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The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now?

Extended version of the Statement in the "Thematic session: Colombia", ICC OTP – NGO roundtable, 19/20 October 2010, The Hague

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1. Introduction

This paper is based on and summarizes the results of an in-depth study of the Colombian peace process under the Law 975 of 2005 (also known as the "Justice and Peace Law"), with a view to the obligation set forth under the complementarity principle of the ICC Statute in its Article 17. In 2009, the research was commissioned by the Gesellschaft für Technische Zusammenarbeit (GTZ) –now Gesellschaft für Internationale Zusammenarbeit (GIZ) – and its Colombian project ProFis, a project funded by the German government with the primary goal of assisting Colombia´s Special Unit for Justice and Peace of the Office of the Prosecutor General in the implementation and application of Law 975 of 2005.[1] The study was presented in January 2010.

The paper briefly sets out the competence of the ICC in the context of the Colombian peace process with non-state armed groups and the main elements of the complementarity test under Art. 17. Then it summarizes the main findings of the study.

The full version of the study in Spanish language[2] can be downloaded under:

- http://www.profis.com.co/modulos/contenido/default.asp?idmodulo=3&documentos=pdfpublicaciones/Procedimientoleyjusticiaypaz.pdf

- http://www.department-ambos.uni-goettin-gen.de/index.php/component/option,com_docman/Itemid,77/gid,342/task,doc_download/

A (shorter) English version[3] can be requested from the author or purchased under:

- http://www.springer.com/law/international/book/978-3-642-11272-0

2. The peace process and the competence of the ICC

Colombia is a State Party to the Rome Statute since 1 November 2002.[4] At that time, Colombia made a declaration under Article 124 suspending the ICC's war crimes jurisdiction for seven

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[1] See for more information: http://www.department-ambos.uni-goettingen.de/index.php/en/Forschung/friedensprozess-in-kolumbien-aufgrund-des-gesetzes-975-v-2272005.html (accessed 27 December 2010).

[2] Kai Ambos (con la colaboración de Florian Huber/Rodrigo A. González-Fuente Rubilar y John Zuluaga), Procedimiento de la Ley de Justicia y Paz (Ley 975 de 2005) y Derecho Penal Internacional – Estudio sobre la facultad de intervención complementaria de la Corte Penal Internacional a la luz del demoninado proceso de „justicia y paz" en Colombia (GTZ, Temis, Bogotá, 2010).

[3] Kai Ambos, The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court – An Inductive, Situation-based Approach (Springer, Heidelberg, 2010).

[4] See Art. 126 (2) ICC Statute. Colombia deposited its instrument of ratification of the Rome Statute on 5 August 2002; http://www.icc-cpi.int/Menus/ASP/states+parties/Latin+American+and+Caribbean+States/Colombia.htm (accessed 27 December 2010).

years.[5] Since the expiration of this period on 1 November 2009, Colombia is also subject to the Court's jurisdiction over war crimes committed since that date.

Peace talks between the Colombian government and the paramilitary groups grouped together under the umbrella organization "Autodefensas Unidas de Colombia" (AUC) (United Self-Defense Forces of Colombia) started in late 2002. Between the end of 2003 and mid 2006, more than 31.000 members of the AUC demobilized progressively. During that period and since the official end of the disarmament process, some factions, which finally denied to demobilize or reorganized their armed structures after an apparent demobilization, as well as armed groups which tight links to the drug-trafficking business, which were not included by the Colombian government in the peace talks, have continued to operate throughout the country.[6]

Since 2002 there has not been much interest of the government and left wing guerrilla groups in a common peace process. The Colombian state has used the full range of its military, police and punitive powers, and has convicted and sentenced the FARC's main leaders resorting to in absentia trials. Recently some commentators have expressed concern about the potentially negative effects that the expiration of Article 124's suspension may have on future negotiations with the guerrilla groups.[7]

3. The complementarity test

Colombia has been under preliminary examination by the Office of the Prosecutor (OTP) since 2006. Since then, the OTP has made several official visits. To date, the Prosecutor has shown concern about alleged crimes within the jurisdiction of the ICC and investigations/proceedings against the allegedly most responsible perpetrators, including paramilitary leaders, politicians with links to organized armed groups, guerrilla leaders and military personnel. The Office is also analyzing allegations of international networks supporting armed groups committing crimes in Colombia.[8]

a) General considerations: the object of reference (situation vs. case), gravity and complementarity *stricto sensu*

While Art. 17 and 53 explicitly only refer to individual "cases" – i.e. specific incidents during which one or more crimes under the jurisdiction of the ICC might have been committed by indi-

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[5] See http://www.icrc.org/ihl.nsf/NORM/909EEAAE157FBD43412566E100542BDE?OpenDocument (accessed 27 December 2010).

[6] See National Commission for Reparation and Reconciliation, Disidentes, Rearmados y Emergentes ¿Bandas Criminales o Tercera Generación Paramilitar?, May 2007, available at: http://www.cnrr.org.co/new/interior_otros/informeDDR.pdf (accessed 27 December 2010); see also National Commission for Reparation and Reconciliation, La reintegración: logros en medio de rearmes y dificultades no resueltas, August 2010, available at: http://www.cnrr.org.co/new/publicaciones/DDR.pdf (accessed 27 December 2010).

[7] "Con la entrada de la Corte Penal Internacional se cerraron puertas para diálogo con la guerrilla," Cambio, 6 August 2009, available at: http://www.cambio.com.co/paiscambio/840/ARTICULO-WEB-NOTA_INTERIOR_CAMBIO-5784290.html (accessed 27 December 2010).

[8] Office of the Prosecutor, OTP Weekly Briefing, 7-13 December 2010 – Issue 67, available at: http://www.icc-cpi.int/NR/rdonlyres/7AC75CA5-614E-4E7C-AF73-48389366D55A/282813/OTPWeeklyBriefing713DecemberIssue_67.pdf (accessed 27 December 2010).

viduals –, it is clear that it is a "situation" – defined generally in terms of temporal, territorial and/or personal parameters – which is referred to in Art. 13 with regard to the triggering process of the ICC. Within a situation, the OTP applies a sequential approach by investigating specific cases one after another rather than all at once, whereby cases inside the situation are selected according to gravity. As soon as the Prosecutor bundles allegations against one or more specific individuals in an early stage of the preliminary investigation, a case hypothesis arises with a view to identify possible specific incidents and suspects according to the degree of gravity and responsibility. From this follows that the Prosecutor has, at the pre-investigation stage, i.e. when he has not yet decided whether he will formally initiate an investigation of a situation, to examine the admissibility with regard to such a situation. He operates on the basis of said case hypothesis checking admissibility only in a generalized manner, but taking into account its general selection criteria, in particular the importance of the suspect and his role. In the case that a State develops some activity, so that situation or case may be inadmissible pursuant to Art. 18 (1) (a)-(c) and 20 (3) (inadmissibility due to State action), the Prosecutor has to look at the concrete cases under national investigation and prosecution in order to define if – despite some State action – the criteria of unwillingness or inability to investigate and prosecute the most responsible perpetrators are fulfilled (see below).

Art. 17 provides for a twofold test distinguishing between complementarity stricto sensu pursuant to Art.17 (1) (a)-(c), (2) and (3) on the one hand, and an additional gravity threshold pursuant to Art. 17 (1) (d) on the other hand. Thus, complementarity stricto sensu only becomes relevant if the respective situation or case is of sufficient gravity in the first place.

As to *Colombia*, the gravity standard can be evaluated on the basis of quantitative criteria, especially in the light of the scale, nature and manner of the violence and crimes committed. Due to the number, seriousness and systematic and widespread character of the crimes committed by non-state armed groups, there can be no doubt that the Colombian situation overcomes the threshold of gravity of Art. 17 (1) (d).

In the case of complementarity stricto sensu it follows from the wording of Art. 17 (1) ("... the Court shall determine that a case is inadmissible where...) that admissibility is presumed and that this presumption may be refuted by – apart from insufficient gravity (Art. 17 (1) (d)) – some action on part of the respective State with regard to its investigation and prosecution obligations. This action must be examined more closely with a view to the requirements established under Art. 17 (1) (a), (b) and (c) in connection with Art. 20. If the respective State action fulfills these requirements, the situation or case are inadmissible. If, in contrast, the state action indicates or entails unwillingness or inability in the sense of Art. 17 (2) or (3), the situation or case must be declared admissible. If, on the other hand, such action is lacking at all, i.e. in the case of (total) inaction, admissibility may be presumed without extensive further reasoning. Thus, the complementarity test stricto sensu may be structured in a threefold way:

- First, situations and cases are admissible if the State remains (completely) inactive (admissibility due to total State inaction)
- Second, if a State develops some activity, a situation or case may be inadmissible pursuant to Art. 18 (1) (a)-(c) and 20 (3) (inadmissibility due to State action)

- Third, as an exception to the inadmissibility mentioned before, despite or because of the State activity, unwillingness or inability on the part of the State is established pursuant to Art. 17 (2) and (3) (admissibility due to unwillingness or inability)

b) Admissibility due to total State inaction

International treaty and customary law provides for a general duty of States to investigate, prosecute and punish international core crimes. While this duty already existed before the ICC Statute, at least regarding the States parties of the respective treaties and/or regarding the respective customary law norms, the ICC Statute has reinforced it with regard to the Statute crimes and with regard to its States parties. Consequently, if a State party remains inactive in the face of genocide, crimes against humanity or war crimes within the meaning of Art. 5-8 of the ICC Statute, it fails to comply with its duty flowing from both the Statute and general international law. This inaction alone makes the situation or case inadmissible under Art. 17 making the analysis of the unwillingness or inability criteria unnecessary. This also follows form an *e contrario* interpretation of Art. 17 (1) (a)-(c), for if this provision requires at least some action (initial investigative steps) for a situation or case to be declared inadmissible, no action whatsoever makes the case admissible without further ado. Inaction in this sense, albeit an empirical not normative concept, is not limited to factual inaction, but also extends to "normative" inaction, i.e. situations where inactivity is due to normative (procedural) obstacles, in particular a blanket amnesty (which is generally inadmissible).

With regard to the criterion of "admissibility due to total State inaction" in the Colombian case, the very existence of Law 975 of 2005 with its special criminal procedure demonstrates that the Colombian State is undertaking efforts to deal with the crimes committed by illegal armed groups. In addition, while Law 975 of 2005 is a new and innovative instrument in Colombia's long lasting intent to resolve the armed conflict, it is not the only one but part of a broader normative and political framework which, notwithstanding its shortcomings and deficits, amounts to a great deal of State activity in order to come to terms with the violence related to the armed conflict. In sum, it can be concluded, that *there is neither a factual nor a normative scenario of State inactivity.* The existing factual and procedural obstacles do not amount to inactivity or a substantial de-activation of the institutional apparatus available to investigate and prosecute international core crimes. Procedural difficulties or obstacles must not be confused with the concept of total inactivity, be it for factual or normative reasons. It is in the context of unwillingness and inability where these obstacles must be revisited taking into account political, operational, administrative and management-related conditions of the criminal proceedings under Law 975 of 2005.

In this respect, the Colombian case differs significantly from the situations of Uganda, Congo, Sudan, Central African Republic and Kenya, which are under investigation before the ICC, as these situations are characterized by a total inactivity of the respective States making the intervention of the ICC admissible without the need to analyze the unwillingness and inability criteria.

c) Inadmissibility due to State action

There seems little doubt that the procedure under Law 975 of 2005 complies with both the investigations/prosecution and trial requirements of Art. 17. It provides for a full-fledged criminal pro-

cedure whose main difference with the ordinary criminal procedure consists of its inquisitorial nature and reliance on the demobilized person´s full confession as the starting point and basis of the subsequent verification procedure. Among different scenarios of transitional justice the Colombian case can be located in the group of "measures that do not amount to full exemptions of criminal responsibility", since Law 975 of 2005 does not completely extinguish punishment, but only grants a considerable reduction of the sentence.

The facts of the case must be investigated by the Office of the Prosecutor General (*Fiscalía General de la Nación*). In addition, the Supreme Court of Justice (*Corte Suprema*) requires extending the investigation beyond the concrete cases to the structural aspects (context of the crimes committed, structure of the armed group involved, links to the state security forces, etc.). On the basis of the factual findings emerging from the confession and its subsequent verification the charges will be formulated and the person concerned tried by the competent judges. The judicial benefit of a reduced prison sentence depends on the cooperation (full confession) by the respective member of the irregular armed group. If he does not cooperate fully he may lose his judicial benefits and be subjected to an ordinary criminal process. While this exclusion from the procedure and benefits under Law 975 of 2005 will only be taken as ultimate resort, its mere possibility shows that the State is ready and willing to "do justice" by ordinary means. Whether this – despite the multiple problems and difficulties of the process – satisfies the complementarity requirements is a question of the unwillingness and inability test.

d) Admissibility due to unwillingness or inability

If complementarity *stricto sensu* is understood in a threefold way as mentioned before, all state action mentioned in Art. 17 (1) (a) – (c) only creates a presumption of inadmissibility, which may be refuted by the establishment of unwillingness or inability pursuant to Art. 17 (2) and (3). The interpretation of these criteria is controversial and remains unsettled, not the least because they are highly normative and open to value judgment. However, one may identify a structural distinction between unwillingness and inability: while in the former case a, in principle, functioning judicial system is politically manipulated to generate impunity for powerful and influential perpetrators, in the later case such a system does, in the worst case, physically not even exist or is substantially collapsed or unavailable.

While unwillingness is not defined in the Rome Statute, Art. 17 (2) only spells out three criteria, which have to be considered, which are the *purpose of shielding* suspects from criminal responsibility, *unjustified delays* in the proceedings and the *lack of independence and impartiality*. While the first criterion (purpose of shielding) suggests a subjective interpretation in the sense of the State´s specific intention, objective or desire to protect individuals from criminal justice, the second and third criteria (unjustified delay and the lack of independence and impartiality) can be understood in a more objective way. However, both subparagraphs (b) and (c) require that the unjustified delay and the lack of independence or impartiality are "inconsistent with an intent to bring the person concerned to justice". This requirement, which operates in addition to the former ones, adds again an element of subjectivity.

In assessing the unwillingness of the national jurisdictions, the following factors, among others, may be taken into account: institutional shortcomings regarding the independence and impartiality of the judiciary (e.g. an investigative, prosecutorial or judicial branch submitted to political authority, or, more broadly, faulty procedural safeguards or a lack of constitutional safeguards for the independence of the judiciary); systematic interference of the executive power in judicial affairs; lack of pre-established parameters governing prosecutorial discretion; notorious lack of independence of judges and prosecutors, notwithstanding the existence of constitutional safeguards; resort to special jurisdictions or extrajudicial commissions of enquiry for international crimes; lack of mechanisms ensuring adequate protection of witnesses; general unavailability of enforcement authorities; obstruction or delay of a case, whether or not due to involvement of political authorities. In order to define if a situation can be characterized as exposing a lack of willingness, analysis of the unwillingness criterion should be referred to the cases hypothesis as part of a possible situation. In the *Colombian* case, special attention must be given to the extradition of paramilitary leaders to the US, the pressure exercised by the former Uribe government against judicial sectors and the fact that Law 975 of 2005 is only being applied on a voluntary basis to a very reduced number of members of illegal armed groups who accept to be prosecuted under the special criminal procedure. Therefore, the great majority of members of illegal armed groups and all state officials are excluded from the application of Law 975 of 2005, which poses the *question if there is a real willingness to investigate and prosecute effectively these persons* under the subsidiary ordinary criminal system.

The inability concept is more objective and factual than its counterpart of unwillingness. Nevertheless, its correct interpretation remains controversial. Inability is determined by three disabling events: a *total collapse*, a *substantial collapse* or the *unavailability* of the national system. Due to the complex institutional framework under Law 975 of 2005 with new institutions and specialized units within the existing judicial institutions and existing criminal proceedings, it is *not possible to speak of a total or substantial collapse of the judicial system in Colombia.*

The determination of unavailability is more difficult, not least because it overlaps with the substantial collapse requirement. In a strict, narrow sense, it might be understood as referring to the non-existence of something. On the contrary and in a broader sense, it could be under understood as the non-accessibility of something existing or the non-usefulness of a remedy, despite its accessibility. Such a broad understanding of the unavailability criterion would allow for including situations where a legal system is generally in place, but in concrete terms does not provide for effective judicial remedies or access to courts, be it for political, legal or factual reasons, or the national system is not able to produce the desired result of bringing the responsible persons to justice. A convincing and sensible interpretation should be based on a *compromise between the broad and the narrow interpretation.* A too narrow interpretation would make the "total or substantial collapse" criteria superfluous and must therefore be rejected. On the other hand, a too broad interpretation would ignore that by using the terms "substantial" instead of "partial" (collapse), the mere inefficient functioning of a judicial system with its deficiencies should not fall under the unavailability concepts. Thus, in the result, the existence of substantial legal or factual obstacles entailing a lack of effective remedies may only constitute unavailability if this qualification can be made by an external observer without entering into value (quality) judgments regarding the internal functioning of the national justice system concerned. The qualification must

be based on *objective (quantitative) factors which are easily verifiable* from outside of the system, for example empirical information indicating that there is no effective remedy for human rights violations. Under these circumstances it is possible that a capacity overload might render the judicial system unavailable, either due to the sheer magnitude of the crimes committed or due to the lack of personal or other resources.

With regard to this criterion of inability (lack or non-availability of a national justice system) in the *Colombian* case, the Colombian State lodged an interpretative declaration on 5 August of 2002, according to which the use of the word "otherwise" in Art. 17 (3) 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. Based on this declaration, the Constitutional Court adopted a similar restrictive approach as to the inability standard. According to the Court, "otherwise unable" refers to a clear absence of necessary objective conditions to carry out proceedings and must be comparable with the concrete examples mentioned in Art. 17 (3), i.e. "to obtain the accused or the necessary evidence and testimony", which are easily verifiable and deal with objective prerequisites to carry out investigations. Obviously, if one follows this view (that corresponds to the restrictive interpretation), a non-availability of the national justice system would not exist, for the Colombian judicial system is generally functioning, notwithstanding its limitations and shortcomings. However, *doubts* remain with regard to the extradition of the paramilitary commanders, who – in practical terms – are not any more accessible in many occasions as suspects or witnesses in national proceedings. Clearly, a broader interpretation of the inability criterion, which focuses on the concrete effectiveness of a judicial remedy in a particular case, might lead to a different conclusion arguing the deficits in the application of Law 975 of 2005, along with the enormous caseload and the lack of personal, financial and institutional resources.

4. Some preliminary recommendations for the further application of Law 975 of 2005

Due to the numerous and serious flaws in the application of Law 975 of 2005 since 2006, *more efforts* have to be undertaken in the near future in order to comply with the complementarity principle under Art. 17 ICC, especially with a view to bring to justice high and middle rank paramilitary leaders and their allies from political, business and military sectors.

- Given the large number of crimes, perpetrators and victims, it is of utmost importance that the Office of the Prosecutor General, lead by the recently (finally!) new elected Prosecutor General, Viviane Morales, develops a global and comprehensive *strategy* of investigation with clear prosecution objectives and targets, taking into account the macro-criminal context of the crimes committed. Such a strategy presupposes a policy of selecting and prioritizing crimes, suspects and cases focusing on the most responsible and on paradigmatic cases which make the real dimensions and magnitude of the violence visible. On the other hand, such an integral strategy should not be limited to the isolated investigation and prosecution of demobilized members of illegal armed groups under the legal framework of law 975 of 2005, but needs to incorporate criminal proceedings against high ranking military

commanders, politicians with links to illegal armed groups, and business men who benefited from alliances with illegal armed groups.

- On the level of *substantive law*, the strategy must be complemented by the development of uniform and stringent criteria as to what crimes and forms of attribution/imputation (participation) should be applied in identical or similar cases. Indeed, the strategy deficit is worsened by the almost *chaotic state* of the Colombian substantive criminal law, characterized by continuous legislative amendments, the incomplete incorporation of international core crimes, the lack of a consolidated jurisprudence concerning these crimes and a widespread confusion regarding the interplay between international and domestic criminal law. There is a clear need for expert advice and legal reforms in this area.

- Notwithstanding a holistic approach in terms of a prosecutorial strategy and the requirement of a full and truthful confession of the crimes committed by demobilized members of illegal armed groups seeking the judicial benefit of the alternative sentence under Law 975 of 2005, the use of *successive ("partial") imputations* (charging) and – as a logical consequence – successive proceedings should be applied in an appropriate manner taking into consideration historical, geographical, material or personal criteria or circumstances and focusing primarily on the most responsible and the most serious crimes.

- The practice of *collective* confession *hearings* (*versiones libres*) with several suspects has considerably accelerated the proceedings, so that a wider use of collective judicial hearings and *joinders* of trial proceedings can be recommended. In order to avoid further congestion of the criminal proceedings, the backlog of cases and the delay of the proceedings, it seems convenient to *reconsider the procedural framework* with a view to reducing the number of hearings during the criminal proceedings. The current practice of realizing two preliminary hearings (on the formulation of imputation and formulation of charges) before the actual hearing on the legalization of charges before a Trial Chamber could be replaced through a judicial reform which provides for only one hearing in which the Prosecutor – after having completed the investigation – presents the charges before the Trial Chamber. The Chamber has then to decide on the legalization of charges and the fulfillment of the requirements for the access to judicial benefits like the reduced prison sentence.

- One of the biggest challenges is to improve the *inter-institutional between and intra-institutional cooperation within institutions* involved in the application of Law 975 of 2005 (i.e. especially the Special Unit for Justice and Peace of the Office of the Prosecutor General, the Higher Tribunal's Investigative Judge and the Special Chambers of Justice and Peace, the Special Units for Justice and Peace of the Procuraduría General de la Nación, the Human Rights Ombudsman and the national and regional offices of the National Commission for Reparation and Reconciliation). The *inter-institutional* cooperation should focus on the access to information about the suspects and victims, the smooth exchange of information regarding ongoing and future proceedings, the scheduling of hearings, the assignation of well trained and experienced legal representatives to victims of cases dealt with during the hearings and the adoption of preliminary measures to protect victims, witnesses or to secure the demobilized person's assets necessary for the reparation of victims. *Intra-*

institutional cooperation refers to the relationship between different units within the said institutions. Generally, this cooperation suffers from the lack of continuity of the personnel working in all institutions, especially the Special Unit for Justice and Peace of the Office of the Prosecutor General. The lack of a public and transparent competition procedure as a prerequisite to enter most public institutions means that officials have no job security and can be sacked almost at will by their superiors. The high fluctuation has the consequence that the accumulated experience and knowledge of more experienced officials is getting lost and the new officials have serious problems to catch up in ongoing proceedings. Thus, a *professionalization* of public service and institutions in Colombia is, not only in the context of the application of Law 975 of 2005, overdue. In the case of the Human Rights Ombudsman (*Defensoría del Pueblo*) it is important to guarantee an adequate legal representation, not only in the preliminary phase of the proceedings, but also before the Justice and Peace Chamber of the High Tribunal in Bogotá. Given the concentration of this phase of the proceedings in Bogotá it is important to make sure that the regional offices of the Defensoría del Pueblo pass on the case files to the public defenders in Bogotá. On the other hand, it must be assured that victims` requests for legal representation and participation lodged in the ordinary local offices of the Defensoría del Pueblo will be transmitted to the Special Units for Justice and Peace of the Defensoría.

- The problems of coordination between and within governmental entities are also a result of the geographic *centralization* of the Justice and Peace proceedings under Law 975 of 2005. While the confession hearings are taking place in several cities and towns throughout the country, only three major cities (Bogotá, Medellín and Barranquilla) host the judicial hearings referring to the imputation and formulation of charges. Even worse, the hearings for the legalization of charges, on reparations and for sentencing lie in the exclusive competence of the Higher Tribunal`s Special Justice and Peace Chamber which currently only operates in Bogotá. As a consequence, access to judicial hearings is difficult, if not impossible for most victims, their legal representatives and even postulated personas since they normally live in the areas where crimes have been committed and these are far away from the major cities. Thus, it is highly advisable to *decentralize* the criminal proceedings, in order to, at least, remove this obstacle for the participation of especially the victims. Against this background the decision to establish Trial Chambers in Barranquilla and Medellín is to be welcomed, but further steps must be taken to strengthen the judicial infrastructure. In this regard it is worthwhile recalling that these disadvantages of a centralized judicial structure might also be mitigated by an adequate *outreach* program which facilitates the access to the hearings through modern forms of communication (technology), e.g. online transmissions of hearings, electronic access to the case files and sufficiently in advance information regarding the scheduling and content of prospective hearings.

- In any case, the access to the hearings is just one problem related to the deficient *victims' participation* in the Justice and Peace procedure. Many practical steps are needed to improve the security and mobility of the victims and thus effectively enable them to participate in the proceedings. The Trust Fund for *Reparations* lacks sufficient resources to adequately compensate victims. Many victims are not properly informed and thus ignorant about their rights. Given the complexity of the legal framework of Law 975 of 2005 the ef-

forts made to adequately inform victims about their rights to justice, truth and reparation and the existing remedies established under national law must be increased.

- Last but not least, the *extraditions* of several high rank commanders of the paramilitary groups in May 2008 to the US occurred without the establishment of a comprehensive and detailed legal framework as to (subsequent) cooperation between Colombia and the US, especially securing the continued access to these persons by the Colombian authorities. Thus, at the moment, it is the exclusive decision of the US authorities to grant access or not. Even though these commanders can formally be investigated and prosecuted in absentia or through videoconference hearings under the Law 975 of 2005 procedural framework or the ordinary justice system, or be called as witnesses in trials against politicians, business men or members of the state security forces, in practical terms it has resulted extremely difficult to advance with the confession hearings and the trials against them as the accused or against third persons with the extradited commanders being witnesses. Therefore, this de facto exclusion of these persons from the Justice and Peace procedure entails the *loss of essential information* with regard to the establishment of the truth. Thus, with a view to Colombia´s (international) obligations under international human rights law vis-à-vis the victims, this situation should be corrected as soon as possible and this presupposes, as already stated, an agreement between Colombia and the US on judicial cooperation.

5. Conclusions

The *limited progress* with regard to pending and ongoing investigations under the framework of Law 975 of 2005 due to normative, procedural, institutional and structural problems, the difficulties to investigate and prosecute members of illegal armed groups no taking part in the special procedure of Law 975 of 2005, and of politicians, high rank military commanders and influential business men for their ties with illegal armed groups since 2002 under the ordinary judicial system, the extradition of leading paramilitary commanders, and the permanent pressure of the former government under ex-president Álvaro Uribe to limit independent investigations of the Supreme Court of Justice against representatives or allies of his government, clearly indicate that Colombia, despite some progress in the proceedings against low or mid rank members of illegal armed groups or state officials, struggles with significant difficulties to comply with the prerequisites under Art. 17. Thus, unfortunately, since the termination of our study in January 2010, no significant progress has been made with a view to our recommendations set out above.

In this context, it must also be born in mind that in the case of declaring an investigation into a *situation* admissible on the basis of a legal analysis, it will – on a second level – be necessary to define adequate individual *cases* for investigation and prosecution. For this task, intimately linked to a broad set of policy options on cooperation, the Prosecutor counts with a broad prosecutorial *discretion* which allows him to single out those cases which – due to their gravity and the rank and status of the suspects – demonstrate a lack of willingness and/or inability to bring to justice those who are most responsible for the commission of international crimes in Colombia since 2002. If no substantive progress on the various fronts identified in our study is made in the

short or medium term, it is becoming increasingly difficult to justify a (selective) non-intervention of the ICC – notwithstanding the Prosecutor's apparent personal preferences[9]

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[9] As expressed in a recent interview in the Colombian newspaper *El Tiempo* (6 December 2010): "'Colombia puede ofrecer su experiencia': fiscal jefe de la CPI", available at: http://www.eltiempo.com/justicia/ARTICULO-WEB-NEW_NOTA_INTERIOR-8537230.html (accessed 4 January 2011).