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Spring 2009

# Deciding the Fate of Complementarity: A Colombian Case Study

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## **DECIDING THE FATE OF COMPLEMENTARITY: A COLOMBIAN CASE STUDY**

Jennifer S. Easterday

### **ABSTRACT**

For over 40 years, one of the worst humanitarian crises in the world has ravaged Colombia, victimizing and displacing nearly a tenth of the population as armed paramilitary groups, guerillas, and the national military battle for territory and control. In an effort to end the conflict, the Colombian government claims it is implementing transitional justice by creating accountability and providing reparations for victims with the Justice and Peace Law. Yet, upon careful examination of the politics of justice in Colombia, it appears as though the passage of the Justice and Peace Law is merely an attempt to shield human rights abusers from criminal liability and evade ICC intervention. How the ICC interprets and evaluates the actions of Colombia will determine the application of complementarity and the future of international criminal law. This paper focuses on the need for an interpretation of complementarity, as found in Article 17 of the Rome Statute, and proposes a method of interpreting Article 17 that will reduce states' exploitation of ambiguities in the Rome Statute. This paper argues that ICC involvement in Colombia will solidify the tenuous principle of complementarity and will provide a much needed guiding principle to the emerging intersection of domestic and international laws. By using Colombia as an example of a state genuinely unwilling to prosecute, the ICC will not only provide justice to Colombians, but it will also reduce the likelihood of mimicry from other states inclined to follow in the footsteps of Colombia's impunity if it is allowed to succeed.

## DECIDING THE FATE OF COMPLEMENTARITY: A COLOMBIAN CASE STUDY

Jennifer S. Easterday<sup>1</sup>

### I. INTRODUCTION

[R]adically transformed circumstances for international criminal justice, both in scope and reach, beg the question of what is to be the relation of international to domestic law in the area of criminal justice. The transformed international system demands a guiding principle apt to address the ongoing relationship of the multiple legal regimes.<sup>2</sup>

“With the International Criminal Court, there is a new law under which impunity is no longer an option. Either the national courts must do it or [the ICC] will.”<sup>3</sup>

The world has recently witnessed radical changes in the international discourse on crimes against humanity and transitional justice. Starting with the Nuremberg trials and culminating in the creation of the International Criminal Court (ICC) and the 10th Anniversary of the Rome Statute, we have seen myriad attempts to establish mechanisms for ensuring accountability for persons who commit war crimes and crimes against humanity and radically increased efforts to protect human rights. In spite of these developments, violations of war crimes and crimes against humanity are rampant in many parts of the world. Indeed, one of the worst humanitarian crises in the world has ravaged Colombia for over 40 years, victimizing and displacing nearly seven percent of the population as armed

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2. Ruti Teitel, *Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT’L L.J. 837, 852 (2005).

3. Press Release, Int’l Criminal Court, ICC Prosecutor Visits Colombia, ICC-OTP-2008021-PR347-ENG (Aug. 21, 2008) (quoting statement by Luis Moreno-Ocampo, head Prosecutor, in October of 2007) [hereinafter Press Release, ICC 2008], available at [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2008\)/icc%20prosecutor%20visits%20colombia](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2008)/icc%20prosecutor%20visits%20colombia).

paramilitary soldiers, guerilla forces, and the army battle for territory and control.<sup>4</sup> Despite a multitude of attempts by the Colombian government at peace agreements and disarmaments, nothing has succeeded in ending the conflict. Colombia is facing a critical moment in its efforts to bring peace to the country and provide justice for its citizens. The ICC is also facing a critical moment as a nascent court struggling to establish itself as a legitimate and efficacious international institution of justice. The nexus between international and domestic law is in great flux, and not surprisingly, these two situations have recently intersected. Indeed, this Article argues that the Colombian situation is testing one form of this nexus, the ICC's complementarity regime. Although complementarity is the international criminal law term *du jour* for navigating the international/domestic intersection, there are no clear examples of how complementarity works in practice. How the ICC interprets and evaluates the actions of Colombia will determine the path of complementarity and the future of international criminal law.

After decades of failed peace agreements, the Colombian government recently turned to transitional justice mechanisms in yet another effort to end the fighting.<sup>5</sup> With the new Justice and Peace Law, passed in 2005,<sup>6</sup> the Colombian government is attempting to create the outward appearance of accountability for paramilitary crimes and provide reparations for victims. Yet a careful examination of the politics of justice in Colombia, a party to the Rome Statute treaty that created the ICC, reveals that these initiatives are thinly veiled attempts to shield human rights abusers from criminal liability and evade ICC intervention. The new Justice and Peace Law seeks to exploit the creative ambiguity that was built into the Rome Statute, and should trigger an interpretation of Colombia's actions under Article 17's "unwilling and unable" complementarity clause. If the ICC allows impunity to reign in Colombia, it would effectively set an international criminal law precedent that would encourage countries to engage in sham prosecutions. Conversely, by exerting jurisdiction and demanding

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4. Reuters AlertNet, *Colombia Displacement*, Feb. 10, 2008, [http://www.alertnet.org/db/crisisprofiles/CO\\_DIS.htm](http://www.alertnet.org/db/crisisprofiles/CO_DIS.htm).

5. It is important to see how the Colombian use of transitional justice mechanisms fits into the larger picture of this relatively new approach to rectifying gross violations of human rights. Transitional justice has a rich background in Latin America and elsewhere in the world, and there are many cases that can inform an analysis of the Colombian case. The field of transitional justice typically looks at the political and legal decisions made after a period of authoritarian or totalitarian rule has ended, when societies are transitioning to democratic rule and coping with "legacies of repression." THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES I (Alexandra Barahona de Brito, Cameron Gonzalez-Enriquez & Paloma Aguilar eds., 2001) [hereinafter POLITICS OF MEMORY].

6. Ley 975 de 2005, Ley de Justicia y Paz [Law 975 of 2005, Law of Justice and Peace], Diario Oficial [D.O.] 45.980 (July 25, 2005) (Colom.), available at [www.vertice.gov.co/index.php?option=com\\_docman&task=doc\\_download&gid=157](http://www.vertice.gov.co/index.php?option=com_docman&task=doc_download&gid=157).

transparent justice in Colombia, the ICC would make clear that states must adhere to the obligations set forth in the Rome Statute. ICC intervention in Colombia would clarify the complementarity principle and demonstrate to other Rome Statute parties that their obligation to prosecute under this principle is a firm one, to be taken in good faith and with utmost seriousness. ICC intervention in Colombia would also broaden the ICC's geographical presence to areas outside of central Africa and provide the justice and accountability Colombian citizens are demanding.

This paper focuses on the political context in which Colombia has deliberately crafted mechanisms of transitional justice to avoid ICC jurisdiction. Section II focuses on the ICC and the interpretation of complementarity as found in Article 17 of the Rome Statute. Discussing the initial questions of jurisdiction and admissibility, this Section outlines the legal ambiguities in the Rome Statute and proposes a method of interpreting Article 17. Section III presents a brief history of the armed conflict in Colombia and the magnitude of the crimes committed by armed actors, and analyzes Colombia's application of transitional justice. The inquiry includes a discussion of the paramilitary demobilization and the subsequent Justice and Peace Law, and an analysis of how these mechanisms strategically apply the rhetoric of transitional justice. Section IV applies the tests for admissibility under the Rome Statute to the Colombian situation. It offers an analysis of the inadequacies of the criminal justice system in Colombia and the political considerations that influenced the creation of the Justice and Peace Law, demonstrating how the corrupt politics behind the bill's passage undermine its efficacy and legitimacy. Under the interpretive schema for Article 17, proposed in Section II, this Article argues that it is clear that the Colombian government is genuinely "unwilling" to prosecute, and that ICC intervention is not only acceptable under the Rome Statute, but also necessary. Finally, Section V concludes with the argument that the ICC must act now to prevent the exploitation of a new, and promising, international criminal court. If the ICC and international criminal law are to provide justice for victims of mass atrocities around the world, the ICC must set a standard of interpretation of the "unwilling and unable" clause of Article 17, and establish strong guidelines for how the concept of complementarity will treat domestic legislation. By establishing this guiding principle, the ICC will not only provide justice to Colombians, but it will also reduce the likelihood of mimicry from other states by defining and applying an emerging principle in international criminal law.

## **II. ICC AND THE INTERNATIONAL COMMUNITY: PROVIDING ENHANCED INTERNATIONAL COOPERATION?**

Signatories of the Rome Statute affirm that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by *taking measures at the national*

level and by *enhancing international cooperation*.”<sup>7</sup> The concept behind the ICC was that it would be a court of last resort; ideally, national courts would be sufficiently developed and transparent to try those who perpetrate crimes against humanity.<sup>8</sup> Under the auspices of the Rome Statute, the ICC is one example of “enhancing” the international community to provide for the effective prosecution of crimes against humanity.<sup>9</sup>

The ICC applies the principle of complementarity to determine how it will interact with domestic legal systems.<sup>10</sup> Under this principle, parties to the Rome Statute assume responsibility for prosecuting war crimes and crimes against humanity.<sup>11</sup> Otherwise, a state party’s citizens are subject to such prosecutions by the ICC.<sup>12</sup> Article 17 is the rubric under which the ICC ostensibly evaluates a state’s performance of this duty to prosecute.<sup>13</sup> The ICC has not yet evaluated a

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7. Rome Statute of the International Criminal Court pmbl., July 12, 1998, 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9, *available at* <http://www2.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm> [hereinafter Rome Statute], (emphasis added).

8. During his inaugural speech, ICC Prosecutor Luis Moreno-Ocampo said “As a consequence of complementarity, the number of cases that reach the Court should not be a measure [sic] its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.” Luis Moreno-Ocampo, Prosecutor, International Criminal Court Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003) (transcript available at [http://www.icc-cpi.int/library/organs/otp/030616\\_moreno\\_ocampo\\_english\\_final.pdf](http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf)).

9. Indeed, the creation of the ICC was met with enthusiasm by many international organizations and countries and fostered high expectations for the end of impunity for crimes against humanity. See William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 59-60 (2008). Burke-White characterizes these expectations as unrealistic. *Id.*

10. Rome Statute, *supra* note 7, art. 1.

11. Rome Statute, *supra* note 7, pmbl.: (“[I]t is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.”) See also Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869, 898 (2002) (discussing the admissibility criteria of Article 17, which preserves “the authority and the right of sovereign States to prosecute [international crimes] in their national courts, as opposed to relying on the ICC”). Moreno-Ocampo also said in a statement to the Diplomatic Corps that rather than compete with national jurisdictions, his office would “encourage national proceedings wherever possible.” Luis Moreno-Ocampo, Prosecutor of the ICC, Statement of the Prosecutor Luis Moreno-Ocampo to the Diplomatic Corps (Feb. 12, 2004), *available at* <http://www.iccnw.org/documents/OTPStatementDiploBriefing12Feb04.pdf>.

12. Rome Statute, *supra* note 7, art. 17. See also El Zeidy, *supra* note 11, at 898.

13. See Rome Statute, *supra* note 7, art. 17. See also El Zeidy, *supra* note 11, at 897 (discussing the right of the ICC to prosecute if and only if the State lacks the “willingness” and “ability” to investigate and prosecute).

state's behavior under Article 17, or clarified how it should be applied.<sup>14</sup> Thus, state parties navigate their obligations under the Rome Statute unguided. This creates a tenuous relationship between national law and international law, one that the ICC should clarify and define in order to be efficacious and fulfill its mandate: to prosecute those responsible for "the most serious crimes of international concern."<sup>15</sup>

Below is an analysis of how ICC jurisdiction and admissibility under Article 17 create space in international law to evaluate and hold states accountable for creating state prosecutorial mechanisms. The situation in Colombia demonstrates how impunity can reign under the Rome Statute, where measures at the national level have failed to punish and effectively prosecute crimes against humanity. For the purposes of this discussion, this Section examines how the court is supposed to work under the Rome Statute, including jurisdiction, admissibility, and the concept of complementarity. The next Sections provide a background to the Colombian conflict and an analysis of the Colombian case under the terms of its Rome Statute obligations, demonstrating how the Colombian government has adopted the rhetoric of transitional justice in an effort to avoid ICC investigation into its state-sponsored human rights abuses.

### **A. Jurisdiction**

The Rome Statute gives jurisdiction to the ICC to prosecute individuals responsible for war crimes, crimes against humanity, genocide, grave breaches of the Geneva Conventions, and aggressions committed after 2002.<sup>16</sup> The court may establish jurisdiction in three ways: referral by a state party, referral by the Security Council acting under its Chapter VII powers of the UN Charter, or through the prosecutor's own initiative, called *proprio motu* powers.<sup>17</sup>

All but one case currently pending before the ICC established jurisdiction based on referral by a state party. The ICC has accepted referrals from Uganda,

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14. The Court had the opportunity to evaluate Sudan's behavior under an Article 17 test after the Ad Hoc Counsel for the Defense for the Situation in Sudan filed "Submissions challenging jurisdiction and admissibility," arguing, inter alia, that Article 17 precluded ICC jurisdiction over crimes committed in Sudan. Situation in Darfur, Sudan, Case No. ICC-02/05, Submissions Challenging Jurisdiction and Admissibility, ICC-02/05-20/Corr, at 22-23 (Oct. 13, 2006). The Pre-Trial Chamber I did not review the merits of this argument however, deciding that the Ad Hoc Counsel for the Defense did not have procedural standing to make such a motion under Rule 19(2) of the Rome Statute. Situation in Darfur, Sudan, Case No. ICC-02/05, Decision on the Submissions Challenging Jurisdiction and Admissibility, ICC-02/05-34-tENG (Nov. 22, 2006).

15. Rome Statute, *supra* note 7, art. 1.

16. *Id.* arts. 5, 11. The Rome Statute entered into force in 2002.

17. *Id.* art. 13.

the Democratic Republic of the Congo, and the Central African Republic.<sup>18</sup> The ICC has also received one case referral from the UN Security Council for the situation in Darfur, Sudan.<sup>19</sup> To date, the ICC Prosecutor, Luis Moreno-Ocampo, has not initiated a *proprio motu* investigation under Article 15 of the Rome Statute.<sup>20</sup> In February 2006, Moreno-Ocampo issued two letters considering and ultimately declining an exercise of his *proprio motu* powers for the situations in Iraq<sup>21</sup> and Venezuela.<sup>22</sup> Moreno-Ocampo has said that his office focuses on the quantity of crimes committed to assess the gravity of a situation and determine whether to issue a referral.<sup>23</sup>

Given this pattern of establishing jurisdiction, where all cases have come before the ICC either by states' self-referral or by Security Council mandate, the ICC has not yet had to evaluate the willingness or ability of a state to prosecute its own perpetrators of Rome Statute crimes.<sup>24</sup> Thus, the state of complementarity remains undecided.<sup>25</sup>

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18. International Criminal Court, ICC – Situations and Cases, <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Apr. 20, 2007).

19. Acting under its Chapter VII powers, the Security Council decided to refer the situation in Darfur for actions after July 1, 2002. *See id.* The Security Council based its decision on the report of the International Commission of Inquiry on Darfur, which determined that the situation constituted a threat to international peace and security. Grace M. Kang, *A Case for the Prosecution of Kim Jong Il for Crimes Against Humanity, Genocide, and War Crimes*, 38 COLUM. HUM. RTS. L. REV. 51, 68 (2006). *See also* S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

20. Rome Statute, *supra* note 7, art. 15.

21. After explaining the lengthy investigation conducted by the Prosecutor's office under Article 15 requirements of the Rome Statute, Moreno-Ocampo concluded that although there was a reasonable basis to believe crimes within the jurisdiction of the ICC had been committed, the "estimated 4 to 12 victims of willful killing," and the "limited number of victims of inhuman treatment, totaling in all less than 20 persons," did not constitute crimes of sufficient gravity to warrant *proprio motu* powers of referral. Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC, regarding Iraq, at 8 (Feb. 9, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

22. Moreno-Ocampo declined to refer *proprio motu* the situation in Venezuela because a majority of the crimes in question were not committed within the ICC's temporal jurisdiction, and those that were did not meet the requirements of the Article 7 definition of persecution. Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC, regarding Venezuela (Feb. 9, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Venezuela\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf). *See also* Rome Statute, *supra* note 7, art. 7.

23. Presentation for ICTY chambers interns with Moreno-Ocampo and ICTY staff, at The Hague, Netherlands (May 29, 2007).

24. After the ICC announced the case for Darfur, Sudan initiated a special court and prosecutions. In its decision on a defense motion challenging admissibility and jurisdiction, the Pre-Trial Chamber I held that the *Ad Hoc* Counsel for the Defense did not have standing to challenge admissibility or jurisdiction under article 19(2) of the Rome



**B. Admissibility: Complementarity and Article 17**

In addition to establishing whether or not the ICC has jurisdiction over a case, the court must also establish that a case is admissible. Admissibility largely turns on the concept of complementarity: a case will not be admissible before the ICC if a national court system is willing and able to hear it.<sup>26</sup> As yet unchallenged by parties to an ICC case, or evaluated by the Office of the Prosecutor (OTP), or Chambers, there is no indication as to how complementarity will actually be implemented by the ICC.<sup>27</sup> This means that the problem of intersecting national

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Statute. Situation in Darfur, Sudan, Case No. ICC-02/05, Decision on the Submissions Challenging Jurisdiction and Admissibility, ICC-02-05-34-tENG (Nov. 22, 2006), available at <http://www.icc-cpi.int/library/cases/ICC-02-05-34-tENG.pdf>.

25. See generally, COMPLEMENTARY VIEWS ON COMPLEMENTARITY (Jann K. Kleffner & Gerben Kor eds., 2006). See also MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 141 (2007).

26. Article I of the Rome Statute states that the ICC shall be “complementary to national criminal jurisdictions,” and Article 17 is the primary article pertaining to complementarity. Rome Statute, *supra* note 7, arts. 1, 17. The Chief Prosecutor, Luis Moreno-Ocampo, interprets Article I as requiring that the ICC only intervene where a state is unwilling or unable to act. He considers that the ICC should be viewed as a success when it has no cases, due to the availability and ability of national courts to try persons responsible for the crimes articulated in the Rome Statute. International Criminal Court, Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 4 (2003) [hereinafter OTP Policy Paper], available at [http://www.amicc.org/docs/OcampoPolicyPaper9\\_03.pdf](http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf).

27. Although complementarity is not a new concept in international law, its formalization in the Rome Statute is a departure from other international criminal tribunals developed after the Nuremberg and Tokyo trials. See El Zeidy, *supra* note 11, at 870. For a full discussion of the history of state sovereignty and international criminal trials, see generally *id.* at 870-81. The first *ad hoc* international criminal tribunals use the concept of primacy to regulate intersections with national jurisdictions. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have the power to formally request that a state defer to their jurisdiction at any stage of the proceedings. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, art. 4, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda, S.C. Res. 955, art. 8, para. 2, U.N. Doc. S/RES/955 (Nov. 8, 1994). Because these tribunals were created by the United Nations, states are obliged to cooperate with their procedures and decisions or risk UN sanctions. Primacy jurisdiction in those two tribunals was prefaced on unique incidents of grave international criminal violations and suffered from criticism and practical problems. Indeed, primacy jurisdiction was established without a general consensus and amid controversy. See El Zeidy, *supra* note 11, at 887. It was challenged directly in the first ICTY case, *Prosecutor v. Tadic*. In that case, the Appeals Chamber held that the infringement on state sovereignty under primacy jurisdiction was justified by the UN Charter, which stipulates that national sovereignty can

and international jurisdictions has been given an abstract solution with no interpretive guide.

Although there has been a lengthy debate among scholars about how to interpret and apply Article 17, it is critical that the ICC itself clarify how it will apply this article in future cases.<sup>28</sup> This will give state parties guidance in establishing national prosecutions and in integrating ICC crimes into their national criminal systems. Without direction from the body that will ultimately evaluate these national systems, impunity gaps will grow and accountability will suffer. This Section discusses the basic parameters of admissibility and proposes a rubric for interpreting Article 17.

The admissibility of a case before the ICC is presumed from the outset.<sup>29</sup> A case only becomes inadmissible when one of the grounds of inadmissibility is proven; when it has been, or is “being investigated or prosecuted by a State . . . unless the State is unwilling or unable *genuinely* to carry out the investigation or prosecution.”<sup>30</sup> Thus, when evaluating admissibility, two questions must be asked.<sup>31</sup> The first question is empirical, whereas the second is normative: (1) Is there a national proceeding? If so, then (2) Is the state unwilling or unable to

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be restricted under a UN Security Council mandate. *See* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 55-60, (Oct. 2, 1995). *See also* U.N. Charter art. 2, para.7. There were objections from members of the UN Security Council “that such a tribunal empowered with primacy must be only temporary, and is only acceptable due to the stressing need of the situation.” Primacy jurisdiction also faced practical challenges, including lack of coercive force to apply primacy, and the fact that it is not automatic, but rather only arises after a formal request by a tribunal. These challenges and the controversy surrounding the infringement on sovereignty inherent in primacy jurisdiction led drafters of the Rome Statute to adopt a more horizontal jurisdiction system that relies on state consent and cooperation. *See* El Zeidy, *supra* note 11, at 888. Thus, in creating the world’s first permanent international criminal tribunal, the drafters of the Rome Statute settled on a complementarity system of jurisdiction.

28. *See infra* Part II.B.

29. Claudia Cárdenas Aravena, *The Admissibility Test Before the International Criminal Court Under Special Consideration of Amnesties and Truth Commissions*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY, *supra* note 25, at 115-16. Thus, in one sense, by signing the Rome Statute, state parties have contractually mandated the ICC to prosecute wherever the state itself fails to do so. Therefore, “arguments that the ICC insistence on prosecution may interfere with sovereignty or domestic democratic measures should not be given too much weight, since in reality the state has already specifically contracted with the ICC to perform precisely this function.” Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT’L L. 481, 486 (2003).

30. Rome Statute, *supra* note 7, art. 17; Aravena *supra* note 29, at 116.

31. Darryl Robinson, *Comments on Chapter 4 of Claudia Cárdenas Aravena*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY, *supra* note 25, at 141-42.

genuinely carry out that proceeding?<sup>32</sup> In determining a state's unwillingness to prosecute, Article 17 provides that the ICC:

[S]hall consider . . . whether one or more of the following exist:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5.
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice.<sup>33</sup>

Furthermore, in deciding to prosecute, the prosecutor must always take into account the "interests of justice . . . , the gravity of the crime, [and] the interests of victims . . . ."<sup>34</sup>

Although Article 17 suggests a rigorous test, it is not conclusive or closed. Rather, the language "shall consider whether" is deliberately open-ended, and suggests that terms such as "for the purpose of shielding," or "inconsistent with an intent," are illustrative rather than determinative.<sup>35</sup> In fact, Philippe Kirsch, the Rome Conference Chair and current President of the ICC, described the resulting language as settling for "creative ambiguity."<sup>36</sup> When it comes to deciphering this ambiguity and determining whether the ICC should investigate or prosecute crimes despite a state's use of selective amnesties, there is no clear answer. In fact, some suggest that determining "[t]he nature of the 'unwillingness' and 'inability' tests will in many cases demand greater resources of the Prosecutor in preparing the admissibility argument than proving the guilt of the alleged perpetrator."<sup>37</sup> To help clarify the terms of Article 17, former UN Secretary General Kofi Annan argued:

[T]he purpose of that clause in the Statute is to ensure that mass murderers and other arch-criminals cannot shelter behind a State

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32. *Id.*

33. Rome Statute, *supra* note 7, art. 17, para. 2.

34. *Id.* art. 53, para. (2)(c).

35. Robinson, *supra* note 29, at 500.

36. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 521-22 (1999) (quoting conversation with Mr. Kirsch).

37. El Zeidy, *supra* note 11, at 899.

run by themselves or their cronies, or take advantage of a general breakdown of law and order.<sup>38</sup>

The Prosecutor is thus tasked with determining when “arch-criminals” are sheltering behind a state run by criminals or their “cronies.”<sup>39</sup> Unfortunately, as already demonstrated, Article 17 provides the Prosecutor with little guidance. Indeed, there were lengthy back and forth negotiations between the drafters concerning exactly how to define the term “unwilling” and how this should be applied by the Prosecutor.<sup>40</sup> Ultimately, the term *genuinely* was chosen on the pretense that it was the “least objectionable” word to use as the test for determining a state’s unwillingness to prosecute.<sup>41</sup>

The exact meaning of the Article 17 phrase “unwilling or unable genuinely”<sup>42</sup> is debated by scholars.<sup>43</sup> Although *genuinely* is perhaps least objectionable, it still raises two basic questions: (1) whether *genuinely* encompasses situations where a government is acting deceitfully and insincerely in prosecuting individuals under national jurisdiction, or (2) whether it refers to a more limited set of circumstances in which a state is simply unwilling and/or unable to prosecute.<sup>44</sup> By analyzing the purpose of the drafters’ use of the words *effectively* and *diligently*, as well as their intention in using *genuinely*, some

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38. Press Release, Secretary-General Kofi Annan, Secretary-General Urges ‘Like Minded’ States to Ratify Statute of International Criminal Court, U.N. Doc. SG/SM/6686 (Sept. 1, 1998), available at <http://www.un.org/News/Press/docs/1998/19980901.sgsm6686.html>; Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 583, 618 n.112 (2007) (quoting Press Release, Secretary-General Kofi Annan, *supra*).

39. See Press Release, Secretary-General Kofi Annan, *supra* note 38.

40. El Zeidy, *supra* note 11, at 899.

41. *Id.* at 900. See also John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 41, 48-51 (Roy S. Lee ed., 1999); Rod Jensen, *Complementarity, ‘Genuinely’ and Article 17: Assessing the Boundaries of an Effective ICC*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY, *supra* note 25, at 147-59. Jensen notes that the International Law Convention “intended the Court to be endowed with the ability to intervene in cases where States had acted or were acting and, through such intervention, to ensure that the national proceedings were effective for the purpose of bringing to justice those accused of crimes within the scope of the draft statute.” *Id.* at 151.

42. Rome Statute, *supra* note 7, art. 17.

43. See generally MOHAMED M. EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE (2008); Holmes, *supra* note 41; Jensen, *supra* note 41; El Zeidy, *supra* note 11. See also Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 418 (2000).

44. Sadat & Carden, *supra* note 43, at 418 & n.219.

conclude that the second, limited, interpretation is correct.<sup>45</sup> Yet, if the drafters had intended Article 17 to require an outright refusal to prosecute, they would not have added the modifier *genuine*—implying that the authenticity of the sentiment matters more than its simple existence.<sup>46</sup> The very inclusion of the modifier suggests that the first interpretation is correct: the phrase “unwilling or unable *genuinely* to carry out the investigation or prosecution”<sup>47</sup> must encompass situations in which a government is acting deceitfully and insincerely. This interpretation is supported by a panel of expert consultants to the ICC, who argue that the term *genuine* modifies the phrase “to carry out the investigation or prosecution” and “to prosecute.”<sup>48</sup> This interpretation suggests that it is not the will that must be genuine, but the actual prosecutions—requiring an evaluation of the veracity of a state’s actions.

Moreover, in assessing the actions of states in prosecuting war criminals, the drafters understood that in order for the ICC to be effective, it must be able to investigate particular factors underlying the state’s action, and to:

look behind the actions of States . . . to determine whether those actions . . . were being carried out in a way that respected the main aim of the Rome Statute, which was to ensure that the most serious crimes . . . did not go unpunished.<sup>49</sup>

The ICC framers settled on the term *genuinely* to describe the “minimum standard” by which state parties purport to hold criminals accountable in order to avoid ICC jurisdiction.<sup>50</sup> Indeed, the ICC expert panel noted that the term *genuine* gives the ICC scope to objectively assess national proceedings.<sup>51</sup> This panel argues that when considering whether a proceeding is genuine, considering a broad context of “laws, procedures, practices and standards of the State concerned” will be almost always necessary.<sup>52</sup> Indeed, the panel argues that

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45. El Zeidy, *supra* note 11, at 900 (He argues that “[a]n examination of Article 17, suggests that ‘genuinely’ refers to situations where the State is really unable or unwilling to proceed).

46. Genuine is defined as “authentic or real; something that has the quality of what it is purported to be or to have.” BLACK’S LAW DICTIONARY 708 (8th ed. 2004). *See also* Jensen, *supra* note 41, at 159. Jensen notes that the Oxford English Dictionary definition of “genuine” was used in informal consultations, and the aspect of the definition that impressed the coordinator was “having the supposed character, not sham or feigned.”

47. Rome Statute, *supra* note 7, art. 17.

48. Xabier Agirre et al., *Informal Expert Paper: The Principle of Complementarity in Practice* para. 21 (International Criminal Court, Office of the Prosecutor, 2003), [www.icc-cpi.int/library/organs/otp/complementarity.pdf](http://www.icc-cpi.int/library/organs/otp/complementarity.pdf).

49. Jensen, *supra* note 41, at 154-55.

50. *Id.* at 156.

51. Agirre et al., *supra* note 48, para. 22.

52. *Id.* para. 35.

evidence of legal systems “plagued with political interference, scripted trials, and unwillingness to pursue certain groups of offenders or offences,” can lead to an inference of “lack of genuineness” in the approach to prosecutions.<sup>53</sup> In effect, Article 17 establishes a standard of accountability for when a state fails to hold certain criminals responsible under national law.<sup>54</sup>

The term *genuinely* as used in Article 17 is unique in that its interpretation is left completely at the discretion of the court, unlike the terms *unwillingness* and *unable*, which are defined in detail.<sup>55</sup> In the absence of a definition in the Rome Statute and related documents articulated in Article 21, a term must be interpreted under the Vienna Convention on the Law of Treaties.<sup>56</sup> Article 31 of the Vienna Convention requires that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>57</sup> Therefore, in determining whether the actions of a state are genuine, the ICC must look at state prosecutions in light of the object and purpose of the Rome Statute—to end impunity for crimes against humanity.<sup>58</sup> Thus, to determine if a state such as Colombia is meeting its Rome Statute obligations to prosecute, the ICC should look behind the passage of purported transitional justice laws and objectively examine whether the motives and broad context of the state’s actions reflect the object and purpose of the Rome Statute.

In addition to the willingness of a state to prosecute, Article 17 also states that a case is admissible before the ICC when a state is unable to prosecute.

Article 17(3) provides:

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.<sup>59</sup>

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53. *Id.* The panel also notes that circumstantial evidence will likely play an extremely important role in assessing the unwillingness of a State to prosecute, *id.* para. 36, and that an Article 17 determination of unwillingness may prove difficult, as states could “employ sophisticated schemes to cover up involvement and to whitewash crimes.” *Id.* para. 44.

54. Jensen, *supra* note 41, at 160.

55. Rome Statute, *supra* note 7, art. 17, paras. 2, 3.

56. *Id.* art. 21, para. 1; Vienna Convention on the Law of Treaties, art. 31, para. 1, opened for signature May 23, 1969, 1155 UNTS 331 (entered into force Jan. 24, 1980).

57. Vienna Convention on the Law of Treaties, *supra* note 56, art. 31, para. 1.

58. Michael Kourabas, *A Vienna Convention Interpretation of the "Interests of Justice" Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A "Great Qualitative Step Forward," or a Normative Retreat?*, 14 U.C. DAVIS J. INT'L L. & POL'Y 59, 73 (2007).

59. Rome Statute, *supra* note 7, art. 17, para. 3.

According to the Office of the Prosecutor, this provision was meant for those situations where there was a “lack of central government, or a state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems which prevents the State from discharging its duties to investigate and prosecute crimes within the jurisdiction of the Court.”<sup>60</sup> Therefore, an analysis of the national judicial system and political climate is necessary in determining a state’s ability to prosecute.

It is critical to note that just as states are committed to allowing the ICC to prosecute under the complementarity principle, the ICC is equally bound to prosecution. Deference to a state’s non-prosecutorial policies is possible only in extreme situations:

- (i) where the Security Council determines that prosecution by the ICC would interfere with international peace and security (Article 16);
- (ii) where the state “mechanisms being employed so closely meet the goals of accountability that they can be considered ‘genuine’ proceedings” (Article 17); and
- (iii) when prosecution would not serve the interests of justice (Article 53).<sup>61</sup>

This obligation of the ICC is mirrored by the obligations of state parties. The OTP makes special note of state parties’ duty to prosecute, stating:

[T]he principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards. This principle is emphasized in the Preamble of the Rome Statute, recalling that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>62</sup>

Given that state parties and the ICC are mutually bound to prosecute, it is imperative for the ICC to clearly determine how these obligations will be evaluated. For the ICC to be an efficacious mechanism for international criminal justice, it must strive to refine Article 17 so that it can serve as a true guiding principle for how national and international laws will interconnect under the complementarity principle. Under its Article 17 power, the ICC should evaluate

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60. OTP Policy Paper, *supra* note 26, at 4.

61. Robinson, *supra* note 2, at 487.

62. OTP Policy Paper, *supra* note 26, at 5.

the underlying political motivations of state-initiated prosecutions to ensure that states act sincerely and transparently to end impunity for crimes against humanity and war crimes. In so doing, it will be important to understand the international political context of transitional justice<sup>63</sup> mechanisms and see through false application of, or observance of, international standards of criminal justice.<sup>64</sup> The political nature of the Colombian government's attempts to provide justice and accountability demonstrate that Colombia is not adhering adequately to the Rome Statute. The following sections will show how a robust application of Article 17 militates in favor of ICC intervention in Colombia.

### III. CHALLENGING COMPLEMENTARITY: COLOMBIA'S JUSTICE AND PEACE LAW

The conflict in Colombia spans generations. After providing a background to the armed conflict, its major players, and the types of crimes typically committed by the armed actors, this Section will describe Colombia's recent attempts to end the conflict, which include a massive demobilization attempt, the passage of the Justice and Peace Law, and embracing transitional justice rhetoric.

#### A. Background to the Conflict

Colombia's modern conflict can be traced to a violent struggle between the Liberals and Conservatives from 1948-1953.<sup>65</sup> During this period, known as

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63. Newly democratic states can take various approaches to transitional justice, and debates often center on the tension between the desire to forgive and forget, and the desire for accountability and retribution. These approaches are rarely, if ever, mutually exclusive, and involve balancing tensions between competing interests. Peace, the establishment of democratic rule, international politics, economics, victims' needs and concepts of justice, establishing the "truth" of what happened, and forming a common or shared history are just some of the myriad considerations that come into play when a state must decide how to proceed when faced with the application of transitional justice mechanisms. Any application of transitional justice is going to be unique and context-specific.

64. Agirre et al., *supra* note 48, paras. 71-74. The panel argues that amnesties and alternative forms of justice should be evaluated by the OTP, in order to uphold the mandate of the ICC. Specifically, the OTP should be guided by considerations that include whether the amnesty/alternative measure (1) is available to the persons most responsible for atrocities; (2) has been legitimized by the U.N. or the international community; (3) has been granted by and to members of the regimes itself; (4) leads to some form of punishment; and (5) provides for justice. *Id.*

65. Jorge L. Esquirol, *Can International Law Help? An Analysis of the Colombian Peace Process*, 16 CONN. J. INT'L L. 23, 28 (2000); Natalia Springer, *Colombia: Internal Displacement – Policies and Problems*, WRITENET 1 June 1, 2006,



“La Violencia,” clashes between Liberal guerrillas and Conservative death-squads resulted in an estimated 200,000 deaths.<sup>66</sup> “La Violencia” ended with a military coup headed by General Gustavo Rojas Pinilla in 1953.<sup>67</sup> Civil authorities regained control over the government in 1957, when the Liberals and the Conservatives reached a power-sharing agreement known as the National Front.<sup>68</sup> Under the National Front, the parties alternated control over the presidency and maintained parity in control over legislative and executive offices to the exclusion of other political parties.<sup>69</sup> While the National Front ensured peace between the two political parties, social violence in the countryside persisted, and the rural self-defense groups that arose during “La Violencia” transformed into guerrilla groups.<sup>70</sup>

### 1. Armed Actors

Colombia’s conflict has been shaped by the military tactics and economic ambitions of three groups of armed actors: guerrillas, paramilitaries, and state security forces. The guerrillas’ political message resounds with many Colombians, although the groups’ extreme military tactics have eroded civilian support. Similarly, the paramilitaries’ gross human rights abuses have led many sectors of Colombian society to question the groups’ avowed commitment to self-defense. The state security forces, meanwhile, under-funded and tainted by their

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<http://www.unhcr.org/refworld/docid/44bf463a4>; Catalina Diaz, Int’l Ctr. for Transitional Justice, Colombia’s Bid for Justice and Peace 2 (May 2007) (draft version available at [http://www.peace-justice-conference.info/download/WS5-Draft%20version-COLOMBIA\\_JUNE11.pdf](http://www.peace-justice-conference.info/download/WS5-Draft%20version-COLOMBIA_JUNE11.pdf)).

66. Esquirol, *supra* note 65, at 28; Springer, *supra* note 65, at 1; Diaz, *supra* note 65.

67. Esquirol, *supra* note 65, at 28.

68. DAVID BUSHNELL, THE MAKING OF MODERN COLOMBIA: A NATION IN SPITE OF ITSELF 223-24 (1993); Esquirol, *supra* note 65, at 28; Springer, *supra* note 65, at 1.

69. BUSHNELL, *supra* note 68, at 224; Esquirol, *supra* note 65, at 28. Although the National Front originally was scheduled to end after 16 years, the power-sharing agreement remained in place until 1986. BUSHNELL, *supra* note 68, at 225.

70. The origins of Colombia’s armed guerilla groups can be traced to 19th century self-defense groups that arose in outlying rural areas and fought actively during “La Violencia.” In the second half of the 20th century, these armed groups adopted a left-wing ideology and political platform and essentially declared war against the government. See Diaz, *supra* note 65, at 3; PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO [U.N. DEVELOPMENT PROGRAMME], INFORME NACIONAL DE DESARROLLO HUMANO COLOMBIA, EL CONFLICTO, CALLEJÓN CON SALIDA 28 (Panamericana Formas e Impresos 2003) [hereinafter PNUD], available at [http://www.pnud.org.co/2003/full/capitulo\\_1.pdf](http://www.pnud.org.co/2003/full/capitulo_1.pdf) (original Spanish), and <http://www.pnud.org.co/2003/EnglishVersion/Chapter1.pdf> (English translation); DENNIS M. HANRATTY & SANDRA W. MEDITZ, EDS., COLOMBIA: A COUNTRY STUDY, (Washington: GPO for the Library of Congress 1988) (“History” section, “La Violencia” subsection), available at <http://countrystudies.us/colombia/>.

association with the paramilitaries, have failed to secure a military victory or peace.

The oldest of the modern guerrilla groups, Ejército de Liberación Nacional (“ELN” or National Liberation Army), formed in 1964 under the influence of Ernesto “Che” Guevara’s ideology and the Cuban revolution. Liberation theology also inspired the ELN’s political views, and some of their most important leaders were ex-Catholic priests.<sup>71</sup> The Fuerzas Armadas Revolucionarias de Colombia (“FARC” or Revolutionary Armed Forces of Colombia) was established two years later, with a Marxist platform for establishing a “New Colombia” based on social justice and economic self-determination.<sup>72</sup> Groups such as Ejército Popular de Liberación (“EPL” or Popular Liberation Army), founded in 1968, and Movimiento 19 de Abril (“M-19” or April 19 Movement), founded in 1973, adopted a class-based orientation and sought to bring a largely rural conflict to urban areas.<sup>73</sup> Since the 1980s, guerrilla groups have funded their activities primarily by providing protection to drug traffickers and extorting ransom from kidnapped civilians.<sup>74</sup>

Paramilitary forces evolved from geographically focused, government-backed civil militias to a national organization with an ideological discourse, popular support, and political power.<sup>75</sup> Beginning in the late 1960s, the government began to organize and arm civilian militias, as permitted under Colombian law.<sup>76</sup> In the 1970s and early 1980s, prominent landowners and drug traffickers created their own private armies to defend their economic interests, including drug fields, smuggling routes, and landholdings, from guerillas’ attempts at extortion and expropriation.<sup>77</sup> In 1997, leaders from paramilitary

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71. Esquirol, *supra* note 65, at 30.

72. *Id.*

73. HANRATTY & MEDITZ, *supra* note 70 (“History” section, “Opposition to the National Front” and “Dismantling the Coalition Apparatus” subsections); BUSHNELL, *supra* note 68, at 245-47.

74. See Esquirol, *supra* note 65, at 30; Int’l Crisis Group, *Presidential Politics and Peace Prospects*, Latin American Report No. 14, June 16, 2005, at 13 [hereinafter ICG, *Presidential Politics*], available at <http://www.crisisgroup.org/home/index.cfm?id=3515&l=1>.

75. See PNUD, *supra* note 70, at 42.

76. Law 48 of 1968 allowed the government to arm civilians with state military weapons (art. 33). See also Inter-Am. C.H.R., *Report on the Demobilization Process in Colombia*, OEA/Ser.L/V/II.120, doc. 60 para. 36 (Dec. 13, 2004) [hereinafter IACHR 2004 Report], available at <http://www.cidh.oas.org/countryrep/Colombia04eng/toc.htm>. Groups of armed citizens fighting on the side of the government have a long history in Colombia. MARKUS KOTH, *TO END A WAR: DEMOBILIZATION AND REINTEGRATION OF PARAMILITARIES IN COLOMBIA* 14 (Bonn Int’l Ctr. for Conversion, Paper 43, 2005), <http://www.bicc.de/publications/papers/paper43/content.php>.

77. IACHR 2004 Report, *supra* note 76, para. 37; PNUD, *supra* note 7069, at 29; Winifred Tate, *Paramilitaries in Colombia*, 8 BROWN J. WORLD AFF. 163, 165 (2001). One such paramilitary group, Muerte a Secuestradores (“MAS”, or Death to Kidnappers) killed

groups formed an umbrella organization called the Autodefensas Unidas de Colombia (“AUC” or United Self-Defense Units of Colombia).<sup>78</sup> By 2003, the AUC had 13,500 members operating in 49 fronts, with a presence in 26 of Colombia’s 32 departments and 382 of its 1,098 municipalities.<sup>79</sup> The paramilitaries are responsible for more than eighty percent of political violence in Colombia, including massacres, selective killings, disappearances, forced displacements, and torture.<sup>80</sup> By 1987, government statistics showed that paramilitaries were responsible for more civilian deaths than guerrillas.<sup>81</sup>

The paramilitaries’ military strength was used to supplement under-resourced state security forces. Historically, Colombia’s defense budget has been low,<sup>82</sup> and underinvestment in training has contributed to the security forces’ reputation for corruption, human rights abuse, and poor battlefield performance.<sup>83</sup> Indeed, paramilitaries are said to act as the *de facto* security force for the Colombian state, engaging in conduct prohibited by national and international

hundreds as part of an effort to “cleanse” areas of leftist subversives and their supporters. HUMAN RIGHTS WATCH, COLOMBIA’S KILLER NETWORKS: THE MILITARY-PARAMILITARY PARTNERSHIP AND THE UNITED STATES, pt. II (1996) *available at* <http://www.hrw.org/reports/1996/killertoc.htm> [hereinafter HRW, KILLER NETWORKS]. MAS was formed in 1982, at a meeting convened by the Bárbula Battalion’s commanders and the local mayor for politicians, ranchers, businessmen, and representatives from the Texas Petroleum Company. *Id.* MAS received money from businessmen and ranchers, and extensive tactical support from the military. *Id.* Another well-known death squad, Los Pepes (Perseguidos por Pablo Escobar, or Persecuted by Pablo Escobar), was formed in 1991 to fight drug kingpin Pablo Escobar and assist the police in capturing him. William Avilés, *Paramilitarism and Colombia’s Low-Intensity Democracy*, 38 J. LATIN AM. STUD. 379, 394 (2006).

78. IACHR 2004 Report, *supra* note 76, para. 42.

79. *Id.* To validate themselves as a political project, the paramilitaries appeal to the same set of claims and rhetoric of vindication for social inequality as the guerillas. The platform of the AUC, for example, demands agrarian reform, urban reform, and other redistributive measures. PNUD, *supra* note 70, at 42.

80. Tate, *supra* note 77, at 169; HUMAN RIGHTS WATCH, SMOKE AND MIRRORS: COLOMBIA’S DEMOBILIZATION OF PARAMILITARY GROUPS, 20 (2005), *available at* <http://hrw.org/reports/2005/colombia0805/colombia0805.pdf>.

81. Avilés, *supra* note 77, at 392.

82. AMBASSADOR MYLES R. R. FRECHETTE, STRATEGIC STUDIES INST., COLOMBIA AND THE UNITED STATES – THE PARTNERSHIP: BUT WHAT IS THE ENDGAME? 18 (2007), *available at* <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB762.pdf>.

83. Center for International Policy (CIP), Colombia Project, *Information About the Combatants*, <http://ciponline.org/colombia/infocombat.htm> (last visited Mar. 22, 2008). Despite the ongoing conflict, Colombia has fewer police and soldiers per capita than many of its neighbors. FRECHETTE, *supra* note 82, at 18. There are only 255,000 regular troops in its armed forces. *See* Fabiola Sanchez, *Venezuela Troops Head to Colombia Border*, ASSOCIATED PRESS, Mar. 5, 2008.

law.<sup>84</sup> Paramilitary soldiers report that they have worked side by side with army soldiers on projects coordinated at high levels of the military.<sup>85</sup> In other instances, the army and paramilitaries tracked the other group's location to avoid engaging in combat with each other.<sup>86</sup> Seventy-five percent of Colombia's military units have been implicated in promoting, supporting, and taking part in paramilitary actions.<sup>87</sup> The Inter-American Court of Human Rights has found that security forces have collaborated to commit torture, disappearances, extrajudicial killings, and massacres,<sup>88</sup> by providing transportation, munitions, and communications to paramilitaries and failing to protect the civilian population.<sup>89</sup> Recently, authorities have initiated criminal investigations against high-ranking members of the military for colluding with paramilitary groups. Military officials have been

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84. See Esquirol, *supra* note 67, at 34-35; ICG, *Presidential Politics*, *supra* note 74, at 17. See generally HUMAN RIGHTS WATCH, *WAR WITHOUT QUARTER: COLOMBIA AND INTERNATIONAL HUMANITARIAN LAW* 100 (1998), available at <http://www.hrw.org/legacy/reports/reports98/colombia/> [hereinafter HRW, *WAR WITHOUT QUARTER*]; Avilés, *supra* note 77, at 387.

85. HRW, *KILLER NETWORKS*, *supra* note 77, pt. II. MAS received training from the Bomboná Battalion, and its members were employed as guides. As early as 1983, MAS was carrying out operations in conjunction with the military. In 1981 Bomboná officers were trained and employed as guides to the Castaño brothers, Fidel and Carlos. They later went on to found the Peasant Self Defense Groups of Córdoba and Urabá (Autodefensas Campesinas de Córdoba y Urabá, ACCU), and by the late 1980s Fidel was a top paramilitary leader and important drug trafficker.

86. ICG, *Presidential Politics*, *supra* note 74, at 17. See generally HRW, *WAR WITHOUT QUARTER*, *supra* note 84.

87. Human rights groups have documented that the following military units have colluded with paramilitary forces: the First, Second, and Fourth Divisions; the Fourth, Fifth, Seventh, Ninth, Fourteenth, and Seventeenth Brigades; Mobile Brigades One and Two; and the Baracoas, Bárbula, Batín No. 6, Bomboná, Cacique Nutibara, Caycedo de Chaparral #17, Héroes de Majagual, Joaquín París, La Popa, Los Guanés, Girardot, Palonegro #50, Rafael Reyes, Riquarte, Rogelio Correa Campos, and Santander Battalions. HRW, *WAR WITHOUT QUARTER*, *supra* note 84, pt. II.

88. 19 Merchants v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_109\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_109_ing.pdf); Mapiripán Massacre v. Colombia, 2006 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_134\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf); Pueblo Bello Massacre v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_140\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf); Ituango Massacres v. Colombia, 2007 Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_148\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf). See also Cambio, *Diez años después*, CAMBIO, Oct. 24, 2007, [http://www.cambio.com.co/paiscambio/747/ARTICULO-WEB-NOTA\\_INTERIOR\\_CAMBIO-3781492.html](http://www.cambio.com.co/paiscambio/747/ARTICULO-WEB-NOTA_INTERIOR_CAMBIO-3781492.html).

89. *Mapiripán Massacre*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 134, paras. 96.32, 96.35.

accused of crimes ranging from financing operations to directly ordering massacres.<sup>90</sup>

The ongoing battles between these three groups have led to a complex and extraordinarily violent conflict in Colombia. The following section details the human rights abuses caused by the conflict.

## 2. Human Rights Violations

Members of security forces, paramilitary groups, and guerrilla groups have committed grave violations of human rights. All of the warring factions systematically target civilians as part of the struggle for control over territory.<sup>91</sup> Armed groups operate their own civilian support networks, a practice that leaves civilians vulnerable when frontiers and alliances shift, and creates an atmosphere of distrust and insecurity.<sup>92</sup> Whole villages are declared military targets, and armed groups use massacres, torture, and forced displacement to create homogeneous “socially cleansed” areas of control.<sup>93</sup> Indeed, campaigns against civilian populations have led to one of the largest populations of internally-displaced persons in the world.<sup>94</sup> Human rights victims are disproportionately residents of rural areas, *campesinos*,<sup>95</sup> as well as members of other vulnerable groups such as women, children, displaced persons, and minorities.<sup>96</sup> Social

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90. HUMAN RIGHTS WATCH, *BREAKING THE GRIP?: OBSTACLES TO JUSTICE FOR PARAMILITARY MAFIAS IN COLOMBIA 89-90*, (2008), available at <http://www.hrw.org/sites/default/files/reports/colombia1008webwcover.pdf> [hereinafter *BREAKING THE GRIP*]; Julian Guerrero, Presentation on Transitional Justice in Colombia, Asser Institute Supranational Criminal Law Series (Apr. 25, 2007) (notes on file with author).

91. Springer, *supra* note 65, at 6.

92. See INTERNAL DISPLACEMENT MONITORING CENTRE, *COLOMBIA: GOVERNMENT "PEACE PROCESS" CEMENTS INJUSTICE FOR IDPS 12* (Jun. 30, 2006), available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/2F1618E6C169F2EBC125719C002F6421/\\$file/Special%20Country%20Report%20Colombia.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/2F1618E6C169F2EBC125719C002F6421/$file/Special%20Country%20Report%20Colombia.pdf) (last visited Mar. 22, 2008).

93. *Id.*

94. *Id.* at 26.

95. See generally, Comité Permanente por la Defensa de los Derechos Humanos, Banco de Datos, <http://cpdh.free.fr/todo.htm> (last visited Mar. 22, 2008). Comité Permanente por la Defensa de los Derechos Humanos Colombia [CPDH] is a non-government organization created following the First National Forum for Human Rights Defense and Democratic Liberties, which took place in Bogota from March 30 to April 1, 1979, in defense of the rights restricted by the government of President Julio César Turbay Ayala.

96. These minority populations are primarily composed of Afro-Colombians and indigenous groups. INTERNAL DISPLACEMENT MONITORING CENTRE, *supra* note 9293, at 23, 25.

leaders, human rights defenders, union members, and journalists are also disproportionately affected.<sup>97</sup>

Particular human rights abuses have characterized different stages of the conflict: systematic torture and arbitrary detention (1978-1982) forced disappearances (1981-1985); selective killings (1982-1988) massacres intended to clear regions of opposition control (1988-1991) criminalization of social protest and a return to selective killings (1991-1996) and massacres intended to terrorize (1997-2002).<sup>98</sup>

Since 2002, which marks the beginning of ICC jurisdiction, massive atrocities have continued, including high rates of massacres, forced disappearances, assassinations, and torture committed by paramilitary groups.<sup>99</sup> The use of torture by government security forces is rising, with 74 cases of torture reported in the first half of 2007, a 46 percent increase from the same period in

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97. U.N. Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia*, para. 34, U.N. Doc. A/HRC/4/48 (Mar. 5, 2007) [hereinafter UNHCHR 2007 Report], available at <http://www2.ohchr.org/english/bodies/hrcouncil/4session/reports.htm>.

98. COMITÉ PERMANENTE POR LA DEFENSA DE LOS DERECHOS HUMANOS COLOMBIA, INFORME ESTADÍSTICO DE DERECHOS HUMANOS 6 (2003), available at <http://indh.pnud.org.co/files/rec/amplCHnocheyniebla.pdf>.

99. ICC has jurisdiction for crimes committed after its entry into force, which occurred on July 1, 2002. Rome Statute, *supra* note 7, art. 11. Between July 2002 and June 2006, state agents allegedly committed on average 227 extrajudicial killings a year. COLOMBIAN COMMISSION OF JURISTS, COLOMBIA 2002-2006: SITUATION REGARDING HUMAN RIGHTS AND HUMANITARIAN LAW, 3 (2007), available at [http://www.coljuristas.org/documentos/documentos\\_pag/CCJ%20Ingles.pdf](http://www.coljuristas.org/documentos/documentos_pag/CCJ%20Ingles.pdf). Between July 2002 and June 2005, paramilitary groups were allegedly responsible for 1,060 assassinations or forced disappearances per year. From July 2002 to June 2006, the average death from paramilitary massacres was 227. *Id.* at 8. In 2002 alone, there were 111 massacres victimizing 661 people. PNUD, *supra* note 70, at 121. Between July 2002 and June 2006, the annual average of extrajudicial killings by paramilitaries was 833. COLOMBIAN COMMISSION OF JURISTS, *supra*, at 9. The Colombian government reports that there were 3004 victims of killings attributable to paramilitary groups between December 1, 2002 and July 31, 2006. Comisión Colombiana de Juristas [Colombian Commission of Jurists], Listado de víctimas de violencia sociopolítica en Colombia: Violaciones a los derechos humanos e infracciones al derecho humanitario presuntamente perpetradas por grupos paramilitares fuera de combate," [List of victims of sociopolitical violence in Colombia: Violations of human rights and infractions of humanitarian law allegedly perpetrated by paramilitary groups out of combat], [http://www.coljuristas.org/documentos/documentos\\_pag/listavictim06.pdf](http://www.coljuristas.org/documentos/documentos_pag/listavictim06.pdf) (last visited Jan. 30, 2009). The 2002-2003 period also saw the highest rates of torture in years. WORLD ORG. AGAINST TORTURE [OMCT], STATE VIOLENCE IN COLOMBIA: AN ALTERNATIVE REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE, 17-18 (2004). For more information on recent human rights abuses committed in Colombia, see Amnesty Int'l, *Leave Us in Peace! Targeting Civilians in Colombia's Internal Armed Conflict* 25-71, AI Index AMR 23/023/2008, Oct. 28, 2008 [hereinafter *Leave Us in Peace*].

2006.<sup>100</sup> Actual figures are likely higher: many instances go unreported because the victims are murdered.<sup>101</sup> Recruiting child soldiers is common, and sexual violence against women is used as a form of warfare, with rape and sexual mutilation often preceding massacres and homicides.<sup>102</sup>

Recent evidence of widespread extrajudicial killings perpetrated by the military caused the Colombian government to fire three generals and 24 soldiers, and led to the resignation of the commander of the Colombian army.<sup>103</sup> These crimes also prompted the U.N. Commissioner for Human Rights, Navi Pillay, to claim that Colombian security forces are engaging in “systematic and widespread” extrajudicial killings, which she noted could be considered a crime against humanity.<sup>104</sup> According to ICC Prosecutor Moreno-Ocampo, his office has

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100. U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2007 – COLOMBIA, § 1(c) (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100633.htm> [hereinafter U.S. DEP’T OF STATE 2007 REPORT] (citing data from Centro de Investigación y Educación Popular (CINEP)). This statistic does not include cases of torture committed by the paramilitary groups during this same period.

101. U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Joint report of the Special Rapporteur on the Question of Torture, Mr. Nigel S. Rodley, and the Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, Mr. Bacre Waly Ndiaye, Submitted Pursuant to Commission on Human Rights Resolutions 1994/37 and 1994/82, Visit by the Special Rapporteurs to the Republic of Colombia from 17 to 26 October 1994*, para. 20, U.N. Doc. E/CN.4/1995/111 (Jan. 16, 1995) [hereinafter *Report of the Special Rapporteurs*].

102. Inter-Am. C.H.R., *Violence and Discrimination Against Women in the Armed Conflict in Colombia*, OEA/Ser.L/V/II, doc. 67 paras. 54-56 (Oct. 18, 2006), available at <http://www.cidh.oas.org/countryrep/ColombiaMujeres06eng/TOC.htm>; *Leave Us in Peace*, *supra* note 99, at 45-54.

103. *Colombian Army Commander Resigns*, BBC NEWS, Nov. 4, 2008 available at <http://news.bbc.co.uk/2/hi/americas/7709073.stm>. The fired soldiers included three generals, 11 colonels, four majors, a captain, a lieutenant, and seven non-commissioned officers. They were accused of killing 11 civilian men found in a mass grave, in order to inflate statistics of rebel deaths. *Id.* This is related to a trend endemic in the Colombian conflict. See COLOMBIAN COMMISSION OF JURISTS, *supra* note 99, at 3-7. See generally *Ejecuciones extrajudiciales directamente atribuibles a la Fuerza Pública en Colombia, julio de 2006 a junio de 2007: Audiencia ante la Comisión Interamericana de Derechos Humanos* [Extrajudicial Killings Directly Attributable to the Public Forces of Colombia, July 2006 to June 2007: Audience Before the Inter-American Commission of Human Rights] Oct. 10, 2007, [http://www.sumapaz.org/documentos/ejecuciones\\_colombia.pdf](http://www.sumapaz.org/documentos/ejecuciones_colombia.pdf). The Colombian Army has also been linked to crimes committed by new illegal armed groups created by demobilized paramilitaries, including the notorious Black Eagles. Int’l Crisis Group, *Correcting Course: Victims and the Justice and Peace Law in Colombia*, Latin America Report N°29, Oct. 30, 2008, at 19 [hereinafter ICG, *Correcting Course*], available at <http://www.crisisgroup.org/home/index.cfm?id=5753&l=6>.

104. *U.N. Says Colombian Military Executing Civilians*, CNN, Nov. 1, 2008, <http://edition.cnn.com/2008/WORLD/americas/11/01/colombia.UN/>.

received information that “thousands of people have been killed, disappeared, kidnapped and forcibly displaced since 1 November, 2002.”<sup>105</sup> However, in spite of these systematic and wide spread violations of international criminal law, impunity has prevailed throughout the conflict, shielding paramilitary and military officials responsible for these crimes from prosecution.<sup>106</sup>

## **B. Colombia’s Move to Transitional Justice**

After many failed peace attempts, Colombia is attempting to put an end to the situation described above by applying the rhetoric and mechanisms of transitional justice. Colombian President Álvaro Uribe began the move toward transitional justice with a massive demobilization effort, followed with an amnesty law directed at the leaders of the paramilitary groups. Together, these two processes form the basis of Colombia’s recent efforts to end the fighting. However, these processes merely reflect the history of impunity in Colombia, and do little to promote accountability. This section discusses the parameters of Colombian demobilization and amnesty, laying the foundation for the next section to demonstrate how the politics of transitional justice mask the Colombian government’s genuine unwillingness to prosecute those responsible for mass atrocities.

### **1. Demobilization**

In December 2002, just a few months after Colombia ratified the Rome Statute, the AUC declared a unilateral cease-fire.<sup>107</sup> On July 15, 2003, the AUC and Colombia signed a peace agreement known as the Ralito Accord.<sup>108</sup> Under the Ralito Accord, the AUC agreed to demobilize its troops by December 31, 2005,<sup>109</sup> in return for government assistance in reintegrating demobilized

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105. *ICC Probes Colombia on War Crimes*, BBC NEWS, Mar. 31, 2005, <http://news.bbc.co.uk/2/hi/americas/4399027.stm>.

106. *See generally*, HRW, *KILLER NETWORKS*, *supra* note 77. This impunity will be discussed in detail below in Part IV.B.2.

107. Colombia signed the Rome Statute in 1998, and ratified it on August 5, 2002. International Criminal Court, *States Parties to the Rome Statute*, <http://www.icc-cpi.int/asp/statesparties/country&id=29.html> (last visited Sept. 15, 2008).

108. *Acuerdo de Santa Fé de Ralito Para Contribuir a la paz de Colombia*, [Santa Fé de Ralito Accord], July 15, 2003, *available at* [http://www.altocomisionadoparalapaz.gov.co/acuerdos/acuerdos\\_t/jul\\_15\\_03.htm](http://www.altocomisionadoparalapaz.gov.co/acuerdos/acuerdos_t/jul_15_03.htm).

109. Diaz, *supra* note 65, at 7.



combatants into civilian life and ensuring their safety.<sup>110</sup> To facilitate dialogue, the government established an area for the demobilization, called the *zona de ubicación*, in May 2004, in Tierralta, Córdoba.<sup>111</sup> Arrest warrants for AUC members located within this 368 square-kilometer area were suspended. In addition, the military forces, the National Police, and judicial authorities withdrew from this area, leaving the civilian population that remained unprotected.<sup>112</sup>

The legal framework existing at the time of the Ralito Accord required individuals to surrender before a designated official.<sup>113</sup> Those who demobilized received health, protection, and security benefits, as well as payments for providing information on the activities of illegal organizations and for surrendering their weapons.<sup>114</sup> In addition, individuals who confessed to political crimes for which they have been accused, but not yet convicted, were entitled to significant legal benefits.<sup>115</sup> However, since no formal investigations have been launched for large numbers of crimes, most paramilitaries will obtain legal benefits without having to fully confess to the crimes committed by the groups.<sup>116</sup>

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110. José Arvelo, *International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 GEO. J. INT'L L. 411, 426 (2006).

111. IACHR 2004 Report, *supra* note 76, para. 88.

112. *Id.* paras. 88, 90. The *zona de ubicación* was implemented through Resolution 092 of 2004, enacted under the provisions of Law 782 of 2002. The only protection afforded to the civilian population is through the presence of members of the Mission to Support the Peace Process in Colombia (the MAPP/OAS Mission), established in January 2004 between President Uribe and then-Secretary General of the Organization of American States (OAS) and former Colombian President Carlos Gaviria. The MAPP/OAS Mission has a mandate to verify initiatives for resolving the conflict, including ceasefires, demobilization, disarmament, and reintegration of ex-combatants into society. The Inter-American Commission on Human Rights provides advisory services to MAPP/OAS. *Id.*, paras. 1-2, 90.

113. Designated officials include judges, prosecutors, military or police authorities, representatives of the Inspector General (*Procurador*) or Human Rights Ombudsman, and local or regional authorities. *Id.* para. 73.

114. *Id.*

115. *Id.* para. 62. Under this legal regime, investigations may be suspended (*cesación de procedimiento*), or precluded (*resolución de preclusión de la instrucción*) and cases may be dismissed (*resolución inhibitoria*). Those who have benefited from a pardon or the suspension of an investigation may not be tried or prosecuted for the same facts giving rise to the granting of benefits. Although the Constitution, human rights treaties to which Colombia is a party, and Laws 418 and 782, among others, prohibit amnesties for certain atrocious crimes, Decree 128 excludes legal benefits only for combatants who have pending trials or convictions of such crimes, and does not make a distinction based on the gravity of the crime. *Id.* paras. 62, 75. Therefore, the possibility for impunity for crimes remains high, as paramilitaries can demobilize without admitting to atrocious crimes that will likely not be investigated. *See Leave Us in Peace, supra* note 99, at 16.

116. Inter-Am. C.H.R., *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*,

Not surprisingly, of approximately 28,000 paramilitaries processed in demobilization courts, 90 percent failed to provide any significant information on crimes committed by their unit.<sup>117</sup>

According to official sources, the government demobilized 31,671 paramilitary combatants in 38 public ceremonies between November 2003 and August 2006.<sup>118</sup> This number far exceeds any previous estimates of the paramilitary group membership, supporting the conclusion that thousands of civilians and common criminals availed themselves of the program's benefits.<sup>119</sup> In a report on its implementation, the Inter-American Commission on Human Rights ("Inter-American Commission") concluded that these initial stages of collective demobilization suffered from legal loopholes stemming from Law 782; a lack of a systematic method to determine criminal responsibility; and a lack of oversight tools, which led to lost opportunities to gather information that would be vital during the prosecution stage.<sup>120</sup> This report also documented the inclusion of many persons in the demobilization that did not appear to be paramilitary fighters whose statements lacked credibility.<sup>121</sup> This observation was supported by reports that paramilitary leaders convinced local villagers to act as paramilitary members in the demobilization process; these reports were not corroborated by the government.<sup>122</sup>

The high rate of demobilization masks a disturbing reality: the paramilitaries, who are responsible for the country's most atrocious crimes, have been able to retain their economic and political power.<sup>123</sup> Paramilitary leaders have been accused of running their criminal operations from prison, and many mid-level paramilitary cadres either failed to demobilize or rearmed.<sup>124</sup> The AUC

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OEA/Ser.L/V/II., doc. 3 para. 76 (Oct. 2, 2007) [hereinafter IACHR 2007 Report], *available at* <http://www.cidh.oas.org/pdf%20files/III%20Informe%20proceso%20desmovilizacion%20Colombia%20rev%2017%20ENG.pdf>. *See also* IACHR 2004 Report, *supra* note 76, para. 76. Officials note that procedural benefits should apply only to the political crime of "conspiracy to engage in criminal conduct" ("*concierto para delinquir*"), and should not impede investigations into atrocious crimes. *Id.*

117. IACHR 2007 Report, *supra* note 116, para. 34.

118. Diaz, *supra* note 65, at 7.

119. FRECHETTE, *supra* note 82, at 33-34. An estimated 8,000 guerrillas have also voluntarily surrendered. Diaz, *supra* note 65, at 7.

120. *See generally* IACHR 2007 Report, *supra* note 116.

121. *See id.* para. 13.

122. *Id.* para. 12.

123. Ex-combatants have referred to the process as a "sham" and a "mockery," which merely "transform[ed] the illegal into the legal." Diaz, *supra* note 65, at 11. *See also* UNHCHR 2007 Report, *supra* note 97, para. 29.

124. *See generally* Int'l Crisis Group, *Colombia's New Armed Groups*, Latin America Report No. 20, May 10, 2007 [hereinafter ICG, *New Armed Groups*], *available at* <http://www.crisisgroup.org/home/index.cfm?id=4824>. *See also* ICG, *Presidential Politics*, *supra* note 74, at 17; Amnesty Int'l, *Colombia: Open Letter to Presidential Candidates*, AI

has continued to recruit fighters, purchase weapons, and regroup its forces.<sup>125</sup> Human rights organizations have attributed more than 2,750 killings and “disappearances” to paramilitaries since the declared ceasefire in December 2002.<sup>126</sup> What is more, a new generation of paramilitaries is emerging based on the drug trade and with links to demobilized paramilitaries.<sup>127</sup> The structures of these new groups are “less visible and more fragmented, [making them] more difficult to combat.”<sup>128</sup> The United Nations Human Rights Council reported that these groups engage in murder, “social cleansing,” death threats and recruitment of child soldiers.<sup>129</sup>

## 2. Justice and Peace Law

The Ralito Accord only gave amnesty benefits to those paramilitaries who did not have any pending prosecutions or convictions.<sup>130</sup> By failing to

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Index AMR 23/013/2006 (Apr. 27, 2006), available at <http://www.amnesty.org/en/library/info/AMR23/013/2006>.

125. See generally ICG, *New Armed Groups*, *supra* note 124. See also ICG, *Presidential Politics*, *supra* note 74, at 17.

126. Amnesty Int’l, *supra* note 124. After his 2006 re-election, Uribe launched the Democratic Security Consolidation Policy (DSCP) to address new security concerns by increasing military and police presence in regions once dominated by the AUC. ICG, *New Armed Groups*, *supra* note 124, at 1. The DSCP identifies the country’s security challenges as essentially criminal, focusing on threats posed by terrorism, drug trafficking, and criminal gangs. Individuals “demobilized” from criminal gangs will be subject to the ordinary penal code, are not eligible for judicial benefits, and, when applicable, may be extradited upon any relapse into drug trafficking, terrorism, or other criminal activities. *Id.* at 20.

127. United Nations Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, paras 41-42, U.N. Doc. A/HRC/7/39 (Feb. 29, 2008) [hereinafter UNHCHR 2008 Report], available at <http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.htm>. ICG *New Armed Groups*, *supra* note 124, at 1. See Organization of American States, *Eighth Quarterly Report MAPP/OAS*, at 6, Doc. OAS/Secr. Gen. CP/doc. 4176/07, (Feb. 14, 2007), which “identifies 22 new structures composed of approximately 3,000 members.”

128. UNHCHR 2007 Report, *supra* note 97, para. 86.

129. UNHCHR 2008 Report, *supra* note 127, para. 42.

130. According to CIDH:

In regulating the provisions of Laws 418 of 1997, 548 of 1999 and 782 of 2002, Decree 128 of 2003 makes it an express condition of the legal benefits that the demobilized person is not under prosecution and has not been convicted for crimes that ‘according to the Constitution, the law, or international treaties signed and ratified by Colombia are ineligible for this class of benefits.’ It should be noted that persons tried or convicted for crimes other than bearing arms against the state cannot benefit from pardon, conditional suspension of sentence, cessation of

provide a legal framework for the paramilitary leaders who already faced criminal proceedings, the Ralito Accord left a serious question unanswered: how to approach prosecutions for those not qualified for amnesty under the demobilization agreement.<sup>131</sup> Together, the government and the AUC applied the rhetoric of “transitional justice” by negotiating and passing the Justice and Peace Law.<sup>132</sup> The law, a pseudo-amnesty, is targeted at the paramilitaries’ high command, and involves minimal sentences and a host of benefits for cooperation.

The Ralito Accord limited amnesties to the political crimes of rebellion and sedition for “rank and file” combatants.<sup>133</sup> This legal framework did not preclude prosecutions of higher-ranking members of the AUC for crimes against humanity and other serious human rights violations.<sup>134</sup> The Colombian government and the AUC negotiated whether combatants would be prosecuted for crimes not covered by the amnesty.<sup>135</sup> The AUC advocated a broad, if not total, amnesty for their crimes, arguing that prosecutions would undermine the fragile peace.<sup>136</sup> On the other end of the spectrum, victims and members of the international community advocated strict application of justice, including individual prosecutions, full disclosure of crimes committed, and reparations for victims.<sup>137</sup> After months of debate, the resulting Justice and Peace Law (“JPL”)

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proceedings, preclusion from investigation or waiver of prosecution, through individual demobilization.

IACHR 2007 Report, *supra* note 116, para. 39.

131. See Diaz, *supra* note 65, at 7. Decree 128 regulates Law 418 of 1997, as extended by Law 782 of 2002 to include paramilitaries. See IACHR 2007 Report, *supra* note 116, para. 38.

132. See *infra* Part III.B.3. The application of transitional justice rhetoric related to the JPL is controversial in Colombia. Diaz notes that:

There is a widespread consensus among academics, governmental officials, and grassroots actors that the country is experimenting with transitional justice while—in the interim—the internal armed conflict continues . . . [T]he Colombian experience exemplifies how contemporary transitional justice could be progressively abandoning goals of real political transformation, and rather serves as one instrument, or tool, of ‘conflict resolution.’

Diaz, *supra* note 65, at 12.

133. See IACHR 2007 Report, *supra* note 116, paras. 38-39.

134. Diaz, *supra* note 65, at 13.

135. See Int’l Crisis Group, *Colombia: Towards Peace and Justice?* Latin America Report No. 16, Mar. 14, 2006, at 2 [hereinafter ICG, *Towards Peace and Justice*], available at <http://www.crisisgroup.org/home/index.cfm?id=4020>.

136. In early 2005, the AUC claimed they would rather “stay on the hills facing war and death” than have the peace negotiations reduced to a “humiliating process of subjection to justice.” Arvelo, *supra* note 110, at 430.

137. *Id.* at 432-36; ICG, *Correcting Course*, *supra* note 103, at 4 & n.22. See also LISA HAUGAARD, LATIN AM. WORKING GROUP EDUC. FUND, THE OTHER HALF OF THE TRUTH: SEARCHING FOR TRUTH, JUSTICE AND REPARATIONS FOR COLOMBIA’S VICTIMS OF PARAMILITARY VIOLENCE 24 (2008).

represented a compromise that purportedly strikes a balance between justice and peace. In reality, the law prioritizes peace over justice, permitting flexible and alternative forms of punishment.<sup>138</sup>

The JPL can best be understood as a pseudo-amnesty. The law provides significantly reduced sentences to combatants who surrender, disarm, turn over stolen assets,<sup>139</sup> and admit to the crimes that they have committed.<sup>140</sup> Specifically, combatants receive 5-8 year sentences,<sup>141</sup> to be carried out in farm-like, low security prisons<sup>142</sup> and reduced by up to 18 months for the time the combatant spent waiting to be demobilized in the *zona de concentración*.<sup>143</sup> Under the original terms of the law, later changed by a Constitutional Court ruling, those who initially failed to confess accurately or completely could still benefit from the

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138. Arvelo, *supra* note 110, at 432-36.

139. Ley 975 de 2005, Ley de Justicia y Paz [Law 975 of 2005, Law of Justice and Peace], Diario Oficial [D.O.] 45.980 art. 11 (July 25, 2005) (Colom.).

140. Ley 975 de 2005, art. 17 (full and truthful confessions).

141. Ley 975 de 2005, art. 29.

142. The Colombian government determines the prison in which sentences, including those of paramilitary leaders, are carried out. Ley 975 de 2005, art. 30(2). The Constitutional Court struck down this provision, holding that the sentences would have to be carried out in prisons that are consistent with penitentiary norms. Sentencia [S.] No. C-370/06, 18 May 2006, Diario Oficial [D.O.] [Constitutional Court] p. 342 para. 6.2.3.3.4.9 (Colom.), available at <http://www.acnur.org/biblioteca/pdf/4276.pdf>. However, Decree 3391 of 2006 reinstates this provision, allowing the national government to select the establishment where paramilitaries will carry out their sentences. Decreto 3391 de 2006 [Decree 3391 of 2006] art. 13 (Sept. 29, 2006) (Colom.). This includes “agricultural colonies” or “casas cárceles,” residential establishments used for a form of protective custody similar to American halfway houses. Ley 65 de 1993, Por la cual se expide el Código Penitenciario y Carcelario [Law 65 of 1993, Issuing the Penitentiary and Prison Code] Diario Oficial [D.O.] 40999, arts. 20-29 (Aug. 20, 1993) (Colom.), available at <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=9210>. Indeed, President Uribe explicitly stated the government would consider agricultural colonies for the paramilitary leaders’ prison time. Presidente Álvaro Uribe, Palabras del Presidente Uribe al conmemorar segundo año de la Ley de Justicia y Paz [Remarks by President Uribe Commemorating the Second Anniversary of the Justice and Peace Law] (July 25, 2007) (transcription available at [http://www.presidencia.gov.co/prensa\\_new/sne/2007/julio/25/09252007.htm](http://www.presidencia.gov.co/prensa_new/sne/2007/julio/25/09252007.htm)). See also BREAKING THE GRIP, *supra* note 90, at 28.

143. Ley 975 de 2005, art. 31. The Colombian Constitutional Court declared that the sentence reduction was unconstitutional. Sentencia [S.] No. C-370/06, 18 May 2006, Diario Oficial [D.O.] [Constitutional Court] p. 342 para. 6.2.3.3.4.6 (Colom.), available at <http://www.acnur.org/biblioteca/pdf/4276.pdf>. However, Decree 3391 reinstated this portion of the JPL. Decree 3391 of 2006, art. 20. This decree also allows time voluntarily spent in government establishments before sentencing to count towards sentencing reduction. Decree 3391 of 2006, art. 11. Given the amount of time it is taking to implement and carry out the JPL, this could mean paramilitary leaders serve extremely low, or no, time in prison.

law if they later admitted to the charges and their omissions were unintentional.<sup>144</sup> If the omissions were intentional, however, crimes would be prosecuted to the full extent of Colombian law.<sup>145</sup>

Voluntary depositions are taken in two sessions. First, the demobilized combatant presents his version of the facts, including the date, place, motive, other perpetrators or participants, the victims, and any other information that will corroborate the truth of his statement.<sup>146</sup> In the second session, the prosecutor interrogates the candidate to elicit more information on each fact given.<sup>147</sup> At this stage, victims or their representatives and the public attorney may request clarification or verification of facts, present evidence, and report anything relevant to the conduct in question.<sup>148</sup> After making a statement, the demobilized combatant is brought before a judge to ensure that he is formally charged within 36 hours.<sup>149</sup>

Procedure under the JPL differs from normal criminal proceedings in Colombia. Differences include the role and posture of the prosecutor, the nature of the initial statement, procedural timing, and the type of procedure.<sup>150</sup> Since the demobilized person applies for the benefits of the JPL voluntarily, it is presumed that he has committed punishable acts.<sup>151</sup> In the voluntary deposition and confession hearing, the demobilized individual presents his version of the facts.<sup>152</sup>

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144. Ley 975 de 2005, arts 17, 25. The Constitutional Court changed the initial consequences for failing to admit crimes, holding that the paramilitary would have to be tried under ordinary criminal law for any crimes not admitted to, and further holding that sentencing benefits under the JPL could be revoked in these cases. Sentencia No. C-370/06 pp. 311-12 paras. 6.2.2.1.7.27 to 6.2.2.1.7.28.

145. Ley 975 de 2005, art. 25.

146. Ley 975 de 2005, art. 17; IACHR 2007 Report, *supra* note 116, para. 64.

147. *See* IACHR 2007 Report, *supra* note 116, para. 64.

148. *Id.*

149. Ley 975 de 2005, art. 17. This time frame has been controversial and was the subject of the Constitutional Court's holding on the JPL. The Court held that the prosecutors must adhere to standard Colombian criminal procedures and that the state has an obligation to thoroughly investigate the paramilitaries' crimes. Sentencia No. C-370/2006 p. 327 para. 6.2.3.1.6.4.

150. IACHR 2007 Report, *supra* note 116, para. 63. In criminal proceedings, Article 324 of the Code of Criminal Procedure governs the initial hearing of statements by the suspect, which may be given before the investigation is formally initiated. The suspect may give his statement voluntarily, or upon summons by the prosecutor. The suspect gives his version of the facts during this hearing, which occurs before he has been charged. The prosecutor may pose questions, especially where a possible confession is involved, but does not necessarily take an active role. Instead, the initiative lies with the suspect. In many cases these proceedings give rise to a formal process, or to a resolution releasing the suspect from prosecution, which closes the investigation temporarily. *Id.* para. 61.

151. *Id.* para. 62.

152. *Id.*

The prosecutor's role is to interrogate the candidate about these facts, in order to establish the truth about what happened.<sup>153</sup>

The JPL also includes provisions addressing victims' rights, which on their face seem to provide adequate participation, procedures, reparations, and access to truth. The law guarantees the victims' right to truth and access to information about the criminal investigation.<sup>154</sup> Victims, either directly or through an attorney,<sup>155</sup> may access criminal files and witness the accused's statements.<sup>156</sup> In practice, however, victims have limited access to these procedures, as the costs and effort required to attend the sessions are often prohibitive.<sup>157</sup>

Victims do not have standing to question the accused directly. Under the JPL, the victims provide their questions to the prosecutor, who has discretion to use only those questions he or she deems relevant.<sup>158</sup> The victim has no

153. *Id.*

154. Ley 975 de 2005, Ley de Justicia y Paz [Law 975 of 2005, Law of Justice and Peace], Diario Oficial [D.O.] 45.980 arts. 7 (right to truth), 36 (participation of social organizations for the assistance of victims), 37 (rights of the victims), (July 25, 2005) (Colom.).

155. IACHR 2007 Report, *supra* note 116, para. 81. If a victim does not have legal representation, upon request and demonstration of need, the Prosecutor General can request that the Ombudsman's Office appoint a public defender to represent him. According to state reports, the Ombudsman's Office has provided legal advice to 9,765 victims of violence, and legal representation to 2,307 victims in JPL proceedings. *Id.* para. 85.

156. *See id.* para. 81.

157. *Id.* The JPL created a National Commission on Reparation and Reconciliation to oversee and enforce victims' rights during demobilization. The illegally acquired assets of participating paramilitaries finance the national reparations fund. The Reparation of Victims and Regional Commissions for Restitution of Property. Under Decree 4760 of 2005, illegally-obtained assets can be classified as reparation under the JPL if they are of economic benefit to the local community and demobilized paramilitaries. *See* Amnesty Int'l, *Colombia: Open Letter to Presidential Candidates*, at 6, AI Index AMR 23/013/2006, Apr. 27, 2006, available at <http://www.amnesty.org/en/library/info/AMR23/013/2006>. However, in spite of these attempts to guarantee reparations, in practice, access problems and difficulties in providing evidence, as well as the strict criteria for criminal liability, present significant obstacles. Since the JPL established the criminal justice system as the only mechanism by which victims can claim economic reparations, these barriers could effectively prevent victims from receiving any compensation for their injuries. Moreover, serious inequalities in accessing reparations could arise, with victims who are members of the most vulnerable groups of Colombian society least likely to have the resources necessary to effectively claim reparations. Such inequalities would undermine the credibility and effectiveness of the process as a mechanism for reconciliation and for restoring peace in areas affected by the conflict. IACHR 2007 Report, *supra* note 116, para. 95. Finally, the victims' provisions in the JPL may be contrary to decisions of the Inter-American Court of Human Rights, which has held that the duty to provide reparations lies with the state, and cannot rest only on the initiative and private ability of victims to assert their rights. *Id.* para. 97.

158. IACHR 2007 Report, *supra* note 116, para. 82.

opportunity to pose additional questions, clarify facts, or cross-examine the applicant.<sup>159</sup> The Inter-American Commission notes that these procedures “severely restrict[] the possibility of the victim to use questioning as a suitable means of obtaining the truth of the facts.”<sup>160</sup> Moreover, restricting the victim’s access handicaps the prosecutor, who thereby loses a valuable resource for evaluating the truthfulness of the voluntary statements.<sup>161</sup>

In reality, the JPL has limited reach. It has been subject to much national and international criticism.<sup>162</sup> It has also experienced various controversial changes following an abstract review by the Colombian Constitutional Court.<sup>163</sup> Furthermore, the initial attempts at implementation reveal that it suffers from severe logistical and procedural problems.<sup>164</sup> A thorough analysis of the JPL’s shortcomings will be discussed below in Section IV.

### 3. Applying the Rhetoric of Transitional Justice

Colombia claims that the aptly named Justice and Peace Law signals its effort to effectuate transitional justice in order to stop the fighting and bring peace to the region.<sup>165</sup> As President Álvaro Uribe noted, “[t]he world is full of peace

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159. *Id.*

160. *Id.*

161. *Id.*

162. BREAKING THE GRIP, *supra* note 90, at 24; HAUGAARD, *supra* note 137, at 5. Colombian civil rights organizations have filed constitutional challenges to the JPL. *See e.g.* Gustavo Gallón, Director, Colombian Commission of Jurists, *et al.*, Demanda Contra la Ley 975 de 2005, available at <http://www.coljuristas.org/justicia/Demanda%20contra%20la%20ley%20975%20de%2005.pdf> (last visited Feb. 18, 2009).

163. *See* Sentencia [S.] No. C-370/06, 18 May 2006, Diario Oficial [D.O.] [Constitutional Court] p. 342 para. 6.2.3.3.4.6 (Colom.), available at <http://www.acnur.org/biblioteca/pdf/4276.pdf>.

164. Inter-Am. C.H.R., *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*, OEA/Ser.L/V/II, doc. 3 para. 49 (Oct. 2, 2007), available at <http://www.cidh.oas.org/pdf%20files/III%20Informe%20proceso%20desmovilizacion%20Colombia%20rev%2017%20ENG.pdf>.

165. ICG, *Presidential Politics*, *supra* note 74, at 22. The wave of transitional justice in Latin America began in the mid 1980s, marked by transitions from military dictatorships in the Southern Cone and extending to Central America in the 1990s. POLITICS OF MEMORY, *supra* note 5, at 4. Only Argentina and Bolivia carried out national trials of any real significance, *id.*, although charges were eventually brought against Chilean dictator Augusto Pinochet for 23 counts of torture, 34 counts of kidnapping, and one count of homicide. The Chilean Supreme Court had ordered that an initial set of charges be dropped because he was found mentally unfit to stand trial; court-appointed psychiatrists later found him capable and new charges were brought. *Chile: Pinochet Held on Torture Charges*,



laws. . . . [Ours] is a law of peace and at the same time of justice, [a] law that seeks reconciliation, but at the same time [seeks] to apply justice and reparation for victims.”<sup>166</sup> Last year, President Uribe went so far as to say that “[t]his is the

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HUMAN RIGHTS WATCH, Oct. 30, 2006, <http://www.hrw.org/en/news/2006/10/30/chile-pinochet-held-torture-charges>. Although Pinochet died before standing trial, his arrest in London in 1998 and the charges brought against him have been credited by Human Rights Watch as spurring a wave of accountability worldwide, and especially in Latin America. Reed Brody, *Pinochet’s European Vacation*, HUMAN RIGHTS WATCH, Oct. 22, 2008, <http://www.hrw.org/en/news/2008/10/22/pinochets-european-vacation>. Historically, however, impunity reigned as amnesty laws and pardons excluded or limited the extent of prosecutions, leaving human rights abusers to go free. POLITICS OF MEMORY, *supra* note 5, at 4. See also *At-a-Glance: The Pinochet Cases*, BBC NEWS, Dec. 10, 2006, <http://news.bbc.co.uk/2/hi/americas/4651478.stm>. However, blanket amnesties are now considered by many to be violations of many international legal norms and transitional justice has moved towards a focus on accountability through punishment. See Katie Kerr, *Making Peace with Criminals: An Economic Approach to Assessing Punishment Options in the Colombian Peace Process*, 37 U. MIAMI INTER-AM. L. REV. 53, 74 (2005). Taking a long-term view of transitional justice, one will find an emerging trend in the region of repealing and declaring amnesties unconstitutional, and pursuing criminal trials years after establishing peaceful democracies. Furthermore, international legal scholars and organizations are adopting the view that states are obligated to prosecute human rights violations and crimes against humanity. Kerr, *supra*, at 74. In fact, the Inter-American Court of Human Rights has pushed for accountability and has explicitly stated that amnesties

designed to eliminate responsibility are inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

Barrios Altos v. Peru, 2002 Inter-Am. Ct. H.R. (ser. C) No. 75 para. 41 (Mar. 14, 2001), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_75\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf). The case was discussing the legality of an amnesty law passed by Peru that allowed for complete impunity for members of the military, police and civilians for human rights abuses occurring between 1980 and 1995. The Inter-American Commission on Human Rights has also held Colombia explicitly responsible for human rights abuses and has called on the state to ensure accountability and reparations for victims of human rights abuses. Riofrío Massacre Colombia, Case 11.654, Inter-Am. C.H.R., Report No. 62/01 paras. 54-58 (Apr. 6, 2001), available at <http://www.cidh.org/annualrep/2000eng/chapteriii/merits/colombia11.654.htm> (last visited December 19, 2006).

166. Presidente Álvaro Uribe, El mundo está lleno de Leyes de Paz [“The World is Full of Laws of Peace”] Bogotá (Jun. 24, 2005) (translation provided by the author) (excerpt in original Spanish: “El mundo está lleno de leyes de paz. Es una ley de paz y al mismo tiempo de justicia. Una ley que busca reconciliación, pero aplicar justicia al mismo tiempo y al mismo tiempo la reparación de las víctimas.”) available at [http://www.presidencia.gov.co/prensa\\_new/sne/2005/junio/24/01242005.htm](http://www.presidencia.gov.co/prensa_new/sne/2005/junio/24/01242005.htm).

first peace process in the world that really demands the truth. In South Africa there were very few cases of truth, in spite of the publicity of truth. This is the first peace process in the world that demands reparation for the victims using the wealth of the victimizers.”<sup>167</sup> Thus, the Colombian government applies the rhetoric of transitional justice to its most recent efforts at bringing peace to the region, using terms and phrases such as “truth”, “justice,” “reconciliation,” and “reparations,” while drawing strong comparisons between the JPL and past instances of transitional justice.

However, the JPL in effect does little to promote justice, truth, reparations, or reconciliation for victims in Colombia; instead, it serves as a quasi-amnesty for the worst perpetrators of crimes against humanity and human rights abuses. Indeed, many aspects of the JPL directly controvert President Uribe’s proclamations of “justice,” “truth” and “peace.”<sup>168</sup>

Worse still, the JPL is not a comprehensive plan involving all of the armed factions.<sup>169</sup> Given the close ties between the government and paramilitaries,<sup>170</sup> it comes as no surprise that in Colombia, the Uribe administration has focused mainly on demobilizing the paramilitary groups. While the government’s concern about paramilitary abuses is well-founded, the complexity of the situation and political impact of other actors in the conflict should not be overlooked. The current fighting is reminiscent of the regional violence Colombia experienced in its past and reflects the ongoing struggle between left and right political ideologies.<sup>171</sup> In light of Colombia’s historical

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167. Presidente Álvaro Uribe, Declaración del Presidente con respecto al caso del ex Director del DAS, Jorge Noguera [Declaration of the President with Respect to the Case of ex-Director of DAS, Jorge Noguera] (Feb. 22, 2007) (translation provided by the author) (excerpt in original Spanish: “[E]ste es el primer proceso de paz en el mundo que exige verdad de verdad. En Sudáfrica hubo muy pocos casos de verdad, a pesar de la publicidad de la verdad. Este es el primer proceso de paz en el mundo que exige reparación a las víctimas con el patrimonio de los victimarios.”), *available at* [http://www.presidencia.gov.co/prensa\\_new/sne/2007/febrero/22/23222007.htm](http://www.presidencia.gov.co/prensa_new/sne/2007/febrero/22/23222007.htm). Despite these lofty promises, victims groups and scholars in Colombia argue that the JPL only provides half of the truth. *See generally* HAUGAARD, *supra* note 137.

168. *See supra* note 166 and surrounding text.

169. Diaz, *supra* note 65, at 7.

170. *See supra* Part III.A.1.

171. PROGRAMA DE LAS NACIONES UNIDAS PARA EL DESARROLLO [U.N. DEVELOPMENT PROGRAMME], EL CONFLICTO, CALLEJÓN CON SALIDA: INFORME NACIONAL DE DESARROLLO HUMANO PARA COLOMBIA – 2003 38-39 (Panamericana Formas e Impresos 2003), *available at* [http://hdr.undp.org/en/reports/nationalreports/latinamericathecaribbean/colombia/colombia\\_2003\\_sp.pdf](http://hdr.undp.org/en/reports/nationalreports/latinamericathecaribbean/colombia/colombia_2003_sp.pdf). For a discussion of the ongoing left/right political animosity, especially concerning the opposition of the government to a march against the AUC a month after a massive, government supported march against the FARC in 2008, see HAUGAARD, *supra* note 137, at 23.

politics and the consistent relationship between the AUC and state military,<sup>172</sup> the fact that the Uribe administration is targeting the right with amnesty reflects the political nature, narrowness, and lack of neutrality inherent in Colombia's transitional justice mechanisms.<sup>173</sup> Furthermore, the omnipresent political influence these factions have on the local populations and the fact that this power is obtained by intimidation and slander campaigns<sup>174</sup> make it hard to discern what the people of Colombia actually want and whether transparent governance would be possible.<sup>175</sup>

In light of the changes in international criminal law and the increase in prosecutions under the Rome Statute, Colombia is operating in a more

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172. *See supra* Part III.A.1.

173. In sharp contrast to his conciliatory policies towards the AUC, Uribe has initiated a strong military policy to fight against the FARC. Uribe was elected in 2002 with a mandate to implement a military strategy to address the conflict. Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49, 61 (2006). To fulfill this goal, Uribe launched the Democratic Security Policy (DSP) (*La Seguridad Democrática*), an approach centered on strengthening the military forces and promoting collaboration among civilians in order to recover territorial control of Colombia. KOTH, *supra* note 76, at 18-19; Diaz, *supra* note 65, at 6. In conjunction with the DSP, Uribe launched a major military operation against the FARC, called "Plan Patriota." Initially, Plan Patriota successfully repelled insurgent groups from urban areas and dismantled kidnapping and extortion networks. The plan also increased the presence of state security forces in rural areas. Uribe's attempt to increase state presence has met with limited success in the FARC's mountain and jungle strongholds, where the insurgents have resorted to typical guerrilla tactics such as booby traps, landmines, and sniping. Int'l Crisis Group, *Tougher Challenges Ahead for Columbia's Uribe*, Latin American Briefing No. 11, Oct. 20, 2006, at 2, 4, 16, available at <http://www.crisisgroup.org/home/index.cfm?id=4455&l=1>. Official government data suggest that the DSP has contributed to the downward trend in the general indicators of violence, particularly murders and abductions rates. However, the number of human rights violations attributed to members of the security forces has increased. UNHCHR has suggested that this increase may be due to the pressure to demonstrate that the policy is having positive results, which creates incentives for officials to commit criminal acts. UNHCHR 2007 Report, *supra* note 97, para. 40.

174. ICG, *Presidential Politics*, *supra* note 74, at 18. *See generally* HRW, WAR WITHOUT QUARTER, *supra* note 84.

175. *See*, for example, the below discussion of the parapolitics scandal, Part IV.C.1. An example of the lack of transparent governance can be found in the Uribe administration's blockage of recent attempts to reform Colombian Congress. After 33 Congressmen had been jailed and 20 percent of Congress was placed under investigation for paramilitary collusion, a bill was proposed which was designed to sanction political parties whose members were arrested pursuant to these investigations. The idea was to prevent these parties from filling their seat with another paramilitary-influenced Congressman. The bill failed after strong opposition from the Uribe administration. Nearly all of the 20 percent of Congress under investigation belong to his coalition. BREAKING THE GRIP, *supra* note 90, at 122-24.

sophisticated political environment than other states that have implemented transitional justice in the past. As such, it is in a prime position to take advantage of any ambiguities in its obligations under the Rome Statute. Other state parties to the Rome Statute, unsure of how the future of international criminal law will evolve and how the principle of complementarity will be applied in real world situations, are very likely to mimic the actions of Colombia by instituting their own sham prosecutions in the name of peace or transitional justice.<sup>176</sup> Thus, it is critical that the ICC apply a rigorous standard for evaluating the ability and willingness of states to prosecute.

In addition, it is important to examine Colombia's additional motivations for passing transitional justice legislation and use them to evaluate the likely success of Colombia's efforts. The next Section argues that in spite of the careful crafting of the JPL and the use of transitional justice rhetoric in its creation and application, which makes the JPL seemingly adhere to the standards of the Rome Statute, the JPL is a bad faith attempt by the Colombian government to preclude prosecution of its worst human rights abusers. Analyzing the JPL under the rubric established by Article 17 of the Rome Statute illustrates the current problem facing the ICC: how to uphold its mandate and require state parties to do the same. Such an analysis also speaks to transitional justice scholar Ruti Teitel's observation that:

[R]adically transformed circumstances for international criminal justice, both in scope and reach, beg the question of what is to be the relation of international to domestic law in the area of criminal justice. The transformed international system demands a guiding principle apt to address the ongoing relationship of the multiple legal regimes.<sup>177</sup>

This Article argues that the guiding principle has already been laid out by the international legal community in Article 17 of the Rome Statute, and that the Colombian situation is testing its application. Section IV analyzes how Colombia's actions violate the terms of the existing guiding principle for complementarity established by the international community.

#### **IV. IMPUNITY REIGNS: IS COLOMBIA GENUINELY WILLING AND ABLE TO PROSECUTE?**

Above, this Article discussed the principle of complementarity and Colombia's duties under the Rome Statute. It then discussed the origins of the conflict in Colombia and the relationship between the various armed groups,

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176. *See infra* Part V.A.

177. Teitel, *supra* note 2, at 852.

before moving on to an analysis of Colombia's transitional justice rhetoric and the consequent Justice and Peace Law. Under the rubric of Article 17's "unwilling" and "unable" clause, this Section discusses the shortcomings of the Colombian criminal law system and the ways in which corrupt political considerations have influenced the Colombian government in developing the JPL. Here it is argued that Colombia's political considerations reverberate beyond the domestic context and are aimed at continuing a policy of impunity and forestalling an ICC intervention in Colombia. An analysis of Colombia's ratification of the Rome Statute, the inadequacy of its criminal justice system, and its unwillingness to prosecute, demonstrates that Colombia is not meeting its obligations under the Rome Statute. This gives the Prosecutor adequate justification to initiate an investigation into human rights violations in Colombia. Section V concludes by arguing that ICC involvement in Colombia is not only important for victims, but also for the development of a new system of international law.

#### **A. Colombia's Ratification and "Interpretations" of the Rome Statute**

The Rome Statute explicitly prohibits signatory reservations, giving it compulsory jurisdiction over cases unless states conduct their own adequate prosecutions.<sup>178</sup> However, some states, including Colombia, have used "interpretive declarations" to temper their ratifications.<sup>179</sup> Colombia's ratification

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178. Rome Statute, *supra* note 7, art. 120.

179. Malta also made a declaration regarding pardons. Rome Statute of the International Criminal Court, Ratification (with Declarations), Malta, Nov. 29, 2002, 2199 U.N.T.S. 266. France made an Article 124 declaration. Rome Statute of the International Criminal Court, Declarations and Reservations Made upon Ratification, Accession (a) or Acceptance, Fr., pt. III, July 17, 1998, 2187 U.N.T.S. 614. France withdrew this declaration in 2008. Rome Statute of the International Criminal Court, Rome, 17 July 1998, France: Withdrawal of Declaration, C.N.592.2008.TREATIES-5, Aug. 13, 2008, available at <http://treaties.un.org/doc/Publication/CN/2008/CN.592.2008-Eng.pdf>. This leaves Colombia as the only state with such an interpretive declaration. The United Kingdom and Australia also made interpretive declarations. Rome Statute of the International Criminal Court, Declarations and Reservations Made upon Ratification, Accession (a) or Acceptance, U.K., July 17, 1998, 2187 U.N.T.S. 633; Rome Statute of the International Criminal Court, Ratification (with Declarations), Austl., July 1, 2002, 2189 U.N.T.S. 505. The Rome Statute specifically prohibits reservations. Rome Statute, *supra* note 7, art. 120. Colombia instead passed several "interpretive declarations," which according to some, are *de facto* reservations. For a detailed discussion of the issue of interpretive declarations and the Rome Statute, see Amnesty Int'l, *International Criminal Court: Declarations Amounting to Prohibited Reservations to the Rome Statute*, AI Index IOR 40/032/2005, Nov. 24, 2005, available at: <http://archive.amnesty.org/library/Index/ENGIOR400322005?open&of=ENG-2S5>. See also the decision of the European Court of Human Rights in *Belilos v. Switzerland*, where the court determined that in order to evaluate whether an interpretive declaration may

included six interpretive declarations, including one that explicitly refers to amnesties:

None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.<sup>180</sup>

Colombian law considers membership in an illegal armed group a political crime,<sup>181</sup> and therefore this interpretive declaration allows for the JPL amnesty and other pardons for paramilitary membership. However, the crimes covered by the Rome Statute are distinctly *not* political crimes.<sup>182</sup> Whereas any amnesty or pardon granted to the majority of demobilized paramilitaries would be protected from ICC jurisdiction under the Demobilization Law 782, the crimes most likely to be charged against the leaders of these groups for the atrocities they committed would not.<sup>183</sup>

Colombia also included interpretive declarations denying jurisdiction over war crimes<sup>184</sup> committed “by Colombian nationals or on Colombian territory” for seven years following the entry into force of the Rome Statute.<sup>185</sup>

actually be an invalid reservation, “one must look behind the title given to it and seek to determine the substantive content.” 132 Eur. Ct. H.R. (Ser. A), 86, 87 (1988).

180. Rome Statute of the International Criminal Court, Ratification (with Declarations), Colom., para. 1, Aug. 5, 2002, 2194 U.N.T.S. 523 [hereinafter Rome Statute, Declaration of Colombia].

181. Informe de Conciliación al Proyecto de ley número 211 de 2005 Senado, 293 de 2005 Cámara [Reconciled Definitive Text of Senate Bill No. 211 of 2005, Chamber of Deputies Bill No. 293 of 2005], arts. 4, 6, 7, and 8, Gaceta del Congreso 390, June 21, 2005 (Colom.), *available* *at* [http://www.fiscalia.gov.co/justiciapaz/Documentos/Gacetitas/Gacetitas\\_390\\_05.htm](http://www.fiscalia.gov.co/justiciapaz/Documentos/Gacetitas/Gacetitas_390_05.htm).

182. The ICC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. Rome Statute, *supra* note 7, art. 5. *See also id.* arts. 6-8 (defining genocide, crimes against humanity, and war crimes).

183. *Id.* art. 8. *See supra* Part III.A.2 for a discussion of the types of crimes committed by armed actors and the national military that would be under the jurisdiction of the ICC. *See supra* Part III.B.1 for a discussion of Law 782.

184. Specifically, crimes listed in article 8 of the Rome Statute. Rome Statute, Declaration of Colombia, *supra* note 180, para. 5. This raises an interesting paradox, given that the Colombian government has resisted admitting that they are in the midst of an armed conflict, instead characterizing the situation as a “terrorist threat.” ICG, *Presidential Politics*, *supra* note 74, at 22.

185. Colombia ratified the statute on August 5, 2002. This would imply that jurisdiction is limited until August 5, 2009. Rome Statute, Declaration of Colombia, *supra*

Ostensibly, Colombia was looking to give itself an open door to avoid ICC jurisdiction.<sup>186</sup> In 2007, the ICC Chief Prosecutor, Luis Moreno-Ocampo, was invited to Bogotá to deliver a speech and meet with government officials, judges, and prosecutors.<sup>187</sup> During his visit, Moreno-Ocampo stressed the importance of prosecuting the top leaders of the paramilitary and guerilla groups in representative cases,<sup>188</sup> and noted that amnesties and pardons are not allowed for the types of crimes that normally fall within ICC jurisdiction.<sup>189</sup> Shortly after his speech, Uribe announced that he would “open the debate” in Colombian Congress about whether to lift the seven year reservation on ICC jurisdiction.<sup>190</sup> Although this clause could be a barrier to prompt ICC intervention in Colombia for certain crimes, it must be noted that this declaration only pertains to war crimes, and therefore there is no jurisdictional limit for crimes against humanity.<sup>191</sup>

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note 180, para. 5. This interpretation was entered under the auspices of Article 124 of the Rome Statute, which provides that

a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory.

Rome Statute, *supra* note 7, art. 124.

186. This clause has not been challenged by the other parties to the Rome Statute. *See* Amnesty Int’l, *supra* note 179. *See also* Colombia’s ICC Declaration a “Prelude to Impunity,” HUMAN RIGHTS WATCH, Sept. 4, 2002, <http://www.hrw.org/en/news/2002/09/04/colombias-icc-declaration-prelude-impunity>.

Significantly, this declaration was not made public nor discussed in Colombian Congress at the time of Colombia’s ratification of the Rome Statute. The declaration was made two days before Uribe took office as President, reportedly after consultations between him and then-President Pastrana. *Id.*

187. Media Advisory, Int’l Criminal Court, Prosecutor Visits Colombia, ICC-OTP-20071018-254-En (Oct. 18, 2007), *available at* [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/otp%20media%20advisory\\_%20icc%20prosecutor%20visits%20colombia](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/otp%20media%20advisory_%20icc%20prosecutor%20visits%20colombia).

188. *Corte Penal Internacional propone juzgar sólo a cabecillas del paramilitarismo y de la guerrilla* [International Criminal Court Proposes Prosecuting Only Heads of Paramilitaries and Guerrilla Groups], CARACOL RADIO, Oct. 19 2007, <http://caracol.com.co/nota.aspx?id=495826>.

189. *Corte Penal Internacional sigue pista a la parapolítica, asegura su fiscal jefe, Luis Moreno Ocampo* [ICC follows the Para-politics Trail, States Its Chief Prosecutor, Luis Moreno Ocampo], ELTIEMPO.COM, Oct. 22, 2007, [http://www.eltiempo.com/justicia/2007-10-22/ARTICULO-WEB-NOTA\\_INTERIOR-3776563.html](http://www.eltiempo.com/justicia/2007-10-22/ARTICULO-WEB-NOTA_INTERIOR-3776563.html).

190. Presidente Álvaro Uribe, Palabras del Presidente Uribe en el encuentro de la Jurisdicción Ordinaria [Excerpts of President Uribe’s Speech at the Meeting on Ordinary Jurisdiction] (Oct. 17, 2007), *available at* <http://web.presidencia.gov.co/sp/2007/octubre/18/15182007.html>.

191. *See* Rome Statute, Declaration of Colombia, *supra* note 180, para. 5.

Also of importance for this discussion, Colombia included an interpretation regarding Article 17(3) of the Rome Statute, which concerns the “ability” of states to prosecute.<sup>192</sup> The interpretation states that “the use of the word ‘otherwise’ with respect to the determination of the State’s ability to investigate or prosecute a case refers to the obvious absence of objective conditions necessary to conduct the trial.”<sup>193</sup> This suggests that Colombia foresaw the possibility that their JPL legislation and its questionable implementation may be considered insufficient under the Rome Statute’s “inability” standards. In addition to the interpretations regarding jurisdiction, this declaration demonstrates that Colombia sought to preclude, or severely limit, ICC intervention from the outset of its ratification.

Although it is unclear exactly what legal force these interpretations have, they are the first hurdle the ICC would have to face in beginning an investigation in Colombia. Because they deal with basic issues such as jurisdiction, the Office of the Prosecutor would have to assess how the interpretive declarations affect Colombia’s duties under the Rome Statute.<sup>194</sup> Next, the Prosecutor would have to establish jurisdiction and admissibility, and evaluate Colombia’s behavior under Article 17.<sup>195</sup> Below, this Section demonstrates that a Colombian case would be admissible before the ICC because Colombia is unable and unwilling to prosecute those responsible for crimes against humanity and war crimes. First, it provides a discussion of the shortcomings of the Colombian criminal justice system and the JPL, and then analyzes how the passage of the JPL and the surrounding political circumstances show that Colombia is not genuinely willing to prosecute. This Section concludes that Colombia is violating its duties under the Rome Statute, and that Article 17 issues of admissibility and complementarity should not bar ICC intervention.

## **B. Ability to Prosecute**

Despite a comprehensive legal framework and administrative agencies tasked with investigating and prosecuting human rights violations in Colombia,

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192. Rome Statute, *supra* note 7, art. 17(3). The Article states

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

*See also supra*, Part II.B.

193. Rome Statute, Declaration of Colombia, *supra* note 180, para. 3.

194. ICC, Informal Expert Paper: Expert Consultation Process on Complementarity in Practice ¶ 25, [www.icc-cpi.int/library/organs/otp/complementarity.pdf](http://www.icc-cpi.int/library/organs/otp/complementarity.pdf) (last visited Nov. 12, 2008).

195. *See supra* Part II.



such violations generally go uninvestigated and unpunished.<sup>196</sup> Prosecutors and courts are overburdened, causing the crimes of human rights violators to go unpunished.<sup>197</sup> In addition to the general failure of the criminal justice system to prosecute human rights violators, the justice and peace process has been plagued by problems since its implementation.<sup>198</sup> Colombia's criminal justice system has neared collapse in the past due to the internal conflict. The result is a criminal justice system that lacks power, loyalty, and the manpower to adequately find, investigate, and prosecute the worst human rights abusers.

This Section provides specific examples of the failures of the Colombian criminal justice system, as well as problems that have arisen in the initial stages of the JPL's implementation. This Section not only reveals that the system is generally not equipped to end impunity for those most responsible for crimes against humanity, but also that the specific mechanism designed to prosecute them may be destined for failure. These examples demonstrate that there is an "obvious

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196. The Constitution is the primary legal document in Colombia. See Antonio Ramirez, *An Introduction to Colombian Governmental Institutions and Primary Legal Sources*, N.Y.U. GLOBALLEX (May 2007) <http://www.nyulawglobal.org/globalex/colombia.htm>. The 1991 Constitution gives full recognition to basic principles such as national sovereignty, separation of political powers, and a representative government. Notably, the Constitution also provides for the preeminence of human rights in Colombia and establishes the state as primarily and ultimately responsible for the protection of human rights. See Ramirez, *supra* note 196; Inter-Am. C.H.R., *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102 doc. 9 rev. 1 ch. II, para. 41 (Feb. 26 1999) [hereinafter CIDH 1999 Report], available at <http://www.cidh.oas.org/countryrep/Colom99en/table%20of%20contents.htm>; CONSTITUCIÓN POLÍTICA DE COLOMBIA, tit. I. The Constitution creates a duty to respect human dignity and prohibits discrimination, and amply recognizes civil and political rights; social, cultural and political rights, such as the right to health; and collective and environmental rights. CONSTITUCIÓN POLÍTICA DE COLOMBIA, arts. 1, 5, 11-82. To complement these Constitutional provisions for the protection of human rights, Colombia has created various institutional entities to prevent and to provide redress for human rights violations, including: disciplinary actions, a human rights ombudsman, a nation-wide human rights program, and Congressional human rights committees. Collectively, these institutions have the authority to investigate, prosecute and sanction human rights violators as well as to take preventative and compensatory measures. CIDH 1999 Report, *supra*, ch. II, para. 40. However, many suffer from lack of resources and funding, and thus are not highly effective. U.S. DEP'T OF STATE REPORT 2006: COLOMBIA: COUNTRY REPORT ON HUMAN RIGHTS PRACTICES § 1(d)-1(e) (2007) [hereinafter U.S. DEP'T OF STATE 2006 REPORT], available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78885.htm> (last visited Apr. 27, 2008).

197. ICG, *New Armed Groups*, *supra* note 124, at 21.

198. See *infra* Part IV.B.1.

absence of objective conditions necessary to conduct the trial,” the test stipulated by Colombia’s interpretive declaration of Article 17(3).<sup>199</sup>

### 1. Specific Examples of the Criminal Justice System’s Failures

A range of administrative deficiencies, dangerous working conditions, and other obstacles to justice plague the Colombian criminal justice system. These problems undermine the independence of the judiciary and have led to systemic impunity and low levels of public trust.<sup>200</sup>

The judiciary is chronically overburdened and notoriously slow.<sup>201</sup> The justice system is under-resourced, understaffed, and lacks cooperation from the security forces and government entities.<sup>202</sup> Implementation of the JPL, combined with the emergence of new illegal groups, has placed additional strain on the criminal justice system.<sup>203</sup>

In addition to administrative burdens, judicial authorities, prosecutors, and witnesses are bribed, intimidated, threatened, and attacked. In 2007, 63 judicial branch employees received death threats.<sup>204</sup> In 2006, eight employees were killed, 31 received death threats, one was kidnapped, one “disappeared,” and five fled the country in fear of their lives.<sup>205</sup> Some judges and prosecutors assigned to small towns worked out of departmental capitals due to a lack of security.<sup>206</sup> Between 1996 and 2001, members of armed groups and other common delinquents murdered 98 officers of the Attorney General’s Office and kidnapped 36 officers.<sup>207</sup> Witnesses were also vulnerable to intimidation, and many refused to testify.<sup>208</sup> Paramilitary infiltration of state institutions has created

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199. Rome Statute, *supra* note 7, art. 17, para. 3. *See also supra* note 193 and surrounding text.

200. U.S. DEP’T OF STATE 2007 REPORT, *supra* note 100, § 1(a); U.S. DEP’T OF STATE 2006 REPORT, *supra* note 196, § 1(a).

201. ICG, *New Armed Groups*, *supra* note 124, at 21.

202. *Id.* at 21. *See generally* U.S. DEP’T OF STATE 2007 REPORT, *supra* note 100.

203. ICG, *New Armed Groups*, *supra* note 124, at 21.

204. U.S. DEP’T OF STATE 2007 REPORT, *supra* note 100, § 1(e).

205. U.S. DEP’T OF STATE 2006 REPORT, *supra* note 196, § 1(e) For example, the prosecutor in charge of investigations leading to the capture of 1,050 FARC members fled the country after receiving death threats from the FARC. *Id.*

206. U.S. DEP’T OF STATE 2007 REPORT, *supra* note 100, § 1(e).

207. U.S. DEP’T OF JUSTICE, WORLD FACTBOOK OF CRIMINAL JUSTICE SYSTEMS, REPUBLIC OF COLOMBIA, June 4, 2003, *available at* <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfcjsco.txt>.

208. U.S. DEP’T OF STATE 2007 REPORT, *supra* note 100, § 1(e). Although the Prosecutor General runs a witness protection program, for those not enrolled, the risk of testifying is high. *Id.*

an atmosphere of pervasive fear in the departments of Nariño, Norte de Santander, and Magdalena.<sup>209</sup>

These problems result in a criminal justice system in which 90 to 98 percent of all crimes go unpunished,<sup>210</sup> and only one out of every 100 crimes reaches trial.<sup>211</sup> Arrest warrants are often not executed<sup>212</sup> and the rate of impunity for crimes involving human rights violations is grave.<sup>213</sup>

The Inter-American Commission has concluded that impunity affects the life and culture of all Colombian citizens, even those not directly affected by violence.<sup>214</sup> In fact, “most international observers agree that this high level of impunity is itself one of the most serious human rights violations occurring in Colombia”<sup>215</sup> as well as “one of the most important factors contributing to the continued violation of human rights and to the general increase in violence.”<sup>216</sup> The widespread impunity in Colombia has led to a lack confidence in the criminal justice system among victims of human rights abuses; a 2000 survey reported skepticism and loss of respect for law and the judiciary.<sup>217</sup> Nearly half of the respondents indicated that they did not trust judges at all, and another 25 percent

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209. ICG, *New Armed Groups*, *supra* note 124, at 21.

210. In June 1996, the Superior Council of the Judiciary reported that 97-98 percent of crimes go unpunished. According to the National Police, the figure is 90 percent. The Commission for the Rationalization of Public Spending and Finances reported in 1996 that the level of impunity in all cases had reached 99.5 percent. CIDH 1999 Report, *supra* note 196, at ch. V, para. 12.

211. According to the 1996 report of the Commission for the Rationalization of Public Spending and Finances. *Id.*

212. *Id.* For example, in January 1998, there were 214,907 outstanding arrest warrants. *Id.*

213. *Id.* para. 14. There are “very few cases in which State agents responsible for human rights violations have received criminal convictions.” *Id.* This impunity permeates civil courts, but is especially prevalent in military tribunals and with regard to military personnel. The U.S. Department of State reported in 2008 that although civilian courts had achieved some progress in cases against military personnel, impunity remained a problem for military personnel who had collaborated with un-demobilized paramilitaries and members of new illegal armed groups. U.S. DEP’T OF STATE 2007 REPORT, *supra* note 100, § 1(a). The Commission similarly noted that the Colombian military system consistently fails to provide effective and impartial judicial remedies for violations of human rights. CIDH 1999 Report, *supra* note 196, at ch. V, para. 17. *See also* Roxanna Altholz, *Human Rights Atrocities Still Go Unpunished in Colombia*, ALTERNET (Jan. 28, 2008), <http://www.alternet.org/rights/75239>.

214. CIDH 1999 Report, *supra* note 196, para. 16.

215. *Id.* The U.N. Special Rapporteur for the Independence of Judges and Lawyers concurred that the lack of appropriate investigations and trials of human rights cases constitutes one of the most serious concerns in the administration of justice in Colombia. *Id.*

216. *Id.*

217. U.S. DEP’T OF JUSTICE, *supra* note 207.

answered that judges were “scarcely reliable.”<sup>218</sup> Forty-five percent of the respondents indicated that they had not reported crimes committed against them to the criminal justice system, for reasons that include:

- general fear or fear of retaliation
- more effective private solution
- inoperative justice
- absence of authority
- authorities involved
- lack of evidence.<sup>219</sup>

Due to such fears and widespread beliefs of corruption, victims often take no action when a crime is committed against them, or resort to vigilante justice.<sup>220</sup> As a result, as many as 74 percent of crimes go unreported in Colombia, contributing to the country’s high levels of impunity.<sup>221</sup>

## 2. Failures of the JPL

In addition to the Colombian justice system being ill-equipped to prosecute war criminals, data also suggests that the implementation of the special process created under the JPL will also be unable to adequately prosecute those falling under the jurisdiction of the ICC. Indeed, recent assessments have found that three years after implementation of the JPL, little progress had been made in either prosecuting human rights violators or providing reparations to victims.<sup>222</sup> Of 3,527 paramilitaries accused of serious crimes, over 1,100 have decided not to

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218. Twenty-eight percent responded that judges were highly reliable. *Id.*

219. *Id.*

220. *Id.*

221. CIDH 1999 Report, *supra* note 196, ch. V, para. 12.

222. ICG, *Correcting Course*, *supra* note 103, at 8-9. *See also*, “*Va mal proceso de Justicia y Paz:*” Armando Benedetti, SEMANA, Apr. 16, 2008, [http://www.semana.com/wf\\_InfoArticulo.aspx?idArt=111037](http://www.semana.com/wf_InfoArticulo.aspx?idArt=111037). The evaluation was conducted by Senator Armando Benedetti, a member of President Uribe’s political party who has been critical of the demobilization process. *See also*, the link to Senator Benedetti’s PowerPoint presentation on this webpage, Presentación de Armando Benedetti sobre Justicia y Paz [Presentation of Armando Benedetti about Justice and Peace] (Apr. 16, 2008), available at <http://www.semana.com/Documentos.aspx?Tag=Justicia%20y%20Paz>, and analysis by Adam Isacson on the CIP Weblog, Plan Colombia and Beyond, <http://www.cipcol.org/> (last visited Apr. 26, 2008). Senator Benedetti is currently being investigated for colluding with paramilitaries. *See La Corte investiga al senador Armando Benedetti por parapolítica* [Court Investigates Senator Armando Benedetti for Involvement in Paragate], CARACOL RADIO, APR. 30, 2008, available at [http://www.caracol.com.co/nota\\_imp.aspx?id=588278](http://www.caracol.com.co/nota_imp.aspx?id=588278).

participate after learning there were no charges pending against them, and only 329 have begun the process of voluntary confessions.<sup>223</sup> None have been convicted,<sup>224</sup> and as of April 2008, only four had completed the “free confession” stage.<sup>225</sup> Participants have confessed to over 2,700 crimes and provided new information on 8,800 crimes previously unknown to investigators.<sup>226</sup> Disturbingly, the authorities have only opened a few investigations into the more than 123,000 crimes reported by victims since November 2006.<sup>227</sup>

This sluggishness is explained in part by a dearth of prosecutorial resources: the Justice and Peace unit of the Prosecutor General’s Office has only twenty-two prosecutors, and the corresponding unit at the Attorney General’s Office, which oversees the prosecutions, has twelve lawyers.<sup>228</sup> The Prosecutor General’s Office created guidelines for prosecutors to follow when taking voluntary depositions under the JPL.<sup>229</sup> However, the Inter-American Commission observed that the prosecutors often fail to take the active role required under the JPL, and instead follow the more passive model utilized in ordinary procedures.<sup>230</sup> The Commission also notes that in the initial hearing stages, the prosecutors are often unskilled and lack the logistical support needed to meet the varied demands of the JPL and to perform their work safely.<sup>231</sup> To improve the pace of the proceedings, the Attorney General’s Justice and Peace

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223. ICG, *Correcting Course*, *supra* note 103, at 8.

224. *Id.*

225. One commentator has noted that, at this rate, it will take over 2,000 years to complete the Justice and Peace process. See “*Va mal proceso de Justicia y Paz:*” Armando Benedetti, *supra* note 222.

226. ICG, *Correcting Course*, *supra* note 103, at 8. These crimes include murders, forced disappearances, extortion, illegal recruitment of minors, kidnappings, and sexual violence (“homicidios, desapariciones forzadas, extorsiones, reclutamiento ilícito de menores, secuestros y violencia sexual”) (translation by author). Fiscalía Entrega Balance a Tres Años de Justicia y Paz [Prosecutor Submits Review of Three Years of Justice and Peace], July 25, 2008, <http://www.fiscalia.gov.co/pag/divulga/noticias2008/justiciapaz/JyPBal3erAñoJul25.htm>.

227. ICG, *Correcting Course*, *supra* note 103, at 8.

228. IACHR 2007 Report, *supra* note 116, para. 73.

229. The guidelines relate to:

- (1) the procedure prior to receipt of the voluntary deposition and confession;
- (2) the allocation of chambers for taking the voluntary deposition;
- (3) the summons to give a voluntary deposition;
- (4) the procedure itself;
- (5) access for victims to the chambers;
- (6) and the number of victims' representatives, which is limited in case of dispute to two representatives.

*Id.* para. 63.

230. *Id.* para. 65.

231. *Id.* para. 74. The Commission reports that investigators are required to travel without means of transport into remote areas of the country where “criminal gangs of every description” are operating. *Id.* para. 73.

Unit (JPU) decided to hold trials based on partial confessions.<sup>232</sup> Under this framework, judges can award victims' reparations, but cannot deliver alternative sentences to the former paramilitaries until they have fully confessed and the JPU has verified their crimes.<sup>233</sup> However, the International Crisis Group reports that:

[L]egal experts fear that such trials could distract attention from efforts to uncover systematic human rights violations, such as sexual enslavement and extermination of indigenous communities, and to find out who ordered, sponsored, and orchestrated them. JPU officials insist that investigations of systematic human rights violations will continue parallel to trials based on partial confessions but acknowledge they need additional resources to carry out both tasks more efficiently.<sup>234</sup>

Also problematic is the lack of cooperation by former combatants. Many JPL participants have deliberately delayed giving information so as to deny responsibility for some crimes, protect former colleagues, or avoid extradition.<sup>235</sup> Moreover, a significant number of the 2,695 JPL applicants on a list provided by the government could not be located by the prosecutor general because either their "address, telephone number or true identity was unknown."<sup>236</sup> The inability of the government to locate applicants seriously undercuts their ability to prosecute as required by the Rome Statute.

Furthermore, it remains undecided whether certain portions of the JPL are constitutional, adding another hurdle to effective implementation.<sup>237</sup> In a 2006 review of the JPL, the Colombian Constitutional Court upheld the constitutionality of the law in general, but overturned certain provisions.<sup>238</sup> The

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232. ICG, *Correcting Course*, *supra* note 103, at 9.

233. *Id.* at 8.

234. *Id.* at 9.

235. *Id.*

236. IACHR 2007 Report, *supra* note 116, para. 47. This was the second list provided by the government; the first list was rejected outright by the Prosecutor General because:

it failed to identify a significant proportion of the applicants. In effect, the list included demobilized persons who were not concentrated in Santa Fe de Ralito, as well as persons who had not passed through the demobilization circuits, and even persons who were in Ralito but who sought only the benefits of Decree 128 of 2003 and of Law 782 of 2002, and not those of the Justice and Peace Law.

*Id.* para. 45.

237. *See id.* para. 50.

238. Sentencia [S.] No. C-370/06, 18 May 2006, Diario Oficial [D.O.] [Constitutional Court] (Colom.), available at <http://www.acnur.org/biblioteca/pdf/4276.pdf>.

Inter-American Commission lauded the decision, but expressed concern about the applicability of this holding to the JPL's judicial processes.<sup>239</sup>

The government's response to the Constitutional Court's holding has been controversial and has added to the confusion over how the JPL will be interpreted.<sup>240</sup> In September of 2006, the government issued Decree 3391,<sup>241</sup> which confirmed some of the holdings of the court but reinstated others that had been declared unconstitutional.<sup>242</sup> In fact, Decree 3391 has been interpreted as reestablishing Article 31 of the JPL.<sup>243</sup> This article reduced prison sentences for time spent by demobilized persons in the concentration zone and was invalidated by the Constitutional Court in its original 2006 decision.<sup>244</sup> The Constitutional Court decision also held that the "Justice and Peace confinement sites," the sites where JPL beneficiaries serve out their sentences, must be controlled by the state penitentiary authorities.<sup>245</sup> Decree 3391, however, states that such sites "may" be used for JPL detainees, but does not describe the characteristics of those sites; nor does the decree bring the sites squarely within the jurisdiction of the penitentiary system.<sup>246</sup> Human rights groups in Colombia have denounced Decree 3391,

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239. IACHR 2007 Report, *supra* note 116, para. 50. The Commission noted: [a]s the IACHR maintained in its statement of August 1, 2006, the decision of the Constitutional Court substantially improved the legal framework for the demobilization process, but there is still uncertainty as to the rules that will govern the judicial process. There is in fact debate over the possible retroactive application of various points of the Constitutional Court's ruling, recognizing that such application might eventually violate the principle of favorability or most lenient criminal law. This uncertainty will be gradually overcome during the first judicial decisions that will interpret and apply the Justice and Peace Law in light of the ruling of the Constitutional Court in each particular case.

*Id.* para. 49.

240. "[T]he adoption of Decree 3391 of September 2006, confirming some of the conditions established in the ruling of the Constitutional Court and regulating other aspects in contradiction to what the court said in that ruling, has generated further confusion over the interpretation of the Justice and Peace Law." *Id.* para. 50 (internal citations omitted). See also ICG, *Correcting Course*, *supra* note 103, at 4 n.22.

241. Decreto 3391 de 2006 [Decree 3391 of 2006] (Sept. 29, 2006) (Colom.).

242. IACHR 2007 Report, *supra* note 116, paras. 50-54.

243. *Id.* para. 51 (citing Decreto 3391 de 2006 [Decree 3391 of 2006] art. 11 (Sept. 29, 2006) (Colom.)).

244. *Id.* para. 49-54 (citing Sentencia [S.] No. C-370/06, 18 May 2006, Diario Oficial [D.O.] [Constitutional Court] p. 342 paras. 6.2.3.3.4.1 to 6.2.3.3.4.6 (Colom.)).

245. *Id.* para. 53 (quoting Decree 3391 of 2006 art. 11; citing Sentencia No. C-370/06 (Case D-6032), paras. 6.2.3.3.4.7 to 6.2.3.3.4.10).

246. *Id.* para. 53.

arguing that it is an attempt to soften the Constitutional Court's holding on the JPL.<sup>247</sup>

Victims' resources are also lacking: by April 2008, only nine percent of registered victims were represented by a lawyer, and each ombudsman had a caseload of 815 victims.<sup>248</sup> In addition, victims and witnesses who want to testify in the JPL proceedings are increasingly being threatened, intimidated, and killed.<sup>249</sup> Again, as of April 2008 fifteen registered victims had been killed under circumstances believed to be related to their claims, and ninety-two had reported receiving death threats.<sup>250</sup> Victims have filed 256 requests for protection,<sup>251</sup> and the Inter-American Commission has received reports of numerous victims and potential witnesses who have received threats and are otherwise "subject to violence, intimidation and local control."<sup>252</sup> These reports suggest that the JPL prosecutors will be unable to secure the evidence and witnesses necessary to properly conduct these trials.<sup>253</sup>

In light of the general disarray of the Colombian criminal justice system, it is clear that, even with the JPL in place, Colombia is unable to meet the standard set out in Article 17 of the Rome Statute: to be able to obtain the accused, necessary evidence, testimony, and effectively carry out proceedings.<sup>254</sup>

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247. See ICG, *Correcting Course*, *supra* note 103, at 4 n.22.

248. Benedetti, *supra* note 222 (slide 3).

249. For a detailed description of the grave threats and obstacles facing victims and the problems this poses to JPU investigators, see generally ICG, *Correcting Course*, *supra* note 103.

250. Benedetti, *supra* note 222 (slides 6-7).

251. ICG, *Correcting Course*, *supra* note 103, at 13.

252. IACHR 2007 Report, *supra* note 116, para. 91. See also *Leave Us in Peace*, *supra* note 99, at 17-18.

253. For example, the International Crisis Group reports that:

despite reports of widespread sexual crimes committed by paramilitary groups, as of July 2008, former paramilitaries had confessed to only two, and since 2006 only 91 claims have been submitted. Women's organisations say that victims do not have access to psychological counselling and support that would encourage them to come forward. The authorities need to analyse the patterns of sexual crimes such as mass rapes, in order to establish whether they were perpetrated at random or as part of a systematic effort, ordered by commanders, to enslave women in certain regions. Judicial strategies such as confessions focused exclusively on sexual crimes should be put into effect, and investigations of crimes against other vulnerable groups, such as children, must be intensified; former paramilitaries have reported the demobilisation of just 450 underage combatants, but there are reports of hundreds more.

ICG, *Correcting Course*, *supra* note 103, at 8-9 (internal citations omitted).

254. Rome Statute, *supra* note 7, art. 17.



According to a panel of ICC experts, *indicia* of inability or “unavailability” of the system include:

- lack of necessary personnel, judges, investigators, prosecutors;
- lack of judicial infrastructure;
- lack of substantive or procedural penal legislation;
- lack of access to the judicial system;
- obstruction by uncontrolled elements; or
- [the existence of] amnesties [or] immunities<sup>255</sup>

As demonstrated above, Colombia’s judicial system and the special JPL procedure meet many of the criteria for deeming a state unable to prosecute, especially regarding necessary personnel, access, uncontrolled elements, and amnesties/immunities. Colombia, therefore, may be genuinely unable to prosecute those responsible for mass atrocities, signaling that ICC intervention is necessary.

### **C. Willingness to Prosecute**

In addition to questions about the ability of Colombia to prosecute those most responsible for mass atrocities, the Colombian government appears genuinely unwilling to prosecute. Colombia’s Justice and Peace Law, rather than balancing the interests of peace and justice, is merely a political tool used to grant impunity for paramilitaries and evade Colombia’s obligations under the Rome Statute. The threat of ICC involvement has influenced the politics of Colombia’s application of transitional justice, which, if allowed to continue unchallenged or unwatched by the ICC, could widen existing ambiguities in the Rome Statute. This Section describes the political circumstances surrounding the passage of the JPL and the depth of AUC/government collusion. This evidence demonstrates that in light of the object and purpose of the Rome Statute, that is, ending impunity for crimes against humanity, Colombia’s actions do not comport with the complementarity principle and are insufficient to prevent ICC intervention.

#### **1. The Politics of Justice in Colombia**

The Uribe administration drafted the JPL in a way that would preclude ICC prosecution of crimes against humanity under the pretense that Colombia had

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255. Agirre et al., *supra* note 48, para. 50. For an in-depth explanation of these and other *indicia*, see *id.* at Annex 4.

sufficiently sentenced perpetrators.<sup>256</sup> In March of 2005, four months before the JPL was passed and in the midst of intense Congressional debate over the exact contents of the law, the chief prosecutor for the ICC requested information from Colombia regarding the peace process with the AUC.<sup>257</sup> The involvement of the ICC made AUC leaders nervous. In leaked conversations between the government and AUC leaders in November of 2004, the high commissioner for peace attempted to allay fears of ICC prosecution by telling the paramilitaries “the fact that the government offers a legal framework, which provides a prison sentence, is important because it blocks the possibility of international jurisdiction.”<sup>258</sup> Indeed, in negotiations with the AUC, the Colombian government argued that an ironclad instrument was necessary to prevent interventions by the ICC or third-country parties exercising universal jurisdiction.<sup>259</sup> In April of 2005, the AUC said it would call for a national referendum to show it had popular support to fight indictments by the ICC.<sup>260</sup>

According to the Colombian government, the biggest factor affecting the decision to prosecute perpetrators of human rights abuses in Colombia is balancing justice with peace.<sup>261</sup> After 40 years of violence and numerous unsuccessful attempts at peace talks, it is clear that this is an important concern.<sup>262</sup> However, the evidence suggests that several other political considerations had considerable influence on the Uribe administration’s decision to implement the JPL.<sup>263</sup> The most significant of these includes the political power of the AUC and the influence of the paramilitaries over members of the Colombian Congress. Furthermore, the state is likely motivated by its own military involvement with the paramilitaries, which has been well documented over time.<sup>264</sup>

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256. See Rome Statute, Declaration of Colombia, *supra* note 180, para. 3 (equating “ability to investigate and prosecute” with “obvious absence of objective conditions necessary to conduct the trial”).

257. ICG, *Presidential Politics*, *supra* note 74, at 18.

258. *Id.* at 18-19.

259. Diaz, *supra* note 65, at 7.

260. ICG, *Presidential Politics*, *supra* note 74, at 18 n.184.

261. Presidente Álvaro Uribe, Presidente Uribe explica la Ley de Justicia y Paz [President Uribe Explains the Justice and Peace Law], SNE, June 5 2005, at <http://www.presidencia.gov.co>.

262. Successive administrations have made numerous attempts to end the conflict. The government systemically has tolerated and actively supported paramilitary activities while alternating between tactics of repression and co-optation with respect to the insurgent groups. Esquirol, *supra* note 65, at 36; Laplante & Theidon, *supra* note 173, at 57.

263. See ICG, *Presidential Politics*, *supra* note 74, at 18.

264. The U.S. State Department, intergovernmental human rights bodies, human rights organizations, and Colombia’s judiciary and ombudsman have extensively documented collaboration between the military and paramilitaries dating to the 1980s. See 19 Merchants v. Colombia, 2005 Inter-Am. Ct. H.R. (ser. C) No. 109 para. 86 (July 5, 2004), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_109\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_109_ing.pdf); U.S. DEP’T OF STATE 2007 REPORT, *supra* note 100; Diaz, *supra* note 65, at 20 (citing *Los crímenes de*

Past Colombian presidents Andres Pastrana (1998-2002) and Alfonso López Michelsen (1974-1978) accused Uribe of using a platform of peace with the paramilitaries to garner support for his re-election campaign, which he won in 2006.<sup>265</sup> Passage of the JPL afforded the Uribe administration an opportunity to distance the Colombian government from the paramilitaries, and gave the paramilitaries the opportunity to strengthen their hold on the government by legitimizing their control.<sup>266</sup> Many social and community organizations, human rights workers, and researchers claim that the JPL serves only to institutionalize *de facto* paramilitary control into *de jure* control.<sup>267</sup> This occurs by giving the demobilized paramilitaries legal avenues to maintain their power and occupy political and social spheres in communities that they had gained control of through the use of force and coercion.<sup>268</sup> Ex-combatants are legitimized after demobilization by obtaining positions in municipal councils, community offices, public transportation, community security, and regulating economic activity in lower income suburbs.<sup>269</sup> Even members of the paramilitary groups consider the process a “sham” and a “mockery,” and one ex-combatant stated that “the negotiations are not changing anything. They are just transforming the illegal into the legal.”<sup>270</sup>

The effect politics played in the government’s decision to pass the JPL is best demonstrated by the extent of influence the AUC has in the Colombian government. According to AUC leader Salvatore Mancuso, the AUC controlled

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*Don Antonio*, REVISTA SEMANA No. 1303, Apr. 21, 2007). See generally HRW, KILLER NETWORKS, *supra* note 77; HRW, WAR WITHOUT QUARTER, *supra* note 84. See also Center for International Policy, *supra* note 83; Cambio, *supra* note 88. The military played a large role in creating paramilitary groups, and provided them with intelligence, weaponry, and logistical support. See generally HRW, WAR WITHOUT QUARTER, *supra* note 84.

265. ICG, *Presidential Politics*, *supra* note 74, at 3, 7.

266. *Id.* at 23; Diaz, *supra* note 65, at 10-11.

267. Diaz, *supra* note 65, at 10-11.

268. *Id.* at 11.

269. *Id.* at 12.

270. *Id.* at 11. A paramilitary leader with the alias “Rodrigo 00” told the Washington Post that “the AUC leadership [was] hoping to use the peace process to obtain political legitimacy for major drug traffickers inside the organization so they [could] keep land, cash and other drug profits.” See Scott Wilson, *Colombian Fighters’ Drug Trade is Detailed; Report Complicates Efforts to End War*, WASH. POST, June 26, 2003, at A01. Moreover, although the government insists strongly that the JPL is designed to apply to the FARC and ELN, peace talks with both of these guerilla groups have so far been fruitless. ICG, *Towards Peace and Justice*, *supra* note 135, at 6. However, the Colombian government and the ELN recently set a date and time for peace talks. Presentation for ICTY chambers interns with Moreno-Ocampo and ICTY staff, at The Hague, Netherlands (May 29, 2007). The FARC has expressly stated that they will take no part in peace talks which involve demobilization, calling a draft of the JPL “grotesque,” and the ELN argued that a peace process between the paramilitaries and the government is oxymoronic, as “there has never been a conflict between them.” ICG, *Presidential Politics*, *supra* note 74, at 23.

one third of the Colombian Congress by 2005.<sup>271</sup> The AUC has used force and intimidation to influence elections and control elected officials.<sup>272</sup> Senatorial candidates have allegedly paid the AUC to weaken the opposition, promising in return to use their connections with legislators, mayors, and councilors to limit government interference with paramilitary activities.<sup>273</sup>

Moreover, the AUC consistently interferes with the judicial system by bribing and threatening judges, prosecutors, and witnesses; and harassing, intimidating, and killing human rights defenders.<sup>274</sup> There is also evidence that the AUC has infiltrated the Attorney General's office.<sup>275</sup> Significantly, Mancuso disclosed a July 2001 agreement between 28 political leaders from Colombia's coastal region and the AUC to "re-create the nation" ("*refundar la Patria*").<sup>276</sup> Indeed, the connections between paramilitaries and government officials appear strong; they allegedly span election fraud (in 2002 and 2006), massacres committed in the department of Sucre, and the army-paramilitary connections in an offence against the leftist guerillas in the city of Medellin in 2002.<sup>277</sup> In April

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271. Diaz, *supra* note 65, at 22.

272. ICG, *Towards Peace and Justice*, *supra* note 135, at 5. According to the UN High Commissioner on Refugees (UNHCR), "the influence of paramilitaries continues to be felt in diverse regions of the country, through pressures, threats and clandestine agreements to control local political, economic and social interests." U.N. Commission on Human Rights, *Report of the High Commissioner for Human Rights on the Situation of Human Rights in Colombia*, para. 78, U.N. Doc. E/CN.4/2006/9\* (May 16, 2006), available at <http://www2.ohchr.org/english/bodies/chr/sessions/62/listdocs.htm>.

273. ICG, *Presidential Politics*, *supra* note 74, at 18. See also BREAKING THE GRIP, *supra* note 90, at 89-90; Diaz, *supra* note 65, at 22.

274. U.S. DEP'T OF STATE 2007 REPORT, *supra* note 100, § 1(e). Attacks against the judiciary were especially violent in the late 1980s, with massacres of judges, presidential candidates, lawyers, human rights monitors, reporters, and other social and political leaders. Luz Estella Nagle, *Colombia's Faceless Justice: A Necessary Evil, Blind Impartiality or Modern Inquisition?*, 61 U. PITT. L. REV. 881, 902-03 (2000).

275. Equipo Nizkor, *Rafael García dice que la infiltración "para" en Fiscalía fue peor que en el DAS*, Aug. 28, 2007, available at <http://www.derechos.org/nizkor/colombia/doc/fiscalia.html>.

276. Élber Gutiérrez Roa, *Guía práctica para entender el escándalo de la 'parapolítica'*, SEMANA.COM., Apr. 11, 2007, <http://www.semana.com/noticias-on-line/guia-practica-para-entender-escandalo-parapolitica/102092.aspx>.

277. See *id.*; Simon Romero, *Colombia Rejects Paramilitary Report*, N.Y. TIMES, Mar. 26, 2007, at A4. In April 2007, Gustavo Petro, a senator of the opposing party, reported that 32 percent of the authorized CONVIVIR directives in Antioquia resulted in relationships with paramilitary groups and their collaboration in various massacres occurring between 1995 and 1997, prompting a lengthy and intense debate in the Colombian Congress. Senado de la República de Colombia, Oficina de Información y Prensa, "*Las Convivir son la raíz del paramilitarismo en Colombia:*" senador Gustavo Petro [*The Convivir Are the Root of Paramilitarism in Colombia:*" Senator Gustavo Petro], Apr. 17, 2007, available at [http://abc.camara.gov.co/prontus\\_senado/site/artic/20070417/pags/20070417213342.html](http://abc.camara.gov.co/prontus_senado/site/artic/20070417/pags/20070417213342.html).

2007, Gustavo Petro, a senator of the opposing party, addressed the Senate with new allegations of corruption—even going so far as to imply the direct involvement of President Uribe.<sup>278</sup> Paramilitary forces grew dramatically during the time of Uribe’s governorship in Antioquia, considered “the heartland of the right-wing militias,” from 1995-1997, and spread to other regions in the late 1990s.<sup>279</sup> Petro’s allegations included claims that during Uribe’s governorship in Antioquia, paramilitary groups used Uribe family farms to launch murderous attacks.<sup>280</sup>

This extensive paramilitary-government collusion supports the argument that the JPL was passed as an attempt to allow paramilitaries to “shelter behind a State run by themselves or their cronies,” something which Kofi Annan argued Article 17 was designed to prevent.<sup>281</sup> It also raises the question of how Colombia will be able to prosecute members of its government who may be held responsible for the mass atrocities committed by paramilitaries.

Significantly, the Colombian Supreme Court recently called for the arrest and indictment of several Congressmen for their connection with the paramilitaries and involvement in serious human rights abuses in what has become known as the “parapolitics scandal.”<sup>282</sup> Colombia’s prosecutor general also began investigating several former-congressmen, governors, mayors, and regional politicians after authorities seized information about the AUC’s finances.<sup>283</sup> As of the time of writing, 50 politicians have been indicted and

For a general overview of the army-paramilitary collusion, see HRW, *WAR WITHOUT QUARTER*, *supra* note 84.

278. *See* Roa, *supra* note 276 (noting Petro’s accusation specifically directed at the Uribe family). Petro later softened his attack on President Uribe, telling a local radio station the day following the accusations that “he had not intended to accuse the president of anything other than ‘letting his guard down’ with regard to the paramilitaries.” *See The Plot Thickens, Again; Colombia*, *ECONOMIST*, Apr. 21, 2007, at 54 [hereinafter *The Plot Thickens*].

279. *The Plot Thickens*, *supra* note 278, at 54.

280. *Id.* Notably, Uribe’s father was murdered on one of the family farms by leftist rebels during an attempted kidnapping in 1983. For a description of the massacres, murders, and other atrocities the paramilitaries committed in Antioquia during this period, see HRW, *WAR WITHOUT QUARTER*, *supra* note 84, pt. IV.

281. *See supra* note 38 and surrounding text.

282. *Colombia Probe Names Uribe Allies*, *BBC NEWS*, Nov. 28, 2006, <http://news.bbc.co.uk/2/hi/americas/6194024.stm>. Information about the degree of paramilitary infiltration into political affairs (known as “para-politics”) is still emerging, but the links appear to be extensive. *BREAKING THE GRIP*, *supra* note 90, at 87.

283. Diaz, *supra* note 65, at 22. *See also* *BREAKING THE GRIP*, *supra* note 90, at 91; *The Plot Thickens*, *supra* note 278, at 54. The Supreme Court is the only body that has jurisdiction to investigate members of Congress. After questioning by the Court, these high-profile politicians typically resign, transferring jurisdiction for their investigation to the Attorney General’s Office, which also has jurisdiction to investigate governors, mayors, and members of the military. *See* *BREAKING THE GRIP*, *supra* note 90, at 91.

detained for crimes including “association for delinquency,” financing paramilitary groups, and even kidnapping and homicide; and more than 30 others are under investigation.<sup>284</sup> That means that over one fifth of Congress has been implicated in paramilitary activity.<sup>285</sup> Many of those detained belong to political coalitions aligned with President Uribe, including Senator Mario Uribe, President Uribe’s second cousin and longstanding close political ally.<sup>286</sup>

In response to the parapolitics scandal, President Uribe accused the Supreme Court justices of bias and criminal activity, allowed associates of paramilitaries to enter the Presidential Palace to meet with government officials, attempted to pass a proposal permitting convicted politicians to avoid prison, and proposed constitutional amendments to remove the investigations from the jurisdiction of the Supreme Court.<sup>287</sup> This response was criticized by Human Rights Watch as creating an “environment of intimidation” and as potentially undermining the progress made thus far against the government’s corruption.<sup>288</sup>

The actions of corrupt officials has come to the attention of Moreno-Ocampo, who asked the Colombian government how it will ensure “the trial of those most responsible for crimes under the jurisdiction of the ICC, including political leaders and members of Congress presumably linked to demobilized groups.”<sup>289</sup> Moreno-Ocampo also told the Colombian government that “the parapolitics scandal is a key issue for [the ICC], because those who are ultimately responsible should be tried and convicted.”<sup>290</sup>

Recently, the paramilitaries and Colombian officials are utilizing yet another mechanism which could avoid prosecution of paramilitary leaders under Colombian law: extradition. In May of 2008, fourteen paramilitary leaders were extradited to the United States on drug charges, including some of the worst

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284. BREAKING THE GRIP, *supra* note 90, at 87; DIAZ, *supra* note 65, at 22. See also *The Plot Thickens*, *supra* note 278, at 54.

285. E.g., *Cousin Mario; Colombia*, ECONOMIST, Apr. 26, 2008.

286. Diaz, *supra* note 65, at 22. See also BREAKING THE GRIP, *supra* note 90, at 93; *The Plot Thickens*, *supra* note 278, at 54.

287. BREAKING THE GRIP, *supra* note 90, at 15-16. For a more in-depth look at Uribe’s reaction and possible consequences, see *id.* at 110-24.

288. *Id.* at 14-15.

289. *Colombia Alista Respuesta A Cpi* [Colombia Readies an Answer to the ICC], ELTIEMPO.COM, Aug. 16, 2008 (translation provided by the author), <http://www.eltiempo.com/archivo/documento/MAM-3056121>. According to this article, ICC Prosecutor Moreno-Ocampo asked this question and others in a letter to the Colombian government sent in June. The letter was kept secret until its publication in a local newspaper, *El Nuevo Siglo*, on August 15, a little over a week before Moreno-Ocampo’s visit.

290. Constanza Vieira, *Colombia: International Criminal Court Scrutinises Paramilitary Crimes*, IPS NEWS, Aug. 27, 2008, <http://www.ipsnews.net/news.asp?idnews=43696>.

perpetrators of human rights violations.<sup>291</sup> These paramilitary leaders were participating in the JPL, but allegedly continued to operate illegal groups and generally disregard the terms of the law.<sup>292</sup> Major human rights organizations question the rationale behind the extraditions.<sup>293</sup> First, the threat of extradition to the United States was a major factor in prompting these paramilitary leaders to negotiate with the government for the Ralito Accord demobilization.<sup>294</sup> Also, the government waited two years before extraditing these paramilitary leaders, although evidence of their continued criminal activity arose as early as 2006.<sup>295</sup> Indeed, the government did little to ensure their full compliance with the law and many argue that the government's own actions can be blamed for the continued illegal activities.<sup>296</sup> Some argue this extradition signals that the government has "lost faith" in the JPL framework, and critics claim that it means the end of the JPL process.<sup>297</sup> Some suggest that the move was made by the government in an ongoing struggle with the Supreme Court over the "parapolitics" scandal and the investigation into connections between the government and paramilitaries.<sup>298</sup>

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291. See Juan Forero, *Colombian Commander Extradited to U.S. After Leniency Deal Collapses*, WASH. POST, May 8, 2008, at A12, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/07/AR2008050703374.html>. Those extradited include Macaco, Jorge 40, Salvatore Mancuso, Don Berna, Hernán Giraldo, Cuco Vanoy, and Pablo Sevillano. BREAKING THE GRIP, *supra* note 90, at 66.

292. Apparently, some of those extradited want to continue with the JPL in Colombia, even as they undergo prosecution in the United States. *Más paramilitares extraditados quieren continuar en Justicia y Paz* [More Extradited Paramilitaries Want to Continue in Justice and Peace], SEMANA.COM, July 1, 2008, [http://www.semana.com/wf\\_InfoArticulo.aspx?IdArt=113175](http://www.semana.com/wf_InfoArticulo.aspx?IdArt=113175).

293. See, e.g., BREAKING THE GRIP, *supra* note 90; ICG, *Correcting Course*, *supra* note 103, at 9.

294. BREAKING THE GRIP, *supra* note 90, at 66. Extradition was also the impetus for some of the most violent attacks in Colombia's history. Esquirol, *supra* note 65, at 35.

295. BREAKING THE GRIP, *supra* note 90, at 66.

296. *Id.* at 67. Human Rights Watch cites the government's failure to verify the extent and nature of demobilization, and the failure to act on evidence of continued criminal activity and the paramilitaries' failure to abide by the terms of the demobilization, such as turning over child soldiers and hostages. *Id.* at 67-81. Moreover, the government's treatment of paramilitary leaders in prison could have contributed to the ease with which they continued their illegal activities. They were allowed special privileges including: unrestricted use of cell phones, a flexible schedule for visitors, access to computers and the internet, medium security measures, no requirement for handcuffs for transfers out of the prison. Even after a report that they were ordering crimes from prison using their government-authorized cell phones, these phones were not restricted until nearly a year later. *Id.* at 77-79.

297. ICG, *Correcting Course*, *supra* note 103, at 3.

298. *Extradición masiva de paramilitares*, [Massive Extradition of Paramilitaries], SEMANA.COM, May 13, 2008, [http://www.semana.com/wf\\_InfoArticulo.aspx?IdArt=111775](http://www.semana.com/wf_InfoArticulo.aspx?IdArt=111775).

How the extraditions will affect justice in Colombia depends in large part on the cooperation and actions of the U.S. Department of Justice (DOJ).<sup>299</sup> Colombian officials claim they will cooperate with the U.S. DOJ to ensure the JPL process is not jeopardized, but it remains unclear whether the prosecutions will proceed in the paramilitary leaders' absence. There have been reports that some paramilitary leaders have plea-bargained for sentences as low as five years for providing drug trafficking information, although U.S. officials say that prosecutors have asked for 30 year sentences. Ultimately, the sentences will be determined by U.S. courts.<sup>300</sup> However, these trials are for drug crimes—not human rights violations—and there is nothing that suggests the extradited paramilitary leaders will continue with the JPL process.<sup>301</sup> This means that the paramilitary leaders could enjoy impunity for their crimes against humanity in Colombia.<sup>302</sup> Should the paramilitary leaders ultimately not complete the JPL process and not undergo prosecution for mass atrocities, there would be further impetus for an ICC intervention to provide justice for their victims. Indeed, the extradition caught the attention of Moreno-Ocampo, who again visited Colombia in August of 2008.<sup>303</sup> During his visit, the Prosecutor investigated both the extraditions and the “parapolitics” scandal.<sup>304</sup>

## 2. Article 17 Analysis

The political scandal and corruption surrounding the JPL's passage, as well as the AUC/government connection, demonstrate that Colombia is not in fact willing to prosecute violators of international crimes under the standards articulated in the Rome Statute. The political influence exerted by the AUC indicates that the Colombian government made decisions related to the JPL in order to shield the AUC leaders, and potentially government officials, from criminal liability. These decisions were not made independently or impartially in a manner consistent with the stated intent of bringing human rights violators to justice.

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299. BREAKING THE GRIP, *supra* note 90, at 84-86; ICG, *Correcting Course*, *supra* note 103, at 3.

300. ICG, *Correcting Course*, *supra* note 103, at 3. Two of those extradited, Ramiro Vanoy (“Cuco Vanoy”) and Francisco Zuluaga (“Gordolindo”) have already been sentenced to 21 and 24 years in prison, respectively. Some contend that this demonstrates that justice can be better served through the U.S. courts than in Colombia, where under the JPL they would have faced a maximum of eight years. *Id.* However, this does not change the fact that they are being charged only with drug crimes, leaving the many victims of their human rights abuses without justice.

301. *Id.*

302. *Extradición masiva de paramilitares*, *supra* note 298.

303. See Press Release, ICC 2008, *supra* note 3.

304. *Id.*



Article 17 explicitly states that complementarity is not met when national prosecutions or justice solutions are made “for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.”<sup>305</sup> In the case of Colombia, the sum total of the evidence suggesting Article 17 has been violated consists of the following:

- (i) There was explicit use of the Justice and Peace Law as a buffer against the ICC in negotiations between the AUC and the government;
- (ii) The law provides for minimum standards of soft punishment;
- (iii) There is a *de facto* exclusion of guerilla groups from the amnesty process;
- (iv) The application of the law violates Colombia’s Constitutional Court ruling on its constitutionality, in favor of leniency towards the paramilitaries;
- (v) There is strong evidence to show extensive control by the AUC of the government, even possibly the President;
- (vi) Many paramilitary leaders may avoid prosecution in Colombia through extradition to the U.S.; and
- (vii) There are potentially many government and military actors who are responsible for mass atrocities that may be granted impunity for their crimes.

ICC experts argue that assessing the unwillingness of a state to prosecute will involve certain *indicia* of a purpose to shield persons from criminal responsibility or which demonstrate a lack of intent to bring the person to justice.<sup>306</sup> These *indicia* include, amongst others:

- direct or indirect proof of political interference or deliberate obstruction and delay;
- general institutional deficiencies (political subordination of investigative, prosecutorial or judicial branch);
- procedural irregularities indicating a lack of willingness to genuinely investigate or prosecute;
- [c]ommonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication [including] political objectives of state authority;
- [l]ongstanding knowledge of crimes without action, and investigation launched only when ICC took action;

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305. Rome Statute, *supra* note 7, art. 17.

306. Agirre et al., *supra* note 48, para. 47.

- [whether] special tribunals, special processes or special investigators with lenient approaches [were] established specifically for the perpetrators.<sup>307</sup>

The foregoing evidence demonstrates that the JPL was enacted for the purpose of shielding the AUC from criminal responsibility for crimes against humanity, in direct opposition to Article 17. Considering the *indicia* provided by ICC experts, Colombia's JPL and the government's subsequent actions demonstrate that Colombia is genuinely unwilling to prosecute those most responsible for mass atrocities. Ironically, the actions of the Colombian government were predicted by scholars of international criminal law, who noted that the word *genuinely* opened the possibility for states to avoid ICC prosecutions "merely by launching an investigation."<sup>308</sup> Colombia seized this opening and enacted sham legislation to preclude ICC prosecutions.

## V. CONCLUSION: FILLING THE "IMPUNITY GAP"

The armed conflict and humanitarian situation in Colombia is vastly complicated and changes daily.<sup>309</sup> Transitional justice mechanisms, though normally employed *after* peace has been attained in a region, are not necessarily misplaced in Colombia.<sup>310</sup> Even shrouded in politicking and corruption, the rhetoric of transitional justice plays an important role in the Colombian peace process and can continue to influence actions taken by the government to bring about peace and ensure victims have access to justice, truth, and reparations. However, the international community needs to monitor this case closely to prevent a course of action that promotes impunity which, if allowed to continue, could become the norm under international law. As such, the ICC needs to scrutinize the Colombian government's manipulation of the Rome Statute and its attempts to evade ICC jurisdiction through the passage of the JPL. ICC involvement will not only end impunity in Colombia, but also define complementarity in a way that ensures justice for victims of the conflict.

### A. Redefining International Law

The ICC will benefit both itself and state parties by interpreting Article 17 as outlined above. By establishing clear guidelines for how state parties should interpret the principle of complementarity, states will be more apt to implement

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307. *Id.* para. 47, Annex 4.

308. *See* Sadat & Carden, *supra* note 43, at 418.

309. *See supra* Part III.A.

310. *See supra* notes 5, 170 and accompanying text. *See also* Diaz, *supra* note 65.

transitional justice mechanisms *with bite* or else risk ICC intervention.<sup>311</sup> Article 17 of the Rome Statute empowers the ICC to ensure that member states are genuinely prosecuting those who commit crimes against humanity and war criminals.<sup>312</sup> This power carries the potential to strengthen national courts, promote the rule of law, and most importantly, increase accountability.<sup>313</sup>

The relationship between international and national law is changing in significant ways.<sup>314</sup> Redefining international law without violating important sovereignty principles is possible under Article 17 of the Rome Statute. That said, the Rome Statute allows the ICC, in limited situations, to cross traditional state boundaries to monitor and evaluate the behavior of state actors.<sup>315</sup> This treaty can also function as a permanent standard that states must adhere to when legislating criminal processes directed at crimes covered by the Rome Statute.<sup>316</sup> However, the legitimacy of this newly redefined international law will turn on whether states recognize and internalize its potential to strengthen the rule of law.<sup>317</sup>

There are many important benefits of the ICC's complementarity regime. First, it allows for the development of the rule of law in countries where it has historically not existed. It shares responsibility for providing accountability and punishment for horrendous crimes between national and international criminal systems.<sup>318</sup> Second, it facilitates interactions between the ICC and state parties to develop and evaluate the state's criminal proceedings.<sup>319</sup> This provides an avenue

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311. DRUMBL, *supra* note 25, at 143.

312. *See* discussion *supra* Part II.B.

313. *See* Burke-White, *supra* note 9, at 62.

314. *See* discussion *supra* Part II.B.

315. DRUMBL, *supra* note 25, at 143.

316. *Id.*

317. *See* Teitel, *supra* note 2, at 855. She argues that:

[c]ontemporary global legalism . . . redefines the status and relation of the international to the national legal regimes in two major ways. First, in the contemporary moment, international criminal law is more pervasive, extending beyond the international realm and state borders as well as circumstances of conflict. Second, while international law is more pervasive and has greater reach than before, it is also increasingly defined by its ongoing interstitiality. By interstitiality it is meant here that in the contemporary relation of the international to the national, international criminal law operates not as an exceptional matter associated with extraordinary postwar sovereignty, but instead in a regular permanent way.

*Id.* at 852.

318. *See* Burke-White, *supra* note 9, at 81.

319. For example, Article 15 allows the Prosecutor to request information from state parties before starting a formal investigation, and if he defers to state proceedings in a given case, Article 18 allows the Prosecutor to request periodic reports from the state on investigations and prosecutions. *Id.* *See also* Agirre et al., *supra* note 48, paras. 1-15.

for creating stronger national legal systems and promotes transparent criminal justice.<sup>320</sup> These and other benefits benefit both state parties and the ICC, and will help develop a stronger and more cohesive system of criminal law.

There is, however, one risk associated with incorporating international legal norms into national and local governments: mimicry.<sup>321</sup> That is, state parties can simply mimic the language of minimum-standard, “cookie-cutter” procedures for prosecution under the Rome Statute. Such mimicry would preclude scrutinizing state-initiated criminal prosecutions. To avoid this, the ICC Prosecutor should be empowered to look beyond the language and rhetoric of transitional justice laws to see if the mimicked provisions are actually being used to prosecute criminals.

States have incorporated ICC provisions in various ways, creating uncertainty as to how the complementarity principle should work in practice. Some states have changed domestic legislation to reflect the definitions of Rome Statute crimes verbatim or in nearly identical terms.<sup>322</sup> Others have applied broader interpretations of the crimes, most often in relation to war crimes.<sup>323</sup> Still others have applied narrower definitions of the crimes, or have not nationalized Rome Statute crimes at all.<sup>324</sup> If a trial were to proceed in a jurisdiction where the Rome Statute crimes have not been codified in national laws, and the individual was tried for ordinary crimes, the ICC would lack jurisdiction to try them a second time under the *ne bis in idem* principle.<sup>325</sup> Thus, it is possible for states to prosecute criminals on reduced domestic charges and apply minimal criminal sanctions, or even grant pardons. For example, prosecuting a case where all of the elements for genocide were met as a simple case of multiple murders, even with minimum sentencing, would be considered final under the Rome Statute. Once the ICC makes a determination about the admissibility of a case under one of these narrow crime definitions or about a state’s proceedings under Article 17, other parties who want to shield their citizens from ICC prosecution are likely to adopt these minimum procedures and be protected in doing so by the complementarity principle.

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320. See DRUMBL, *supra* note 25, at 124; Agirre et al., *supra* note 48, paras. 1-15.

321. DRUMBL, *supra* note 25, at 123.

322. This includes the United Kingdom, Australia, South Africa, Germany, and the Netherlands (regarding genocide and crimes against humanity). Julio Bacio Terracino, *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*, 5 J. INT’L CRIM. JUST. 421, 423-24 (2007).

323. This includes Bosnia and Herzegovina, the Netherlands (regarding violation of the laws and customs of war), France, Ecuador, and the Democratic Republic of Congo. *Id.* at 424-26.

324. For example, Bosnia and Herzegovina restricted the definition of war crimes to exclude enlisting or conscripting children. *Id.*

325. Rome Statute, *supra* note 7, art. 20, para. 3; Terracino, *supra* note 322, at 438.

### **B. Bringing Peace to the Region**

After 40 years of fighting and endless attempts at establishing peace in Colombia, a robust interpretation of an article of the Rome Statute seems like an unlikely harbinger of peace. However, this interpretation opens up the possibility for ICC involvement in Colombia. ICC involvement would have significant consequences in Colombia, including providing a sense of justice for citizens and victims, increasing international attention and aid to the region, and promoting transparency in Colombian criminal law. It would also expand the ICC's work out of Africa, and make it a truly international organization.<sup>326</sup>

Prosecuting those responsible for crimes against humanity and war crimes in Colombia would be in keeping with the desires of victims and civilians. Some indication of the desires of Colombian citizens can be found in a recent survey conducted by the International Center for Transitional Justice and Fundación Social.<sup>327</sup> The survey assessed the opinions and perceptions of over 2,000 respondents in February and March of 2006.<sup>328</sup> The report found that Colombians are "deeply distrustful of the current demobilization process."<sup>329</sup> Twenty-eight percent said they did not think the conflict would be resolved in the next 14 years, and thirty percent did not think the conflict would ever be resolved.<sup>330</sup> Sixty-three percent of respondents believe that both leaders and rank-and-file fighters should be held accountable and prosecuted for their crimes, and a further forty-five percent did not think any leniency should be granted to leaders.<sup>331</sup> In terms of the type of sentences that should be imposed on those prosecuted, nearly seventy percent were in favor of maintaining or even augmenting the already established punishments for the crimes alleged.<sup>332</sup> This

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326. Currently all of the cases and situations pending before the ICC are from African states. *See supra* notes 18-19.

327. Press Release, Int'l Ctr. for Transnational Justice, ICTJ Report: Colombians Want Genuine Peace with Justice, (Dec. 22, 2006), *available at* <http://www.ictj.org/images/content/6/1/617.pdf>.

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* When asked about prosecutions of the national armed forces for acts committed in combat with the guerillas, 75 percent of respondents were "completely in agreement" that those groups be judged and condemned for their actions. PERCEPCIONES Y OPINIONES DE LOS COLOMBIANOS SOBRE JUSTICIA, VERDAD, REPARACIÓN Y RECONCILIACIÓN, [PERCEPTIONS AND OPINIONS OF COLOMBIANS ABOUT JUSTICE, TRUTH, REPARATION AND RECONCILIATION] 31, Dec. 22, 2006, *available at* <http://www.ictj.org/static/Americas/Colombia/ColomSurvey.pdf>. The largest number of respondents, 44 percent, thought that members of the illegal armed groups should be tried by the ordinary Colombian justice system, followed by 34.8 percent who thought it was the job of military courts, and, finally, 21 percent who thought it was the responsibility of international organizations. *Id.* at 30.

332. *Id.* at 27.

report demonstrates that Colombian citizens are calling for prosecution to the fullest extent, including the terms of punishment. Based on this survey, it is clear that the position of the government to grant amnesty to the AUC contravenes the will of the Colombian population.

If the ICC should choose to forego full-blown prosecutions of Colombians for crimes against humanity, it should at the very least publicly monitor the situation. This could include launching an investigation into the JPL, with clearly defined tests for evaluating Colombia's behavior under Article 17. By initiating such an investigation, Colombia and other states would know to tread carefully with domestic legislation concerning crimes within the ICC's jurisdiction. An ICC investigation may even prompt the Uribe administration to amend the JPL in accordance with the Constitutional Court decision and the Rome Statute.

Indeed, increased global attention on the Colombian situation already appears to have prompted President Uribe to reevaluate Colombia's interpretive declarations to the Rome Statute.<sup>333</sup> ICC involvement would certainly raise international awareness of the situation, thereby increasing the likelihood of aid for victims.<sup>334</sup> Working together, ICC representatives and Colombian government officials could bring the JPL into compliance with the Rome Statute more quickly and effectively. Similar to the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone (SCSL), the ICC could provide assistance, resources, legislative advice, and best practices ideas in order to promote peace and justice in the region.<sup>335</sup>

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333. See *supra* note 190 and surrounding text.

334. Jann K. Kleffner, *Complementarity as a Catalyst for Compliance*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY, *supra* note 25, at 79, 97. Kleffner also notes that public announcements by the ICC Prosecutor can trigger support and actions by other international actors. *Id.* Indeed, visits by Moreno-Ocampo to Colombia spur waves of national and international news articles. See, e.g., Simon Romero, *Court Looks at Supporters of Rebels in Colombia*, N.Y. TIMES, July 27, 2008, available at <http://www.nytimes.com/2008/08/16/world/americas/16colombia.html>; *El Supremo de Colombia denuncia un complot del Gobierno* [The Supreme Court of Colombia Denounces a Government Plot], EL PAIS, Spain, Aug. 26, 2008, [http://www.elpais.com/articulo/internacional/Supremo/Colombia/denuncia/complot/Gobierno/elpepuint/20080826elpepuint\\_5/Tes](http://www.elpais.com/articulo/internacional/Supremo/Colombia/denuncia/complot/Gobierno/elpepuint/20080826elpepuint_5/Tes); Simon Romero, *International Court May Investigate Colombian Rebels' Backers*, INT'L HERALD TRIB., Aug. 15, 2008, available at <http://www.iht.com/articles/2008/08/15/america/colombia.php>. These and many other news stories indicate that ICC involvement in Colombia would raise international attention to the conflict.

335. This was also proposed by the ICC expert panel. Agirre et al., *supra* note 48, paras. 1-15. The International Criminal Tribunal for the former Yugoslavia has created an extensive outreach program that involves increasing local accessibility to the court and its cases, as well as training on the rule of law. See generally ICTY Outreach website, <http://www.un.org/icty/bhs/frames/outreach.htm> (last visited Feb. 5, 2009). The Special Court for Sierra Leone also has a robust outreach program. See SCSL Outreach and Public

The complementarity principle and the possibility of ICC intervention can act as a “catalyst for compliance” by member states, prompting states to promote domestic justice and accountability for war crimes and crimes against humanity.<sup>336</sup> However, the ICC must ensure that the appearance of “compliant” measures by member states is legitimate, and adheres to the stated purpose of the Rome Statute.<sup>337</sup> If the ICC truly is designed to serve as a court of last resort, other mechanisms must be incorporated into the ICC mandate to improve national justice systems, develop the rule of law, and encourage state party compliance with the Rome Statute.<sup>338</sup>

Regardless of the mechanism the ICC employs to examine the Colombian situation, it must do so soon, and it must do so publicly. As international criminal law develops, state sovereignty principles will change to the extent they deal with state party nationals who commit crimes against humanity. Colombia has an obligation to prosecute its citizens who commit such crimes. It is up to the ICC and the international community to clearly define the terms of

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Affairs page, <http://www.scs-sl.org/ABOUT/CourtOrganization/TheRegistry/OutreachandPublicAffairs/tabid/83/Default.aspx> (last visited Feb. 14, 2009). For details on its successes, including the recent publication of a document of legal terms translated into five regional languages, see SCOTT WORDEN & EMILY WANN, U.S. INST. OF PEACE, SPECIAL COURT OF SIERRA LEONE BRIEFING: THE TAYLOR TRIAL AND LESSONS FROM CAPACITY BUILDING AND OUTREACH (2007), [http://www.usip.org/pubs/usipeace\\_briefings/2007/0821\\_special\\_court.html](http://www.usip.org/pubs/usipeace_briefings/2007/0821_special_court.html); Press Release, Special Court for Sierra Leone, Special Court Launches Glossary of Legal Terms in Local Languages (Nov. 6, 2008), available at <http://www.scs-sl.org/LinkClick.aspx?fileticket=Dw8KzKOLV3k%3D&tabid=73>. For a discussion on the positive impact of the ICTY on judicial reform in Bosnia & Herzegovina (BiH), see William Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279 (2008). Burke-White argues that the creation of the ICTY completion strategy in 2002 marked the beginning of a period in which the ICTY facilitated the creation of a stronger judiciary in BiH, including the creation of the State Court of Bosnia & Herzegovina. This positive view of ICTY domestic influence runs contrary to conventional understandings of ICTY domestic impact, which have been critical. *Id.*

336. Kleffner, *supra* note 334, at 80; Burke-White, *supra* note 9, at 68. See also DRUMBL, *supra* note 25, at 123-48. Drumbly warns against what he calls a risk of homogeneity, arguing that “[i]n assessing the quality of justice, there may be recourse to contrast the proffered national proceedings to those envisioned by international criminal law . . . . In the end, the content of local practices may be excluded regardless of the legitimacy with which these practices are perceived. Because the preferred practice is that which dominates in Western societies, excluded local practices overwhelmingly will be those present in non-Western societies.” *Id.* at 143.

337. Rome Statute, *supra* note 7, pmbl.

338. See generally Burke-White, *supra* note 9. Burke-White provides a discussion of the situation in Sudan, another complementarity case study the ICC is currently faced with. *Id.* at 72.

Colombia's obligation, and send a message that deceit, insincerity, and a bad faith application of the Rome Statute obligations will not be tolerated. Only in this way can the ICC prevent more states from following Colombia's bad example.

