



THE IMPACT OF THE ICC IN COLOMBIA: POSITIVE COMPLEMENTARITY ON TRIAL

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 provides an assessment of the different ways in which the establishment of the ICC has influenced the local response to atrocities in Colombia. It situates the analysis by introducing, first, a brief portrait of the main features of the conflict in Colombia, and by describing in some detail its legal system. The rest of the report is organized around two main sections. The first one offers a comprehensive analysis of the influence of the ICC on Colombia's main transitional justice mechanism, the Justice and Peace Law (JPL). The second section provides an assessment of its impact on three particular areas, namely, prosecution rates before local courts, normative impact at a doctrinal level, and impact in terms of capacity development. A conclusion extracts some key observations over the policy of the ICC towards potential situation countries.

This report suggests that the influence of the ICC on the JPL framework has been mixed. On the one hand, it may be connected with certain positive developments. This influence can be perceived, for instance, in the way many domestic actors have made use of the “threat” of an intervention of the ICC to further accountability processes, and normative developments both in Congress and before the Colombian judiciary. The “shadow” of the ICC was also used to pressure (at least initially) the parties to the conflict. Furthermore, the ICC has also been influential in slowly driving prosecutors into focusing on the systematic and widespread character of mass criminality in Colombia, and changing their institutional division of labour from the traditional distribution by cases, to the more rational allocation of fronts within the conflict. It has also favoured progress in local criminal investigations generally, as shown by the unprecedented number of mass graves identified and unearthed. Finally, it is argued that the influence of the ICC contributed to enhancing the accountability elements contained within the JPL framework. It contributed, *inter alia*, to domestic legal authorities adopting tougher imprisonment conditions for paramilitaries, wider participation of victims within the processes, and more demanding provisions on reparations for victims.

On the other hand, this general process of “hardening” of the JPL also had several negative consequences. For one, the transitional justice process lost support of one of its two crucial actors, ie, the paramilitaries. This has led to the failure of the process of demobilization. This resulted in political and practical obstacles to effective investigations. Most significantly, this rupture may have led to the “parapolica” scandal,

which entailed the investigation of a significant number of politicians on the basis of their links with paramilitary groups, and signaled the final rupture between the administration and the paramilitaries. One of the possible consequences of this scandal was the extradition of 14 of the main paramilitary bosses to the US on drug-related offences. This ultimately made their continuing participation in the JPL proceedings much more difficult. All in all, these negative effects created serious obstacles which have not been overcome by local authorities, as illustrated by very significant delays in processing cases, the quashing of the first two convictions almost five years after the JPL framework begun operating, and difficulties in conducting meaningful investigations in the midst of enduring conflict.

As indicated, the next section of this report addresses the issues the impact of the ICC on three discrete areas or practices within the Colombian justice system. In terms of prosecutorial rates, it suggests that it is not possible to make any significant inferences regarding the intervention of the ICC at this stage. With regards to normative influence, it argues that the ICC has contributed to an ongoing process of internalization of international standards, both legislatively and in terms of their use by local courts. This impact can be best captured by looking at the rules concerning the attribution of criminal liability to someone in a position of leadership in a certain organization, such as a paramilitary commander, for the crimes of the organization, and the use of crimes against humanity despite the fact that they are not explicitly provided for under Colombia's domestic law. And yet, it is also suggested that this genuine process of internalization of international and foreign standards has been characterized by significant mistakes in the use of international criminal law concepts and sources. Finally, this report argues that the main contribution of the ICC in terms of enhancing the local capacity of domestic actors had little to do with the many trainings, and other direct capacity development initiatives conducted with local legal professionals. Rather, its main influence can be traced to the pressure it exercised over domestic actors so that they take the accountability element of the transitional justice process more seriously. This approach, however, is also connected to some of the main shortcomings in Colombia's transitional justice process, and the adoption of certain policies which have ultimately tended to overwhelm the system through unrealistic expectations.

The conclusion pulls out some critical observations regarding the policy of positive complementarity, implemented by the ICC to deal with situations like Colombia. This

report ultimately suggests that the impact of the ICC may have put Colombia in a no-win situation. That is, if the ICC were to close its preliminary assessment of the Colombia case, this would genuinely deprive actors who are pushing for investigations and prosecutions before the Colombian authorities of one of their key legal, argumentative, and political resources. By contrast, if the ICC were to open an investigation this may well also undermine the timid momentum that has been developed. And finally, the persistence of the “threat” may end up winding its capacity to move the key actors in the desired direction because it may simply lose credibility. In the conclusion, this report offers some suggestions out of this juncture.

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LIST OF ABBREVIATIONS

AUC.....	Autodefensas Unidas de Colombia
ICRC.....	International Committee of the Red Cross
CTI.....	Cuerpo Técnico de Investigación
DAS.....	Departamento Administrativo de Seguridad
ELN.....	Ejército de Liberación Nacional
EPL.....	Ejército Popular de Liberación
EU.....	European Union
FARC.....	Fuerzas Armadas Revolucionarias Colombianas
FGN.....	Fiscalía General de la Nación
GTZ.....	Deutsche Gesellschaft für Technische Zusammenarbeit
ICC.....	International Criminal Court
ICtHR.....	Inter-American Court of Human Rights
ICHR.....	Inter-American Commission for Human Rights
ICTJ.....	International Center for Transitional Justice
JPL.....	Justice and Peace Law
M-19.....	Movimiento 19 de Abril
OAS.....	Organization of the American States
OTP.....	Office of the Prosecutor
SIJIN.....	Seccional de Policía Judicial e Investigación
UNJP.....	Unidad Nacional de Justicia y Paz
USAID.....	<i>United States Agency for International Development</i>

1. INTRODUCTION

The armed conflict in Colombia is arguably the lengthiest in the Western Hemisphere. Like many other conflicts in different parts of the world, it has been characterized by the perpetration of mass atrocities and widespread impunity. The establishment of the International Criminal Court (ICC) has, at least on paper, the capacity to change this scenario by altering the behavior of both illegal armed groups and public authorities. Put briefly, the ICC provides now the “legal mechanisms” to tackle impunity if Colombia fails to do this itself.¹ The Rome Statute, however, identifies states as the main bearers of the duty to investigate and prosecute individuals for core international crimes.² In Colombia the ICC has not launched an investigation so far. It has only made public the fact that it is under preliminary examination, namely, that it is assessing the progress of accountability processes being conducted before domestic authorities. As such, it provides an interesting case study of the ways in which the ICC, and in particular its Office of the Prosecutor (OTP) have decided to use the institutional tools the Rome Statute provides to encourage and support local accountability processes.

This report focuses on the different ways in which the establishment of the ICC has influenced the local response to atrocities. It argues that, on the one hand, the ICC has had certain positive impacts on the situation in Colombia. This positive influence can be perceived in the way many domestic actors have made use of the “threat” of an intervention to further accountability processes, and normative developments both in Congress and before the Colombian judiciary; the “shadow” of the ICC was also used to pressure (at least initially) the parties to the conflict. At the same time this report argues that the ICC has also facilitated several disruptive elements. The influence of the ICC can be connected with the extradition of paramilitary bosses, or serious delays and unrealistic demands on Colombia’s transitional justice process. Admittedly, these difficulties should be evaluated in the light of the fact that the conflict in Colombia has not come to an end, and that the paramilitary groups that initially agreed to demobilize have

¹ Manuel Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción* (Bogotá: Siglo del Hombre Editores, 2010), Chapter 4.

² The ICC would intervene only if the state with primary jurisdiction over the relevant offences is either unwilling or unable to do so. Rome Statute, Preamble, Article 1 and Article 17.

failed to do so. And yet they allow us to critically assess the strategic decisions that the ICC has made in order to encourage domestic efforts to achieve criminal accountability.

Before we start, three brief points of clarification are in order. First, the scope of this paper must be circumscribed in at least one respect. The analysis it provides leaves out important elements, particularly the influence of other international tribunals or institutions, most notably the Organization of the American States (OAS), the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (ICtHR). Although sporadic reference will be made to these bodies – which, after all, did play an important role in connection with certain developments of the legal and political situation in Colombia – this report seeks to identify and isolate the possible impacts of the ICC. Secondly, the research for this article is substantially based on a number of interviews conducted in Bogotá, The Hague and London between the end of 2008 and the end of 2009. Selection of interviewees was aimed at getting as balanced a picture as possible although, for confidentiality reasons, no statements are explicitly attributed to any them.³ Finally, the research underlying this report is updated to December 2010, although efforts have been made to include certain specific developments that occurred until the end of that year.

The report is structured as follows. Sections 2 and 3 provide, respectively, a succinct background to the conflict in Colombia and of Colombia's legal system. Section 4 describes the Colombian response to mass atrocities with particular emphasis to its transitional justice mechanism known as Justice and Peace Law (JPL) and the involvement of the ICC therein. Section 5 assesses the policy of positive complementarity followed by the ICC and its effects on Colombia by examining its impact on prosecution rates, on normative developments and the enhancement of local capacity. Section 6 summarizes the key findings and provides a few concluding remarks.

2. BACKGROUND OF THE CONFLICT

The conflict in Colombia started in the period of 1948-1953, known as “*La Violencia*”, between Liberal guerrillas and Conservative groups. In 1957, and after a military coup, the National Front composed of Liberals and Conservative accessed power. Meanwhile,

³ For a list of interviewees, see the Annex to this Report.

in rural areas newly created self-defence groups became the basis for the leftist guerrilla groups. Although initially the conflict was predominantly political in nature, since the 1990s at least, drug trafficking became at its very core (and a permanent obstacle to peace and stability in Colombia), financing illegal armed groups and continuing to infiltrate politics and the economy.⁴

The conflict involves three main groups of actors: the leftist-guerrillas, the paramilitary groups, and the state armed forces. Among the former, the *Ejército de Liberación Nacional* (ELN) was formed around 1964 and only two years later the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) were established with a Marxist programme to create a “New Colombia”. Other groups such as the *Ejército Popular de Liberación* (EPL) and the *Movimiento 19 de Abril* (M-19) sought to bring the conflict to more urban areas.⁵ Paramilitary forces, by contrast, were initially formed to fight these guerrilla groups.⁶ But they were also involved in internecine fighting between different drug cartels (eg, they were heavily involved in the assassination of Pablo Escobar in 1992).⁷ They represented the armed response of regional elites, large-landowners, ranchers, and drug traffickers not only against the guerrillas, but also against the political reforms in the region attempted by the central government.⁸ The military has traditionally been understaffed and underfunded and thereby required the support or “supplement” of the paramilitary forces in Colombia.⁹

The different factions in the conflict became more powerful during the 1980s and 1990s. With the disappearance of the two main cartels (Medellín and Cali) the drug industry atomized into several groups. The guerrilla organizations (particularly FARC)

⁴ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 3.

⁵ For a good summary, see Jennifer S. Easterday, “Deciding the Fate of Complementarity: A Colombian case study”, *Arizona Journal of International and Comparative Law* 26 (2009), 63-65, and the references cited therein.

⁶ The Medellín drug cartel was key to the creation of these groups.

⁷ In fact, the Castaño brothers, who founded the AUC, came from a group called the “Pepes” (ie, people persecuted by Pablo Escobar).

⁸ Note, though, that the Inter-American Court of Human Rights has recognized that the paramilitary phenomenon was not only accepted by state authorities, but rather encouraged and heavily supported, see, eg, *Caso de la masacre de La Rochela v. Colombia*, Decision of 11 May 2007, Series C No 163, and *Caso de la masacre de Pueblo Bello v. Colombia*, decision of 31 January 2006, Series C No 140, among others.

⁹ With the end of the Cold War and under the Reagan administration it launched its war on drugs, which meant huge support and operation in Colombia. US forces were both involved in the killing of Pablo Escobar (of the Medellín Cartel) and in the fall of the Cali Cartel, some years later. The Pastrana administration (1998-2002) was perhaps the first one to frame the problems in Colombia as the result of drug trafficking. Thus it was able to convince consumer countries, and notably the US, to become even more heavily involved by supporting local efforts. This gave way to the Plan Colombia (see Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, chapters 2 and 3).

and paramilitaries took advantage of this power vacuum, becoming key players in the drug business.¹⁰ The FARC went from 900 combatants, distributed across 9 fronts in the early eighties, to a force numbering between 11,000 and 12,000 combatants, distributed across 60 fronts in the late nineties. The ELN went from 70 combatants distributed across 3 fronts, to 3,500 combatants in 30 fronts. By 1998, the guerrillas had an estimated annual income of 600 millions US dollars.¹¹ In 1997 Carlos Castaño created the *Autodefensas Unidas de Colombia* (AUC) which consolidated the relevant local paramilitary groups acting in different parts of the country. Their main objective was to fight the guerrillas (mainly the FARC) and penetrate the territories in which the AUC had their main source of funding (through drug-trafficking). This would signal the beginning of “one of the bloodiest times in Colombian history, with more than a thousand massacres, millions of people displaced by violence, and the alliance between paramilitaries and politicians in the regions and the expansion of paramilitary might throughout the country.”¹² Members of all three groups have been allegedly involved in serious human rights violations. The conflict has been characterized by the systematic targeting of civilians, extrajudicial killings and massacres, forced disappearances, sexual offences and torture.¹³ The victims of the struggle have overwhelmingly been people living in rural areas. This has created an enormous problem of displaced people in Colombia.

In September and October 1998 the Pastrana administration granted political recognition to FARC and ELN and in 1999 a peace process with FARC and ELN was formally launched.¹⁴ This was, interestingly, the time of the greatest expansion of the AUC. The process broke down in February 2002, when FARC kidnapped an airliner in order to take some political figures as hostages. Uribe, up until then a relatively unknown figure in national politics, was subsequently elected to the highest political office through advocating the harshest policies against FARC.¹⁵ The first policy pursued by the Uribe

¹⁰ *ibid*, ch. 3.

¹¹ Approximately 48% of FARC's income came from drug trafficking, 36% from extortion, 8% from kidnapping, 6% from cattle rustling, and the rest from armed robbery of banks and other financial institutions. Rangel 2001: 391.

¹² See <http://www.verdadabierta.com/la-historia/> (last accessed 4 January 2012).

¹³ See, generally, IACHR, *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, OEA/Ser.L/V/II, doc 67, paras. 54-56 (Oct. 18, 2006).

¹⁴ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 3. The FARC were not negotiating their surrender or demobilization, but rather they were allegedly pursuing an ambitious reforms programme in which they would share power to some degree.

¹⁵ A year before elections, Uribe had no more than 2% of voters' support.

administration was called Democratic Security. Its main aim was to consolidate state control over Colombian territory and confront six “interrelated threats”, namely, terrorism, illegal drug trafficking, traffic of arms, ammunitions and explosives, kidnapping and extortion, and homicide.¹⁶ As it will be argued in some detail below, Uribe was also responsible for the policy of demobilization of paramilitary forces which ultimately led to the Justice and Peace Law’s transitional justice mechanism. This framework has been put into question on several grounds, including the tiny number of decisions (2 more than five years after its entry into force), the congestion it created within the judiciary, the lack of meaningful confessions, and the failure in terms of effective demobilization.¹⁷ In 2009, Uribe was succeeded by his former Minister of Defence, Manuel Santos. In June 2011, Santos signed into law the Victims and Land Restitution Act, which contains explicit provisions regarding reparation to victims of the conflict by giving them back their land.¹⁸

3. THE NATIONAL LEGAL SYSTEM

The Judiciary in Colombia is composed of 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.¹⁹ The Prosecutor General’s main function is to investigate alleged crimes and bring cases before the competent judicial authority.²⁰ 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

¹⁶ Presidencia de la República, Ministerio de Defensa, “Política de Defensa y Seguridad Democrática” (2003), 24 (available at http://www.derechoshumanos.gov.co/Programa/Documents/2010/seguridad_democratica.pdf last accessed July 22 2011).

¹⁷ See section 4.1.

¹⁸ See *El País*, “Santos aprueba la Ley de víctimas y restitución de las tierras” (11 June 2011), available at http://www.elpais.com/articulo/internacional/Santos/aprueba/Ley/Victimas/Restitucion/Tierras/elpepuint/20110611elpepuint_2/Tes (last accessed on 20 July 2011).

¹⁹ 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 (Constitution of Colombia, Article 233); and Military Penal Code, Law 1407 of 2010.

²⁰ 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.

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-atrocity crimes are heard, at the trial level, by *Specialized Circuit Courts* – the heirs of emergency criminal justice. These courts are of the same hierarchy of Circuit Courts, though they specialize on crimes with greater impact, usually related to the conflict, such as drug-trafficking, terrorism, and organized crime.

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. Violations of international humanitarian law and human rights are not regarded as service-related offences. 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.²¹

Two Penal Codes are relevant for the period 1990-2010: the 1980 Penal Code and the 2000 Penal Code. General principles of the criminal law system, definition of crimes and sentencing are included in these legislative acts. There is no life imprisonment²² or capital punishment²³ and the maximum sentence term prescribed is sixty years. The 1980 Penal Code included the offences of conspiracy to commit a crime (*concierto para delinquir*)²⁴ and terrorism.²⁵ Other mass-atrocity crimes were regulated under different types of homicide,²⁶ personal injuries,²⁷ and other offences.²⁸ The new

²¹ Law 1407 of 2010, Articles 1 and 3.

²² Political Constitution', Article 34.

²³ *ibid*, Article 11.

²⁴ Decree 100 of 1980 (Penal Code), Article 186.

²⁵ *ibid*, Article 187.

²⁶ *ibid*, Article 323.

²⁷ *ibid*, Article 331.

²⁸ *ibid*, Article 268 (kidnapping), Article 355 (extortion).

substantive criminal law is Law 599/2000.²⁹ This new Criminal Code contains certain international crimes, although with slight variations. Regarding genocide, for instance, in addition to the protected groups included in both the Genocide Convention and the Rome Statute, Colombian law also protects *political* groups.³⁰ Some crimes against humanity, such as enforced disappearance of persons³¹ and forcible transfer of population, have also been included in this new law.³² War Crimes were incorporated in the Criminal Code under the title of 'Crimes Against Persons and Property Protected by International Humanitarian Law'.³³ The comprehensive list of offences found there includes homicide, sexual offences, forbidden means and methods of war, and conscription of child soldiers, amongst other crimes.³⁴ Finally, the successive Military Penal Codes enacted in 1988,³⁵ 1999³⁶ and 2010³⁷ include chapters on *crimes against the civilian population*, including devastation, looting, and requisition.

There have also been significant changes with regards to criminal procedure law.³⁸ 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, following a constitutional reform³⁹, the system further gravitated towards an Anglo-American adversarial model. Under the 2004 Code of Criminal Procedure, prosecutors' powers are limited; and any pre-trial measures involving the restriction of fundamental

²⁹ 'Criminal Code', Law 599 (24 July) Official Diary 44.097 (24 July 2000).

³⁰ 'New Criminal Code', Article 101. For a more detailed treatment of this issue, see section 5.2.

³¹ *ibid*, Article 165.

³² *ibid*, Article 180. The contextual element of the offence found in the Rome Statute, that is that the act is committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack', is not required.

³³ *ibid*, Articles 135-164.

³⁴ On the domestication of the Rome Statute, see section 4.

³⁵ Decree 2550 of 1988.

³⁶ Law 522 of 1999.

³⁷ Law 1407 of 2010.

³⁸ 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).

³⁹ Legislative Act 002 of 2003.

rights require authorization by a judge. This procedure is also predominantly oral.⁴⁰ 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.⁴¹

During the last three decades the various Colombian criminal law institutions have manifested 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, terrorism and the like. During the 1980s military tribunals were given jurisdiction to prosecute and sentence civilians for mass-atrocity crimes.⁴² 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 presented by drug cartels, guerrilla and paramilitary groups.⁴³ 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).⁴⁴ Regional Justice was abolished at the end of the 1990s and a permanent, “specialized” justice was created within the ordinary criminal justice system to deal with particularly grave offences – many of them related to the armed conflict.⁴⁵ Despite the new framework, little has actually changed.⁴⁶ Specialized Circuit Judges are still a moderated form of emergency criminal justice, for they operate under special criminal procedures which restrict the rights and guarantees of the accused, on the basis of the argument that they represent a threat to

⁴⁰ 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.

⁴¹ ‘New Code of Criminal Procedure’, Article 533.

⁴² The Supreme Court of Justice declared in 1989 that such practice violated the Constitution, and struck down the provisions allowing this practice.

⁴³ 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.”

⁴⁴ See Decree 2790 (1990, also known as the Statute for the Defense of Justice), and Decree 2700 (1991), which enacted a new Procedural Penal Code.

⁴⁵ Law 504 of 1999.

⁴⁶ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 3.

the state and society due to the seriousness of the offences for which they are being prosecuted. In 2005, the JPL jurisdiction and legal framework was established.

4. 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.⁴⁷ This decision was adopted without previous consultations and was heavily criticized.⁴⁸ The reason for the reservation was, arguably, to facilitate the peace negotiations with the FARC and other groups.⁴⁹ This reservation had been agreed to by Uribe who succeeded Pastrana a few months later.⁵⁰

The implementation of the Rome Statute required a rather complex procedure, which included a constitutional amendment. It was approved by Law 742 (2002), and this Law was assessed by the Constitutional Court.⁵¹ Instead of simply stating that Rome Statute was in accordance with the Colombian Constitution, the Court went much 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. The analysis of this decision is beyond the scope of this report.⁵² Now, because some of the provisions in the Statute did go against certain specific provisions in the Colombian Constitution, the following text was added to article 93:

⁴⁷ This period expired in November 2009.

⁴⁸ 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)).

⁴⁹ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

⁵⁰ Interview C-5.

⁵¹ Decision C-578 of 2002.

⁵² For a more detailed analysis, see Alejandro Aponte, “Colombia”, in Kai Ambos et al, *Persecución Penal Nacional de Crímenes Internacionales en América Latina y España* (Montevideo, Ur: Konrad Adenauer, 2003), 201-256 [hereinafter, “Colombia”].

“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.”⁵³

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.”⁵⁴ 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.⁵⁵ Otherwise, the Constitutional Court could have considered certain provisions of the Statute as contrary to the Colombian Constitution.

The remainder of this section examines Colombia’s response to mass atrocities before the permanent criminal jurisdiction and the specific legal regime designed to deal with some of the international crimes arising from the conflict, the JPL framework. For present purposes it may suffice to note, though, that the decision of the Constitutional Court regarding the implementation of the ICC Statute in Colombia was mentioned during the parliamentary debate of the JPL.⁵⁶ Moreover, the entry into force of the Rome Statute brought about significant pressure on members of the different armed groups.⁵⁷ Most symbolically, perhaps, one of the Castaño brothers, a prominent paramilitary leader, retired the day before the ICC Statute entered into force.⁵⁸

⁵³ Translation by author. The Spanish text 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 a las garantías contenidas en la Constitución, tendrá efectos exclusivamente dentro del ámbito de la materia regulada en él.”

⁵⁴ Constitutional Court, Decision C-578 (2002), 50-52.

⁵⁵ *ibid*, 53 and 143.

⁵⁶ Interview C-4.

⁵⁷ Interviews C-7 and C-10.

⁵⁸ Interview C-5.

4.1 JUSTICE AND PEACE LAW (JPL) FRAMEWORK

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 AUC. This was based on the Santa Fe de Ralito Accord, a secret instrument agreed by some paramilitary leaders and 30 politicians in the Atlantic Coast.⁵⁹ Many leaders of the AUC agreed to 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.⁶⁰ 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.”⁶¹ 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.⁶²

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.”⁶³ 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

⁵⁹ It has been published in its entirety, in the Colombian newspaper *El Tiempo*, 19 January 2007, Bogotá. This agreement was signed in the context of the negotiations between the Pastrana Administration and the FARC, and the request, by the latter, to see concrete results with regards to the paramilitary phenomenon.

⁶⁰ This was important as several paramilitary leaders already had important sentences imposed upon them (which they were not serving). Interview C-5.

⁶¹ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

⁶² Two anonymous interviewees.

⁶³ “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).

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”.⁶⁴ The JPL was approved by Congress on 20th June 2004, and signed into Law 975 on 22nd July 2005.

The JPL was originally meant as complementary to Law 782 (2002) for cases in which the type of criminal behaviours perpetrated by members of organized armed groups was not covered by the latter, that is, when pardon, suspension of proceedings, or other type of decision were not applicable, precisely because of their link to mass atrocity crimes.⁶⁵ That is, while Law 782 only provided for negotiations with AUC, and the possibility of pardoning political offences, the JPL was presented as a transitional justice tool.⁶⁶ The main objectives of the JPL were to facilitate the peace process and ensure reintegration of members of organized armed groups into civil life, and to ensure victims’ their rights to truth, justice and reparation.

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.⁶⁷ Part of civil society never saw the Justice and Peace process as a justice process, ie, as a process for making individuals criminally liable for mass atrocities. Rather, the process was often viewed as a negotiation between two close parties (the Uribe administration and the paramilitary kingpins⁶⁸) to sort out a particular problem.⁶⁹ This was not a process of negotiation between the government and a seditious group.⁷⁰ Indeed, the links between paramilitary groups and state structures

⁶⁴ Interview C-4.

⁶⁵ See La Verdad Abierta, “Procesos de Justicia y Paz” (13 November 2008), available at <http://www.verdadabierta.com/la-historia/periodo4/justicia-y-paz> (last accessed 19 April 2011).

⁶⁶ See, eg, Bills 211/2005 of the Senate and 293 of the House of Representatives. See also Decree 3391/06, Article 2.

⁶⁷ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

⁶⁸ 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. On this see, “Alvaro Uribe accused of Paramilitary Ties”, The Guardian, 8 September 2011, available at <http://www.guardian.co.uk/world/2011/sep/08/alvaro-uribe-accused-paramilitary-ties> (last accessed on 14 September 2011).

⁶⁹ Interview C-4.

⁷⁰ Paradox of sedition, the Constitutional Court, and the extradition for political crimes.

were very close.⁷¹ Some suggest that the Justice and Peace process was a way of laundering money and reputation: “they go to prison for 5 years and when they are out, they have full right to their assets, and they keep their influence and power in the region.”⁷² The JPL stands in striking contrast with the Democratic Security Policy, which provided harsh penalties to left-wing guerrillas.⁷³

Admittedly, entry into this process is filtered by criminal investigations. Combatants who lay down their arms are classified into two groups. The first group includes combatants with ongoing criminal investigations for non-political war crimes and violation of IHL rules. They are introduced to the JPL process in order to extract full confession, or are tried under the ordinary system, if the conditions for eligibility into JPL are not met. The second group concerns combatants with no pending sentences or charges, and no ongoing criminal investigations. They are set free and no criminal proceedings are instituted against them for paramilitarism unless they are subsequently found potentially liable of a different crime (eg, drug-trafficking, torture, etc).⁷⁴ In November 2010, the Constitutional Court ruled that this practice was unconstitutional, for it was a form of disguised amnesty. In Colombia, amnesty is only available with respect to political crimes, but paramilitarism has been refused this status.⁷⁵ By the time of the writing of this text, it is still unclear how this second group will be treated.⁷⁶

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 jurisdiction also have a duty of continued cooperation with the authorities in dismantling the illegal armed group to which they belonged, of not committing any new

⁷¹ On this see the section on parapolitics below.

⁷² Interview C-2.

⁷³ *ibid.*

⁷⁴ Given the considerable overload of the Colombian criminal justice system, this is a highly unlikely outcome.

⁷⁵ See Colombian Supreme Court, Decision 26945, of 11 July 2007.

⁷⁶ The Santos Administration has signed Law 1424 of 2010, which deals with individuals belonging to a paramilitary organization who have not been involved in specific war crimes or crimes against humanity (Articles 1 and 7). This Law, and Decree 2601 of 2011 that complements it, establish a process through which individuals belonging to these groups receive some kind of probation provided they satisfy certain requirements and they accept certain obligations. The Administration claims this law does not constitute a form of amnesty or pardons for this group of paramilitaries (*La Semana*, “No habrá indulto o amnistía para grupos armados ilegales: Gobierno” (11 June 2011), available at <http://www.semana.com/nacion/no-habra-indulto-amnistia-para-grupos-armados-ilegales-gobierno/158553-3.aspx> (last accessed on 22 July 2011)). Most of the key provisions of this Law and its Decree, in any event, are under consideration before Colombia’s Constitutional Court (Claim D-8475).

crimes, and of contributing to their own rehabilitation through work or study.⁷⁷ Non-compliance with these commitments is punishable by the imposition of the much higher sentence applicable under the Penal Code.

As of June 2010, approximately 25,000 former combatants from paramilitary forces laid down their arms. 4346 of them were included in the JPL to be tried before its jurisdiction. Of these, 266 have been indicted, and 12 have been charged. Of these 12 defendants, a judgment has been pronounced on 2 cases, both related to the *Massacre of Mampuján*, which involved the intentional killing of 11 civilians by a paramilitary group on 10 March 2000.⁷⁸ Until 30 September 2009, there were 257,089 registered victims.⁷⁹ A particular feature of the JPL is that it was both politically and juridically designed to address only one of the main actors of the conflict: the paramilitaries. “There was no room”⁸⁰ for public officials or other actors (namely, guerrilla groups). And yet, “at least five heavyweight drug barons, feeling the pressure from the United States, joined the AUC to pose as paramilitaries, thus becoming eligible to enjoy the eventual benefits of a peace negotiation with the Government.”⁸¹ Although some isolated members of guerrilla organizations have joined the JPL process,⁸² their involvement is still marginal.⁸³

Law 975 was eventually reviewed by Colombia’s Constitutional Court.⁸⁴ As Iturralde points out, “[t]he Court ... made a display of its political skills, for it showed independence from the government and its allies, who subjected it to intense pressure.”⁸⁵ In a 6-3 decision, it ruled that the JPL was compatible with Colombia’s “Constitutional

⁷⁷ Law 975 of 2005, Article 29.

⁷⁸ See <http://www.cej.org.co/justiciometros/2402-avance-de-los-procesos-de-justicia-y-paz> (last accessed 16 April 2011). Since then, a further conviction has been obtained.

⁷⁹ UNJP Figures, Report on the application of the JPL of 15 October 2009 (unpublished document, on file with the author).

⁸⁰ Interview C-6.

⁸¹ To do this they “bought” paramilitary fronts, as if they were franchises. “‘Don Diego’ quería comprar frente ‘para’”, *El Tiempo* (05-12-2005); “Cúpula paramilitar que amenaza con volver al monte no es la misma que inició los diálogos de paz” *El Tiempo* (30-04-2005).

⁸² At the end of 2009 there were already three or four prosecutors working specifically on demobilized guerrilla (interview C-6).

⁸³ Interviews C-7 and C-10.

⁸⁴ 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.

⁸⁵ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

block”,⁸⁶ thereby preserving the demobilization process with the AUC. However, it also 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 made them conditional to full confession of the crimes perpetrated as members of illegal armed groups, and full disclosure of their unlawful activities.⁸⁷ In cases where defendants refrained from complying with these requirements, they would lose their benefits and their cases be transferred to the permanent jurisdiction for prosecution.⁸⁸

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 considered the provision requiring prosecutors to bring charges against defendants “immediately” after the full version unconstitutional, thereby providing them with a more sensible amount of time to build the case before taking the applicant before a guarantees magistrate. 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.⁸⁹ It also established that demobilized members of illegal armed groups would have to compensate their victims not only with illegally obtained assets, but also with their lawfully obtained assets.⁹⁰

⁸⁶ 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.

⁸⁷ Constitutional Court of Colombia, Decision C-370, 211.

⁸⁸ *ibid*, paras. 6.2.2.1.1 – 6.2.2.1.7.30.

⁸⁹ *ibid*, paras. 6.2.3.2.2.1 – 6.2.3.2.2.10.

⁹⁰ *ibid*, paras. 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).

Some argue that if this decision had been fully implemented, it would have had better results in terms of ensuring victims' rights to truth, justice and reparations in Colombia.⁹¹ The Government, however, repealed *de facto* some of the main findings of the court, by its regulatory activity.⁹² A good example of this was Decree 3391, which establishes that regular detention sites administered by the state penitentiary authorities "may" be used for JPL detainees. However it neither states the features of those sites, nor brings them within the authority of penitentiary authorities. "The measure proved so unpopular among the media, political opposition, and public opinion that the government backtracked and enacted a more restrained decree, which nonetheless made clear that the Court's decision was not retroactive."⁹³ This meant that those groups that had already demobilized could still take advantage of some of the benefits struck down by the Court, such as counting the time spent in concentration zones as part of the prison sentence. Even more importantly for the paramilitaries, the government claimed that, as long as they observed the terms of the JPL, it would not exercise its prerogative to extradite them.⁹⁴

In any event, and despite subsequent action by the Colombian administration, the Constitutional Court's decision left two possible scenarios open. Either the Paramilitaries yielded to the pressure, or they rebelled and forced the Administration into a new agreement so that they would present a new law and fresh new rules. Ernesto Báez, one of the top paramilitary commanders, made it clear that this decision had provided a "fatal blow" to the peace process. As a result of this, the paramilitary leaders started linking politicians to their illegal activities.⁹⁵

Significantly for our purposes, the ICC may have influenced some of these developments in Colombia. Many interviewees suggested that the clearest impact of the ICC in the JPL context has been in the manner its existence has been used by national actors or stakeholders. An important part of human rights organizations, NGOs, victim groups, etc used the existence of the ICC to persuade public authorities of the need to

⁹¹ Interview C-4.

⁹² For a detailed analysis of this issue, see *La Metáfora del desmantelamiento*, Chapter VI, section 1.

⁹³ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

⁹⁴ This did not materialize. On this see the section on extraditions below.

⁹⁵ Interviews C-4, C-5, C-8 and C-14.

strengthen and advance the accountability process.⁹⁶ 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 unlikely that the ICC would open an investigation.⁹⁷ In August 2008, he sent another public letter to the Colombian Government asking what steps were being taken to ensure that the main responsible for mass atrocity crimes, including politicians and Congressmen, could be tried for their offences.⁹⁸ The ICC Prosecutor repeated in December 2008 that he “would ensure that there will be justice in Colombia; if it is not pursued by Colombian judges, the Court will intervene.”⁹⁹ The existence of the ICC and its supervisory role on Colombia may have influenced the specific decisions of the Constitutional Court on the JPL framework. However, on this particular area, many commentators perceive a more decisive influence of the international human rights law movement, chiefly of the Inter-American Court of Human Rights.¹⁰⁰ Also, albeit more controversially, the US State Department may have also influenced this process as a result of its need to certify each year Colombia’s record on human rights. A bad review would seriously limit and could even block the provision of economic and military aid.¹⁰¹ In any event, the “hardening” process that the JPL underwent was clearly in the direction the ICC may have expected and, in that respect, it may have helped delay or avoid a direct intervention by the latter in the situation in Colombia.¹⁰²

4.1.1 “PARAPOLITICS”, EXTRADITIONS AND THE JPL FRAMEWORK

The process through which the JPL was strengthened had an unexpected consequence. Certain politicians began attacking the government on behalf of paramilitary leaders

⁹⁶ Interviews C-2, C-5, and C-7, among others.

⁹⁷ Interview C-2.

⁹⁸ In Ana María Díaz, “La sociedad civil espera la acción de la Corte Penal Internacional en Colombia” *El Monitor* 38, October 2009, 17.

⁹⁹ *Diario Nuevo Siglo*, “O Colombia hace justicia o nosotros lo haremos: CPI”, December 9 2008 (cited in *La metáfora del desmantelamiento*, 292).

¹⁰⁰ Interviews C-3, C-5, C-, and C-10 among others.

¹⁰¹ Although the US allegedly supported the Law, they argued that they would insist on the extradition on the AUC top commanders (interview C-14).

¹⁰² Interview C-4.

precisely because of the links between them.¹⁰³ An example of this is the way in which former congressperson Yidis Medina changed her statement and testified that she had voted in favour of President's Uribe re-election as a result of receiving benefits from public officials.¹⁰⁴ Similarly, Vicente Castaño and Salvatore Mancuso, two prominent leaders of the AUC, publicly recognized that around 35% of Congressmen were "their friends" and that the AUC had direct links with many politicians in their respective regions.¹⁰⁵ Thus the expansion of JPL seems to have contributed to a conflict which came to be known as the "parapolitica" scandal.

Part of the "expansion" of the JPL involved congressmen and politicians, although they refused to come under this voluntary framework. Under Colombia's Constitution, Congressmen are to be investigated and tried by the Supreme Court as a first and final instance tribunal. As of mid-2010, 25 of the more than a hundred congressmen that were being investigated on grounds of their links with paramilitary groups have been convicted.¹⁰⁶ A commentator suggests that "although the number of convictions is still low, the evidence gathered in these judicial proceedings largely exceeds the most unrealistic expectations held beforehand regarding the size and the implications of these links between politicians, public officials and criminal organizations."¹⁰⁷ In fact, some of the decisions by the Supreme Court have considered that certain politicians were not only connected to the paramilitary groups; since the separate opinion in the case against Ricardo Elcure Chacón, they have explicitly admitted the possibility that they be liable for

¹⁰³ This phenomenon has a long history. In 1994 President Samper was accused, on the basis of taped phone conversations, of receiving large sums of money for his campaign from the Cali Cartel. This was investigated under what came to be known as Process 8,000.

¹⁰⁴ Interview C-5. See, similarly, interview C-4.

¹⁰⁵ In Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

¹⁰⁶ For updated information on the number and situation of defendants, see <http://www.verdadabierta.com/parapolitica> (last accessed, 18 April 2011).

¹⁰⁷ Claudia López Hernández (ed), *Y refundaron la patria. De cómo mafiosos y políticos reconfiguraron el Estado colombiano* (Barcelona: Random House Mondadori, 2010), chapter 1.

crimes against humanity perpetrated by these groups.¹⁰⁸ These investigations, some argue, have also created momentum for prosecutors dealing with mass atrocity crimes.¹⁰⁹

One of the institutional consequences of the “parapolitics” scandal was a direct confrontation between the Uribe Administration and the Supreme Court.¹¹⁰ Some observers have even spoken of “open persecution” of Supreme Court members.¹¹¹ This, in turn, had implications for the JPL framework at different levels. Previously, the conflict was between the executive and the Constitutional Court, partly because of the latter’s positions regarding issues such as imprescriptibility of crimes under international law, and application of international human rights standards to the “peace” process, as exemplified by decision C-370. Partly as a result of its new composition, partly as a result of unmet expectations,¹¹² and partly as a result of its intervention in JPL decisions,¹¹³ the Supreme Court changed certain aspects of its traditional legal doctrine for an approach more in line with international human rights and international criminal law standards.¹¹⁴ This confrontation strengthened the public position of the Supreme Court giving it far more independence from the political authorities and brought it in line with the

¹⁰⁸ See Comisión Colombiana de Juristas, “¿La “parapolítica al desnudo?”, *Boletín No. 41: Sobre los derechos de las víctimas y la aplicación de la Ley 975*, Bogotá, 22 October 2009, available at http://www.coljuristas.org/documentos/boletines/bol_n41_975.html (last accessed 6 April 2011). See also, prosecution of retired general Rito Alejo del Río which was the result of the words of Fredy Rendón Herrera (aka “The German”) in the context of a JPL hearing at <http://www.verdadabierta.com/justicia-y-paz/2129-doce-paramilitares-fueron-guias-del-ejercito-en-la-operacion-genesis> (last accessed April 7 2011).

¹⁰⁹ Rodrigo Uprimny Yepes, “La Crisis de la Parapolítica”, *Semana*, 7 January 2007, available at http://www.semana.com/wf_lmprimirArticulo.aspx?IdArt=100286 (last accessed, 26 April 2011).

¹¹⁰ HRW, “Colombia: Proposal Threatens ‘Parapolitics’ Investigation,” August 3, 2008, available at <http://www.hrw.org/en/news/2008/08/03/colombia-proposal-threatens-parapolitics-investigations> (last accessed April 6 2011).

¹¹¹ Interview C-4. Magistrates of the Supreme Court were allegedly being phone-hacked by the DAS (the Colombian Secret Service). On this see, inter alia, *Semana*, “Escándalo por denuncia de Semana sobre nuevas ‘chuzadas’ del DAS” (23 February 2009), available at <http://www.semana.com/seguridad/escandalo-denuncia-semana-sobre-nuevas-chuzadas-desde-das/121052-3.aspx> (last accessed on 28 July 2011).

¹¹² Interview C-5.

¹¹³ Some say that the ICC following developments on JPL made a difference for the Supreme Court in terms of adopting the Constitutional Court’s jurisprudential line, if only to make admissibility of the situation for the ICC harder. (ibid and an anonymous interviewee).

¹¹⁴ Interview C-14 and two anonymous interviewees. This confrontation even left Colombia without a General Prosecutor (*Fiscal General de la Nación*) for several months, thus affecting all criminal investigations but particularly those related to gross human rights violations. In Colombia, the President would send three candidates to the Supreme Court, of which the Court would choose one. The Supreme Court rejected the first group proposed by the Administration. During his Administration, Uribe did not send another group of candidates. See also Miguel La Rota and Rodrigo Uprimny, “La importancia del Fiscal General”, in *El Tiempo*, 6 December 2009, available at http://www.dejusticia.org/interna.php?id_tipo_publicacion=1&id_publicacion=696 (last accessed 7 April 2011). The General Prosecutor is crucial to support and direct investigations on members of FARC or ELN, and other crimes such as the policy known as “false positives” involving the Colombian military (Interview C-4).

jurisprudence of the Constitutional Court in matters of great significance for the trials regarding crimes under international law.¹¹⁵ Most interestingly for our purposes, the weakness of the Supreme Court due to the tensions it experienced with the Executive branch, encouraged it to reach out for the ICC's OTP for support.¹¹⁶

The most dramatic implication of the “parapolitics” scandal for the JPL framework was arguably the extradition of a number of paramilitary chiefs to the US on drug charges. Since 2006, Colombia extradited for drug charges 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 of the most prominent paramilitary leaders on May 12th, 2008.¹¹⁷ This has been one of the most sensitive and controversial topics regarding the complementarity test of the ICC, as it has been often perceived as a clear form of political interference with the accountability process in terms of individual criminal responsibility for crimes under the jurisdiction of the Court.¹¹⁸ The actual consequences for the JPL process are still unclear.

Ambos has argued that there is no real evidence that the purpose of the extraditions was to shield these paramilitary leaders from prosecution for international crimes.¹¹⁹ Although, the extraditions ultimately protected the paramilitaries, leaving them outside the reach of the ICC, the real motive behind them seems to lie elsewhere. Some authors suggest that these extraditions should be understood as an “attempt by [President] Uribe to show the United States that he is tough on the paramilitaries.”¹²⁰

¹¹⁵ Interview C-5. Previously, there had been strong tensions between the Supreme and the Constitutional Court precisely on such issues. Initially, while the Constitutional Court favoured a jurisprudential line more in accordance with international human rights and international criminal law standards, the Supreme Court defended more traditional interpretations based on Colombia's Criminal Code.

¹¹⁶ Interview C-3. They have also gathered support of other Supreme Courts in the world, such as the US, and other Latin American countries. This, some say, made it more deferential to the ICC (on this see Section 5.2).

¹¹⁷ “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 its 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).

¹¹⁸ 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 July 22 2011) [hereinafter ICTJ “Colombia”].

¹¹⁹ 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), 194.

¹²⁰ See interviews C-3, C-4, C-5, C-10 and C-14, among others. Katherine Reilly indicates that more than seven hundred defendants have been extradited between 2002 and 2008, see her “Colombia: The 2008 extraditions and the Search for Justice”, *University of Notre Dame, Center for Civil and Human rights, Working paper No. 3, Winter 2008*,

However, most commentators argue that extraditions were the result of the “parapolitics” processes. Paramilitary leaders started threatening that they would start “talking”, leading to resignation of important politicians. Hence, the government saw “the extraditions as helping to deter the emergence of any new information about the intimate bonds that have existed between Uribe, many of his legislative supporters, and the AUC, effectively halting progress in the investigation of the *parapolítica* scandal.”¹²¹

Be that as it may, 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.”¹²² 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.¹²³ As of February 2010, 15 out of the 20 paramilitaries extradited had not resumed “open confessions” within the JPL framework.¹²⁴ For those who did resume them, the delay was between 6 and 13 months after their extradition.¹²⁵ 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.¹²⁶ Several stakeholders considered its lack of

11-12. Colombia and the US were, at the time, trying to get the Free Trade Agreement which was under consideration by the US Congress.

¹²¹ Jessica Bryant, “Colombia: Uribe, Extradition and the Fight for Justice”, *Council on Hemispheric Affairs*, May 29, 2008, available at <http://www.coha.org/colombia-uribe-extradition-and-the-fight-for-justice/> (last accessed 6 April 2011).

¹²² Cited in *La metáfora del desmantelamiento*, 297. This was confirmed a year later.

¹²³ 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.

¹²⁴ At <http://www.fiscalia.gov.co/justiciapaz/Versiones.asp>, (last accessed, 10 January 2011).

¹²⁵ 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.

¹²⁶ Interview C-4.

involvement blatantly deficient.¹²⁷ Although the situation of open confessions of paramilitaries in the US somewhat improved, it still faces serious problems.¹²⁸

This situation has also impacted negatively on proceedings being pursued before the permanent criminal jurisdiction.¹²⁹ Put bluntly, the problem seems to be that “[t]he Colombian government lacks the political will to guarantee judicial cooperation with the United States to ensure that the domestic process continue[s].”¹³⁰ Similarly, the ICHR observed that “these extraditions affected the duty of Colombia to uphold the rights of victims to truth, justice, and reparations for crimes perpetrated by paramilitary groups.”¹³¹ The reasons for this are that it “impedes the investigation and trial of grave crimes through mechanisms provided for under the JPL in Colombia and the regular proceedings before ordinary tribunals”, and it “forecloses the possibility for victims to participate in the pursu[al] of truth with regards to the crimes committed during conflict”¹³² thereby limiting their access to reparations. Moreover, this extradition interferes with efforts to determine the links between state agents and these paramilitary leaders.”¹³³ Paradoxically, victims went to the US to speak to the paramilitaries and reached an agreement with them, so that they stay under the JPL and resume cooperation with the Colombian authorities.¹³⁴ As directly put by an interviewee, “two political games are taking place simultaneously: extradition is a way of keeping truth out of the Colombian judicial processes, or a way for victims and perpetrators to reach an agreement so the truth can be ultimately exposed.”¹³⁵

It is not easy to assess the real implications of these extraditions for Colombia’s accountability process. Extradition has been, on the one hand, a tough punishment for

¹²⁷ 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.

¹²⁸ 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).

¹²⁹ *La metáfora del desmantelamiento*, 303.

¹³⁰ ICTJ, “Colombia”, 4.

¹³¹ Press Comm. 21/08, 14 May 2008, Inter-American Commission expresses concern for the extradition of Colombian paramilitary leaders.

¹³² *ibid.*

¹³³ *ibid.* See also, Reilly, “Colombia: The 2008 extraditions and the Search for Justice”, 3.

¹³⁴ Interview C-4 and anonymous interviewee.

¹³⁵ Interview C-5.

paramilitaries; their families are exposed in Colombia and punishment is harsher than that which they would have got under JPL. In fact, to avoid being extradited to the US, the AUC had long strived to be recognized as an armed organization with political motivations.¹³⁶ From a different perspective, many observers suggest that these extraditions have been the final blow against an already severely weakened JPL process.¹³⁷ Ultimately, the extraditions to the US have been very poorly regarded because it is often considered that the criminal investigations for mass atrocities should have concentrated on the leaders, rather than on lower ranks. The Prosecutor's office in Colombia felt "mutilated" by the decision to extradite them, because of their future unavailability.¹³⁸ As already suggested, extradition to the US protects paramilitary leaders as it avoids the risk of them being extradited to the ICC.¹³⁹ In fact, the *Comisión Colombiana de Juristas*, an NGO representing victims, has argued that although the Colombian and US governments had stated that paramilitaries would receive no benefits unless they cooperated (also) with the aims of the JPL framework, many of them have reached agreements with the Justice Department and received reduced sentences despite there being no cooperation with JPL.¹⁴⁰

And yet, some people have also argued that, in the long run, the extradition of the paramilitary leaders may have had a positive overall effect on the JPL process. By literally removing these key players, the ongoing investigations were able to make significant progress because mid-level and lower-level actors started to collaborate more.¹⁴¹ Although it is too early to assess the ultimate impact these extraditions had over the JPL process, it is not clear that the balance will be clearly detrimental. This conclusion holds, it seems, even if the JPL processes end up being undermined by other equally crucial considerations.

Since August 2009, the Supreme Court of Justice has declined to extradite paramilitary leaders requested by the United States for drug-related charges, when these

¹³⁶ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, ch. 4.

¹³⁷ Interview C-4.

¹³⁸ Interview C-3.

¹³⁹ In fact, as it will be examined below, some observers complained that the ICC did not act quickly enough to prevent the extraditions taking place despite the fact that it had been warned before the majority of them took place (interview C-4).

¹⁴⁰ *La metáfora del desmantelamiento*, 297-298, and its references.

¹⁴¹ Interview C-5.

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."¹⁴² However, the denial of extradition was made conditional on the cooperation of the accused with Colombian authorities.

4.1.2 PARTIAL INDICTMENTS AND FIRST CONVICTIONS: THE FIRST DELAYED STEPS OF JPL

A further issue regarding the JPL framework that is relevant for our purposes here is the discussion around partial indictments and the decision of the Supreme Court to declare null and void the first two decisions reached under JPL, namely those of aka "*El Loro*" and "*El Iguano*".¹⁴³ As it will be examined in more detail below, some people have indicated the existence of some kind of connection between the sudden change of position of the Supreme Court in this regard and the influence of the ICC.

The JPL provides that actual attribution of facts would be conducted by prosecutors after the "open confessions" have been finalized.¹⁴⁴ In July 2008, the Supreme Court established that prosecutors could do partial attribution of facts even before the end of the open confession deposition process.¹⁴⁵ This measure was initially envisaged as a way to deal with the already serious impasses and obstruction in JPL processes. In effect, open confessions were still ongoing four years after the JPL was passed, without any one of them reaching the "trial" stage.¹⁴⁶ Moreover, until 2010, only 20% of the 3,635 paramilitaries who "volunteered" under Justice and Peace had been heard.¹⁴⁷ As a result of this decision by the Supreme Court, then, the same person could

¹⁴² Supreme Court, Chamber on Criminal Cassation, Second instance, Decision 29559, "Carlos Mario Jiménez Naranjo", 22 April 2008.

¹⁴³ Under Article 26 of the JPL, the Supreme Court is competent to review appeals on matters of substance on issues arising during the public hearings and/or sentences of Justice and Peace judges.

¹⁴⁴ Article 18, Law 975 (2005).

¹⁴⁵ Supreme Court, Decision 30120 (by Alfredo Gómez Quintero), 23rd July 2008, 32. The strategy of formulating partial attributions was initially proposed by the Colombian government.

¹⁴⁶ *La metáfora del desmantelamiento*, 211. Some, like that of Paramilitary Chief Salvatore Mancuso, lasted more than two years.

¹⁴⁷ *ibid*, 212.

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 main finding in this respect was 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.¹⁴⁸

This reasoning has been challenged on its merits. First, it has been argued that, at some point the different facts attributed to the same individual would have to be unified, so the process would be delayed in any event. This would generate confusion and frustration for victims towards the end of the process.¹⁴⁹ Furthermore, this decision by the Supreme Court to some degree contradicted decision C-370 by the Constitutional Court, which considered “open confessions” compatible with the Colombian Constitution only in so far as they were “complete and truthful”.¹⁵⁰ This meant that for an individual to be eligible to receive the benefits of the JPL, she should have already confessed all the crimes she may have committed or at least had knowledge of. (The Supreme Court tried to avoid this difficulty by suggesting that this exception would only cover events that were omitted for reasons other than an attempt at hiding the truth).¹⁵¹ Finally, this would be incompatible with the fact that the JPL was established to process individuals for crimes against humanity, which by definition have to be committed on a widespread or systematic basis. Hence to partition the process according to the will of the defendant may render the facts attributed to a single defendant characterized as common crimes, rather than as international crimes.¹⁵² Put differently, “partial attribution of facts entails that cases are analyzed by the judiciary separately from their context, as if there was no connection between them.”¹⁵³

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

¹⁴⁸ *ibid*, 32.

¹⁴⁹ *ibid*, 214.

¹⁵⁰ On this Decision, see above.

¹⁵¹ See Decision 30120, 32. Admittedly, as it has been argued, one may well wonder how it is that a given defendant would show sufficiently that the reason that certain facts were not included in their initial deposition is that they had “forgotten” about them (*La metáfora del desmantelamiento*, 215).

¹⁵² See, eg, ICG, “Correcting Course: Victims and the Justice and Peace Law in Colombia”, *Latin America Report* No 29, Oct. 30 2008, 9.

¹⁵³ *La metáfora del desmantelamiento*, 216.

framework, namely, that of Wilson Salazar Carrascal, aka “*el Loro*”.¹⁵⁴ 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.¹⁵⁵ In support of its decision to quash Carrascal’s conviction (and reject the use of partial attribution of facts), 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. For that purpose, it is crucial that any decision examines the relationship between the individual convicted and the group more generally. 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*).¹⁵⁶ Finally, the Supreme Court suggested that partial charges should be used 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 she belonged.¹⁵⁷

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, Carrascal 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 the length of the period during which it had been

¹⁵⁴ Supreme Court, Decision 31539 (by 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. (See the Courts’ Decision 29560, M.P. Augusto Ibáñez Guzmán, of 28 May 2008).

¹⁵⁵ 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 confess 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).

¹⁵⁶ 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 (MP: Yesid Ramírez Bastidas), 19 August 2009. On a criticism to the use of this crime by Colombian courts see Section 5.2 of this report.

¹⁵⁷ Decision 31539, 31 July 2009, 14.

active.¹⁵⁸ In this decision, the Supreme Court ultimately supported some of the requirements established explicitly and implicitly by the Constitutional Court in its decision C-370. This stance was repeated in other processes, making this approach to the application of the JPL framework somewhat more generalized.¹⁵⁹

This new jurisprudential line regarding partial attribution of facts has not been without its critics. Some disagree with this decision, because “it means investigating and corroborating every single case of a particular applicant.”¹⁶⁰ This commentator takes issue, in particular, with the case of Jorge Iván Laguer Zapata (aka “*El Iguano*”). *El Iguano* was in charge of one of the fronts under Mancuso. He had around 300 individuals under his command and had presence in 21 municipalities in the north of Santander. He had been implicated in around 4,000 crimes which the prosecutor’s office had documented, including massacres and recruitment of child soldiers, among many others. As a result of the direction given by the Supreme Court, “if not all of these events were sufficiently documented, the Prosecutor’s Office would not be able to bring him to trial under the JPL scheme.”¹⁶¹ Allegedly, no justice system (and even less one with the limited resources and scarce capabilities that JPL jurisdiction had) could handle the kind of investigations that the Supreme Court envisages, in the fashion that it is required from them (for “old” and complex cases) and in accordance with international standards.¹⁶² The 707 individuals who have ratified their participation in JPL, have mentioned 32,909 crimes, of which 26,163 are homicides.¹⁶³ It is thereby suggested that the previous policy was more sensible, in the sense that it would allow prosecutors to show the widespread or systematic character of the crimes by cherry-picking some of them.¹⁶⁴ Furthermore,

¹⁵⁸ This was, in fact, even recognized by the Tribunal (Tribunal Superior de Bogotá, Sala de Justicia y Paz, Rd. Interno 0197, Wilson Salazar Carrascal, 19 March 2009, para. 72).

¹⁵⁹ *La metáfora del desmantelamiento*, 232.

¹⁶⁰ Interviews C-9 and C-11.

¹⁶¹ Interview C-6.

¹⁶² Interviews C-9 and C-11.

¹⁶³ UNJP Figures, Report on the application of the JPL of 15 October 2009 (unpublished document, on file with the author). The Prosecutors’ Office has been able to investigate the facts in only 14,612 cases.

¹⁶⁴ *ibid.* On top of rejecting partial charges, they require the Prosecutor’s Office to provide evidence on collective and individual harms/torts.

this change in the jurisprudence of the Supreme Court allegedly took the relevant actors by surprise and made it necessary to revise a two-years-old prosecutorial strategy.¹⁶⁵

A third point of view, suggests that, in fact, the cases of *El Loro* and *El Iguano* “were full of mistakes”.¹⁶⁶ 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. Thus, although they were perceived as a substantial setback to the office of the prosecutor’s overall strategy, they may have been important in correcting the course the JPL framework was taking, which obscured the systematic and widespread character of Colombia’s mass criminality.¹⁶⁷

4.1.3. SOME OBSERVATIONS ON THE JPL FRAMEWORK

Perhaps the greatest limitation of the JPL has been its incapacity to secure peace in any of its proposed areas of influence. After some years of being in full operation, at least 20 paramilitary groups with some 3,000 combatants were still active in Colombia.¹⁶⁸ Also, two of the other players involved in the conflict have remained largely if not entirely untouched by JPL, namely, the leftist guerrillas and the military. This means, among other things, that security concerns for investigators and public officials, let alone for witnesses and victims are extremely serious.¹⁶⁹ “There are situations in which judges themselves request not to intervene in a particular case, because in their territory, their district, they lack the necessary safeguards to perform their duties.”¹⁷⁰ Another significant shortcoming, according to several actors and commentators on the process is the deficit in victims’ participation, both in terms of numbers, of effective protection,¹⁷¹ and actual opportunities to make questions or intervene during the open confession.¹⁷²

¹⁶⁵ *ibid.*

¹⁶⁶ Interviews C-5, C-9, and C-14.

¹⁶⁷ Interview C-11.

¹⁶⁸ “Media Colombia está copada de Nuevo por grupos criminales ligados a narcotráfico y paramilitarismo”, *El Tiempo* (15-07-2007), available at <http://www.derechos.org/nizkor/colombia/intel/intelmain.html> (last accessed 8 April 2011).

¹⁶⁹ Supreme Court of Justice, Criminal Cassation Chamber, Decision 24490, 13 December 2005 (MP: Álvaro Pérez Pinzón), 3.

¹⁷⁰ Aponte, “Colombia”, 169.

¹⁷¹ It is very hard for victims to assist to hearings or other proceedings when at the entrance of the courtroom there is a large number of followers of a particular paramilitary leader supporting him (interview C-2).

¹⁷² Interviews C-1, C-2, C-4 and C-13. The prosecutor’s would go allegedly too quickly over the charges and not much new and significant information was extracted from them.

Moreover, progress in investigations and processing of cases is still considered very limited. Most eloquently, after more than five years in operation, there were three decisions (all of them convictions) before JPL courts. There are several considerations that help explain this. For one, although the JPL Unit started being operational at the beginning of 2006, during a whole year they had no applicants (*postulados*). During that year, they started working on files that ultimately had to be dropped, and started working on compiling information that would allow them to corroborate the information provided in the context of the “open confession”.¹⁷³ Also, there has been a lack of medium to long-term prosecutorial strategy: “they had to improvise as they went along.”¹⁷⁴ Initially it was not clear to those responsible for the investigations how to identify bodies, how to exhume them, and so on. Few of the relevant personnel had a clear idea of how to investigate mass criminality or clear notions concerning international criminal law and international humanitarian law. The understaffed/under-resourced JPL Unit, created by the Attorney General received more than 155,000 claims from victims of paramilitary atrocities and other violence since November 2006, leading to a bottleneck in the process of justice, truth, and reparations.¹⁷⁵ At the end of 2008, there were 58 prosecutors in charge of investigating around 3000 individuals.¹⁷⁶ Furthermore, because of rotation between units not all the prosecutors working on JPL cases have received the same level of training. This resulted in an unequal distribution of relevant knowledge between them.¹⁷⁷

Because of the number of claims, the available resources and the time constraints of the JPL process, “the factual elements to determine the agent’s criminal responsibility in the context of justice and peace ultimately depends on the collaboration of the applicants, rather than on the capacity of the judicial system to establish their responsibilities.”¹⁷⁸ The General Prosecutor’s office itself recognized a lack of capacity to

¹⁷³ Interview C-2.

¹⁷⁴ *ibid.* See also, Ambos, “Procedimiento de la Ley de Justicia y Paz (Ley 975 De 2005) y Derecho Penal Internacional”, 136.

¹⁷⁵ Mikel Delagrangé, “Latin America: The Next Frontier for the ICC?”, citing International Crisis Group, “Correcting Course: Victims and the Justice and Peace Law in Colombia”, Latin America Report No. 29 (2008), available at <http://www.crisisgroup.org/home/index.cftnid=57>, 53 (last accessed 6 April 2011).

¹⁷⁶ Iturralde, *Castigo, liberalismo autoritario y justicia penal de excepción*, 285.

¹⁷⁷ Interview C-2.

¹⁷⁸ Ambos, “Procedimiento de la Ley de Justicia y Paz (Ley 975 De 2005) y Derecho Penal Internacional”, 135.

corroborate the information provided by the applicant as a matter of confession.¹⁷⁹ Furthermore, prosecutors complain that they faced significant political opposition to the process, making it harder to show actual progress.¹⁸⁰ The JPL proceedings started destabilizing internally once prosecutors started asking questions about who helped the AUC, supported them, etc.¹⁸¹ In short, the JPL process has been characterized in practice by its capacity to overwhelm the Colombian justice system.¹⁸² The expectations it created were simply impossible to meet.¹⁸³

Yet, although the general view is probably that after several years results have been meager, or close to insignificant, some suggest that a closer look may provide a somewhat different picture. Although the JPL Unit of the Prosecutor's Office in Colombia has been often criticized by academics and members of the civil society, it is argued that on the basis of the Constitutional Court and the Supreme Court decisions, certain prosecutors started to conduct the hearings in a way that allows them to get new information, and to focus on the systematic or widespread character of the relevant events.¹⁸⁴ Furthermore, the organizational structure of the Prosecutor's office in JPL has now been designed to take into account the elements of widespread or systematic criminality. Prosecutors are not divided by case, but by block. This has allowed them to develop criteria that would enable them to identify patterns of human rights violations.¹⁸⁵ In fact, it has been claimed that significant progress has been made at least in terms of understanding the "magnitude" of the criminal phenomenon.¹⁸⁶ It has also been suggested that progress has been unprecedented in the number of mass graves discovered and unearthed.¹⁸⁷ As it shall be examined below, there has been radical

¹⁷⁹ *ibid*, 136, citing an interview with Luis González León.

¹⁸⁰ Anonymous interviewee.

¹⁸¹ Interview C-6.

¹⁸² Alejandro Aponte, *Persecución Penal de Crímenes Internacionales: Diálogo Abierto entre la Tradición Nacional y el Desarrollo Internacional* (Bogotá: Ed. Ibáñez, 2010), 248.

¹⁸³ Interviews C-6, C-11, and C-14. See also Ambos, "Procedimiento de la Ley de Justicia y Paz (Ley 975 De 2005) y Derecho Penal Internacional", 129.

¹⁸⁴ An example of this is the free version of Ever Veloza (aka "HH"), in which the prosecutors started asking questions which in fact contributed to obtaining truth and information to conduct prosecutions.

¹⁸⁵ Interview C-2.

¹⁸⁶ *ibid*.

¹⁸⁷ See Presentation by the FGN at the "Simposio Internacional, Justicia Transicional en Colombia, 4 años del contexto de la Ley de Justicia y Paz", Bogotá, 23 July 2009 (recording on file with the author). And yet, very few of the bodies that have been found have been identified.

progress in the development and application of legal tools to investigate and capture the type of crime perpetrated as part of the conflict.¹⁸⁸

All in all, by the end of 2009 the JPL process was considered generally defunct by many participants and commentators.¹⁸⁹ As a result of it becoming more a transitional justice mechanism than a blanket amnesty, as initially envisaged, it lost support of one of its two crucial actors. This resulted in political and practical obstacles to effective investigations. Since then, however, there has been some improvement. More than twenty members of congress have been convicted as a result of the processes in parapolitics and almost a third of the congressmen have been indicted. A decision seizing all their assets and assigning them to reparations under the JPL framework is currently under revision by the Supreme Court.¹⁹⁰ Most of the biggest paramilitary chiefs have been extradited to the US, leaving greater room for domestic prosecutions. The JPL system has convicted at least three defendants for crimes under international law, and there reportedly is progress with other investigations.¹⁹¹ It is too soon to assess whether the JPL process may effectively make a difference in terms of securing truth, justice and reparations for victims. This clearly has not been the case so far; but the process has slowly taken this road.

4.2 ORDINARY CRIMINAL JURISDICTION

As mentioned above, prosecutions and trials for mass atrocity criminality also take place before the Human Rights Unit under Colombia's permanent jurisdiction. The Human Rights Unit was created to investigate and prosecute emblematic cases of human rights violations, cases for which international pressure was at its highest. It has competence over the whole Colombian territory, but cases are heard in the different Regions.¹⁹² Unlike the JPL Unit, the Human Rights Unit works on a case-by-case basis, rather than based on geographical fronts. That is, while the JPL Unit has slowly developed a more systematic approach to mass criminality, the permanent jurisdiction has been "too much

¹⁸⁸ See section 5.2.

¹⁸⁹ Interview C-4, and two anonymous interviewees, among others.

¹⁹⁰ Anonymous interviewee.

¹⁹¹ *ibid.* See, eg, "Confirman única sentencia contra paramilitares en Justicia y Paz" *El Espectador*, 29 April 2011, available at <http://www.elespectador.com/noticias/judicial/articulo-266147-confirman-unica-sentencia-contra-paramilitares-justicia-y-paz> (last accessed 14 September 2011).

¹⁹² Aponte, "Colombia", 169.

focused on ‘blood’ cases, and their investigatory techniques are shaped by those cases of “common” criminality.”¹⁹³ Although it was created as an elite team, currently each prosecutor is in charge of around 50 cases, of the greatest complexity. Moreover, except for a few prosecutors, there is no specialization in terms of crimes.¹⁹⁴ All this undermines the capacity to conduct prosecutions based on the patterns of criminality and victimization as a whole.¹⁹⁵

There have been some positive synergies between JPL and Human Rights jurisdictions. Although there is no structural effort, prosecutors have been trying to collaborate on an informal basis. This collaboration is mainly to do with two specific shortcomings. As stated above, the JPL Unit spent almost two years gathering information related to crimes perpetrated by the paramilitaries by going through the investigations that had been performed before the Human Rights courts. Yet, at the same time, once the JPL Unit became more active, the permanent jurisdiction relied on the JPL Unit’s capacity to investigate, as it allegedly had greater technical knowledge, resources and support to do so.¹⁹⁶ The Human Rights division of the judiciary has made significant progress on the basis of JPL Unit information, and “many convictions been obtained for these facts.”¹⁹⁷ As put by one of our interviewees, “[w]hat is not identified or unearthed through the process in Justice and Peace, cannot really be investigated by the permanent jurisdiction.”¹⁹⁸ Thus, the JPL Unit gathered information with regards to politicians, members of the Colombian armed forces, public servants and 4,371 cases against other individuals which it contributed to the investigations before the permanent jurisdiction.¹⁹⁹

¹⁹³ *ibid.* For instance, they allegedly do not know how to use documentary evidence for the purposes of investigating mass criminality.

¹⁹⁴ Interview C-2.

¹⁹⁵ “Prosecutors in this unit, however, say they are trying to adopt a more systematic approach, and to exchange information on cases, etc.” (*ibid.*).

¹⁹⁶ Whereas before demobilization the General Prosecutor’s Office (*Fiscalía General de la Nación*) had identified only 350 members of the AUC, on the basis of information obtained in the context of the LJ&P the criminal justice system has been able to identify a great number of members of these groups and in the last four years, it has convicted 990 members of AUC before the permanent jurisdiction. See, Presentation by the FGN at the “Simposio Internacional, Justicia Transicional en Colombia, 4 años del contexto de la Ley de Justicia y Paz”, Bogotá, 23 July 2009 (recording on file with the author).

¹⁹⁷ Interview C-6.

¹⁹⁸ Interview C-3.

¹⁹⁹ UNJP Figures, Report on the application of the JPL of 15 October 2009 (unpublished document, on file with the author). See also, interview C-6.

Admittedly, this informal kind of collaboration has embedded in it the problem of duplicity of investigations, with its correlate in lack of efficiency, poor use of scarce resources, and so on. Processes before the permanent jurisdiction are only suspended after there is a proper indictment under JPL.²⁰⁰ (Previously, the same case would normally be pursued before both jurisdictions simultaneously). Yet, in several cases, convictions of paramilitaries have been obtained due to the information revealed by paramilitaries collaborating within the context of JPL.²⁰¹ Also, the permanent jurisdiction has been responsible for the investigation and prosecution of those applicants who have decided to withdraw from the justice and peace framework, and for the investigation of successor groups who are not part of the JPL process.²⁰²

5. ASSESSMENT OF THE ICC'S POSITIVE COMPLEMENTARITY FRAMEWORK UNDER THE LIGHT OF THE COLOMBIAN SITUATION

This section assesses the influence of the ICC over the Colombian legal system by following developments in three specific areas of research, namely that of prosecution rates, normative impact and the development of local capacity. The research has been conducted mainly in other contexts of DOMAC. I shall hereby provide a summarized version of the main considerations and findings.

5.1 PROSECUTION RATES²⁰³

The purpose of this section is to assess the impact of the ICC on the functioning of Colombia's domestic courts by comparing the volume of work and sentencing patterns. It seeks to analyze whether the involvement of the ICC in Colombia may have encouraged or discouraged the operation of domestic courts in quantitative terms, and whether its sentencing policies may have been affected. In order to establish whether the ICC has

²⁰⁰ *Corte Suprema de Justicia*, rad. 28250, Consideraciones.

²⁰¹ Ambos, "Procedimiento de la Ley de Justicia y Paz (Ley 975 De 2005) y Derecho Penal Internacional", 191, citing the case of Ever Veloza García (aka "HH").

²⁰² On successor groups, see Human Rights Watch, "Paramilitaries' Heirs. The New Face of Violence in Colombia" (February 2010), available at <http://www.hrw.org/en/reports/2010/02/03/paramilitaries-heirs-0>, last accessed on 22 July 2011.

²⁰³ This section is based upon Yael Ronen and Sharon Avital, "Prosecutions and Sentencing in Colombia", forthcoming DOMAC Report.

had an effect on national policies, it was necessary first to assess whether there are discernible trends in the practice of the domestic jurisdiction, and then consider whether these trends are attributable in any way to interaction with the ICC. Since domestic policies may be affected by factors other than the ICC, it is necessary to examine other potentially-impacting factors that may influence national policies.

Ultimately, it must be concluded at this stage that the practice of the ICC with respect to Colombia is as yet too limited to enable any meaningful finding on the quantitative relationship between the ICC and domestic practice. In addition, the data on national prosecutions available is still limited and does not account for the full volume of prosecutions.²⁰⁴ Therefore, DOMAC research was not able to establish any significant trend with regards to the number of prosecutions and trials in Colombia after the involvement of the ICC.²⁰⁵ It has neither provided clear trends regarding number of appeals nor clear patterns regarding sentencing;²⁰⁶ nonetheless, some modest patterns of judicial response are discernible.²⁰⁷ First, appealed cases largely concern convictions, and there is some correlation between the outcome of first instance judgments and the affiliation of the defendant. Namely, most proceedings which have ended in conviction are of militia members, both paramilitaries and leftist guerrillas, and for the most part these convictions have been upheld by appeal courts. By contrast, the rate of appeals on acquittal at first instance is higher with respect to government forces. This may reflect a higher rate of acquittal among government forces in the first place, or an inclination of the prosecution to pursue the cases of military personnel more strictly. Neither of these two trends seems to be obviously linked to the influence of the ICC.

5.2 NORMATIVE IMPACT

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

²⁰⁴ DOMAC research on this point has been based on research of files at the Penal Chamber of the Supreme Court of Colombia sitting as the Court of Cassation. See, Ronen and Avital, "Prosecutions and Sentencing in Colombia", section 3.

²⁰⁵ *ibid*, sections 3.1 and 3.2.

²⁰⁶ *ibid*, sections 3.3 and 3.4.

²⁰⁷ *ibid*, section 5.

treaties or custom, or to decisions reached by their international counterparts, partly as a result of the Constitutional Court adopting the Constitutional block as a way of many international human rights and humanitarian law provisions into the domestic legal system.²⁰⁸ This may be exemplified by reference to different areas of the law. 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 co-perpetration-by-means through and organized structure of power. They also employed the concept of crimes against humanity, even in cases where there was no domestic legislation providing for them. They even adapted the standards of evidence for cases of sexual violence, from international legal provisions.²⁰⁹ Similarly, the debate concerning partial attribution of facts, which was discussed above, has been largely conducted on the basis of international law arguments. While establishing guidelines for the future application of the JPL framework, the Supreme Court 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.²¹⁰ The purpose of the present section is to assess the extent to which this general trend can be traced to the influence of the ICC.²¹¹

The 2000 Penal Code was enacted in order to put the criminal justice system in line with the rules and principles of the 1991 Constitution. Although as a matter of fact certain international offences were incorporated to the Colombian legal system by Law 589 of 2000, the debate regarding incorporation of certain international offences took place in the context of the new Criminal Code for Colombia, approved under Law 599 of 2000.²¹² 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, that were enacted as 4 broad

²⁰⁸ See above.

²⁰⁹ Interview C-2.

²¹⁰ Interviews C-6, C-9, and C-11.

²¹¹ This section is concerned mainly with substantive law issues. Most of the procedural reforms in Colombia were conducted before its involvement with the ICC.

²¹² 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 (septiembre de 2009), 8.

types of criminal offences: genocide,²¹³ torture,²¹⁴ enforced disappearance,²¹⁵ and forced displacement.²¹⁶ The Constitutional Court has modified some of these offences in order to bring them in line with the definitions in international human rights instruments,²¹⁷ which once ratified, are incorporated in the Colombian Constitution.²¹⁸ The Court used a very broad understanding of the notion of “human rights treaties”, including specific conventions against atrocious crimes (eg the Inter-American Convention on Forced Disappearance of Persons),²¹⁹ international humanitarian law conventions (eg the 1977 Additional Protocols to the Geneva Conventions),²²⁰ and even the Rome Statute and the Elements of Crimes as evidence of customary international law.²²¹ Although none of these developments can be attributed to the ICC, their introduction can be correlated to the general trend in which one can situate the ratification and entry into force of the Rome Statute.²²²

There are, however, certain areas in which a more definite influence can be traced. This report concentrates on doctrinal influence on the attribution of responsibility, and on the use of the international law on crimes against humanity.²²³ Beginning with the rules regarding criminal responsibility, the main issue has to do with the possibility of attributing criminal liability to someone in a position of leadership in a certain

²¹³ Law 599 of 2000 (Penal Code), Article 101.

²¹⁴ *ibid*, Article 178.

²¹⁵ *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.

²¹⁶ *ibid*, Article 180. A crime under Article 7(1)(d) of the Rome Statute whenever committed as part of a widespread or systematic attack against the civilian population. Also under Article 8(2)(e)(viii) whenever committed in the context of a non-international armed conflict.

²¹⁷ In Judgment C-177 of 2001, the Constitutional Court eliminated an element of the crime of genocide, Article 101 of the 2000 Penal Code, which required that the protected national, ethnic, racial, religious or political group acted “within the legal order”. In Judgment C-148 of 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.

²¹⁸ Article 93 of the Colombian Constitution.

²¹⁹ Judgment C-580 of 2002.

²²⁰ Judgment C-225 of 1995.

²²¹ Judgment C-291 of 2007.

²²² It should be reminded that the ICC had no jurisdiction over war crimes until 2009 in Colombia due to an Article 124 declaration and that there was significant internal opposition to include domestic provisions providing for crimes against humanity on the basis that their vagueness would be incompatible with the strict understanding of the principle of legality defended locally. On this, see below.

²²³ For a broader analysis of this issue, see A. Chehtman, “The ICC and its normative impact on Colombia’s legal system” (DOMAC Report, available at <http://www.domac.is/reports/>, forthcoming).

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 responsibility are not generally accepted.²²⁴ 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.²²⁵ 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.²²⁶ 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.²²⁷ 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.²²⁸

²²⁴ 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).

²²⁵ Francisco Muñoz-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.

²²⁶ See debate at *La metáfora del desmantelamiento*, 219-220.

²²⁷ 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 23825, of 7 March 2007 (MP: Javier Zapata Ortíz); and *Yamid Amat*, Supreme Court, Criminal Cassation Chamber, Decision 25974 (8 August 2007).

²²⁸ López Díaz, "El caso colombiano", 165. 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, JICJ 9(1) (2011), 85-190.

The Human Rights Unit at the Prosecutor's Office was the first to introduce this doctrine in a number of cases,²²⁹ and the JPL Unit soon followed.²³⁰ In 2009, the Criminal Chamber of the Supreme Court timidly started to consider incorporating this doctrine into its case law.²³¹ But 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 argued 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.”²³²

Notwithstanding any criticism towards this jurisprudential line, it is clear that the Colombian judiciary experienced a powerful 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.²³³ The doctrinal development adopted by the Colombian judiciary seems,

²²⁹ 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).

²³⁰ 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.

²³¹ Supreme Court, Criminal Cassation Chamber, Decision 29640, 16 September 2009.

²³² *Alvaro Alfonso García Romero*, Supreme Court, Criminal Cassation Chamber, Decision 32805, (23 February 2010).

²³³ See Decision on the Confirmation of Charges in *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008, para. 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, paras. 213-216.

by contrast, to have been taken from other Latin American countries.²³⁴ That is, the concrete tools utilized by the Prosecutors and, subsequently, by the tribunals themselves were explicitly taken from the *Fujimori* decision in Peru,²³⁵ 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.²³⁶

In addition, the Rome Statute and the ICC's policy of positive complementarity have arguably been influential in terms of the application by local authorities of the law on crimes against humanity.²³⁷ 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.²³⁸ Yet, in a relatively short period of time the Colombian legal system changed drastically its approach towards crimes against humanity.²³⁹ 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, the one that took the first steps.²⁴⁰ 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 had perpetrated certain behaviours considered grave under the light of International Humanitarian Law, as well

²³⁴ 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.

²³⁵ 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).

²³⁶ *Alvaro Alfonso García Romero*, Supreme Court, Criminal Cassation Chamber, Decision 32805 (23 February 2010), at paras. 78-79.

²³⁷ Interview C-6.

²³⁸ 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/Luchalmpunidad/Paginas/publicaciones.aspx>, last accessed 7 June 2011).

²³⁹ 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).

²⁴⁰ 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.

as other generalized or systematic offences that reach the level of crimes against humanity.²⁴¹ This particular understanding of the criminal phenomenon was considered critical for the purposes of capturing the “big picture” of paramilitarism.²⁴²

To conceptualize crimes against humanity, the Supreme Court referred to several international instruments and decisions; but, unlike in the previous example concerning modes of liability, here 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.²⁴³ 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.”²⁴⁴ 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.²⁴⁵

And yet, with the broadening of the charges available both under the JPL and the Human Rights jurisdictions came certain substantive mistakes.²⁴⁶ 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.²⁴⁷ 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

²⁴¹ 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 33301, 11 March 2010 (M.P. Alfredo Gómez Quintero).

²⁴² 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.

²⁴³ *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.

²⁴⁴ Constitutional Court, Decision T-355-07, at 23. Little or no reference was made to rules of customary international law, though.

²⁴⁵ 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.

²⁴⁶ Interviews C-6, C-9 and C-11.

²⁴⁷ Provided for in Article 340-2 of the Colombian Criminal Code.

crime against humanity.²⁴⁸ 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 Statute.²⁴⁹

Admittedly, 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.²⁵⁰ 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, by forcing them to concentrate on the bigger picture, rather than on isolated crimes.²⁵¹ 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.²⁵² On these same grounds, it has been criticized by a part of the Colombian academic literature.²⁵³

To sum up, we can identify a quite radical process of increased openness towards international legal standards in Colombia. This trend has enhanced the capacity of Colombia to push for greater accountability, but it has also led to certain serious mistakes and conflations in its use of international law.²⁵⁴ In any event, it has been

²⁴⁸ See, inter alia, Supreme Court of Justice, Criminal Cassation Chamber, Decision 26945, 11 July 2007 (M.P. Yesid Ramírez Bastidas y Julio Enrique Socha Salamanca); Decision 29472, 10 April 2008 (M.P. Yesid Ramírez Bastidas), and Decision 31582, 22 December 2009 (M.P. María del Rosario González).

²⁴⁹ Supreme Court, Criminal cassation Chamber, Decision 29472, 10 April 2008 (M.P. Yesid Ramírez Bastidas), translation in Bertoni et al, *Digest of Latin American jurisprudence on international crimes*, 110.

²⁵⁰ 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.

²⁵¹ Interview C-4.

²⁵² 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.

²⁵³ 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.

²⁵⁴ 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, File 110016000253200680281).

argued by several interviewees, that the particular direction in which this process has developed has to do in one way or another with the ICC and its “supervisory” role. In particular, several observers consider at least as one potential explanation for many of these developments the concern to satisfy the requirements of the principle of complementarity in order to avoid an intervention by the ICC.²⁵⁵ 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 domestic political synergies²⁵⁶ and 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.²⁵⁷

5.3 CAPACITY DEVELOPMENT

Unlike many other countries where crimes under international law are taking place, or have recently taken place, Colombia has a sophisticated legal system and it also has experienced and generally well-trained legal professionals. In this respect, it has hardly the same needs in terms of technical assistance or provision of training as East Timor, Kosovo, or even Sierra Leona, Rwanda and the DRC. There are gaps in certain areas and specific skills that would significantly improve investigations and trials for mass criminality. And yet the main obstacles to effective proceedings seem to lie elsewhere.

Certain contextual elements make real progress with the investigation and prosecution of international crimes extremely challenging. Chief among them is the difficulty in securing genuine political will to advance with investigations. Another crucial element hindering their progress is the persistence of the conflict and the resulting difficulty in accessing many of the areas in which the crimes have been committed, and securing the collaboration of the relevant witnesses. On a more institutional level, there is a significant lack of resources and technical specialization among the key operators. Although JPL prosecutors and investigators arguably have more resources than an average prosecutor in Colombia (they receive support from USAID²⁵⁸, GTZ, and

²⁵⁵ Interviews C-4, C-5, C-6, C-12 and two anonymous interviewees.

²⁵⁶ 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.

²⁵⁷ Interview C-2.

²⁵⁸ Plan Colombia alone involved the “disbursement of more than \$600 million a year in aid from the United States to fight drug trafficking and leftist guerrillas”. Simón Romero, “U.S. Aid was key to hostage rescue in Colombia”, *New*

international cooperation generally), they still lack enough material resources to conduct investigations in distant areas of the country.²⁵⁹ Finally, the Judicial Police (ie investigators) lack specific capacity and specialization for this type of cases. Police investigators do not belong to a sole institution.²⁶⁰ There are several bodies involved in this type of tasks, like the *Seccional de Policía Judicial e Investigación* (SIJIN, or Investigative Section of the Judicial Police), which depends from the National Police, and the *Cuerpo Técnico de Investigación* (CTI, or Technical Investigative Body), which depends directly from the office of the prosecutor.²⁶¹ Furthermore, it is harder to develop capacity in investigators because of the rotation they undergo. Part of this alleged weakness stems from the fact that there is no specialized body to conduct investigations on this type of crimes.²⁶² But most of it has to do with the vast number of crimes it is meant to be investigating, the lack of a clear strategy of prioritization of cases and of investigating systematic criminality, lack of effective leadership among prosecutors, and of support by political authorities.²⁶³

In terms of direct capacity development, there have been a significant number of trainings conducted with judges, prosecutors, and police officers offered by different institutions. The main international actors in this area have been the ICTJ and the GTZ (USAID has funded several trainings in this area) and the ICRC. Some local institutions have also been involved in this issue, most notably, several universities. This general context provides for a variety of approaches and illustrates the popularity of training as a chosen path to developing local capacity. Yet it also creates difficulties in terms of coordination, coherence and adequate planning. In particular, it has been forcefully argued that American and German institutions “have their own agendas and their own understanding of how the Colombian legal system should work, and they both struggle to

York Times, July 13, 2008, available at <http://www.nytimes.com/2008/07/13/world/americas/13colombia.html> (last accessed on 6 April 2011).

²⁵⁹ Interview C-2.

²⁶⁰ On this, see section 4.

²⁶¹ The CTI has better coordination with prosecutors than the SIJIN. Interview C-2.

²⁶² Interview C-3.

²⁶³ Interview C-14.

get their way of doing things established. In fact, it has been sometimes claimed that their approach is often perceived as a form of “legal imperialism”.²⁶⁴

In terms of content, trainings have included basic topics in international criminal law. They are therefore useful for officials with little expertise in this area.²⁶⁵ Still, it has been complained commentators that the international community brings experts for two-week trainings, and does not generally establish more permanent bases for consultation or collaboration. This usually undermines the learning process and its capacity to produce considerable results.²⁶⁶ It has been also generally suggested that too much focus is made in doctrinal issues and not enough attentions is paid to investigative methods, strategies, and approaches towards mass or organized criminality.²⁶⁷ And yet, results have been better overall than in other jurisdictions, such as the BiH.²⁶⁸ This difference may be explained, in part, because the number of trainings has not been as overwhelming, thereby leading to training-fatigue, and because the number of officials who received them has been smaller. The capacity development process has also involved local expertise and, in particular, local involvement and input in the organization of many activities. In the case of prosecutors, however, considerable horizontal movement between units made specialized training on investigation and prosecution for international crimes being unevenly distributed among them.²⁶⁹

An interesting development in the context of technical assistance is the programme funded by the European Union that provided for two international experts with practical experience in mass atrocity cases to work on a permanent basis in Colombia.²⁷⁰ Their task has been to support directly three magistrates of the Trial Chamber for Justice and Peace cases by, for example, elaborating an evidentiary protocol to prove contextual elements of international offences. This plan has implied the

²⁶⁴ Anonymous interviewee.

²⁶⁵ Interviews C-9 and C-11.

²⁶⁶ Interview C-2.

²⁶⁷ Interview C-14, among others.

²⁶⁸ A. Chehtman, “Developing Bosnia and Herzegovina’s Capacity to Process War Crimes Cases. Critical Notes on a ‘Success Story’”, *Journal of International Criminal Justice* 9(3) (2011), 547-570.

²⁶⁹ Lately a group was formed which was specifically involved in investigating crimes against union leaders (BIT group) (interview C-8).

²⁷⁰ See “Focal points’ compilation of examples of projects aimed at strengthening domestic jurisdiction to deal with Rome Statute Crimes”, RC/ST/CM/INF.2, 21-2.

selection of two individuals with relevant training, language abilities, an understanding of the political and legal culture, and, perhaps most importantly, who remained attached to the programme for more than two years, allowing them to build relations of trust and respect with the local professionals.²⁷¹ This has allegedly made a significant difference to local officials, and it may be a form of hybridity worth exploring in more detail in future research and policy planning.²⁷²

According to the OTP, under the policy of “positive complementarity” the ICC will encourage national proceedings wherever possible rather than compete with local courts.²⁷³ It may be argued that despite some interesting developments the contribution of the ICC in terms of developing local capacity in Colombia has been suboptimal.²⁷⁴ This may be unsurprising since, as it is commonly argued, the ICC lacks an explicit mandate to engage itself in capacity development initiatives and, moreover, still has not exercised its jurisdiction over the situation in Colombia.²⁷⁵ But the ultimate explanation of the overall failure of the ICC in this respect seems to lie in the type of relationship developed between the ICC and the Colombian judiciary, and the kinds of incentives this relationship provides.

In some cases, a positive approach to complementarity would involve altering the balance of incentives that an unwilling state faces, designed to encourage its political authorities to initiate domestic prosecutions.²⁷⁶ As illustrated in section 4, the ICC’s approach to developing local capacity in Colombia has been largely connected with the ‘threat’ of it opening an investigation. This could very well obtain, according to the general perception among Colombian authorities (and observers) if they did not carry out

²⁷¹ Anonymous interviewee.

²⁷² The German agency GTZ has created a program called ProFis to support the work of the Prosecutor’s Office in Colombia (and also other offices in the judiciary) with the application of the JPL. On this programme see, <http://www.profis.com.co/modulos/contenido/default.asp?idmodulo=160> (last accessed April 28 2011).

²⁷³ Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps, The Hague, Netherlands (12 February 2004), available at http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf (last accessed on 10 December 2010). Currently “Positive complementarity” seems to be less about the ICC influencing local actors and more about horizontal collaboration between states (see, eg, <http://www.icc-cpi.int/NR/exeres/0A7DEDFE-4308-4487-992D-1ED77AB5CAAE.htm>, last accessed on January 20 2011).

²⁷⁴ An ICC official suggested that the training seminars held by the ICC Registry have more of an outreach function, focusing on ICC norms and procedures rather than on issues relevant for national investigations (anonymous interviewee).

²⁷⁵ Interviews C-13 and D-3.

²⁷⁶ Burke-White, “Implementing a Policy of Positive Complementarity”, 70.

serious and reliable trials for international crimes.²⁷⁷ This approach is eloquently illustrated by the messages conveyed by the ICC prosecutor at specific critical junctures of the JPL process.²⁷⁸ The ICC is commonly referred to as “el Coco” in the local jargon – an ogre in children’s fairy tales – indicating a policy perhaps too focused on providing sticks as its preferred way to ensure compliance.²⁷⁹

This has reportedly had some positive effects over Colombia’s transitional justice process of accountability. As we have seen, it may have provided the original Justice and Peace framework, which contained essentially nominal penalties, with more serious sanctions and a more ambitious framework for developing a historic record of the atrocities. It is also suggested that it has favoured certain progress in the legal treatment of this kind of gross human rights violations. This has obtained, for instance, by it encouraging the incorporation of evidentiary standards sensitive to difficulties as in the case of sexual offences,²⁸⁰ pushing for investigations into the systematic forms of criminality and patterns of violence, and more procedural rights for victims. In this respect, and as explained in the previous section, it may have encouraged the use of international crimes, such as crimes against humanity, even if they were not explicitly provided for as a matter of domestic criminal law.²⁸¹

But there are also negative effects connected with this particular “sticks-only” approach; the incentive this threat creates for Colombian authorities “may end up undermining the whole process by directing it towards unrealistic goals.”²⁸² The Supreme Court of Colombia, for instance, has prevented the use of partial attributions of facts, forcing prosecutors to conduct investigations into the full facts disclosed by defendants. But the worst implication is arguably the antagonizing effect it has over the relationship between domestic authorities and the ICC. As it has been put by an interviewee, “this ‘observation’ phase is an obnoxious term; ... [i]t is perceived as the kind of strategy the

²⁷⁷ Interviews C-3 and C-12.

²⁷⁸ See, eg, letter to the Colombian Parliament when the Justice and Peace Law was being debated (on file with author).

²⁷⁹ Interviews C-2, C-4, and C-12.

²⁸⁰ Interview C-2.

²⁸¹ In all these relevant respects, however, the role of the ICC as a triggering influence for them is shared by the Inter American Court of Human Rights (see previous section) and, of course, with Colombia’s own domestic synergies (most notably the Constitutional Court’s push to introduce international human rights standards in the Colombian legal system). See interviews C-4, C-9, C-12 and C-14.

²⁸² Interviews C-6, C-9 and C-11.

[International Monetary Fund] follows, and which is often strongly resisted domestically.”²⁸³ The shared sense in certain areas of the judiciary and other public authorities in Colombia seems to be one of hostility towards the ICC, rather than collaboration.

Moreover, if the OTP were to decide to take Colombia out of the list of situations under observation, thereby taking this “stick” away, this may have a powerful detrimental effect on ongoing domestic process.²⁸⁴ And yet, it is also quite widely believed that if the ICC were to open an investigation on Colombia, this would also lift a significant part of the political incentive to push for investigations and trials domestically.²⁸⁵ Intervention would be perceived by the local judiciary as a statement of inability²⁸⁶ and would create the temptation to free-ride on the work of the ICC.²⁸⁷ Admittedly, most of the more influential potential indictees would rather have local authorities investigating, as they would be perceived as more easily influentiable. The sense is that intervention by the ICC, however, would weaken the domestic legal system in terms of its capacity to conduct investigations locally, ie, it would have a destabilizing effect, and at the same time it would create gross inequalities between defendants.²⁸⁸ For a few cases in which the relevant perpetrators would be taken to trial (in the best case scenario), most of the others would remain at large.²⁸⁹

A possible way out of this juncture would be to add some “carrots” to this overall framework, namely, to foster interaction between local authorities and the ICC in order to develop trust and establish some sort of working relations, albeit loose ones. The *Consejo Superior de la Judicatura* has the power to create new dependencies. So without the need for a direct intervention of the ICC, it could create a unit of international

²⁸³ Interview C-3.

²⁸⁴ Anonymous interviewee.

²⁸⁵ Interviews C-3, C-4 and C-6 among others. Those more sceptical, however, would argue that this in fact begs the question; for they never had any expectations on the outcome of this process, in terms of justice, truth and reparations.

²⁸⁶ Interview C-3.

²⁸⁷ Burke-White, "Implementing a Policy of Positive Complementarity", 82.

²⁸⁸ Interview C-2. It has been standardly argued that the only thing the Colombian administration, the Constitutional Court, and the Supreme Court have had in common with regards to the JPL and parapolitics issues is their shared view regarding the need to avoid an intervention by the ICC (Interviews C-2, C-3, C-14 among others).

²⁸⁹ See, Human Rights Watch, "ICC: Course Correction. Recommendations to the Prosecutor for a More Effective Approach to 'Situations under Analysis'", June 2011, available at <http://www.hrw.org/fr/news/2011/06/16/icc-course-correction> (last accessed, July 23 2011).

support even within the Supreme Court and the Prosecutor's Office. This could stabilize the investigation and trial of this kind of cases. They would also benefit from advice on the right approach to these cases.²⁹⁰ These developments might be considered even a positive indicator vis-à-vis the complementarity test, and create positive synergies even in the case the ICC were to open a limited investigation. Moreover, it would also be possible for the OTP itself to establish relationships with local judicial and prosecutorial authorities (and not only with the executive branch),²⁹¹ not only with civil society organizations.²⁹² It could, for instance, establish a special division within the OTP to liaise with local authorities on a permanent basis.²⁹³ It could finally develop guidelines on complementarity and protocols contributing to local jurisdictions' practice of investigating, charging, and trying individuals for this type of crime.²⁹⁴

6. CONCLUDING REMARKS

To conclude this report, there are at least four of the ways in which the ICC has impacted on Colombia's legal system. Perhaps the greatest influence has been, paradoxically, in the use made in it by domestic actors. The ICC has been significantly present in political discourse, as a way to exercise pressure on certain key actors both within and beyond the JPL framework. The main concern for local authorities has been, generally, to avoid the launch of a formal investigation over the situation in Colombia. In this respect, we have examined how it became relevant at the discussion of every key decision concerning the process of transitional justice in Colombia.²⁹⁵ Second, and relatedly, the ICC has been influential in contributing to the momentum for existing investigations. It has helped legitimizing the work of those prosecutors who have been more ambitious than the context would otherwise warrant.²⁹⁶ Third, the ICC has contributed to the development and application of "new" standards, more in line with contemporary

²⁹⁰ Interview C-3.

²⁹¹ Burke-White, "Implementing a Policy of Positive Complementarity", 72.

²⁹² Interviews C-4 and C-12.

²⁹³ Interview C-3.

²⁹⁴ Interview C-2.

²⁹⁵ Since the entry into force of the Rome Statute, different organizations from civil society have sought to obtain the intervention of the ICC. This has included presentations, interviews, etc with the ICC's OTP.

²⁹⁶ This includes the investigation of massacres, and the uncovering of mass graves.

international criminal law and rejection of more “traditional” legal concepts provided for under Colombia’s domestic criminal laws.²⁹⁷ It has “internationalized” Colombia’s criminal law by forcing judges, prosecutors, and influential academics to look more closely into this kind of perspective.²⁹⁸ This has also required the development of analytical and investigatory tools at the level of the investigation of complex criminality. And finally, the ICC has contributed to put more pressure over key actors of the Colombian conflict. In these respects, and others examined throughout this report, the ICC has had overall a positive influence over the Colombian process of domestic accountability.

Admittedly, the accountability process in Colombia is far from reaching a stage in which the complementarity principle would be considered satisfied.²⁹⁹ The greatest difficulty of this accountability process has been the persistence of the conflict in Colombia, and the failure of the JPL framework to achieve genuine demobilization of paramilitary organizations. While this obtains, security conditions for officials, victims, and even some offenders will not allow for actual prosecutions to take place in a significant scale. Also, the JPL process has faced enormous delays and limitations in terms of its investigative capacity. After more than six years there have been only a handful of trials. Finally, there are significant impunity gaps regarding the other two main actors of the conflict, namely the leftist guerrilla organizations and individuals belonging to the state (both officials and members of the military). Very limited investigations have been conducted over state officials for international crimes, as it is perhaps best illustrated by the lack of serious prosecutions for the “false positive” cases.³⁰⁰

In this context, it may be useful to conclude with a few words on the ICC’s policy of “positive complementarity” and its implications for Colombia. The idea behind a positive approach to complementarity may be simply interpreted as a policy by which the ICC would actively encourage domestic prosecutions for crimes within its jurisdiction.³⁰¹

²⁹⁷ Interview C-5.

²⁹⁸ Interview C-14.

²⁹⁹ Against this conclusion but sharing many of the considerations on which this reasoning is based, see Ambos, “Procedimiento de la Ley de Justicia y Paz (Ley 975 De 2005) y Derecho Penal Internacional”.

³⁰⁰ This allegedly entailed a policy by the military of killing civilians, and then take them to other parts of the country and dress them into “guerrilla outfits” to suggest they were military casualties. On this see, eg, *Directiva Ministerial Permanente* Number 29/2005 (Secret), which established payment of rewards “in exchange for deaths of enemy combatants, seizure of weapons, and the provision of information generally” (cited in ICTJ, “Colombia”).

³⁰¹ See, eg, William W. Burke-White, “Implementing a Policy of Positive Complementarity in the Rome System of Justice” *Criminal Law Forum* 19 (2008) 60.

Put differently, “[c]omplementarity shifts incentives by changing the default option from impunity to supranational prosecution.”³⁰² However, the impact of the ICC in Colombia illustrates, as Schabas has suggested, that the concept of complementarity may also imply an antagonistic relationship between national justice systems and the ICC: “[i]nitiatives by the Prosecutor would be a sign that the national system had failed to do its duty.”³⁰³ It involves almost nothing of what the group of experts drafting the study on complementarity “in practice” endorsed. Namely, ideas such as “partnership”, “dialogue with States” and “burden-sharing” between Colombia and the ICC have been entirely absent from both political and legal discourse.³⁰⁴ “The ICC puts pressure on providing some form of outcome.”³⁰⁵ This pressure is shared by certain local actors and has had both constructive and destructive consequences. This is because the ICC is mainly felt as a “sword of Damocles hanging over public authorities.”³⁰⁶ It has provided Colombian authorities little or no incentives to explore the possibility of building collaborative relationships with the Court.

As a result of this form of implementation of the policy of positive complementarity, several observers have described the situation as a no-win situation. If the ICC were to close its preliminary assessment of the Colombia case, this would genuinely deprive actors who are pushing for investigations and prosecutions before the Colombian authorities of one of their key legal, argumentative, and political resources. By contrast, if the ICC were to open an investigation this may well also undermine the timid momentum that has been developed. As Burke-White has suggested, there seems to be a problem where the ICC first trains and enhances local legal capacity and then launches its own investigation.³⁰⁷ And finally, the persistence of the “threat” may end up winding its capacity to move the key actors in the desired direction because it may simply lose credibility. The policy of positive complementarity, as currently interpreted,

³⁰² Burke-White, “A Community of Courts: Toward a System of Criminal Law Enforcement”, *Michigan Journal of International Law* 24(1) (2002), 92.

³⁰³ William Schabas, “Complementarity in Practice: Some Uncomplementary Thoughts” *Criminal Law Forum* 19 (2008) 6. Schabas suggests, however, that in practice the ICC has aimed at attracting cases, rather than insisting States fulfil their obligations mainly by being generally unthreatening to states by targeting rebel groups more than pro-government militias.

³⁰⁴ Informal expert paper: The principle of complementarity in practice.

³⁰⁵ Interview C-6.

³⁰⁶ Interview C-3.

³⁰⁷ Burke-White, “Implementing a Policy of Positive Complementarity in the Rome System of Justice”, 77.

seems to be doomed in one important respect, namely, that it fails to provide local actors with a sustainable cluster of incentives that will support the initiation and continuation of a genuine process of accountability before domestic courts. This, notwithstanding all the positive (and sustainable) effects it may have had in the internationalization of Colombia's criminal law and legal approach towards mass criminality.

LIST OF INTERVIEWEES³⁰⁸

1. Gabriel Arias, ICTJ Colombia
2. Mr Leonardo Augusto Cabanas Fonseca, JPL Prosecutor
3. Ms Montserrat Carboni, OTP – ICC
4. Prof. Manuel José Cepeda, University of Los Andes, former Judge of the Colombian Constitutional Court
5. Prof. Eduardo Cifuentes, University of Los Andes, former Judge of the Colombian Constitutional Court
6. Ms Ana Díaz, Researcher Comisión Colombiana de Juristas
7. Judge Lester M. González, JPL – Colombia
8. Mr Carlos González, Mapp OAS – Colombia
9. Mr Fabricio Guariglia, OTP – ICC
10. Ms Diana Guzman, Researcher at Dejusticia
11. Dr Manuel Iturralde, University of Los Andes, Colombia
12. Judge Uldi T. Jiménez López, JPL – Colombia
13. Ms Marta López, Mapp OAS – Colombia
14. Ms Haylen Maldonado, Defensoría del Pueblo, Colombia
15. Ms Camilla Sudgen, DfID
16. Mr Pascal Turlan, OTP – ICC

³⁰⁸ A few other interviewees have requested to remain anonymous.

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