

# THE COLOMBIAN PEACE PROCESS (LAW 975 OF 2005) AND THE ICC'S PRINCIPLE OF COMPLEMENTARITY\*

Kai Ambos\*\*

## Abstract

The chapter assesses the Colombian peace process, as regulated by Law 975 of 2005 (*Ley de Justicia y Paz*), with a view to Colombia's obligations under Article 17 of the ICC Statute. After some preliminary remarks (*infra* 1), it gives an overview of the process under Law 975, taking into account not only the relevant norms, but, especially, the practice (2). In the second part, the complementarity test of Article 17 of the ICC Statute is systematically analysed and applied to the Colombian situation (3). First, the object of reference of this test, in particular the distinction between situation and case, will be examined. Then, the actual complementarity test will be analysed - distinguishing between complementarity *stricto sensu* on the one hand, and an additional gravity threshold on the other.

## 1. Preliminary remarks

The so-called 'Justice and Peace Law' (*Ley de Justicia y Paz*) of 25 July 2005 (hereinafter: 'Law 975') continues a Colombian policy of restorative justice which goes back to the 1980s<sup>1</sup> and pursues the objective to disarm, demobilize and reintegrate irregular armed groups ('Grupos Armados Organizados al Margen de la Ley', *i.e.*, 'groups operating outside the law', hereinafter 'GAOML'). While the earlier peace processes only referred to 'left-wing' insurgents, Law 975 also or even predominantly covers 'right-wing' paramilitary groups.<sup>2</sup> The Law provides, as the central concession to the irregular groups, for a conversion of the 'normal' punishment into a so-called 'alternative sentence' (*pena alternativa*) of minimum five and maximum eight years for the crimes committed during membership in the irregular group (Articles 3, 29<sup>3</sup>).<sup>4</sup> Thus, while Law 975 does not offer a

---

\* The paper is based on a comprehensive study on the Colombian peace process with a view to the obligations arising from the principle of complementarity. It was commissioned by a German government project to support the Colombian *Fiscalía General de la Nación* in the implementation of Law 975 (Project GTZ-ProFis, Bogotá). The original study was published in Spanish: *Procedimiento de la Ley de Justicia y Paz (Ley 975 de 2005) y Derecho penal internacional*, Bogotá: Temis [[www.editorialtemis.com](http://www.editorialtemis.com)] 2010 (with the assistance of F. Huber/R. A. González-Fuente Rubilar/J. Zuluaga, hereinafter 'Ambos *et al.*'), available at <[www.department-ambos.uni-goettingen.de/documents/procedimiento-de-la-ley-de-justicia-y-paz.pdf](http://www.department-ambos.uni-goettingen.de/documents/procedimiento-de-la-ley-de-justicia-y-paz.pdf)>. A shorter version was published in English: *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court – An Inductive Approach* (2010) (hereinafter 'Ambos'). The reader is kindly referred to these publications for further analysis and references.

\*\* Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August Universität Göttingen; Judge at the District Court (*Landgericht*), Göttingen. – I thank Ousman Njikam, currently ICTY (The Hague), for a final language revision.

<sup>1</sup> It started in March 1981 with a conditional amnesty for political and related crimes for guerrilla groups (*Ley 37 de 1981*); for a good summary in English see Inter-American Commission on Human Rights ('IACHR'), Report on the demobilization process in Colombia, OEA/Ser.L/V/II.120, Doc. 60, 13 December 2004, at 53 *et seq.*

<sup>2</sup> Art. 1 Law 975 defines GAOML as guerrilla or self-defense (paramilitary) groups ('grupo de guerrilla o de autodefensas').

<sup>3</sup> Articles without reference refer to Law 975. For the full text in English, see Ambos, *supra* note \*, part III 3.

<sup>4</sup> According to Art. 10 of Decree 3391 of 2006 the 'ordinary sentence', consisting of the main and accessory sentence, will be suspended by the 'alternative sentence'. The alternative sentence may therefore be interpreted as a 'penal surrogate' ('subrogado penal'), see R. Uprimny and M. P. Saffon, '¿Al fin, ley de justicia y paz? La Ley 975 tras el fallo de

full exemption of punishment, its mitigation is considerable compared to the normal punishment for these kind of crimes under ordinary Colombian criminal law.<sup>5</sup> Clearly, this considerable mitigation requires something in return from the potential beneficiary and that is his contribution to ‘truth, justice and reparation’ (Article 1), in particular by providing full information about the crimes committed by him and/or his group (Article 3). The Constitutional Court has reinforced this obligation.<sup>6</sup> Against this background Law 975 can be qualified as a *law of a conditionally reduced penalty*.<sup>7</sup>

As to its *subject matter*, Law 975 applies to the international core crimes, *i.e.*, genocide, crimes against humanity and war crimes, except – a concession to U.S. national interests – if the irregular group or the individual beneficiary was (primarily) involved in drug trafficking (Article 10(5) and Article 11(6)).<sup>8</sup> According to traditional Colombian practice, international core crimes must not be subject to an amnesty, pardon or any other exemption of punishment<sup>9</sup> and thus such an exemption could not – independent of the international obligations to that effect<sup>10</sup> – be admitted.<sup>11</sup>

As to the *temporal scope of application*, Law 975 does not apply to crimes committed after its entry into force, *i.e.*, 25 July 2005 (Article 72).<sup>12</sup> The Supreme Court confirmed this view by arguing that the clear letter of the law does not allow for an extension of its application beyond its entry into force.<sup>13</sup> The government’s attempt to extend the temporal application to the the demobilization of the group (instead of the Law’s entry into force)<sup>14</sup> has so far not found a majority in Congress.<sup>15</sup>

---

la Corte Constitucional’, in R. Uprimny (ed.), *Justicia Transicional sin Transición* (2006), 201, at 211. The main sentence, in turn, encompasses the inhibition of the exercise of political rights (Art. 35 in connection with Art. 43(1) of the Constitution).

<sup>5</sup> The normal punishment would amount to 50 to 60 years (Arts. 31(2), 37(1) *Código Penal* = Penal Code, hereinafter ‘CP’).

<sup>6</sup> Constitutional Court of Colombia, Judgment of 18 May 2006, C 370, section 6.2.2.1.7.26. For the text of the law with the amendments arising from this important judgement see Ambos, *supra* note \*, part III 3.

<sup>7</sup> Cf., P. Kalmanovitz, ‘Introduction’, in M. Bergsmo and P. Kalmanovitz (eds.), *Law and Peace Negotiations* (2009), 7, at 15.

<sup>8</sup> According to Art. 10(5) a condition of the collective demobilization is that ‘the group was not organized for the purposes [*no se haya organizado para*] of drug trafficking or illicit enrichment’, according to Art. 11(6) the individual demobilised activity must ‘not have had as its purpose [*como finalidad*] narcotics trafficking or illicit enrichment’.

<sup>9</sup> The first conditional amnesty mentioned above (*supra* note 1) already excluded ordinary crimes such as kidnapping, extortion and killings *hors de combat* (see IACHR, *supra* note 1, at 54). The predecessor of Law 975, Law 782 of 2002, also excluded ‘atrocious acts of ferocity or barbarism, terrorism, kidnapping, genocide, murder committed outside combat or placing the victim in a state of defenslessness’ from its benefits (Art. 19, last para.). On the difficult relationship between Laws 975 and 782 see Ambos, *supra* note \*, part I 1.

<sup>10</sup> Cf., K. Ambos, ‘The Legal Framework of Transitional Justice’, in K. Ambos *et al.* (eds.), *Building a Future on Peace and Justice* (2009), 19-103, at 28 *et seq.*

<sup>11</sup> There were however proposals to that effect, see *e.g.*, for the first ‘impunity’ proposal of the Uribe government Uprimny and Saffon, *supra* note 4, at 201, 203.

<sup>12</sup> Law 975 only applies to continuous or permanent offences (*e.g.*, the forced disappearance of persons) if their execution commenced before its entry into force, the violation of the legal interest protected ceased to exist at the moment of demobilization and the beneficiary actively cooperates in order to ascertain the victims’ rights (Executive Decree 4760 of 2005, Art. 26).

<sup>13</sup> Supreme Court of Justice - Criminal Chamber (Corte Suprema de Justicia - Sala de Casación Penal, hereinafter ‘Supreme Court’), Judgment of 24 February 2009, Rad. 30999, para 7.

<sup>14</sup> The draft law is available at: <http://www.altocomisionadoparalapaz.gov.co/web/noticias/2009/marzo/documentos/PROYECTO%20DE%20LEY-VIGENCIA.pdf>.

<sup>15</sup> This extension would in any case undermine the original rationale of the temporal application, *i.e.*, to require the respective group to stick to the negotiated agreement and, in any case, abstain from committing further crimes after the entry into force of Law 975 *independent of its demobilizations* (see also Supreme Court, Judgment of 19 November 2002, Rad. 7026, paras. 5, 7).

As to *pending investigations or trials* against members of irregular groups in general, Article 20 provides for their ‘joinder’ and the ‘accumulation of sentences’ if the respective offences have been committed ‘during or on occasion of membership’ in the respective group;<sup>16</sup> crimes committed before membership are excluded from Law 975, *i.e.*, they must be dealt with exclusively by the ordinary criminal justice system. Thus, in case of conflict between the ordinary procedure and the Justice and Peace procedure with regard to the same crimes committed ‘during and on occasion of membership’, one must distinguish as follows: The ordinary criminal proceedings are *temporarily suspended* when these same crimes are the object of a (successive or partial) imputation under Law 975; they are *definitely joined* (‘*accumulated*’) with the Law 975 proceedings if the charges are confirmed (‘legalized’) by the Higher Tribunal’s Justice and Peace Chamber.<sup>17</sup> In the case of a prior sentence for crimes committed ‘during and on occasion of membership’, this sentence shall be ‘accumulated’ with the sentence to be imposed under Law 975 according to the normal rules of cumulative sentencing (*concurso*) under the Criminal Code.<sup>18</sup> In any case, while the ‘accumulated’ sentence can be higher than the alternative sentence,<sup>19</sup> the finally executed sentence will never go beyond the range of 5 to 8 years fixed by the alternative sentence.<sup>20</sup>

## 2. The process under Law 975

The process under Law 975 consists of an administrative and a judicial phase.<sup>21</sup> The latter can be divided in a ‘pre-procedural’ phase, directed by the General Prosecutor’s Office (*Fiscalía General de la Nación*), and a ‘procedural’ one, directed by the Higher Tribunal’s special Justice and Peace Chambers (*Salas de Justicia y Paz*).<sup>22</sup> In a nutshell the procedure can be presented as follows:

### Table: Overview of the procedure under Law 975

---

<sup>16</sup> See also Supreme Court, Judgment of 27 August 2007, Rad. 27873, section 2.1 (‘Naturaleza jurídica y estructura del trámite previsto por la ley 975 de 2005’).

<sup>17</sup> See Supreme Court, Judgment of 25 September 2007, Rad. 28250, Consideraciones de la Corte. On the confirmation of the charges see *infra* 2.2., note 40 and main text.

<sup>18</sup> According to Art. 31 CP, in case of various offences, the gravest sentence will be increased but must not exceed 60 years. See for the applicability of these rules, Art. 460 of Law 906 of 2004 (current *Código de Procedimiento Penal* = Code of Criminal Procedure, hereinafter: ‘CPP’) and Art. 470 of Law 600 of 2000 (‘former CPP’).

<sup>19</sup> Constitutional Court, *supra* note 6, section 6.2.1.6.4 has declared the last part of paragraph 2 of Article 20 (‘... but in no case may the alternative sentence be greater than that provided for in this law’) unconstitutional.

<sup>20</sup> *Ibid.* See for the first concrete application Tribunal Superior de Bogotá, Judgement of 19 March 2009, Sala de Justicia y Paz, Rad. 11001600253200680526, Wilson Salazar Carrascal (‘El Loro’), para. 164-166.

<sup>21</sup> Cf., Supreme Court, *supra* note 16, section 2.1. (‘Naturaleza jurídica y estructura del trámite previsto por la ley 975 de 2005’); see also Supreme Court, Judgement of 23 August 2007, Rad. 28040, (‘Consideraciones de la Corte, cuestión previa, section 2’) and Judgement of 25 September of 2007, Rad. 28040, (‘Consideraciones de la Corte, Estructura del proceso de justicia y paz’).

<sup>22</sup> The distinction between a ‘pre-procedural’ and a procedural phase *stricto sensu* is a particular feature of Colombian law and doctrine (see Supreme Court, *supra* note 16, section 2.1.) (Naturaleza jurídica y estructura del trámite previsto por la ley 975 de 2005). In contrast, in most other Latin American procedural systems it is understood – as in modern criminal procedure – that the criminal process starts with the *notitia criminis*, *i.e.* the knowledge of the prosecutorial authorities (police and/or prosecutor) that a crime has been committed.

demobilization, disarmament, reintegration	<i>postulation</i> Art. 10, 11	preliminary investigation before “free version” ( <i>versión libre</i> )	“free version” Art. 17	methodological program Art. 17	
	possibility of preliminary hearing: -anticipated evidence -safeguarding measures		evtl. termination		
accepts	hearing of <i>formulation of charges</i> Art. 19	10 days	request for hearing of formulation of charges	evidentiary phase 60 to 180 days Art. 18	hearing of <i>formulation of imputation</i> Art. 17, 18
rejects	breaking of procedural unity Art. 21		appeal		
hearing of <i>verification of acceptance of charges</i> Art. 19	“incident” of <i>reparation</i> Art. 19, 23	<i>sentencing</i> hearing Art. 19	(alternative) sentence	execution of sentence	

### 2.1. Administrative phase

The administrative phase starts with the *demobilization*, i.e., the ‘individual or collective act of laying down arms and abandoning the irregular group’ (Article 9). Apart from not being involved in drug trafficking (Article 10(5), 11(6)), the respective member must fulfill certain *conditions*, i.e., disarm, give up any criminal activity, surrender any goods from criminal activity and cooperate with the investigating authorities (Article 10, 11). Once the respective member of a group is recognized as such, the final list of ‘postulated’ members is sent to the General Prosecutor by the Ministry of the Interior and Justice.<sup>23</sup> With the then following preliminary investigation, the pre-procedural phase of the judicial phase starts.<sup>24</sup>

While the sending of the list (‘postulation’) normally implies the completion by the respective group members of the disarmament and demobilization phase, their *reintegration* into society will require more time and additional measures. The demobilized members shall receive certain economic assistance to that effect. Yet, the reintegration does not only depend on their conduct but also on the attitude of the communities where they should be received. For this reason it is highly important that these become actively involved in the process.

Clearly, the recognition of a person as a member of an irregular group and his postulation is the *first filter* in the process of Law 975. Thus, the question arises whether this decision as well as the exclu-

<sup>23</sup> See Executive Decrees 3360/2003, 423/2008 and 1364/2008.

<sup>24</sup> The case law puts the reception of this list on an equal footing with the *notitia criminis* in the ordinary procedure, see e.g., Supreme Court, Judgment of 27 August de 2007, Rad. 27873, section 2.1. (‘Naturaleza jurídica y estructura del trámite previsto por la ley 975 de 2005’).

sion of a person from the list is of administrative-political (executive) or judicial nature. The answer depends on the moment this decision is taken: As long as we are in the administrative phase of selecting the persons who may benefit from Law 975, the process is completely controlled by the government; once the judicial process is initiated, *i.e.*, with the passing of the list of the demobilized members to the Prosecutor General, the Prosecutor and the competent Courts take over the process, *i.e.*, it ceases to be purely executive and becomes strictly judicial.<sup>25</sup>

While a voluntary and explicit renunciation of the postulated person leads to the automatic and irrevocable *exclusion* from Law 975, the exclusion for other reasons, *i.e.*, due to the non-fulfillment of the eligibility requirements, must be decided – at the request of the Prosecutor – by the Higher Tribunal's Justice and Peace Chamber, composed of three judges.<sup>26</sup>

## 2.2. Judicial phase

Once the administrative phase with the listing of the possible beneficiaries is completed, the Prosecutor's 'Unit for Justice and Peace' (*Unidad Nacional de Fiscalía para Justicia y Paz*, 'UJP') starts, designing the so called 'methodological program',<sup>27</sup> a comprehensive investigation in order to determine, in a reasonable time<sup>28</sup>, the facts and circumstances necessary to establish criminal responsibility and the reparation for the victims.<sup>29</sup> In this so-called 'preliminary investigations before the free version' (*actuaciones previas a la versión libre*) phase, it is also possible to hold preliminary hearings in order to, for example, secure important evidence or adopt measures regarding victims' protection.<sup>30</sup> The competent Prosecutor then proceeds to receive the so-called 'free version' (*versión libre*)<sup>31</sup> of the postulated GAOML member; it is preceded by his confirmation (*ratificación*) to submit to the procedure of the Law 975<sup>32</sup>. In the free version itself, the respective members of the irregular group must give a complete and true account (*confesión completa y veraz*) regarding 'time, manner and place' of all the criminal acts committed 'on occasion of their membership' in an irregular group.<sup>33</sup> The version consists of various phases or sessions which, in turn, may be structured in various sub-sessions or hearings which may take weeks or months. In case of giving incomplete or even false information the suspect will lose the right to the benefit of the 'pena alternativa'.<sup>34</sup> Further, he must list the objects and goods to be provided for the reparation of the victims. While the hearing of the version is not open to the general public, the *victims* have a right to full participation, *inter alia*, by being present and participating in the hearings.<sup>35</sup>

---

<sup>25</sup> Supreme Court, Judgment of 10 April 2008, Rad. 29472, para. 11.

<sup>26</sup> See for more details Ambos *et al.*, *supra* note \*, para. 118 *et seq.*

<sup>27</sup> See *infra* note 36.

<sup>28</sup> See Art. 1 Decree 2898 of 2006 and Art. 1(2) Decree 4417 of 2006.

<sup>29</sup> See Art. 15, 16 Law 975 and Art. 4 Decree 4760 of 2005.

<sup>30</sup> See Legislative Act 03 of 2002 and Law 906 of 2004.

<sup>31</sup> The concrete development of this act has been described in various norms, including various instructions from the Prosecutor General to the Special Unit of Justice and Peace, see Ambos, *supra* note \*, part I 2.2.

<sup>32</sup> See Art. 1 of Decree 4417 of 2006.

<sup>33</sup> See Art. 17(2) Law 975 and Article 9 Decree 3391 of 2006. See also Constitutional Court, *supra* note 6, section 6.2.2.1.5. ('Análisis conjunto de los artículos 17 parcial, 25 parcial y 29 parcial de la Ley 975 de 2005').

<sup>34</sup> Constitutional Court, *supra* note 6, section 6.2.1.4.2.

<sup>35</sup> In this sense Constitutional Court, Judgment of 24 January 2008, T-049; Council of the State (*Consejo del Estado*), Administrative Chamber (*Sala de lo Contencioso Administrativo*), Fourth Section, Judgment of 26 July 2007, Rad.

Once the *versión libre* is finished, the prosecutor, with the assistance of the investigators of the judicial police (*policía judicial*), evaluates the information received by the potential beneficiary and determines the further investigatory steps to be taken. The objective of this so called '*programa metodológico*'<sup>36</sup> is to verify the confession of the beneficiary and to possibly find out further relevant facts as to his responsibility and the criminal activities of his group. The program must be carried out in a reasonable time<sup>37</sup> and it is a prerequisite for the following phase of the 'formulation of the imputation' (*formulación de imputación*).<sup>38</sup> If the process of verification of the 'free version' arrives at the conclusion that no crime has been committed, the investigation will immediately be ceased and the proceedings terminated (Article 27).

As soon as all possible crimes are established, the '*imputation*' will be formulated (Article 18). It constitutes a procedural act by which the demobilized person becomes formally a defendant (*imputado*)<sup>39</sup> and the statute of limitation is interrupted. It takes place in a hearing before the judge of control of individual rights (*magistrado de control de garantías*) who must examine its formal and material legality. Another hearing for the formulation and admission of the charges (Article 19) is to be held before the judge of control not later than 120 days after the verification of the acts imputed to the beneficiary.<sup>40</sup>

It is important to note in this context that the Colombian jurisprudence has stressed on different occasions that the investigation of the acts confessed by the beneficiary and possibly further acts not (yet) confessed is a continuous task of the Prosecutor. It starts with the first verification after the free version and only finishes with the formulation of charges, *i.e.*, runs through the whole judicial phase of the process from the start until the end.<sup>41</sup> In particular, it was held that the investigation does not terminate with the formulation of the imputation but must be continued until the formulation of charges. Immediately after having affirmed the legality of the charges the Chamber may, at the request of a party, set, within 5 days, a date for a reparation hearing (*incidente de reparación integral*, Article 23).<sup>42</sup>

Once the Chamber has confirmed the legality of the charges, a *sentencing hearing* shall be held within 10 days. The sentencing decision contains the main and accessory (ordinary) sentence (*pena principal y accesoria*) and the 'alternative' sentence;<sup>43</sup> it may also contain certain rules of conduct, reparation obligations and the confiscation of goods to make the reparation effective. It is important to recall that the alternative sentence suspends the whole ordinary sentence, *i.e.*, not only its main part consisting of the term of imprisonment but also the accessory part which may for example im-

---

2500023240002007-00290-01; Supreme Court, Judgment of 8 June 2008, Rad. 27484. - Generally on the rights and protection of victims see Arts. 37, 38 Law 975 and Ambos *et al.*, *supra* note \*, para. 258 *et seq.*

<sup>36</sup> This 'program' is explicitly provided for in Art. 207 CPP (Law 906 of 2004) and serves to organize and structure the investigation in a systematic way.

<sup>37</sup> Constitutional Court, *supra* note 6, section 6.2.3.1.6.5.

<sup>38</sup> See Supreme Court, Judgment of 28 May 2008, Rad. 29560.

<sup>39</sup> Cf., Art. 286 CPP.

<sup>40</sup> See Art. 18 Law 975 and Art. 6 Decree 4760 of 2005.

<sup>41</sup> Supreme Court, *supra* note 38. See also Tribunal Superior, *supra* note 20, para. 77.

<sup>42</sup> See for more details Ambos *et al.*, *supra* note \*, para. 215 *et seq.*

<sup>43</sup> Art. 29 Law 975 and Art. 8 Decree 4760 of 2005.

pose an inhibition of exercise of public rights and functions.<sup>44</sup> Once the alternative sentence has been served (in an ordinary penitentiary!)<sup>45</sup> the convicted beneficiary will be on parole for a period of half of the alternative sentence. If he does not comply with the conditions imposed, the parole must be revoked and the convict must serve the ordinary sentence imposed. Ultimately, it is the Justice and Peace Chamber which grants and revokes the benefits of Law 975. In particular, it *excludes* a demobilized person from the legal regime of Law 975, *e.g.*, if he commits crimes after his demobilization (Article 25).<sup>46</sup>

### 3. The complementarity test as applied to the Colombian situation

The short overview of the process under Law 975 has prepared the ground for a closer examination of the ICC Statute's complementarity test with regard to the the Colombian situation. As I have explained my understanding of the complementarity test in detail elsewhere,<sup>47</sup> I will limit myself here – after some preliminary remarks (*infra* 3.1.) – to indispensable conceptual considerations, and focus on the concrete application of the complementarity test to the Colombian situation. In doing so, I will distinguish between gravity (*infra* 3.2.) and complementarity *stricto sensu* (3.3.). Such a distinction is compelling if one considers, following the Lubanga Pre-Trial Chamber,<sup>48</sup> that gravity pursuant to Article 17(1)(d) ICC Statute constitutes an additional threshold different from complementarity *stricto sensu* pursuant to Article 17 (1)(a)-(c), (2) and (3) ICC Statute. This implies, in turn, that complementarity *stricto sensu* only becomes relevant if the respective case is of sufficient gravity in the first place. It therefore seems logical to examine gravity first and only then, if the gravity standard is satisfied, complementarity *stricto sensu*.<sup>49</sup>

#### 3.1. Preliminary remarks

The complementarity test is an *on-going process* and may be revisited several times before the commencement of the trial.<sup>50</sup> The Kony Pre-Trial Chamber ('PTC') made the continuing nature of the test clear stressing the possibility of 'multiple determinations' of and 'multiple challenges' to admissibility in a given case.<sup>51</sup> From this follows that complementarity, being part of the admissibility of a situation, is to be examined at a very *early stage* during pre-trial proceedings, or, more exactly, during *preliminary inquiries* or the pre-investigation stage of the proceedings. In fact, once the 'Jurisdiction, Complementarity and Cooperation Division' ('JCCD') of the Office of the Prosecutor ('OTP') has affirmed the ICC's jurisdiction in all its aspects (*ratione temporis, personae and*

<sup>44</sup> See *supra* note 4.

<sup>45</sup> The Constitutional Court, *supra* note 6, section 6.2.3.3, correctly declared unconstitutional Art. 31 which reduced the alternative sentence by the time (max 18 months) the members of irregular groups stayed in the so called 'concentration zone' (*zona de concentración, zona de ubicación*), *i.e.*, an area provided by the government for their retreat without any State control.

<sup>46</sup> See *supra* note 26 with main text.

<sup>47</sup> Ambos, *supra* note \*, part II.

<sup>48</sup> *Prosecutor v. Lubanga and Ntaganda*, Annex II, Decision on the Prosecutor's application for warrants of arrest, article 58, Doc. ICC-01/04-01/07, 10 February 2006, para. 29.

<sup>49</sup> For the OTP's same approach in the Iraq situation, see Iraq response, Annex to the ICC-OTP, 'Update on Communications received by the Office of the Prosecutor of the ICC', 10 February 2006, 9.

<sup>50</sup> See also J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions* (2008), 245.

<sup>51</sup> *Prosecutor v. Kony et al.*, Decision on the Admissibility of the Case under Article 19 (1) of the Statute, Doc. ICC-02/04-01/05, 10 March 2009, para. 25 *et seq.* (26, 28, 52).

*materiae*), it has to analyze the complementarity issue. Only if a situation is considered admissible, will the Prosecutor be in a position to analyze more closely whether a formal investigation in the sense of Article 53 may be opened.<sup>52</sup>

In fact, Article 53 itself requires a positive decision with regard to jurisdiction and admissibility before coming to the more policy-based and discretionary criteria of subparagraph (c) of paragraphs 1 and 2. The Article 53 decision is at least as complex as the decision under Article 17 and the criteria to be applied, especially the ‘interests of justice’ test (Article 53(1)(c), (2) (c)), may even be considered more relevant with regard to the specific challenges posed by transitional justice processes.<sup>53</sup> This is especially true for the Colombian situation where it may well be possible that a situation or even a case may be considered admissible but, still, an investigation will not (formally) be opened for the reasons spelt out in Article 53(1) and/or (2). While this deserves a closer examination, it is beyond the scope of this paper.

Article 17 and 53 explicitly only refer to (individual) ‘cases’<sup>54</sup> – i.e., ‘specific incidents during which one or more crimes ... seems to have been committed by one or more identified suspects’<sup>55</sup> – but it is clear that not cases but (general) ‘situations’ – ‘generally defined in terms of temporal, territorial and in some cases personal parameters’<sup>56</sup> – are referred to the Prosecutor under the triggering procedure (Article 13). Accordingly, the *procedural development* from a situation to a case goes as follows:<sup>57</sup>

- (1) the OTP obtains *notitia criminis*;
- (2) starts pre-investigating;
- (3) identifies a situation;
- (4) checks the criteria enshrined in Article 53(1), 15(3), Rule 48 with regard to the situation as a whole;
- (5) starts a formal investigation (in the case of a referral), or asks for authorization of a formal investigation (in the case of information under Article 15) in the sense of Article 54;
- (6) investigates all-embracing and ideally identifies individual suspects;
- (7) ultimately applies for a warrant of arrest or summons to appear if the reasonable grounds standard of Article 58(1), (7) are met; and
- (8) the PTC issues a warrant of arrest or summons to appear.

---

<sup>52</sup> See on the structure of the pre-trial phase before the ICC Ambos, *Internationales Strafrecht*, 2008, § 8 mn. 20a *et seq.*; K. Ambos, ‘The Structure of International Criminal Procedure: ‘Adversarial’, ‘Inquisitorial’ or Mixed?’, in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007), 429, at 433 *et seq.*

<sup>53</sup> See for an analysis of the interests of justice clause Ambos, *supra* note 10, 82 *et seq.*; for a broad prosecutorial discretion K. Rodman, ‘Is Peace in the Interest of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court’, (2009) 22 *LJIL* 99; for criteria with regard to amnesties H. Olásolo, ‘Admissibilidad de Situaciones y Casos Objeto de Procesos de Justicia de Transición ante la Corte Penal Internacional’, in J. Almqvist and C. Espósito (eds.), *Justicia Transicional en Iberoamérica* (2009), 286 *et seq.*

<sup>54</sup> See also M. Benzing, ‘The Complementarity Regime of the ICC: International Criminal Justice between State Sovereignty and the Fight against Impunity’, (2003) 7 *MPUNYB* 591, at 603.

<sup>55</sup> *Prosecutor v. Lubanga*, Decision on the applications for participation in the proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6, Doc. ICC-01/04-101-tEN-Corr, 17 January 2006, para. 65.

<sup>56</sup> *Ibid.* See also J. K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 199; War Crimes Research Office (‘WCRO’), *The Relevance of ‘a Situation’ to the Admissibility and Selection of Cases before the International Criminal Court* (2009), 21-22.

<sup>57</sup> I follow here my (former) doctoral student I. Stegmiller, *The Pre-Investigation Stage of the ICC* (forthcoming, 2010).



### 3.2. Does the Colombian situation pass the gravity threshold?

Gravity has thus far largely been applied and defined by the OTP. Regulation 29 No. 2 of the OTP Regulations refers for the assessment of the gravity of ‘situations’ to ‘various factors, including their scale, nature, manner of commission, and impact.’<sup>58</sup> As to the ‘scale’, the Office referred to the number of victims and also took the geographic and temporal scope of the crimes into account.<sup>59</sup> This approach has been criticized because of the difficulty in establishing exact victim numbers, the lack of qualitative criteria<sup>60</sup> and a proper methodology as to the objects of comparison.<sup>61</sup> With respect to the *nature* of the crimes, the OTP considers that all ICC crimes ‘are crimes of concern to the international community and, as such, grave in themselves’.<sup>62</sup> Regarding the *manner of the commission*, the OTP refers to aspects of particular cruelty, crimes against particularly vulnerable victims and involving discrimination, abuse of *de jure* or *de facto* power, and, under certain circumstances, a so-called ‘added factor’, for example, if the crimes were apparently committed with the aim or consequence of increasing the vulnerability of the civilian population at large (through attacks on peacekeepers).<sup>63</sup> Last but not least, the *impact* criterion, albeit finally adopted by the Regulations, still seems to be controversial within the OTP, very much favored by the Chief Prosecutor<sup>64</sup> but not by (all) his staff members.<sup>65</sup> More importantly, it is not at all clear how impact is to be understood; it seems as if it is very close to ‘social alarm’ as employed by PTC I.

As to *judicial pronouncements* on gravity, the issue remains largely unsettled at the ICC level. Although the Lubanga Pre-Trial Chamber<sup>66</sup> proposed at least some abstract criteria regarding a case – the nature and social impact (‘social alarm’) of the crimes (systematic or large-scale?), the manner of commission (e.g. particular brutality or cruelty) and the status and role of the suspected perpetrators (are they the most responsible?) – these criteria have been widely criticized<sup>67</sup> and rejected by

---

<sup>58</sup> Regulations of the Office of the Prosecutor, Case No. ICC-BD/05-01-09, entry into force 23 April 2009. See also ICC-OTP, *Report on the activities performed during the first three years (June 2003-June 2006)*, 12 September 2006, 6 and ICC-OTP, *Report on prosecutorial strategy*, 14 September 2006, 5, referring to the scale and nature of the crimes, the manner of commission and the impact of the crimes.

<sup>59</sup> M. McAuliffe deGuzman, *Gravity and the Legitimacy of the ICC* (2008), paper 69, 30, at 35; F. Guariglia, ‘The Selection of Cases by the Office of the Prosecutor of the International Criminal Court’, in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), 209, at 214.

<sup>60</sup> For a prioritization of such qualitative criteria, i.e., the systematicity of the crimes, the social alarm caused and State involvement K. J. Heller, ‘Situational Gravity under the Rome Statute’, in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice* (2010), 227, at 229 *et seq.*; crit. M. Osiel, ‘When Law ‘Expresses’ more than it Cares to Admit: Comments on Heller’, in C. Stahn and L. van den Herik (eds.), *op. cit.*, 254, at 258.

<sup>61</sup> W. Schabas, *An Introduction to the International Criminal Court* (2007), 190; *ibid.*, *Prosecutorial Discretion and Gravity* in Stahn and Sluiter, *supra* note 59, 229, at 245-46.

<sup>62</sup> ICC-OTP, *Criteria for Selection of Situations and Cases, draft for discussion*, June 2006, para. 16.

<sup>63</sup> ICC-OTP, *supra* note 62, para. 17.

<sup>64</sup> M. Ocampo mentioned impact on various occasions (*Statement by Luis Moreno-Ocampo: Informal meeting of Legal Advisors of Ministries of Foreign Affairs*, 24 October 2005, at 6; ICC-OTP, *Third Report of the Prosecutor of the International Criminal Court, to the Security Council pursuant to UNSC 1593 (2005)*, 2006, 2).

<sup>65</sup> A senior member of OTP, Senior App. Counsel Fabricio Guariglia, did not include impact in a recent paper (*supra* note 59, 212 *et seq.*); crit. also Seils, ‘The Selection and Prioritization of Cases by the Office of the Prosecutor of the ICC’, in M. Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (2009), 55, at 59; Seils was the former Head of OTP’s Situation Analysis Section (August 2004 to October 2008) and mainly responsible, *inter alia*, for the OTP selection paper which does not contain this criterion (ICC-OTP, *supra* note 62, para. 12).

<sup>66</sup> Situation in the DRC in the case of *Prosecutor v. Thomas Lubanga Dyilo*, Decision concerning PTC I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the case against Mr. Thomas Lubanga Dyilo, Doc. ICC-01/04-01/06, 24 February 2006, para. 42 *et seq.* (46, 50-4, 63).

<sup>67</sup> See W. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’, (2008) 6 *JICJ* 731, at 743; WCRO, *The Gravity Threshold of the ICC* (2008), 36 *et seq.*; J. Ohlin, ‘Peace, Security, and Prosecutorial

the Appeals Chamber. It reversed the PTC's decision holding that its gravity test is flawed and thus constitutes an error of law in the sense of Article 81(a)(iii) ICC Statute.<sup>68</sup>

Applying these criteria to the *Colombian situation*, there is little doubt that it passes the gravity threshold in quantitative terms,<sup>69</sup> taking into account the scale, nature and manner of the violence and the crimes committed. Between 1964 and 2007, 673.930 homicides have allegedly been perpetrated; during the same period about 95.000 deaths as a result of armed conflict, 51.530 kidnappings, 24.579 terrorist acts and 4.499 massacres have been reported.<sup>70</sup> As to the number of victims, the former Chief Prosecutor himself recently spoke of 230.000 registered victims until 23 July 2009.<sup>71</sup> With regard to the phenomenon of internal displacement, as of July 2009 the figures range from almost 3 million to 4.6 million displaced persons;<sup>72</sup> in any case, these figures convert Colombia probably in the country with the second highest number of displaced persons after Sudan.<sup>73</sup> According to NGO sources, there were also 7132 disappearances between 1977 and 2004.<sup>74</sup> Last but not least, according to the 'International Campaign to Ban Landmines', in 2007, Colombia had the highest rate of victims caused by land mines in the world.<sup>75</sup> Against the background of these figures, it is not surprising that the Colombian Courts and other judicial and government institutions have themselves recognized the gravity of the situation speaking, *inter alia*, of 'gravest crimes', 'grave criminality' and 'grave assaults against humanity'.<sup>76</sup>

While these facts and figures leave no doubt that the Colombian *situation* – seen from a general perspective – overcomes the gravity threshold of Article 17(1)(d), this does not necessarily mean that all *cases* covered by Law 975 meet this threshold. Thus, some cases of low rank members of paramilitary groups – the so called 'foot soldiers' (*miembros rasos*) – who only execute superior orders and are easily replaceable may not reach the gravity threshold. These persons may not even be investigated or tried under Law 975 since their cases may fall under the opportunity principle and thus be suspended or terminated.<sup>77</sup>

---

Discretion', in Stahn and Sluiter, *supra* note 59, 185, at 200; for further references see Ambos, *supra* note \*, part II 5.1.1.

<sup>68</sup> *Situation in DRC*, Judgment on the Prosecutor's appeal against the decision of PTC I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', Doc. ICC-01-04-169, 13 July 2006 [reclassified as public on 23 September 2008 pursuant to *Situation in DRC*, Decision on the unsealing of judgment of the Appeals Chamber issued on 13 July 2006, Doc. ICC-01-04-538-PUB-Exp, 22 September 2008, paras.1-3, 54 *et seq.* (68 *et seq.*); in the same vein, *Prosecutor v. Al Bashir*, Decision on the Prosecutor's application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Doc. ICC-02/05-01/09-3, 4 March 2009, para. 48 with fn. 51

<sup>69</sup> For my distinction of *legal (non discretionary, mostly quantitative)* gravity pursuant to Art. 17(1)(d) (and Art. 53 (1)(b), (2)(b)) and *relative (discretionary, qualitative)* gravity pursuant to Art. 53(1)(c) and (2)(c) see Ambos, *supra* note \*, part II 5.1.2.

<sup>70</sup> See D. Otero, *Las Cifras del Conflicto Colombiano* (2007).

<sup>71</sup> Figure presented by Mario Iguarán, former Prosecutor General of Colombia, during the inaugural speech of the international conference, *Justicia Transicional en Colombia, 4 años en el contexto de la Ley de Justicia y Paz*, Bogotá, 23 July 2009.

<sup>72</sup> The lower figure is from the government, the higher from NGOs, see internal displacement monitoring centre ('IDMC'), available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpCountries\)/CB6FF99A94F70AED802570A7004CEC41?OpenDocument](http://www.internal-displacement.org/8025708F004CE90B/(httpCountries)/CB6FF99A94F70AED802570A7004CEC41?OpenDocument).

<sup>73</sup> Amnesty International ('AI'), *'Leave us in Peace': Targeting Civilians in Colombia's Internal Armed Conflict* (2008), 38.

<sup>74</sup> See Otero, *supra* note 70, at 109.

<sup>75</sup> See *Landmine Monitor Report 2007*, available at <http://www.icbl.org/lm/2007/>.

<sup>76</sup> See Constitutional Court, *supra* note 6, sección 6.2.2.1.7.6. and *passim*; Supreme Court, Judgment of 11 July 2007, Rad. 26945, V 2.6. and *passim*. For further references see Ambos, *supra* note \*, part II 5.1.3.

<sup>77</sup> For a discussion of the opportunity principle introduced by Law 1312 of 2009 (9 July) in Art. 324 no. 17 CPP with regard to membership in a GAOML see Ambos, *supra* note \*, part I 1. and part II 5.1.3.

### 3.3. Complementarity *stricto sensu*

In the case of complementarity *stricto sensu*, it follows from the wording of Article 17(1) ('the Court shall determine that a case is inadmissible where ...') that admissibility is *presumed*<sup>78</sup> and that this presumption may be refuted by – apart from insufficient gravity (Article 17(1)(d)) – some action on the part of the respective state with regard to its investigation and prosecution obligations (Article 17(1)(a)–(c)). Clearly, this action must be examined more closely with a view to the requirements established in Article 17(1) (a), (b) and (c) in connection with Article 20(3). Thus, the complementarity test *stricto sensu* may be structured in a threefold way:<sup>79</sup>

- First, situations and cases are admissible if the state remains inactive (*admissibility due to total state inaction*, *infra* 3.3.1.);
- Second, if the State develops some activity, a case may be inadmissible pursuant to Article 17(1) (a)–(c) and 20(3) (*inadmissibility due to state action*, *infra* 3.3.2.);
- Third, as an exception to the inadmissibility mentioned before, despite or because of the State activity, unwillingness or inability on the part of the state is established pursuant to Article 17(2) and (3) (*admissibility due to unwillingness or inability*, *infra* 3.3.3.).

#### 3.3.1. Admissibility due to total state inaction

The ICC Statute has reinforced the (pre-existing) general duty of states to investigate, prosecute and punish international core crimes with regard to the Statute crimes and to its state parties.<sup>80</sup> In the face of this obligation, inaction alone makes a situation or case admissible under Article 17.<sup>81</sup> The same conclusion can be drawn from an *e contrario* interpretation of 17(1)(a)–(c): if this provision requires, at a minimum, some action (initial investigative steps)<sup>82</sup> for a case to be declared inadmissible, no action whatsoever makes the case admissible without further ado.<sup>83</sup> Such 'uncontested admissibility'<sup>84</sup>, however, clearly does not exist if a state, like Colombia, sets up a functioning state machinery and a special procedure to deal with international crimes. Still, in such a case of lacking *factual* inaction, there could be *normative* inaction by way of *normative* (procedural) *mechanisms* which impede the initiation of proceedings at the outset (*a priori* inaction) or facilitate their irregular termination after some initial investigative steps (*a posteriori* inaction).<sup>85</sup>

---

<sup>78</sup> Cf., J. Meißner, *Die Zusammenarbeit mit dem Internationalen Strafgerichtshof nach dem Römischen Statut* (2003), 70-1; C. Cárdenas, *Die Zulässigkeitsprüfung vor dem Internationalen Strafgerichtshof* (2005), 116; Kleffner, *supra* note 56, at 104 *et seq.*

<sup>79</sup> See also I. Stegmiller, 'Complementarity Thoughts', (2010) 21(1) *CLF* (forthcoming).

<sup>80</sup> Cf., Ambos, *supra* note 10, at 29 *et seq.* (para. 8).

<sup>81</sup> Cf., Benzing, *supra* note 54, at 105.

<sup>82</sup> Kleffner, *supra* note 56, at 105.

<sup>83</sup> *Prosecutor v. Lubanga*, *supra* note 66, para. 29 with fn. 19; *Prosecutor v. Lubanga and Ntaganda*, *supra* note 48, para. 41; *Prosecutor v. Kony et al.*, *supra* note 51, para. 44; ICC-OTP, *Informal expert paper: the principle of complementarity in practice*, 2003, paras. 17-8. For the same view in the doctrine see, instead of many Stigen, *supra* note 10, at 199 *et seq.* (201); Kleffner, *supra* note 56, at 104-05, 342; M. El Zeidy, *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (2008), 106, 161, 230, 318.

<sup>84</sup> See ICC-OTP, *supra* note 64, para. 13. See also Schabas, *supra* note 61 (Prosecutorial Discretion), at 236-37.

<sup>85</sup> For the *a priori*-*a posteriori* distinction see H. Olásolo, *The Triggering Procedure of the International Criminal Court* (2005), 149-50, 166.

With regard to the Colombian situation, the extradition of top-level paramilitary commanders to the U.S.A.<sup>86</sup> and the application of the opportunity principle to low-level group members<sup>87</sup> raise the question of whether these mechanisms unduly limit or even undermine the duty to investigate and prosecute within the framework of Law 975. In other words, is it reasonable to argue that these mechanisms lead to the neutralization of the objectives of justice and peace and thus promote state inactivity in concrete and grave cases covered by Law 975? As to the *extraditions*, it is fair to say that while the access to the extradited commanders has become certainly more difficult and ultimately depends on the generosity of the U.S. authorities,<sup>88</sup> it is equally true that none of the commanders have formally been excluded from Law 975 and they are, in fact, more or less actively participating. It would thus be premature to argue that the extraditions have amounted to a state of inactivity towards the extradited paramilitaries. A different matter is, though, a possible lack of willingness or ability expressed by these extraditions. This will be discussed later. As to the *opportunity principle* it can clearly be said that its concrete application does not constitute an impediment for the investigation of international core crimes. First of all, the respective provision (Article 324(17), CCP) contains an explicit prohibition to apply the opportunity principle to serious violations of human rights and international humanitarian law ('IHL'). Secondly, the application of the principle presupposes that there are no other pending investigations against the group member going beyond his membership and his sworn declaration to that effect. Admittedly, these safeguards can be bypassed in practice and only time will tell if the Prosecutor's Office, in charge of applying the principle, is able and willing to apply it in strict compliance with the letter and spirit of national and international law. In any case, it is important to note that the investigation against the respective persons can be reopened in case of non-compliance or lack of the legal requirements. Thus, taking into account all relevant factors,<sup>89</sup> it is fair to conclude that there exists *neither a factual nor normative scenario of state inactivity*.<sup>90</sup>

### 3.3.2. Inadmissibility due to state action (Article 17(1)(a)-(c) and 20(3))

By distinguishing between investigation (Article 17(1)(a)), prosecution (Article 17(1)(b)) and trial (Article 17(1)(c) referring to Article 20(3)) Article 17 aims to cover *all procedural stages* from investigation to trial. The criteria are considered to be exhaustive.<sup>91</sup> The distinction in the various procedural stages corresponds to the different moment of application of possible exemptions from prosecution or punishment. An amnesty, for example, normally impedes a prosecution (subparagraph (b)) or even an investigation (subparagraph (a)), while a pardon is a typical post-conviction exemption only applicable after a trial (subparagraph (c));<sup>92</sup> such a post-conviction measure can hardly constitute a ground for admissibility since it will be difficult to demonstrate that it was taken to shield the person concerned from criminal responsibility (Article 17(1)(c) in connection with Article 20(3)(a)).<sup>93</sup>

<sup>86</sup> Nine top-level commanders have been extradited for drug-related offences between 2008 and 2009, see IACHR, *Press Release N°. 21/08*, 14 May 2008. For a detailed analysis see Ambos *et al.*, *supra* note \*, para. 319 *et seq.*; see also Ambos, *supra* note \*, part I 3 (vii).

<sup>87</sup> See *supra* note 77 and main text.

<sup>88</sup> For a recent critical account see International Human Rights Law Clinic – University of California Berkeley, *Truth behind bars. Colombian Paramilitary Leaders in U.S. Custody*, February 2010, available at <http://www.law.berkeley.edu/files/IHRLC/Truthbehindbars.pdf>.

<sup>89</sup> For a more extensive discussion see Ambos, *supra* note \*, part II 5.2.1 b).

<sup>90</sup> For the same result, see Olásolo, *supra* note 53, at 282.

<sup>91</sup> See, instead of many, Kleffner, *supra* note 56, at 104.

<sup>92</sup> Ambos, *supra* note 10, at 74 (para. 39).

<sup>93</sup> See also Stigen, *supra* note 10, at 334-35; Kleffner, *supra* note 56, at 266-67.

The provision presupposes some *state action*,<sup>94</sup> more concretely that the case is ‘being investigated or prosecuted’ (Article 17(1)(a)) and, if there is enough evidence, ultimately tried. The investigation and prosecution requirements must be read together<sup>95</sup> since, in any case, once an investigation is finished a decision to prosecute or not to prosecute must be taken. In other words, while an investigation in the sense of subparagraph (a) may block the intervention of the ICC for a certain period of time (namely, as long as the case is ‘being investigated’), afterwards a decision in favor or against prosecution must be taken and in this precise moment, Article 17(1)(b) becomes applicable. In case of a decision in favour of prosecution, the decision-making authority shifts to the trial judge and Article 17(1)(c) becomes applicable.

While the trial requirement of subparagraph (c) poses little problem, it is controversial and crucial how (strictly) the terms ‘investigations’ and ‘prosecutions’ in subparagraphs (a) and (b) are to be interpreted. As to the *investigation requirement*, it is debatable whether a criminal investigation by the respective criminal justice organs is necessary or facultative. Even non-judicial forms of investigation, in particular a (effective) Truth and Reconciliation Commission (‘TRC’),<sup>96</sup> would suffice. A systematic and teleological interpretation<sup>97</sup> suggests that, at a minimum, a *systematic inquiry* into the facts and circumstances of the case,<sup>98</sup> the already mentioned initial or *minimal investigative steps*,<sup>99</sup> with a view to a criminal prosecution are required. This interpretation is also confirmed by the second requirement, the *decision to prosecute*.<sup>100</sup> Such a decision can only be taken if a substantial investigation of *concrete* acts and *individual* suspects has been carried out. In other words, a decision to prosecute presupposes a criminal or at least individualized investigation, which precedes and prepares it.<sup>101</sup> Clearly, prosecution refers to criminal prosecution<sup>102</sup> but not to the prosecution itself - only the ‘decision’ to prosecute is required. This presupposes that the organ that takes this decision must have at least two options, namely either to prosecute or not to prosecute.<sup>103</sup>

There seems to be little doubt that the procedure under Law 975 complies with both the *investigation/prosecution* and *trial* requirements of Article 17. As shown above, Law 975 provides for a full-fledged criminal procedure whose main difference with the ordinary criminal procedure consists of its inquisitorial nature and reliance on the demobilised person’s full confession as the starting point and basis of the subsequent verification procedure. On the basis of the factual findings emerging from the confession, and its subsequent verification, the charges will be formulated and the person concerned tried by the competent judges. In addition, it must not be overlooked that the special Justice and Peace procedure does not foreclose the possibility of subjecting the persons concerned to an ordinary procedure.<sup>104</sup>

---

<sup>94</sup> Benzing, *supra* note 54, at 600-1 with fn. 48.

<sup>95</sup> See already Ambos, *supra* note 10, at 74 (para. 39).

<sup>96</sup> On non-judicial forms of investigation and the criteria of an effective TRC see Ambos, *supra* note 10, at 40 *et seq.* (46) (para. 12 *et seq.* [16]).

<sup>97</sup> Cf., Ambos, *supra* note \*, part II 5.2.2 a).

<sup>98</sup> Cárdenas, *supra* note 78, at 58; see also Stigen, *supra* note 10, at 203.

<sup>99</sup> See *supra* note 82 and main text.

<sup>100</sup> See already Ambos, *supra* note 10, at 76 (para. 41).

<sup>101</sup> See also C. Stahn, ‘The Geometry of Transitional Justice: Choices of Institutional Design’, (2005) 3 *JICJ* 695, at 712.

<sup>102</sup> Cf., Stigen, *supra* note 10, at 205; Kleffner, *supra* note 56, at 268-69.

<sup>103</sup> D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, (2003) 14 *EJIL* 500.

<sup>104</sup> On the possibility of exclusion see already *supra* section 2.1, note 26 and main text.

### 3.3.3. Admissibility due to unwillingness or inability (Article 17(2) and (3))

The application of the threefold complementarity *stricto sensu* test to the Colombian situation impressively demonstrates that the admissibility of a situation or case ultimately depends on the establishment of unwillingness (subparagraph 1(a)–(c) in connection with paragraph 2) or inability (subparagraph 1(a), (b) in connection with paragraph 3) on the part of the respective national justice system.

#### 3.3.3.1 Unwillingness

Although unwillingness is not defined in the Statute, Article 17(2) spells out the criteria that have to be considered: (1) the purpose of shielding (subparagraph (a)), (2) unjustified delay (subpara. (b)), and (3) the lack of independence and impartiality (subparagraph (c)). The list is exhaustive<sup>105</sup> and is to be applied in the alternative ('one or more of the following').<sup>106</sup> Yet, the existence of one of these criteria does not necessarily lead to a finding of unwillingness, the Court 'shall consider' them to determine unwillingness (Article 17(2)); thus, they are necessary but not sufficient factors to determine unwillingness.<sup>107</sup> In essence, unwillingness is determined by the underlying *bad faith* expressed in the actions or omissions of the respective national justice system.<sup>108</sup> The crucial point is whether the proceedings are not 'genuine', *i.e.*, whether the deviation from a genuine proceeding is such that it must be considered as an expression of the state's bad faith and thus unwillingness.<sup>109</sup> While this implies strong value judgments with regard to the judicial system of a state in general and its treatment of international crimes in particular, the unwillingness test is not about passing moral judgments but about the quality of the proceedings, its seriousness and good-faith with a view to bringing the person to justice. It is worthwhile to point out that there may be legitimate reasons not to investigate, prosecute or convict - for example a lack of evidence, no public interest or policy considerations.<sup>110</sup>

As to the Colombian situation, the analysis of (un)willingness must not only focus, in an isolated manner, on the three criteria mentioned in Article 17(2), but must put them in *context*, *i.e.*, attempt to undertake a *comprehensive assessment* of the multiple efforts of the national authorities, taking into account the real and concrete context of the Colombian situation. As to the *purpose of shielding*, *i.e.*, the State's intention, objective or desire to protect the individual responsible from (criminal) justice expressing the bad faith mentioned,<sup>111</sup> one has to assess the so-called 'alternative sentence' ranging between five and eight years. Can it be considered an expression of bad faith that ensues from a lack of willingness and thus, at least indirectly, a purpose of shielding? The Colombian Constitutional Court,<sup>112</sup> while admitting that the sentence may appear disproportionately low for the serious crimes in question, does not see a disproportionality with regard to the right to justice, given that the ordinary sentence is not replaced, but only suspended under certain conditions to be fulfilled by the beneficiary. Indeed, it is not to be expected that the judgments pursuant to Law 975 will be invalidated by the ICC; rather, more importance may be given – in the sense of a more com-

---

<sup>105</sup> Cf., Stigen, *supra* note 10, at 257-8, 314; Kleffner, *supra* note 56, at 104; El Zeidy, *supra* note 83, at 168.

<sup>106</sup> S. Morel, *La Mise en œuvre du Principe de Complémentarité par la Cour Pénale Internationale le Case Particulier des Amnisties* (2005), 116; Kleffner, *supra* note 56, at 134.

<sup>107</sup> Stigen, *supra* note 10, at 258, 290 (as to 'unjustified delay').

<sup>108</sup> Cárdenas, *supra* note 78, at 113; Stigen, *supra* note 10, at 290; El Zeidy, *supra* note 83, at 168, 236.

<sup>109</sup> Stigen, *supra* note 10, at 252.

<sup>110</sup> See for a discussion of these reasons Stigen, *supra* note 10, at 309 *et seq.*

<sup>111</sup> Cárdenas, *supra* note 78, at 115-6; El Zeidy, *supra* note 83, at 175, 316; F. Razesberger, *The ICC: The Principle of Complementarity* (2006), 43; Kleffner, *supra* note 56, at 135.

<sup>112</sup> See Constitutional Court, *supra* note 6 (Consideraciones de la Corte VI. 3.3.).

prehensive restorative justice approach<sup>113</sup> – to the demobilized person's effective contribution to truth and reconciliation and his reintegration into society.

The criterion of *unjustified delay* can be evaluated from an *absolute perspective* by considering the time needed to investigate, prosecute and convict demobilized members under Law 975, or from a *relative perspective* by comparing the Law 975 with the ordinary criminal proceedings. A relative perspective faces the problem that reliable data on the duration of ordinary criminal proceedings, starting with the investigation and finishing with a first instance verdict, are not available. In absolute terms, the results so far produced by Law 975, more than four years after its entry into force, are, at first sight, disappointing since a judgment was delivered in only one case by the Higher Tribunal's Justice and Peace Chamber (19 March 2009), but even this single judgment has been annulled by the Supreme Court.<sup>114</sup> On the other hand, one must not overlook that more than 50.000 members of GAOML have demobilized since 2002,<sup>115</sup> almost 4.000 have been postulated, 1.926 of which have initiated the free version procedure.<sup>116</sup> Thus, from this perspective, it is fair to say that progress in terms of demobilizations, investigations and confessions has been made but this is not (yet) reflected in the production of final judgments. Only time will tell if the considerable pre-trial progress will also bear fruit in this sense.

As to the third sub-criterion of *independent and impartial proceedings*, i.e., proceedings free from external (political) influence and bias of the judicial personnel itself,<sup>117</sup> it must first be noted that Law 975 was substantially changed by the Constitutional Court, especially by judgment C-370 of 2006,<sup>118</sup> calling, *inter alia*, for greater respect for the right to truth and reparation for the victims. Also, the Supreme Court's interpretation of Law 975 has been crucial for its application by the enforcement authorities and lower courts. Recently, it explicitly recognized the ICC's jurisdiction over the Statute crimes committed on Colombian territory<sup>119</sup> and even reserved its right to inform the ICC if Colombian institutions obstruct the efficient administration of justice.<sup>120</sup> Thus, despite the executive branch's quite 'flexible' approach to comply with these (and other) demands, the Higher Courts have demonstrated and maintained their independence *vis-à-vis* the executive power. Neither the interpretation nor the application has been (directly) influenced by the executive branch or other external actors to an extent that one could doubt the substantive independence of the judicial authorities. In fact, the current relationship between the executive (in particular the president) and the judiciary (in particular the Supreme Court) is characterized by a great tension which, according to some analysts, even amounts to an institutional crisis and impasse as far as joint decisions (e.g., the appointment of the new Chief prosecutor) are concerned.<sup>121</sup>

---

<sup>113</sup> In a similar vein M. Valiñas, 'Interpreting Complementarity and Interests of Justice in the Presence of Restorative-based Alternative Forms of Justice', in Stahn and van den Herik (eds.), *supra* note 60, 283 *et seq.* (286).

<sup>114</sup> Supreme Court, Judgment of 31 July 2009, Rad. 31539. For more details see Ambos, *supra* note \*, part II 5.2.3. b) bb) (2).

<sup>115</sup> According to police figures, 51.921 GAOML members have demobilized (among them approx. 16.000 members of guerilla groups), see Policía Nacional de Colombia (DIJIN), *Desmovilizados colectivos e individuales. Informe control y monitoreo a octubre 2009* (2009), available at <http://www.altocomisionadoparalapaz.gov.co/web/noticias/2009/octubre/documentos/40%20CONTROL%20DESMOVLIZADOS%20OCTUBRE.pdf>.

<sup>116</sup> The UJP has formulated imputations against (approximately) 165 of the demobilized persons and presented charges against 47 of them; 4 cases have advanced to the hearing on the legalization of charges (Comité Interinstitucional de Justicia y Paz, Matriz de Justicia y Paz, 31 December 2009 (on file with the author).

<sup>117</sup> Cf., Ambos, *supra* note \*, part II 5.2.3. b) aa).

<sup>118</sup> *Supra* note 6.

<sup>119</sup> Supreme Court, Auto de segunda instancia, 21 September 2009, rad. 32022.

<sup>120</sup> Supreme Court, Judgment of 3 December 2009, Rad. 32672, section 11.3.

<sup>121</sup> See M. La Rota/R. Uprimny, 'La importancia del Fiscal General', *El Tiempo*, 6 December 2009.

### 3.3.3.2 Inability

While the inability concept is more objective and factual than its counterpart of unwillingness,<sup>122</sup> its correct interpretation is still controversial.<sup>123</sup> Inability is determined by three disabling events: (1) a ‘total’ collapse, (2) a ‘substantial’ collapse, or (3) the ‘unavailability’ of the national judicial system.<sup>124</sup> The said events must entail the state’s inability<sup>125</sup> ‘to obtain the accused or the necessary evidence and testimony or otherwise (...) to carry out its proceedings.’ (Article 17(3)).<sup>126</sup>

A *total collapse* presupposes that the judicial system as a whole – not only temporarily or partially – does not function anymore.<sup>127</sup> In this sense, a total collapse may be equated with inaction as discussed above.<sup>128</sup> As to a *substantial collapse*, it is controversial whether the provision embraces a quantitative and/or qualitative assessment.<sup>129</sup> The collapse is ‘substantial’ if it has a great or significant impact on the functioning of the national justice system.<sup>130</sup> A geographically limited collapse may suffice, *i.e.*, if the State’s effective control does not extend to the whole territory but fails in some parts,<sup>131</sup> as, for example, in the Ituri region of the Democratic Republic of the Congo. If, however, such a partial (substantial) collapse can be compensated by shifting the resources and proceedings to another venue, the threshold is not reached.<sup>132</sup>

The determination of *unavailability* is more difficult, not least because it partly overlaps with the substantial collapse requirement.<sup>133</sup> A *broad* literal interpretation may reveal three potential facets: the non-existence of something, the non-accessibility of something, and the non-usefulness of a remedy, irrespective of its existence and accessibility.<sup>134</sup> Such a broad reading would also allow for including situations under unavailability where a legal system is generally in place but *in concreto* does not provide for effective judicial remedy or access to the courts (‘human rights unavailability’), be it for political, legal or factual reasons (capacity overload), or is not able to produce the desired result (bring the responsible to justice).<sup>135</sup> A *narrower* view rejects such quality judgments about a national justice system.<sup>136</sup> Accordingly, one cannot demand more than ‘some existent national infrastructure’ and the fulfillment of some minimum international standards with a view to ensure the security for victims, witnesses, judges and defendants.<sup>137</sup> The correct view should find a *middle ground* between the broad and narrow interpretations. Thus, the existence of substantial legal or factual obstacles entailing a lack of effective remedies may only constitute unavailability if

---

<sup>122</sup> J. T. Holmes, ‘Complementarity: National Courts *versus* the ICC’, in A. Cassese et al. (eds.), *The Rome Statute of the ICC: a Commentary* (2002), Vol. I, 667, at 677; Morel, *supra* note 6, at 129.

<sup>123</sup> See El Zeidy, *supra* note 83, at 227 with references for both positions.

<sup>124</sup> ICC-OTP, *supra* note 83, para. 49. This view is also shared by the doctrine, see *e.g.*, M. Arsanjani and M. Reismann, ‘The International Criminal Court and the Congo: From theory to reality’, in L. Sadat/M. Scharf (eds.), *The Theory and Practice of International Criminal Law. Essays in Honour of M. Cherif Bassiouni* (2008), 325, at 329.

<sup>125</sup> ‘Judicial system’ must be understood broadly, see Kleffner, *supra* note 56, at 154.

<sup>126</sup> For a discussion see Stigen, *supra* note 10, at 326 *et seq.*

<sup>127</sup> Cárdenas, *supra* note 78, at 126; Stigen, *supra* note 10, at 314-5.

<sup>128</sup> Cf., Kleffner, *supra* note 56, at 154, 160.

<sup>129</sup> For ‘relevant facts and evidence’ see ICC-OTP, *supra* note 83, para. 50.

<sup>130</sup> Stigen, *supra* note 10, at 316; El Zeidy, *supra* note 83, at 226.

<sup>131</sup> Kleffner, *supra* note 56, 32-3; Razesberger, *supra* note 111, at 48-9; differentiating Stigen, *supra* note 10, at 315-6.

<sup>132</sup> Cf., Kleffner, *supra* note 56, at 155; El Zeidy, *supra* note 83, at 225.

<sup>133</sup> Cf., Kleffner, *supra* note 56, at 155, 160.

<sup>134</sup> Stigen, *supra* note 10, at 316-7.

<sup>135</sup> See Stigen, *supra* note 10, at 319 *et seq.*; also El Zeidy, *supra* note 83, at 227-8.

<sup>136</sup> Arsanjani and Reismann, *supra* note 124, at 329 *et seq.*; J. T. Holmes, ‘The Principle of Complementarity’, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (1999), 41, at 48.

<sup>137</sup> W. Burke-White, ‘Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo’, (2005) 18 *LJIL* 559, at 579.



this qualification can be made by an external observer without entering into value (quality) judgments regarding the *internal* functioning of the national justice system concerned. The qualification must be based on objective (quantitative) factors which are easily verifiable from outside of the system, for example empirical information indicating that there is no effective remedy for human rights violations. Under these circumstances it is possible that a capacity overload might render the judicial system unavailable, either due to the sheer magnitude of the crimes committed or due to a lack of personnel or other resources.<sup>138</sup>

With regard to the *Colombian situation* and the complex institutional framework established pursuant to Law 975 (and its concrete functioning),<sup>139</sup> one can *neither* speak of a *total nor substantial collapse* of the national judicial system. Up to November 2009, the UJP has set up three main offices (in Bogotá, Medellín and Barranquilla) and additional satellite offices in 42 cities; it employed more than 680 officials.<sup>140</sup> The judicial authorities have, in theory, the possibility to carry out investigative activities in the whole territory of the country. Exhumations and victims' sessions have been realized in all departments, including the ones characterized by their difficult access due to the geographical situation or the presence of (new) illegal armed groups.<sup>141</sup>

With regard to the *unavailability* test, the Colombian government proposes a restrictive reading, namely the clear absence of the necessary objective conditions to investigate and try a person.<sup>142</sup> The Constitutional Court further refers to the concrete examples mentioned in Article 17(3) ICC Statute (*i.e.*, 'to obtain the accused or the necessary evidence and testimony').<sup>143</sup> Obviously, if one follows this view, one can hardly speak of the unavailability of the Colombian national justice system given its general functioning.<sup>144</sup> This conclusion is confirmed by the advances, albeit small but real, in the *prosecution of international crimes* pursuant to the criminalization of IHL violations in Articles 135-164 of the Criminal Code of 2000 (Law 599).<sup>145</sup> However, a broader interpretation in the sense of the above mentioned *human rights unavailability* might lead to a different conclusion; arguing that the deficits in the application of Law 975, along with the enormous caseload and the lack of personal, financial and institutional resources, constitute a denial of an effective legal remedy and this entails the inability of the judicial system as a whole.

#### 4. Conclusion

The compatibility of the Colombian peace process with the principle of complementarity ultimately depends on the *unwillingness/inability* test of Article 17(2) and (3) ICC Statute. This is also true for similar transitional justice processes which can be located, pursuant to the five scenarios of transitional justice developed elsewhere,<sup>146</sup> in the fourth group of '*measures that do not amount to full*

---

<sup>138</sup> Cf., Stigen, *supra* note 10, at 329-30.

<sup>139</sup> See for a comprehensive analysis Ambos et al., *supra* note \*, para. 17 *et seq.* (primera parte).

<sup>140</sup> See FGN-UJP, *Oficio 012896* (on file with the author), 9 November 2009, at 17.

<sup>141</sup> See FGN, *Informe de Gestión 2008-2009* (2009), at 109.

<sup>142</sup> See *Colombia's interpretative declaration of 5 August 2002 to Article 17 ICC Statute*, para. 3, available at <http://www.icrc.org/ihl.nsf/NORM/909EEAAE157FBD43412566E100542BDE?OpenDocument>.

<sup>143</sup> Constitutional Court, Judgment of 30 July 2002, C-578 (V. 4.3.2.1.5. La regulación del principio de complementariedad).

<sup>144</sup> For the same result C. Castillo et al., 'La Justicia en Zonas de Conflicto Armado', in M. García Villegas (ed.), *Jueces sin Estado, La Justicia Colombiana en Zonas de Conflicto Armado* (2008), at 168.

<sup>145</sup> See for details Ambos, *supra* note \*, at part II 2.2.3. c) bb) fn. 51 *et seq.* and the figures here *supra* note 116.

<sup>146</sup> See Ambos, *supra* note 10, at 78 (para. 44) distinguishing between a blanket self-amnesty, a conditional amnesty with a TRC, a conditional amnesty without a TRC, measures not amounting to full exemptions and *ex post* exemptions, in particular pardons.

*exemptions of criminal responsibility*'. In such situations the (in)admissibility depends on the seriousness of the commitment (good faith) of the respective government and the judicial authorities, on the one hand, to achieve peace as the purpose of the (transition) process, and, on the other, to achieve justice for the victims. Justice in this sense is not limited to criminal, retributive justice but encompasses truth, reparation and reconciliation. The government's commitment can be evaluated by the comprehensiveness of the measures, *i.e.*, if they are designed to apply to all groups involved in the conflict in an equal manner or if one group is excluded or (*de facto*) privileged, which would imply a verdict of unwillingness with regard to that group. This is not so much a legal-normative, but practical question.

As to the Colombian situation, at this moment, it seems rather difficult to plead unwillingness or inability to investigate and prosecute international crimes and, on this basis, to justify the ICC's (formal) intervention. One may come to a different conclusion with regard to concrete cases, though, in particular the cases against the most important, high-level commanders (including the extradited ones). Insofar, one may argue that Colombia has not done everything possible and necessary with regard to Article 17 ICC Statute, but this does not change the global evaluation defended here. To be sure, the deficits and problems of the Justice and Peace process must be resolved as soon as possible to avoid an intervention of the ICC.<sup>147</sup> The recourse to *alternative justice mechanisms*, in particular, an effective Truth Commission and (other) non-punitive sanctions, could help to overcome or at least mitigate some of the practical problems in the implementation of Law 975.<sup>148</sup> Without such mechanisms, it will be difficult to reconcile the demobilization process with the justice element of transitional justice. In particular, the establishment of an effective Truth Commission and a major commitment of the other institutions and entities involved in the process, would greatly help the *Fiscalía* to concentrate more exclusively on its actual task of criminal investigation and prosecution instead of assuming additional functions, especially with regard to victims' assistance. The design and implementation of *reparation mechanisms* going beyond the limited framework of criminal proceedings may help to facilitate an easier and less discriminatory access to reparations for victims. Finally, it should be recalled that the complementarity test is an *ongoing process* which may be revisited periodically, *i.e.*, there may come a point where the ICC's Prosecutor is no longer content to maintain the Colombian situation under observation in the preliminary phase of proceedings and feels the need to go a step further and submit it to the Pre-Trial Chamber for further consideration pursuant to Article 15(3) ICC Statute.<sup>149</sup>

---

<sup>147</sup> For a set of recommendations see Ambos, *supra* note \*, at part II Ch. 7.

<sup>148</sup> In a similar vein for a restorative, alternative justice approach Valiñas, *supra* note 113, at 280 *et seq.* (287-88).

<sup>149</sup> In this context it is worthwhile mentioning that the OTP has rather quickly invoked this provision on 26 November 2009 with regard to the crimes allegedly committed in Kenya in relation to the post-election violence of 2007-2008, available at [http://www.icc-cpi.int/NR/rdonlyres/AC13413D-D097-4527-B0AE-60CF6DBB1B68/281313/LMOINTROstatement26112009\\_2\\_2.pdf](http://www.icc-cpi.int/NR/rdonlyres/AC13413D-D097-4527-B0AE-60CF6DBB1B68/281313/LMOINTROstatement26112009_2_2.pdf). PTC II authorized the commencement of the investigation pursuant to Article 15 (4) ICC Statute on 31 March 2010 (*Situation in the Republic of Kenya, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09, 31 March 2010; Judge Kaul dissenting).