).

[130] Supreme Court, Criminal Cassation Chamber, Decision 32022, 21 September 2009 (M.P. Sigifredo Espinosa). On the relevance of the block of constitutionality in this regard, see eg, Decisions C-1188 del 2005 and T-578 del 2006.

[131] Superior Tribunal of the District of Bogotá, Justice and Peace Chamber, in the case against Jorge Iván Laverde Zapata, alias El Iguano, 7 December 2009, at 35. Supreme Court, Second instance decision, in the case against "El Iguano" Decision No 33301, 11 March 2010 (M.P. Alfredo Gómez Quintero).

was considered crucial for the purposes of capturing the "big picture" of paramilitarism.[132] As stated by Aponte, we can see in Colombia "significant progress in the application of the international rules, albeit limited specifically to the Unit on Human Rights and International Humanitarian Law and specialized judges [such as those of the JPL process] … where the more sophisticated debate is taking place."[133] In a similar vein, the Supreme Court suggested that genocide could be used even in cases in which the relevant conduct had been performed before the entry into force of Law 589(2000), given that this crime was already provided for in the 1948 Genocide Convention.[134]

To conceptualize crimes against humanity, the Supreme Court referred to several international instruments and decisions; but the Court went into particular detail to consider the content of Article 7 of the ICC Statute, which "codified figures contained in other international treaties or pacts" (sic) and the relevant bits of the Elements of the Crimes.[135] Similarly, the Constitutional Court argued that given that crimes against humanity are not defined in any domestic statute, "judicial operators should refer to the Rome Statute of the International Criminal Court, in particular, to article 7, and to the 'Elements of Crimes' adopted by the Assembly of the States Parties".[136] The direct application of these crimes provided for under international law was justified mainly through the notion of the Block of Constitutionality and article 93 of the Constitution, through which certain international human rights and humanitarian law covenants are considered binding law in Colombia.[137]

For instance, in a decision concerned with the rights of women to concrete protective measures, the Constitutional Court indicated that "sexual violence in the

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[132] As stated by the Supreme Court itself, this legal interpretation of the facts had two important legal implications: imprescriptibility of crimes and the ineffectiveness of the due obedience defence. On imprescriptibility, see in particular decision C-1036 (2006) by the Constitutional Court.

[133] These cases have not really reached the Supreme Court yet, besides jurisdictional conflicts between judges in which the issue at stake is precisely whether the offence constitutes homicide or homicide of protected person under IHL.

[134] Supreme Court, Criminal Cassation Chamber, Decision 33118 (13 May 2010).

[135] *Salvador Arana Sus*, Supreme Court, Criminal Cassation Chamber, Decision 32672 (3 December 2009), at 23. In support, see Interview C-6 and Aponte 2008, 210, referring to the influence of the ICC's Statute on the position of the Prosecutor's office.

[136] Constitutional Court, Decision T-355-07, at 23. Little or no reference was made to rules of customary international law, though.

[137] Decision 32022, at 29. Article 11 protects the right to life, Article 12 prohibits enforced disappearances, article 13 prohibits any form of discrimination based on gender, race, national or familiar origin, and so on, and article 17 prohibits slavery, servitude and human trafficking in all its forms.

context of an armed conflict is a serious crime that entails domestic and international criminal responsibility for their perpetrators, and which, depending on the circumstances of its commission may constitute a war crime or a crime against humanity."[138] For this purpose, and explicitly stating that such a proposition did not entail "affirmation of the jurisdiction of the International Criminal Court",[139] the Constitutional Court cited common article 3 to the Geneva Conventions, article 4.2.e of AP II, and articles 8.2.c.i and 8.2.e.vi of the ICC Statute referring to war crimes, and 7.1.g and h, which makes reference to crimes against humanity.[140] It also highlighted the customary nature of this kind of prohibition based on ICTY jurisprudence.[141]

And yet, with the broadening of the charges available both under the JPL and the Human Rights jurisdictions came certain substantive mistakes.[142] Chief among them is perhaps the use of the concept of aggravated conspiracy to commit a crime (*concierto para delinquir agravado*) as a discrete crime, rather than as a mode of liability.[143] The Supreme Court considered this "offence" as the "basic crime" in proceedings in accordance with the JPL, and it established that it is to be considered in itself a kind of crime against humanity.[144] For these purposes, the Court "highlighted … that the Rome Statute creating the International Criminal Court not only has taken into account the conduct of the perpetrator or participants, but also has given special consideration to the existence of plans to commit crimes against humanity" and cited article 25 of the Rome Statute.[145]

These doctrinal developments follow the same trend as other developments in the area of partial attribution of facts, or rules governing individual criminal liability examined

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[138] Constitutional Court, Decision 092(2008), at 63.

[139] ibid.

[140] In this context it made explicit reference to cases *Prosecutor v. Brdjanin and Zupljanin* (ICTY 1st September 2004),

[141] In particular, the Constitutional Court cited in support of this proposition ICTY cases *Prosecutor v. Anto Furundzija* (decision of 10 December 1998, para. 168, and *Prosecutor v. Dragoljub Kunarac et al* (decisions of 22 February 2001, and 12 June 2002).

[142] Interviews C-6, C-9 and C-11.

[143] Provided for in article 340-2 of the Colombian Criminal Code. On other important mistakes, see note 122 above.

[144] See, inter alia, Supreme Court of Justice, Criminal Cassation Chamber, decision No 26945, 11 July 2007 (M.P. Yesid Ramírez Bastidas y Julio Enrique Socha Salamanca); decision No 29472, 10 April 2008 (M.P. Yesid Ramírez Bastidas), and decisión 31582, 22 December 2009 (M.P. María del Rosario González).

[145] Supreme Court, Criminal cassation Chamber, decision No 29472, 10 April 2008 (M.P. Yesid Ramírez Bastidas), translation in Bertoni et al, *Digest of Latin American jurisprudence on international crimes*, at 110.

above. It has been argued that the *domestic* equivalent of conspiracy to commit a crime operates in practice as analogous to the contextual element associated with International Crimes in the Rome Statute.[146] Put differently, it forces local authorities to concentrate on the bigger picture, rather than on isolated crimes.[147] The positive aspect of this development is, thus, that it has required a substantial change of mentality from judicial authorities generally, and from prosecutors and investigators in particular. However, the problem with this development is that it seems to be based on a conflation. Namely, it treats as a crime, and in particular as a crime against humanity something which is, under international criminal law, a mode of participation in an offence.[148] On these same grounds, it has been criticized by a part of the Colombian academic literature.[149]

Utilizing the notion of crimes against humanity has certain important legal implications. At a minimum, and using the words of the Supreme Court, "statutes of limitations do not apply to crimes against humanity [; and] they are attributable to the individual that perpetrates them, regardless of whether he or she is acting as an organ of the State. [The perpetrator] cannot be exempted from criminal responsibility on the grounds that he may have acted following orders of a hierarchical superior."[150] In this same vein, the Constitutional Court referred specifically to the Rome Statute as the legal basis for precisely the finding of imprescriptibility.[151]

Moreover, the Constitutional Court has rejected the possibility of granting amnesties or pardons for crimes against humanity. It has argued that the JPL does not "establish the extinction of criminal proceedings with regards to crimes that could be

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[146] Kai Ambos, *Procedimiento de la Ley de Justicia y Paz (Ley 975 De 2005) y Derecho Penal Internacional. Estudio sobre la Facultad de Intervención Complementaria de La Corte Penal Internacional a la luz del denominado proceso de "Justicia y Paz" en Colombia* (Bogotá: GTZ, 2009), 132; and Aponte, *Persecución Penal de Crímenes Internacionales*, 200.

[147] Interview C-4.

[148] Conspiracy to genocide' used to be a separate mode of liability in the Genocide Convention and the Statutes of ICTY/ICTR. In the Rome Statute, however, the notion of 'conspiracy' disappeared. It may be considered to linger on in the 'common purpose' provision of Article 25(3)(d). I am grateful to Harmen van der Wilt for pointing this out to me.

[149] See, inter alia, Andreas Forer and Claudia López Díaz, *Acerca de los crímenes de lesa humanidad y su aplicación en Colombia* (Bogotá: GTZ, 2010), 33-34.

[150] Supreme Court, Criminal Cassation Chamber, Decision of 11 March 2010: "Son crímenes imprescriptibles. Son imputables al individuo que los comete, sea o no órgano o agente del Estado. Tampoco, puede ser eximido de responsabilidad penal por el hecho de haber actuado en cumplimiento de órdenes de un superior jerárquico: esto significa, que no se puede invocar el principio de la obediencia debida para eludir el castigo de estos" (translation by author).

[151] Constitutional Court, Decision C-580 (2002), C-370 (2006) and, in particular, C-1036 (2006). Again, emphasis is made on treaty law rather than the perhaps more appropriate, relevant rules under customary law.

attributed to members of armed groups who decide to subject their situation to it"; nor it "contains a provision that exonerates the criminal from serving his or her criminal sanction."[152] Entry into the JPL process is, admittedly, filtered by criminal investigations. That is, combatants who lay down their arms were classified into two groups: the first group includes combatants with ongoing criminal investigations for non-political war crimes and violation of IHL rules; the second group is composed by combatants with no pending sentences or charges, and no ongoing criminal investigations. The former were introduced to the JPL process in order to extract full confession, or are tried under the ordinary system if the conditions for eligibility are not met. By contrast, those in the second group were set free and no criminal proceedings are instituted against them unless they were subsequently found potentially liable of a crime.[153] In November 2010, the Constitutional Court ruled that this practice was unconstitutional, for it was a form of disguised amnesty. To reach that conclusion it explicitly referred to the Rome Statute.[154]

The Court also discarded that the possible benefit that wrongdoers could receive in accordance with the JPL meant some kind of hidden pardon. This is because,

> "the tribunal must impose in its sentence the punishments … established in the Criminal Code for the relevant crimes, within the limits thereby established. Further to imposing the relevant sentence for said crimes, the tribunal will decide whether to confer the legal benefit of the alternative penalty, provided that the beneficiary satisfies all the relevant requirements. Imposing an alternative penalty does not turn null and void nor extinguishes the original penalty. This penalty is extinguished only once this alternative penalty imposed is served in its entirety, and provided that all the relevant obligations derived from the requirements imposed for the conferral of the benefit are met."[155]

Again, to arrive at this conclusion the Court considered that "crimes provided for in the Rome Statute for the International Criminal Court, [ie] genocide, torture, enforced

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[152] See para. 3.3.3. of Decision C-370 (2006). This position was confirmed by the Constitutional Court in its decision C-575-06, para. 6.2.4.

[153] Given the considerable overload of the Colombian criminal justice system, this is a highly unlikely outcome.

[154] See Constitutional Court, Decision C-578-02 (M. P. Manuel José Cepeda Espinosa) stating that: "the principles and norms of international law accepted by Colombia…, the Rome Statute, and our Constitutional law only admit amnesties and pardons for political offences, and reject self-amnesties, blanket amnesties, full stop laws or any other mean that precludes victims exercising their right to a judicial remedy, as established by the Inter-American Court of Human Rights" (*"…los principios y normas de derecho internacional aceptados por Colombia (artículo 9 CP.), el Estatuto de Roma, y nuestro ordenamiento constitucional, que sólo permite la amnistía o el indulto para delitos políticos y con el pago de las indemnizaciones a que hubiere lugar (artículo 150. numeral 17 de la CP.), no admiten el otorgamiento de auto amnistías, amnistías en blanco, leyes de punto final o cualquiera otra modalidad que impida a las víctimas el ejercicio de un recurso judicial efectivo como lo ha subrayado la Corte Interamericana de Derechos Humanos."*) (Translation by author.)

[155] Decision C-370 (2006) para. 6.2.1.4.8.

disappearances, and summary, extrajudicial or arbitrary executions are international crimes, which are underogable and peremptory."[156]

4. CONCLUSION

To sum up, this report has argued that the relevant period has been one of intense normative development in Colombia. Although local authorities still overwhelmingly use domestic criminal law provisions in trials for international crimes,[157] Colombia has experienced a quite radical process of increasing openness towards international legal standards. This has obtained, albeit with certain significant conflations or mistakes, particularly in the fields of international human rights law and international criminal law. This trend has been influenced by many elements, some of which obey to domestic synergies.[158] However, it has been argued by several interviewees, and pointed out on the basis of a number of decisions by local courts, that the direction in which this process has developed has to do in one way or another with the ICC and its "supervisory" role in Colombia. In particular, at least one potential explanation for many of these developments could well be an existing concern to satisfy the requirements of the principle of complementarity in order to avoid an intervention by the ICC. At the same time, however, this particular trend towards a more systematic analysis of the phenomenon of mass criminality in Colombia has also been linked with the decisions of the Inter-American Court on Human Rights, which has explicitly required the Colombian State to take this line of action in its criminal investigations. Indeed, many observers suggest that all in all the Inter-American Court has been much more influential on the Colombian case than the ICC.[159] This influence, moreover, has arguably been impacted

[156] Decision T-821-07, note 69, at p. 39: "Son crímenes internacionales de carácter imperativo o inderogable, los consagrados en el Estatuto de Roma de la Corte Penal Internacional, el genocidio, la tortura, la desaparición forzada de personas y las ejecuciones sumarias, extralegales o arbitrarias." (Translation by author.)

[157] In general, Justice and Peace Units work on the basis of the 1980 Criminal Code, which did not contain war crimes. Aponte, *Persecución Penal de Crímenes Internacionales,* 160 and 183.

[158] In this respect, one could cite the confrontation between the Supreme Court and the Uribe administration mentioned in section 4, and the use of many international law developments by other actors such as victims' groups or NGOs.

[159] Interviews C-4, C-5, C-6, C-12 and two anonymous interviewees.

on Colombia through the standards developed, even more than by the fact that Colombia has been found responsible for human rights violations.[160]

[160] Interview C-2.

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