The Content of Colombian Justice and Peace Law accomplishes the International Criminal Court Standards

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Content

RESUMEN

El autor analiza la ley de justicia y paz colombiana (LJP) desde la perspectiva del Estatuto de Roma (ER). La LJP es la actual ley de reconciliación colombiana, la cual se aplica a los miembros de todas las organizaciones armadas que han (o habían) operado en el país y que son acusados, entre otros, de haber cometido crímenes bajo la jurisdicción de la Corte Penal Internacional (CPI). Por consiguiente, el autor explora la naturaleza complementaria de la CPI, su consecuente "procedimiento de activación" y sus estándares para decidir si activa o no su jurisdicción complementaria en una determinada situación.

Después, basado en el anterior marco teórico, el autor analiza si el contenido de la LJP cumple con los mencionados criterios.

En particular, con los estándares de complementariedad esbozados en el artículo 17 del ER. Así, él concluye que el contenido de la ley, en efecto, cumple con tales estándares porque (1) la LJP no es una ley de amnistía o indulto, (2) individualiza la responsabilidad penal de los criminales mediante dos tipos de penas (por ejemplo, la 'normal' y la "alternativa'), (3) la ley se aplica a todos los miembros de cualquiera de los grupos armados que han (o habían) operado en el país, (4) sus investigaciones se han hecho por medio de una Fiscalía General de la Nación y una rama judicial independientes, lo cual permite juicios imparciales, (5) sus procedimientos fueron diseñados para ser tan ágiles como sea posible, y (6) respetando todas las garantías del debido proceso reconocidas en el derecho internacional.

El presente artículo es por tanto un acercamiento introductorio para una mejor compresión de la situación colombiana desde la perspectiva del derecho penal internacional.

Palabras clave

Principio de complementariedad, procedimiento de activación, admisibilidad, sub-factor de complementariedad, disposición, Ley de Justicia y Paz

ABSTRACT

The author analyses the Colombian Justice and Peace Law (JPL) from the Rome Statue (RS) perspective. This JPL is the current Colombian reconciliation law applicable for all the members of the illegal armed groups that have (or had) operated in the country who are, inter alia, alleged perpetrators of crimes under the International Criminal Court (ICC) jurisdiction. Accordingly, the author explores the complementary nature of the ICC, its consequent "triggering procedure" and its standards to decide whether to activate its complementary jurisdiction in a given situation.

Then, based on this theoretical frame, the author analyses whether the content of the JPL achieves this criteria.

More specifically, the standards of complementarity of article 17 RS. Thus, he concludes that the content of the law does achieve those RS standards on the grounds of that (1) the JPL is not amnesty or pardon law, (2) it individualizes the criminal responsibility of the perpetrators by two kind of penalties (i.e. the 'normal' and the 'alternative'), (3) the law applies to all the members from all the illegal armed groups that have (or had) operated in Colombia, (4) its investigations have been made through an independent national prosecution service and judicial branch which allows impartial decisions to be made and (5) its proceedings were designed to be as fast as possible, (6) respecting all the guaranties of due process recognized by international law.

The following article is therefore an introductory approach to a better understanding of the Colombian situation from the angle of the international criminal law.

Key words

Principle of complementarity, triggering procedure, admissibility, Sub-factor of Complementarity, willing, Justice and Peace Law.

INTRODUCTION

Whether the International Criminal Court (ICC) will exercise its jurisdiction in Colombia has been in an issue in both the county and the Court. The Colombian *situation* has been the subject of "preliminary analysis"[1] and the Chief Prosecutor of the ICC, Luis Moreno Campo, has visited the country twice in the last two years, being officially invited by the Colombian authorities.

ICC Prosecutor´s most recent visit was held at the end of August, 2008. The press release of the ICC informed that

> Prosecutor Moreno Ocampo and his team will continue the ongoing examination of the investigations and proceedings in Colombia, focusing particularly on the people who may be considered among those most responsible for crimes within the jurisdiction of the ICC. As stated by the Prosecutor during his last visit: ´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 we will' (OTP, 2008).

This bulletin added that

> the Prosecutor will also seek further information about the investigations and proceedings being conducted in Columbia (sic) against soldiers and politicians -members of Congress among them- allegedly involved in crimes committed by paramilitaries and guerillas. In this context, he will seek further information on the extradition of 15 former paramilitaries being tried under the Justice and Peace Law to the United States of America in May 2008 (OTP, 2008).

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[1] On 2007, in a New Year message to all staff, President, Prosecutor and Registrar of the ICC stated that "Situation in countries on three continents, including Colombia, have been the subject of preliminary analysis".

Finally, the announcement stated that the

> Icc Office of the Prosecutor is also looking into allegations on the existence of international support networks assisting armed groups committing crimes within Colombia that potentially fall within the jurisdiction of the Court. Letters requesting information have been sent to Colombia's neighboring countries, to other States and to international and regional organizations (Otp, 2008).

These extracts show the Icc Office of the Prosecutor´s (Otp) concerns for Colombia.

On one hand, there are examinations regarding the internal reconciliation process. More specifically, about the proceedings under the Law 975, 2005, also recognized as Justice and Peace Law (Jpl). This is a reconciliation law made under the context of the peace process that Colombian authorities were overtaking with the Autodefensas Unidas de Colombia (Auc), which translates as United Self-defense Groups of Colombia, also known as Paramilitaries. Auc is one of the illegal armed groups that were operating in the country, as well as the guerrilla groups of Farc and Eln (Pardo Rueda, 2004)[2]. Under Jpl, members of all illegal armed groups who want to make peace with the government and who have allegedly committed *inter alia* crimes under the jurisdiction of the Icc, may receive softer penalties under certain strict conditions.

Jpl proceedings could also expose information about links between soldiers of the Colombian Military forces and politicians allegedly implicated in such crimes committed by paramilitaries or guerillas. In addition

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[2] Auc were a type of federation of armed groups which were created in beginning as self-defense groups from the guerrillas. They were initially financed by farmers and honest landlords but later also by drug traffickers who had invested their tremendous profits in rural lands. All of them were targets of the guerrillas acts of blackmail, stealing of livestock and kidnapping. However, since around the mid 1990's they began to traffic with drugs, not only to fight against the guerrillas, which were already a part of that illegal business, but also for the benefit of their leaders becoming "true" criminals. After that, due to their power, they became as big of a challenge to society and the government as the guerillas (Pardo Rueda, 2004).

to this, the Colombian government, on an audacious decision, decided in May 2008 to extradite 15 of the top commanders of the AUC to the USA. Consequently, OTP concerns exist about the cooperation of these high rank commanders due to the explanation of such links between soldiers and politicians which could result in an individual criminal responsibility under the Rome Statue (RS).

On the other hand, it seems that the OTP is alarmed about possible criminal connections under RS between Colombian illegal armed groups and authorities of neighboring countries. Thus, the OTP is looking for relevant information which links the terrorist organization of FARC to politicians and members of the military forces from Venezuela and Ecuador. On the morning of 1st of March 2008, the Colombian army confiscated some laptops and USB devices on Ecuadorian territory under the Fenix Operation in which alias *Raul Reyes* –the 2nd highest leader of the FARC– was discharged. On May 15th, after a request from the Colombian authorities, Interpol validated the information contained in the laptops and USB devices, which showed awkward relations between the FARC and those authorities. Hence, the OTP inquiries are in that regard.

Due to space restrictions, this document will not deal with all the previous issues. Its scope is narrowed to the accomplishment of the JPL content to RS investigation and prosecution standards. This is also due to the fact that this analysis is used as the starting point for the study of the Colombian *situation* from the RS perspective.

Here it will be submitted that the JPL content achieves those standards, so ICC should not activate its jurisdiction in Colombia on the grounds of its content. It will be argue on the grounds that the JPL content manifests the *willingness* (in the terms of RS) of the Colombian State to investigate and prosecute alleged perpetrators for crimes competence of the Court.

Thus, this paper has been divided in four parts. First, the complementary nature of the jurisdiction of the ICC will be discussed. As it will be showed, the conception of the nature of the Court determines the interpretation of

other dispositions of the RS, especially those related to the triggering procedure for the activation of the complementary jurisdiction of the Court (triggering procedure). In the second part, an overview of the triggering procedure will be explained in order to put into context the relevant ICC standards for the analysis of the JPL content. Third, this aspect (the content) of the JPL will be analyzed in the light of these standards. The enforcement of the law exceeds the scope of this paper, so it will be the object of a future article. Finally, some conclusions will be stated.

1. COMPLEMENTARY NATURE OF THE ICC

Article 1 RS states that the Court "shall be complementary to national criminal jurisdictions" and its preamble emphasizes "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions"[3]. This means that the jurisdiction of ICC is complementary to national courts. In short, it implies that ICC only can put into effect its jurisdiction under exceptional circumstances (Cassese, 2003). These special circumstances are when a State which has jurisdiction over international crimes neither starts an investigation or prosecution or is genuinely unwilling or unable to carry them out[4]. Thus, RS creates a procedural institution which constitutes as a unique feature of this international tribunal: the principle of complementary (Knoops, 2003).

Because the RS is a treaty based Statue, it has a complementary nature with national jurisdictions[5]. Unlike the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for

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[3] Paragraph 10 of the RS Preamble.

[4] See article 17 RS.

[5] ICC was created by the RS which was adopted on 17 July 1998 by the UN Diplomatic Conference on the Establishment of an International Criminal Court in Rome. It came into operation on the 1st of July 2002 and its judges were inaugurated on the 11th of March 2003. Its adoption, one day before the adoption of the Universal Declaration of Human Rights, was made on 9 December 1948, almost 50 years after that the UN General Assembly had approve the resolution 216 B (III) ordering the International Law Commission (ILC) to enact a Draft Statue of an International Criminal Court (Knoops, 2003).

Rwanda (ICTR), which were created on the UN Security Council Chapter VII Resolution[6], ICC is a product of international negotiations in where sovereignty of States still is the core principle for the interactions among States. In this sense, Professor Bassiouni –Chairman of the Drafting Committee of the Rome Diplomatic Conference to Establish an International Criminal Court– states that

> [w]hile contemporary international law evolves within the framework of the Westphalian system that jealously guards national sovereignty, the state of international relations is mostly characterized by the Hobbesian anarchical state of nature that allows for a wide degree of unilateral exceptionalism. It is within this context, and in the shadow of the end of the Cold War, that the International Criminal Court (ICC) was established and, as a result, it reflects these realities (Bassiouni, 2006).

Thus, the ICC "was conceived as a treaty-based international legal institution of last resort that would preserve the primacy of national legal systems of the contracting parties" (Bassiouni, 2006).

If RS would no be based on the sovereignty of States the ICC would not ever arise[7]. As Professor Holmes considers,

> success in Rome is due in no small measure to the delicate balance developed for the complementarity regime. States which were

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[6] Further differences with other international tribunals are the following. First, ICC is the only international criminal tribunal which is permanent whereas the others are ad hoc tribunals. Secondly, ICC jurisdiction is not geographically restricted while the others international tribunals are limited to the territory of the former Yugoslavia and Rwanda (Knoops, 2003).

[7] Matthew Brubacher considers that in the Preparatory Committees there were two main groups: liberalistic and realist. In the first group, basically represented by NGOs, there were those who support a liberalist orientation and consider the ICC as, in his words, "the manifestation of aspirations to promote the building of ethical legal processes through the creation of institutions capable of promoting due process and the rule of law". Thus, they advocated for a Prosecutor who could initiate investigations ex officio as a necessary requirement in order that the ICC would be an institution "capable of holding all persons accountable for committing crimes of universal concern, regardless of their power or position". In others words, what they want is an institution which takes the States' sovereignty

> concerned primarily with ensuring respect for national sovereignty and the primacy of national proceedings that were able to accept the complementarity provisions because they recognized and dealt with these concerns (Holmes, 2002).

Thus, according to Bassiouni, "[t]he complementarity regime is one of the corner stones on which (…) ICC [was] built" (Bassiouni, 2006). Therefore, he adds, "[t]he ICC was never intended to be a supra-national legal institution nor would it have been accepted as such by most states" (Bassiouni, 2006).

Professor Bassiouni also thinks that "[a]nother important ancillary function of the ICC is to prod national jurisdictions to assume their international legal obligations" (Bassiouni, 2006). As Holmes asserts,

> [t]hroughout the negotiating process, States made it clear that the most effective and viable system to bring perpetrators of serious crimes to justice was one which must be based on national procedures complemented by an international court. Such a system would

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as little as possible into consideration to investigate or prosecute the international crimes committed in their territory or by their nationals. Therefore, following the expression of Professor Bassiouni, in this sector there are those who pretend that the ICC is more a "supra-national legal institution" rather than a complementary one (Bassiouni, 2006). In the second group, headed by the United States, there were those who support a pragmatic (factual) vision of the Court, as result of their realist view of the context in which the Statue was signed and in which the ICC ICChas to do its work. Consequently, they have a pragmatic understanding of international law, which is considered a derivation from the interrelationship of States, as the central actors in the international community, who both (a) consent to be only within the rules they observe as capable to their own interest and (b) that their main obligation is to their citizens more so than to foreigners. In their view, it is in the realpolitik environment in which the Court has to operate, so, as Koskenniemi states, an "equal application of universal norms is implausible, as no international entity can impose itself in a manner capable of detracting from the perfect equality of state sovereignty". In other words, the ICC has to realize that it has to work on the realpolitik logic. Therefore, the principal concern of the representatives of this sector was the creation of an institution which does not reduce in 'excess' their autonomy to judge international crimes allegedly committed in their territory or by their nationals. Hence, this approach considers the ICC a complementary institution rather than supra-national legal institution (Brubacher, 2004). In summation, the core difference between both approaches is the scope of the concept of sovereignty of the States in relation with the ICC, taking into account the context of their vision of the realities of international politics.

> reinforce the primary obligation of States to prevent and prosecute (…) [international crimes and] [a]t the same time, the system would create a mechanism, through a permanent international criminal court, to fill the gap where States could not or failed to comply with those obligations (Holmes, 2002).

Hence, RS preamble recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes"[8], but guaranteeing "lasting respect for and the enforcement of international justice"[9].

In conclusion, the nature of the ICC is to be a complementary institution which only exercises its jurisdiction under exceptional circumstances rather than being a supra-national legal institution or an international court of appeals. Therefore, it is submitted that this is the light in which the relevant provisions of the statue must be interpreted.

On the other hand, the principle of complementary is also justified on efficiency grounds. Clearly, States generally have the best access to evidence and witnesses and also there are practical limits on the number of prosecutions the ICC can bring (OTP) a. 2003).

2. THE TRIGGERING PROCEDURE FOR THE ACTIVATION OF THE COMPLEMENTARY JURISDICTION OF THE COURT (TRIGGERING PROCEDURE)

Due to the principle of the complementary, according to Professor Hector Olasolo,

> the RS has three kinds of procedures: [a] triggering, [b] criminal and [c] the civil procedures. The triggering procedure is autonomous; its

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[8] Paragraph 6 of the RS Preamble.

[9] Paragraph 11 of the RS Preamble.

> object, parties and proceedings are perfectly distinguishable from those of the criminal and civil procedures (Olasolo, 2005).

It is due to the triggering procedure that the ICC decides whether or not it activates its jurisdiction in a given territory.

The ICC has distinguished between *situations* and *cases*. In a decision from January 18 2006, which was followed in another decision on February of the same year, the Pre-Trial Chamber (PTC) considered

> that the Statute, the Rules of Procedure and Evidence and the Regulations of the Court [(Rules)] draw a distinction between situations and cases in terms of the different kinds of proceedings, initiated by any organ of the Court, that they entail (PTC, 2006).

On one hand, *situations*,

> which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such (PTC, 2006).

On the other hand, *cases*,

> "which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear". (PTC, 2006).

Thus, it is submitted that before the activation of its complementary jurisdiction the ICC has as a "potential-inactive" jurisdiction over States, which has to be activated by the "triggering procedure". Once the

jurisdiction is activated on *situation*, it becomes in a "permanent-active" jurisdiction over *cases* under its competence.

In summation, *situations* and *cases* are two different concepts in which the former refers to the object of the triggering procedure and the latter to the criminal and civil procedures once the Court has decided to exercise its jurisdiction. An example of these different concepts is the *case* of Thomas Lubanga Dylo on the *situation* Democratic Republic of the Congo.

Despite the strictly procedural matters, it is suited that the triggering procedure has two core aspects: a) the *activation mechanism* according to articles 13 and 15 RS, and b) the analysis of the *three factors to determine the activation of the jurisdiction of the ICC* in order to determine whether there *is a reasonable basis to proceed* in a given *situation* according to Articles 17 and 53 RS and Rule 48.

The first aspect is composed of three *activation mechanisms* to trigger the "potential-inactive" jurisdiction of the ICC[10]. These mechanisms are: a) upon referral of a SP (SP) b)) upon referral by the Security Council (SC) of the United Nations (UN), and c) the Prosecutor *proprio motu* on the basis of *communications* provided for individuals and organizations about crimes under the jurisdiction of the Court[11].

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[10] See article 13 RS.

[11] *1. Situation referred by a SP:* Through this mechanism the potential-inactive jurisdiction of the Court is triggered for the initiative of a government of a SP. This way is regulated in articles 13 (a) and 14 RS. The former disposition states that the ICC may exercise its jurisdiction if a "situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a in accordance with article 14". Article 14 (1) affirms that "[a] may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes" (For a detailed analysis of the triggering proceedings by the initiative of a SP, see Olasolo, H., 2005). Finally, due the principle of complementarity which is the result of the State-oriented approach of the Statute –expression of Professor Antonio Cassese (Cassese, 2005)–, it is not a coincidence that so far three of the four *situations* that have triggered the jurisdiction of the Court have been caused by SP referrals. These are the situations of Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR). However, it is important to recall that all those referrals are self-referrals.

The second aspect has three factors which are the testing elements to determine the activation of the jurisdiction of the ICC. These factors are: jurisdiction, gravity and complementarity with national proceedings and interest of justice (OTP (a) and (b), 2006).

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2. Situation referred by the UN Security Council: This mechanism in which the SC operates, acting under Chapter VII of the UN Charter, refers a situation to the Prosecutor when it is considered that one or more of the crimes under jurisdiction of the ICC appears to have been committed. According to Olasolo, its purpose is to guarantee the right of access to the ICC for the SC, the political organ of the UN, which mission is the maintenance and restoration of international peace and security. A remarkable difference with the other mechanisms is that the SC referrals can activate the ICC jurisdiction with regard to countries that are not SP. The procedure of this activation mechanisms is regulated by articles 13(b) and 53 (1), (3) and (4) RS. The OTP has only received one referral from the SC which, as has happened up until now with the three State referrals that have been sent to the OTP has triggered the jurisdiction of the ICC (See Olasolo, H., for a detailed analysis of the triggering proceedings by the initiative of the UN SC).

3. Situation investigated by Prosecutor proprio motu: This mechanism allows the prosecutor to initiate investigations on the basis of the analysis of the communications, without a SP or SC referral. However, in this scenario the Prosecutor has less autonomy. Thus, when the prosecutor receives a SP or SC referral, Article 53 provides that he shall initiate an investigation unless he determines that there is no reasonable basis to proceed under the Statute. In this case, the initiation of investigation is further simplified in that the Pre-trial Chamber (PTC) may only review his determination not to proceed, but does not review an affirmative decision to proceed. On the contrary, when the Prosecutor receives a communication, the test is the same but the starting point is reversed: the Prosecutor shall not seek to initiate an investigation unless he first concludes that there is a reasonable basis to proceed. Thus, if after the analysis of such communications he considers that there is a reasonable basis to proceed with an investigation, he shall submit to the PTC a request of authorization of an investigation (article 15 (3) RS). If the PTC authorizes the investigation, the OTP can open (activate) it, "without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of the case" (article 14 (4) RS). Hence, by the two previous activation mechanisms, the Prosecutor has complete autonomy to decide whether to initiate investigations once a SP or the SC refers a *situation*. But when he wants to do the same *proprio motu*, he needs "to convince the PTC" in order to get its authorization to initiate it. Therefore, based on this mechanism, the decision to investigate is not only that of the Prosecutor but also of the PTC which, in the end, ultimately decides whether there is a reasonable basis to proceed with an investigation, and thus, to trigger the jurisdiction of the ICC. Consequently, and taking into account the abovementioned complexity of international politics in which the Prosecutor has to make his decisions as a result of the state approach of the RS, it is not a surprise that this way is the only activation mechanism that could never trigger the jurisdiction of the Court, despite the large amount of communications the Prosecutor had received (See OTP (b), 2003. For a detailed analysis of the triggering proceedings by the initiative of the OTP *proprio muto*, see Olasolo, H., 2005).

As Prosecutor has said,

> I am required to consider three factors. Firstly, I must consider whether the available 'information provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. Where this requirement is satisfied, I must then consider admissibility before the Court, in light of the requirements relating to [the sub-factor of] gravity and [the sub-factor of] complementarity with national proceedings. Thirdly, if these factors are positive, I must give consideration to the interests of justice (OTP (a) and (b), 2006).

None of the activation mechanisms of the first aspect can automatically activate the jurisdiction of the Court. Once one of them is selected and has completed its material and procedural requisites, a situation must to pass the test of the second part.

It is submitted that JPL standards of investigation or prosecution can be analyzed either solely under the sub-factor of complementarity or both the later sub-factor and the factor of interest of justice. However, due to reasons of space and that in a recent policy paper, OTP said that "the exercise of the Prosecutor's discretion under article 53 (1) (c) and 53 (2) (c) is exceptional in its nature and finally that there is a presumption in favour of the investigation or prosecution wherever the criteria established (…) [in the other factors] has been met" (OTP (b) 2007), the present document will only deal with the JPL standards from the perspective of the sub-factor of complementarity[12].

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[12] Colombia ratified the RS on 5 August 2002, so ICC has a 'potential-inactive' jurisdiction over Colombian territory and its citizens. However, its government did the declaration of article 124 RS, so the Court only will have competence for war crimes committed after November 2009. Regarding the sub-factor of gravity, for the purposes of this analysis it will be assumed that Colombian "*situation*" accomplishes it.

3. THE SUB-FACTOR OF COMPLEMENTARITY AND THE COLOMBIAN JPL

a. Article 17: The manifestation of principle of complementarity

This disposition is the "operative" manifestation in the RS of the principle of complementarity. According to Professor Williams, it "ensures that the ICC will not become seized of a case when the concerned States are investigating or prosecuting in good faith" (Williams, 1999). This view is the result of a philosophical concept of the nature of the ICC in previously exposed terms based on both the wording of the RS and on the historical fact that the prevailing view in Preparatory Works was that the ICC should not to have primacy over national criminal courts, but rather would complement them (Williams, 1999). Otherwise, the Statue simply would not be "marketable in Rome", and thus, it never would be approved (Williams, 1999). Therefore, RS presumes that the general rule is that a *situation* will not be declared admissible and, only exceptionally, would the Court exercise its jurisdiction.

The OTP published an Informal Expert Paper with various specialists in order to give an expert consultation about the principle of complementarity in practice to the Chief Prosecutor and its Staff (OTP (c), 2003). This paper states that article 17 "in fact deals with three logically distinct circumstances" (OTP (c), 2003). Firstly, when a State has not initiated any investigation. In this case, evidently, the *situation* will be admissible. Secondly, when the abovementioned presumption occurs, in which the RS assumes that the State is doing investigations or prosecutions properly. In circumstances like this, the *situation* will not be admissible, so the ICC will not exercise its jurisdiction. Finally, there is the scenario in which "it can be shown that the proceedings are not genuine, because the State is either unwilling or unable to carry out genuine proceedings" (OTP (c), 2003).

Indeed, the words of article 17 are clear in presuming that the Court will declare a *situation* as inadmissible because it assumes that an allegedly committed international crime(s) will be either: a) in process of being

investigated or prosecuted by a State that has jurisdiction over it[13], or b) that it has been investigated by State which has jurisdiction over it and the State has decided not to prosecute the person concerned[14]. However, as an exception ("unless"), the article stipulates that the ICC may exercise its jurisdiction if exceptional circumstances occur. These circumstances being that a State genuinely is or was unwilling or unable to carry out such investigations or prosecutions.

Nevertheless, there are those who argue that article 17 has a "principle of admissibility" instead of a principle of complementarity on *situations* where there are amnesties or pardons. Under this view, the structure of article 17 implies that a *situation* is generally admissible before the Court "unless the conditions of inadmissibility are fulfilled" (Stahn, 2005). In other words, for this perspective the general rule is the admissibility of a situation and only exceptionally the Court should not exercise its jurisdiction. Therefore, they consider that what such an article actually does is regulate exceptions for the "principle of admissibility" (Stahn, 2005).

However, it is submitted that despite the debate about the capacity of article 17 or article 53 to bear the ICC proceedings in an amnesties or pardons *situations*, there is nothing in the history, preamble, in the articles or in efficiency grounds that justify a conceptualization such as "principle of admissibility" in the RS. Therefore, indisputably the principle of complementarity is the lighthouse from which the RS has to be interpreted, especially article 17, in all scenarios.

b. Description of the JPL

Colombia has two main national legal mechanisms for its reconciliation process. On one hand, Law 1106 of 2006[15] also identified as pubic order law

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[13] See article 17 (1) (a).

[14] See article 17 (1) (b).

[15] This law extends Law 418 of 1997, which was extended by Law 548 of 1999 and Law 782 of 2002.

(Pol), which allows to pardon the members of the illegal armed groups as long as they have not committed, *inter alia*, international crimes[16]. On the other hand, there is the Jpl which deals with such members that are alleged committed, *inter alia*, crimes under the jurisdiction of the Icc.

Jpl was born from the necessity to have a juridical frame to make the peace process with the Auc. The available juridical mechanisms, mainly the Pol, were not enough due to the growing consciousness of the Colombian society about the perpetrators of gross human rights violations cannot be the object of amnesties or pardons, as in previous peace processes[17]. This fashion is in accordance with new trends of international criminal that does not allow impunity for such perpetrators even in a context of a reconciliation process. Under this context, the necessity to "standardize" such law with the rs arises[18].

The Jpl aim is to facilitate the peace processes and the individual or collective reincorporation to the civil life of members of the illegal armed groups, as long as the rights of the victims to the truth, justice and the reparation are guaranteed[19].

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[16] See article 19 Law 782.

[17] Within such wave arrives also the demanding of truth and to reparation to the victims of Paramilitaries. Former Senator Rafael Pardo Rueda in the Senate and former Congressman (now Senator) Gina Parody in the House of Representatives lead the Truth, Justice and Reparation bill which results in the current Jpl.

[18] During the debates of the bill of the future Jpl in the Colombian parliament, Senators and Congressmen exposed why, in their opinion, it was important to have such consistency with the rs, while others expressed their concerns on that regard. Thus, Congresswoman (now Senator) Gina Parody talks about the necessity of the Jpl to accomplish international standards in order to avoid future interventions of, for instance, the Icc. On the other hand, Congressman (now Senator) Luis Fernando Velasco and (former) Senator Dario Martinez leave a record in which they made statements during the process of the constitutional reform that would allow Colombia to become a sp of the rs. In this statement they expose their apprehensions about the negative concerns over the impact of the Icc for future peace process Finally, Senators German Vargas Lleras (former) and Hernan Andrade respectively leave a record and made a speech about their views regarding an eventual intervention of the Icc in Colombia, according to their interpretation of the rs. The rs, therefore, was an important issue at the moment to approve the Jpl in Congress (Senado de la República de Colombia, 2005).

[19] See article 1 Law 975, 2005.

JPL regulates the investigation and prosecution of such people that have allegedly committed, *inter alia*, international crimes, whether as authors or participants of crimes committed during their membership to such illegal armed groups, on conditions that they have both decided to demobilize from such groups and decisively will contribute to national reconciliation[20]. This law has been applied also to members of others illegal armed groups that still maneuver in the country, FARC and ELN[21].

The JPL has truth, justice and reparation features. The truth feature is expected to have a restorative justice for victims and is expected to help avoid the paramilitarism and its crimes in the future. If the members of such criminal organizations confess all the truth, they will have a reduction on their penalties. In addition, they will have to compensate their victims with their own patrimony. Nevertheless, because the triggering procedure of the RS only deals with the "justice" aspect, only it will be analyzed in this article[22].

JPL cannot be confused with a pardon or amnesty law. Amnesties are acts of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted (Black's Law Dictionary, 1999). A pardon can be defined as an instance of officially nullifying punishment or other legal consequences of a crime (Black's Law Dictionary, 1999). While the amnesty extinguishes the criminal action, the pardon redeems the criminal action. In the former, the State forgets the offence; in the latter, the individual is exempted from penalty. Whilst the amnesty is applied for the judges, pardons are applied for the executive branch (Corte Constitutional, Sentencia C-370/2006).

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[20] See article 2 Law 975, 2005.

[21] Although the JPL was conceived under the context of the peace process with the AUC, it can be applied also for guerrilla members. In fact, many of them, individually considered have received the benefits of it. Nevertheless, it is important to clarify that the JPL can be applied also to a peace process with them. However, guerrillas' members from both FARC and ELN have been said that JPL requirements are to tuft, position that is shared for many experts. (For instance, see the opinion of Vicenc Fisas in: (El Tiempo (a), 2007).

[22] The "truth" feature is only relevant if it allows to more investigations and prosecutions for crimes under the jurisdiction of the Court.

Indeed, the principal benefit that beneficiaries of JPL could receive is an *alternative penalty*. It consists of the suspension of the 'normal' penalty stated in the judicial decision under the criteria of the Criminal Code, to be replaced for the *alternative* one[23]. The verdict of guilty will be given by a *Tribunal Superior de Distrito Judicial,* which is the previous territorial instance to the national Colombian Supreme Court. This *alternative* penalty has a minimum punishment of five years and maximum of eight years, taking into account, *inter alia*, the gravity of the crimes and their effective collaboration to the cleaning up of them, i.e. the confession of all the truth[24].

Therefore, JPL is not an amnesty law because: a) the State is not officially forgiving certain classes of persons who are subject to trial that have not yet been convicted, b) or it is not extinguishing a criminal action, or c) forgetting the offences. JPL is either a pardon law since it does not allow official annul of punishments or except individuals from penalties.

The JPL procedure is also special. Regarding the investigation, first, the government has to postulate the individuals that could be beneficiaries for the JPLby sending a list to the *Unidad Nacional de Fiscalía para la Justicia y la Paz*[25] (UNJP). It is a special unit of the National Prosecution Service created by JPL, in which a delegated prosecutor receives competence for the crimes allegedly committed for a given individual[26]. Then, on a *version libre*[27], such a delegated prosecutor shall interrogate the individual, in presence of his lawyer, for all the facts that he knows, and the individual shall confess to the delegated prosecutor all the crimes he committed during and on occasion of their membership to such illegal armed groups[28]. According to the Colombian Constitutional Court, if that confession is not "complete

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[23] See article 3 Law 975, 2005.

[24] See article 29 Law 975, 2005.

[25] It translates as something like a Special Unit of the National Prosecution Service for the JPL.

[26] See article 16 Law 975, 2005. Colombian National Prosecution Service is part of judicial branch of power.

[27] This is a procedural instance that translates as free version.

[28] See article 17 Law 975, 2005.

[31] See article 17 Law 975, 2005

and truthful" the individual can not have access to the benefits of the law (Corte Constitutional, Sentencia C-370/2006). In addition, that beneficiary shall indicate the properties that he has to compensate his victims[29].

Next, the prosecution procedures start. With this version and other material that the State services has, the Unfjp will prove the veracity of such a version. At that moment, the individual will be in the disposition of a guarantees judge who shall determine his place of imprisonment[30]. Then, within a period of thirty-six (36) hours, the guarantees judge shall decide the moment for an *Audiencia de Formulacion de Imputacion*[31], in which the delegate prosecutor has a) to impute the charges, b) to request a preventive detention of the individual, and c) to request cautionary measures for the property that the individual had indicated. From that moment, the Unfjp has sixty days to complete the investigation and verification of facts admitted by the individual and all that have knowledge thereof[32]. Within that period, and as soon as possible, the delegated prosecutor shall request to the guarantees judge an *Audiencia de Formulacion de Cargos*[33], in which the delegated prosecutor will formulate the investigation and will verify the charges from the prosecution service[34]. In this hearing, the accused may accept all those charges, in which the confession, in order to be validated, has to be in way which is free, voluntary and spontaneous. If he/she accepts the accusations, his file shall be sent immediately to a *Tribunal Superior de Distrito Judicial*, which within the next ten days shall evaluate if such a confession was suitable within the above-mentioned procedural guarantees. If that *Tribunal* considers it positive, it shall proceed with the individualization of the punishment[35], a sentence in which both the "normal" and the *alternative* penalties will be set[36]. However, if a member of an illegal armed

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[29] See article 17 Law 975, 2005.

[30] See article 17 Law 975, 2005.

[31] It translates something like a hearing to formulate imputations.

[32] See article 18 Law 975, 2005.

[33] It translates something like a hearing to formulate charges.

[34] See article 18 Law 975, 2005.

[35] See article 19 Law 975, 2005.

[36] See article 24 Law 975, 2005.

group does not accept the charges or he retracts from what he had admitted in the *version libre*, his case shall be investigated throughout the ordinary procedures and he shall lose all the benefits from the JPL.

C. JPL and Complementarity

The abovementioned "three logically distinct circumstances" under article 17 are in fact three different scenarios of study. Consequently, the present JPL analysis will be made using a scenarios methodology.

Scenario 1

Has the State initiated an investigation? In its first six months forty members of the paramilitary groups had accepted the JPL proceedings, in addition to the investigations that the ordinary justice system had previously made to the application of the JPL (El Tiempo (b), 2007). Therefore, it is concluded that the Colombian State already had initiated investigations.

Scenario 2

Is the State properly conducting the investigations or prosecutions? As was stated, due to the complementary nature of the RS, the ICC should suppose that the Colombian State is properly performing its investigations or prosecutions under the JPL.

In this sense, the OTP expert panel on complementarity considers that ICC should exercise its jurisdiction "only in clear cases of unwillingness or inability to genuinely prosecute" (OTP (c), 2003). Consequently, "the standard for assessing [the "willingness" or "availability"] should reflect appropriate deference to national systems as well as the fact that the ICC is not an international court of appeal, nor is it a human rights body designed to monitor all imperfections of legal systems" (OTP (c), 2003).

This OTP expert panel also affirms that the allocation of the burden of proof is for the "party raising the issue" (OTP (c), 2003).

This assignment of the burden is suggested by the structure of Article

17, which calls for a determination of inadmissibility 'unless' (…) ['willingness' or 'availability' is] shown. Thus, the term 'unless' suggests a distinct issue, one that logically must fall on the party arguing for admissibility. This conclusion is further bolstered by a policy of giving the benefit of the doubt to States exercising jurisdiction and assuming that they are acting in good faith. In addition, it is an evidentiary principle that a party alleging bad faith generally carries the burden (Otp (c), 2003).

Scenario 3

The last scenario occurs when there are proceedings but it can be shown that they are not genuine because the State is either unwilling or unable to carry out genuine proceedings. Consequently, is in this scenario where the "unwillingness" and "unavailability" of State in a given *situation* is analyzed. Because the abovementioned previous press release from Icc about the visit of the Prosecutor to Colombia on August 2008, it is assumed that they are looking for information on the "willingness" of Colombian authorities.

The standard of availability is not applicable to Colombian *situation*. According to article 17 (3), the concept of "unable" is concerned with the inability of a State "to obtain the accused or the necessary evidence and testimony or otherwise to carry out its proceedings", "due to total or substantial collapse or unavailability of its national judicial system". This provision was inserted to take account of 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 (Otp (a). 2003).

4. Willingness of colombian authorities under Jpl

The content of Jpl has to reflect that Colombian State is *willing* to investigate or prosecute those alleged committed international crimes in order to accomplish the Icc standards.

Article 17 (2) contains the criteria that the ICC shall consider to determine the unwillingness of a given *situation*, which "having regard the principles of due process recognized by international law". The paragraph sets up that such unwillingness can be established if one or more such criteria exist, i.e. that even if they only occurred, the Court may declare that a country is unwilling to carry out the correspondent proceedings (Williams, 1999).

a. The Standards of Willingness

The first criterion refers to the intent to shield a person from his criminal responsibility. Thus, Article 17 (2) (a) deals to whether there is a purpose to shielding the allegedly committed perpetrator. This is when the proceedings were or are being undertaken or the national decision was made for the purpose to protect the alleged perpetrator[37]. This standard was "the main purpose of adding a provision on 'unwillingness' (…) [in order] to preclude the possibility of sham trials aimed at shielding perpetrators" (Holmes, 2002).

The second standard deals to whether there are unjustified delays in the proceedings to bring the allegedly committed perpetrator to justice. This scenario occurs when there has been an unjustified delay in the proceedings which, in circumstances, is inconsistent with an intent to investigate or prosecute the concerned person[38]. This standard was included in the Statue as an additional criteria from which could be determined a purpose to shielding the allegedly committed perpetrator. Therefore, this delay must be inconsistent with the purpose to bring the person concerned to justice (Holmes, 2002).

The OTP informal expert paper on complementarity considers there are some indications that determine the "unwillingness" of a situation regarding the criteria of 'shielding a person' or 'unjustified delaying'. Those applicable for analysis of the content of the JPL are: a) general institutional

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[37] See article 17 (2) (a).

[38] See article 17 (2) (b).

deficiencies (political subordination of investigative, prosecutorial or judicial branch), and b) procedural irregularities indicating a lack of willingness to genuinely investigate or prosecute (OTP (c), 2003).

Finally, the last standard deals with the independence and impartiality of the proceedings (Holmes, 2002). Thus, this criterion deals with a situation in which the proceedings: a) were not or are not being conducted independently or impartially, and b) they were or are being conducted in a manner which, in the circumstance, is inconsistent with an intent to bring the alleged committed perpetrator to justice[39]. Therefore, where a State was unable to provide for independent and impartial proceedings (including guaranteeing due process for defendants), the Court should then intervene[40].

b. The JPL and the Willingness Standards

The content of JPL accomplishes RS standards of investigation or prosecution regarding the willingness of the State.

Regarding the first standard, this is because (1) JPL is not amnesty or pardon law, (2) it individualize the criminal responsibility of the perpetrators by two kind of penalties (i.e. the 'normal' and the '*alternative*'), (3) the law applies to all the members from all the illegal armed groups that have (or had) operate in Colombia, and (4) investigations are designed to be made by an independent prosecutor in order to allows (5) impartial prosecutions from independent judges.

However, it could be argued that with JPL proceedings what the government wants is to "to protect the alleged perpetrators" with smaller penalties, i.e. the *alternative penalties* between 5 and 8 years.

It is submitted that such statement is incorrect on the grounds of the second and third reasons abovementioned. It is also mistaken since the

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[39] See article 17 (2) (c).

[40] See article 17 (2) (c).

strict conditions that the JPL has for its beneficiaries is to achieve the *alternative penalty*. As was stated, it is the obligation of the accused to confess *completely and truthfully* all the facts that he knows on the *version libre*[41] but if he does not accept the charges or he retracts from what he had admitted in the *version libre* to the *Tribunal de Distrito Judicial*, he will lose the JPL benefits, and thus, be processed by ordinary procedures. Additionally, RS does not dispose a specific number of years in imprisonment[42]. Finally, JPL is even stricter that the RS in terms of fines and forfeitures of proceeds, property and assets derived directly or indirectly from crimes under jurisdiction of the Court[43]. It is because while under the RS regimen this is optional from judges, under the JPL those forfeitures are mandatory.

In relation to the second standard, the JPL proceedings were made to be as agile as possible.

Finally, concerning the third standard, JPL achieves RS standards since (1) the investigations or prosecutions are made to be independent and impartial and (2) the defendants have all the guaranties of due process recognized in international law.

CONCLUSION

The ICC is an institution of a complementary nature. It means that the Court should presume that the JPL proceedings are according to RS despite the fact that is a reconciliation process law in where the penalties can be smaller than in normal circumstances.

Article 17 is the main manifestation of the principle of complementarity. This article states that ICC can activate its potential-inactive jurisdiction on *situation* essentially if occurs the exceptional circumstance that a

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[41] This is a procedural instance that translates as free version.

[42] See article 77 (1) RS.

[43] See article 77 (2) RS.

State which has jurisdiction over the crimes also under jurisdiction of the Court is *unwilling* or *unable* to investigate or prosecute the alleged perpetrators. Consequently, ICC must presume good faith from State policies and its authorities.

Colombian JPL accomplishes *unwilling* investigation and prosecutions standards of RS. This is because (1) JPL is not an amnesty or pardon law, (2) it individualizes the criminal responsibility of the perpetrators by two kind of penalties (i.e. the "normal" and the "*alternative*") (3) the law applies to all the members of all the illegal armed groups that have (or had) operated in Colombia, (4) its investigations have been made through an independent national prosecution service and judicial branch which allows impartial decisions and (5) its proceedings were designed to be as swift as possible, (6) respecting all the guaranties of due process recognized by international law.

Additionally, there is no doubt that Colombian State is *available* (on grounds of the provisions or RS) to carry out the relevant proceedings for the ICC.

Therefore, it was submitted that the content of the JPL accomplishes RS standards, so an activation of the complementary jurisdiction of the Court on this grounds would not be legally correct.

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Acronym glosary

AUC	Autodefensas Unidas de Colombia
CAR	Central African Republic
DRC	Democratic Republic of Congo
ELN	Ejército de Liberación Nacional
FARC	Fuerzas Armadas Revolucionarias de Colombia
Interpol	Internacional Police
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JPL	Justice and Peace Law
OTP	Office of the Prosecutor of the International Criminal Court
PTC	Pre-Trial Chamber of the International Criminal Court
POL	Public order law
RS	Rome Statue
SC	Security Council of the United Nations
SP	States Parties (of the Rome Statue)
TSFD	Tribunal Superior de Distrito Judicial
UNFJP	Unidad Nacional de Fiscalía para la Justicia y la Paz
USA	United States of America

¿Podría desglosarse o acumularse una petición individual, en cualquier momento del procedimiento que se adelanta ante la Comisión Interamericana?

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