

Judgment C-370/06

LAW OF JUSTICE AND PEACE- No requirement to reserve statutory law

THING JUDGED CONSTITUTIONAL-Configuration

REGULATORY UNIT-Integration

INCONSTITUTIONALITY DEMAND-Charges must be clear, certain, specific, relevant and sufficient

AMNESTY AND INDULT-Approval by qualified majority

AMNESTY AND INDULT-Distinction

JUSTICE AND PEACE LAW-No amnesty or **pardon/JUSTICE AND PEACE LAW-** legislative **procedure** as ordinary law

It is observed by the Court that it does not provide for the extinction of criminal action in relation to crimes that may be imputed to members of armed groups who decide to take advantage of it, which is why it is clear that the State did not decide through this law to forget about criminal actions, so that in juridical-constitutional rigor the affirmation according to which this law grants an amnesty is not acceptable. With regard to the alleged granting of a pardon, there is also no evidence that any of the norms contained in the accused law provide that the penalty with which a process initiated against members of illegal armed groups who decide to avail themselves of that law once imposed by a judicial sentence ceases to be executed. While it was true that he was subject to less stringent criminal law treatment than that provided for in the Criminal Code, the truth was that, even so, the penalty did not disappear. This is imposed, but the defendant may be entitled to a benefit that could reduce the deprivation of liberty for a time, without it disappearing. In the present case, therefore, the budgets defining amnesty and pardon are not given, and it could therefore be wrong to require the Legislator to carry out a procedure reserved for this type of legal entity for the issuance of the accused law.

DRAFT LEGISLATIVE ACT-Tramite must continue when there is no approval of a provision/**DRAFT LEGISLATIVE ACT-Plenary** of the respective House may again introduce matter denied by the Committee.

CRIME OF SEDITION IN LAW OF JUSTICE AND PEACE-Inconstitutionality for formal defects

LAW ON JUSTICE AND PEACE-Unawareness of the principle of **consecutivity/LEGISLATIVE TRAMITE-** undue processing of appeal

With the procedure given to articles 70 and 71 of Law 975/05, the principle of consecutivity was ignored, since as a result of the undue processing of the appeal presented in the Senate before the decision to deny them adopted by the Permanent First Constitutional Commissions, they were finally referred to Constitutional Commissions that were not competent; and once approved by the latter without having the competence to do so, they were introduced in an irregular manner in the second debate before the plenary of the Senate, as if they had been approved by the Constitutional Commissions empowered to do so.

LAW OF JUSTICE AND PEACE-Object

LAW ON JUSTICE AND PEACE - Scope of application

LAW ON JUSTICE AND PEACE - Victims' Rights

RIGHT TO PEACE-Consecration in international instruments

RIGHT TO PEACE-Nature/RIGHT TO PEACE IN INTERNATIONAL LAW-Fundamental Purpose/RIGHT TO PEACE-Third Generation Right/RIGHT TO PEACE-Subjective Right/RIGHT TO PEACE-Legal Duty

Peace constitutes (i) one of the fundamental purposes of International Law; (ii) a fundamental end of the Colombian State; (iii) a collective right at the head of Humanity, within the third generation of rights; (iv) a subjective right of each one of the human beings individually considered; and (v), a legal duty of each one of the Colombian citizens, to whom it corresponds to tend to its achievement and maintenance.

JUSTICE OF TRANSITION-Concept

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS-Obligation of the State to investigate, prosecute and punish human rights violations

AMERICAN CONVENTION ON HUMAN RIGHTS-Obligation of the State to investigate, prosecute and punish human rights violations

CONVENTION AGAINST TORTURE AND CROSS, HUMAN OR DEGRADANT TREATMENT OR PENALTY-Rights of victims

INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PEOPLE - Obligations of States

CONVENTION ON THE PREVENTION AND PUNISHMENT OF GENOCIDE

INTERNATIONAL CRIMINAL COURT-Competence complementary to the jurisdiction of the State party

INTER-AMERICAN COURT OF HUMAN RIGHTS-Jurisprudence concerning the right to justice, investigation, knowledge of the truth, reparation for victims and non-repetition

JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS-Importance as a Source of International Law

INTERPRETATION OF RIGHTS UNDER INTERNATIONAL TREATIES-Importance of the jurisprudence of the Inter-American Court of Human Rights

HUMAN RIGHTS VIOLATION-Prevention Obligation

VIOLATION OF HUMAN RIGHTS-Obligation of research

HUMAN RIGHTS VIOLATION-Obligation of prosecution and judicial sanction

HUMAN RIGHTS VIOLATION-Obligation to investigate, prosecute and sanction within a "reasonable time".

IMPUNITY - Obligation to prevent it

HUMAN RIGHTS VIOLATION-State obligation to initiate *ex officio* investigations

VICTIM REPAIR-Scope

RIGHT TO THE TRUTH-Scope

set of principles for the protection and promotion of human rights through the fight against impunity - the rights of victims in peace transition processes

REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS ON THE DEMOBILIZATION PROCESS IN COLOMBIA-Concepts of truth, justice and reparation

RIGHTS OF VICTIMS TO TRUTH JUSTICE AND REPAIR-Constitutional Jurisprudence

FREEDOM OF LEGISLATIVE CONFIGURATION IN THE FIELD OF PEACE-Limits

METHOD OF PONDERATION IN LAW OF JUSTICE AND PEACE-Need to apply/PAZ-Not absolute value

The weighting method is appropriate for the resolution of the problems posed by this case, since it is not possible to fully materialise, simultaneously, the different rights at stake, namely justice, peace, and the rights of victims. The achievement of a stable and lasting peace that removes the country from the conflict through the demobilization of illegal armed groups may be subject to certain restrictions on the objective value of justice and the correlative right of victims to justice, since otherwise, because of the factual and legal situation of those who have taken part in the conflict, peace would be an unattainable ideal. This is a political and practical decision of the Legislator, which is oriented towards the achievement of a constitutional value. In this sense, Law 975 of 2005 is a development of the 1991 Constitution. But peace doesn't justify everything. The value of peace cannot be given an absolute scope, since it is also necessary to guarantee the materialization of the essential content of the value of justice and of the victims' right to justice, as well as the other rights of victims, despite the legitimate limitations imposed on them in order to put an end to the armed conflict.

CONTROL OF CONSTITUTIONALITY OF THE LAW OF JUSTICE AND PEACE-Pounding peace, justice and the rights of victims

PENAL ALTERNATIVITY-Concept

PENAL ALTERNATIVITY-Characteristics

ALTERNATIVE PENALTY IN LAW OF JUSTICE AND PEACE-Essential elements

ALTERNATIVE PENALTY IN LAW OF JUSTICE AND PEACE-No pardon implied

ALTERNATIVE PENALTY IN JUSTICE AND PEACE LAW-Penalty deprived of liberty for 5 to 8 years

ALTERNATIVE PENALTY IN JUSTICE AND PEACE LAW-It does not disproportionately affect the value of **criminal justice/ALTERNATIVITY IN JUSTICE AND PEACE LAW-Cooperation** with justice must be directed towards the effective achievement of victims' rights.

This configuration of the so-called alternative penalty, as a measure aimed at achieving peace, is consistent with the Constitution in that, as derived from articles 3 and 24, it does not entail a disproportionate affectation of the value of justice, which is preserved by the imposition of an original penalty (principal and accessory), within the limits established in the Criminal Code, proportional to the offence for which the offender has been convicted, and which must be served if the demobilized person convicted fails to comply with the commitments under which the benefit of the suspension of the sentence was granted. However, the Court considers that some expressions of Articles 3, 20 and 29 deserve special consideration insofar as they may contain measures that, despite being oriented towards the achievement of peace, could entail a disproportionate affectation of the value of justice and particularly of the right of victims. This is the case with the expression of article 3, which conditions the suspension of the execution of the sentence determined in the respective sentence, to "collaboration with justice". This requirement formulated in such generic terms, stripped of specific content, does not satisfy the right of victims to the effective enjoyment of their rights to truth, justice, reparation and non-repetition. Criminal alternatives would seem to disproportionately affect the rights of victims if the "collaboration with justice" did not include the entirety of the rights of such victims, and if it did not require concrete actions on the part of those who aspire to access such benefits in order to ensure the effective enjoyment of these rights. Consequently, the Court will declare the constitutionality of Article 3, on the understanding that "collaboration with justice" must be directed to the effective achievement of the victims' rights to truth, justice, reparation and non-repetition.

ACCUMULATION OF PENALTIES IN JUSTICE AND PEACE LAW-Procedure/ACUMULATION OF PENALTIES IN JUSTICE AND PEACE LAW-Inconstitutionality expression "but in no case shall the alternative penalty be greater than that provided for in this law".

The value of justice is not disproportionately affected by the fact that the legal cumulation of penalties, determined in accordance with the rules established for that purpose by the Criminal Code, operates in relation to the main penalties that may be imposed or imposed, in respect of the various offences perpetrated during and on the occasion of the convicted person's membership of the respective group, which are the subject of the cumulation. The foregoing does not mean that in these cases they cease to be benefited by what the law has called criminal alternatives. In such a way that if the demobilized person previously convicted for criminal acts committed during and on the occasion of his or her membership of an organized armed group outside the law is covered by Law 975 of 2005, and fulfils the corresponding requirements, such prior conviction shall be legally cumulated with the new sentence that may be imposed as a result of his or her free version and the investigations carried out by the Public Prosecutor's Office. After this legal cumulation has taken place, the judge shall fix the ordinary sentence (principal and accessory sentence), the execution of

which shall be suspended and the benefit of the alternative sentence of 5 to 8 years in relation to the cumulative sentence shall be granted, if the requirements of Law 975 of 2005 are met. If, after the time of the alternative sentence and the probationary period has elapsed, the sentenced person has fully complied with the obligations established by law, the sentence initially determined in the sentence as a result of the legal accumulation shall be declared extinguished. Otherwise, it will be revoked and the sentenced person will have to serve the accumulated sentence, initially determined in the sentence (articles 24 and 29). The same does not apply to the expression "but in no case may the alternative penalty be greater than that provided for in this Act" in paragraph 2 of article 20, which is unconstitutional. This segment completely eliminates convictions for criminal acts committed prior to demobilization, since it conditions the legal accumulation of penalties from which the ordinary penalty, the execution of which is to be suspended, is to be determined in the sentence. Such a total removal of the previous conviction amounts to a manifestly disproportionate affectation of the victims' right to justice and could be interpreted as a disguised pardon.

FREEDOM TO TEST IN JUSTICE AND PEACE LAW-Requirement not to repeat the crime for which he was convicted is contrary to justice and victims' right to non-repetition.

With regard to article 29, the Court notes that, as paragraph 4 is worded, the commitment acquired by the beneficiary of the alternative penalty during the period of probation consists of "not relapsing into the crimes for which he was convicted in the framework of the present law". This expression entails a disproportionate affectation of the value of justice and of the right of victims to non-repetition, since it allows the coexistence of the benefit of sentence reduction with phenomena of recidivism in relation to crimes other than those for which they were convicted. No contribution to peace or justice can make such a permissive measure. The benefits granted must be linked to the convicted person's unwavering commitment not to intentionally engage in criminal conduct of any kind, and to the beneficiary's effective contribution to the attainment of peace. The purposes of resocialization and reinsertion that animate these benefits become innocuous with an expression such as the one in question. The intentional commission of a new crime during the period of probation, whatever its nature, generates the revocation of the benefit.

RIGHT TO TRUTH IN LAW OF JUSTICE AND PEACE-Unawareness in rule that does not provide for loss of benefits by not confessing all crimes

The standards demanded establish that persons who have committed crimes as members of specific armed groups are entitled to a substantial reduction in the effective penalty to be served. In order to obtain this benefit it would seem, according to one interpretation, that they do not have to confess all the crimes in which they participated as members of a block or front. They could confine themselves exclusively to recognizing the crimes for which they are held responsible by the State without providing any additional information. If in the future the State finds that not all the crimes were confessed, the person does not lose the benefits that have already been imposed on him in respect of the crimes he accepted to commit. In addition, he may have access to new benefits in respect of unconfessed offences if the State cannot prove to him that the omission was intentional. The Court considers that this regulation ignores the victims' right to the truth, whose constitutional and international dimension was previously reiterated.

RIGHT TO TRUTH-Minimum content

The minimum content of the victims' right to the truth protects, in the first place, the right to have the most serious crimes investigated. This implies that such crimes must be investigated and that the State is liable by action or omission if there is no serious investigation in accordance with national and international standards. One of the forms of violation of this right is the non-existence of

measures that sanction justice fraud or incentive systems that do not seriously take into account these factors or seriously and decisively promote the attainment of the truth.

RIGHT TO THE TRUTH-Collective Dimension

As far as the collective dimension of truth is concerned, its minimum content includes the possibility for societies to know their own history, to elaborate a relatively reliable collective account of the facts that have defined it and to have memory of those facts. To this end, impartial, comprehensive and systematic judicial investigations must be carried out into the criminal acts for which an historical account is sought. A system that does not benefit the reconstruction of historical truth, or establishes only weak incentives for it, could compromise this important right.

FREE VERSION AND CONFESSION IN LAW OF JUSTICE AND PEACE-Must be complete and truthful

PENAL ALTERNATIVITY-Revocatory for having hidden in free version participation in crime

The Court warns that the fifth paragraph of Article 29, aimed at regulating the cases of revocation of probation and of the benefit of alternative sentencing, uses an overly broad expression, e.g., "fulfilled these obligations". Such obligations may be those of the immediately preceding paragraph, which would leave the victims' right to the truth completely unprotected. On the other hand, the second paragraph of that article refers to "the conditions provided for in this law", which includes multiple requirements, without specifying which ones. This is especially important with regard to the right to the truth, which would be mocked if the convicted person could maintain the benefit of the alternative sentence despite the discovery of a crime committed on the occasion of his belonging to the specific armed group, imputable to the beneficiary and which he had concealed in his free version. According to this interpretation, the beneficiary of the alternative would continue to enjoy the alternative penalty despite having concealed, not any crime, but one in which he participated as a member of the block or to which he belonged. Where the concealed offence is also directly related to his membership of a specific demobilised group, or from which he individually decided to separate in order to demobilise, it is manifestly disproportionate to admit that the convicted person retains the benefit. In effect, this interpretation would render the alternative inoperative and inefficient in the face of the ends of justice, and would excessively affect the right to truth. For these reasons, the Court shall declare constitutional paragraph 5 of article 29 on the understanding that the benefit of alternation shall also be revoked when the beneficiary has concealed in the free version his participation as a member of the group in the commission of a crime directly related to his belonging to the group.

CRIMINAL BENEFITS IN JUSTICE AND PEACE LAW-Can only be conferred on those who have fully satisfied the victims' right to the truth.

LEGISLATIVE OMISSION RELATIVE-Concept

RIGHT TO TRUTH IN FORCED DISAPPEARANCE CRIME-Implies the right to know the final fate of the disappeared person

INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PEOPLE-It is part of the block of constitutionality.

ELIGIBILITY REQUIREMENTS FOR COLLECTIVE DEMOBILIZATION AND

FORCED DISAPPEARANCE CRIME - Obligation to indicate whereabouts of disappeared persons/ **RELATIVE LEGISLATIVE COMMISSION-Configuration**

It is unconstitutional for the Colombian State to grant criminal benefits to persons who are responsible for the crime of enforced disappearance, without requiring, as a condition for the granting of the benefit, in addition to the fact that they have decided to demobilize within the framework of this law that those responsible for the crime have indicated, from the moment their eligibility is defined, the whereabouts of the disappeared persons. Indeed, as noted in the previous case, the State cannot renounce using all the mechanisms at its disposal to prevent extremely serious crimes and, in the case in which they were committed, to interrupt their effects on the victim or on his or her next of kin. In this regard, it is important to recognize that the obligation to release abducted persons is similar in nature to the constitutional obligation to disclose the fate of missing persons. However, there does not appear to be any reason why the legislator failed to establish as an eligibility requirement the disclosure of the fate of disappeared persons while enshrining as a condition for access to the benefits of the law the release of kidnapped persons, in the event of collective demobilization. Since there is no principle of sufficient reason for this distinction and there is, however, the inalienable obligation of the State to adopt all measures to clarify this crime in the shortest possible time and to report on the whereabouts of the disappeared, it does not seem constitutionally adequate to exclude the one mentioned in the present judgment. In sum, for the reasons expressed both now and in the previous one apart from this judgment, the Court considers that the omission of the legislator of which the lawsuit accounts is the result of the failure to comply with a specific constitutional duty at the head of state. This duty consists in taking all the measures at its disposal to establish, in the shortest possible time, the whereabouts of the disappeared persons. The silence on this requirement at the time of applying for the application of the Law demanded before the decision to demobilize collectively, is equivalent to a waiver of the State to fulfill this duty, waiver to which the legislator is not authorized.

ADVERTISING OF PUBLIC DOCUMENTS-Exceptions

RESERVATION OF INFORMATION IN JUSTICE AND PEACE LAW-Procedure to protect the privacy, life, integrity or safety of victims and witnesses

It does not escape the Court the fact that multiple articles of the law demanded are ordered to the public authorities the exhaustive investigation of the facts and their public diffusion as condition for the satisfaction of the rights of the victims and for the adoption of measures of non-repetition. In order for such mechanisms - such as truth commissions - to operate fully, it is necessary that there be no reservation on relevant information, unless it is a matter, as also established by law, of protecting the privacy, life, integrity or security of victims and witnesses. Finally, article 58 is entitled Measures to guarantee access to the Archives and is inserted in Chapter X of the Law, aimed integrally at ensuring the duty of memory and the reconstruction of a historical account of the phenomena to which the Law applies. In these terms, it cannot be understood that the norm demanded allows, by way of exception, to sacrifice the goods, values and rights pursued by the entire Chapter X within which it is inserted. Systematic and teleological interpretation criteria must be imposed on the interpreter of the law, by virtue of which it must be understood that the provisions demanded are limited exclusively to referring to the rules in force on judicial reserve in order to protect the life and safety of witnesses.

HUMAN RIGHTS VIOLATION-State obligation to investigate is part of the right to justice

RIGHT TO A REASONABLE TERM IN CRIMINAL PROCESS-Consecration in the American Convention on Human Rights

RESEARCH PERIOD IN CRIMINAL PROCESS-Criteria for determining reasonableness

SET OF PRINCIPLES AGAINST IMPUNITY-State obligation to investigate

FREE VERSION AND DEMOVILIZED CONFESSION IN LAW OF JUSTICE AND PEACE-Procedure

IMPUTATION FORMULATION HEARING IN LAW OF JUSTICE AND PEACE-Time to fix and carry it out

The Court observes that the partially challenged norm establishes, in general terms, reasonable criteria that guarantee a prompt, impartial and exhaustive investigation of the facts that the demobilized person brings to the attention of the prosecutor's office. Several aspects support this view: a). In the first place, it should be borne in mind that the prosecutor's verification work is based on the existence of a confession, which in fact provides a framework for the investigation; (b) Secondly, it is relevant for the purposes of the investigation that the law establishes that the investigative bodies (the prosecutor's office and the judicial police) must draw up and develop a methodological programme, which is regulated by article 207 of the Code of Criminal Procedure, in order to make the demobilized person confessed available to the judge responsible for supervising guarantees; c) and thirdly, it should be noted that the 36-hour term established by the rule cannot be interpreted as the term of investigation, as understood by the plaintiffs, but rather as the term established for the magistrate of control of guarantees to signal and conduct the hearing for the formulation of the accusation, once the prosecutor hearing the case has requested it. The foregoing implies that the provision of the demobilized person before the judge of control of guarantees is conditional upon the elaboration and development of the methodological program as derived from the third paragraph of the partially challenged norm.

FREE VERSION AND DISMOVILIZED CONFESSION IN LAW OF JUSTICE AND PEACE-Inconstitutionality of the expression "immediately" referring to the term in which the demobilized person must be placed at the disposal of the magistrate of control of guarantees.

The expression that does seem to set a term for the prosecutor that excessively reduces the possibility of constructing a case before the indictment hearing is the one that heads the judged section. In effect, the rule states that "the demobilized person shall immediately be left at the disposal of the judge exercising the function of control of guarantees". This duty is to be fulfilled "immediately" after a fact which the rule does not specify, but which is inferred from the essential object of the rule, i.e. the receipt of the free version. Therefore, upon receipt of the free version, the prosecutor must immediately place the demobilized person at the disposal of the guarantee control magistrate, who will have 36 hours to conduct an indictment hearing. This clearly makes it impossible for the methodological programme of the investigation to be fully developed, which manifestly disproportionately affects the victims' right to justice and makes the State's duty to investigate unfeasible. Consequently, the expression "immediately" shall be declared unconstitutional. Of course, the development of such a methodological research programme must take place within a reasonable period of time, in accordance with the case law on the subject mentioned above, given that crimes have already been confessed and that in the light of the purposes of the law, the situation of each demobilized person must be defined in a timely manner.

FREEDOM OF LEGISLATIVE CONFIGURATION IN PROCESS FORMS AND

TERMS-Limits

INVESTIGATION AND VERIFICATION OF FACTS ADMITTED BY LAW OF JUSTICE AND PEACE-Term within which they are supplied does not entail disproportionate affectation of the right to justice and the search for truth.

With respect to the 60-day term established by the accused segment, the Court finds that it is oriented to a very specific task, which is the investigation and verification of the facts confessed by the accused and all those of which he has knowledge within the scope of his competence. The Chamber thus finds that the 60-day time limit established with a view to establishing the basis for the formulation of charges constitutes a legislative measure that does not entail a disproportionate affectation of the right to justice and the search for truth. It responds to a research purpose that is inserted in a procedure that has its own objectives and particularities. For this reason, the terms of the ordinary procedure cannot be taken as a benchmark.

RIGHTS OF VICTIMS IN JUSTICE AND PEACE LAW-Right to Receive Information

RIGHT OF ACCESS TO THE ADMINISTRATION OF JUSTICE-SCOPE

CIVIL PART IN CRIMINAL PROCESS-Participation for the realization of the rights to truth and justice

RIGHTS OF VICTIMS IN LAW OF JUSTICE AND PEACE-Access to the file from its inception

Bearing in mind the ambiguity and uncertainty that the term "defendant" introduces in the norm under review, generating multiple interpretations in an aspect of constitutional relevance such as the victims' right to the truth, in evident connection with the right to justice, the Court will proceed to condition the content of the provision in the sense that the expression "and in the terms established in the Code of Criminal Procedure" of numeral 38.5 of article 37, alludes to article 30 of Law 600 of 2000 which regulates "access to the file and the provision of evidence by the injured party", provided that it is interpreted in accordance with the conditioned exequibilidad of this rule declared by judgement C-228 of 2002, by virtue of which, the victim or injured parties can directly access the file from its initiation, to exercise the rights to truth, justice and reparation. In these terms, the conditioned constitutionality of numeral 38.5 of article 37 shall be declared.

RIGHTS OF VICTIMS IN JUSTICE AND PEACE LAW-Participation in free version proceedings, formulation of imputation and acceptance of charges.

The plaintiffs' perception that the accused provisions exclude the participation of the victim in the proceedings regulated therein is not correct. A systematic view of the rules relating to the victim's procedural faculties within the framework of the principles that animate it and the jurisprudential developments in force in the matter, allow us to conclude that, contrary to what was affirmed in the lawsuit, the law guarantees the participation of victims in the proceedings of free version and confession, formulation of accusations and acceptance of charges. This conclusion is reinforced by the law's clear choice of a markedly accusatory procedural system that is developed through hearings to which victims' access cannot be obstructed.

DILIGENCE OF ACCEPTANCE OF DEMOVLIZED CHARGES IN LAW OF JUSTICE AND PEACE-Control of legality

CASING APPEAL IN JUSTICE AND PEACE LAW-Delete is not unconstitutional

The exclusion of an appeal in cassation as a means of challenging the sentence issued in second instance by the Supreme Court of Justice, Criminal Chamber, does not affect the rights and procedural guarantees of the participants in the process, nor the impossibility of materializing the substantial right, as the plaintiffs point out. It is certainly not the only remedy of cassation that is suitable for guaranteeing the effectiveness of such rights. The freedom of configuration of the procedures that is assigned to the legislator entails a requirement to adapt them to the specificities of the processes, their nature and objectives. It is evident that Law 975/05 regulates a procedure that has its own particularities, one of them, perhaps the most relevant is that it is structured from the full and trustworthy confession of the accused, which also generates specific procedural needs. Consequently, it is not fortunate to maintain that the provision excluding cassation in this procedure is unconstitutional with regard to the assertion of alleged discriminatory treatment of participants in the special procedure, taking as a parameter of comparison the ordinary procedure, which responds to different nature and purposes.

RESOURCE OF REPLACEMENT IN JUSTICE AND PEACE LAW-Cases in which it proceeds

APPEAL OF SENTENCE IN LAW OF JUSTICE AND PEACE-Tramite

EXTRAORDINARY ACT OF REVIEW IN LAW OF JUSTICE AND PEACE-Consecration

DEFENSORY OF THE PEOPLE AND LAW ON JUSTICE AND PEACE-Restriction on victim assistance

The victims are undoubtedly one of the most vulnerable sectors of the population to which the Ombudsman's Office, within the framework of its competencies, can develop a whole range of possibilities for advice, assistance and protection, in the development of the powers attributed to it by the laws that deal with this important institution. The "present" expression of the challenged normative segment in effect introduces a severe restriction on the possibilities of assistance to victims by the Ombudsman's Office, which conflicts with the broad conception of victims' rights.

VICTIM RIGHTS IN THE CRIMINAL PROCESS-Possibility of intervening in all phases of the action/**RIGHTS OF VICTIMS IN JUSTICE AND PEACE LAW-Judicial representation** in court/**RIGHTS OF VICTIMS IN THE CRIMINAL PROCESS-Overcoming** the conception that limited the rights of victims to a simple claim for compensation.

It is clear that the reductive conception of the victims' rights to a simple claim for compensation has now been overcome. The adaptation of victims' rights to international standards through jurisprudence implies the recognition that the universal rights to truth, justice and reparation imply the power to intervene in all phases of the action, in the development of the right to access justice in conditions of equality. This equal access derives from the bilateral nature of the right to an effective judicial remedy by virtue of which the rights of victims cannot be diminished in relation to those assisting the defendant. The contemporary consideration of the victim as the active protagonist of the process leads to the enjoyment of standards of protection similar to those of other participants in the process. Consequently, the fact that the contested rule explicitly establishes the right of victims to judicial representation during the trial cannot be interpreted as excluding the exercise of the right of nomination at other stages of the process. Such explicit recognition of the right to be

represented by counsel at trial should be without prejudice to the appointment of judicial representatives at other stages of the proceedings.

ZONES OF CONCENTRATION IN JUSTICE AND PEACE LAW-Inconstitutionality of paying time in concentration zones for the mere fact of being located in them/**EXECUTION OF PENALTY IN JUSTICE AND PEACE LAW-Inconstitutionality** of paying time in concentration zones for the mere fact of being located in them.

Even within the framework of an instrument that invokes as its fundamental purpose the materialization of peace in the country, the penalty cannot be stripped of its attribute of fair and adequate reaction to criminality, nor can it take place outside of the state interventions that the exercise of ius puniendi demands in the constitutional rule of law. The first would lead to undesirable phenomena of impunity, even in the context of a pacification process, and the second to the loss of legitimacy of the sanctioning power of the State. The punitive regime that falls into one or the other phenomenon is contrary to the Constitution. Under these assumptions, the Court observes that article 31 assimilates to the serving of a sentence the circumstance of being located in a concentration zone, in spite of the fact that there has not been any State measure that has led people to be in that place. In that sense, it does not constitute a penalty inasmuch as it does not involve the coercive imposition of the restriction of fundamental rights. Generally, the permanence in a concentration zone by members of organized armed groups outside the law, in the process of demobilization, is due to a voluntary decision of those persons, which contributes to exclude any possibility of equating a situation of such nature to the execution of a sentence, which dispenses with and displaces the state interventions that characterize the state monopoly of sanctioning power.

ESTABLISHMENT OF RECLUSION IN JUSTICE AND PEACE LAW-Subject to prison control

RIGHTS OF VICTIMS TO REPAIR IN LAW OF JUSTICE AND PEACE-Members of armed groups outside the law respond with their own heritage

There does not seem to be a sufficient constitutional reason why, in the face of processes of mass violence, the general principle that whoever causes the damage must repair it should not be applied. On the contrary, as the Court has already explained, national and international norms, doctrine and jurisprudence have considered that economic reparation from the perpetrator's own patrimony is one of the necessary conditions to guarantee the rights of victims and promote the fight against impunity. Only in the case in which the State is responsible - by action or omission - or when the own resources of those responsible are not sufficient to pay the cost of massive reparations, does the State assume the subsidiary responsibility that this implies. And this distribution of responsibilities does not seem to vary in processes of transitional justice towards peace. It is in accordance with the Constitution that the perpetrators of this type of crime respond with their own patrimony for the damages caused by them, with observance of ordinary procedural rules that draw a limit to patrimony liability in the preservation of the dignified subsistence of the subject to whom said liability is imputed, circumstance that will have to be determined in attention to the particular circumstances of each individual case.

ELIGIBILITY REQUIREMENTS FOR COLLECTIVE AND INDIVIDUAL DEMOBILIZATION-Delivery of illicit goods

The eligibility requirements addressed in Articles 10 and 11, which are partially demanded, are requirements "for access to the benefits established by this law", i.e., they are accessibility

conditions. In these circumstances it does not seem necessary for the person to hand over part of his lawful assets at this stage, since, at least technically, there is not yet a title for such a transfer. Certainly, goods of illicit origin do not belong to him and, therefore, the delivery does not imply a transfer of property but a return to their true owner - through the restitution of the good - or to the State. However, your lawful assets will belong to you until there is a court conviction ordering you to surrender them. On the other hand, the goods resulting from the illegal activity, all of them without exception, must be delivered as a prior condition for accessing the benefits established by Law 975/05. The legislator may establish such an eligibility requirement, both for collective demobilization and for individual demobilization. For these reasons, the Court does not find the expressions "product of illegal activity" of numeral 10.2 of article 10 of the Law and "product of illegal activity" of numeral 11.5 of article 11 of the same Law unconstitutional. It shall be so declared in the operative part of this Order.

CAUTELARY MEASURES IN LAW OF JUSTICE AND PEACE-Procedure on lawful property

The Court states that if the beneficiaries of the law must respond with their own patrimony for the damages caused, the truth is that there is no reason to prevent precautionary measures from falling on their lawful property. In effect, this prohibition diminishes the effectiveness of state action aimed at achieving comprehensive reparation for the victims.

VICTIMAS-Definition in justice and peace law

VICTIMS OF CRIMES-People who are regarded as such

The Constitutional Court has pointed out that the victim or injured party of a criminal offence must be the person who has suffered real, concrete and specific damage, regardless of the nature of the damage and the offence that caused it.

HUMAN RIGHTS VIOLATION AND CONSTITUTIONALITY BLOCK-Rights of the victim's next of kin

According to constitutional law, interpreted in the light of the block of constitutionality, the relatives of persons who have suffered direct violations of their human rights have the right to appear before the authorities so that, having demonstrated the real, concrete and specific damage suffered during the criminal activities, they are allowed to request the guarantee of the rights that have been violated. This does not mean that the State is obliged to presume harm to all relatives of the direct victim. Nor does it mean that all family members have exactly the same rights. What, however, if derived from the norms and jurisprudence cited, is that the law cannot prevent the access of the relatives of the victim of human rights violations to the authorities in charge of investigating, judging, condemning the perpetrator and repairing the violation.

VICTIMS IN JUSTICE AND PEACE LAW-Exclusion of relatives who do not have first degree of consanguinity with the direct victim is unconstitutional/VICTIMS IN JUSTICE AND PEACE LAW-Exclusion of relatives of victims who have not died or disappeared is unconstitutional

The Court considers that the right to equality and the rights of access to the administration of justice, due process and an effective judicial remedy are violated by the provisions of the defendant law that exclude family members who do not have the first degree of consanguinity with the direct victim from the possibility that, through the demonstration of the real, concrete and specific harm

suffered during the criminal activities covered by the defendant law, they may be recognized as victims for the purposes of the aforementioned law. It also violates such rights to exclude relatives of direct victims when they have not died or disappeared. Such exclusions are constitutionally inadmissible, which does not preclude the legislature from relieving the burden of proof on certain relatives of direct victims by establishing presumptions as it did in paragraphs 2 and 5 of article 5 of the accused law.

JUDICIAL INDEMNIFICATION IN THE LAW OF JUSTICE AND PEACE-Subjection to availability of resources in the General Budget of the Nation is unconstitutional/**RIGHTS OF THE VICTIMS TO THE REPAIR IN THE LAW OF JUSTICE AND PEACE-Affectation** by norm that establishes subject of indemnification to availability of resources in the General Budget of the Nation.

The Court considers it necessary to consider the precise content of the norm being studied in order to elucidate this charge of unconstitutionality. By virtue of this provision, the Solidarity Network, when settling and paying the compensation decreed by the judges in accordance with the provisions laid down in the same Law 975 of 2005, shall be subject to the limits established for this purpose in the National Budget. In the Court's view, this limitation is disproportionate, and constitutes an excessive affectation of the victims' right to reparation. Once it has been ordered, as a consequence of a judicial process under the formalities of the law, that a person who has been a victim of a violation of his human rights has the right to receive a certain amount of money as compensation, a certain right is consolidated in his favor that cannot be subject to later modifications, much less when these are derived from the availability of resources in the General Budget of the Nation.

CIVIL LIABILITY DERIVED FROM PUNISHABLE FACT-People obliged to respond

The Colombian legal tradition is no stranger to solidarity in civil liability arising from the punishable act, or its extension to persons other than those criminally responsible. Thus, according to this tradition, the damages caused by the infraction must be repaired by those who are jointly and severally criminally liable, and by those who, according to the substantial law, are obliged to respond. According to this conception of liability, they are obliged to make reparation for damages arising from punishable conduct (i) those criminally responsible; (ii) those who according to substantial law are liable for acts committed by others, i.e. those known as civilly responsible third parties, and (iii) those who illegally enrich themselves with the crime.

SOLIDARITY CIVIL LIABILITY OF ARMED GROUPS UNDER THE LAW IN LAW OF JUSTICE AND PEACE-Procedure/RIGHTS OF THE VICTIMS TO THE REPAIR IN LAW OF JUSTICE AND PEACE-Order in which you are satisfied by the obligors/**RIGHTS OF THE VICTIMS TO THE REPAIR IN LAW OF JUSTICE AND PEACE-anonymous damages**

For the Court, it is clear that if the benefits established by law are for the specific group, or for its members due to their belonging to the corresponding block or front, the latter must have correlative patrimonial responsibilities, even outside the determination of criminal responsibilities, as long as the damage and the causal relationship with the activity of the specific group are established and the belonging of the demobilized person to the corresponding front or front has been judicially defined. Anonymous damages, that is, those for which it has not been possible to identify the active subject, cannot be exempt from reparation; the damage and the causal link with the activities of the illegal armed bloc or front whose judicially identified members are beneficiaries of the provisions of the law cannot be proven; such members must respond through the mechanisms established in the law. Satisfaction of the principle of reparation requires observance of an order in the allocation

of resources that make up the fund. In this way, the first to be compensated are the perpetrators of the crimes, in subsidy and by virtue of the principle of solidarity, the specific group to which the perpetrators belong. Before resorting to State resources for the reparation of victims, the perpetrators of the crimes, or the block or front to which they belonged, should be required to respond with their own patrimony for the damages caused to the victims of the crimes. The State enters this sequence only in a residual role in order to cover the rights of victims, especially those who do not have a judicial decision fixing the amount of compensation to which they are entitled (second paragraph of article 42 of Law 975 of 2005) and in the event that the perpetrators' resources are insufficient.

FUND FOR THE REPAIR OF VICTIMS-its constituent assets

INHIBITION OF THE CONSTITUTIONAL COURT FOR SUBSTANTIVE CLAIM INEPTITUDE-Incompliance with the requirements of certainty, specificity and relevance

SENTENCE OF CONSTITUTIONALITY-General and immediate effect

Reference: file D-6032

Complaint of unconstitutionality against articles 2, 3, 5, 9, 10, 11.5, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 34, 37 numerals 5 and 7, 46, 47, 48, 54, 55, 58, 62, 69, 70 and 71 of Law 975 of 2005 "By which provisions are issued for the reincorporation of members of organized armed groups outside the law, which contribute effectively to the achievement of national peace and other provisions are issued for humanitarian agreements", and against the law in its entirety.

Applicant: Gustavo Gallón Giraldo and Others

Speaker Magistrates:

Dr. MANUEL JOSÉ CEPEDA ESPINOSA

Dr. JAIME CÓRDOBA TRIVIÑO

Dr. RODRIGO ESCOBAR GIL

Dr. MARCO GERARDO MONROY CABRA

Dr. ALVARO TAFUR GALVIS

Dr. CLARA INÉS VARGAS HERNÁNDEZ.

Bogotá, D.C., eighteenth (18) May 2006.

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The Plenary Chamber of the Constitutional Court, in compliance with its constitutional powers and with the requirements and procedures established by Decree 2067 of 1991, has ruled as follows

FEELINGS

I. BACKGROUND.

Citizen Gustavo Gallón Giraldo and numerous other citizens filed a public action of unconstitutionality against Law 975 of 2005 *"By which provisions are issued for the reincorporation of members of organized armed groups outside the law, which contribute effectively to the achievement of national peace and other provisions are issued for humanitarian agreements"*, in its entirety, or, in subsidy, the unconstitutionality of articles 2 partial, 5 partial, 9 partial, 10 partial, 11.5 partial, 13 partial, 16 partial, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 34, 37.5, 37.7, 46 partial, 47, 48 partial, 54 partial, 55 partial, 58, 62, 69, 70 and 71 of the same Law.

Once the constitutional and legal formalities for unconstitutionality proceedings have been completed, the Constitutional Court proceeds to decide on the complaint in question.

II. STANDARDS DEMANDED.

The full text of the Law as it appeared in Official Gazette No. 45,980 of July 25, 2005, is transcribed below, since the plaintiffs fully accused the Law, and in particular some provisions that are highlighted.

**"LAW 975
25/07/2005**

making provisions for the reinstatement of members of organized armed groups outside the law who effectively contribute to the achievement of national peace and making other provisions for humanitarian agreements.

The Congress of Colombia

DECREE:

CHAPTER I

Principles and definitions

Purpose of this Act. The purpose of this law is to facilitate peace processes and the individual or collective reintegration into civilian life of members of illegal armed groups, guaranteeing victims' rights to truth, justice and reparation.

An organized armed group outside the law is defined as a guerrilla or self-defence group, or a significant and integral part thereof, as blocks, fronts or other modalities of those same organizations, which are dealt with in Law 782 of 2002.

Article 2: *Scope of the law, interpretation and application of regulations.* This Act regulates the investigation, prosecution, punishment and judicial benefits of persons linked to organized armed groups outside the law, as perpetrators or participants in criminal acts committed during and on the occasion of belonging to those groups, who have decided to demobilize and contribute decisively to national reconciliation.

The interpretation and application of the provisions of this law shall be carried out in accordance with the constitutional norms and international treaties ratified by Colombia. The incorporation of some international provisions in the present law should not be understood as the negation of other international norms that regulate the same matter.

The reinsertion into civil life of persons who may be favoured by amnesty, pardon or any other benefit provided for in Act No. 782 of 2002 shall be governed by the provisions of that Act.

Article 3. *Alternativity.* Alternativity is a benefit consisting of suspending the execution of the sentence determined in the respective sentence, replacing it with an alternative sentence that is granted by the contribution of the beneficiary to the achievement of national peace, collaboration with justice, reparation to victims and their adequate resocialization. The concession of the benefit is granted according to the conditions established in the present law.

Article 4: *Right to truth, justice, reparation and due process.* The process of national reconciliation to which this law gives rise shall, in all cases, promote the right of victims to truth, justice and reparation and respect the right to due process and the judicial guarantees of the accused.

Article 5. *Definition of victim.* For the purposes of this law, a victim is a person who, individually or collectively, has suffered direct damages such as temporary or permanent injuries that cause any type of physical, psychic and/or sensory (visual and/or auditory) disability, emotional suffering, financial loss or impairment of fundamental rights. The damage must be the result of actions that have violated criminal law, carried out by organized armed groups outside the law.

The victim shall also be the spouse, companion or permanent companion, and relative **in the first degree of consanguinity**, first civil of the direct victim, when the victim has been killed or has disappeared.

The status of victim is acquired regardless of whether the perpetrator of the punishable conduct is identified, prosecuted or convicted, and regardless of the

family relationship between the perpetrator and the victim.

Members of the security forces who have suffered temporary or permanent injuries resulting in any type of physical, mental and/or sensory (visual or hearing) disability, or impairment of their fundamental rights, as a consequence of the actions of any member or members of organized armed groups outside the law, shall also be considered as victims.

Likewise, the spouse, companion or permanent companion and relatives **in the first degree of consanguinity** of members of the security forces who have lost their lives in the course of acts of service, in connection with the same or outside it, as a consequence of acts performed by a member or members of groups organized outside the law, shall also be considered as victims.

Article 6: Right to justice. In accordance with the legal provisions in force, the State has the duty to conduct an effective investigation leading to the identification, capture and punishment of those responsible for crimes committed by members of illegal armed groups; to ensure that the victims of such conduct have access to effective remedies to redress the harm inflicted; and to take all measures to prevent the recurrence of such violations.

The public authorities involved in proceedings under this Act shall comply primarily with the duty set forth in this article.

Article 7. Right to the truth. Society, and especially victims, have the inalienable, full and effective right to know the truth about crimes committed by organized armed groups outside the law, and about the whereabouts of victims of kidnapping and enforced disappearance.

Investigations and judicial proceedings to which the present law applies should promote the investigation of what happened to the victims of such conduct and inform their families accordingly.

The judicial processes that take place after the present law is in force shall not prevent other non-judicial mechanisms for the reconstruction of the truth from being applied in the future.

Article 8: Right to reparation. The right of victims to reparation includes actions for restitution, compensation, rehabilitation, satisfaction; and guarantees of non-repetition of conduct.

Restitution is the performance of actions that tend to return the victim to the situation prior to the commission of the crime.

The compensation consists of compensating the damages caused by the crime.

Rehabilitation consists of carrying out actions aimed at the recovery of victims who suffer physical and psychological trauma as a result of crime.

Moral satisfaction or compensation consists of carrying out actions aimed at restoring the dignity of the victim and disseminating the truth about what happened.

Guarantees of non-repetition include, inter alia, the demobilization and dismantling of illegal armed groups.

Symbolic reparation is understood to be any service provided to the victims or to the community in general that tends to ensure the preservation of historical memory, the non-repetition of the victimizing acts, the public acceptance of the facts, public forgiveness and the restoration of the dignity of the victims.

Collective reparation must be oriented towards the psycho-social reconstruction of populations affected by violence. This mechanism is especially envisaged for communities affected by the occurrence of systematic violence.

The competent judicial authorities shall determine the individual, collective or symbolic reparations, as the case may be, under the terms of this law.

Article 9. *Demobilization.* Demobilization is understood as the individual or collective act of laying down one's arms and abandoning an organized armed group outside the law, carried out before a competent authority.

The demobilization of the organized armed group outside the law shall be carried out in accordance with the provisions of Law 782 of 2002.

CHAPTER II Preliminary aspects

Article 10. *Eligibility requirements for collective demobilization.* Members of an organized armed group outside the law who have been or may be charged, accused or convicted as perpetrators or participants in criminal acts committed during and on the occasion of belonging to those groups, when they cannot benefit from some of the mechanisms established by Law 782 of 2002, may access the benefits established by this law, **provided that they are on the list that the National Government submits to the Attorney General's Office** and that they also meet the following conditions:

10.1 The organized armed group in question has been demobilized and dismantled in compliance with the agreement with the National Government.

10.2 That the goods **resulting from the illegal activity** are delivered.

10.3 That the group make available to the Colombian Family Welfare Institute the totality of recruited minors.

10.4 That the group cease all interference with the free exercise of political rights and civil liberties and any other illicit activity.

10.5 The group is not organized for drug trafficking or illicit enrichment.

10.6 **That the kidnapped persons, who are in their possession, be released.**

Paragraph. Members of an organized armed group outside the law who are deprived

of their liberty may have access to the benefits contained in this law **and those established in Law 782 of 2002**, provided that the corresponding judicial decisions determine that they belong to the respective group.

Eligibility requirements for individual demobilization. Members of organized armed groups outside the law who have demobilized individually and who contribute to the attainment of national peace may be eligible for the benefits established by this law, provided that they meet the following requirements:

11.1 To provide information or collaborate with the dismantling of the group to which it belonged.

11.2 That it has signed an act of commitment with the National Government.

11.3 That the arms have been demobilized and left in the terms established by the National Government for this purpose.

11.4 To cease all unlawful activity.

11.5 To deliver the goods **derived from the illegal activity**, so that the victim can be repaired **when they are available**.

11.6 Their activity was not for the purpose of drug trafficking or illicit enrichment.

Only persons whose names and identities are presented by the National Government before the Attorney General's Office may access the benefits provided for in this law.

CHAPTER III Procedural principles

Article 12. *Orality.* The procedural action shall be oral and shall be carried out using the appropriate technical means to ensure its faithful reproduction.

The preservation of records shall be the responsibility of the Secretary of the National Unit of the Attorney General's Office for Justice and Peace created by this law, and of the Chamber of the Superior Judicial District Court that hears the trial, as appropriate.

Article 13. *Celerity.* Matters discussed at the hearing will be resolved within the hearing. Decisions shall be deemed to have been notified on the podium.

Preliminary hearings will be held before the Guarantees Control Magistrate appointed by the respective Tribunal.

The following cases will be heard in a preliminary hearing:

1. The practice of an anticipated test that for well-founded reasons and of extreme necessity is required to avoid the loss or alteration of the evidentiary means.
2. The adoption of measures for the protection of victims and witnesses.

3. The application and decision to impose an insurance measure.
4. The request and decision to impose precautionary measures on assets **of illicit origin.**
5. The formulation of the imputation.
6. The filing of charges.
7. Those that resolve similar issues to the previous ones.

Decisions disposing of substantive issues and judgments shall be factually, evidentiarily and legally founded and shall state the grounds on which the form of order sought by the parties is upheld or rejected.

The distribution of the matters referred to in this law shall be made on the same day on which the action is received in the corresponding office.

Article 14. *Defence.* The defence shall be the responsibility of the defence counsel freely appointed by the accused or accused or, failing that, by the National Public Defence System.

Article 15. *Clarification of the truth.* Within the procedure established by the present law, public servants shall make the necessary arrangements to ensure that the truth about the facts under investigation is ascertained and that the defendants are guaranteed a defense.

The National Unit of the Attorney General's Office for Justice and Peace created by this law shall investigate, through the delegated prosecutor for the case, with the support of the specialized group of judicial police, the circumstances of time, manner and place in which the punishable conducts were carried out; the living, social, family and individual conditions of the accused or accused and his previous conduct; the judicial and police record, and the damages that individually or collectively he has caused directly to the victims, such as physical or psychological injuries, emotional suffering, financial loss or substantial impairment of fundamental rights.

With the cooperation of the demobilized persons, the judicial police will investigate the whereabouts of kidnapped or disappeared persons and will inform their families in due course of the results obtained.

The Attorney General's Office shall ensure the protection of the victims, witnesses and experts it intends to present at the trial. The protection of witnesses and experts that the defense intends to present shall be the responsibility of the Ombudsman's Office. The Superior Council of the Judiciary shall be responsible for the protection of the judges of the Superior Courts of the Judicial District who are to hear the trial.

CHAPTER IV **Investigation and trial**

Article 16. *Jurisdiction.* Received by the National Unit of the Prosecutor's Office for Justice and Peace, **the name or names of** the members of organized armed groups outside the law who are willing to contribute effectively to the achievement of national peace, the corresponding delegated prosecutor shall immediately assume the competence to do so:

16.1 To know about investigations into criminal acts committed during and on the occasion of belonging to an organized armed group outside the law.

16.2 To be aware of investigations against its members.

16.3 Be aware of the investigations that should be initiated and those that are known at the time or after demobilization.

The Superior Judicial District Court determined by the Supreme Court of Justice, by means of an agreement issued prior to the commencement of any proceedings, shall be competent to hear the trial of the punishable conducts referred to in this law.

There may be no conflict or collision of jurisdiction between the Superior Courts of the Judicial District that hear cases referred to in this law and any other judicial authority.

Free version and confession. The members of the illegal armed group, whose names the National Government submits to the consideration of the Attorney General's Office, who expressly invoke the procedure and benefits of the present law, will render a free version before the delegated prosecutor assigned to the demobilization process, who will question them on all the facts of which he has knowledge.

In the presence of their defender, they shall state the circumstances of time, manner and place in which they participated in the criminal acts committed on the occasion of their membership of these groups, which precede their demobilization and for which they are covered by this law. In the same diligence they will indicate the goods that are given for reparation to the victims, if they have them, and the date of their entrance to the group.

The version submitted by the demobilized person and the other actions taken in the demobilization process shall be made immediately available to the National Unit of Justice and Peace Prosecutors' Offices so that the deputy prosecutor and the Judicial Police assigned to the case may prepare and develop the methodological programme to initiate the investigation, verify the veracity of the information provided and clarify those facts and all those of which they have knowledge within their sphere of competence.

The demobilized person shall immediately be placed at the disposal of the magistrate exercising the function of control of guarantees in one of the detention facilities determined by the National Government in accordance with article 31 of this Act, who shall, within the following thirty-six (36) hours, signal and hold a hearing on the formulation of the indictment, at the request of the prosecutor hearing the case.

Article 18. *Formulation of imputation.* When from the material evidentiary elements, physical evidence (sic), legally obtained information, or from the free version it can reasonably be inferred that the demobilized person is the author or participant of one or more crimes under investigation, the prosecutor delegated for the case will request the magistrate who exercises the function of control of guarantees to schedule a preliminary hearing for the formulation of the accusation.

At this hearing, the public prosecutor shall make the factual imputation of the charges under investigation and request the magistrate to order the pretrial detention of the accused in the appropriate detention centre, in accordance with the provisions of this Act. It shall also request the adoption of precautionary measures on goods of illicit origin that have been delivered for purposes of reparation to the victims.

After this hearing and within sixty (60) days thereafter, the National Unit of the Attorney General's Office for Justice and Peace, with the support of its judicial police group, will carry out the work of investigation and verification of the facts admitted by the accused, and all those of which it has knowledge within the scope of its competence. At the end of the term, or sooner if possible, the prosecutor of the case shall request the magistrate exercising the function of control of guarantees to schedule a hearing for the formulation of charges, within ten (10) days following the request, if applicable.

With the formulation of the accusation, the statute of limitations of the criminal action is interrupted.

Article 19. *Acceptance of charges.* At the arraignment hearing, the accused may accept those presented by the Public Prosecutor's Office, as a consequence of the free version or the investigations under way at the time of demobilization.

For it to be valid, it must be done freely, voluntarily, spontaneously and with the assistance of its defender. In this event, the Magistrate exercising the function of control of guarantees shall immediately send the proceedings to the Registry of the Chamber of the Superior Court of the Judicial District to which his knowledge corresponds.

Upon receipt of the action, the corresponding Chamber shall convene a public hearing within ten (10) days to examine whether the acceptance of charges has been free, voluntary, spontaneous and assisted by its counsel. If it is found to be in accordance with law, within ten (10) days it will summon a sentencing hearing and an individualization of the sentence.

Paragraph 1: If in this hearing the accused does not accept the charges, or retracts those admitted in the free version, the National Unit of the Attorney General's Office for Justice and Peace shall refer the action to the competent official in accordance with the law in force at the time of the commission of the conduct under investigation.

Paragraph 2: When there is a request for integral reparation, the provisions of article 23 of this law shall be complied with beforehand.

Article 20. Accumulation of proceedings and penalties. For the procedural purposes of this Act, the proceedings in progress for criminal acts committed during and on the occasion of the demobilized person's membership in an armed group organized outside the law shall be cumulative. In no case shall the accumulation of punishable conduct committed prior to the demobilized person's membership of the illegal armed group proceed.

When the demobilized person has been previously convicted for criminal acts committed during and on the occasion of belonging to an organized armed group outside the law, the provisions of the Criminal Code on the accumulation of legal penalties shall be taken into account, but in no case shall the alternative penalty exceed that provided for in the present law.

Article 21. Breaking of the procedural unit. If the accused or accused partially accepts the charges, the procedural unity will be broken with respect to those not admitted. In this case the investigation and prosecution of charges not accepted will be handled by the competent authorities and the law is procedural in force at the time of their commission. The benefits covered by this law shall be granted in respect of the charges accepted.

Article 22. Investigations and accusations prior to demobilization. If, by the time the demobilized person avails himself of the present law, the Public Prosecutor's Office is conducting investigations or has filed an accusation against him, the accused, assisted by his counsel, may orally or in writing accept the charges set forth in the resolution imposing an insurance measure, or in the formulation of the accusation, or in the resolution or indictment, as the case may be. This acceptance must be made before the magistrate who fulfils the function of control of guarantees under the conditions provided for in this law.

Article 23. Incident of integral reparation. At the same hearing in which the Chamber of the corresponding Superior Judicial District Court declares the legality of the acceptance of charges, upon the express request of the victim, or of the prosecutor of the case, or of the Public Prosecutor at her request, the reporting magistrate shall immediately open the incident of full reparation of damages caused by the criminal conduct and shall convene a public hearing within five (5) days thereafter.

This hearing will begin with the intervention of the victim or his legal representative or ex officio lawyer, so that he can express in a concrete manner the form of reparation that he is seeking, and indicate the evidence that he will use to substantiate his claims.

The Chamber shall examine the claim and reject it if the person promoting it is not a victim or if the actual payment of damages is proven and this is the only claim made, a decision that may be challenged under the terms of this law.

Once the application has been accepted, the Chamber shall inform the accused who has accepted the charges and shall then invite the interveners to conciliate. If there is agreement on its content, it will incorporate it into the decision that

fails the incident; otherwise it will dispose of the practice of the evidence offered by the parties, it will hear the basis of their respective claims and in the same act the incident will fail. The decision in either direction will be incorporated into the conviction.

Paragraph 1: Exclusively for the purposes of the conciliation provided for in this article, the victim, the accused or his defence counsel, the public prosecutor who has been seized of the case or the public prosecutor may request the summons of the Director of the Social Solidarity Network in his capacity as author of the expenditure of the Fund for the Reparation of Victims.

Paragraph 2: The granting of the alternative penalty may not be denied in the event that the victim does not exercise his or her right in the integral reparation incident.

Article 24. *Contents of the Judgment.* In accordance with the criteria laid down by law, the main penalty and the accessory penalties shall be laid down in the conviction. In addition, the alternative penalty provided for in the present law shall be included, as well as the commitments of conduct for the term provided by the Court, the obligations of moral and economic reparation to the victims, and the extinction of ownership of the property to be used for reparation.

The relevant Chamber will be responsible for evaluating compliance with the requirements laid down in this law for access to alternative punishment.

Article 25. *Facts known after the sentence or pardon.* If members of illegal armed groups who received the benefits of Law 782 of 2002, or who benefited from the alternative penalty under this law, are subsequently charged with crimes committed during and on the occasion of their membership and before their demobilization, these conducts will be investigated and judged by the competent authorities and the laws in force at the time of the commission of these conducts, without prejudice to the granting of the alternative penalty, in the event that it collaborates effectively in the clarification or accepts, orally or in writing, freely, voluntarily, expressly and spontaneously, duly informed by its defender, to have participated in its realization and provided that the omission has not been intentional. In this event, the convicted person may benefit from the alternative penalty. Alternative penalties shall be cumulated without exceeding the maximum penalties established in this Act.

Taking into account the seriousness of the new facts tried, the judicial authority will impose an extension of twenty per cent of the alternative sentence imposed and a similar extension of the time of probation.

Article 26. *Appeals.* Except for the sentence, the reinstatement proceeds for all decisions and is supported and resolved orally and immediately at the respective hearing.

Appeals are made against orders disposing of substantive matters, adopted during hearings, and against judgments. It is filed in the same hearing in which the decision is made, and is granted in the suspensive effect before the

Criminal Chamber of the Supreme Court of Justice.

The Judge-Rapporteur shall summon the parties and interveners to an oral argument hearing to be held within ten (10) days of receipt of the action at the Registry of the Criminal Cassation Chamber. Once the appeal is upheld by the appellant and the other parties and interveners have heard, the Chamber may decree a recess of up to two (2) hours to issue the corresponding decision.

If the appellant does not attend or does not support the appeal, it shall be declared void.

Paragraph 1: The processing of appeals under this law shall have priority over other matters under the jurisdiction of the Criminal Chamber of the Supreme Court of Justice, with the exception of actions for protection.

The Extraordinary Review Action shall be heard by the Plenary Chamber of the Supreme Court of Justice, under the terms set forth in the Criminal Procedure Code in force.

Paragraph 3: No appeal against the decision of the second instance is admissible.

Article 27. *Filing of proceedings.* If, in relation to the facts admitted or not admitted by the demobilized person in his free version or in subsequent action, as the case may be, before the hearing of the indictment, the delegated prosecutor comes to establish that there are no motives or factual circumstances that allow their characterization as a crime or that indicate the possible existence, he shall immediately have the file of the action filed. However, if new evidence emerges, the investigation shall be resumed in accordance with the procedure laid down in this Act for as long as the criminal action has not been extinguished.

Article 28. *Intervention of the Public Prosecutor's Office.* Under the terms of Article 277 of the Constitution, the Public Prosecutor's Office shall intervene when necessary, in defense of the legal order, the public patrimony, or fundamental rights and guarantees.

**CHAPTER V
Alternative Penalty**

Article 29. *Alternative penalty.* The competent Chamber of the High Judicial District Court shall determine the appropriate penalty for the offences committed, in accordance with the rules of the Criminal Code.

In the event that the convicted person has complied with the conditions set forth in this law, the Chamber shall impose an alternative sentence consisting of deprivation of liberty for a minimum period of five (5) years and not more than eight (8) years, assessed according to the gravity of the crimes and their effective collaboration in the clarification of the same.

In order to qualify for the alternative sentence, the beneficiary must undertake

to contribute to his or her resocialization through work, study or teaching during the time he or she is deprived of liberty, and to promote activities aimed at demobilizing the armed group outside the law to which he or she belonged.

Upon completion of the alternative sentence and the conditions imposed in the sentence, he shall be granted probation for a term equal to half of the alternative sentence imposed, during which period the beneficiary undertakes not to repeat the crimes for which he was convicted under this law, to appear periodically before the High Court of the Judicial District concerned and to report any change of residence.

Once these obligations have been fulfilled and the trial period has elapsed, the principal penalty shall be declared extinguished. Otherwise, the probation shall be revoked and the initially determined sentence shall be served, without prejudice to the subrogation provided for in the corresponding Criminal Code.

Paragraph. In no case will penal subrogations, additional benefits or complementary rebates be applied to the alternative penalty.

CHAPTER VI Regime of deprivation of liberty

Article 30. *Establishment of confinement.* The National Government shall determine the establishment of confinement where the effective sentence must be served.

Detention facilities must meet the safety and austerity conditions of the facilities administered by Inpec.

The sentence may be served outdoors.

Article 31. **Time spent in concentration zones. The time that members of illegal armed groups linked to processes for collective reincorporation into civilian life have remained in a concentration zone decreed by the National Government, in accordance with Law 782 of 2002, shall be computed as the time of execution of the alternative sentence, which may not exceed eighteen (18) months.**

The official designated by the National Government, in collaboration with the local authorities where appropriate, shall be responsible for certifying the time spent in the assembly zone by members of the armed groups covered by this Act.

CHAPTER VII Institutions for the execution of the present law

Article 32. *Jurisdiction of the Superior Courts of the Judicial District in matters of justice and peace.* In addition to the powers established in other laws, the High Judicial District Courts designated by the High Judicial Council shall be competent to move forward the judging stage of the proceedings covered by this law and to oversee the enforcement of sentences and the obligations imposed on convicted persons.

It is the responsibility of the Secretary of the respective Court to organize, systematize and preserve the archives of the facts and circumstances related to the conduct of the persons subject to any of the measures dealt with in this law, in order to guarantee the victims' rights to the truth and preserve the collective memory from oblivion. It should also ensure public access to records of enforced cases, and have a Communications Office to disclose the truth of what happened.

Article 33. *National Unit of the Attorney General's Office for Justice and Peace.* The National Unit of the Prosecutor's Office for Justice and Peace should be created, delegated to the Superior Courts of the Judicial District, with national competence and integrated in the manner indicated in the present law.

This unit shall be responsible for carrying out the proceedings that, by reason of its competence, correspond to the Office of the Attorney General of the Nation, in the procedures established in this law.

The National Unit of the Prosecutor's Office for Justice and Peace shall have the permanent support of a special judicial police unit, made up of members of the appropriate authorities, with exclusive and permanent dedication and with competence throughout the national territory.

To add the following positions to the staff of the Attorney General's Office for the year 2005 established in transitory article 1 of Law 938 of 2004:

150 Criminal Investigator VII

15 Secretary IV

15 Judicial Assistant IV

20 Driver III

40 Escort III

15 Criminal Investigation Assistant IV

20 Assistant Prosecutor II.

Paragraph. The Office of the Attorney General of the Nation will include the following positions from its staff to form the National Unit of the Office of the Attorney General for Justice and Peace: 20 Deputy Prosecutor before the Tribunal.

Article 34. *Public Defender's Office.* The State shall guarantee defendants, accused and convicted persons the exercise of their right to a defence, through the mechanisms of the Public Defender's Office and under the terms established by law.

The Office of the Ombudsman shall assist victims in the exercise of their rights **and within the framework of the present law.**

Judicial Prosecutor's Office for Justice and Peace. The Attorney General of the

Nation shall create, for the purposes of this law, a Judicial Office for Justice and Peace, with national competence, for the fulfillment of its constitutional and legal functions.

Participation of social organizations providing assistance to victims. In order to comply with the provisions of this law, the Office of the Attorney General of the Nation will promote mechanisms for the participation of social organizations in providing assistance to victims.

CHAPTER VIII

Victims' rights vis-à-vis the administration of justice

Article 37. *Rights of victims.* The State shall ensure that victims have access to the administration of justice. In development of the foregoing, victims shall have the right:

38.1 Receive all the procedure a dignified human treatment.

38.2 To the protection of their privacy and the guarantee of their safety, and that of their families and witnesses in their favour, whenever they are threatened.

38.3 A prompt and full reparation of the damages suffered, at the expense of the perpetrator or participant in the crime.

38.4 To be heard and to be provided with evidence.

38.5 To receive, from the first contact with the authorities **and under the terms established in the Code of Criminal Procedure**, relevant information for the protection of their interests; and to know the truth of the facts that make up the circumstances of the crime of which they have been victims.

38.6 To be informed of the final decision regarding criminal prosecution and to lodge appeals where appropriate.

38.7 To be assisted **during the trial** by a trusted attorney or by the Judicial Attorney's Office covered by this law.

38.8 To receive comprehensive recovery assistance.

38.9 To be assisted free of charge by a translator or interpreter, in the event of not knowing the language, or of not being able to perceive the language by the organs of the senses.

Article 38. *Protection of victims and witnesses.* The officials referred to in this law shall take appropriate measures and take all appropriate actions to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, as well as that of other parties to the proceedings.

This shall take into account all relevant factors, including age, gender and health, as well as the nature of the crime, in particular when it involves sexual violence, disrespect for gender equality or violence against children.

Special training will be given to officials working with these types of victims.

These measures shall not prejudice or be incompatible with the rights of the accused or a fair and impartial trial.

Article 39. *Exception to publicity in the trial.* As an exception to the principle of the public nature of trial hearings, the District High Court, in order to protect victims, witnesses, or an accused person, may order that part of the trial be held in camera. It will be able to order the practice of testimony through the audiovideo system to allow its contradiction and confrontation by the parties.

In particular, these measures shall be applied in respect of victims of sexual assault or children and adolescents who are victims or witnesses.

Article 40. *Other protection measures during the process.* Where publicity of material evidence, physical evidence or legally obtained information poses a serious danger to the safety of a witness or his or her family, the Prosecutor shall refrain from presenting them in any pre-trial proceedings. In its replacement it will make a summary of these elements of knowledge. In no case shall such measures prejudice or be inconsistent with the rights of the accused or a fair and impartial trial.

Article 41. *Attention to special needs.* The judicial bodies, technical support entities and the Office of the Judicial Procurator for Justice and Peace shall take into account the special needs of women, children, adults and persons with disabilities who participate in the process.

CHAPTER IX

Right to reparation for victims

Article 42. *General duty to repair.* The members of the armed groups who benefit from the provisions of this law have the duty to compensate the victims of those punishable conducts for which they were convicted by judicial sentence.

Likewise, when it has not been possible to identify the active subject but the damage and the causal link with the activities of the Illegal Armed Beneficiary Group is proven by the provisions of this law, the Court directly or by referral from the Prosecution Unit, will order the reparation to be charged to the Reparation Fund.

Article 43. *Reparation.* The High Judicial District Court, when pronouncing its sentence, shall order reparation to the victims and shall determine the appropriate measures.

Article 44. *Acts of reparation.* The reparation of the victims covered by this law entails the duties of restitution, compensation, rehabilitation and satisfaction.

In order to be entitled to the benefit of probation, the convicted person must provide the Fund for the Reparation of Victims with property, if any, earmarked for that purpose; perform satisfactorily the acts of reparation imposed on him; collaborate with the National Committee for Reparation and Reconciliation; or enter into an agreement with the Superior Judicial District Court to ensure compliance with his

reparation obligations.

The following are acts of integral reparation:

45.1 The delivery to the State of illegally obtained goods for the reparation of victims.

45.2 A public declaration restoring the dignity of the victim and of the persons most closely associated with the victim.

45.3 Public acknowledgement of having caused harm to victims, public declaration of repentance, request for forgiveness addressed to victims, and a promise not to repeat such punishable conduct.

45.4 Effective collaboration in locating abducted or missing persons and the bodies of victims.

45.5 The search for missing persons and the remains of dead persons, and assistance in identifying and reburial them according to family and community traditions.

Article 45. *Request for Reparation.* Victims of illegal armed groups may seek redress from the Superior District Court for the facts known to them.

No one may be repaired twice for the same concept.

Article 46. *Restitution.* Restitution implies the performance of acts that tend to return the victim to the situation prior to the violation of his rights. It includes the restoration of freedom, the return to your place of residence and the return of your property, **if possible.**

Article 47. *Rehabilitation.* Rehabilitation should include medical and psychological care for victims or their **first-degree** relatives **in accordance with the Victims' Reparations Fund Budget.**

Social services provided by the government to victims, in accordance with existing laws and regulations, are part of reparation and rehabilitation.

Satisfaction measures and guarantees of non-repetition. Satisfaction measures and guarantees of non-repetition, adopted by the various authorities directly involved in the national reconciliation process, should include:

49.1 Verification of the facts and full and public disclosure of the judicial truth, to the extent that it does not cause **further unnecessary harm** to the victim, witnesses or **other persons**, or create a danger to their safety.

49.2 The search for the disappeared or the dead and assistance in identifying and reburial them according to family and community traditions. This task is mainly carried out by the National Unit of Prosecutors for Justice and Peace (Unidad Nacional de Fiscalías para la Justicia y la Paz).

49.3 A judicial decision that restores the dignity, reputation and rights of the victim

and those of the victim's **first-degree** relatives.

49.4 Apology, including public acknowledgement of the facts and acceptance of responsibility.

49.5 The application of sanctions to those responsible for violations, all of which will be the responsibility of the judicial bodies involved in the processes covered by this law.

49.6 The competent chamber of the Judicial District High Court may order commemorations, tributes and recognition of victims of illegal armed groups. In addition, the National Reconciliation and Reparations Commission may recommend the adoption of this type of measure to the political or government bodies at the various levels.

49.7 Prevention of human rights violations.

49.8 Attending human rights training courses for those responsible for violations. This measure may be imposed on convicted persons by the competent chamber of the High Judicial District Court.

Article 49. *Collective reparation programs.* The Government, following the recommendations of the National Reconciliation and Reparations Commission, should implement an institutional programme of collective reparation that includes actions directly aimed at recovering the institutions of the Social Rule of Law, particularly in the areas most affected by violence; recovering and promoting the rights of citizens affected by acts of violence; and recognizing and dignifying the victims of violence.

National Commission for Reparation and Reconciliation. The National Commission for Reparation and Reconciliation shall be created, composed of the Vice President of the Republic or his delegate, who shall preside over it; the Attorney General of the Nation or his delegate; the Minister of the Interior and Justice or his delegate; the Minister of Finance and Public Credit or his delegate; the Ombudsman, two Representatives of Victim Organizations and the Director of the Social Solidarity Network, who shall serve as the Technical Secretariat.

The President of the Republic shall appoint five members of this Commission, at least two of whom must be women.

This Commission will be valid for 8 years.

Functions of the National Commission for Reparation and Reconciliation. The National Commission for Reparation and Reconciliation shall perform the following functions:

52.1 Guarantee victims' participation in judicial clarification processes and the realization of their rights.

52.2 Submit a public report on the reasons for the emergence and evolution of illegal armed groups.

52.3 Monitor and verify the reintegration processes and the work of local authorities in order to ensure the full demobilization of members of organized illegal armed groups and the full functioning of institutions in those territories. For these purposes, the National Reparation and Reconciliation Commission may invite foreign bodies or personalities to participate.

52.4 Monitor and periodically evaluate the reparation covered by this law and make recommendations for its proper implementation.

52.5 Submit, within a period of two years from the entry into force of this law, to the National Government and the Senate and House of Representatives Peace Committees, a report on the process of reparation to the victims of illegal armed groups.

52.6 Recommend criteria for reparations under this law, from the Victims' Reparations Fund.

52.7 To coordinate the activity of the Regional Commissions for the Restitution of Goods.

52.8 Carry out national reconciliation actions that seek to prevent the recurrence of new acts of violence that disturb national peace.

52.9 Give its rules of procedure.

Regional Commissions for the Restitution of Goods. The regional commissions shall be responsible for facilitating the procedures related to claims on property and possession of goods within the framework of the process established in this law.

Article 53. *Composition.* The Regional Commissions shall be composed of one (1) representative of the National Commission for Reparation and Reconciliation, who shall chair it; one (1) delegate of the Office of the Procurator for Justice and Peace; one (1) delegate of the Municipal or District Personería; one (1) delegate of the Ombudsman; and one (1) delegate of the Ministry of Interior and Justice.

The National Government shall have the power to appoint a representative of the religious communities and shall determine, in accordance with the needs of the process, the functioning and territorial distribution of the commissions.

Article 54. *Victims' Reparation Fund.* Establish the Fund for Victims' Reparations as a special account without legal personality, the authorising officer of which will be the Director of the Social Solidarity Network. The resources of the Fund shall be implemented in accordance with the rules of private law.

The Fund shall be made up **of all assets or resources delivered in any capacity by the illegal organized armed persons or groups referred to in this law**, by resources from the national budget and donations in cash or in kind, national or foreign.

The resources administered by this Fund shall be under the supervision of the

Office of the Comptroller General of the Republic.

Paragraph. The goods referred to in Articles 10 and 11 shall be delivered directly to the Victims' Reparations Fund created by this law. The same procedure shall be observed with respect to assets linked to criminal investigations and actions for extinction of the right of ownership in progress at the time of demobilization, provided that the conduct was carried out on the occasion of their belonging to an organized group outside the law and prior to the entry into force of this law.

The Government shall regulate the operation of this Fund and, in particular, as regards the reclamation and delivery of goods in respect of bona fide third parties.

Functions of the Social Solidarity Network. The Social Solidarity Network, through the Fund referred to in this Act, shall be responsible for the following functions, **in accordance with the budget allocated to the Fund:**

56.1 Liquidate and pay the judicial indemnities covered by this law within **the limits authorized in the national budget.**

56.2 Administer the Victims' Reparations Fund.

56.3 Proceed with other repair actions where appropriate.

56.4 Any others indicated in the regulations.

CHAPTER X Preservation of archives

Article 56. *Duty of memory.* Knowledge of the history of the causes, developments and consequences of the actions of illegal armed groups should be maintained through appropriate procedures, in compliance with the State's duty to preserve historical memory.

Article 57. *Measures for the preservation of archives.* The right to the truth implies that the archives are preserved. To this end, the judicial bodies in charge of them, as well as the Office of the Attorney General of the Nation, must adopt measures to prevent the theft, destruction or falsification of archives that seek to impose impunity. This is without prejudice to the application of the relevant criminal rules.

Article 58. *Measures to facilitate access to archives.* Access to archives should be facilitated in the interest of victims and their relatives to assert their rights.

When access is requested in the interest of historical research, authorization formalities shall only be for the purpose of access control, custody and proper maintenance of the material, and not for purposes of censorship.

In any case, the necessary measures should be taken to safeguard the right to privacy of victims of sexual violence and of child and adolescent victims of illegal armed groups, and not to cause **further unnecessary harm** to the victim, witnesses **or other persons**, or create a danger to their safety.

CHAPTER XI

Humanitarian Agreements

It is the Government's obligation to guarantee the right to peace in accordance with articles 2, 22, 93 and 189 of the Constitution, taking into account the situation of public order in the country and the threat against the civilian population and legitimately constituted institutions.

In order to comply with the provisions of article 60 of this Act, the President of the Republic may authorize his representatives or spokespersons to make contacts that will enable humanitarian agreements to be reached with organized armed groups outside the law.

The President of the Republic shall have the power to request from the competent authority, for the purposes and under the terms of this law, the conditional suspension of the penalty and the benefit of the alternative penalty in favour of members of organized armed groups outside the law with which humanitarian agreements are reached.

The National Government may demand the conditions it deems appropriate for these decisions to contribute effectively to the search for and achievement of peace.

CHAPTER XII

Duration and supplementary provisions

Article 62. *Complementarity.* For anything not provided for in this Act, **Law 782 of 2002 and the Code of Criminal Procedure** shall apply.

Article 63. *Favourable future law.* If, subsequent to the enactment of this law, legislation is enacted granting members of armed groups outside the law more favourable benefits than those established in this law, the persons who have been subject to the alternative mechanism may benefit from the conditions established in these subsequent laws.

Article 64. *Handing over of minors.* The surrender of minors by members of armed groups outside the law shall not cause the loss of the benefits referred to in the present law and in Law 782 of 2002.

The National Government, the Superior Council of the Judiciary and the Office of the Attorney General of the Nation shall appropriate sufficient resources indispensable for the proper and timely application of the law of extinction of dominion.

In accordance with the Programme for Reincorporation into Civilian Life, the National Government shall endeavour to link demobilized persons to productive projects or to training or education programmes that facilitate their access to productive employment.

Simultaneously and in accordance with the same program, it will seek their support to enter appropriate psychological assistance programs to facilitate their social reincision and adoption to normal daily life.

Magistrates of the High Judicial District Courts, created under this law, shall be elected by the Plenary Chamber of the Supreme Court of Justice from lists sent by the Administrative Chamber of the High Judicial Council.

The requirements demanded to be a Magistrate of these Courts, will be the same demanded to be a Magistrate of the current Superior Courts of Judicial District.

The Administrative Chamber of the Superior Council of the Judiciary may form administrative and social support groups for these Courts. The nomination of employees shall be the responsibility of the Magistrates of the Courts created by this law.

Article 68. Appeals under this law, which are dealt with by the Supreme Court of Justice, shall take precedence over other matters within the jurisdiction of the Corporation and shall be resolved within thirty days.

Persons who have demobilized within the framework of Act No. 782 of 2002 and who have been certified by the National Government may benefit from inhibitory resolution, preclusion of investigation or cessation of proceedings, as the case may be, for the offences of conspiracy to commit a crime under the terms of the first paragraph of article 340 of the Criminal Code; illegal use of uniforms and insignia; instigation to commit a crime under the terms of the first paragraph of article 348 of the Criminal Code; manufacture, trafficking and carrying of arms and ammunition.

Persons convicted of the same crimes and who meet the conditions set forth in this article may also access the legal benefits enshrined for them in Act No. 782 of 2002.

Article 70. *Reduction of penalties.* **Persons who, at the time of the entry into force of this Act, are serving sentences that have been executed shall have the right to have their sentence reduced by one tenth. Except those convicted of crimes against sexual liberty, integrity and training, against humanity and drug trafficking.**

For the granting and assessment of the benefit, the judge in charge of enforcement of sentences and security measures shall take into account the convicted person's good behaviour, his commitment not to repeat criminal acts, his cooperation with the courts and his actions for reparation to the victims.

Article 71. *Sedition.* **To add to article 468 of the Criminal Code a paragraph along the following lines: "The crime of sedition shall also be committed by those who are members or members of guerrilla or self-defence groups whose actions interfere with the normal functioning of the constitutional and legal order. In this case, the penalty shall be the same as for the crime of rebellion.**

Paragraph 10 of article 3 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988 and incorporated into national legislation by Law 67 of 1993,

shall remain in full force".

Article 72. *Validity and derogations.* This Act repeals all provisions to the contrary. It shall apply only to events that occurred prior to its entry into force and shall apply from the date of its promulgation".

III. THE LAWSUIT.

The lawsuit of unconstitutionality that initiated this process was filed by a group of one hundred and five (105) Colombian citizens, acting on their own behalf or on behalf of various organizations, against Law 975 of 2005 in its entirety, or in subsidy, against certain sections of articles 2, 5, 9, 10, 13, 11.5, 17, 18, 23, 26 par. 3, 29, 31, 34, 37.5, 37.7, 46, 47, 48, 54, 55, 58, 62, 69, 70 y 71.

For purposes of precision, this section will review in detail the various charges of unconstitutionality contained in the lawsuit, following the structure of the same. This structure consists of three main parts: (1) a chapter entitled "Summary" summarizing the formal and substantive charges brought against the challenged statute, (2) a chapter setting forth certain prior considerations regarding the scope of application of the challenged statute, and (3) a chapter setting forth the various arguments that make up the charges of unconstitutionality directed against the provision under review.

Summary of the charges of unconstitutionality to be examined.

1.1. The plaintiffs explain that Law 975 of 2005 in its entirety, or in subsidy the rules demanded, are unconstitutional for reasons of form and substance.

1.2. With regard to substantive defects, they explain that there are mainly two of them. One of them affects several provisions of Law 975 of 2005; the other affects article 71 thereof.

1.2.1. The first substantive defect stems from the paragraphs accused of all the articles being sued, with the exception of Article 71, which in the view of the plaintiffs constitute a 'system of impunity': *'the underlined paragraphs of the articles being sued (Articles 2, 5, 9, 10, 13, 11.5, 17, 18, 23, 26 par. 3, 29, 31, 34, 37.5, 37.7, 46, 47, 48, 54, 55, 58, 62 and 69) for substantive flaws, constitute in their entirety a system of impunity because they allow the granting of the benefit of alternative punishment (art. 29), reduced by the time spent in areas of concentration (art. 31), on the basis of a procedure that guarantees neither truth, nor justice, nor reparation.* This charge is based on the additional reasons summarized below.

1.2.1.1. *"First of all, Law 975 provides for an extremely inadequate investigation of a minimum percentage of demobilised persons (Article 2 partial, 9 partial, 10 partial, 18 partial, 62 partial, 69). In effect, only combatants who, prior to their demobilization, have been prosecuted or convicted for non-amnestible or pardonable crimes will be subject to this law. It is pointed out that those who would be protected by this law are a tiny minority that the Government has estimated at 300 to 400 individuals; and that "the majority of combatants have no trials or convictions against them, because their identity is unknown and because, in any case, there is great impunity in the country. For the majority of the demobilized, the Government issued Decree 128 of 2003, under the protection of which it releases those who do not have a judicial record, without taking the trouble to initiate even a process for their obvious membership in an illegal armed group, which is unconstitutional and also contrary to Law 782 of 2002, or law of public order, which Decree 128 intended to regulate.*

1.2.1.2 Moreover, with regard to this small group of facts, the defendant law establishes insufficient terms for the investigation, which make it impossible to properly investigate the magnitude of the facts *"in terms of their gravity, and their elements of systematicity and generality"*.

1.2.1.3 In addition, the established procedure *"does not provide adequate guarantees for victims' participation and access to justice, since it does not allow them access to the file (partial art. 37.5), does not expressly provide for their participation in the proceedings (partial arts. 17, 18, 34 and 37.7) and omits an appeal in cassation (partial art. 26 par. 3). In these conditions, the procedure of Law 975 does not constitute an effective remedy"*.

1.2.1.4 In addition, the law allows demobilized persons to access the benefits established therein *"without having to make a full confession of the facts (partial art. 17), without being required to indicate the whereabouts of persons who disappeared at the time of demobilization (partial art. 10.6), and without losing the benefits for committing new crimes (partial art. 29)"*.

1.2.1.5 The procedure established in the accused law prevents adequate reparation for the damages suffered by the victims, *"since it excludes from the right to reparation victims who, being victims, are not recognized as such (arts. 5 partial, 47 partial, and 48.3 partial); it points out that only illegally acquired goods or other goods will be eligible for reparation if the demobilized person has them (arts. 10.2 partial, 11.5 partial, 13.4 partial, 17 inc. 2 partial, 18 inc. 2 partial and 46 partial); does not provide adequate guarantees for the restitution of the property (art. 54 partial); does not indicate the assessment of damages in favor of the victim because the victim does not promote the incident of reparation (art. 23); and makes the payment of reparations dependent on budgetary limitations (art. 47 partial, 55 partial)*.

1.2.1.6. This procedure also establishes *"exemptions from the duty to disseminate in full the precarious truth to be attained (arts. 48.1 and 58 in part)"*.

1.2.1.7 The law disregards the State's obligation to punish those responsible for serious human rights violations and breaches of international humanitarian law with custodial sentences, *"by establishing that they may serve part of their sentence in areas of concentration, which have been set aside for other purposes and which are in no way places of deprivation of liberty" (art. 31)*.

1.2.1.8. The plaintiffs conclude: *"Despite all these shortcomings and the fact that, in conclusion, the victims will not be recognized in their rights, the law foresees an alternative penalty benefit that closes the system of impunity, which implies that, at most, demobilized combatants will serve between three and a half and six and a half years of eventual deprivation of liberty, despite the fact that the Colombian Criminal Code and the Rome Statute established by the International Criminal Court contemplates significantly broader penalties*.

1.2.1.9. To this extent, it is stated that, as provided for in the procedure laid down in the accused norms, the benefit of alternative punishment in reality constitutes a veiled pardon, *"since it allows the exoneration of a very important part of the sentence without the minimum conditions required by the Constitution and international treaties and commitments in the field of human rights and international humanitarian law, thus constituting a disproportionate benefit in favour of the perpetrators of the most aberrant crimes and to the detriment of the victims"*. It is also considered that this benefit of alternative punishment constitutes a veiled pardon *"because it foresees an undue governmental intervention in its granting, intervention proper to the measures of pardon and amnesty"*.

1.2.1.10. It is also considered that the articles in question constitute an amnesty, *'since they allow, as*

a direct effect of the application of the rules, the erasure of the responsibility of the perpetrators of serious crimes - violations of human rights and breaches of international humanitarian law - who, at the time of their demobilisation, have no judicial process or sentence for this type of crime'.

1.2.1.11. Finally, it is stated that the accused rules do not go beyond a strict proportionality judgment such as the one to be applied in this case, since *'they treat victims unequally, sacrificing constitutional values and principles that are more relevant than those achieved with the differential measure. In fact, the benefit of the alternative penalty is disproportionate, not only because it exceeds the legal minimums, which prohibit measures leading to impunity, but also because the benefits are granted without demanding a genuine contribution to the clarification of the truth, to justice and reparation, or to the non-repetition of violations.*

1.2.2 The second substantive defect concerns article 71 of the accused law, which added to the criminal offence of sedition a paragraph, according to which membership in, or formation of, paramilitary groups constitutes a crime of sedition: *"The rule is contrary to the Constitution, which provides for exceptional treatment of political crime, and ignores the fact that under Columbian law paramilitarism has never been considered a crime of sedition. The modification introduced to the criminal type of sedition does not correspond to the concept of political crime, which has as one of its fundamental elements the opposition to the State".* In this sense, article 71 of Law 975/05 *"violates the State's duty of guarantee and the obligation to guarantee an effective remedy, which includes access to justice and the duty of the State to investigate crimes committed in its territory".*

1.3 As for the defects of form, three are indicated in the complaint that, in the petitioners' opinion, affect Law 975/02 as a whole.

1.3.1. First, the law was not treated as statutory: *"The Constitution requires that laws regulating fundamental rights, such as the rights to truth, justice and reparation, as well as procedures and remedies for their protection, be statutory laws (Article 152 of the Constitution). According to Article 153 of the Constitution, such laws must be approved by an absolute majority of the members of Congress and previously reviewed by the Constitutional Court. Law 975 of 2005, despite the fact that it regulates matters of statutory law, was processed and approved as ordinary law".*

1.3.2 Second, the law was not treated as a pardon law: *"Since Law 975 of 2005 grants covert pardons, it should have been dealt with through the special procedure provided for these cases: secret ballot (article 131 of Law 5 of 1992) and qualified majorities (articles 150 of the Constitution and 120 of Law 5 of 1992). However, the law was passed and approved as ordinary law.*

1.3.3 Third, during the passage of the law, two articles that had been denied were unduly appealed: *"Articles 70 and 71 ('reduced penalties' and 'sedition'), after being denied in the joint sessions of the first Committees of the Senate and House, were appealed, using as a basis articles of Law 5 of 1992 that were not applicable to the case. When one or more articles of a bill are denied, there is no rule that allows your appeal. However, the appeal was used and, as a result of the appeal, the articles were approved, in an irregular manner, in the plenary of the Senate.*

2. The applicant's preliminary observations on the scope of Law 975/05.

In this second chapter of the application, it is explained what is, in the view of the petitioners, the scope of application of the accused norm:

"Law 975 of 2005 regulates the granting of criminal benefits for crimes consisting of serious violations of human rights and breaches of humanitarian law, including war crimes and crimes

against humanity.

According to article 2, Law 975 of 2005 'regulates the investigation, prosecution, punishment and judicial benefits of persons linked to illegal armed groups, as perpetrators or participants in criminal acts committed during and on the occasion of belonging to those groups, who have decided to demobilize and contribute decisively to national reconciliation'. However, the regulation of criminal benefits for demobilization established by law does not cover all types of crimes, but only those that cannot be the object of amnesties and pardons, that is, crimes of special gravity such as war crimes and crimes against humanity, and serious violations of human rights.

The foregoing, inasmuch as Law 975 of 2005 complements, but does not replace, the existing regulations regarding benefits for reincorporation into civil life. This is stipulated in the last paragraph of article 2 of the Act, according to which 'the reinsertion into civil life of persons who may be favoured with amnesty, pardon or any other benefit established in Act No. 782 of 2002 shall be governed by the provisions of that Act'. Thus, in spite of the issuance of the so-called 'justice and peace' law, the provisions of Law 782 of 2002 and its regulatory decree 128 of 2003 remain in full force to regulate the situation of combatants who, at the time of their demobilization, have neither criminal proceedings nor convictions against them for crimes that cannot be amnestied or pardoned, as expressly stipulated in article 21 of that decree.

The entry into force of Law 975 of 2005 broadens the scenarios for granting legal benefits for demobilization, authorizing the granting of the same to those who are being prosecuted or have been convicted of crimes of special entity.

The legal regulation is differentiated according to the legal situation in which the combatants find themselves at the time of their demobilization. The normative framework provides for the following three events, assigning different legal consequences to each: (i) in the case of combatants who, at the time of their demobilization, have neither criminal proceedings under way nor convictions against them; (ii) in the case of combatants who are being prosecuted or have been convicted for the crimes of sedition, assault and rebellion (including related crimes); and (iii) in the case of combatants who have criminal proceedings under way or convictions against them for crimes other than political and related crimes. Only in this last event (iii) would the procedure for the granting of benefits under Law 975 of 2005 be applied, without prejudice to the fact that demobilized combatants who find themselves in other situations request to avail themselves of the law.

In the first case (i), the provisions of Decree No. 128 of 2003 are applied, according to which demobilized combatants who have neither trials nor convictions should not be subject to investigative proceedings. In the second event (ii), demobilized combatants who are prosecuted for amnestiable and pardonable crimes may have access to the benefits contemplated in Law 782 of 2002, that is, inhibitory resolution, preclusion resolution, cessation of proceedings, conditional suspension of the execution of the sentence and pardon. This second group includes demobilized persons under investigation or convicted of the crimes of rebellion, sedition and assault, and the crimes contemplated in article 69 of Law 975 of 2005. It should not be forgotten that article 71 of that law modified the criminal type of sedition to include the formation or belonging to paramilitary groups^(...).

By maintaining the validity of the legal and regulatory instruments that existed prior to their issuance, Law 975 of 2005 establishes a set of procedures and benefits that are only applicable to members of illegal armed groups who are in the third event (iii), that is, to combatants against whom there is a criminal process or a judicial conviction against them for crimes for which amnesty and pardon are outlawed.

Combatants of illegal armed groups against which there are prosecutions or judicial sentences for war crimes, crimes against humanity, serious violations of human rights, breaches of international humanitarian law and other crimes of special concern, such as drug trafficking and extortion, may only benefit from the provisions of Law 975 of 2005.

Thus, a combatant of a paramilitary or guerrilla group who is being investigated for his or her participation in the respective armed group, and who is only charged with the crimes of conspiracy to commit a crime, illegal carrying of weapons, and use of uniforms belonging to the military forces, may receive the benefits established by Law 782 of 2002 (injunction and preclusion resolution, cessation of proceedings, conditional suspension of the execution of the sentence, and pardon); while that against which there is a prosecution or conviction for crimes such as enforced disappearance, torture, kidnapping, etc., must resort to the provisions of Law 975 of 2005 in order to receive the benefit of the alternative penalty".

3. Substantiation of charges for substantive defects

3.1. First charge for substantive defects: defects affecting the alternative procedure and penalty laid down in Articles 2, 5, 9, 10, 13, 11.5, 16, 17, 18, 23, 26 par. 3, 29, 31, 34, 37.5, 37.7, 46, 47, 48, 54, 55, 58, 62 and 69 of Law 975/05.

3.1.1. The proportionality test as a framework for examining the constitutionality of the rules charged.

3.1.1.1. First of all, it is explained that there is a *complementary* relationship between the rights to justice and peace. While the interest in seeking peace and establishing legal mechanisms to dismantle combatant armed groups is in apparent tension with the interests of justice and the protection of human rights and international humanitarian law, it is a dilemma that is not insoluble.

Both interests have a constitutional basis: they were enshrined in the preamble as aspirations of the constituent by adopting the 1991 Charter, they are essential purposes of the State (art. 2, C.P.) and they are fundamental rights (arts. 22, 2, 5, 93 and 229, C.P.). On the other hand, constitutional jurisprudence *"has recognized that the realization of the right to justice is a very important element to achieve peaceful coexistence, that is, to offer institutional means of conflict resolution through which violent responses that are not compatible with the Colombian Constitution are avoided"*. Judgment C-228 of 2002 is cited in this regard. Reference is also made to the updated set of principles for the protection and promotion of human rights through action to combat impunity, adopted by the United Nations Commission on Human Rights, which stressed the need to base the search for national reconciliation on the satisfaction of justice. It concludes: *"Justice and peace, therefore, are not opposing rights, contradictory interests or mutually exclusive values in the light of the Constitution. On the contrary, in the constitutional order, justice in cases of human rights violations and breaches of humanitarian law is a path that is indispensable to travel in order to reach peace.*

3.1.1.2. It is then stated that the method to be applied to determine the constitutionality of the rules accused is the proportionality test, since *'although justice and peace are complementary principles and rights, they sometimes result in apparent tension in contexts of transition to democracy or of overcoming armed conflicts. In such contexts, it is necessary to grant criminal benefits to those who have committed serious human rights violations or breaches of humanitarian law in order to overcome the armed conflict.*

The express purpose of Law 975/05 is to facilitate the achievement of peace and the reintegration of combatants into civilian life, as well as to guarantee the rights of victims; that is, to seek a balance between peace and justice, through the establishment of special criminal procedures and sanctions, that is, an alternative penalty, to which demobilized combatants who have committed crimes that cannot be pardoned or amnestied must submit. *In accordance with the foregoing,*" the complainants explain, "*Law 975 of 2005 subjects the victims of human rights violations and breaches of international humanitarian law to differentiated treatment, according to which those responsible for the crimes caused to them are not subject to the criminal procedures and sanctions provided for in ordinary legislation, but to special procedures and penalties established by the defendant law.*

In this sense, the plaintiffs consider that the constitutionality of the criminal procedures and sanctions established in Law 975/05 should be determined through the resolution of the following questions: "*i. If the law violates the right to justice, in its components of the rights to truth, justice and reparation, and ii. Under what conditions can these benefits of reduced sentences be granted so that they do not violate the right to justice and are truly an instrument for achieving peace*". The response to these problems requires, in the view of the actors, a proportionality judgment, "*that is, the method adopted by constitutional jurisprudence to examine whether measures restricting rights are discriminatory*". In this regard, judgment C-093 of 2001 is cited as regards the elements of the proportionality trial; and it is clarified that the trial to be applied must be *strict*, not intermediate or weak, since as explained in the aforementioned judgment C-093/01, this is the figure to be applied when it comes to laws that limit the enjoyment of a constitutional right to a certain group of persons, or when they affect populations that are in situations of manifest weakness: "*As mentioned, Law 975 of 2005 subjects to differentiated treatment cases in which crimes of serious violations of human rights and breaches of international humanitarian law have been committed, establishing limitations on the right to justice, which is a fundamental constitutional right. In addition, in the same way it affects a population that is in manifest weakness, which is the situation of the victims of the mentioned crimes*".

3.1.1.3. The premises on which the proportionality judgment to be applied in this case must be based are set out below:

"In order to overcome armed conflicts, or for 'reasons of public convenience', the Constitution provides for the State power to grant pardons or amnesties (articles 150.17 and 201 of the Constitution). Similarly, international humanitarian law, which is part of the constitutional bloc in accordance with articles 93 and 214 of the Constitution, calls on States to grant amnesties for the termination of armed conflicts (article 6 of Protocol II Additional to the Geneva Conventions).

2. The State's power to grant amnesties and pardons is constitutionally limited for the following reasons: i. Pardons and amnesties may only be granted for political crimes (articles 150.1 and 201 of the Constitution), and ii. Under no circumstances may atrocious and barbaric acts, including serious violations of human rights, breaches of international humanitarian law, war crimes and crimes against humanity, be construed as political crimes.

3. As already noted, the State has an inalienable obligation to investigate, prosecute and punish serious violations of human rights, in accordance with the Constitution, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Inter-American Convention on Forced Disappearance." The State has an inalienable obligation to investigate, prosecute and punish serious violations of human rights, in accordance with the Constitution, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention

on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Inter-American Convention on Forced Disappearance.

For the plaintiffs, the observance of these premises guarantees respect for the essential core of the right to justice, as well as the genuine character of peace processes: *"Only in these conditions, peace and justice are not contradictory rights, but interdependent. In this way, justice becomes a guarantee of peace and peaceful coexistence.*

In the following sections of the lawsuit, both the content of the right to justice and the reasons why the accused norms violate it and do not resist the application of a trial of strict proportionality are developed.

Violation of the right to justice

3.1.2.1. General details on the content of the right to justice.

First of all, some clarifications are made in the application regarding the content of the right to justice in a generic sense.

3.1.2.1.1. Its constitutional basis is to be found in Articles 2, 5, 29 and 229 of the Political Charter: *"The right to justice is a pillar of the social rule of law. It is, in turn, a way of guaranteeing human dignity, rights and peaceful coexistence. That is why it is a fundamental right.* At this point, the 2002 judgment C-426 is cited as support, as well as the International Covenant on Civil and Political Rights (articles 2.1., 2.3. and 14), the American Convention on Human Rights (articles 2.2., 8 and 25), the Universal Declaration of Human Rights (articles 8 and 10) and the American Declaration of the Rights of Man (article 18).

3.1.2.1.2. Non-compliance with the duty to investigate and punish crimes committed against human rights leads to the repetition of their violation, as recognized by the Inter-American Court of Human Rights in the case of *Bámaca Velásquez v. Guatemala* (22 February 2002), and constitutes impunity. In this regard, the so-called "Joinet Principles" of the United Nations Commission on Human Rights are cited, which define impunity *"for the absence, de jure or de facto, of the criminal responsibility of the perpetrators of human rights violations, as well as their civil, administrative or disciplinary responsibility, so that they escape any investigation aimed at allowing them to be charged, arrested, tried and, if they are found guilty, sentenced to appropriate penalties, and to make reparation for the harm suffered by their victims," so that they escape any investigation aimed at allowing them to be charged, arrested, tried and, if they are found guilty, sentenced to appropriate penalties, and to make reparation for the harm suffered by their victims.*

It is also a duty derived from an international treaty validly ratified by the Colombian State, which cannot be breached through the approval of an internal law.

3.1.2.1.3. The obligation to guarantee human rights and provide effective judicial remedies derives the right to justice in its different elements: the right to know the judicial and historical truth, the right to have those responsible investigated, tried and punished with proportionate penalties, and the right to obtain full reparation. *"The rights of victims to these three attributes of justice, as minimums, remain fully valid even in stages of transition or at the end of armed conflicts. Certain benefits may be granted, especially in the area of penalties, provided that the minimums continue to be respected (for example, the reduction of penalties that does not mean a total pardon of the same), and provided that it is not done with the intention of concealing atrocities and the responsibility of their*

perpetrators, but as a genuine search for peace within the framework of just processes".

3.1.2.1.4. Although Article 6 of Protocol II Additional to the Geneva Conventions stipulates that the authorities have a duty to seek the 'widest possible' amnesties, such measures must be interpreted in accordance with state obligations regarding the right to justice. Moreover, as the International Committee of the Red Cross has expressed, such a rule "is not intended to be an amnesty for those who have violated international humanitarian law" (Letter from the International Committee of the Red Cross to the Prosecutor of the Criminal Tribunal for the former Yugoslavia, 1995).

3.1.2.1.5. The prohibition of war crimes and crimes against humanity is a peremptory norm or *ius cogens*. To support this assertion, the decision of the British House of Lords on the Pinochet case - which referred to the crime of torture -, the decision of the Criminal Tribunal for the Former Yugoslavia in the case of the Prosecutor against Kupreskic (January 14, 2000) - in which most of the rules of IHL were qualified - are cited, in particular those prohibiting war crimes, crimes against humanity and genocide as imperative and non-derogable norms of *jus cogens*, and the decision of the same Court in the case of the Prosecutor v. Furundzija (December 10, 1998) - which referred to the crime of torture. Hence, States cannot take measures to authorize or pardon the violation of these norms, by means of amnesty laws, as expressed in the Furundzija case cited.

3.1.2.1.6. The States have the duty to take the necessary measures so that no one is removed from judicial protection, as established by the Inter-American Court of Human Rights in the Barrios Altos case, in whose judgment it was expressed, in terms of the plaintiff, that *"self-amnesty laws that contribute to the concealment of those responsible for human rights violations and that hinder the investigation and clarification of the facts are incompatible with the American Convention on Human Rights.*

3.1.2.1.7 Similarly, the Joinet Principles cited above set out certain limits that amnesties must respect, specifically in the sense that (i) perpetrators of serious international crimes cannot benefit from such measures until the State has fulfilled its obligations of investigation, detention and punishment, and (ii) amnesties have no effect on the victims' right to reparation.

3.1.2.1.8. Based on the foregoing, it is stated that *"Article 6 of Protocol II does not imply that amnesties granted after the cessation of the conflict may cover war crimes and crimes against humanity. Indeed, armed conflict does not constitute sufficient reason to limit State obligations to investigate, prosecute and punish those responsible for serious crimes under international law. The four Geneva Conventions of 1949 (...) and Protocol I Additional to the Geneva Conventions (...) expressly state the obligation of States to investigate and criminalize violations of international humanitarian law.*

3.1.2.1.9. The Inter-American Commission on Human Rights, in referring to the process of demobilization of paramilitary groups in Colombia, stressed the need to protect the rights of victims, comply with the state obligation to administer justice in accordance with international law, guarantee due process and judicial protection applicable in armed conflicts, and fulfill its duty to judge and punish those who commit or order the commission of serious violations of international humanitarian law.

3.1.2.1.10. The plaintiffs' conclusion on the general content of the right to justice is as follows:

"In conclusion, the right to justice - composed in turn of the rights to truth, justice and reparation - is a fundamental right, especially in cases of violations of human rights and breaches of international humanitarian law. Such a character corresponds to the international obligation of the

Colombian State to guarantee human rights and implies the duty of the Colombian State, not only vis-à-vis other States, but especially vis-à-vis individuals, to investigate, prosecute and punish those responsible for such acts. This obligation becomes even more imperative in cases of war crimes and crimes against humanity, insofar as the prohibition of these acts is the norm of jus cogens and, consequently, such prohibition implies the correlative obligation of States not to take any kind of judicial or administrative measure that would divert their perpetrators from the course of justice. Such an obligation is not derogated from by the fact that it is at the end of an armed conflict, nor can it be ignored with a view to overcoming it.

3.1.2.2. Ignorance of the right to the truth as part of the right to justice.

This section explains why some of the accused norms violate the right to the truth.

3.1.2.2.1. The right to the truth is defined as an integral part of the fundamental right to justice, *"and consists of the right of victims and society to know what happened, the circumstances of the violations, those responsible, as well as the motives and structures that gave rise to human rights violations and breaches of international humanitarian law. The right to the truth derives from the duty of States to guarantee and the right of individuals to an effective remedy.* The pronouncement of the Inter-American Commission on Human Rights in the case of Ignacio Ellacuría and others v. El Salvador (December 22, 1999), regarding state duties with respect to the right to the truth, is cited at this point.

3.1.2.2.2. It is also explained that the right to the truth is both individual and collective: *"The right to the truth is individual because it is a faculty at the head of the victims of serious violations of human rights or breaches of international humanitarian law and it is subsumed in the right to obtain the clarification of the facts and the prosecution of those responsible. Likewise, it is collective because its realization is indispensable for States to take measures to ensure that events do not recur and to prevent them in the future. This right takes on special relevance in cases such as Colombia, where massive and systematic violations of human rights and international humanitarian law have been suffered for years.* This point is supported by Constitutional Court ruling T-249 of 2003, as well as the relevant content of the aforementioned Joinet Principles.

3.1.2.2.3. The complainants also point out that satisfaction of the right to the truth is also a form of reparation, since it *'constitutes an acknowledgement to the victim that his or her pain was the result of a certain and serious event and accepted as such by the institutions'.* In addition, it is an indispensable element for the State to be able to take measures of non-repetition. In this regard, the pronouncements of the Inter-American Court in the cases of Myrna Mack Chang v. Guatemala (November 25, 2003) and others are cited.

3.1.2.2.4. The Inter-American Commission on Human Rights also pronounced on the guarantee of the right to the truth during the process of demobilization of paramilitary groups in Colombia, noting the following:

"30. Faced with this reality, the right to the truth must not be curtailed through legislative or other measures. The IACHR has established that the existence of factual or legal impediments, such as the issuance of amnesty laws, to access to information on the facts and circumstances surrounding the violation of a fundamental right, and that prevent the initiation of judicial remedies in the domestic jurisdiction, are incompatible with the right to judicial protection provided for in Article 25 of the American Convention.

31. The Inter-American Court has established in its jurisprudence that the right to the truth is subsumed in the right of the victim or his next of kin to obtain from the competent organs of the

State the clarification of the facts and the prosecution of those responsible in accordance with the parameters of Articles 8 and 25 of the American Convention.

32. In any case, the enjoyment of this right to know the truth about the commission of crimes under international law is not limited to the relatives of the victims. The Commission and the Inter-American Court have stated that societies affected by violence have, as a whole, the inalienable right to know the truth about what happened and the reasons and circumstances in which aberrant crimes were committed, in order to prevent such acts from happening again in the future. Society as a whole has the right to know the conduct of those who have been involved in the commission of serious violations of human rights or international humanitarian law, especially in the case of passivity or systematism; to understand the objective and subjective elements that contributed to creating the conditions and circumstances within which atrocious conduct was perpetrated; and to identify the normative and factual factors that led to the emergence and maintenance of situations of impunity; to have elements to establish whether state mechanisms served as a framework for the consummation of punishable conducts; to identify victims and their belonging groups as well as those who have participated in acts of victimization; and to understand the impact of impunity.

3.1.2.2.5. The State is obliged to guarantee the right to the truth, even in cases of amnesties, since it has the "duty to remember"; this does not imply that the granting of amnesties for serious crimes is justified in exchange for respecting the right to the truth: *"What is meant is that, even in cases where, as in Chile after the dictatorship, amnesties contrary to international law are granted, such amnesties do not exempt the State from its obligation to guarantee the truth"*. The pronouncement of the Inter-American Commission on Human Rights on the Chilean Truth and Reconciliation Commission is cited here. The complaint also states that *"in individual cases, the guarantee of the right to the truth is constituted in a way to avoid cruel, inhuman or degrading treatment such as that related to the denial of the occurrence"*, as determined by the United Nations Human Rights Committee in the Srpska case (March 7, 2003).

3.1.2.2.6 It is concluded from the foregoing that *"the right to the truth is an integral part of the fundamental right to justice and derives from its national and international recognition, as well as from the State's duty to guarantee. The right to the truth must be guaranteed individually and collectively. Its guarantee is, in turn, a form of reparation, it is obligatory even in contexts where amnesty laws have taken place, and it is a way of avoiding cruel, inhuman or degrading treatment.*

3.1.2.2.7. Ignorance of the right to the truth by article 25 of Law 975, for "the absence of loss of benefits for not confessing all the crimes committed".

At this point the plaintiffs state the reasons why the right to the truth is not known with the provisions of Article 25, which provides:

Article 25. Facts known after the sentence or pardon. If members of illegal armed groups who received the benefits of Law 782 of 2002, or who benefited from the alternative penalty under this law, are subsequently charged with crimes committed during and on the occasion of their membership and before their demobilization, these conducts will be investigated and judged by the competent authorities and the laws in force at the time of the commission of these conducts, without prejudice to the granting of the alternative penalty, in the event that it collaborates effectively in the clarification or accepts, orally or in writing, freely, voluntarily, expressly and spontaneously, duly informed by its defender, to have participated in its realization and provided that the omission has not been intentional. In this event, the convicted person may benefit from the alternative penalty. Alternative penalties shall be cumulated without exceeding the maximum penalties established in this Act.

Taking into account the seriousness of the new facts tried, the judicial authority will impose an extension of twenty per cent of the alternative sentence imposed and a similar extension of the time of probation.

In the plaintiffs' view, the underlined aside allows demobilized combatants to be exonerated from the obligation to contribute to the truth in order to access the alternative penalty: *"On the contrary, the demobilized combatant will never lose benefits by omitting other serious crimes he or she has committed. In the worst case, if after the sentence (cases regulated by Law 975) or pardon (cases regulated by Decree 128 of 2003) new facts are known that have been omitted in the free version, the person may have access to the alternative penalty again except if: i. He does not collaborate in the clarification or does not accept the new crime imputed to him, or ii. The omission was intentional."* In this way, the petitioners explain that the demobilized combatants do not lose in any case the benefit of the alternative penalty on the crime they accept at the time of rendering a free version for the fact of omitting information on other crimes they have committed: *"The defendant article restricts itself to regulating the situation regarding access to benefits for new crimes that are imputed to it and that have not been confessed previously. The norm demanded even allows that if the new imputed crime is not confessed by the demobilized person at the moment of the imputation of the same one, but later 'collaborates in its clarification' and it is not proven that the initial omission was intentional, the demobilized person will be able to access again to the benefit of the alternative penalty"*.

It also explains that *"if it is proven that the omission was intentional but the crime omitted is very serious, the loss of benefits will not operate either, but will aggravate the alternative penalty by 20%. According to the foregoing, the judicial officer shall classify serious crimes - such as those to be prosecuted under this law - into much more serious crimes than others. That is, if, for example, a demobilized person who has received the benefit of the alternative penalty is subsequently charged for another act, the judicial officer may increase the penalty by 20% if the crime is very serious, having to classify crimes such as torture, forced disappearance, kidnapping, violent carnal access, forced recruitment of children, among others, on a scale of gravity, deciding for example that the crime of torture is more serious than the crime of violent carnal access or vice versa. And it is added that "it is possible that a demobilized combatant does not remember at the moment of his free version some of the facts of minor gravity committed in a long period of permanence in a combatant group. However, it is not admissible that it is not in the duty to confess the fullness of the serious facts to access the benefits"*.

To this extent, the petitioners consider that in order to access the benefits granted by the defendant law, the demobilized are not obliged to contribute to the truth, not even to confess the crimes for which a judicial benefit is sought; and that the benefit obtained as a consequence of the first free version will never be lost, since the law does not foresee the figure of loss of benefits.

In the view of the plaintiffs, this rule *"hinders the realization of the right to the truth of the victims of the omitted facts because, in this way, the demobilized combatant does not really have the duty to contribute to the truth about the facts that he knows and in which he participated"*. Therefore, such a provision violates the Colombian State's obligation to adopt legislative measures to realize the right to the truth, *"and it is even contradictory to the principles and provisions set forth in the body of Law 975 itself, in which it is established that its purpose is to facilitate peace processes by guaranteeing, among others, the right to the truth (arts. 1, 4, 7, 8, 15, 32, 37, 48.1 and 57)"*.

They express that in order to prevent Law 975/05 from becoming a mechanism that generates impunity, *"it is indispensable that, in order to access criminal benefits, demobilized combatants*

must contribute to the truth by confessing the totality of the crimes of serious violations of human rights and breaches of international humanitarian law that they committed, and by providing the information they have on other facts of which they are aware, even though they are not criminally responsible for them. (...) Since truth is an indispensable condition for the realization of justice, it must also be an indispensable contribution of those who want to access such generous benefits as those of alternative punishment. The obligation of the State to issue normative measures that facilitate the realization of the right to the truth is especially imperative at a time when the aim is to overcome periods of serious human rights violations and armed conflict through judicial benefits.

In addition, they point out that in cases of ringleaders, *"in principle, they should have knowledge of the acts committed by the troops under their responsibility. This is not an objective criminal responsibility, but it must be assumed that a commander in a military structure is responsible, at least militarily, for the acts of the forces under his command; therefore, one criterion for determining responsibility is that, in the case of ringleaders, responsibility for the acts committed by the group under his command must at least be ascertained.* Article 28 of the Rome Statute of the International Criminal Court is cited in this regard.

They also indicate that the requirement of full confession is not contrary to the right not to self-incrimination enshrined in the Political Constitution (art. 33), the International Covenant on Civil and Political Rights (art. 14.f) and the American Convention on Human Rights (arts. 8.2.g and 8.3), since self-incrimination can be validly carried out as long as it is free, since it is a renounceable right.

It is concluded at this point that *"if the demobilized person does not confess the totality of the facts and omits facts of serious violations of human rights or breaches of humanitarian law, and the State, through Law 975, offers him the benefit of the alternative penalty, he should assume the risk and responsibility of losing such benefit if he omits serious facts or misrepresents the truth. However, Law 975 allows for the omission of truth and even lies. // With this provision, the right of victims to access the truth and the State's obligation to guarantee them justice is hindered because it will depend on the will of the perpetrators to contribute to the realization of justice.*

It is therefore requested that the underlined section of article 25 of Law 975/05 be declared unconstitutional, and that it be stated that *"the concealment of the truth results in the loss of the benefit of the alternative penalty for the confessed offence and the impossibility of accessing that benefit for the known offence after the sentence or pardon"*.

3.1.2.2.8. Violation of the right to the truth by article 10 of Law 975, for having omitted "to stipulate the obligation of demobilized persons to report the whereabouts of disappeared persons".

Article 10 of Law 975/05 is requested, which provides:

"Article 10. Eligibility requirements for collective demobilization. Members of an organized armed group outside the law who have been or may be charged, accused or convicted as perpetrators or participants in criminal acts committed during and on the occasion of belonging to those groups, when they cannot benefit from some of the mechanisms established by Law 782 of 2002, may access the benefits established by this law, provided that they are on the list that the National Government submits to the Attorney General's Office and that they also meet the following conditions:

10.1. That the organized armed group in question has been demobilized and dismantled in compliance with the agreement with the National Government.

10.2. That the goods resulting from the illegal activity are delivered.

10.3. That the group make all recruited minors available to the Colombian Family Welfare Institute.

10.4. That the group cease all interference with the free exercise of political rights and civil liberties and any other illicit activity.

10.5. The group is not organised for drug trafficking or illicit enrichment.

10.6. That the kidnapped persons, who are in their possession, be released.

Paragraph. The members of the organized armed group outside the law who are deprived of their liberty may have access to the benefits contained in this law and those established in Law 782 of 2002, provided that the corresponding judicial decisions determine that they belong to the respective group.

For the plaintiffs, in approving the accused norm, a relative legislative omission was incurred, consisting of the fact that demobilized combatants are not required to indicate, at the time of demobilization, the whereabouts of the disappeared persons. They proceed to explain why, in the present case, the five conditions set out in constitutional jurisprudence (judgement C-185 of 2002) for the creation of a relative legislative omission, namely, are met: (ii) such a rule excludes from its legal consequences cases which, being assimilable, should be contained in its normative text, or which omits to include an ingredient or condition which, under the Constitution, is essential to harmonize the text of the rule with the mandates of the Political Charter; (iii) that the exclusion of the cases or elements in question lacks a principle of sufficient reason; (iv) that by virtue of the lack of justification and objectivity alluded to, the cases excluded from the legal regulation remain in a situation of negative inequality compared to those that are protected by the consequences of the norm; and (v) that the omission results from the breach of a specific duty imposed on the legislator by the Constituent.

As for element (i), they point out that there is a rule on which the office is preached, namely, numeral 6 of article 10, defendant.

With regard to element (ii), they explain that there is a rule that excludes from its legal consequences cases that, because they are assimilable, should be included in its scope: *"The exclusion of the same legal consequences is evident in assimilable cases, since article 10, paragraph 6, establishes the obligation of the demobilized person to release, at the time of demobilization, the kidnapped persons; however, it does not refer to the obligation to inform, at the time of demobilization and as a condition of eligibility, the whereabouts of disappeared persons. The two situations can be assimilated to the extent that the intention of the norm is to guarantee that, in effect, the commission of crimes that are characterized by being continuous, such as kidnapping and also forced disappearance, is suspended. // Enforced disappearance is a continuous criminal act, the commission of which ends when the person or his remains appear.* The pronouncement of the Inter-American Court of Human Rights in the Blake case is cited at this point.

In relation to element (iii), they assert that the omission in question does indeed lack a principle of sufficient reason: *"No reason is known for excluding such a requirement; therefore, it cannot be asserted that the reason is justifiable in the light of the constitutional order"*.

With regard to element (iv), it is explained that negative inequality is effectively generated for cases excluded from legal regulation as opposed to those that are covered by the norm: *"The relatives of disappeared persons have the right to have the State take all measures to clarify the whereabouts of the disappeared persons, information which, moreover, makes the commission of the continuing crime of enforced disappearance cease. However, it omits to adopt a measure that allows the State to have elements to determine the whereabouts of the disappeared person, whereas such a measure is adopted for other crimes, such as kidnapping"*.

Finally, they point out that there is also element (v), consisting of the omission being the result of a

breach of a specific constitutional duty on the part of the legislator, since the duty of the Colombian State to adopt measures to establish the whereabouts of the disappeared persons was breached: *"The inclusion of such a requirement that was omitted - that of providing information on the whereabouts of disappeared persons - is indispensable to make effective the constitutional mandate expressed in Article 12 of the Constitution, which categorically prohibits the forced disappearance of persons in accordance with the Inter-American Convention on Forced Disappearance of Persons, which is part of the constitutional bloc. It is also harmonious with article 4.2 of the Declaration against Enforced Disappearance (...)"*.

They also affirm that in cases of enforced disappearance the right to the truth has a reinforced constitutional protection, given the express and strict formulation of the prohibition enshrined in Superior Article 12; and cite the case of Lucio Parada Cea et al. v. El Salvador of the Inter-American Commission on Human Rights (27 January 1999), in which it was affirmed that relatives in these cases have the right to access and receive information on the whereabouts of disappeared persons, in harmony with the provisions of Article 32 of Protocol I Additional to the Geneva Conventions. On the other hand, they emphasize that the denial of the right to the truth in cases of enforced disappearances also constitutes cruel treatment prohibited by international law, as expressed by the Human Rights Committee in the case of Mariya Staselovich v. Belarus (2003).

In the same sense, they indicate that in accordance with articles 43, 44 and 45.5 of the same Law 975/05, at the time of passing sentence, the search for disappeared persons or their remains may be established as one of the possible orders of reparation, which materializes the constitutional obligations in this field; *"however, the obligation to indicate the whereabouts of disappeared persons is not included in the eligibility requirements of those who demobilize. Furthermore, it is not clear why the duty to provide information on the whereabouts of the victim is left for the moment of sentencing and should not be provided from the very moment of demobilization, especially when it is a way of fulfilling also the requirement for eligibility in collective demobilization established in article 10.4 of the law itself (...)"*. In this order of ideas, the plaintiffs explain that the information on the whereabouts of the disappeared must be provided in advance in order to access benefits, without being left for the moment of sentencing; and they indicate that the United Nations Working Group on Enforced or Involuntary Disappearances made an observation in this precise sense when referring to the Colombian case, and specifically to Law 975/05. They also affirm that *"the fact that the contribution to the location of the whereabouts of disappeared persons is prior would allow access to the benefits of reduced sentences; otherwise sensu, to grant generous criminal benefits without such a contribution is disproportionate"*. Article 3 of the Inter-American Convention on Enforced Disappearances is cited here.

Consequently, the plaintiffs request the Court to declare Article 10 unconstitutional by legislative omission, and to declare that *"it is understood that such rule also includes the duty of the group to provide information leading to the determination of the whereabouts of the disappeared persons"*.

3.1.2.2.9. Violation of the right to the truth by articles 48 and 58 of Law 975/05, inasmuch as they do not know the obligation to carry out a complete dissemination of the truth.

Articles 48 and 58 of Law 975/05 are demanded in this point, which provide:

"Satisfaction measures and guarantees of non-repetition. Satisfaction measures and guarantees of non-repetition, adopted by the various authorities directly involved in the national reconciliation process, should include:

49.1 (sic) Verification of the facts and full and public disclosure of the judicial truth, to the extent that it does not cause further unnecessary harm to the victim, witnesses or other persons, or create a

danger to their safety.

Article 58. Measures to facilitate access to archives. Access to archives should be facilitated in the interest of victims and their relatives to assert their rights.

When access is requested in the interest of historical research, authorization formalities shall only be for the purpose of access control, custody and proper maintenance of the material, and not for purposes of censorship.

In any case, the necessary measures should be taken to safeguard the right to privacy of victims of sexual violence and of child and adolescent victims of illegal armed groups, and not to cause further unnecessary harm to the victim, witnesses or other persons, or create a danger to their safety.

The plaintiffs explain that, in principle, the transcribed articles enshrine restrictions on the dissemination of the truth and access to archives that are legitimate and proportionate as limitations of the right to the truth, inasmuch as their purpose is not to generate more damage for the victims and to protect the security of witnesses who have contributed to the clarification of reality. However, they consider that the paragraphs underlined allow two interpretations, one of which is unconstitutional.

In effect, it is stated that "an unconstitutional interpretation of those rules would allow the dissemination of truth or access to archives to be limited to avoid causing any kind of harm to any person, including, for example, demobilized combatants or the persons who have supported them. Such an interpretation would be a denial of the right to the truth of victims of human rights violations and breaches of international humanitarian law, as it would again override the interests of the perpetrators over the interests of the victims and reaffirm the conditions under which they have been oppressed. This would be particularly feasible if it were interpreted as harm, for example, the moral damage that those responsible for the crimes would suffer because the truth of the facts is publicly known, or the moral damage of any other kind that may be suffered by persons who have not directly perpetrated the crimes but who have collaborated with, financed or supported the activity of armed groups from the public, political or economic spheres".

Claimants recall that international standards on the right to the truth only justify restricting access to information in the interests of victims and justice; this is the case, for example, with article 68.5 of the Rome Statute of the International Criminal Court. It also cites some pronouncements of the United Nations Commission on Human Rights in which it has been explained that the restriction of access to the truth is also justified when it is a question of protecting persons other than the victims, as long as it is a question of safeguarding their life and security: *"all the interpretations within the reports prepared by United Nations experts and approved by the United Nations Commission on Human Rights only find limitations to the public knowledge of the truth in order to safeguard the interests of persons other than the victims and witnesses when there are risks to their security and integrity".*

Based on the foregoing, the plaintiffs request the Court to declare the conditional constitutionality of the apartheid defendants, *"under the understanding that only that which may entail a risk to the security or integrity of persons who have intervened to help the victim or prevent further violations shall be understood as 'unnecessary harm' to 'other persons'".*

3.1.2.3. Violation of the right to justice in the strict sense

3.1.2.3.1. In this section, the plaintiffs set forth the reasons why they consider that, in addition to ignoring the right to truth as the first component of the right to justice in the general sense, they also ignore the state obligation to satisfy the right to justice in the strict sense, as the second component

of the right to justice in the general sense, relating to *"the declaration of criminal responsibility and the assignment of condignated sanctions to those responsible for crimes and, in this case, serious violations of human rights and breaches of humanitarian law"*. They point out, in relation to the content and foundation of the right to justice in the strict sense, that *"the duty of the State to guarantee human rights implies the duty to investigate, prosecute and adequately punish those responsible for violations of human rights and international humanitarian law"*.

3.1.2.3.2. Explain that while Article 2 of the Constitution establishes for the authorities the duty to protect citizens in their rights, international human rights law establishes two major duties for States: a duty of abstention, *"by virtue of which States must refrain from violating, by action or omission, human rights"*, and a duty of guarantee, *"which refers to the obligation of the State to prevent violations, investigate them, prosecute and punish their perpetrators and repair the damage caused"*.

In accordance with the foregoing, they recall that the Colombian State has an international obligation to investigate, prosecute and punish those responsible for atrocious crimes, and to guarantee the victims of such crimes an adequate remedy. They cite in this regard the treaty provisions that enshrine the right to an effective judicial remedy and the right to judicial guarantees (International Covenant on Civil and Political Rights, arts. 2.1, 2.3 and 14; American Convention on Human Rights, arts. 2, 8 and 25; Universal Declaration of Human Rights, arts. 8 and 10; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1, 6 and 8; Inter-American Convention on Forced Disappearance of Persons, arts. 1 and 3; Convention on the Prevention and Punishment of the Crime of Genocide, arts. 1, 4, 5 and 6). It also cites some cases resolved by international courts in which this duty of the State has been highlighted in cases of serious human rights violations, including the Velásquez Rodríguez and "19 merchants" cases of the Inter-American Court of Human Rights.

To recapitulate Colombia's international obligations regarding the right to justice in the strict sense, they transcribe Principle 19 of the "Updated Set of Principles for the protection and promotion of human rights through action to combat impunity", prepared by an expert from the United Nations Commission on Human Rights, the text of which is as follows:

"Principle 19. Duties of States with regard to the administration of justice. States shall undertake prompt, thorough, independent and impartial investigations into violations of human rights and international humanitarian law and shall take appropriate measures in respect of the perpetrators, especially in the field of criminal justice, to ensure that they are duly prosecuted, tried and sentenced. Although the prosecution initiative is first and foremost one of the missions of the State, complementary procedural rules should be adopted so that the victims themselves, their families or heirs can take such an initiative, individually or collectively, in particular as civil parties or as persons who initiate a trial in States whose criminal procedural law provides for such proceedings. States shall ensure broad legal participation in the judicial process to all injured parties and to any person or non-governmental organization having a legitimate interest in the process.

3.1.2.3.3. Violation of the right to justice due to "the restricted investigation of facts as Law 975 of 2005 residual to Decree 128 of 2003".

At this point, the plaintiffs contest certain provisions of Articles 2, 9, 10, 18, 62 and 69 of Law 975/05, namely:

"Article 2. Scope of the law, interpretation and normative application. This Act regulates the investigation, prosecution, punishment and judicial benefits of persons linked to organized armed

groups outside the law, as perpetrators or participants in criminal acts committed during and on the occasion of belonging to those groups, who have decided to demobilize and contribute decisively to national reconciliation.

The interpretation and application of the provisions of this law shall be carried out in accordance with the constitutional norms and international treaties ratified by Colombia. The incorporation of some international provisions in the present law should not be understood as the negation of other international norms that regulate the same matter.

The reinsertion into civil life of persons who may be favoured by amnesty, pardon or any other benefit provided for in Act No. 782 of 2002 shall be governed by the provisions of that Act.

Article 9. Demobilization. (...)

The demobilization of the organized armed group outside the law shall be carried out in accordance with the provisions of Law 782 of 2002.

Article 10. Eligibility requirements for collective demobilization.

(...)

Paragraph. Members of an organized armed group outside the law who are deprived of their liberty may have access to the benefits contained in this law and those established in Law 782 of 2002, provided that the corresponding judicial decisions determine that they belong to the respective group.

Article 18. Formulation of imputation. When from the evidentiary material elements, physical evidence (sic), legally obtained information, or from the free version can be inferred. (sic) reasonably that the demobilized person is the author or participant in one or more crimes under investigation, the prosecutor delegated for the case will request the magistrate exercising the function of control of guarantees to schedule a preliminary hearing for the formulation of the accusation.

At this hearing, the public prosecutor shall make the factual imputation of the charges under investigation and request the magistrate to order the pretrial detention of the accused in the appropriate detention centre, in accordance with the provisions of this Act. It shall also request the adoption of precautionary measures (sic) on goods of illicit origin that have been delivered for purposes of reparation to the victims.

After this hearing and within sixty (60) days thereafter, the National Unit of the Attorney General's Office for Justice and Peace, with the support of its judicial police group, will carry out the work of investigation and verification of the facts admitted by the accused, and all those of which it has knowledge within the scope of its competence. At the end of the term or sooner if possible, the prosecutor of the case shall request the magistrate exercising the function of control of guarantees to schedule a hearing for the formulation of charges, within ten (10) days following the request, if applicable.

With the formulation of the accusation, the statute of limitations of the criminal action is interrupted.

Article 62. Complementarity. For anything not provided for in this Act, Law 782 of 2002 and the Code of Criminal Procedure shall apply.

Persons who have demobilized within the framework of Act No. 782 of 2002 and who have been certified by the National Government may benefit from inhibitory resolution, preclusion of investigation or cessation of proceedings, as the case may be, for the offences of conspiracy to commit a crime under the terms of the first paragraph of article 340 of the Criminal Code; illegal use of uniforms and insignia; instigation to commit a crime under the terms of the first paragraph of article 348 of the Criminal Code; manufacture, trafficking and carrying of arms and ammunition.

Persons convicted of the same crimes and who meet the conditions set forth in this article may also

access the legal benefits enshrined for them in Act No. 782 of 2002.

In the opinion of the plaintiffs, the norms demanded violate the Constitution *"because they make the procedure provided for in Law 975 not applicable to all demobilized combatants, but only to those who cannot access the benefits established in Decree 128 of 2003 which regulates Law 782 of 2002"*. They explain that Law 975/05 is of residual application as opposed to Decree 128/03, which regulates Law 782/02, since according to the terms of Article 10 of the same Law 975/05, combatants will be able to access their benefits when they cannot benefit from any of the mechanisms established in Law 782/02. This provision is consistent with article 21 of Decree 128/03, according to which *"None of the benefits indicated shall be enjoyed by those who are being prosecuted or have been convicted of crimes which, in accordance with the Political Constitution, the law or international treaties signed and ratified by Colombia cannot receive this kind of benefits"*. For the plaintiffs, this rule is contrary to the provisions of Law 782/02, *"which provides that demobilized persons who have committed crimes that cannot be pardoned or amnestied, regardless of whether or not they have been prosecuted for it, shall not enjoy judicial benefits"*. In any case, the plaintiffs affirm that in accordance with the regulations in force, *"only those combatants who, at the time of their demobilization, are being prosecuted or have been convicted of crimes that cannot be pardoned or amnestied shall be beneficiaries of the law"*.

For the plaintiffs, these provisions mean that *"all demobilized combatants who, at the time of demobilization, do not have judicial proceedings or convictions against them for serious crimes, are not judicially investigated, even though in reality they have committed crimes constituting violations of human rights or breaches of international humanitarian law. In accordance with the foregoing, the law does not provide an effective remedy for the victims of such acts because, despite the fact that the combatants are demobilizing, in accordance with Law 975 and Decree 128 of 2003, the facts of authorship of the demobilizing group are not investigated, for which there is certainly responsibility of at least a part of the combatants."*

In order to illustrate the effect of these norms, the following data are presented on the demobilization of paramilitary groups, clarifying that the situation would be equally unconstitutional in relation to members of guerrilla groups who may also be subject to such norms:

"As far as paramilitary groups are concerned, since the beginning of the negotiations currently under way, almost 11,400 paramilitaries have individually and collectively demobilized and approximately 18,000 are expected to demobilize in total. Of those demobilized, it is estimated that only 300 or 400 will be prosecuted under Law 975 of 2005, that is, 2.2% of the paramilitaries who will demobilize. Only that 2.2% have judicial proceedings or convictions against them for serious crimes that cannot be pardoned or amnestied. In addition, that 2.2% of paramilitaries will not be prosecuted for all the serious crimes they have committed, since they will only be prosecuted for the crimes for which they are prosecuted. Worse still, according to official information from the Attorney General's Office, as of August 2005, 11,414 paramilitaries and 5,004 guerrillas had demobilized. Of the paramilitaries, 8,798 had demobilized collectively and 2,616 individually. Of the 11,414 demobilized paramilitaries, 13 had a level of command within the paramilitary structure. In addition, of the demobilized paramilitaries, only 55 had investigations for crimes other than conspiracy to commit a crime and rebellion; not all are necessarily investigated for human rights crimes and breaches of humanitarian law. Thus, assuming that the 55 were investigated for human rights crimes and breaches of international humanitarian law, this would mean that only 0.48% of the paramilitaries demobilized to that date would be prosecuted under the justice and peace law and 99.52% are already enjoying the benefits of law 782.

In no way is it credible that only 0.48% of the members of demobilizing paramilitary groups are

responsible for the magnitude of violations of human rights and international humanitarian law whose authorship has been attributed to such groups. (...). This is because Law 975 of 2005 will be applied in a context of high impunity for violations of human rights and international humanitarian law committed by paramilitary groups, state agents and guerrilla groups. (...) Most of the acts committed by paramilitary groups - and the same situation is preached by guerrilla groups - are in impunity. (...)"

It is also explained, in the same sense, that Law 975 *"has been conceived as a procedure, rather than a judicial investigation, for verifying the version that demobilized combatants wish to submit of the acts for which they have already been investigated or convicted, in accordance with articles 17 and 18. The same analysis could be made with respect to the guerrilla groups if they decided to take advantage of Law 975.*

The plaintiffs state that under Decree 128/03, which regulates Law 782/02, *"persons who receive benefits for indultible or amnestible crimes should not be subjected to an inquiry into their alleged authorship or knowledge of facts constituting serious crimes"* - they state that, in effect, such Decree 128/03 does not provide for judicial procedures to access benefits, but *"at most, establishes the termination of proceedings when they are already in progress"*.

They emphasize, in relation to the above factual elements, that these are relevant for the constitutionality trial advanced by the Constitutional Court, insofar as they derive directly from the norm studied, and not from its undue application: *"the factual situations and, specifically, the impunity generated by the application of the articles of Law 975 demanded is relevant for the analysis of constitutionality insofar as it is a direct and unconstitutional effect of the articles demanded in this section"*.

In the plaintiffs' opinion, in order for Law 975/05 not to become an instrument of impunity, it is necessary that all demobilized combatants be submitted to the procedure established therein: *"That is to say, all demobilized persons, without prejudice to the fact that when appropriate they receive the benefits provided for in Law 782 and even in Decree 128 of 2003 (pardon, conditional suspension of the execution of the sentence, cessation of proceedings, preclusion of the investigation or inhibitory resolution), should be subject to a minimum judicial inquiry, that is to say, to the free version and to the hearing of formulation of charges (arts. 17, 18 and 19 of the law), with adequate victim participation mechanisms"*. Likewise, they consider that the hearing for the formulation of charges foreseen in article 18 of the law *"should not be a simple possibility but should be obligatory, that is, the demobilized combatant should be charged, at least for the crimes corresponding to the fact of being a paramilitary or guerrilla, depending on the case. If it turns out after the investigation that the demobilized person cannot be held responsible for crimes that cannot be pardoned or amnestied, he could have access to the benefits of Law 782"*. Only in this way do they consider that the Colombian State would be complying with its international obligations to provide effective remedies for the investigation of acts constituting human rights violations. It is recalled in this regard that *"such clarification is necessary to ensure, on the one hand, that the State can take preventive measures and, on the other, that victims can exercise their right to know and society can also exercise their collective right to know the history of violations. In addition, the clarification of the truth is an indispensable element for the determination of criminal responsibility and the consequent imposition or non-imposition of sanctions. // In this regard, it should be remembered that the investigation of human rights violations is an integral part of the right to justice.*

To conclude their argument on this charge, the plaintiffs explain that the paragraphs accused can be interpreted in the sense of giving rise to two separate proceedings:

"The first, which is that of demobilized persons who have no criminal proceedings or convictions for crimes that cannot be pardoned or amnestied and which is processed through the granting of the benefits of Decree 128 without investigation or judicial inquiry.

2. The second is that of demobilized persons who have already been investigated or convicted of serious crimes and who must submit to the free version and, in general, to the procedure of Law 782".

For the actors, this interpretation is unconstitutional, since "it would imply that the non indultible or non amnestiable acts committed by the demobilized members of the first group would not be subject to any judicial investigation, leaving the victims of crimes not investigated or tried until the moment of demobilization without effective judicial recourse. In this way, not only is a procedure for failure established (...) but these facts are not even subject to judicial investigation". Such an interpretation would violate state duties to guarantee human rights, investigate the facts and clarify them in order to materialize the right to justice; and would also contradict the very meaning of Law 975/05, "which states in its initial articles that judicial benefits shall be granted guaranteeing the victims' right to the truth (arts. 1, 4, 7, 8, 15, 32, 37, 48.1 and 57)".

Consequently, upon considering the aforementioned interpretation unconstitutional, they request the Court to declare the conditional constitutionality of the norms accused in this section, *"in the sense that all combatants who demobilize must be submitted to free version diligence in order to declare whether or not they are responsible for serious crimes of a non-amnestible or non-indulgent nature. In this way, demobilized combatants can access the benefits of Law 782 and Decree 128 but under the commitment to contribute to the truth to the point of assuming the consequence of loss of benefits in cases where they omit to confess serious crimes.* The request made is as follows:

"The Constitutional Court is requested to condition the constitutionality of the paragraphs underlined in articles 2, 9, 10, 62 and 69, in the sense that all persons who demobilize must be submitted to the diligence of a free version and confess the facts for which they are responsible, on pain of losing the benefits, by omission or deformation of the truth.

Likewise, it is requested that the constitutionality of the underlined section of article 18 of the law be declared conditional, on the understanding that the charges will proceed in all cases, at least for the crimes that constitute belonging to paramilitary groups or guerrilla groups, after which, if appropriate, the benefits of Law 782 of 2002 will be applied.

3.1.2.3.4. Violation of the right to justice due to the reduced terms of investigation enshrined in Law 975/05.

The plaintiffs dispute some sections of Articles 17 and 18 of Law 975/05, as well:

"Article 17. Free version and confession. The members of the illegal armed group, whose names the National Government submits to the consideration of the Attorney General's Office, who expressly invoke the procedure and benefits of the present law, will render a free version before the delegated prosecutor assigned to the demobilization process, who will question them on all the facts of which he has knowledge.

In the presence of their defender, they shall state the circumstances of time, manner and place in which they participated in the criminal acts committed on the occasion of their membership of these groups, which precede their demobilization and for which they are covered by this law. In the same diligence they will indicate the goods that are given for reparation to the victims, if they have them, and the date of their entrance to the group.

The version submitted by the demobilized person and the other actions taken in the demobilization

process shall be made immediately available to the National Unit of Justice and Peace Prosecutors' Offices so that the deputy prosecutor and the Judicial Police assigned to the case may prepare and develop the methodological programme to initiate the investigation, verify the veracity of the information provided and clarify those facts and all those of which they have knowledge within their sphere of competence.

The demobilized person shall immediately be placed at the disposal of the magistrate exercising the function of control of guarantees in one of the detention facilities determined by the National Government in accordance with article 31 of this Act, who shall, within the following thirty-six (36) hours, signal and hold a hearing on the formulation of the indictment, at the request of the prosecutor hearing the case.

Article 18. Formulation of imputation. When from the evidentiary material elements, physical evidence (sic), legally obtained information, or from the free version can be inferred. (sic) reasonably that the demobilized person is the author or participant in one or more crimes under investigation, the prosecutor delegated for the case will request the magistrate exercising the function of control of guarantees to schedule a preliminary hearing for the formulation of the accusation. At this hearing, the public prosecutor shall make the factual imputation of the charges under investigation and request the magistrate to order the pretrial detention of the accused in the appropriate detention centre, in accordance with the provisions of this Act. It shall also request the adoption of precautionary measures on goods of illicit origin that have been delivered for purposes of reparation to the victims.

After this hearing and within sixty (60) days thereafter, the National Unit of the Attorney General's Office for Justice and Peace, with the support of its judicial police group, will carry out the work of investigation and verification of the facts admitted by the accused, and all those of which it has knowledge within the scope of its competence. At the end of the term, or sooner if possible, the prosecutor of the case shall request the magistrate exercising the function of control of guarantees to schedule a hearing for the formulation of charges, within ten (10) days following the request, if applicable.

With the formulation of the accusation, the statute of limitations of the criminal action is interrupted."

In the view of the plaintiffs, the procedure established in these rules does not constitute an effective remedy, since it is based on excessively short terms of investigation: "Law 975 establishes a term of 36 hours from the free version of the accused for the Attorney General's Office to formulate the imputation of the facts (art. 17) and a term of 60 days for the hearing of the formulation of charges (art. 18). Such terms are insufficient to ensure an adequate and full investigation of the facts. At the most, this term can constitute a mechanism to verify the facts for which the demobilized combatant was already tried or convicted and which, moreover, are accepted by him in the free version".

To illustrate the point, the plaintiffs make a comparison with the terms established in the ordinary criminal procedure - not without first clarifying that the criminal procedural system enshrined in Law 975/05 is not clear, insofar as it refers simultaneously to the Code of Criminal Procedure adopted by Law 600 of 2000 and the procedure established in Law 782 of 2000. Thus, they explain that in accordance with the ordinary Code of Criminal Procedure, the terms are considerably broader and more appropriate for the actions that must be carried out during them; they carry out in this regard the following analysis, which is transcribed in its entirety because it contains different elements of judgment that make up the charge to be examined:

"Assuming that the applicable Code is that of the accusatory system, the terms are considerably reduced. In the first place, the term for the indictment, 36 hours in the norm demanded, is indefinite in the Code of Criminal Procedure (arts. 286, 287, 288 and 289 of Law 906 of 2004). During this

indefinite term, without an accused person being present, the Public Prosecutor's Office may conduct an investigation to collect evidence that will allow it to arrive at a minimum degree of certainty regarding the existence of the crime and the responsibility of the person who will be charged. Once the Public Prosecutor's Office reaches that minimum certainty, it formulates the charge, in which the person is informed of the charge and acquires the status of accused. From then on, 30 days run until the indictment is filed. // This 30-day term is a term mainly intended for the accused to prepare his or her defence. (...) Although after the accusation the Prosecution can continue the investigation, by that time it has a broad collection of evidence to support the accusation before the judge of knowledge. It takes 30 days from the formulation of the indictment for the accused to prepare the defence and for the Prosecution to request the preclusion or formulate the accusation. If the knowledge prosecutor does not do so within the term, he loses his jurisdiction and his superior appoints a new prosecutor, who has an additional 30 days to make the decision 'from the moment the case is assigned to him'. Once these terms have expired, if the accused is deprived of liberty, he or she shall be immediately released and the defence or the Public Prosecutor's Office shall request preclusion (arts. 175 and 294).

Law 975 establishes a different procedure, in which the Public Prosecutor's Office has much less investigative capacity. Although the term that runs between the indictment and the formulation of charges in Law 975 is twice that provided for in the Ordinary Code (60 days), it is very insufficient because within the process of Law 975 there is no term of investigation prior to the indictment. That is to say, while in the ordinary Code the accusation is foreseen as the culmination of the investigation and as the beginning of the term for the accused to prepare his defense, in Law 975 the accusation is based exclusively on the free version of the accused and on the data that the Attorney General's Office may have, and if you wish to have more elements for the diligence of the accusation, you must collect them or organize them in 36 hours.

Subsequently, according to article 16 of the defendant law, in the following 60 days the Attorney General's Office is competent to: i. hear investigations of criminal acts committed during and on the occasion of belonging to an organized armed group outside the law; ii. To know of investigations already underway against its members; iii. To know about the investigations that should be initiated and those that are known at the time or after the demobilization. The broad jurisdiction of the Prosecutor's Office would allow it to conduct an adequate investigation that would enable it to contrast the defendant's statement with other elements that it has or that are presented in the process; however, materially this is not possible because the 60-day period is decidedly insufficient to seriously document the human rights violations and breaches of international humanitarian law allegedly committed by demobilized combatants.

In this regard, the plaintiffs proceed to make a detailed description of the different actions that the Prosecutor's Office should carry out during that sixty-day term, in accordance with article 16 of Law 975/05, other criminal procedural rules and the Political Constitution:

"Contrast the free version with additional evidence to the free version. The investigation takes place within a procedure that is designed with the objective of granting the benefit of the alternative sentence without the accused having to collaborate effectively with the justice system in order to gain access to the benefit. Therefore, the defendant's version cannot be the only or main source of investigation, but must be subjected to a serious procedure of contrasting and obtaining additional evidence to ensure that there were no omissions or malformations of the truth in the version.

2. *In the event that victims are able to intervene before the reparation incident, the Attorney General's Office should take into account the version of the victims that, according to Article 37.4 of the same law, must have effective possibilities of participation, providing evidence and that these*

are taken into account within the investigation and serve to contrast the defendant's version with the version of the victims and the evidence that they present [however, as will be seen in Section 1.2.4, the law does not allow victims to have the material capacity to exercise the powers provided for in Article 37 of the law].

3. Investigate the facts in their complexity by determining whether war crimes and crimes against humanity occurred. In addition to the isolated facts - torture or enforced disappearance - the Prosecutor's Office should investigate whether elements of passivity and systematicity were presented, that is, whether crimes against humanity or war crimes were presented, in accordance with the Rome Statute of the International Criminal Court. The State's obligation in these cases is not limited to the investigation of a serious but isolated event, but rather to investigate the relationship between such crimes, in their complexity, in order to determine the characteristics of passivity and systematicity that characterize them. Thus, in addition to contributing to the realization of justice, progress would also be made so that the victims and society could have access to the integral truth of the acts of violations of the responsibility of paramilitary and guerrilla groups. Similarly, only if the crimes are truly investigated in all their magnitude, with the purpose of effectively proving or seriously ruling out the existence of crimes against humanity and war crimes, would Law 975 become an element to guarantee adequate justice to the victims and not, on the contrary, a normative element that contributes to meeting the conditions for the International Criminal Court to act on the Colombian case due to the lack of effective investigative resources in domestic law to investigate the crimes under its jurisdiction. Investigating crimes in all their magnitude implies that the judicial remedies provided - and therefore the judicial terms - make it possible to elucidate whether the crimes have occurred in a systematic and generalized manner, and who is responsible for that set of crimes. Crimes committed 'systematically' and 'generalized' are different from crimes committed alone. (...) The principle of complementarity of the International Criminal Court is that national jurisdiction shall prevail only in cases where the Court grants remedies that enable the prosecution of those responsible for the crimes within its jurisdiction (arts. 17 and 20 of the Rome Statute). (...) Taking into account the challenges that, according to international standards, the Prosecutor's Office faces in the investigation of demobilized combatants, 60 days are manifestly insufficient for a proper investigation of crimes against humanity.

4. During those 60 days, it is also the responsibility of the Prosecutor's Office to investigate the facts of responsibility of the military structures that were under the military command of the demobilized combatants. The Prosecutor's Office will have to prosecute, among others, paramilitary chiefs - and eventually guerrillas - and very high-level ringleaders who should be investigated for all crimes attributable to their troops during the time they commanded them, in accordance with the criteria of article 28 of the Rome Statute of the International Criminal Court. To this end, it must also define, through a serious investigation process, among other aspects, the date of entry of the combatant into the armed group, the troops in charge, the areas in which those troops operated, the crimes allegedly committed by those troops, who had effective command over them, and the knowledge that the military chief had of those facts.

For the plaintiffs, it is impossible to conduct an investigation that complies with those elements within 60 days. They recall at this point that the Inter-American Court of Human Rights, in the Velásquez Rodríguez case, stated that the State's duty of investigation must be fulfilled by effectively seeking the truth, undertaking the investigation seriously and not simply formally or beforehand condemned to be unsuccessful; and also specified that in order for resources to be adequate, its function within the domestic legal system must be adequate to protect the rights infringed. For the plaintiffs, "if there are allegations of war crimes and crimes against humanity, the judicial remedy must be effective, which means it must be adequate to deal with those

allegations. If you are called to fail beforehand it is a resource that is not effective. Consequently, the terms indicated (36 hours and 60 days) are unconstitutional, because they are not sufficient to carry out a serious investigation that is an effective remedy that allows the adequate clarification of the truth and the realization of justice.

Finally, the plaintiffs point out that from a practical perspective the 60-day term will actually be much shorter, given the workload that will be assigned to each of the competent prosecutors: *"In addition to the fact that the 60-day time limit is in itself insufficient, in practice the actual time available to each prosecutor between the provisional and definitive indictments will be much shorter. In effect, it should be noted that for the processes governed by Law 975, article 34 authorized in its sole paragraph the creation of 20 positions of prosecutors. Assuming, as the Government has reported, that the number of persons subject to Law 975 is 300 (although there may be more), each of the 20 prosecutors would be responsible for investigating 15 demobilized persons. So, on average, each prosecutor would have four days to investigate each defendant, assuming he also works Sundays and holidays. Clearly, the procedure established by Law 975 of 2005 constitutes an impossible mission".*

For the foregoing reasons, they request the Constitutional Court to declare the expressions accused in articles 17 and 18 to be unconstitutional, *"and therefore to apply the procedural terms indicated in the Code of Criminal Procedure applicable according to the date and place of occurrence of the act, in accordance with the system of gradual entry into force of legislative act 02 of 2003".*

3.1.2.3.5. Violation of the right to justice by virtue of "unconstitutionality by application of criminal procedure statute and developed from legislative act 02 of 2003".

The constitutionality of articles 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of Act No. 975/05 in their entirety, as transcribed in chapter II of this Order, as well as the expression "and the Code of Criminal Procedure" in article 62 *ibid.* are challenged here.

For the plaintiffs, the interpretation according to which the Criminal Procedure Code to which Article 62 of Law 975/05 refers is the one contained in Law 906 of 2004, "although it is the only plausible one according to Law 975, it would be unconstitutional. They explain that this is the only possible interpretation, since the Criminal Procedure Code enshrined in Law 600 of 2000 obeys a different system, with a mixed accusatory tendency, while the new system introduced by Legislative Act 03 of 2002 is substantially different, as explained by the Constitutional Court (sentence C-873/03). They point out that Law 975/05 "refers to diligences and figures that only exist in the new system and that are exclusive to it (diligence of formulation of imputation, principle of orality, for example)"; and that according to the Constitutional Court itself, "the two procedural systems cannot be applied in the same procedure: in some aspects the system of the 1991 Constitution and, in others, the system of legislative act 03 of 2002. To apply them at the same time would be to circumvent the transitional regime provided for in the constitutional reform itself by making a contradictory system or without legal harmony".

In this order of ideas, they explain that since Law 975/05 refers to figures of the criminal procedure system established in 2002, "it follows that the constitutional norms applicable to the law are such". However, in its opinion, the system established in Legislative Act 03 of 2002 cannot be applied to acts committed prior to its issuance, "as are most of the acts that would be prosecuted by Law 975 of 2005", as provided for in the same constitutional reform indicating the validity of the new system. The petitioners conclude:

"Thus, only two interpretations are possible: on the one hand, it concludes that Law 975 refers to

the Code of Criminal Procedure of the criminal procedure regime indicated in accordance with the constitutional rules in force before Legislative Act 03 of 2002. Such an interpretation would be unconstitutional because it would imply applying in the same procedure - that of Law 975 - two systems based on different constitutional norms and different procedural conceptions. The second interpretation would be that the applicable procedure is that established by Law 906 of 2005 based on Legislative Act 03 of 2002. Such an interpretation would only be constitutional in the event that such a code applies to crimes committed after 1 January 2005. Although the law has regulated that the new system came into force only in Bogotá and the coffee belt, it would be feasible to apply Law 975 of 2005 for crimes committed after 1 January 2005 throughout the country, since the territory of application of the new system would be extended beyond Bogotá and the coffee belt by Law 975 itself, in accordance with Legislative Act 03 of 2002 which would authorize the law to do so. For all events occurring prior to 1 January 2005 the application of Law 906 of 2004 is unconstitutional because it contravenes Article 5 of Legislative Act 03 of 2002.

The constitutional alternative that the legislature had was to refer to the procedure of Law 600 of 2000 for events occurring prior to 1 January 2005, without having to apply concurrently with the principles, figures and procedures of the new Code of Criminal Procedure referred to above, and to refer to the procedure of Law 906 of 2004 only for events occurring after 1 January 2005. Such a formula was not considered in Law 975 of 2005".

Consequently, the Court is requested to declare the articles accused to be conditionally constitutional *"on the interpretation that the procedure provided for therein is only applicable to crimes committed after 1 January 2005. For all other purposes, such rules are unconstitutional. The Court is also asked to declare the conditional constitutionality of the expression "and the code of criminal procedure" in article 62, "on the understanding that the applicable Code is Law 600 of 2000 for all crimes, except those committed since 1 January 2005".*

3.1.2.3.6. Violation of victims' right of access to an effective judicial remedy by (a) limitations on access to the file, (b) limitation of their procedural powers and (c) abolition of cassation appeal.

Plaintiffs recall that the right to justice includes the right of victims to have access to an effective judicial remedy, allowing them to participate in the processes in which their rights are to be defined; and that this right is related to the guarantee of their rights to honour and good name, which *"also acquire relevance in the abundant cases in Colombia in which armed groups commit human rights violations or breaches of humanitarian law against persons of the civilian population, unjustifiably accusing them of belonging to an armed group, despite not being true or, worse still, for being social leaders or carrying out work in defence of human rights"*. However, some of the norms of Law 975 "make inane the real possibility of participation of victims in the procedure", as explained below.

(a) Limitations on access to the file.

The plaintiffs accuse Article 37, in the segment underlined:

"Article 37. Rights of victims. The State shall ensure that victims have access to the administration of justice. In development of the foregoing, victims shall have the right:
38.5 [sic] To receive, from the first contact with the authorities and under the terms established in the Code of Criminal Procedure, relevant information for the protection of their interests; and to know the truth of the facts that make up the circumstances of the crime of which they have been victims.

For the actors there are two interpretative possibilities in this regard: "the first, that reference is being made to the Code of Criminal Procedure issued by Law 906 of 2004; the second, that reference is being made to that issued by Law 600 of 2000".

The first possibility would involve applying the new criminal procedure system established by Legislative Act 03 of 2002, *"which, as was seen, would be unconstitutional, at least for crimes committed prior to its entry into force.* If the Court considers that this unconstitutionality is not present, and that it is possible to resort to the system of Law 906, Article 136 of the same would have to be applied, which does not enshrine the right to access to the file, *"which is unconstitutional because it does not know that access to the file is an indispensable faculty for victims to participate effectively in the procedural debate and in the construction of the truth. (...) As constitutional jurisprudence indicates, the realization of the right to the truth and the right to justice is not effective if the victim cannot access the file. Even the faculty to provide evidence cannot be exercised in a way that truly allows it to contribute to the construction of procedural truth if it is not accompanied by access to the file. That is, if the victim does not have access to the file, he will not be able to present the evidence within a litigation strategy and in the manner he considers most appropriate for the realization of his constitutional interests and rights and for the realization of justice.* Judgment C-228 of 2002 is cited here.

Consequently, they request that the Court declare the conditional constitutionality of Article 37.5, *"on the understanding that the expression 'in the terms established in the Code of Criminal Procedure' be interpreted in accordance with the criteria set forth in Judgment C-228 of 2002, which makes the right of victims to access to the file imperative".*

(b) Limitations on the prosecutorial powers of victims.

Articles 17, 18 and 19 of Law 975/05, as transcribed above, as well as the expression "and within the framework of this law" in article 34, and the expression "during the trial" in article 37, are charged in their entirety at this point.

For the plaintiffs, the procedure enshrined in the accused provisions does not allow victims the real and effective possibility of their interests being taken into account when defining their rights. They explain that Article 17 does not provide for the participation of the victim in the free version proceedings, so *"he does not have the opportunity to know the version of the facts given by the defendant"*. Nor does article 18 expressly provide for the victim's participation in the formulation of the charge; and article 19 expressly omits to provide for the victim's participation in the arraignment hearing. *"The first diligence in which express mention is made of the participation of the victims in the process is at the hearing to verify the voluntariness of the acceptance of the charges and refers to the initiation of the incident of reparation that is given at their request (art. 23).*

They assert that the only constitutional interpretation of these provisions must confer on victims the right to participate in all stages of the process, which would be consistent with article 37 of the same law, under which the procedure must guarantee victims' right of access to the administration of justice, which includes their right to be heard, "which implies that they have the opportunity to be present in the proceedings, assisted by a lawyer who provides them with a technical defense of their interests and that they have all the legal faculties required to participate effectively in the construction of the procedural truth and access to integral reparation that is determined in accordance with the facts and criminal responsibilities proven with their participation. To that extent, they request the Court to declare the conditional constitutionality of Articles 17, 18 and 19 accused, on that understanding.

This is the only way to comply with the international obligation of the State to provide the conditions that allow the effective exercise of the right of victims to participate in the process: *"as mentioned by the Inter-American Court of Human Rights in the Velásquez Rodríguez case, the State's obligations in matters of the right to justice must be undertaken seriously and must not be destined to fail beforehand. In the case of the rules in question, this implies not only that victims should be allowed to participate in the entire procedure, but also that conditions exist that allow them to effectively exercise their right to do so. Therefore, it will also be requested that the conditioned constitutionality of articles 17, 18 and 19 be declared, in the sense that the State guarantees suitable and effective mechanisms so that the victims are in the possibility of learning of the initiation of the procedure and taking the decision to participate in it"*.

Regarding the accused segment of article 34, according to which the Office of the Ombudsman shall assist victims in exercising their rights 'within the framework of the present law', they state that *"such an expression, in order to be constitutional, must also apply, not only to the exercise of their rights during the reparation incident, but throughout the procedure, in the terms demanded for the interpretation of articles 17, 18 and 19"*.

Finally, they affirm that the accused expression of article 38-7 must be declared unconstitutional, since it *"limits the exercise of the victims' rights to the trial stage, excluding the rest of the procedure"*.

The petitioners make their petition in this sense as well:

"H is requested. Court that declares the conditional constitutionality of articles 17, 18 and 19, and the expression 'within the framework of the present law' of article 34, under the understanding that suitable and effective mechanisms must be guaranteed so that the victims are able to learn of the initiation of the procedure, can exercise the right to be heard, allowing them to witness the proceedings, be assisted by a lawyer who will provide them with a technical defence of their interests and have all the legal powers required to participate effectively in the construction of procedural truth and access to comprehensive reparation determined in accordance with the facts and proven criminal responsibilities with their full participation. // The unconstitutionality of the expression 'during the trial' in article 37.8 of the law is also requested."

(c) Withdrawal of the appeal

The plaintiffs contest the provisions of paragraph 3 of article 26, by virtue of which *"No appeal in cassation may be lodged against the decision of the second instance"*. They explain that an appeal in cassation is admissible in ordinary criminal proceedings in relation to cases such as those to be submitted to Law 975/05, as provided in articles 205 of Law 600/02 and 184 of Law 906/04. They also point out that the object of the appeal in cassation is not simply formal, "but seeks the realization of the material right and constitutional guarantees, both of the accused and of the victim" - and recall in this regard that both Law 906/04 and Law 600/00 state that the purposes of cassation are "the effectiveness of the material right, the respect of the guarantees of the interveners, the reparation of the grievances inferred from them and the unification of the jurisprudence", which is why cassation is directly related to the realization of the constitutional rights to due process and justice. On the other hand, they affirm that the purposes of cassation, given their specificity, cannot be replaced by the extraordinary appeal for review.

Based on the foregoing, they affirm that although the Legislator has the power to regulate the appeal in cassation, he cannot do so in order to generate discriminatory treatment in cases of human rights violations, "in relation to which the procedural guarantees must be extreme in order to adequately

guarantee the realization of justice.

They then explain that the suppression of the cassation appeal in this case does not exceed a strict proportionality judgment, since it is not clear what is the constitutional purpose it intends to achieve, and *"the measure is disproportionate because of the relevance of the constitutional values and principles sacrificed, which are what the cassation appeal is intended to achieve, namely, the effectiveness of the material law, respect for the guarantees of the interveners and reparation for the grievances inflicted upon them. That is, celerity in justice cannot lead to sacrificing the material realization of justice. Furthermore, the suppression of the remedy of cassation means that the protection of the right to justice in cases of violations of human rights, instead of being extreme, is weakened to the detriment of the rights of the judicial guarantees of the victims and of the accused and, consequently, of the effective prevalence of the inalienable rights of the person"*.

They therefore request that the accused provision be declared unconstitutional.

3.1.2.3.7. Violation of the right to justice due to "ignorance of the State's obligation to punish those responsible for serious human rights violations with real custodial sentences".

This point is accused of the provisions of Article 31 of Law 975/05, which provides:

"Article 31. Time spent in concentration zones. The time that members of illegal armed groups linked to processes for collective reincorporation into civilian life have remained in a concentration zone decreed by the National Government, in accordance with Law 782 of 2002, shall be computed as the time of execution of the alternative sentence, which may not exceed eighteen (18) months. The official designated by the National Government, in collaboration with the local authorities where appropriate, shall be responsible for certifying the time spent in the concentration zone by members of the armed groups covered by this Act.

In the view of the plaintiffs, this article is unconstitutional in that it provides that part of the sentence may be served in "locational areas".

They explain that one of the components of the right to justice in cases of serious crimes is its adequate sanction. They cite in this regard Judgment C-069 of 1994, in which the Constitutional Court explained that the punishment of serious crimes is a way of protecting human dignity, as well as Judgments C-565 of 1993 and C-228 of 2002. They also allude to article 4 of the Convention against Torture - which establishes the obligation to criminalize torture and punish it with appropriate penalties - article 3 of the Inter-American Convention on Forced Disappearance - which enshrines the obligation to classify enforced disappearance as a crime and establish an appropriate penalty - and the draft International Convention on Enforced Disappearance. They also cite pronouncements of the Inter-American Court of Human Rights on the punishment of those responsible for serious crimes as part of the right to justice - *Trujillo Oroza v. Bolivia*, 27 February 2002, and *Myrna Mack Chang v. Guatemala*, 25 November 2003 - as well as the pronouncement of the Inter-American Commission on Human Rights on the demobilization process of the Colombian paramilitaries, in which it was said that serious violations of international humanitarian law must be adequately sanctioned by the State. They also refer to the creation of international criminal tribunals, *ad hoc* or permanent, as an indication of the international consensus on the need to adequately punish serious and systematic violations of human rights or international humanitarian law. Based on this normative and legal framework, the plaintiffs affirm that "it is evident that the obligation to punish the perpetrators of serious crimes cannot be reduced to a mere formality, but must be translated into the fulfillment of an effective sanction".

In this sense, they affirm that the defendant provision violates the Constitution "because it allows persons sentenced to deprivation of liberty to evade its fulfillment through the period of stay in the so-called 'location zones'", which are a mechanism established in paragraph 2 of article 8 of Law 418/97. The text of this paragraph is:

"(...) the National Government may agree with the spokespersons or members representing organized armed groups outside the law, with whom dialogue, negotiations or agreements are carried out, their temporary location or that of their members, in specific and certain areas of national or international territory, if considered convenient. In the aforementioned areas, the execution of arrest warrants against them shall be suspended until the Government so determines or declares that the process has been completed. (...)"

The plaintiffs point out that the power of the President of the Republic to establish 'zones of location' or 'zones of détente', as an instrument for the achievement of peace, was not created as a form of deprivation of liberty: *"On the contrary, one of its purposes is to concentrate the negotiators and spokespersons of the armed groups with which the Government is conducting negotiations, with the aim of suspending arrest warrants. That is, rather than a way of applying criminal law and subjecting those who have committed crimes within negotiation groups to special conditions of deprivation of liberty, it is a way of suspending the exercise of justice against them in order to guarantee negotiation processes.* In addition, they affirm that neither in the processes with the guerrillas nor in the process with the paramilitaries have the location zones been conceived or functioned as places of deprivation of liberty.

Therefore, *"if the stay in the concentration zones is not a deprivation of liberty, computing the time spent in it by demobilized persons as the execution time of the alternative sentence for up to 18 months, as article 31 of Law 975 of 2005 does, constitutes a covert pardon, which is not admissible for war crimes or crimes against humanity and serious violations of human rights and breaches of humanitarian law, which are the crimes whose trial is intended to regulate Law 975, and flagrantly violates articles 150.17 and 201.2 of the Constitution, which only authorize the granting of pardons for crimes of a political nature"*.

Consequently, they request that the Court declare article 31 accused unconstitutional.

Violation of the right to reparation, as part of the generic right to justice.

3.1.2.4.1. The applicants claim that, as demonstrated above, the demobilization process based on Law 975/05 will lead to impunity, as the vast majority of demobilized persons will not be investigated or tried for the crimes they have committed. *"In this context, the right to reparation will be seriously limited, since the number of cases that will remain in impunity will, unfortunately, be very high. In very few cases will the truth about what happened be determined, and only in those few cases will the victims be able to access reparation, which in turn is limited by the shortcomings of Law 975 of 2005 in this area"*.

3.1.2.4.2. It is recalled that the right to reparation is directly linked to the state obligation to provide effective remedies to victims of human rights violations, as established by the UN Human Rights Committee in its General Comment to Article 2 of the International Covenant on Civil and Political Rights. "The right to reparation -they affirm- is derived from the general principle of law according to which whoever causes damage must repair it; reparation includes the duty to offer guarantees that the facts that caused the damage will not be repeated. They also cite the provisions of the United Nations Commission on Human Rights in the *"Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian*

Law", in the sense that the right to full and effective reparation includes the elements of "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition". They also cite the Inter-American Court of Human Rights in the Blake case, affirming that "reparation consists in adopting measures that tend to make the effects of the violation committed disappear.

For the plaintiffs, the materialization of these different elements of reparation requires the establishment of instruments and measures that provide real and effective possibilities of reparation to the victims after a judicial process: "Establishing the truth of what happened, guaranteeing effective access to the administration of justice and adequate participation in the process, and adopting all necessary measures to prevent the recurrence of acts of violence are some of the indispensable requirements for achieving adequate reparation. In addition, an indispensable budget for guaranteeing reparation is "the existence of goods that contribute to the reparation, and therefore, the obligation of those who have violated a right to respond with their patrimony".

In this sense, they affirm that although article 8 of the accused law enunciates the components of the right to reparation, no measures are established to materialize this right within a judicial process, and therefore the reparation defined therein is left without practical effects, for the reasons indicated below.

3.1.2.4.3. Violation of the right to reparation by the rules according to which only illegally acquired goods, or other goods, contribute to reparation if the demobilized person had them.

Articles 10(2), 11(5), 13(4), 17, 18 and 46 are accused in this point in the following paragraphs:

"Article 10. Eligibility requirements for collective demobilization. (...) 10.2. That the goods are delivered as a result of the illegal activity. (...)

Eligibility requirements for individual demobilization. (...) 11.5. To deliver the goods resulting from the illegal activity, so that the victim can be repaired when they are available. (...)

Article 13. Celerity. (...) The following cases will be dealt with in a preliminary hearing: (...) 4. The application for and decision to impose interim measures on assets of unlawful origin. (...)

Free version and confession. The members of the illegal armed group, whose names the National Government submits to the consideration of the Attorney General's Office, who expressly invoke the procedure and benefits of the present law, will render a free version before the delegated prosecutor assigned to the demobilization process, who will question them on all the facts of which he has knowledge.

In the presence of their defender, they shall state the circumstances of time, manner and place in which they participated in the criminal acts committed on the occasion of their membership of these groups, which precede their demobilization and for which they are covered by this law. In the same diligence they will indicate the goods that are given for reparation to the victims, if they have them, and the date of their entrance to the group. (...)

Article 18. Formulation of imputation. When from the evidentiary material elements, physical evidence (sic), legally obtained information, or from the free version can be inferred. Reasonably (sic) that the demobilized person is the author or participant of one or more crimes under investigation, the prosecutor delegated for the case will request the magistrate exercising the function of control of guarantees to schedule a preliminary hearing for the formulation of the indictment.

At this hearing, the public prosecutor shall make the factual imputation of the charges under

investigation and request the magistrate to order the pretrial detention of the accused in the appropriate detention centre, in accordance with the provisions of this Act. It shall also request the adoption of precautionary measures on goods of illicit origin that have been delivered for purposes of reparation to the victims. (...)

Article 46. Restitution. Restitution implies the performance of acts that tend to return the victim to the situation prior to the violation of his rights. It includes the restoration of liberty, the return to their place of residence and the return of their property, if possible.

For the plaintiffs, by virtue of the paragraphs accused, "the perpetrators will not have to guarantee reparation with all their property, since the persons responsible for the crimes and benefited by the project will only deliver, if they have them, the property of illicit origin with a view to reparation". They emphasize that the duty of demobilized persons to compensate their victims is significantly limited by the apertes demanded, which are contrary to the appropriate reparation measures: "*on the one hand, the general principle according to which the debtor must respond to his creditors with the totality of his patrimony is unknown; the law refers repeatedly to the delivery of goods of illicit origin, a limitation aggravated by the difficulty in distinguishing between goods of 'lawful' origin and those of illicit origin. In addition, the expression 'if I had them' opens the possibility for the demobilized person to declare that he does not have any illicit goods to deliver, an eventuality before which the law does not establish any measure to confront the alleged insolvency of the criminals, when this has been done in fraud of the rights of the victims*".

The petitioners consider that in order to guarantee reparation to the victims, demobilized combatants should be obliged to surrender all of their property, whether of licit or illicit origin. On the other hand, they indicate that the accused provisions establish that demobilized combatants must hand over their assets 'if they have them', 'when they are available', or 'if possible'. They explain that the law "*does not indicate through what procedure or in what terms the legal operator will be able to investigate cases in which the demobilized person commits fraud to the detriment of the victims; and in the case in which the Public Prosecutor's Office has elements to consider that there is a possible fraud, it will result in the very difficult practice that within the 60 days foreseen for the investigation diligences are also carried out to verify that the demobilized person has not incurred in fraud and to obtain that the goods are delivered for reparation*".

They reiterate, at this point, that it is the constitutional and international duty of the State to guarantee just reparation to the victims as part of the obligation to provide effective remedies, enshrined in Article 2 of the Political Charter, Article 2.3 of the International Covenant on Civil and Political Rights, and Articles 1 and 63 of the American Convention on Human Rights. They also state that "*the State's responsibility in relation to the duty to provide reparation to victims of crimes is broad: the State must ensure that the rules governing the matter give victims the right to claim reparation (article 2); it must provide reparation in the event that the damage caused is attributable to the State for the action or omission of its authorities (article 90 of the Constitution); it must compensate the victims of political criminals who are amnestied or pardoned when they are exempted from civil liability (article 150 numeral 17)*".

As a consequence of the foregoing pleas, they request that the Court declare the paragraphs claimed to be unconstitutional.

3.1.2.4.4. Violation of the right to reparation for the absence of adequate guarantees for the restitution of property.

The underlined paragraphs of Article 54 are demanded in this segment:

"Article 54. Victims' Reparations Fund. Establish the Fund for Victims' Reparations as a special account without legal personality, the authorising officer of which will be the Director of the Social Solidarity Network. The resources of the Fund shall be implemented in accordance with the rules of private law.

The Fund shall be made up of all assets or resources delivered in any capacity by the illegal organized armed persons or groups referred to in this law, by resources from the national budget and donations in cash or in kind, national or foreign.

The resources administered by this Fund shall be under the supervision of the Office of the Comptroller General of the Republic.

The applicants recall that one of the components of the right to reparation is that of restitution, which has been defined by the United Nations Commission on Human Rights in the "Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law" as an act that "must return the victim to the situation prior to the gross violation of international human rights law or the grave violation of international humanitarian law", and which includes, inter alia, the return of victims' property. To that extent, the plaintiffs assert that "property violently usurped from its owners, possessors, occupants or holders by persons who demobilize under Law 975 of 2005 must be returned to those who had rights to them, under the conditions in which they had them, thus fulfilling the duty of restitution".

However, they explain that the defendant clause can be interpreted in a way contrary to the duty of restitution, *"since the norm establishes that the goods delivered by demobilized persons will be part of the Fund for the Reparation of Victims, without making explicit that when it is a question of goods violently usurped from those who had any right over them, they must be returned to them. The rule should exempt such property from the common fund, in order to respect the right of victims to restitution. Otherwise, if all the goods delivered by the demobilized persons were part of the common fund for reparations, the persons who had any rights to the land delivered would lose the possibility of recovering it.* They point out that the main ones affected by this interpretation would be those displaced by the violence, since "they would definitively lose the lands to which they had some right". In this regard, they assert that the accused norm should be interpreted in accordance with the Guiding Principles on Internal Displacement, which oblige the competent authorities to ensure the recovery of property or possessions abandoned by the displaced, or dispossessed at the time of displacement. They also cite the "Principles on Housing and Property Restitution for Refugees and Displaced Persons" adopted by the United Nations Sub-Commission on the Promotion and Protection of Human Rights.

Consequently, they request the Constitutional Court to *"condition the constitutionality of the second paragraph of Article 54 to the fact that, in compliance with the duty of restitution as a component of the right to reparation, those who have been violently usurped from their owners, possessors, occupants or holders are exempt from 'the goods or resources that are in any way delivered', since in that case they must be restituted and must not form part of a common fund for reparations".*

3.1.2.4.5 Violation of the right to reparation as not all victims will be able to claim reparation.

The underlined sections of articles 5, 47 and 48 of the Law are demanded, as well:

"Article 5. Definition of victim. For the purposes of this law, a victim is a person who, individually or collectively, has suffered direct damages such as temporary or permanent injuries that cause any

type of physical, psychic and/or sensory (visual and/or auditory) disability, emotional suffering, financial loss or impairment of fundamental rights. The damage must be the result of actions that have violated criminal law, carried out by organized armed groups outside the law.

The victim shall also be the spouse, companion or permanent companion, and relative in the first degree of consanguinity, first civil of the direct victim, when the victim has been killed or has disappeared.

The status of victim is acquired regardless of whether the perpetrator of the punishable conduct is identified, prosecuted or convicted, and regardless of the family relationship between the perpetrator and the victim.

Members of the security forces who have suffered temporary or permanent injuries that cause any type of physical (sic), psychic and/or sensory (visual or auditory) disability, or impairment of their fundamental rights, as a consequence of the actions of any member or members of organized armed groups outside the law, shall also be considered as victims.

Likewise, the spouse, companion or permanent companion and relatives in the first degree of consanguinity of members of the security forces who have lost their lives in the course of acts of service, in connection with the same or outside it, as a consequence of acts performed by a member or members of groups organized outside the law, shall also be considered as victims.

(...) Article 47. Rehabilitation. Rehabilitation should include medical and psychological care for victims or their first-degree relatives in accordance with the Victims' Reparations Fund Budget.

Social services provided by the government to victims, in accordance with existing laws and regulations, are part of reparation and rehabilitation.

Satisfaction measures and guarantees of non-repetition. Satisfaction measures and guarantees of non-repetition, adopted by the various authorities directly involved in the national reconciliation process, should include: (...)

49.3 (sic) A judicial decision that restores the dignity, reputation and rights of the victim and those of the victim's relatives in the first degree of consanguinity.

For the actors, the definition of the concept of victim enshrined in these articles is restrictive with respect to the persons it encompasses, as well as those who have suffered direct harm. Thus, "the siblings of a forcibly disappeared or murdered person, or other relatives who are not in the first degree of consanguinity, would not have the right to claim reparation. In the case of a member of the security forces who has been assassinated in the context of the armed conflict, only the 'spouse, permanent partner and relatives in the first degree of consanguinity' shall be victims. With regard to rehabilitation, the law provides that only the direct victim and first-degree relatives shall receive medical and psychological care.

They indicate that in contrast to these provisions, the Inter-American Court of Human Rights, in the July 5, 2004 ruling in the "19 comerciantes vs. Colombia" case, as well as in the November 25, 2003 ruling in the "Myrna Mack Chang vs. Guatemala" case, considered that the brothers of direct victims are also victims and should be compensated; what is more, in the first of these rulings it considered a cousin of the victim as affected and entitled to reparation.

Therefore, they affirm that the limitation of the concept of victim, and therefore of the obligation of reparation, is unconstitutional and contrary to the international regulation of the matter: "By restricting the concept of victims below the parameters defined by the norms and national and international jurisprudence on the matter, Law 975 contradicts the Constitution in multiple ways, both in relation to the preamble and to articles 2, 5, 9, 93 and 213.2, among others.

Consequently, they request that the Court declare the constitutionality of the paragraphs being sued

conditioned, in the following sense:

"For the purposes of the definition of victim established in article 50 of Law 975 of 2005, the spouse, companion or permanent companion, and family member in the first and second degree of consanguinity and the first degree of civil consanguinity are considered as victims.

- The medical and psychological rehabilitation care provided for in article 47 of Act No. 975 of 2005 is extended to the spouse, permanent partner and family member in the first and second degree of consanguinity and the first degree of civil consanguinity.

- The judicial decision referred to in article 48.3 (erroneously referred to as 49.3 in the text of the law published in the Official Gazette) by means of which the criminal process is terminated in accordance with the provisions of Law 975 of 2005, must re-establish the rights of the spouse, companion or permanent companion, and relative in the first and second degree of consanguinity and the first degree of civil consanguinity.

3.1.2.4.6. Violation of the right to reparation if victims do not promote the reparation incident

Article 23 of Law 975/05 is attacked, the text of which is:

"Article 23. Incident of integral reparation. At the same hearing in which the Chamber of the corresponding Superior Judicial District Court declares the legality of the acceptance of charges, upon the express request of the victim, or of the prosecutor of the case, or of the Public Prosecutor at her request, the reporting magistrate shall immediately open the incident of full reparation of damages caused by the criminal conduct and shall convene a public hearing within five (5) days.

This hearing will begin with the intervention of the victim or his legal representative or ex officio lawyer, so that he can express in a concrete manner the form of reparation that he is seeking, and indicate the evidence that he will use to substantiate his claims.

The Chamber shall examine the claim and reject it if the person promoting it is not a victim or if the actual payment of damages is proven and this is the only claim made, a decision that may be challenged under the terms of this law.

Once the application has been accepted, the Chamber shall inform the accused who has accepted the charges and shall then invite the interveners to conciliate. If there is agreement on its content, it will incorporate it into the decision that fails the incident; otherwise it will dispose of the practice of the evidence offered by the parties, it will hear the basis of their respective claims and in the same act the incident will fail. The decision in either direction shall be incorporated into the conviction.

For the actors, the regulation in the accused article on how the reparation incident is to be handled is not the only possibility for victims to claim reparation, since articles 42, 43 and 45 contain other provisions on the subject; they state that this article must be harmonized with the other norms within Law 975 regulating the right to reparation, "so that if the victim does not request that the reparation incident be opened, he does not lose the right to be repaired".

They explain that victims may not be able to act within the reparation incident for various reasons: security risks that prevent them from attending the process, lack of information about the process, or lack of resources to act, among others. "In the interests of guaranteeing victims' rights to reparation, action should be taken if they do not request the opening of the incident provided for in article 23 of Law 975 of 2005. (...) The right to reparation should be guaranteed to victims in all circumstances, and should not be conditioned on the victim's participation in the process, bearing in mind also that his or her participation may be limited by reasons beyond his or her control.

On the basis of the foregoing, the applicants make the following request:

"The Constitutional Court is requested to declare the constitutionality of article 23 of Law 975 of 2005, subject to the condition that in all cases in which the victims were not able to participate in the proceedings and therefore had not requested that the incident of reparation be opened:

- *The judgement shall award damages and order the appropriate measures of reparation, in accordance with articles 8, 46, 47 and 48 of Law 975 of 2005; and*
- *Victims may seek redress, under the terms of article 45 of Law 975 of 2005, before the Superior Court of the Judicial District".*

3.1.2.4.7. Violation of the right to reparation in that "if the demobilized person hides information about crimes committed, he does not lose the benefit of alternative punishment, either for crimes already accepted or for new ones that are known".

The constitutionality of the underlined paragraphs of Article 25 is contested:

"Known facts after the sentence or pardon. If members of illegal armed groups who received the benefits of Law 782 of 2002, or who benefited from the alternative penalty under this law, are subsequently charged with crimes committed during and on the occasion of their membership and before their demobilization, these conducts will be investigated and judged by the competent authorities and the laws in force at the time of the commission of these conducts, without prejudice to the granting of the alternative penalty, in the event that it collaborates effectively in the clarification or accepts, orally or in writing, freely, voluntarily, expressly and spontaneously, duly informed by its defender, to have participated in its realization and provided that the omission has not been intentional. In this event, the convicted person may benefit from the alternative penalty. Alternative penalties shall be cumulated without exceeding the maximum penalties established in this Act.

Taking into account the seriousness of the new facts tried, the judicial authority will impose an extension of twenty percent of the alternative sentence imposed and a similar extension of the time of probation.

The plaintiffs recall that detailed charges were filed against the accused party for considering that he violated the right to the truth, as outlined in section 3.2.2.7. above. In addition, they assert that this rule has consequences that violate the right to reparation.

In effect, they explain that the right to reparation is affected by the lack of knowledge of the right to the truth, *"since those responsible for the crimes will not be established, nor will the circumstances in which they occurred, so that the victims will have no one to turn to to claim for the rights that were violated"*. They point out that the omission of information about crimes violates the victims' right to reparation, and that such omission is especially serious when demobilized combatants benefit from significant reductions in punishment, *"in exchange for which they should be obliged to tell the truth and make reparations to the victims. If he fails to comply with these obligations, he should be punished with the loss of the alternative penalty benefit for the offences for which he has been convicted, as well as with the impossibility of benefiting again from the alternative penalty for the offence of which he has become aware after the first conviction. However, Article 25 provides otherwise.* He summarizes his arguments against this norm stating that *"rewarding the concealment of information with the possibility of accessing significant discounts and without losing benefits previously granted for the supposed contribution to peace is contrary to the duty of the State to guarantee the effectiveness of the rights and to provide an effective remedy in case they have been violated. Article 25 of Law 975 of 2005, insofar as it favors the concealment of the truth, ignores the obligations indicated in previous sections on reparations: articles 2, 17 and 90 of the Constitution, article 2 of the International Covenant on Civil and Political Rights and article 1 of the American*

Convention on Human Rights.

Consequently, they request that the Court declare the underlined paragraphs unconstitutional, *"and, on the contrary, point out that the concealment of the truth has as a consequence the loss of the benefit of the alternative penalty for the confessed crime and the impossibility of accessing such benefit for the known crime after the sentence or pardon"*.

3.1.2.4.8. Violation of the right to reparation due to budgetary limitations on the payment of reparations.

The underlined sections of articles 47 and 55 of the Law are demanded:

"Article 47. Rehabilitation. Rehabilitation should include medical and psychological care for victims or their first-degree relatives in accordance with the Victims' Reparations Fund Budget. Social services provided by the government to victims, in accordance with existing laws and regulations, are part of reparation and rehabilitation.

Functions of the Social Solidarity Network. The Social Solidarity Network, through the Fund referred to in this Act, shall be responsible for the following functions, in accordance with the budget allocated to the Fund:

56.1 (sic) Liquidate and pay the judicial compensations covered by this law within the limits authorized in the national budget.

The actors consider that these paragraphs violate the Charter by limiting state responsibility for reparations to victims to the budgetary availability of the Victims' Reparations Fund. They recall that the only fixed resources of the Fund will be those of the national budget, since the delivery of the assets of demobilized combatants is limited for the reasons explained above, and national or international donations will be random; moreover, this norm "does not establish what amount will be allocated from the national budget for reparations, but instead limits them to the budget of the Fund. They indicate that reparations to victims should not be limited to the budget allocation, since "if the Council of State, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights or the Committee of the Covenant order reparations, the Government is obliged to include in the budget the resources for that purpose", as provided for in Law 288 of 1996, art. 1. The accused articles, which establish a ceiling for reparations, contravene the State's obligations in this area.

They assert that the State *"cannot excuse itself from paying compensation on the grounds that the resources available for effect in the respective fund are less than the amounts ordered by any of these tribunals"*; and cite what the Inter-American Court of Human Rights affirmed in the Myrna Mack Chang v. Guatemala judgment of November 25, 2003, in the sense that the State cannot invoke its domestic law to modify or fail to comply with its international obligations to repair, which are regulated in their scope, nature, modalities and determination of beneficiaries by international law, which are regulated in their scope, nature, modalities and determination of beneficiaries by international law. *Through these norms,*" they affirm, *"the possibility of victims being compensated will be seriously restricted, thus ignoring the State's duty to guarantee the effectiveness of the rights and to provide an effective remedy in the event that they have been violated.* This constitutes a breach of articles 2, 17 and 90 of the Constitution, article 2 of the International Covenant on Civil and Political Rights and article 1 of the American Convention on Human Rights. Consequently, they request that the Court declare the accused expressions unconstitutional.

3.1.2.5. Violation of the right to obtain guarantees of non-repetition of conduct prejudicial to the rights of victims.

3.1.2.5.1. It is explained in the application that the right to reparation includes the State obligation to take measures to ensure that the acts of violence that harmed the victims are not repeated. They cite in this regard the text of the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law" of the United Nations Commission on Human Rights, which lists the measures to be taken as guarantees of non-repetition. They also indicate that guarantees of non-repetition, as a component of the right to reparation, form part of the State's obligation to provide effective remedies to human rights victims, as explained by the United Nations Human Rights Committee; and cite the pronouncement of the Inter-American Commission on Human Rights on the demobilization of paramilitaries in Colombia, in the sense of highlighting the obligation to adopt measures that guarantee non-repetition, within the framework of reparation to victims.

3.1.2.5.2. They then explain that although Article 8 of Law 975/05 establishes guarantees of non-repetition as part of the right to reparation, "in clear contradiction to Article 8, other provisions of the law are contrary to the State's duty to guarantee non-repetition: no benefits are lost through recidivism of criminal activities, no benefits are lost if the demobilized person does not collaborate in the demobilization of the armed group, and no measures are taken to prevent those who access the benefits from continuing to commit crimes".

3.1.2.5.3. In this point, the following expressions of article 29 of Law 975/05 are indicated as defendants:

"Article 29. Alternative penalty. The competent Chamber of the High Judicial District Court shall determine the appropriate penalty for the offences committed, in accordance with the rules of the Criminal Code.

In the event that the convicted person has complied with the conditions set forth in this law, the Chamber shall impose an alternative sentence consisting of deprivation of liberty for a minimum period of five (5) years and not more than eight (8) years, assessed according to the gravity of the crimes and their effective collaboration in the clarification of the same.

In order to qualify for the alternative sentence, the beneficiary must undertake to contribute to his or her resocialization through work, study or teaching during the time he or she is deprived of liberty, and to promote activities aimed at demobilizing the armed group outside the law to which he or she belonged.

Upon completion of the alternative sentence and the conditions imposed in the sentence, he shall be granted probation for a term equal to half of the alternative sentence imposed, during which period the beneficiary undertakes not to repeat the crimes for which he was convicted under this law, to appear periodically before the High Court of the Judicial District concerned and to report any change of residence.

Once these obligations have been fulfilled and the probationary period has elapsed, the principal penalty shall be declared extinguished. Otherwise, the probation shall be revoked and the initially determined sentence shall be served, without prejudice to the subrogation provided for in the corresponding Criminal Code.

Paragraph. In no case shall criminal subrogation, additional benefits or rebates be applied in addition to the alternative penalty".

According to the plaintiffs, the accused expressions imply that the demobilized persons to whom the alternative sentences are applied are not obliged to cease completely their illicit activities in order to benefit from the corresponding reduction in sentence.

They explain that *"paragraph 4 defendant does not intend that the demobilized person cease his criminal activity during the period of probation, thereby ignoring the obligation to ensure the non-repetition of acts of violence against victims; paragraph 5 defendant does not establish conditions for the loss of benefits to the head of the demobilized, once the term of probation has ended. // In application of paragraph 4, the demobilized person undertakes, during the period of probation, not to 'repeat the offences for which he was convicted under this Act'. This means that if, during that period, the demobilized person commits any crime other than that for which he was convicted in accordance with the procedure established in Law 975 of 2005, he will not lose the benefit of the alternative penalty. Probation is revoked and the main penalty is applied only if, during the period of probation, he reoffends 'for which he was convicted'. As a consequence of the application of paragraph 5 of article 29 of Law 975 of 2005, if, after completing the term of probation, the demobilized person again commits the crimes for which he was convicted, or any other crime that constitutes a violation of human rights, he does not lose the benefit of the alternative punishment. For the actors, neither of these two norms respects the right of victims to guarantees of non-repetition; "on the contrary, the law will have created the conditions for acts of violence to be repeated. In neither case, the demobilized person will have contributed to the construction of peace or reconciliation; however, he will have benefited from a very large reduction in punishment.*

For the foregoing reasons, they express that paragraph 4, in order to adequately respect the rights of victims and achieve the objective of peace it pursues, must be adjusted in such a way that the commission of any intentional crime during the period of probation entails the loss of the benefit of the alternative penalty. For their part, they consider that paragraph 5 contains a relative legislative omission, since it does not establish the conditions to which the demobilized person must be subjected after having completed the probationary period: *"Once the probationary period has been completed, the demobilized persons must make commitments that adequately respond to the reason for their demobilization, that is, they must behave in such a way that the reduction of the penalties from which they benefited has as a consideration an effective contribution to peace. Therefore, the commitment of the demobilized person must be not to commit any intentional crime, at least for the duration of the main penalty.*

Accordingly, the petitioners make the following request to the Court:

"To declare the unconstitutionality of the expressions 'the' and 'for which he was convicted in the framework of the present law', underlined in paragraph 4 of article 29 of Law 975 of 2005.

- Declare the relative legislative omission of paragraph 5 of article 29, indicating that the demobilized person undertakes not to commit any fraudulent crime during the time of the main penalty, otherwise he will lose the benefit of the alternative penalty.

Violation of the prohibition on granting amnesties and pardons for serious human rights violations, war crimes and crimes against humanity.

3.1.3.1. This charge is formulated in a complex manner, against many provisions of Law 975/05.

In the first place, all the normative paragraphs demanded on the basis of the previous charges are taken up again, namely, the expressions accused of articles **2** - *"because law 975 of 2005 is residual to decree 128 of 2003"*-, **5** - *"because not all victims will be able to claim reparation"*-, **9** - *"because law 975 of 2005 is residual to decree 128 of 2003"*-, **10.2** - *"for pointing out that only illicitly acquired goods go for reparation"*-, **10.6** - *"for omitting to stipulate the obligation of demobilized persons to indicate the whereabouts of disappeared persons"*-, **10 paragraph** - *"for being Law 975 of 2005 residual to Decree 128 of 2003"*-, **11.5** - *"for indicating that only illicitly acquired goods go*

for reparation or when the demobilized person has them"-, **13.4** -"for pointing out that only illegally acquired goods are eligible for reparation"-, **17** -"for applying the criminal procedure established and developed since Legislative Act 02 of 2003" and "for limiting the faculties of victims in judicial proceedings"-, **17 paragraph 2** -"for pointing out that only goods are eligible for reparation if the demobilized person had them"-, **17 paragraph 4** -"for establishing reduced terms of investigation"-, **18** -"for applying the statutory criminal procedure developed from legislative act 02 of 2003" and "for limiting the faculties of victims in judicial proceedings"-, **18 paragraph 1** -"because the investigation of facts is restricted, due to the fact that Law 975 of 2005 is residual to Decree 128 of 2003"-, **18 paragraph 2** -"for indicating that only illegally acquired goods contribute to reparation"-, **18 paragraph 3** -"for establishing reduced terms of investigation"-, **19** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003" and "for limiting the powers of victims in judicial proceedings"-, **20** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003"-, **21** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003"-, **22** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003"-, **23** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003" and "for not providing for the assessment of damages in cases where the victim does not promote the incident of reparation"-, **24** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003"-, **25** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003"-, **25 paragraphs 1 and 2** -"for not providing for the loss of profit through non-confession of all offences"-, **26** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003"-, **26 paragraph 3** -"for abolishing the appeal"-, **27** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003"-, **26 paragraph 3** -"for abolishing the appeal"-, **27** -"for applying the criminal procedure laid down and developed from legislative act 02 of 2003"-, **28** -"for applying the statutory criminal procedure developed from legislative act 02 of 2003"-, **29** -"for not providing guarantees of non-repetition"-, **31** -"for ignoring the State obligation to punish those responsible for serious crimes to real custodial sentences"-, **34** -"for limiting the powers of victims in judicial proceedings"-, **37.5** -"for not allowing access to the file"-, **35.7** -"for limiting the faculties of victims in judicial proceedings"-, **46** -"because it does not provide adequate guarantees for the restitution of property"-, **47 paragraph 1** -"because not all victims will be able to claim reparation" and "for establishing budgetary limitations on reparation"-, **48.1** -"for ignoring the obligation of full disclosure of the truth"-, **48.3** -"because not all victims will be able to claim reparation"-, **54, subsection 2** -"for not providing adequate guarantees for the restitution of property"-, **55, subsection 1 and subsection 1** -"for establishing budgetary limitations on the payment of reparations"-, **58 subsection 2** -"for ignoring the obligation of complete dissemination of the truth"-, **62** -"for being the law 975 of 2005 residual to the decree 128 of 2003" and "for applying the penal procedure statutory and developed from the legislative act 02 of 2003"-, and **69** -"for being the law 975 of 2005 residual to the decree 128 of 2003"-.

Furthermore, they conflict with the underlined paragraphs of Articles 3, 10, 16, 17 and 29, as well:

"Article 3. Alternativity. Alternativity is a benefit consisting of suspending the execution of the sentence determined in the respective sentence, replacing it with an alternative sentence that is granted by the contribution of the beneficiary to the achievement of national peace, collaboration with justice, reparation to victims and their adequate resocialization. The concession of the benefit is granted according to the conditions established in the present law.

Article 10. Eligibility requirements for collective demobilization. Members of an organized illegal armed group who have been or may be charged, accused or convicted as perpetrators or participants in criminal acts committed during and on the occasion of their membership of such groups may be entitled to the benefits provided for in this Act, provided that they are included in the

list submitted by the National Government to the Office of the Attorney-General of the Nation and that they also meet the following conditions (...).

Article 16. Jurisdiction. Received by the National Unit of the Attorney General's Office for Justice and Peace, the name or names of members of organized armed groups outside the law who are willing to contribute effectively to the construction of national peace, the corresponding delegated prosecutor shall immediately assume the competence to do so: (...)

Free version and confession. The members of the illegal armed group, whose names the National Government submits to the consideration of the Attorney General's Office, who expressly invoke the procedure and benefits of the present law, will render a free version before the delegated prosecutor assigned to the demobilization process, who will question them on all the facts of which he has knowledge. (...)

Article 29. Alternative penalty. The competent Chamber of the High Judicial District Court shall determine the appropriate penalty for the offences committed, in accordance with the rules of the Criminal Code.

In the event that the convicted person has complied with the conditions set forth in this law, the Chamber shall impose an alternative sentence consisting of deprivation of liberty for a minimum period of five (5) years and not more than eight (8) years, assessed according to the gravity of the crimes and their effective collaboration in the clarification of the same.

In order to qualify for the alternative sentence, the beneficiary must undertake to contribute to his or her resocialization through work, study or teaching during the time he or she is deprived of liberty, and to promote activities aimed at demobilizing the armed group outside the law to which he or she belonged.

Upon completion of the alternative sentence and the conditions imposed in the sentence, he shall be granted probation for a term equal to half of the alternative sentence imposed, during which period the beneficiary undertakes not to repeat the crimes for which he was convicted under this law, to appear periodically before the High Court of the Judicial District concerned and to report any change of residence.

Once these obligations have been fulfilled and the probationary period has elapsed, the principal penalty shall be declared extinguished. Otherwise, the probation shall be revoked and the initially determined sentence shall be served, without prejudice to the subrogation provided for in the corresponding Criminal Code.

Paragraph. In no case shall criminal subrogation, additional benefits or rebates be applied in addition to the alternative penalty."

3.1.3.2 In support of their charge, the plaintiffs recall that both Colombian constitutional order and international law permit the granting of amnesties and pardons for political crimes, but with respect for certain limits, "so that those responsible for serious crimes, such as human rights violations and breaches of international humanitarian law, cannot, under any circumstances, be benefited by such measures of grace.

3.1.3.3 After recalling the definitions of amnesty and pardon, they affirm that in the Colombian legal system these figures only operate against political crimes and their related crimes; and that according to legislation and constitutional jurisprudence, atrocious crimes cannot be the object of such measures. They also point out that the power to grant pardons is vested in the Government, in accordance with the law - that is, it is a regulated power, since "the Government can only exercise it in the development of a pardon law that authorizes it and imposes certain factual limits on it. In addition, once the power is exercised, the government must inform Congress of its exercise. The government cannot limit the liability of those pardoned in relation to individuals, that is, the pardon

does not generate extinction of civil liability.

3.1.3.4. They then identify certain characteristics common to amnesties and pardons, in accordance with Article 150-17 of the Charter: (i) can only be granted on the basis of an act of Congress; (ii) pardon requires, by virtue of Article 201 of the Charter, the intervention of the Government; (iii) it is a common law requiring approval by a special majority that *"must be doubly qualified: first, two-thirds of the votes are required; and second, these two-thirds are required not only of those present, but of the members of both Houses"*; (iv) they are granted in crisis situations: "(v) the corresponding law must be general and impersonal, in order to guarantee equality; (vi) it only deals with political crimes and related crimes; and (vii) the vote of congressmen is secret.

3.1.3.5 They also stress that, since amnesties and pardons apply only to political crimes, they cannot cover acts of ferocity or barbarism, which "in no case can they be considered political crimes, and as ordinary crimes they cannot be the subject of amnesty or pardon", nor can crimes against humanity such as kidnapping, as expressed in Ruling C-069 of 1994. In this way, they consider that "the seriousness of the crime is a determining criterion for establishing whether a crime can be considered as political. Thus, torture, forced disappearance, non-combat homicide, among others, are acts of such gravity that, according to the Constitutional Court, they cannot be the object of benefits such as amnesty or pardon. They also cite judgments C-214/93 and C-415/93.

3.1.3.6 Emphasize that the Constitutional Court, in examining articles 127 of the Penal Code and 184 of the Military Penal Code, synthesized its jurisprudence on political crimes and amnesties, pronouncing itself clearly "against broad and general amnesties, against impunity as an encouraging factor in the breakdown of just order, against crime - even political - as a legitimate option for the exercise of violence and, in this sense, recognizes the duty of the Attorney General's Office to investigate all crimes and prosecute those responsible. In addition, the Court has considered that a broad and general amnesty would violate the right of victims to access to justice, a right recognized in Article 229 of our Political Charter.

3.1.3.7 The following is a summary of the various international norms that set limits to the possibility of granting amnesties or pardons, including Article 6 of Protocol II Additional to the Geneva Conventions of 1949, in relation to which both the International Committee of the Red Cross and the Inter-American Commission on Human Rights have stressed that it does not make it possible to grant general amnesties for those who have violated international humanitarian law. They explain that "the impossibility of granting pardons and amnesties in cases of serious violations of human rights is based on the duty of States to investigate, prosecute and punish those responsible for such crimes, including within the development of peace processes". They cite in this regard Article 25 of the American Convention on Human Rights, Article 2.3 of the International Covenant on Civil and Political Rights, Article 6 of the Inter-American Convention to Prevent and Punish Torture, and Article 18 of the Declaration on the Protection of All Persons from Enforced Disappearance.

They also cite the pronouncements of the Inter-American Court of Human Rights in the cases of *Myrna Mack v. The Court of Human Rights* and the *Inter-American Court of Human Rights* in the cases of *Myrna Mack v. The Inter-American Court of Human Rights*. Guatemala - in which it was warned that "the State must guarantee that the internal process aimed at investigating and punishing those responsible for the facts of this case will have its due effects and, in particular, must refrain from resorting to figures such as amnesty, the statute of limitations and the establishment of liability exclusions"- and *Barrios Altos* - in which it stated that "amnesty provisions are inadmissible, the statutes of limitations and the establishment of liability exclusions intended to prevent the investigation and punishment of those responsible for serious human rights violations such as

torture, summary, extralegal or arbitrary executions and enforced disappearances, all of them prohibited for contravening non-derogable rights recognized by International Human Rights Law", and that "self-amnesty laws lead to the defencelessness of the victims and the perpetuation of impunity, for which reason they are manifestly incompatible with the letter and spirit of the American Convention". They recall that this line of jurisprudence has been reiterated by the Inter-American Commission on Human Rights when referring to the negotiation process with Colombian paramilitary groups.

They conclude, in this sense, that *"in accordance with the Constitution and the international human rights treaties in force in Colombia, under no circumstances may amnesties or pardons be granted for serious crimes, including serious violations of human rights and breaches of international humanitarian law"*.

3.1.3.8. The following explains in detail why the norms demanded in this section form a system of impunity that *"as a system is a veiled pardon and a hidden amnesty"*. The specific reasons that support this assertion are transcribed in their entirety below, because of their importance for the sustenance of the position being studied:

"The norms demanded are a system of impunity because they allow the granting of the benefit of alternative punishment (arts. 3 and 29), reduced by the time spent in concentration zones (art. 31), through a procedure that guarantees neither truth, nor justice, nor reparation.

Firstly, because it is in principle residual to decree 128 of 2003, the law provides for an extremely inadequate investigation of a minimum percentage of demobilized persons (article 2 partial, 9 partial, 10 partial, 18 partial, 62 partial and 69). In addition, with regard to those reduced facts, it points out manifestly insufficient terms, which make it impossible to adequately investigate the magnitude of the facts, taking into account their gravity, their elements of systematicity and their passivity or generalization. In addition, the procedure does not provide adequate guarantees for victims' participation and access to justice, since it does not allow them access to the file (art. 37.5 partial), nor does it expressly provide for their participation in the proceedings (arts. 17, 18, 34 and 37.7 partial) and omits an appeal in cassation (art. 26 par. 3). Under these conditions, the procedure of Law 975 does not constitute an effective remedy.

As if that were not enough, the law allows demobilized persons to access benefits without having to make a full confession of the facts (art. 17), without being required to indicate the whereabouts of persons who disappeared at the time of demobilization (10.6 partial), and without losing benefits for committing new crimes (art. 29 partial).

The procedure provided for in the law also prevents adequate reparation for victims, since it excludes from the right to reparation victims who are not recognized as such (arts. 5 partial, 47 partial and 48.3 partial); it points out that illegally acquired goods will only be eligible for reparation if the demobilized person has them (arts. 10.2 partial, 11.5 partial, 13.4 partial, 17 partial inc. 2, 18 inc. 2 partial and 46 partial); does not provide adequate guarantees for the restitution of property (art. 54 partial); does not indicate the assessment of damages in favor of the victim when the victim does not promote the reparation incident (art. 23); and makes the payment of reparations dependent on budgetary appropriations, thus restricting existing legislation on reparations (arts. 47 partial and 55 partial). The procedure provided for in the law also exempts the duty to make full disclosure of the precarious truth to be reached (arts. 48.1 and 58 partial).

Act No. 975 further disregards the State's obligation to punish those responsible for serious human rights violations and breaches of international humanitarian law with real custodial sentences, by

providing that they may serve part of their sentence in areas of concentration, which have been set aside for other purposes and are in no way centres for the deprivation of liberty (art. 31).

Despite all these shortcomings and the fact that, in conclusion, the victims will not be recognized in their rights, the law foresees an alternative penalty benefit that closes the system of impunity, which implies that, at most, demobilized combatants will eventually serve between three and a half and six and a half years of deprivation of liberty, despite the fact that the Colombian Criminal Code and the Rome Statute established by the International Criminal Court provide for significantly stricter penalties.

Thus, in accordance with the procedure provided for in the provisions of Law 975 of 2005, the benefit of the alternative sentence constitutes a veiled pardon, since it allows the exoneration of a very significant part of the sentence without the minimum conditions required by the Constitution and international treaties and commitments in the area of human rights and international humanitarian law, thus constituting a disproportionate benefit in favour of the perpetrators of the most aberrant crimes and to the detriment of the victims.

The benefit of the alternative penalty is also a veiled pardon because it provides for government intervention. As has been seen, pardon, according to article 201 of the Constitution, is a mechanism in which there is a special assessment of the context, public order and circumstances of national convenience that give rise to government intervention. In the measures of pardon (amnesties and pardons), the Government intervenes to determine which persons need to be pardoned in order to guarantee peaceful coexistence. Such interference is only admissible in such cases because otherwise it would violate judicial independence, which is a gallantry of due process and fair trial (...) and separation of powers (...).

For their part, penalty reduction systems are mechanisms provided for in an impersonal and abstract manner by a general law that is applicable to all persons who find themselves in the cases provided for in the conditions indicated by the law for accessing the discount. However, Article 17 of Law 975 states that this procedure shall be applied only to persons 'whose names are submitted by the National Government to the consideration of the Attorney General's Office', making this procedure equivalent to a measure of grace, such as a pardon or amnesty. The Government listing is also mentioned in Articles 10 and 17 of the defendant law.

The constitutional jurisprudence rejects the measures of reduction of penalties for collaboration with the justice because they are pardons or veiled amnesties that would contradict the Constitution. This opinion has been expressed in judgments C-171 of 1993 and C-709 of 1996.

The standards demanded also constitute a veiled amnesty as a system that gives rise to impunity for serious crimes under international law. This is a veiled measure because Law 975 of 2005 does not directly exempt those responsible for serious human rights violations and breaches of international humanitarian law from investigation and prosecution. He does it surreptitiously.

First of all, with regard to amnesty, the articles demanded constitute an amnesty because they allow, as a direct effect of the application of the rules, the erasure of the responsibility of the perpetrators of serious crimes - violations of human rights and breaches of international humanitarian law - putting an end to the proceedings to be initiated, extinguishing the criminal action.

As has been mentioned on several occasions, to the extent that Law 975 does not subject the majority of demobilized combatants to any judicial investigation, it allows them to reintegrate into

civilian life, leaving them without accounts pending with the justice system, despite the fact that they may be perpetrators of non-amnestible and pardonable crimes. While it is hypothetically possible that demobilized combatants who have received the benefits of Law 782 of 2002 and Decree 128 of 2003 may be investigated later if there are reasons to do so, in practice, and by direct application of Law 975, a judicial immunity is granted. There are normative provisions or omissions that obstruct the subsequent action of justice in such a way that they end up making it impossible in relation to the vast majority of demobilized combatants who have committed crimes for which they have not been prosecuted, namely:

- 1. The law does not provide that all demobilized combatants must submit to free version diligence, in which, in order to access benefits, they must confess all the facts for which they are responsible.*
- 2. Even if they were subject to the free version, the law does not provide for the loss of benefits for omitting serious crimes. In fact, the benefits initially received remain intact. At most they would lose the benefit of the alternative penalty in relation to new facts, and only if it were proven that the omission of the information was intentional.*
- 3. The main evidence for the investigation is the saying of the demobilized combatant. The procedure does not provide that victims can truly participate in the debate on evidence and criminal responsibility, and although article 16 of the law theoretically provides for a broad investigative competence of the Prosecutor's Office, the judicial terms for collecting evidence on crimes that they have committed and that have not been confessed are insufficient, and barely allow the accused's version to be verified.*

Under these conditions, the action of justice is doomed to failure. Thus, although the law does not contain a provision that expressly exempts those responsible for serious crimes from criminal responsibility, the system established therein, complemented by Decree 128 of 2003, generates as a direct effect the impossibility of justice in the generality of cases. Exceptionally, there may be cases in which truth, justice and reparation are obtained, but the system as a whole is not organized to facilitate this objective, but to prevent it.

The regulation provided for in Law 975 of 2005 is thus a highly sophisticated mechanism of impunity, because by resorting to apparently very generous definitions and enunciations of victims' rights, it designs a system that covertly enables impunity for numerous serious war crimes and crimes against humanity committed in Colombia, which constitute serious violations of human rights and breaches of humanitarian law.

Law 975 provides a mechanism that makes it impossible for the State to comply with its constitutional and international obligation to guarantee human rights through effective remedies that allow for the investigation, prosecution and punishment of acts that constitute an assault on those rights. Under these conditions, the perpetrators of the crimes have benefited and will benefit from such a mechanism to evade justice. In practical terms, in relation to crimes that are not investigated as a consequence of the application of the law, an amnesty benefit is generated for demobilized combatants, even if they are perpetrators of non-amnestible crimes.

On the other hand, in relation to the crimes for which alternative punishment is imposed, the norms demanded by Law 975 constitute, as a system, a veiled pardon. It has already been seen that pardon is the act by which the pardon of the sentence established in a sentence that has been pronounced as a consequence of a previous process is granted. The benefit of the alternative sentence constitutes a veiled pardon because it allows those responsible for serious crimes, such as human rights violations, breaches of humanitarian law, war crimes and crimes against humanity, to evade the

fulfilment of the totality of the sentence provided for in Colombian criminal law and in accordance with international standards on the matter without, in return, making a real contribution to peace and the realization of justice. Moreover, the benefit of the alternative penalty is not a system of reduced sentences, but a measure of grace in which the Government intervenes through a discretionary decision.

In these conditions, the articles demanded in this chapter, integrated to the benefit of the alternative penalty (art. 29) and to the norms that provide for governmental intervention through the list of beneficiaries to whom Law 975 should apply (arts. 10 partial, 16 partial and 17 partial), constitute a system of impunity (...)"

For the applicants, that system of impunity infringes Articles 150-17, 201-2, 2, 4, 13, 22, 95, 229 and 250 of the Constitution. They therefore seek a declaration that the rules of which it is composed are unconstitutional.

3.1.4. Conclusion on the proportionality test.

After setting forth the foregoing charges, the plaintiffs conclude that the benefits granted under Law 975/05 do not exceed the strict judgment of proportionality, and set forth, element by element, the reasons why this is so.

3.1.4.1. Firstly, they consider that the measure is not appropriate, i.e. it is not a suitable means of achieving a constitutionally valid end. The constitutional end being pursued is peace, which is a legitimate constitutional value; but the system of impunity enshrined in the accused law is not an ideal means of achieving it: as seen in the section on the complementarity between justice and peace, by placing these rights and guiding principles at the core of the Constitution, the constituent expressed its intention that peace should not be founded on the denial of justice, except in cases of crimes so serious that they constitute attacks on human dignity through atrocious violations of the most basic rights of the human person. It cites in this regard the Charter of the United Nations, which *"based the search for peace and the preservation of peaceful coexistence on respect for and the guarantee of human rights"* and *"found the search for peace, respect for fundamental rights and justice to be basic and interdependent presuppositions"*. In this way, they affirm that *"under no position can it be said that impunity can be, in the light of national and international norms, the path to peace"*.

Nor is impunity a suitable means to contribute to democracy, since it goes against the current definition of this concept - they stress that *"one of the essential elements of democracy, according to the Inter-American Democratic Charter, is respect for human rights"*.

3.1.4.2. Having established that the system enshrined in the defendant rules is not a suitable means of achieving this end, they state that *'it is not necessary to go into the analysis of the second element of the proportionality judgment, i.e. whether or not the different treatment is 'indispensable'. To the extent that impunity is not ideal for achieving peace, it cannot be said that differential treatment is 'indispensable' for achieving peace. And, even if it were indispensable to do so, and there it connects with the third element of the proportionality judgment, it would not be possible from a legal perspective because it would violate minimum standards of human rights protection which, as we have seen, are even imperative norms of jus cogens.*

3.1.4.3. They also stress that unequal treatment *'sacrifices constitutional values and principles that are more relevant than those achieved with the differential measure. In fact, the benefit of the alternative penalty is disproportionate, not only because it exceeds the legal minimums prohibiting*

measures leading to impunity, but also because the benefits are granted without even requiring the suspension of hostilities.

3.1.4.4. They conclude that *"the alternative sentence of between three and a half and six and a half years (discounting the one and a half years' stay in the 'location zone') is a disproportionate benefit, since in return the standards demanded do not require progress towards either peace or justice. Demobilized combatants can maintain their economic power, they should not return violently usurped lands, they should not contribute to the truth, they should not even commit themselves to not continue in hostilities, because even if they do, they maintain the benefits.*

They also consider that the concept of alternative sentencing violates the right to equality with others who have committed less serious crimes and should serve higher sentences, as well as the principle of human dignity and the prevalence of fundamental rights.

The plaintiffs summarize their observations on the strict proportionality judgment as follows: *"the norms demanded are unconstitutional because, in the first place, they seek peace through impunity, despite the fact that impunity is not a suitable mechanism to achieve peaceful coexistence. Secondly, under these conditions, impunity is not 'indispensable' to achieving peace and, even if it were, thirdly, it would not be admissible in the light of the Constitution to sacrifice justice because it would violate minimum human rights standards and even imperative norms of jus cogens. Finally, it does not surpass the proportionality analysis in a strict sense, because through the benefit of the alternative penalty, added to the procedure, excessive benefits are given without the demobilized persons having to hand over their assets, without them having to reveal all the truth they know about serious crimes and without even guaranteeing that their violations will not be repeated. Consequently, the procedure provided for in the rules demanded by Law 975, added to the benefit of the alternative penalty, is unconstitutional because it is disproportionate.*

They emphasize that the Court must declare the unconstitutionality of the norms demanded in this section in their entirety, analyzing them as a system, and not in isolation, as was done in Ruling C-251 of 2002 in relation to Law 684 of 2001 on National Security: *"The benefit of the alternative penalty is not unconstitutional per se; its unconstitutionality results from the systematic analysis of the procedure and mechanisms provided for by law, due to the disproportion between the benefit and the rights of the victims, as minimum norms of the right to justice are surpassed. Thus, the articles studied throughout this chapter constitute a systematic framework of impunity that generates the total unconstitutionality of all of them as a system.*

3.1.4.5. As a consequence of the proportionality judgment outlined in the application, the applicants make the following requests:

"Principal:

declare the underlined paragraphs of Articles 2, 3, 5, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 37, 46, 47, 48, 54, 55, 58, 62 and 69 of Law 975 of 2005 to be unconstitutional.

Subsidiary:

In the event that the Court does not find the first principal petition to be appropriate, the unconstitutionality of all the paragraphs underlined throughout this chapter (...), as set forth in each of the relevant points, of Articles 2, 5, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 37, 46, 47, 48, 54, 55, 58, 62 and 69 should be declared unconstitutional. If this

petition is granted, the Court is respectfully requested to also treat these norms as a system, in such a way that unconstitutionality or conditional constitutionality is declared in relation to all of them, given their interrelationship, which means that if some remain standing, the realization of the rights to truth, justice, reparation and peace will be negatively affected.

3.1.5. Absolute invalidity of the rule and the legal situations arising therefrom.

To conclude the presentation of the first charge for substantive defects against the normative system enshrined in Law 975/05, the plaintiffs assert that these are provisions that violate imperative rules of *jus cogens*, namely the prohibition of crimes against humanity and war crimes and the prohibition of removing those responsible from justice, which is why they are absolutely null and void. They cite in this regard the provisions of the 1969 Vienna Convention on the Law of Treaties defining the concept of norms of *jus cogens*, as well as the pronouncements of the ICTY, the International Court of Justice and the Constitutional Court defining such provisions as peremptory norms of international law.

To the extent that peremptory norms are violated, not only are these norms absolutely null and void, but also any criminal judgment rendered on the basis of them: *"A judgment rendered on the basis of norms violating the principles of jus cogens cannot be said to have any validity at the national or international level. Thus, a criminal sentence issued on the basis of norms violating jus cogens and issued for the purpose of removing those responsible for international crimes from the action of justice is not valid and does not generate rights in favor of its beneficiaries.* To the same extent, they explain that the principle of *ne bis in idem* is not applicable to such cases.

Consequently, *"the Constitutional Court will be requested to declare that the ruling on constitutionality will have effect from the moment Law 975 of 2005 was issued, without taking into account the situations that the law has had in favour of those responsible for serious violations of human rights and international humanitarian law".* They therefore make the following request: *"That the unconstitutionality of the paragraphs underlined throughout this chapter (...), as raised in each of the relevant points of Articles 2, 5, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 37, 46, 47, 48, 54, 55, 58, 62 and 69, is declared as of the entry into force of Law 975 of 2005 and that all the effects that such rules may have produced are annulled".*

3.2. Second charge of substantive vices: unconstitutionality of the classification of paramilitarism as sedition.

The second substantive charge is directed against the underlined paragraphs of Article 71 of Law 975/05, the text of which is:

"Article 71. Sedition. The following paragraph is added to article 468 of the Criminal Code: Sedition shall also be committed by those who are members or members of guerrilla or self-defence groups whose actions interfere with the normal functioning of the constitutional and legal order. In this case, the penalty shall be the same as for the crime of rebellion.

Paragraph 10 of article 3 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988 and incorporated into national legislation by Law 67 of 1993, shall remain in full force".

The plaintiffs assert that this article is vitiated by vices of form and substance; in this section they point out the rationale for the substantive charges, that is, the reasons why they consider that the classification of the formation and membership of paramilitary groups as sedition violates the Political Charter.

3.2.1 First, they affirm that the Colombian legal system has never considered paramilitary groups as seditious, since *"their character, nature, and objectives do not correspond to the elements of the criminal type of sedition envisaged for those who oppose the State, and not for those who, like paramilitary groups, act with their support and in supposed defense of institutions."*

3.2.2. They then express that although there is no definition of the concept of political crime in the Criminal Code, all crimes considered as political are grouped under the heading of crimes against the constitutional and legal system, and both doctrine and jurisprudence have listed their constitutive elements; they cite in this regard a doctrinal definition that characterizes them as those that, through the use of violence, seek to change current political, constitutional, legal, economic and social institutions to replace them with others that are considered more just. They also cite a definition given by the Supreme Court of Justice in its judgement of 20 August 1996, in which it was stated that political crimes are: means to seek the common interest, consisting of rethinking the economic, political and social conditions of a community, which involve attacks on the political and institutional organization of the State, and are directed as an objective against the State as a person or political institution.

3.2.3 Based on the above definition, under which one of the fundamental components of a political crime is that it is committed to attack the State, the petitioners assert that the paramilitary groups, now included in the norm charged as seditious, do not have such an objective. In this regard, they carry out a historical account of the origin and development of Colombian paramilitarism, as well as a review of the pronouncements of different international organizations on them, and conclude that *"the activity of paramilitary groups has never had the objective of opposing the State; on the contrary, paramilitary groups emerged with the support of the State, and carry out their activities with its complicity. Paramilitary groups do not seek to change institutions or impede their functioning; instead, they proclaim themselves their defenders, while the authorities claim their presence."*

3.2.4 The plaintiffs then explain that by virtue of the classification of paramilitarism as sedition, paramilitary groups, without their conduct falling within the accepted legal criteria for defining a political offence, "could receive a comprehensive list of benefits under the Constitution and the law for perpetrators of political offences". These privileges include receiving amnesties or pardons, participating in politics and the exercise of public power, and not being extradited for the crimes they have committed.

3.2.5 Similarly, the demand states that the classification of paramilitarism as sedition in fact modified the Constitution: "To consider as a political delinquent anyone who, with the support of the State and in supposed defense of institutions, 'interferes with the normal functioning of the constitutional and legal order', is contrary to the will of the constituent, who exceptionally admitted a different criminal and political treatment for those who oppose the State. They recall in this regard that in judgment C-456/97 it was stated that the favourable treatment for political offenders contained in articles 35, 150-17, 179-1, 201-2, 232-3, 299, transitional 18 and transitional 30 of the Political Constitution, is of an exceptional nature and therefore of restrictive interpretation: "The legislator is not empowered to distort the content of the criminal type of sedition, giving the character of political to a crime that does not have these characteristics, since with it it modifies the scope of the constitutional articles that, in a restrictive way, give a favorable treatment to the political delinquent".

3.2.6 For the foregoing reasons, they consider that the accused party is unaware of article 2 of the International Covenant on Civil and Political Rights, which establishes the right to an effective

judicial remedy for victims of human rights violations, as well as article 1 of the American Convention on Human Rights and articles 2, 22, 229 and 250 of the Constitution, "since, by designating the formation or membership of paramilitary groups as a political offence, the State will fail to fulfil its obligation to guarantee and respect rights". They therefore request that the Court declare that separate statement unconstitutional.

4. Substantiation of Formal Defects Charges

The plaintiffs affirm that the debate on Law 975 presented several defects of form, since the rules governing the legislative process were unknown, so the Law must be declared unconstitutional. The formal defects are summarized as follows :

a. The Act was not treated as statutory, although it is a law that regulates fundamental rights such as the rights to peace, truth, justice and reparation, as well as procedures and remedies for their protection, as required by Article 152 of the Charter. In addition, this type of law must be approved by an absolute majority: art. 153 of the same Constitution and be subject to prior review by the Constitutional Court. However, the Act was passed and passed as ordinary law.

b. The Act was not treated as a pardon even though it grants them in covert form. Consequently, the special procedure for these cases had to be followed: secret ballot (art. 130 of Law 5 of 1992) and qualified majorities (art. 150 of the Charter and 120 of Law 5 of 1992). However, Law 975 was processed and approved as ordinary law.

c. An improper appeal of denied articles was processed. They point out that articles 70 and 71, which establish a reduction in penalties and sedition, which after being denied in the joint sessions of the first Committees of the Senate and House were appealed, using as a basis an article of Law 5 of 1992 that is not applicable to the case, because when one or several articles of a bill are denied there is no rule that allows their appeal. However, the appeal was used and as a result of the appeal, these provisions were irregularly approved.

They explain this point thus: in the joint sessions of the first Committees of Senate and House (6, 11 and 12 April 2005), articles 61 and 64 of bill 293 of 2005 House, 211 of 2005 Senate, were debated. Article 61 of the draft corresponds to article 70 of Law 975 and article 64 to article 71 thereof.

Article 61 was submitted for consideration to the first joint Senate and House Committees, and was denied in both Committees: in the Senate 4 yes votes and 10 no votes. In the House, 8 yes votes and 11 no votes, as recorded in Minutes No. 9, Gazette No. 407, p. 47.

In a joint session of the First Committee of the Senate and House of 12 April 2005, Act no. 11, the request to reopen Article 61, which had been denied in the previous session, was voted on. After the debate on the reopening, the following vote took place: denied by the First Committee of the Senate, by yes 6 votes, and by no 10 votes. In the House, by yes, 12 votes, and by no, 7. Consequently, the proposal to reopen was denied, Minutes 11, Gazette no. 409, p. 15.

As for article 64, a roll-call vote was held during the joint sessions, which in the Senate obtained the following result, according to Act no. 10, of April 11, 2005, Gazette no. 408, pp. 26 and 27, as follows: by yes, 6, and by no, 8. In the House the result was: by yes, 13, and by no, 7. A request was made to reopen the debate, but the proposal to reopen Article 64, which had not been approved, was denied by the Senate, 5 yes and 8 no votes. The House also requested the reopening of the debate, despite the fact that the proposition obtained 15 yes votes and 1 no, the House Committee did not have a quorum to decide.

The plaintiffs transcribe sections of Resolution 187 of the Presidency, which submits to the Second Commission the report approved by the Plenary of the Senate in order to comply with Article 166 of the Regulations of the Congress. In development of this Resolution, Resolution 0721 of May 14, 2005 of the Board of Directors of the House of Representatives was issued "by which an Accidental Commission is designated". The report of the Sub-Commission in relation to the appeal of articles 61 and 64 stated that it must be resolved in accordance with article 166.

They state that the articles were approved as a result of the appeal process, in the Second Committee of the Senate on 1 June 2005 and in the Third Committee of the House on 1 June 2005.

This irregular appeal process continued in the Plenary Session of the Senate on June 20, 2005, where articles 61 and 64 of the bill were approved, as indicated in Gazette 522 of August 12, 2005.

They also explain the following:

"During that session, the proposal that ended the report of the Second Committee was approved, in which the articles were approved (several senators recorded their negative vote); secondly, the reincorporation of articles 61 and 64 of the draft, which were appealed, was debated, to be studied again. At this point, the irregularity of the appeal became even more evident, as articles 61 and 64 appealed were not part of the amending specification, and instead, with that numbering, there were separate articles. After an intense debate in which some senators reiterated their disagreement with the appeal, the reinstatement was approved, with proof of negative vote of Jimmy Chamorro Cruz, Jorge Enrique Robledo Castillo, Samuel Moreno Rojas, Héctor Helí Rojas Jiménez, Javier Antonio Peñaloza Núñez, Francisco Rojas Birry, Carlos Roberto Ferro Solanilla, Andrés González Díaz and Mauricio Jaramillo Martínez. (page 196)

They transcribe excerpts from the Minutes of the session that appears in Gazette 522 of 2005 that show that some senators expressed themselves about the irregularity of the appeal procedure, since there is not one for articles but for bills. However, the articles were approved and on June 22, 2005 the bill was approved with the negative vote of Senators Avellaneda, Chamorro, Wolf and Pardo.

They consider that the results of these votes clearly indicated that none of these two articles could continue their legislative process, as they were denied in the first debate. However, these provisions were adopted as a result of an appeal, based on rules of Law 5 of 1992 that were not applicable to the case.

Hernán Andrade Serrano and Carlos Moreno de Caro filed an appeal, which was processed through Resolution 187 of May 17, 2005, of the Presidency of the Senate, in which it was ordered to transfer to the Second Commission of the Senate, based on articles 166 and 180 of Law 5 of 1992,

However, these articles are not applicable, since 166 does not provide for the appeal of one or more bills, but when the bill has been denied in its entirety or definitively archived. The use of this article is irregular and a number of parliamentarians have noted this.

Article 180 was not applicable either, since what the appeal was seeking was the approval of two articles that had been denied, and not, as the norm establishes, the correction of technical, terminological or grammatical errors or inaccuracies.

The applicants then proceed to explain the importance of respecting the procedure during the legislative procedure.

They point out that Law 975 of 2005 should not come into force until constitutional control has been exercised.

Finally, they ask the Court to request Resolution 072 of May 18, 2005 of the House of Representatives, the Minutes of the June 1, 2005 session of the Second Committee of the Senate, and Congressional Gazette no. 221 of April 29, 2005.

IV. INTERVENTIONS

1. INTERVENTION OF THE MINISTRY OF THE INTERIOR AND JUSTICE

Mr. Luis Hernando Angarita Figueredo, in his capacity as Vice-Minister of the Interior in charge of the functions of the Ministerial Office, intervenes to request the constitutionality of the demanded norm.

The intervention is divided into two parts: **I.** Defence against fundamental defects; **II.** Defence against vices of form. The procedure followed by the intervener takes the form of the thematic establishment of the reply to the objections.

I. Defence of charges for substantive defects

The intervening Ministry points out that the charges affecting the procedure and the alternative penalty provided for in Law 975 of 2005 are inadmissible. It expresses that as fundamental rights, the right to justice and peace, find development in the law of justice and peace, which under such a context enshrines "*regulations that because of differences, do not reflect any discrimination*".

It expresses that it is a question of adopting a criminal policy that is in accordance with the Constitution, and that makes possible peace, peaceful coexistence and the development of values, principles and fundamental rights. It argues, based on judgement C-038 of 1995, that the legislator has the power of broad legislative configuration to outline the orientations of the State's criminal policy. It rescues an argument that in the cited sentence, was expressed: being the Constitution a wide normative framework, it provides the legislator with a relative autonomy. Thus, "*laws are not always a development of the Constitution but are, on many occasions, the concretion of a political option within the frameworks established in the Charter*". It complements this argument with support in Judgment C-198 of 1997, which mentioned the scope of freedom of legislative configuration with respect to the establishment of criminal conduct. On the object of the law, he also adds that "*Precisely in order to comply with its obligations to investigate, judge and punish, the Colombian State issued the Justice and Peace Law, which provides the authorities with important criminal policy tools to comply with the punitive function, and with the application of the principles of orality, celerity and clarification of the truth and with the guarantee of the rights of the victims, without neglecting the accused*".

It also mentions Judgment C-292 of 1997, in which it was expressed that "*the criminal policy of the State may vary in the sense of reducing penalties or suppressing crimes,*" according to the variations that occur in society both in the conduct that offends and in the magnitude of the harm they cause, "*no less than in the evolution of the prevailing principles and values within the conglomerate*".

It maintains that the legislator in Law 975 of 2005, within its freedom of configuration, design and determination of criminal policy, implemented constitutional values and principles to achieve the objectives established in Article 2 of the Constitution. The aim is also to materialize respect for human life and dignity and the real exercise of fundamental rights. It points out that for this purpose the law provides for measures for an adequate relationship between justice and peace, for which an alternative penalty is provided that must be complied with by whoever abides by the law and complies with the conditions established therein among them, demobilize, collaborate with the justice system, hand over illegally acquired property and repair the victims. To support the foregoing, arguments are supported by the reference to the legislative process. Paper for First Debate on Bill 211 of 2005 Senate, 293 of 2005 House. Published in the 74th Congress Gazette of Friday, March 4, 2005.

As for the strictly procedural part of the law, it mentions that it guarantees the right to justice by establishing the authorities, and the procedure, to investigate and prosecute those who submit to it. **1.** a unit of the Public Defender's Office to protect the rights of defendants and ensure the guarantees of victims. There is also provision for the participation of a judicial procurator's office for justice and peace. **3.** It also provides for the application of a capital punishment of an alternative penalty and for commitments and obligations on the part of convicted persons.

He explained that the alternative penalty was a legal benefit that applied once the requirements laid down in the law had been met. To conclude that the Colombian State with this law fully complies with the duty acquired in the international community and international treaties and conventions. It states that the aim is to guarantee the human rights of persons residing in Colombia, with the aim of dismantling and demobilizing organized armed groups outside the law. The intervention is developed under themes proposed by the speaker as well:

1.1. "Proportionality Trial as a Framework for Examining the Constitutionality of Law 975".

With respect to this point, the intervener points out that the Justice and Peace Law applies the principle of proportionality, for which he explains: Law 975 of 2005 is not a law for times of normality, it is characterized by using transitional justice mechanisms with a view to achieving peace. It indicates as the end of the law demanded, as well as of other similar laws, the search for different mechanisms tending to the solution of the armed conflict. In this sense, the Law of Justice was also intended to complement the provisions of Law 782 of 2002, "*filling a legal void in relation to members of illegal armed groups who are committed to crimes that cannot be pardoned*". It therefore concludes that the objective of the Act "*is to facilitate peace processes and the reintegration into civilian life of members of armed groups outside the law, and the overcoming of problems of violence*", an objective established in article 1 of the Act.

Regarding the issue of impunity, he points out that "*since it is not a law of forgiveness and forgetfulness, there is no place for impunity*". In this regard, it states that "*all crimes must be investigated and convicted, criminals punished and victims repaired*", nor is there a statute of limitations for unconfessed crimes. He makes a comparison with recent peace processes in the world, and points out that this law "*incorporates the highest international standards in the field of justice, requiring the confession version and a minimum period of deprivation of liberty as a prerequisite for access to legal benefits, with the State retaining all its capacity for investigation, prosecution and punishment*".

More specifically, and with regard to the addressees of the law, it states: "*this law may be invoked only by those who have demonstrated their will for peace and only in respect of acts committed on the occasion of belonging to the illegal armed group and prior to the promulgation of Law 975 of*

2005". He goes on to say: "*From this date onwards, they cannot commit any more crimes, on pain of being left out of the effects of the crime; without prejudice to keeping open the opportunity to demobilize for both guerrilla and self-defense groups so that they can take part in a process of national reconciliation that Colombians so desire.* In this sense, the process of seeking peace through the law is summarized as follows: cessation of activities and structures of violence, and effective reintegration of members of such groups into civilian life. For the intervener, this means that Law 975 of 2005 is supported by restorative justice while seeking peaceful coexistence and the materialization of the victims' rights to truth, justice and reparation.

From the foregoing, it follows for the intervener that the criminal policy conceived in Law 975 reflects an adequate weighting between justice and peace, "*in such a way that justice, without ceasing to be so, cedes its retributive approach based primarily on punishment for a restorative approach*", for the fulfillment of the objectives of the law. Restorative justice is supported by Legislative Act No. 2 of 2003. The above arguments find support in judgment C-979 of 2005, from which the intervener extracts the concept of retributive justice.

With regard to the alternative penalty, he mentions in detail that the law develops a specific procedure on the imposition of the main and accessory penalties and establishes the competent authority to do so. It explains that the Superior Judicial District Court must decide on the legal benefit of the alternative sentence, "*which does not annul, invalidate or extinguish the main sentence initially imposed, which only extinguishes when the alternative sentence is served, the convicted person demonstrates compliance with the other conditions in the terms established by law.* It specifies that the alternative penalty is a legal benefit that is granted in a similar way to the criminal subrogation in compensation that the convicted has met the legal requirements, which is why when this benefit is granted, in the event of breach of obligations or commitments acquired the person will serve the penalty initially determined.

In conclusion, with regard to this first argument, he states: "*the benefit of the alternative penalty does not modify the punitive boundaries established in the statute of penalties for crimes that can be advanced by means of the regulation provided for in Law 975 of 2005 and for which the persons to whom this rule is addressed are sentenced*". In detail, and with regard to the punitive quantum, it states: "*the punitive quantum fixed remains untouched, which is why the offender, in carrying out the punitive dosage - individualization of the sentence - does so in accordance with the impossible penalties enshrined in the corresponding criminal types of the Penal Code, accepting the rules provided therein in accordance with the provisions of article 29 of the Justice and Peace Act*".

It points out that it is not a question of privileging organized armed groups outside the law, but of a means to achieve a legitimate end, consisting of sparing society enormous suffering "*caused by the actions of these powerful and sophisticated organizations*". He then points out that in such an event, transitional justice is necessary to achieve peace as an indispensable budget for the consolidation of the Social Rule of Law. He insists that far from implying impunity, "*the consecration of the benefit of the alternative penalty increases the probability that the most serious crimes committed by these groups will not go unpunished and that society will be adequately protected by avoiding greater evils*".

Regarding the powers of the legislator, he argues that "*criminal dosimetry is reserved to the legislator and not to the constitutional judge.* It supports its argument in Ruling C-591 of 1993, and concludes from the analysis of the ruling that "*only in cases of manifest and undeniable disproportion or blatant unreasonableness would it be for the constitutional judge to declare the unconstitutionality of the normative provisions submitted to his examination*". It closes the first part of its argument with support in Judgments C-070 of 1996, C-013 of 1997, and C-013 of 1997. It

adds that *"the competence of the legislator is clearly established, and it is not for the constitutional judge to establish the crimes (art. 29 of the Penal Code)"*. It then adds: *"In these cases, the Court must avoid, submerge the elaboration of criminal policy, a function that does not correspond to it"*, it relies on C-843 1999. The argument derives from the fact that the indication of *"conduct as a crime and consequent punishment is a matter that compromises the general interest while limiting the rights of individuals and especially compromises personal freedom"*. From the above reasoning he extracts that *"crimes and penalties must be defined in a broad parliamentary debate, especially guaranteeing pluralism and the principle of majorities (C-198 of 2002)"*.

It refers to the discussions in the legislative process (Bill 211 of 2005), in which it dealt with the issue of the dosimetry of the penalty. The main argument of which is synthesized in the existence of reasonable penalties, with a minimum effective penalty, provided that they are accompanied by repentance, restoration, reparation for the victims, a clear and precise decision to arrive at a peace process. Regarding the power to establish dosimetry, he refers to Judgment C-0591 of 1993, in which it was generally held that *"the dosimetry of penalties and sanctions is a matter left to the legal definition and whose constitutional relevance is manifest only when the legislator incurs a punitive excess of the type proscribed in the Constitution"*. It is based on the parliamentary debate in the First Joint Commissions to Bill 211 of 2005, in which the scope of the concept of "penal alternative" was discussed and established.

It goes back to the beginning of the argument on proportionality and points out that with the establishment of the alternative penalty, this principle is not breached. He explains that *"this benefit is constitutionally justified or legitimate to preserve the general interest and achieve the peace and justice enshrined in the preamble to the Political Constitution, superior goods among which there is a tension that the legislator modulates for the purpose of protecting persons residing in Colombia"*. It further argues that the alternative penalty is proportional because it is a necessary measure to achieve peace and national reconciliation and also useful because it allows for the demobilization and bringing to justice of members of illegal armed groups. *"It is effective and makes it possible to realise the wishes for peace - reasonable - it is oriented towards a legitimate end, peace"*. On these exceptional measures for the achievement of peace refers expressly to a concept issued by Fruhling, Michael (United Nations High Commissioner for Human Rights). In which the purposes of transitional justice and the procedure for the trial of crimes committed by armed groups outside the law are specified.

Under the budget of satisfaction of conditions of truth, justice and reparation, under democratic postulates and in accordance with the evaluation of the historical, social and economic context, it maintains that *"the legislator considered it necessary to offer people who demonstrate the purpose of amendment and attitude of rectification and subject to compliance with strict eligibility requirements, contemplated in articles 10 and 11 of the law, a path for their reincorporation into society, enjoying a legal benefit compatible with their collaboration for institutional recovery and the consolidation of peace"*. This benefit consists of the conditional suspension of the sentence once a basic period of effective deprivation of liberty has been served, and having fulfilled the commitments imposed by the judges in terms of reparation, good behaviour and accessory penalties.

Explains the scope of the judicial decision imposing the penalty: *"the judicial decision then does not fall on the sanction as such, which was imposed, with full procedural guarantees, on a subject who violated the criminal law but on the execution of the same, and has, in this area, a provisional character, as long as the judge maintains the conviction that the convicted has not only contributed to the achievement of national peace, collaborating with justice, and contributed with reparation to victims but is in the process of an adequate resocialization"*.

It insists that the peace negotiation established in Law 975 of 2005 does not provide for the granting of amnesties and pardons since it establishes an effective penalty for those who are sentenced to between five and eight years in prison. The intervener acknowledges that this reasoning is in accordance with international norms and in accordance with the provisions of national jurisprudence, in accordance also with the provisions of articles: transitory 30 of the Constitution, 50 of Law 418; article 11 of Law 733 of 2002, which prohibits (amnesty and pardon) for crimes such as kidnapping, conspiracy to commit serious crimes, extortion, terrorism. It explains in more detail that "*amnesty or pardon is only granted for political crimes, in accordance with what is regulated in Law 782 of 2002*". Furthermore, "*In this law the legislator expressly establishes the condition of seditiousness of members of organized armed groups outside the law, but only for belonging to such groups, excluding that other criminal activities may be considered as conduct related to this crime, with the exception of those contemplated in article 69 *ibid**". It concludes that Law 975 of 2005 establishes that neither amnesty nor pardon will be granted (articles 2 and 10). In this regard, it should be noted that, according to international instruments and national and international jurisprudence, the most serious crimes are not considered political crimes or crimes connected with them.

1.2 . "There is no place for the violation of the right to justice".

On this subject, he points out that the legislator enshrined in Article 6 of the Justice and Peace Law the guidelines that the authorities must follow in order to comply with the right to justice. To this end, "*the State has the duty to carry out an effective investigation to identify, capture and punish those responsible for the most serious crimes committed by members of the self-defense groups or guerrillas and to guarantee victims access to effective remedies so that their interests may be served, and also to adopt measures aimed at preventing the recurrence of conduct that violates human rights*".

It also states that Act No. 975 of 2005 is in accordance with the Preamble to the Constitution, articles 2, 5, 29 and 229 above, and the rulings of the Inter-American Court of Human Rights. It specifies that "*the State in the exercise of the *ius puniendi* of which it is the head has the duty to carry out an effective investigation aimed at identifying, investigating, prosecuting and punishing those responsible for the most serious crimes committed by organized armed groups outside the law, as well as guaranteeing victims access to the administration of justice, reparation for the damage caused by the crime, and adopting the necessary measures to avoid the repetition of such obligations*". He notes that these measures are scattered throughout the text of the law.

1.2.3. "The accused articles do not disregard the State duty to investigate, prosecute and punish".

It expresses that the actors formulate the charges from a subjective position. To this end, it states that the accused articles do not ignore the state's duty to investigate, judge and punish. The text of the law provides for the necessary provisions to provide the authorities with the tools to carry out the investigation, prosecution and sanction of those involved. Article 34 instructs the Procurator-General to create a judicial procurator's office for justice and peace; article 35 directs the promotion of mechanisms for the participation of social organizations in assisting victims. "*The legislator attributed the competence for the trial of these crimes to a collegiate judge whose members, by hierarchy, are dressed, have greater preparation and experience as administrators of justice. This is also predictable from the Deputy Prosecutors*".

For the intervener, the establishment of the National Prosecutorial Unit for Justice and Peace is in

accordance with the provisions of the first paragraph of article 250 above and article 66 of Law 906 of 2005, related to the ownership and obligatory nature of the exercise of criminal action. It also points out that the contested precepts are consistent and in harmony with various international norms and with articles 228 and 229 of the Constitution. It relies on the above argument in judgments C-406 of 1992 and T-006 of 1992.

It points out that Colombia is one of the countries with the most advanced legislation in the implementation of criminal policy instruments to prevent, judge and punish the crime of enforced disappearance, even going beyond international obligations, "*proof of which is Law 589 of 2000 (which typifies genocide, forced disappearance, forced displacement and torture)*". It insists on the purpose of the Justice and Peace Law, on the procedure for carrying it out, and on the pronouncements made on the subject by the Inter-American Court of Human Rights, the Inter-American Convention, the Covenant on Civil and Political Rights and the Rome Statute. It therefore concludes that Act No. 975 of 2005 does not disregard the State's duty to investigate, prosecute and punish those responsible for committing serious crimes, which is in accordance with articles 228 and 230 of the Constitution.

1.2.4 "The articles regulating the procedure established in Law 975 of 2005 are in conformity with the provisions of the American Convention on Human Rights and the International Covenant on Civil and Political Rights."

Against the argument that the law presents a restrictive procedure outside the ordinary procedure, it maintains that the plaintiffs are not right, insofar as the legislator made the differentiation in accordance with "*their constitutional competences and within the framework of the authorizations that the 1991 constituent gave them in this respect*". The procedure established by law provides victims with effective and real guarantees so that they can have access to the administration of justice. The differential treatment, he concludes, "*finds support in an objective and reasonable justification that complies with the principle of rationality, since the measure adopted is adequate for the purposes pursued with it - which is none other than to achieve the demobilization of the members of the illegal armed groups*". There is an effective connection between the different treatment provided, and the specific circumstances that motivated it and the purpose sought by the legislator.

It concretizes its argument by pointing out that "*the measure adopted is the result of a prior analysis between the means employed and the end of the measure taken. In this case, it is based on a real and concrete assumption - the existence of organized armed groups outside the law - aimed at rationally achieving a goal - the demobilization of members of organized armed groups outside the law and their social reinsertion - constitutionally admissible with a legal consequence adjusted to the principle of proportionality - protection of the superior value of justice, the rights of victims and ensuring peaceful coexistence and the validity of a just order*". It reiterates under this argument the protection of victims and the guarantee of rights for the accused.

More concretely, it maintains, with respect to the rights of victims, that the law has provided for the intervention of the Public Prosecutor's Office in the defense of the legal order and fundamental rights. It refers to the articles of the law that contain this provision. (34, 35, 36). It concludes that "*the legislator enshrined an entire chapter aimed at protecting the rights of victims*". The definition of victims is in line with the international parameters on the subject set out in the Basic Principles of Justice for Victims of Crime and Abuse of Power. (Resolution 40/34 of 29 November 1985). Finally, it adds that the accused norms do not violate articles 8 and 10 of the Universal Declaration of Human Rights.

1.2.5. "There is no room for ignorance of the state obligation to satisfy the right to the truth".

Regarding the right to the truth, the Ministry of the Interior and Justice specifies that the law enshrines provisions that protect *"the dignity of victims by granting them every facility to do so so, so that they may intervene throughout their actions in defence of their rights to truth, justice and reparation"*. She noted that article 37 spelled out in detail the rights of victims. Articles 38 to 41 also contain provisions obliging the competent authorities to take appropriate measures to protect the dignity of the victims.

It supports the above argument in the constitutional provisions (obligation of the authorities to protect the honor, property and rights of residents in Colombia), and in the report of Ponencia para segundo debate al Proyecto de Ley 211 de 2005 Senado, in which it was pointed out that the repression of the crime alone is not enough, but that there is a need to consider reparation to the victim. It was also recognized that *"not only the perpetrator needs or is in urgent need of socialization or resocialization, but also the victims have to be protagonists of the criminal drama. Let the victim be guaranteed his rights."*

An additional argument on the right to the "truth" is based for the intervener on the fact that *"the law responds to international standards and constitutional mandates, since it adopts a series of measures to know the truth about what happened, beginning with the diligence of a free version and confession in which the norm imperatively provides that the accused manifest the circumstances of time, manner and place in which the facts occurred and indicate the goods obtained illegally and that they deliver for reparation to the victims (art. 17)"*. Expresses that articles 4, 7 and 15 are consistent with constitutional mandates and international standards on victims' rights. *"The collaboration with the justice system that will be achieved through the free version, which provides important inputs to the Attorney General's Office for the clarification of the facts and the knowledge of the truth of what happened, allowing the speed of the process.* In order to establish the concept of truth, it resorts to the Second Debate Paper of Bill 211 of 2005 Senate: *"the truth, which means that it is necessary not only to know the reality about the punishable conducts that have violated the juridical goods, but also when the historical reconstruction of the facts and the contribution of information that indicates the whereabouts of the relatives of such victims is demanded"*.

He resorts to article 7 of the law, which *"leaves open the possibility that other non-judicial mechanisms for the reconstruction of the truth, such as Truth Commissions, may be applied, which is in accordance with the provisions of general principles 1 to 10"*. In addition, article 15 states that it is imperative that public servants covered by the law shall take the necessary measures to establish the truth of the facts and guarantee the defence of the accused, for which purpose the National Prosecution Unit, with the support of the Judicial Police, shall investigate the circumstances of time, manner and place, the conditions of the accused or accused, his background and the damage caused. The provision orders the Judicial Police with the collaboration of the demobilized to investigate the whereabouts of kidnapped and disappeared persons and to report the results to their families, which is in accordance with constitutional mandates and international instruments.

In support of the purpose of the express rule that the legislator took into account what is enshrined in Article 33 of the Constitution. It points out that the accused, in exchange for the benefits granted to him, must contribute to the attainment of peace and collaborate with the proper functioning of the administration of justice (article 95, paragraphs 1, 6 and 7 of the Penal Code). The law also contemplates consequences in the events in which it omits to inform the authorship or participation in certain facts. It states that the law makes the distinction between intentionality and non-intentionality of conduct. The law provides that in the first case the benefits are lost and new known

cases are tried by judicial officials and existing laws at the time of the commission of the crime, and in the second case the alternative sentence and probation are increased by twenty percent.

The foregoing explanation leads the intervener to specify that article 24 establishes for the judge the obligation to make a list of circumstances in order to satisfy the right to the truth. In this sense, it indicates the functions of the judge: he or she will evaluate the requirements established in the law for access to benefits; the acceptance of charges brought against him or her; the acts of reparation established in articles 44 and the measures of satisfaction and guarantees of non-repetition established in article 48.

It adds that the law provides for other provisions to guarantee the right to the truth, such as public declaration restoring the dignity of the victim, public acknowledgement of the damage caused, collaboration in locating kidnapped and disappeared persons, public apology recognizing the facts and accepting responsibility, verification of the facts and dissemination of the truth, taking care not to cause further unnecessary harm.

1.2.5.1 "It is not true that the Justice and Peace Law does not have legal consequences for not confessing all the crimes committed."

He maintains that the challengers, resorting to an isolated and mistaken interpretation of article 25 of Law 975, partially accuse him of stating that the demobilized person is not obliged to contribute to the truth in order to benefit from the alternative penalty and that in no case does he lose the benefit by omitting information. In the face of this argument, he maintains that the accused article must be interpreted in a systematic manner with the other provisions of Law 975 and in accordance with the provisions of the International Agreements and Treaties.

He explains that *"if members of organized illegal armed groups who benefit from alternative punishment are charged with crimes committed during and on the occasion of their belonging to such groups after the sentence, these acts will be investigated and judged by the competent authorities and the laws in force at the time they were committed, i.e. in these events the granting of the benefit is prohibited, which will lead to their loss, except when the person collaborates effectively with justice and accepts his participation in the acts as long as the omission was not intentional"*. This question is related to what is established in article 17, which enshrines the figure of the free version and confession. It takes as a reference for the subject it deals with, the first debate of the First Commissions, in which the scope of the legal figure of the free version and confession was discussed. It also refers to Judgment C-776 of 2001, which dealt with the right to be free from self-incrimination.

It adds that the verbs "manifest and indicate", as for confession, denote imperativity that excludes discretion. He explains that this free version diligence is taken in the form of collaboration with the justice system and the demobilized person must voluntarily manifest the circumstances of time, manner and place in which he or she has participated, in accordance with the provisions of the law.

Finally, with respect to the subject, he states: *"if there is no cooperation with the justice system, the application of the benefits established in the law does not proceed, and it is pertinent in any case to remember that the above-mentioned applies without prejudice to the constitutional prohibition of self-incrimination in accordance with the provisions of article 33 above"*. To this effect, reference is made to Judgment C-621 of 1998 and to the First Debate of Bill 211 of 2005 in which Mr. Ramiro Marín, Deputy Prosecutor before the Supreme Court of Justice, intervened.

1.2.5.2. "The charge against the omission to stipulate the obligation of demobilized"

combatants to report the whereabouts of disappeared persons is inadmissible".

He maintains that it can be deduced from article 10, paragraph 4, of the law under appeal that it is an obligation to indicate at the time of demobilization the whereabouts of the disappeared persons. It points out that enforced disappearance is a crime of permanent conduct, the commission of which ceases once the fate of the person has become known or the body of the victim of the disappearance has been found. He maintains that this same article demands as one of the requirements for collective demobilization that they be included in the list that the national government will send to the Attorney General's Office.

It calls for a systematic interpretation of the precepts of the law, in relation to article 15 which regulates the procedural principle of the clarification of the truth. Article 44 establishes as acts of reparation the effective collaboration for the location of kidnapped or disappeared persons and the location of the corpses of victims and the search for the disappeared and the remains of dead persons and assistance in identifying them. It concludes that this article must be interpreted in harmony with the provisions of article 42, which prescribes the duty of members of organized armed groups outside the law to provide reparation to victims.

It mentions several provisions that the defendant law enshrines in reference to the issue of conduct that should lead to reparation for victims (art. 7, and 48 numeral 2). It concludes that this demonstrates the importance that the Law attaches to the investigation of the fate of persons subjected to enforced disappearance in order to satisfy the right to the truth.

He comments that the legislator adopted measures in the Justice and Peace Law to determine the whereabouts of disappeared persons, which is in accordance with articles 2 and 12 of the Constitution. In so doing, he maintains that the assertion that "*the duty to provide information is left until the moment of sentencing is disregarded, because within the obligations of the Prosecutor's Office and the Judicial Police is the duty to carry out investigations in this regard from the beginning of the action*". The authorities have important sources to carry out their functions of clarifying the truth: inquiries, crossing of information, etc. Thus, the provisions of the Justice and Peace Act are in line with principles 25 and 34 of the Constitution.

1.2.5.3. "Inappropriateness of the imputation on the ignorance of the obligation to carry out a complete diffusion of the truth".

It argues that the expressions "more unnecessary damage" and "or other persons" contained in Ordinal 1 of Articles 48 and 58 of Law 975 of 2005 are in harmony and concordance with Articles 25 and 13 of the Constitution. It is the obligation of the authorities of the Republic "*to protect all persons residing in Colombia...*". "*Note that the provision does not in any case provide that such protection should be afforded only to certain persons to the exclusion of others*. It specifies that it should be borne in mind that "*the general rule in this case is the full and public dissemination of the truth and the exceptional rule is the restriction of this measure so that it does not cause further unnecessary harm to the victim, witnesses and other persons, nor create a danger to their safety as provided for in article 48-1*". These provisions conform to the higher principles and postulates (art. 15, 44 and 250). The law provides for the protection of the privacy rights of victims of sexual violence and child and adolescent victims of illegal armed groups and regulates measures to facilitate access to archives. Thus, it is clear that the restriction set forth in articles 48 and 58 of Law 975 is within the constitutional faculties that the constituent delivered to the legislator to modulate fundamental rights. It is based on judgment C-475 of 1997, which refers to the scope of the concept of fundamental right.

1.2.6. "It is not true the charge related to the Ignorance of the state obligation to satisfy the right to justice in the strict sense".

It points out that the provisions of articles 24 and 29 of the Act are in line with the provisions of article 2 of the Constitution, because *"it fulfils its duty to refrain from violating human rights and, on the contrary, protects and guarantees them; on the other hand, the State fulfils its commitment to prevent human rights violations, investigates, prosecutes and punishes those responsible for these serious crimes and adopts the appropriate measures to satisfy the right to reparation for victims"*. It insists that the provisions are in accordance with international treaties and conventions.

It states that the Law establishes judicial guarantees through which both victims and defendants have the right to be heard with due guarantees and within a reasonable period of time. It points out that among other measures, the law fulfils the obligation of judicial protection in such a way that any person subjected to it, whether a victim or demobilized, has the right to a simple and prompt remedy or any other effective remedy before the judicial authorities that protect them against acts that violate their fundamental rights. All in accordance with International Conventions and Treaties. On the subject, he referred to the report "The question of impunity for perpetrators of human rights violations (civil and political)", a final report prepared and revised by M. Joinet in application of Sub-Commission decision 1996/119 (E/CN.4/Sub.2/1997/20/Rev.1.2 October 1997), in which he stated that within the framework of the right to justice, the right to a just and effective remedy. *the condition of seditious is recognized to members of the self-defense groups and guerrilla but only with respect to membership in these groups, without the crimes they have committed during their stay to them can be considered related to the political crime.... "*

1.2.7. "Absence of reason in relation to the charge involved in the restricted investigation of facts as Law 975 of 2005 is residual".

In this respect, the intervention of the government at the head of the Ministry of the Interior and Justice is maintained, and the actors start from an erroneous interpretation of the object of the Justice and Peace Law. It therefore specifies that the legislator was clear in stipulating in article 2 of the law that *"the reinsertion into civil life of persons who may be favored with amnesty, pardon or any other benefit established in Law 782 of 2002, shall be governed by the provisions of that law."*

It reinforces its argument with the first paragraph of article 10, which establishes requirements for access to the benefits established by law. Members of an organized armed group outside the law who have been or may be charged, accused or convicted as perpetrators or participants in criminal acts committed during or on the occasion of belonging to these groups may have access to these benefits, when they are unable to benefit from some of the mechanisms established in Act No. 782 of 2002, provided that they are included in the list that the National Government submits to the Public Prosecutor's Office.

The law sought to complement the provisions of Law 782 of 2002, which regulates the granting of legal benefits such as pardon, preclusion of investigation, cessation of proceedings and inhibitory resolution for members of organized armed groups outside the law. *"However, it is known that among the guerrilla and self-defense groups there are members who cannot access the aforementioned benefits, because they have committed serious crimes under international law by expressly prohibiting norms of internal legislation and international instruments."* He comments that from the very debate of the Law (Bill 211 of 2005 Senate, 293 of 2005. House), it was mentioned that the addressees of the law would be the members of the armed organizations outside the law, who have committed crimes against humanity and not only to the members of the self-defense groups, but that it is addressed to all the armed organizations outside the law that want to try

tomorrow a peace process. The current international requirement does not allow peace processes to be concluded with amnesties and pardons for people who have committed crimes against humanity.

It points out that Decree 128 of 2003, develops Law 782 of 2002 and "*therefore Law 975 of 2005, does not depart from its spirit nor contradict it*". Article 21 of Decree 128 of 2003 prohibits the granting of benefits to crimes that cannot be applied to them. "*In other words, those who are being prosecuted or have been convicted for crimes that according to the Political Constitution, the law or the international treaties signed and ratified by Colombia cannot receive this kind of benefits.*"

It points out that the challengers are unaware of Decree 1385 of 1994, which created in Article 5 the Operational Committee for the Abandonment of Weapons with the function of evaluating compliance with the requirements for access to the benefits covered by Law 782 of 2002. Only members of organized armed groups who meet the requirements set forth in Law 782 of 2002 may access the benefits established in that Law. It then explains that if a person belonging to these groups attempts to avail himself of benefits while committing serious crimes under international law, the authorities will reject such a request and process it in accordance with national law and if the person is found to have fraudulent access to the benefits, the benefits will immediately be known to be revoked. It specifies that persons subject to Act No. 782 of 2002 and Decree No. 128 of 2003 are investigated by the Public Prosecutor's Office in order to define their legal status. In order to grant a pardon, there must be an enforceable sentence, which is why a process must be advanced in which the commission of political crimes and related crimes has been demonstrated.

The applicant submits that if the applicants' request were granted, the rules being sued would be distorted. It adds that it would be confusing the treatment that the same Charter establishes for political crimes with that stipulated for other crimes. He adds that the time and resources required to investigate the most serious crimes and punish the perpetrators would be neglected. This would ignore the rights of victims and the State's obligation to investigate, prosecute and punish those responsible for these punishable acts.

1.2.7. "Impropriety of the charge of unconstitutionality due to the reduced term of investigation".

He maintains that the legislator took into account in Law 975 of 2005, two procedural principles: orality and celerity, which are also included in the new Code of Criminal Procedure, which regulates the new accusatory system, which seeks to speed up the State's response to conviction or acquittal.

Unlike the generality of investigations: the Prosecutor will have the information provided by the demobilized combatants in the free version and confession. This action, along with the others, will be sent to the National Prosecution Unit. The Judicial Police and the assigned Judicial Police will elaborate and develop the methodological program to initiate the investigation and carry out the corresponding verifications. It welcomes the presentation for the second debate in the Plenary of the Senate in which the following principles of the accusatory system in Colombia were manifested: celerity, orality, the right to material and technical defense, and the clarification of the truth. This procedure shall be carried out in accordance with the provisions of articles 22 and 16 of the Act.

With respect to the brevity of the term to investigate, it points out that the law enshrines a term of 60 days to investigate. He maintains that the brevity of the term is due to the fact that the Prosecutor starts from a confession and prior information. "*These 60 days are considered sufficient time, because the process takes place within the rules of the Accusatory System*". It maintains that the authorities have information from the outset that will be verified and will facilitate their work of

investigation and prosecution and will have the mechanisms of criminal policy to expedite action, so it will not be necessary to have the terms established in the ordinary procedure, which justifies and makes reasonable and proportionate those established in the lawsuit.

It points out that for the above-mentioned reasons, there will be no need to resort to the indefinite term stage regulated in articles 286, 287, 288 and 289 of Law 989 of 2004. In addition, since not all demobilized combatants are involved in serious crimes to which the law can be applied, prosecutors and courts will be able to concentrate their efforts on investigating those responsible for these acts.

1.2.8 "Improcedencia del cargo de inconstitucionalidad por aplicación del procedimiento penal estatuido y desarrollado a partir del Acto Legislativo 03 de 2002".

Articles 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 and the expression "Penal Code" in article 62 of Law 975 of 2005 do not ignore article 5 of Legislative Act 03 of 2002, *"There is no reason to affirm that figures of the criminal process established by the constitutional reform of 2002 can only be applicable to acts committed after the issuance of the Legislative Act"*. The aforementioned constitutional reform does not limit its application in time, although it is clear that the constituent could have enshrined it in this way. In addition, it mentions that *"Article 5 of Legislative Act 03 of 2002 leaves to the law the determination of the gradualness of the application of the new system and the determination of the validity that defines the crimes to which it is to be applied, thus giving the legislator a wide margin of configuration with respect to the possibility of applying the norm to crimes committed before the issuance of the aforementioned legislative act"*.

With respect to the possibility of applying the procedure established in Law 975 of 2005 to punishable conducts prior to Legislative Act 03 of 2002, it states that *"there is no express limitation in the superior ordering of its precepts to crimes committed prior to its validity is a matter of convenience whose assessment is the responsibility of Congress and not the Court"*.

He pointed out that the new Code of Criminal Procedure (Law 906 of 2004), which introduced the accusatory system in development of Legislative Act 03 of 2002, should not be confused with the Justice and Peace Law, which applied to persons charged with, accused of or convicted of crimes that could not be amnestied or pardoned and which had an accusatory court. The procedure enshrined in Law 975 of 2005 is a special accusatory court procedure different from that established in Laws 600 of 2000 and 906 of 2004. Expresses that the purpose of Law 975 of 2005, has a restricted application due to the object, unlike Law 906 of 2005, due to the particularities presented by its addressees, accused by the commission of crimes not amnestiable or pardonable and by the alternative penalty provided therein. To this effect, he refers to an intervention by the Deputy Attorney General of the Nation in the First Debate in Joint Commissions to the Senate Bill 211 of 2005, from which he extracts that *"it is not a question of a mixture of procedures, but rather of a reduction of the terms foreseen in Law 906"*.

On the other hand, it states that Law 975 of 2005 does not violate Article 5 of Legislative Act 03 of 2005, nor does it contravene the provisions of Article 533 of Law 906 of 2004. *"The institutions and principles contained in the accusatory system are universally enshrined norms not only in procedural codes but also in international instruments for the protection of human rights, they are in accordance with international standards and seek to make the different procedure established there more efficient and effective, without affecting any constitutional norm"*. It further explains: *"The legislator took into account the constitutional principles of proportionality and reasonableness as well as the higher values of justice and the essential purposes of the State to ensure peaceful coexistence and the validity of a just order enshrined in the preamble and in articles 2, 22 and 29 of the Constitution. The mandate of article 5 of the legislative act and the*

precept that develops it of Law 906 of 2004 make clear and express reference to the new code, that is to say, to Law 906 of 2004 and not to any other norm". In this sense, it refers to the first debate in the joint Senate and House committees.

1.2.9. "It is not true that there is a violation of the right of victims of serious human rights violations to have access to an effective judicial remedy."

It affirms that contrary to what was expressed by the plaintiffs, the Justice and Peace Law guarantees access to an effective judicial remedy. In accordance with universal trends, victims are accorded great importance and their rights are no longer limited to the mere aspect of compensation but are recognized as having rights to truth, justice and reparation. It is based on the report for the second debate in the plenary of the Senate, in which the rights of victims vis-à-vis the administration of justice were debated.

With regard to the possibility of access to the case file, the Ministry of the Interior and Justice states that although article 62 does not expressly state which Code of Procedure the rule refers to, it should be borne in mind that, in the case of victims, Act No. 906 of 2004 regulates the rights to truth and reparation more broadly and favourably, in accordance with international standards and constitutional jurisprudence. It points out that this led to the inclusion of several figures in the Justice and Peace Law, such as the integral reparation incident article 23 and the victims' rights stipulated in article 37.

1.2.10. "The position is not justified by rules that limit the faculties of victims in proceedings".

The Vice-Minister of the Interior and Justice explains that the norms demanded do not limit the faculties of the victims in the processes: He verifies that the second paragraph of article 2 of Law 975 of 2005, provides that the interpretation and application of the dispositions foreseen in said law must be made in accordance with the superior norms and international instruments. It mentions that article 62, which makes reference to the provisions of the Justice and Peace Law, Law 782 of 2002 and the Code of Criminal Procedure, must be taken into account. He called for a systematic interpretation of the rule, in line with articles 2, 63 and 37 of Act No. 975 of 2005. It goes on to say that article 34 orders the Public Defender's Office to act on behalf of the victims not only in the integral reparation incident but throughout the process, taking into account the intervention of the Attorney General's Office, the Superior Court Chamber of the Judicial District and the Judicial Prosecutor's Office for Justice and Peace. He also explains that the expression "*during the trial*" in numeral 7 of article 38 must be interpreted in accordance with the provisions of numeral 3 and 5 of article 137 of Law 906 of 2004.

1.2.11. "Unsuitability of the charge on the suppression of the appeal".

He submits that the position is unsupported, inasmuch as the abolition of the appeal is not a disproportionate measure. The Supreme Court of Justice is the highest Court of Ordinary Jurisdiction as established in Article 234 of the Constitution. It is based on ruling C-037 of 1996. He argues that the Constitution did not define any hierarchy of Chambers in the Supreme Court. Nor does it mean that the Plenary Chamber is the hierarchical superior of any of them. He points out that article 26, which regulates appeals and appeals, is a guarantee of the process. *The legislator does not deny victims and defendants access to the highest court of ordinary jurisdiction, but is regulating that the intervention of this body should not be repetitive or lead to a delay in the process.*

1.2.13. "It is not true that the State's obligation to punish those responsible for serious human

rights violations with real custodial sentences is unknown.

It maintains that Law 975 of 2005 does not ignore the State's obligation to punish those responsible for serious human rights violations. He explained that the concentration zones had been established by the National Government in accordance with article 3, paragraph 2, of Law No. 782 of 2002, as a measure to advance talks, demobilization and weapons surrender. These zones are controlled by the security forces, which establish security measures to protect the integrity of the demobilized combatants, and in which the activities carried out there are monitored, as well as preventing demobilized combatants from leaving the area without the authorization of the competent authorities.

It states that the time spent by the demobilized person in the concentration zone (article 31) will be counted as the time of execution of the alternative sentence, and does not constitute "*a covert pardon*". He explains that "*the control of the concentration zone is carried out by the public force and therefore movements and actions in that area are subject to the law, to the extent that members of organized armed groups outside the law cannot leave that zone without the corresponding permission of the national government.*"

In addition, it assures that in accordance with Law 782 of 2002, in this area, prosecutors, judges, judicial police agencies and other State authorities have an institutional presence. It maintains that in these circumstances "*demobilized persons have their right to restricted locomotion and their controlled actions, reasons that justify the decision taken by the legislator to provide that a period of time that members of organized armed groups outside the law have remained in such areas shall be computed as the time of execution of the alternative sentence, limiting said period to 18 months, in addition to the fact that the demobilized person must serve the rest of the alternative sentence that is effectively imposed on him or her*". It argues that this provision is "*justified by the purpose pursued, which is to facilitate peace processes and the reintegration into society of members of organized armed groups outside the law, while guaranteeing the rights of victims*".

Finally, he adds that the creation of these zones was endorsed by the Constitutional Court in Ruling C-048 of 2001, from which he extracts what the Court said: "*these zones cannot be a refuge for delinquency and their establishment is valid as a development of a policy of negotiated solution to internal violence, as instruments of negotiation for the achievement of peace. In these places, constitutional mandates and institutional authority must be preserved, and respect for human rights must reign.*"

1.2.12."The charge that there is ignorance of the state obligation to satisfy the rights of redress is untrue.

It states that Law 975 of 2005 is in line with the Constitution "*since the Constitution, from its preamble, enshrines the bases of responsibility derived from punishable conduct, by establishing among the guiding and founding principles of the State, that of assuring its members life, peaceful coexistence and, in addition to the victims, truth, justice and reparation, within a framework that guarantees a just economic, political and social order*". He adds that these principles are reiterated in article 2 above, and that Law 975 enshrines throughout its text several provisions regulating the duties of members of organized armed groups outside the law. The right to reparation is comprehensively regulated. Articles 1, 2, 4, 10, 11, 17, 24, 37, Chapter IX. 42, 43, 45, and article 49 provide for collective reparation programs to be implemented through an institutional program of collective reparation.

It mentions the creation of the National Commission for Reparation and Reconciliation, which

should follow up and periodically evaluate reparation and reconciliation and, within two years, submit a report on the victims' reparation process to the National Government and to the Senate and House Peace Committees. Article 54 establishes the Victims' Reparations Fund to administer the resources earmarked for this purpose.

It also sustains its argument in the first debate in the First Committees, Joint Senate and House it was said: that restitution is the realization of the actions that tend to return the victim to the previous situation, to the commission of the crime, compensation consists of compensating the damages caused by the crime, rehabilitation consists of carrying out actions tending to the recovery of victims who suffer physical and psychological trauma as a result of the crime. It defines the concepts of satisfaction, guarantees of non-repetition, demobilization, dismantling of illegal armed groups. It is based on Ruling C-228 of 2002.

Expresses that the norms of the Law keep a coherent and harmonious order to obtain the intended ends establishing in the judicial process the truth of what happened, guaranteeing an effective access to justice and the adequate participation of the victims in the action, which is in accordance with article 2 of the International Covenant on Civil and Political Rights.

1.2.13. "The charge does not apply to rules that stipulate that only goods acquired illegally or others, if any, are repaired".

It argues that it should be borne in mind that Law 975 of 2005 is a special law that applies to those who submit to it and that it also refers for its interpretation and application to the international treaties ratified by Colombia and to what is not provided in it, to Law 782 of 2002 and to the Code of Criminal Procedure. This implies that if the person intentionally conceals information about illegal activities in which he or she participated and about the origin of goods derived from such activities, these will be outside the provisions of the law.

In addition, it maintains that the organized armed groups outside the law to which it is directed, "*are organizations that have great economic resources as a result of their activities outside the law and that also have sophisticated and complex structures*". It maintains that the legislator, aware of this situation (the need to dismantle these groups, to investigate, judge and punish their members, and to satisfy the victims' rights to truth, justice and reparation), considered it opportune to adopt measures such as the ones accused, aimed at achieving the aforementioned ends and, consequently, at achieving national peace.

It states that Article 17 of Law 975 provides that in the free version the demobilized person shall indicate, in an imperative manner, the goods he delivers for the reparation of the victims, without it being said that they are illegally acquired goods. Explain that with the expression "if you have them" it is being anticipated that they will be other people of the group to which they belong, the one who has them in his power or in his name. This argument applies to the expression "if possible" in article 46.

It notes that in the Lawsuit, provides for the implementation of the action of extinction of domain regulated in Law 793 of 2002. The action of extinction of domain will not be applied only to the goods that the demobilized ones deliver, it will also proceed in those events in which the demobilized ones omit to inform about these goods in the diligence of free version and confession, whenever it is known of its existence by other means. The paragraph of article 54 provides that, in addition to the assets referred to in articles 10 and 11 of the Act, the Victims' Reparation Fund shall also be provided with assets linked to criminal investigations and extinction actions in progress at the time of demobilization, provided that the conduct was carried out on the occasion of their

belonging to the group, without prejudice to that relating to bona fide third parties.

It concludes that the reparation of victims is guaranteed taking into account that the Fund for the Reparation of Victims will have not only the resources provided by the demobilized combatants, but also those for which the extinction of the domain, the resources of the national budget and national and foreign donations will proceed, which is in accordance with the provisions of article 2 above and the commitments acquired by the Colombian State in articles 2.3 of the International Covenant on Civil and Political Rights, and the American Convention on Human Rights. The Reparation Fund will act in accordance with the Court's order when the active subject cannot be identified.

1.2.14. "Unsuitability of the charge that there are no adequate guarantees for the restitution of the property".

The Ministry of the Interior and Justice states that the part of article 54 of Law 975 that is being demanded is in accordance with the constitutional provisions and international norms that regulate the right to reparation for victims, especially in relation to the content of restitution. It argues that the challenged norm should be interpreted in a systematic manner, especially in harmony with articles 2, 52, 54 and 62 of the challenged law.

It mentions that in a special process, such as that enshrined in Law 975 of 2005, "*the rights of victims to truth, justice and reparation are protected*", given the intervention of different judicial and administrative authorities that are part of the National Reconciliation and Reparation Commission and the Fund for the Reparation of Victims. It points out that these authorities have express functions for the protection of victims.

1.2.15. "Unsuitability of the charge that not all victims will be able to claim reparation".

It states that Law 975 of 2005 includes the definition of victims in international instruments. With support in articles 35 of the Civil Code, and 50, it maintains that the legislator in exercise of the freedom of configuration considered it appropriate to extend the definition of victim for purposes of reparation in the precepts mentioned, which was in accordance with international law (including the Rome Statute). This issue is based on the first debate in the Joint First Committees of the Senate and House of Representatives on Bill 211 of 2005, in which the concept of victim was debated.

1.2.16. "It is not true that the right to reparation is violated if the victim does not promote the incident of reparation.

The intervener states that article 24 regulates the content of the conviction, while articles 43 and 45 stipulate that the Superior Court of the Judicial District, when pronouncing the sentence, shall order the reparation of the victims and determine the pertinent measures. It concludes that these provisions relate directly to the rights of victims as provided for in article 37 of Law 975 of 2005. By way of reference to article 62, article 135 of the P.P. Code establishes that it is the duty to communicate to the victims the rights recognized from the moment they intervene, as well as the faculties and rights they may exercise and the possibility of formulating a claim for compensation in the process through the prosecutor or directly in the incident of integral reparation. It maintains that "*the right to reparation is not violated then if the victim does not promote the incident of reparation because the law orders the Court to contemplate in the sentence the obligation of economic and moral reparation to the victims (24 and 43), except in the event that the case is presented in article 106 of the Penal Code, According to which: "the application for full reparation by means of this special procedure expires thirty days after the announcement of the judgment of criminal*

responsibility", the victim may resort to the provisions of article 488 of the Code of Civil Procedure.

1.2.17. "There is no place for the charge that if the demobilized person conceals information about crimes committed, he does not lose the benefit of the alternative penalty, either for crimes already accepted or for new ones that are known.

He argues that the intention of Article 25 of Law 975 of 2005 is not to allow the demobilized person to omit information about serious crimes. It argues that *"the provisions enshrined in Article 25 are not designed to favour alleged offenders, nor are they intended to permit the omission of information about serious crimes, because as is clearly stated, it was the will of the legislator to derive consequences from the intentional omission of the demobilized, providing that if, after the benefit of the alternative penalty has been granted, he or she is charged with crimes committed during and on the occasion of belonging to those groups and before demobilization, such conduct shall be judged in accordance with the laws in force at the time the crimes were committed"*. It further argues that if the person provides effective cooperation and accepts participation in the acts, he or she may be the beneficiary of the alternative penalty, provided that the omission was not intentional. The juridical accumulation of penalties shall be applied, without exceeding the maximum punishment indicated in the law, in which event the judge shall impose twenty percent more of the alternative penalty imposed and a similar increase shall be taken with respect to the term of probation.

He insists that there must be a systematic interpretation of the law. The provisions of article 15, which orders the Public Prosecutor's Office and the Judicial Police to investigate the circumstances of time, manner and place in which the crimes occurred, as well as everything related to the accused, must be taken into account, in harmony with the provisions of article 16. In more detail, it states: *"The investigative body assisted by the judicial police not only carries out from the free version and confession the verification of the demobilized person's statements regarding the crimes in which he took part and delivered for reparation, but also investigates everything related to the person who avails himself of the law, in order to determine whether there are other charges, accusations or convictions against the person.* And it describes which is the procedure that for the effect is established in the law.

1.2.18. "There is no place for an unconstitutionality defect based on budgetary limitations for the payment of reparations.

It mentions that the expressions in articles 47 and 55 of the Justice and Peace Law accused by the plaintiffs do not violate articles 2, 17 and 90 of the Constitution, nor do they violate the commitments made by Colombia in articles 2 of the International Covenant and 1 of the American Convention on Human Rights, because those paragraphs must be interpreted systematically and in accordance with articles 2, 62, 42, 43 and 54 of Law 975 of 2005.

1.2.19. 'There is no room for ignorance of the State obligation to take measures to ensure non-repetition'.

It maintains that the State establishes in the Justice and Peace Law effective measures to guarantee the right to reparation, in accordance with the commitments acquired in article 2 of the International Covenant on Civil and Political Rights. In this sense, it points out that the regulation of the right to reparation, including the component of non-repetition of conduct, is broad and sufficient. It points out that the guarantee of non-repetition also includes tributes, commemorations and recognition of victims, verification of the facts and dissemination of the truth, and the application of criminal

sanctions to those responsible.

1.2.20. "It is not true that if the demobilized person continues delinquendo does not lose the benefit of the alternative penalty."

Ask for a systematic interpretation of article 29. In this sense, it points out that the plaintiffs "*do not take into account that the provisions in the accused paragraphs refer to the situation in which the convicted person has already served the alternative sentence and has complied with the obligations and commitments imposed and acquired initially when convicted...*", and therefore, a new situation comes to regulate in such provisions, which is about the freedom of evidence, "*in which new commitments are imposed on him, among which is the commitment not to repeat the crimes for which he was convicted in the framework of this law, i.e. the condition provided for in articles 10-4 and 11-4 is maintained where they undertake to cease all illegal activity*".

With regard to the scope of the Act, it states that it shall only apply to offences committed prior to its entry into force in accordance with the provisions of article 72. Therefore, any criminal offence committed subsequently shall be investigated and tried in accordance with the ordinary procedure and not through the special procedure. Crimes committed by such persons who have fulfilled the obligations imposed in the fourth paragraph and after the probationary period have elapsed shall be judged by ordinary procedure and shall not give rise to the loss of the benefit of the alternative penalty because it has already expired. If the person fails to comply with the conditions provided for in the fourth paragraph, his probation shall be revoked and he shall pay the penalty initially determined and also the penalty imposed as a new offence.

1.2.21. "There is no place for the charge concerning the violation of the prohibition to grant amnesties and pardons for serious violations of human rights, war crimes and crimes against humanity."

The intervener notes that Law 975 of 2005 does not violate the prohibition to grant amnesties and pardons for serious violations of human rights, war crimes and crimes against humanity. To support his argument, he relies on the 1993 C-260 ruling, which studied the crime of pardon. From the foregoing, he concludes that "*the law of justice and peace does not contemplate pardon in any part*". Act No. 975 of 2005, in accordance with international instruments and constitutional principles, provides for pardon and amnesty for the most serious offences covered by the Act, and for these an alternative penalty involving deprivation of liberty.

It adds that this prohibition provided for in the law in question establishes that the reinsertion into civil life of persons who may be favored with amnesty or pardon or any other benefit shall be governed by the provisions of Law 782 of 2002 (by means of which the validity of Law 418 of 1997, extended and modified by Law 548 of 1999, is extended). It recalls the mandate of article 29 *idem*, which provides that persons who commit crimes that cannot be pardoned or amnestied and who meet the requirements established by law shall serve an alternative custodial sentence of between five and eight years, which shall be determined taking into account the seriousness of the crimes and the effective cooperation of the accused in clarifying them. He argues that in this sense, the actors confuse the institution of pardon with the benefit of alternative punishment. It argues that these are two totally different legal figures. The benefit of the alternative penalty referred to in the accused articles at no time constitutes a pardon, an institution consisting of the total or partial pardon of the penalty. Situation that does not arise in this case, where a sentence of effective deprivation of liberty must be served. The article must be interpreted in accordance with the provisions of articles 3 and 24 of the law sued.

It specifies that the sentence will be assessed taking into account the seriousness of the crimes and the effective collaboration provided for the clarification of such punishable conducts. Penalties to which, in accordance with the provisions of the paragraph, in no case shall criminal subrogation, additional benefits or additional rebates apply, i.e. the deprivation of liberty shall be effective for a period to be determined by the Court. Article 29 stipulates that upon completion of the alternative sentence and the obligations imposed in the sentence, he shall be granted probation for a period of time equal to half of the alternative sentence imposed on him. A situation that takes place under certain conditions. It concludes that the demanding conditions of the law for access to the benefit of the alternative penalty are far from being a pardon. Which is why the legislator did well to give Law 975 of 2005 the procedure of an ordinary law and not a pardon law.

He argues that this situation was discussed in the first joint Senate and House Committees. It concludes, then, that the essence of the Justice and Peace Law is the criminal treatment of those who, being members of armed groups, cannot be pardoned and who are given different treatment by society and the State for contributing to the achievement of peace. These groups have not been defeated and their members have voluntarily demobilized, surrendered and submitted to the authorities. Law 975 of 2002 does not enshrine a preferential treatment but a different procedure contained in a special law. The will of the legislator on the subject can be seen in what was expressed in the first debate on Bill 211 of 2005. Senate, which states that although serious crimes (sedition, assault, conspiracy to commit a crime, committed by groups outside the law) require a criminal sanction, these, in the interests of national reconciliation must answer to the judges but with the possibility of benefits in exchange for collaboration. This is in accordance with the requirements of international organizations.

It explains in more detail that *"the condition of seditious that was granted to the self-defense and guerrilla groups in article 71 of the law, is only for membership of that group, without the other crimes committed by reason of their membership can be considered in any way related to sedition, with the exception of the crimes provided for in article 69 of the Justice and Peace Law."*

With regard to the Government's intervention, he points out that *"it is not true that the Government's intervention constitutes an intervention in politics in the exercise of the right of grace"*. This intervention is based on articles 113 and 189 numeral 4 of the Political Constitution. Articles 10 and 11 of the law imply the participation of the Government either in the signing of an agreement for the demobilization and dismantling of the group, or in the signing of a deed of commitment with the demobilized, *"which in no case implies the exercise of the right of grace"*.

It points out more emphatically that *"it is not possible to conceive of a process such as justice and peace without the participation of the national government"*, for which it relies on the provision of article 189, paragraph 3, of the Constitution. Information required to prepare the lists established in Article 10 and the reference referred to in Article 11. Information also required to prevent benefits from being improperly accessed by persons other than the intended recipients (guerrillas and self-defence groups).

1.2.22. "The standards demanded do not constitute a system of impunity which, as a system, is a veiled pardon and a covert amnesty".

It maintains that the Justice and Peace Law does not establish a system of *"criminal benefits, since in accordance with the provisions of article 3, in line with the provisions of article 29, the criminal benefit established for demobilized persons is that of alternative punishment"*. However, says the Ministry, the fact that the time spent in the concentration zone is calculated as the time spent on the alternative sentence does not violate any constitutional provision. Although demobilized persons are

not in austere conditions in a penitentiary, some of their rights are limited and their presence there is a sign of demobilization, surrender and submission to the authorities. In addition, the intended purpose makes the measure comply with the principle of proportionality. It concludes that the legislator considered that the time spent there advancing the conversations would be computed as the time of execution of the alternative sentence, which is justified by the purpose pursued, which is none other than to facilitate the peace processes and the reincorporation into society of members of organized armed groups outside the law, while guaranteeing the rights of victims. *"It is therefore possible to conclude that the benefit of the alternative penalty is only one."*

In addition, the follow-up and accompaniment that the OAS delegates are carrying out in the détente zone should be taken into account, which gives legitimacy to the conversations. There was also a presentation for the first debate in the Senate, which debated the end of the establishment of resocialization penalties and as fair retribution. It clarifies that the alternative penalty provided for in the accused law shall in no case be subject to criminal subrogation, benefits or additional rebates. It is therefore an effective deprivation of liberty, and is in line with the assertion made in judgment C-171 of 1993 on pardon.

It states that *"the plaintiffs are not right when they state that the extension by the legislator of the crime of sedition could lead to them receiving the pardon and other benefits established in Law 782 of 2002, since this decision does not imply that the recipients of the law of justice and peace, such as an institution or such a norm, will be applied to them"*. The issue is based on Ruling C-047 of 2001, related to the wide margin of legislative configuration as a mechanism tending to the solution of the armed conflict in Colombia. He goes on to explain that the legislator took into consideration the provisions of Law 733 of 2002, and in articles 30, 150 numeral 17 and 201 numeral 2 of the Constitution, which establish that these benefits will be granted only for political crimes, for the issuance of the Justice and Peace Law, he also took into account the pronouncements of the Constitutional Court.

Nor is it true that the accused precepts constitute a veiled amnesty as a system that surreptitiously gives rise to impunity, because contrary to what the authors have said, they do not erase the responsibility of the perpetrators of the most serious crimes by putting an end to the processes to be initiated, since the Attorney General's Office carries out the criminal action of which it is the owner by investigating the crimes and accusing those responsible before the Court, contrary to the characteristics of amnesty where there is forgetfulness of criminal activity.

1.2.23. "Conclusion of the Proportionality Judgment".

The intervener observes that there is no impunity in the norm demanded, *"since it is a law of forgiveness and forgetfulness, all crimes must be investigated and judged, criminals punished and victims separated"*. Consider that there is no statute of limitations for unconfessed crimes. It concludes that this *"law incorporates the highest international standards in the field of justice, requiring, among others, the confession version and a minimum period of deprivation of liberty as a prerequisite for access to legal benefits, while retaining the State in all its capacity for investigation, prosecution and punishment"*.

In line with the foregoing, it points out that the law, on the one hand, does not provide for amnesty or pardon, and on the other hand, the alternative penalty implies that its purpose is to suspend the execution of the sentence for a period of time, provided that the requirements are met. He explains that the judicial decision does not fall on the sanction insofar as it is concerned, but on the execution of the same, and has in this area a provisional treatment, as long as the judge maintains the conviction that the convicted person has not only contributed to the achievement of peace.

He explains that in the alternative penalty in no case will criminal subrogation, benefits or complementary rebates be applied. Article 29 also enshrines the concept of probation for a term equal to half of the alternative penalty, which is considered once the alternative penalty has been served and the conditions imposed in the sentence have been met, and if conditions are met, the principal penalty shall be declared extinguished and in the event that the commitments acquired are not met, the judicial authority shall revoke the probation and the person - shall lose the benefits that had been granted to him - and shall serve the penalty initially determined in the Criminal Code, an event in which he shall have access to the criminal subrogation.

It adds that the law establishes as an essential requirement for access to the benefits provided for in the law, the comprehensive reparation of victims by demobilized persons through measures such as restitution, compensation, rehabilitation and satisfaction (art. 43 et seq.). Symbolic forms of reparation are also provided, such as public and express requests for forgiveness of victims and the adoption of measures of non-repetition.

It considers that the demand rule does not infringe the principle of equality. Because the consecrated benefits are subject to conditions that are oriented to the achievement of the effectiveness of the administration of justice, inasmuch as the collaboration demanded of the beneficiaries seeks on the one hand to submit to the law and the authorities those criminals who have a greater capacity to destabilize society, and on the other to preserve the right of the victims to truth, justice and reparation. On the other hand, it points out that the benefits foreseen in the norm require an effective collaboration of the authorities, since they must apprehend the heads of the criminal organizations, the effective disarmament of these and the prevention of future criminal acts. It therefore concludes that such benefits cannot be said to be conferred by the mere fact of having committed certain punishable conduct but rather a means which the legislator considered appropriate to achieve a legitimate aim, namely the effective dismantling of illegal armed organisations.

1.2.24. "Absence of reason as to the allegations of absolute nullity of the rule and the legal situations arising therefrom".

It reiterates that the purpose of Law 975 is to remove those responsible for serious crimes from the action of justice, to achieve the demobilization of armed members outside the law, to submit them to the authorities, to impose an alternative penalty for their contribution to peaceful coexistence and reparation for the victims, from which it concludes that a balance between justice and peace is sought. It does not produce a system of impunity and guarantees the investigation, prosecution and punishment of those responsible. On the other hand, it does not ignore *jus cogens* because neither amnesty nor pardon is being consecrated. In relation to the subject, he transcribes excerpts from what was said in the first debate of the Joint Commissions to Bill 211 of 2005. Senate. Gazette 200 of 13 June 2005. In addition, he insists that the scope of the concept of alternative sentencing, among others, is to establish justice that is acceptable to both the victim and the perpetrators. In order that crimes against humanity be worthily punished, recognized, reparations be derived, and that this not be an impediment to achieving peace.

1.2.25. "Improcedencia del cargo de inconstitucionalidad relacionado en la tipificación del parlamilitarismo como sedición".

It states that the fact that the addressees of the law have not been qualified as seditious does not mean that doing so violates any constitutional norm, since the legislator in exercise of his freedom of configuration and within the powers to design criminal policy is empowered to do so. It is based

on judgments C-695 of 2002 and C-529 of 1994, which dealt with the competence of the legislator and the dynamics of legislation.

It explains that the addition that the legislator makes to the criminal type of article 468 of the Criminal Code is framed within the exercise of freedom of configuration that is proper to it. Due to the protection of constitutional values and ends such as justice, peaceful coexistence, the validity of an order, as well as the social, economic and political situations that present themselves at a given historical moment can select new legal assets that deserve protection, increase, decrease penalties and establish different procedures, within the framework of a reasoned and reasonable criminal policy.

1.2.26 "It is not true that the conduct provided for in article 71 of Law 975 of 2005 constitutes an attack on the State. Unlike the plaintiffs, the actions of the self-defense groups affect the functioning of the State because they interfere with the normal functioning of the constitutional and legal order.

It states that the legal good protected by this type of criminal offence is the constitutional and legal system. The crime of sedition is those behaviors that can be perfected or modified by the concurrence of the action and intention of several people. He's one of those so-called danger crimes. The fundamental aspect of this functioning is the use of weapons and seeks to temporarily impede the free functioning of the constitutional and legal regime in force.

The addition to the criminal offence does not violate the principle of legality since the legislator, on the one hand, has the constitutional competence to describe new offences, modify existing offences or exclude them from the Criminal Statute in accordance with social expediencies and with the aim of achieving the constitutional aims of the State. It points out that one characteristic of the Justice Law is universality. Reference is made to the report for the Second Debate on Bill 211 of 2005, which indicates that the law is aimed at organized groups outside the law, understood as guerrilla or self-defence groups or a significant and integral part thereof, such as blocs or fronts and other forms of organization.

He argues that article 71 conforms to the principle of legality and to the provisions of article 10 of Law 599 of 2000. The provision unequivocally defines, expressly and clearly, the basic structural characteristics of the criminal offence of sedition. With regard to the last paragraph of article 71, which refers to the integration of legislation with article 10 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, it argues that it was the legislator's intention to enshrine this provision there in order to close the doors to persons involved in narcotics trafficking, preventing these persons from having access to this benefit.

Subject to what was said in the first debate of articles 61 and 64 of Bill 211 of the Senate, 293 House: the conformation or belonging to self-defense groups or guerrilla consists of a concert to commit a crime, with the purpose of temporarily interfering or supplanting the proper functioning of State institutions. Hence the possibility of the guerrillas committing this crime. However, with respect to the possibility that the active subject of the same, the self-defense groups, is referred to a ruling of the Constitutional Court in which it was said that only the State can administer justice. *"The so-called armed self-defense groups lack legitimacy, since in reality they constitute paramilitarism, incompatible with the structure of the rule of law.* It was also affirmed that there are suitable instruments in the Constitution and it expresses them in a detailed way to participate, therefore there is no reasonable reason to point out that armed confrontation is legitimate and much less violent attitudes of resistance to authority. *"The approval of this article by the Congress of the Republic clarifies the nature of the criminal actions of illegal armed groups and also gives legal*

certainty to the process of demobilization of members of illegal armed groups.

He also points out that article 64 is in accordance with the Constitution and international standards. This provision will be an important instrument for the peace policy pursued by the Colombian State, insofar as it will facilitate the demobilization and reintegration into society of large numbers of members of organized illegal armed groups who abandon their activities as members of those groups and demonstrate their willingness to join civilian life.

1.2.27. "The charge against paramilitary groups in Colombia, allied with the State, lacks sustenance and veracity.

In relation to this issue, he maintains that *"the Social Rule of Law does not tolerate, support, nor is it complicit in the criminal activities committed by self-defense groups and exercises all its power of coercion and repression to dismantle these organized armed groups outside the law and subject their members to the rule of law.* It emphasizes that the State has wished to issue norms through which peaceful coexistence and the existence of a just order can be ensured. It is based on Judgment C-009 of 1995, which states that force against law cannot be legitimized.

1.2.28. "Improcedencia de las imputaciones sobre consecuencias de la calificación del paramilitarismo como delito político".

The intervener refers to article 17 of the lawsuit, which establishes that members of organized groups outside the law whose names are submitted by the national government to the consideration of the Attorney General's Office, who avail themselves of the procedure and benefits established therein, will render a free version before the Deputy Prosecutor and in the presence of his or her counsel will manifest the circumstances of time, manner and place of the commission of the crimes. Article 19, paragraph 1, provides that if the accused does not accept the charges during the hearing to reconcile the charges, or if the charges are those admitted, in the free version, the National Unit of the Public Prosecutor's Office for Justice and Peace shall refer the action to the competent official, i.e., it loses the benefits enshrined in Act No. 782 of 2005, or the alternative penalty provided for in Act No. 975 of 2005. Finally, he points out that the benefits will not be lost, as an exception established in the rule, by anyone who accepts to have participated in its realization as long as the omission was not intentional.

He argues that Congress categorically ruled out the connection of sedition to crimes against humanity and other serious crimes. It is based on Ruling C-456 of 1997. It clarifies that the norm provides with imperative character - not discretionary - the obligation of the demobilized ones to manifest in the diligence of free version, the circumstances of time, way and place of the crimes in which it has participated and of the same form they must indicate the goods that they deliver for the reparation of the victims. He says they won't be able to participate in politics. It affirms that extradition will not proceed for these persons, in accordance with national and international standards. However, those who, in spite of being possible beneficiaries of the qualification of the political offence, but who have incurred in other offences for which they may be requested, may not evade the application of the figure of extradition.

He specifies that the statement of the plaintiffs is not true, since the recognition of a political condition has nothing to do with the serious crimes that he may commit during and on the occasion of his belonging to the group. He commented that crimes against humanity had no connection with political crimes, because if there had been a connection it would not have been necessary to issue the Justice and Peace Law, everything could have been prosecuted by means of pardon or amnesty. The legislator has been clear in pointing out that there is no connection between the fact of being

sedition and the crimes of genocide, crimes against humanity or drug trafficking.

He argues that those convicted will not be convicted of sedition or any other political crime but of crimes against humanity and therefore will not be able to engage in politics or hold public office, because they are crimes that have no connection with political status. In accordance with the above, the principal penalty initially determined must appear alongside the alternative penalty in the text of the judgment, thus ruling out treatment as a political offender and the granting of any benefit.

It refers to the Second Debate in the Plenary of the House of Representatives to the cited bill: where the scope of the law is expressed, as regards extradition and political crimes, which for the latter there is not. The intervention refers to Judgment C-456 of 1997, Judgment that excluded the connection of political crimes, eliminating impunity for crimes related to rebellion and sedition. Ratifying the competence of the legislator to determine the common crimes committed in connection with strictly political ones and which because of their ferocity, barbarism, because they are crimes against humanity cannot be.

Finally, it comments that article 69 establishes the benefit of the inhibitory resolution, preclusion of the investigation or cessation of proceedings, as the case may be, for the crimes of conspiracy to commit a crime in the terms of the first paragraph of article 340 of the Criminal Code; illegal use of uniforms and insignia; instigation to commit a crime in the terms of article 348 of the Penal Code; manufacture, trafficking and carrying of arms and ammunition.

1.2.29. "Article 71 of Law 975 did not modify the Political Constitution".

It argues that the amendment of article 468 of the Criminal Code, which defines the crime of sedition, was carried out by the legislature in accordance with the authorization granted to it by the 1991 Constitution, in order to design the State's criminal policy. The condition of seditious only applies to membership in guerrilla or self-defence groups and, therefore, any kind of connection with other crimes is ruled out, except for those enshrined in article 69 of Law 975 of 2005.

1.2.30. "Unsubstantiated charges in relation to international norms violated since article 71 of Law 975 of 2005".

It argues that the accused article does not violate articles 2 of the International Covenant on Civil and Political Rights and article 1 of the American Convention on Human Rights. Contrary to what was affirmed by the plaintiffs, the Colombian State adopts measures aimed at fulfilling the commitments and guaranteeing all persons residing in the country their fundamental rights, including the right to equality. The law contains provisions aimed at protecting the rights to truth, justice and reparation (articles: 1, 4, 6, 7, 8, 10, 11), the clarification of the truth, enshrined in articles 12, 13, 14, 15; and the procedure for investigation and trial (Chapter IV), there is also the alternative penalty provided for in articles 3 and 29. The regime of deprivation of liberty (articles 30 and 31), the institutions for the enforcement of the law (Chapter VII), Chapter VIII rights of victims, provided for in Chapter IX and the preservation of archives in Chapter (X).

II. Defense of Charges for Defects of Form.

It points out that the charges are inadmissible, since Law 975 of 2005 does not affect the essential core of the fundamental rights of the victims or accused, accused or convicted persons and therefore did not require a statutory law.

He explains that the will of the 1991 Constituent provided that the statutory laws be an exception to

the general system that dominates the legislative process, which is why he pointed out that these laws must have a qualified majority for their approval, modification or repeal. This type of law regulates essential matters for society, however it states that the Court has indicated that not every rule or issue related to the matters stipulated in Article 152 transcribed should be treated as statutory law. It refers to Judgment C-247 of 1995, which specified the concept of statutory law reserve.

It argues that the criterion for defining whether a statutory law is required for the issuance of the norms that affect them (fundamental rights) lies in verifying whether the corresponding precepts affect the essential core of those, such as when restrictions or limitations are enshrined in their exercise, which in fact translates into their regulation, clearly alluded to in article 152 of the Constitution. And it points out the concept of essential core of the rights taken from Judgment C-033 of 1993. It is based on other judgments on the subject issued by the Constitutional Court. (C-013 of 1993, C-311 and C-425 of 1994, C-566 of 1993).

He observes that if the thesis put forward by the plaintiffs were accepted, it would go so far as to create a legal system composed mostly of statutory laws, which would lead to the petrification of the legal system, making it difficult to adapt the rules, the historical moments and the social reality of the country. A restrictive interpretation of a statutory law reservation must be made in relation to fundamental rights. It is based on Judgment C-313 of 1994.

He specifies that the articles of Law 975 of 2005 do not affect the essential core of the rights enshrined therein, nor the rights of access to justice and judicial guarantees. Especially since they do not establish limits, restrictions, exceptions, or prohibitions to their exercise that make them impracticable, or hinder their exercise, or strip them of the necessary protection, but on the contrary, the provisions seek to guarantee victims' access to the administration of justice, ensure their rights, and reparation. The law contains the necessary normative provisions to provide the guarantees enshrined in the Constitution to persons who are the object of accusation, indictment or conviction for the crimes contemplated in the law and who avail themselves of it in accordance with the provisions established therein. It argues that the special and exceptional procedure of the statutory law to regulate fundamental rights is only necessary when the legislator pretends the integral and specific regulation of them, an event that is not presented in the articles demanded. Not everything can be regulated by statutory law because it leads to the petrification of procedural norms and affects the agility required by the administration of justice. He appealed Judgment C-646 of 2001.

It points out that the norms of the law being sued are procedural norms through which the rules of criminal procedure are prescribed, as evidenced in the creation of the Chambers of the Superior Courts of the Judicial District, the assignment of competencies within a criminal jurisdiction to Magistrates of control of guarantees and the creation of the Attorney General's Office Units, which does not affect the essential core of the law. He explained that since the Justice and Peace Law contained provisions of a different nature, it was not possible to fully regulate the fundamental rights provided for therein and the procedures and remedies for their protection.

It maintains that the establishment of rules of procedure and competence are not aspects included within the concept of administration of justice referred to in article 152 of the Constitution. If so, all procedures should be issued through a rigorous and very special procedure of a statutory law and would nullify the power attributed to the Congress of the Republic. In addition, the statute of criminal procedure was treated as ordinary law and refers to the rights of the victims and of the parties involved in the process without it having been necessary as a statutory law. Refers to Judgment C-228 of 2002.

The plaintiffs start from a mistaken premise, which leads them to affirm that the statutory laws

develop in a detailed and exclusive manner the subjects that the constitution reserves to that kind of laws, forgetting that the same norm authorizes the legislator to issue, through ordinary channels, the diverse codes.

2. "It is not true that Law 975 of 2005 should come into force until the control of constitutionality is done.

It expresses that in relation to the request made by the actors related to the validity of the Justice and Peace Law, it should be taken into account that in the Order of November 8, 2005, the Magistrate Rapporteur Alfredo Beltrán Sierra, considered that it was not viable to accede to this petition, *"because on the one hand, the Political Constitution does not grant such power to the Court, unlike what happens with the Council of State, and the other is a decision in this sense is the competence of the Plenary Chamber at the time of examining one of the charges presented, when it decides whether it should have been processed as a statutory bill and not as ordinary law, Law 975 of 2005, which is a substantive resolution with the legal consequences that implies.*

In addition, the intervener maintains that all competences are regulated and therefore the organs of the State can only perform functions that have been attributed to them by the Constitution and the law. In addition, article 238 specifies that the jurisdiction of contentious-administrative matters may be suspended provisionally, for the reasons and with the requirements established by law. Article 241, for its part, entrusts the Court with the guardianship and integrity of the constitution and does not attribute this function to the Court. In addition, the effects of a failure occur once the process has finished, that is, when the corresponding sentence has been issued and it has been executed.

2.1 "It is not true that since this is a law that grants covert pardons, their approval would require a special procedure that was not respected in the procedure given to the process.

It points out that constitutional jurisprudence has considered pardon to be a decision by the State in the exercise of its sovereign power that totally or partially pardons the sentence imposed on certain persons by means of a judicial sentence, subject to compliance with constitutional requirements. It refers to a 2000 C-1404 ruling that dealt with the concept of pardon.

He explains that article 29 enshrines other additional commitments that the demobilized person must fulfil in order to have the right to the alternative penalty, such as contributing to their resocialization through work, study or teaching, promoting activities aimed at demobilizing the armed group, among others. The demanding conditions set out in the law of justice and peace for access to the benefit of alternative punishment are far from being a pardon. Which is why the legislator did well to give Law 975 of 2005 the procedure of an ordinary law and not a pardon law.

It refers to the debates of the joint Senate and House First Committees of the Justice and Peace Bill, in which it was expressed: *"the law introduces criminal treatment for those who, being members of armed groups, cannot be pardoned and must be given generous treatment by society and the State".*

It specifies that contrary to what the plaintiffs stated, the benefit enshrined in the Justice and Peace Law does not imply the extinction of the sentence, since, as established in articles 24 and 29, it is initially the main sentence and the accessories determined in the sentence by the Chamber of the Superior Court of the Judicial District corresponding to the crimes committed and calculated in accordance with the rules of the Criminal Code, a sentence that includes the alternative sentence, the commitments acquired by the convicted person, the moral and economic reparation obligations of the victims, and the extinction of ownership of the property destined for reparation. It concludes that the extinction of the main sentence will be declared by the judicial authority once the

alternative sentence, which is effective deprivation of liberty without reduction of sentence, is served in the first place. Once this has been completed, the second step is to grant him probationary freedom for a term equal to half of the alternative sentence, imposing demanding commitments that, if not complied with, will lead to the revocation of this figure and the application of the sentence initially determined, that is to say, it brings as a consequence the loss of the benefit, concluding that it is not a question of a right of grace that extinguishes the sentence.

2.2. "Unfairness of the charges related to the processing of the appeal of articles 70 and 71 of Law 975 of 2005".

It points out that the constitutional provision nowhere in its text provides that only bills denied in their entirety may be appealed in the Commission and not individual articles that were denied in the Commission. This constitutional mandate is further developed in article 180 of Law 5 of 1992. It is clear that the rules of procedure of Congress allow the plenary of both the Senate and the House to consider re-examining or reviewing the provisions denied by the committees, provided that there has been an appeal of the measure and it has been dealt with through the established procedure, as effectively happened in the case of articles 61 and 64 of Bill 211 of 2005.

Law 5 of 1992 also develops this constitutional mandate, establishing that when a bill is denied or indefinitely filed by the Commission, any member of the Commission, the author thereof, the Government or the spokesperson of the proponents in cases of popular initiative, may appeal such decision to the plenary of the respective House. The plenary, after the report of an accidental commission, decides whether to accept or reject the appeal. If it accepts, the presidency must refer the bill to another constitutional commission to process the first debate, and if it rejects it, it will proceed to order the file. It relates to judgement C-385 of 1997.

He argues that having submitted articles 61 and 64 of the Bill to the Plenary of the respective House in Bill 211 of 2005 Senate, constitutes a primarily democratic and participatory measure that is consistent with the Preamble and articles 1 and 2 of the Constitution and with the essential purposes of the State. It should be borne in mind that the plenaries are made up of all the members of each of the Houses and therefore there is more reflection and participation within them on the issues submitted for study than in the committees, which aims to adopt the decision that best corresponds to the general interests, keeping also in line with the second paragraph of article 160 of the Constitution. For the approval of the articles, the formal requirements of the Constitution and the regulations of the Congress were fully observed, fully realizing the democratic principle of expression and expression of the sovereign will with the necessary guarantees that they understood. Mentioning the Constitutional Court, he maintains that it has determined that if a procedural defect related to the parliamentary debate generates the unconstitutionality of the bill and/or legislative act or if it is an irrelevant irregularity insofar as it does not violate any constitutional principle or value, it is necessary to resort to the principle of instrumentality of forms. Refers to Judgments C-737 of 2001 and C-473 of 2004.

It argues that considering the context, it is not possible to speak of the existence of a procedural defect, since Articles 61 and 64 were approved by the Congress of the Republic with the fulfillment of the constitutional and legal requirements. The procedure for the approval of the articles in question is described below.

According to the Sub-Commission Report on the appeal against the denial of articles 61 and 64 of the Justice and Peace Bill. Article 61 was denied in both the First Committee of the Senate and the First Committee of the House. On April 12, 2005 the reopening of the discussion of this article was requested, the proposal was denied in the First Committee of the Senate and approved in the First

Committee of the House. With the opening denied, the article was appealed to the Plenary.

Article 64 of the aforementioned bill was denied in the Senate and approved in the House, which is why the article was denied in the Joint Committees, a decision that was appealed before the Plenary. It transcribes the report of the Sub-Commission in relation to the appeal filed against the denial of articles 61 and 64, published in Gazette 300 of 2005. In order to deal with the appeal filed against the denial of the aforementioned articles, the President of the Senate formed a subcommittee to report on their origin, which considered that article 166 of Law 5 of 1992 should be applied when assigning the study of said articles to the Third Committee of the House. (Congress Gazette No. 302 of 27 May 2005).

Subsequently, the Board of Directors sent the articles denied in the First Constitutional Committees of the Senate and House, after the appeal was approved by the plenary of the Corporation, to the Second Committee of the Senate and Third Committee of the House of Representatives for the first debate to be held on articles 61 and 64 of the Justice and Peace Bill, in accordance with article 166 of Law 5 of 1992, which in the relevant part enshrines: "*the plenary, after the report of an accidental commission, shall decide whether to accept or reject the appeal. In the first event, the presidency will send the project to another constitutional commission so that it can complete the process in the first debate and in the last one, the project will be archived*".

Francisco Murgueitio Restrepo (Coordinator); Manuel Ramiro Velázquez Arroyave, Manuel Antonio Díaz Jimeno, Jesús Angel Carrizosa Franco, Enrique Gómez Hurtado, Jairo Clopatofsky Ghisays, Jimmy Chamorro Cruz; Luis Guillermo Vélez Trujillo, Habib Merheg Marín and Ricarlo Varela Consuegra, who presented two papers, one signed by Senator Jimmy Chamorro, in which he requests that article 61 be filed and that article 64 be approved, and the other signed by the other speakers, in which he requests that articles 61 and 64 be approved with the suggested modifications. The majority opinion was approved by the Second Committee at its meeting of 1 June 2005. (Gazette 827 of 2005).

In the Third Committee of the House of Representatives, the Representatives were appointed as rapporteurs: Zulema Jattin Corrales, Coordinator or Oscar Darío Pérez, who presented the positive paper to the approval of articles 61 and 64. The Opinion was adopted on 1 June 2005 (Gazette 318 of 2005). The intervener concludes that the procedure observed by the plenaries to the report prepared by the Accident Committees for the appeal, is totally different from the assortment in the Second Committee of the Senate and Third Committee of the House, in relation to the approval in first debate of articles 61 and 64. They were subsequently incorporated into the text of Bill 211 of 2005. He then points out that the democratic principle was observed with all its guarantees.

In this regard, he points out that it should also be made clear that articles 158, 160 and 161 above allow us to conclude that both the Commissions and the plenaries may introduce modifications to the Projects of the General Conference, provided that the Project retains its identity. In addition, it states that article 154 of the Political Constitution establishes that even with respect to projects entrusted to the exclusive initiative of the Government, the Houses may introduce the pertinent modifications. The issue is supported by Judgment C-807 of 2001.

2. INTERVENTION OF THE INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE "ICTJ"^[1].

Citizens Juan Méndez, Eduardo González, Leonardo G. Filippini and Catalina Díaz, intervene in the present constitutionality process in order to present the observations of the International Center for Transitional Justice, as *amicus curiae*. The written submission is divided into five sections: In the

first part, they present an overview of the obligations of States for the realization of justice in contexts of political transition; in the second part, they analyze the exercise of the criminal jurisdiction of the State in contexts of transition; in the third part they present some experiences of investigation and judicial determination of the facts and attribution of responsibility in contexts of political transition; in the fourth part they refer to the incompatibility of several norms of the accused law with the rights of the victims and the international obligations of the States to guarantee them; and, finally, in the fifth part they make several petitions to this Constitutional Court.

In that order, this statement will be summarized:

With regard to the obligations of States in the realization of justice in contexts of political transition, it is pointed out by the intervening organization that in accordance with the current postulates of international law, States are imposed obligations for the realization of justice in cases of international crimes. Thus, in addition to the treaty obligations arising from the conclusion of international treaties, there is a growing consensus in the international community regarding the obligations of States under customary international law, which do not cease because a State is undergoing a political transition. On the contrary, the consensus of the international community on the rights of victims of serious violations of international human rights law and international humanitarian law and the correlative duties of States was reaffirmed by the United Nations General Assembly on 10 November 2005. The *Basic Principles on the Right to a Remedy and Reparation*^[2] were adopted *by consensus without a vote*. With the adoption of these Principles, the General Assembly of the United Nations reaffirmed the conception that States have a series of obligations of guarantee or *duty of guarantee* for the realization of human rights.

After briefly referring to the content of some of the Principles concerning the obligations of States and the right of victims, it is specified that the obligations of States do not cease due to the fact that they are going through situations of political transition; On the contrary, the international community has developed a series of restrictions and positive obligations on States precisely with the aim of combating impunity in contexts of negotiation of armed conflicts or democratic transitions, a consensus that has been made explicit over the last fifteen years in the formulation of the *"Principles for the protection and promotion of human rights through actions to combat impunity"*, which include and detail the rights to the truth (chapter II), to justice (chapter III), and to reparation and the adoption of guarantees of non-repetition (chapter IV). The intervening entity states that these Principles coincide to a large extent with the *Basic Principles on the Right to a Remedy and Reparation*, without creating new obligations for States, but rather collect and organize a series of international rights and obligations that have their source in treaties and international custom, and has been recognized and specified in the jurisprudence of International Courts and the bodies monitoring the implementation of certain treaties such as the United Nations Human Rights Committee.

Once reference is made to this entire set of Principles, the intervening organization states that societies attempting to overcome an armed conflict or an authoritarian process through negotiation are faced with the dilemma of demands for justice, on the one hand, and the urgency of reaching a stable political situation, on the other. However, he argues that the success of a political transition or peace process seems to depend on the negotiating parties mutually assuring each other that the new political situation will not result in revenge. However, she adds, in practice more than the fear of reprisals from former enemies, what exists is a tendency to consolidate pacts that impede the action of justice, since the parties to a negotiation that have committed human rights violations seek impunity even after having left power or laid down their arms. However, he adds, the stability of a political situation obtained on the basis of such pacts or agreements is minimal, and the peace processes thus achieved are barely sustainable, since those who commit such abuses feel above the

law and may persist in practices dangerous to the rule of law. The decision to maintain impunity for those who have violated rights in exchange for ensuring the stability of the transition, not only affects the quality of democracy but is not sustainable in the long term, even in transitions based on *pacts of oblivion*, the past has been reviewed by virtue of the persistence of victim organizations that do not accept subordination to the priorities of political operators.

Thus, societies seeking a transition out of armed conflict or authoritarian regimes and their legacy of impunity must seek ways to make it sustainable, based on respect for fundamental human rights principles, as well as strengthening the space for political action to prevent the return of violence or authoritarianism. It is precisely in order to explain the practical problems that arise in these societies and to identify certain principles that must be observed that the so-called *transitional justice* has emerged, referring to the development, analysis and practical application of strategies to confront the legacy of human rights violations in order to contribute to creating conditions for a democratic, peaceful and more just future.

This is a justice that in recent years has gained "[a]cceptation in international scenarios as a discipline and source for the formulation of public policies. In August 2004, the Secretary-General of the United Nations presented the document *"The rule of law and transitional justice in conflict and post-conflict societies"* to the United Nations Security Council. This document reflects, to a certain extent, the consensus of the international community on the duties of States with regard to justice in transitional contexts. The Secretary-General, in his report, expressly states that peace treaties approved by the United Nations cannot, in any case, grant amnesties in cases of genocide, war crimes and crimes against humanity, or in cases of serious violations of human rights, and that amnesties granted previously do not constitute an obstacle to prosecution before any tribunal created or assisted by the United Nations.

2. In relation to the exercise of the State's criminal jurisdiction in contexts of transition, the intervening organization states that transitional justice recognizes that the fight against impunity does not depend exclusively on criminal justice, but must be articulated with elements of rehabilitation, reparation, recognition of the victim and his memory, and institutional reform. It also acknowledges that the application of each State's criminal justice may differ in the way discretionary limits are identified and recognized, effective collaborative mechanisms, as well as the availability of appropriate non-judicial mechanisms. It also recognizes that in transitional situations there may be limitations on the ability of Governments to adopt certain justice measures, which include a lack of resources, an inadequate justice system, difficulty in obtaining evidence, the existence of a large number of perpetrators and victims, among other circumstances. However, he adds, the analytical framework of transitional justice does not find that these limitations serve as an excuse for inaction by States. At present, he clarifies, there is a clear presumption against impunity, which leads the debate to focus on issues of strategy and tactics *rather than on simplistic options that balance justice and peace*. This means that offering absolute impunity to perpetrators of international crimes in exchange for ending their involvement in a conflict is unacceptable.

In these contexts of transition, the judiciary acquires a preponderant role, since after a period of abuse, the role of judges and magistrates as a democratic counterweight and as a guarantee of access to rights becomes an essential factor. The presence of the State through one of its branches of power whose main purpose is to guarantee the rights of victims as an individual guarantee against abuses is fundamental in rebuilding trust in institutions.

Justice in general has a special commitment in the processes of political transition. In particular, the performance of the criminal justice system is one of the most important pillars of the powers of the State. Its archetypal function is the administration and control of State violence, and it is essential

for the effective reconstruction of confidence in the existence of limits to the State and responsibility for the violation of those limits. The intervener states that in cases of conflict in which abuses have been perpetrated or consented to by the state authority, there are natural expectations directly addressed to the actors of the criminal justice system, since from them the rational exercise of violence is expected. Without the existence of a criminal jurisdiction one could not speak of the existence of limits, and without criminal judges in particular there are no certain limits to the work of the punitive agencies of the State.

He goes on to refer to the importance that international law has been concentrating on transition processes, citing, among others, the document containing the criteria of the international community drawn up by the UN Secretary General, presented to the Security Council in August 2004, *"The rule of law and transitional justice in conflict and post-conflict societies"*, a report according to which justice, peace and democracy are not exclusive objectives but rather imperatives that reinforce each other.

The organization involved in the present process maintains that in the inter-American regional sphere, the strong position of the Inter-American Court of Human Rights is well known, which has consistently established that no law or provision of domestic law can prevent a State from fulfilling its obligation to investigate and punish those responsible for violations of human rights. In this sense, he adds, the IACHR has pointed out that amnesty provisions, statutes of limitation and the establishment of liability exclusions, which are intended to prevent the investigation or punishment of those responsible for human rights violations, such as executions or disappearances, are unacceptable. This is because the obligation of States to adequately investigate and punish those responsible must be diligently complied with in order to avoid impunity and the repetition of such acts. He also cites the International Criminal Tribunal for the Former Yugoslavia^[3], the Special Court for Sierra Leone^[4], *"and several national courts in conflict with the principles of international law have ruled against amnesties for certain crimes."*

It argues that the importance of the effective application of criminal law and the search for truth for the consolidation of democracy is decisively stressed in the international arena. At the same time, the realization of these ends under national jurisdiction has an added value in that it allows for the strengthening of local capacities and facilitates attention to the particularities of each community. These principles were also enshrined in the Rome Statute of the International Criminal Court, which provides that international jurisdiction is subsidiary to national jurisdictions. Under the terms of that Statute, the International Criminal Court will only intervene in the absence of justice on the part of national courts.

Negotiation processes aimed at the cessation of internal armed conflicts or the transition from authoritarian regimes to democratic regimes can justify a certain flexibility in the forms of exercise of the State's criminal jurisdiction. So much so that the Statute of the International Criminal Court uses the formula *"exercise its criminal jurisdiction against those responsible for international crimes"*, yet this flexibility excludes amnesties for international crimes such as genocide, crimes against humanity and other serious violations of international humanitarian law. Nor does the international community accept the presence of amnesties under sophisticated formulas within the framework of complex negotiations. In fact, the Statute of the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia *"[e]xclude from the scope of protection of the guarantee against multiple criminal prosecution cases in which the foregoing trial was not conducted independently or impartially, in accordance with due process standards, or in a manner inconsistent with the intent to bring the person to justice"*.

On the other hand, there is the right of victims and society to know the truth of what happened. In

this context, the margin of appreciation of the States for the negotiation of the cessation of the internal conflict cannot ignore the rights of the victims to the clarification of the facts, to justice and to reparation. The State is under an obligation to investigate violations that have occurred independently of its direct responsibility, an obligation that is closely linked to the legal duty to punish those responsible and compensate the victims. The intervener maintains that despite having a strong link with the duty to punish those responsible, the duty to investigate has an autonomous content, unscathed even in the face of the existence of obstacles to punishment. This is because the impossibility of punishing those responsible does not undermine the duty to investigate human rights violations. In this sense, the Inter-American Court has established that the right to the truth is subsumed in the right of the victims or their families to obtain from the State the clarification of the facts and the trial of those responsible, in accordance with Articles 8 and 25 of the American Convention. This law also prevents the obligation to investigate from being extinguished for as long as the uncertainty about what happened to the victims lasts.

3. With reference to experiences of clarification, judicial or quasi-judicial determination of facts and attribution of responsibility in contexts of political transition, the intervening organization argues that international experience demonstrates the feasibility of negotiating the termination of authoritarian regimes or internal armed conflicts without sacrificing the clarification of facts of serious human rights violations and the attribution of responsibility to violators. To support his claim, and taking into account the criminal justice approach to the issue in Colombia, he refers to five experiences in which facts were established and perpetrators were attributed criminal responsibility in judicial or quasi-judicial settings. Indeed, he cites and reviews experiences such as: the early release programme for people in Northern Ireland; the quasi-judicial process for granting amnesty conditional on full and public disclosure of the facts in South Africa; the "truth trials" in Argentina; the complementarity between the mixed court and the Sierra Leone Truth Commission; and the complementarity of criminal and restorative justice mechanisms in East Timor. He adds that in the South African and Argentinean cases, despite the amnesty granted to human rights violators, the facts were investigated and clarified and their perpetrators were held responsible.

4. For the intervening organization there is an incompatibility of several norms of Law 975 of 2005 with international norms on truth, justice and reparation. In fact, he argues that without having studied all the norms whose constitutionality is being debated in the present process, since their approximation to the norms of the accused law has been made from the perspective of international law, he finds that several provisions of the same seriously compromise the international obligations of the Colombian State, namely:

a) The regime of indefinite access to the benefits of the alternative penalty with minimum incentives for the provision of information enshrined in Article 25, violates the right of victims to know the truth of what happened, particularly in the normative segment that provides "*...without prejudice to the granting of the alternative penalty, in the event that it effectively collaborates in the clarification or accepts, orally or in writing, freely, voluntarily, expressly and spontaneously, duly informed by its defender, to have participated in its realization and provided that the omission was not intentional. In this event, the convicted person may benefit from the alternative penalty. Alternative penalties shall be cumulated without exceeding the maximum penalties established in this Act. Taking into account the seriousness of the new facts tried, the judicial authority will impose an extension of twenty percent of the alternative sentence imposed and a similar extension of the time of probation.*

According to the intervener, this transcribed section does not encourage the provision of information by the demobilized combatant for the clarification of the facts in which he participated. Access to the system of reduced sentences for the second, third or fourth time is conditional on the

omission not being intentional and on the demobilized person collaborating effectively in the clarification of the facts or accepting his or her participation in them. The only additional consequence is a 20% increase in the alternative penalty imposed at the discretion of the judge in the assessment of the seriousness of the new facts. In such cases, he adds, the law instead of attributing to the combatant who accedes to the benefits of alternative punishment (Law 975/05), or amnesty and pardon (Law 782/2002), the burden of confessing his participation in the facts, transfers to the State the burden of proof regarding the unintentionality of the omission.

The content of the normative part of article 25 of the law in question establishes a regime of minimum incentives for the contribution of the demobilized person to the clarification of the facts, which violates the right of the victims to know the truth of what happened, as well as the correlative duty of the State to adopt adequate measures to guarantee this right. In this regard, the *Body of Principles to Combat Impunity* provides that the State must take appropriate measures to give effect to the right to know, including those necessary to ensure the independent and effective operation of the judiciary.

In support of his argument, he brings up the South African experience in which it is demonstrated that *"[a]s a good number of facts that occurred during the conflict in that country were clarified, amnesties were granted subject to full and public disclosure of the facts by the perpetrator. To ensure the perpetrators' disclosure of the truth of what happened, South African law established a time limit within which those who sought to benefit from amnesties had to apply in writing and that those who did not do so in a timely manner ran the risk of being prosecuted in accordance with ordinary laws and procedures. In addition, the Amnesty Sub-Commission reserved the right to qualify whether the account of the facts offered by the perpetrator had been complete, otherwise the amnesty was rejected. The South African case demonstrates that the perpetrators' contribution to fact-finding is achieved through a range of incentives associated with the serious risk of prosecution and the full exercise of jurisdiction by the State.*

(b) The shortened terms for formulating the charge (36 hours) and advancing the investigation (60 days) provided for in articles 17 and 18 violate the right of victims to know what happened. These time limits are insufficient and superlatively compromise the right of victims to know the truth about what happened and the correlative duty of the State to adopt appropriate measures to give effect to the right to know, including those necessary to ensure the effective operation of the judicial apparatus. The time limits contained in the articles in question are extremely short, if one also considers that the law in question establishes minimum incentives for those who avail themselves of the alternative penalty to provide information on the facts in which they participated. In such terms, the State unnecessarily restricts the possibilities of ascertaining the truth.

Taking into account the regime of indefinite access to the benefits of the alternative penalty referred to in Article 25 of Law 975, the number of demobilized combatants, the number of prosecutors assigned to the new National Unit of the Attorney General's Office for Justice and Peace, estimates on the number of victims, and the estimates of the number and nature of violations committed in the context of the internal armed conflict in Colombia, the terms for formulating the indictment and advancing the investigation do not respond to the State's international obligation to establish an effective remedy and conduct an investigation that seriously and genuinely leads to the clarification of the truth.

(c) Act No. 975 does not expressly establish the right of victims to access the file from the moment it is opened. Article 37, paragraph 5, of the above-mentioned Act provides that victims shall have the right to receive information for the protection of their interests, under the terms established in the Code of Criminal Procedure. From the normative content cited, there is a lack of precision as to

which of the two Codes of Criminal Procedure in force in Colombia should be applied, whether Law 600 of 2000 or Law 906 of 2004, since taking into account the moment of occurrence of the facts, article 37 of Law 975 could be interpreted in accordance with the norms of Law 906 of 2004, under whose regime victims do not have the right to access to the file.

Denying victims access to the file is a violation of the right to justice. In accordance with Principle 19 of the *Body of Principles to Combat Impunity*, States must guarantee the legitimacy and effective participation in the judicial process of all persons to whom harm has been inflicted, or even third parties who demonstrate a legitimate interest. Under this principle, victims, their families and heirs should be entitled to become a civil party to the proceedings, which, of course, should include full and permanent access to the file from the very beginning of the proceedings.

That being so, in order to protect victims' right to justice, this Constitutional Court could apply its previous jurisprudence, according to which the victim must be allowed to actively intervene in the process, even from the preliminary investigation stage. This Court has held that the effective guarantee of the rights to truth, justice and economic reparation depends on the civil party being allowed, from the preliminary investigation stage, to know and dispute judicial decisions, to provide evidence and to cooperate with judicial authorities [C-228 of 2002]. In that judgment, the intervening organization adds, it was specified that victims who had become a civil party must be guaranteed access to the file, and even those who, despite not having done so, express their interest through the right of petition.

(d) The right to justice includes the right of victims to be assisted by a lawyer at all stages of the criminal process, and not only at the trial stage, as appears to be apparent from article 37 of the Accused Act. Thus, the rule in question seems to exclude the right of victims to be assisted by a lawyer during the investigation stage. It argues that "*[T]he restriction of the right of victims to legal assistance brought about by the norm and the correlative obligation of the State to provide a lawyer only 'during the trial' are in line with the provisions of articles 17, 18 and 19 on free version proceedings, on the formulation of charges and on the hearing of the formulation of charges. These rules in no way provide for the participation of victims in the proceedings they regulate. According to them, it would seem that the victim's intervention in the process is reduced to the stage of the trial, and particularly to his intervention in the public hearing where he would express 'in a concrete manner the form of reparation he intends' and would indicate 'the evidence he will use to support his claims'. Restricting the right of victims to participate in the process only to the trial stage seriously compromises the right of victims to access to justice.*

In the international field, the Inter-American Court of Human Rights has been particularly emphatic in reinforcing the central role that victims should have in the investigation stage of the criminal process. In accordance with its jurisprudence, certain restrictions on the participation of victims constitute a violation of the State's duty to investigate, because they constitute a flaw in the way in which that duty is undertaken.

(e) The intervening organization maintains that Act No. 975 of 2005 exempts the *perpetrator* from the obligation to use his assets to pay compensation for the damage he has caused, thereby violating the victims' right to reparation. This is because the accused law is articulated in the idea of economic compensation to victims who request reparation within the *special* criminal process established by law, with goods that are the product of illegal activity or that are of illicit origin, but nowhere is it established that economic reparation should be assumed by the perpetrator with all his patrimony regardless of its origin (art. 24). On the contrary, Article 55 of Law 975 provides that the Social Solidarity Network, through the Reparation Fund "*[t]endrá a cargo, de acuerdo con el presupuesto asignado para el Fondo (...) liquidar y pagar las indemnizaciones judiciales de que*

trata la presente ley dentro los límites autorizados en el presupuesto nacional".

The intervener states that from the harmonic interpretation of the provisions of the law accused in relation to reparations, it seems to be understood that its purpose is that all assets that are eventually delivered by demobilized combatants go to the Reparations Fund and once there, are distributed among the victims who have obtained economic compensation decisions in the courts. In addition, according to article 42 of the lawsuit, the resources of the Fund must cover economic compensation in those cases in which the person responsible has not been identified but the causal link between the damage and the activities of the illegal armed group that benefits from Law 975 has been demonstrated.

In his opinion, it follows that even with a judicial court decision ordering the payment of economic compensation, victims cannot be certain of receiving what legally corresponds to them, since the law leaves the realization of the right to economic compensation to the contingency of the Government's policies, in terms of compensation and the budgetary effort it decides to make in relation to the Reparations Fund.

Articles 10, 11, 13 and 18, insofar as they require the demobilized person to invoke the law only for the return of property of illicit origin and exempt him from the obligation to pay the sentence in damages imposed by the court, are contrary to the right of the victims to obtain reparations and to the correlative duty of the State to repair and to guarantee an effective remedy for the victim to go against the person responsible for the damages.

Principle 31 of the *Body of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* embodies the principle of international humanitarian law, according to which any violation of an international norm entitles victims or their heirs to obtain reparation, to address the perpetrator of the harm, and the duty of the State to provide reparation. Similarly, Principle 32 specifies that every victim must have the possibility of exercising an accessible, rapid and effective remedy "*through criminal, civil, administrative or disciplinary channels*".

The fact that Law 975 of 2005 has provided for *special criminal proceedings* as the proper setting for victims to request reparation of damages, should have established the obligation of the *perpetrator* to pay out of his assets the convictions in damages against him. Defending such an obligation in a Reparations Fund without the certainty for the victim that he or she will obtain a payment is a deception, since such a scheme does not at all guarantee an accessible, rapid or effective remedy to obtain reparation for the damage that has been caused.

On the other hand, according to the intervening organization, the law in question confuses the restitution of property to which the victims to whom their property rights have been violated are entitled with the obligation of the perpetrators responsible for causing the damage to compensate financially for the damage caused. Illicitly obtained property must be returned to its rightful owners, possessors or holders, and the State cannot claim that violently expropriated property will pay court judgments in damages. One thing is the restitution of illegally and illegally acquired property, and another is the financial compensation to which victims are entitled for the damage caused.

5. Based on the above considerations, the International Center for Transitional Justice requests the declaration of unconstitutionality of the following provisions of Law 975 of 2005:

- Article 25 in the normative segment states: "*(...) without prejudice to the granting of the alternative penalty, in the event that it effectively collaborates in the clarification or accepts, orally or in writing, freely, voluntarily and spontaneously, duly informed by its defender, to have*

participated in its realization and provided that the omission was not intentional. In this event, the convicted person may benefit from the alternative penalty. The legal cumulation of alternative penalties shall be carried out without exceeding the maximum penalties established in this Act.

- The expression "*within the next thirty-six (36) hours*" contained in the final paragraph of article 17;

- The expression "*and within the next sixty (60) days*" contained in the third indent of Article 1; the expression "*and in the terms established in the Code of Criminal Procedure*" contained in numeral "38.5" [sic] of Article 37, or in subsidy, request the Court to declare that this expression only conforms to the Political Constitution in the understanding that the criminal procedure to which it refers includes the right of the victim to access the file from the preliminary investigation stage;

- The expression "*during the trial*" contained in Article 37, paragraph 38.7 [sic]. In subsidy, they request that it be declared that this expression only conforms to the Political Charter to the extent that it is understood to include the victim's right to be assisted by counsel from the preliminary investigation stage;

- The expression "*product of the illegal activity*" contained in numeral 10.2 of article 10; the expressions "*product of the illegal activity*" and "*when available*" contained in numeral 11.5 of article 11; the expression "*of illicit origin*" contained in point "4" of article 13 and the expression "*of illicit origin*" contained in the second paragraph of article 18.

3. INTERVENTION BY AMICUS CURIAE, - INTERNATIONAL COMMISSION OF JURISTS.

With the presentation of a memorial, Amicus Curiae, the International Commission of Jurists (ICJ) wanted to submit to the consideration of the Honorable Constitutional Court some relevant arguments of international law on the incompatibility of the Justice and Peace Law with the international human rights obligations of the Colombian State. In particular, the ICJ wished to highlight the incompatibility of several provisions of this law with Colombia's international obligations to investigate, prosecute and punish with penalties appropriate to the gravity of the crimes against the perpetrators of serious human rights violations, war crimes and crimes against humanity; to guarantee the victims of these crimes and their families the rights to an effective remedy, justice, reparation and truth; and to eradicate impunity for these serious international crimes. Likewise, in relation to the modification of the criminal type "sedition", the ICJ wishes to highlight the incompatibility of the Justice and Peace Law with the principle of legality of crimes and Colombia's obligations to eradicate impunity.

Given the very serious repercussions that Law 975 of July 25, 2005 has on the international obligations of the Colombian State, the International Commission of Jurists (ICJ) requested the Honorable Constitutional Court, when analyzing the provisions of the Justice and Peace Law, to take into consideration the arguments and conclusions of the legal brief "Amicus Curiae" sent.

Specifically, on the Justice and Peace Law, he said:

"Law 975, and particularly articles 3, 5, 18, 29, 31 and 71, opens an avenue to consecrate impunity for serious human rights violations, crimes against humanity and war crimes. In so doing, the Colombian State is in breach of its international obligations - from both conventional and customary sources - to investigate, prosecute and punish with penalties appropriate to the gravity of the crimes, the perpetrators of serious

human rights violations, war crimes and crimes against humanity; to guarantee the victims of these crimes and their families the rights to an effective remedy, justice, reparation and truth; and to eradicate impunity for these serious international crimes.

The Justice and Peace Law replaces the prison sentence with the benefit of "alternativity", consisting of the suspension of the execution of the criminal sanction and replacing it with an "alternative penalty". The "alternative penalty", irrespective of the nature of the offence, consists of deprivation of liberty for a period of five to eight years. The time during which the convicted person remained in the concentration zones, during the negotiation and demobilization process, is counted as the time of execution of the alternative sentence. This figure of the "alternative penalty" not only contradicts the principle of proportionality of penalties but is contrary to the international obligation of the State to punish serious human rights violations such as torture, extrajudicial executions and enforced disappearance, crimes against humanity and war crimes with penalties appropriate to the gravity of these crimes. The imposition of derisory sanctions, in disregard of the principle of proportionality of penalties, constitutes a recognised form of impunity under international law.

The Justice and Peace Law limits the definition of victims and, therefore, their right to reparation, since it limits it to those who have suffered "damages [...] [as a consequence] of actions that have violated criminal law, carried out by organized armed groups outside the law. This established definition is not in conformity with the definition of victim enshrined in international law, which includes damages arising from gross violations of international human rights law or serious violations of international law. This regulation of the Justice and Peace Law, together with the fact that illicit conduct under international law would also go unpunished for lack of national criminal legislation, is contrary to the international obligation of the State to provide reparation for both the crimes established in national legislation and for conduct constituting serious violations of international law.

The Justice and Peace Law establishes a special judicial procedure, with short terms for conducting investigations. It is difficult to conceive, as the Inter-American Commission on Human Rights has pointed out, that within the time limits set by the Justice and Peace Law, the competent authorities can carry out effective investigations aimed at judicially clarifying the thousands of cases of massacres, selective executions, forced disappearances, kidnappings, torture and serious damage to personal integrity, forced displacements and usurpation of land, among other serious crimes. Such regulation implies a violation of the international obligation of the State to conduct effective investigations to prosecute and convict the perpetrators of such crimes. This is all the more so in cases of enforced disappearances, in respect of which the obligation to investigate persists until the fate and whereabouts of the disappeared person have been clarified with certainty, owing to the permanent or continuing nature of this crime. Such regulation also constitutes a major obstacle to the realization of the right to the truth and the right to reparation for victims and their families. The right to truth and reparation for victims is also undermined by the system of "trickling confessions" or renditions established by the Justice and Peace Law, which does not require full and complete confession of all crimes committed as an indispensable requirement to benefit from the "alternative penalty".

The Justice and Peace Law modifies the crime of "sedition" in such a way that it classifies as a political crime the membership or formation of self-defence groups. This

provision has serious consequences. On the one hand, it constitutes a violation of the principle of the legality of crimes - *nullum crimen sine lege*. It could also constitute an obstacle to the effective application of the principle of universal jurisdiction and the *aut dedere aut judicare* rule, since there is a universal rule on extradition according to which political offences are not extradited. Under international law, serious violations of human rights constituting international crimes, crimes against humanity and war crimes cannot be classified as political crimes, even if their perpetrators were politically or ideologically motivated to commit them. The consequences provided for by international law for political crimes do not apply to such crimes, especially as regards grounds for non-extradition and asylum.

In short, the Justice and Peace Law allows for the consolidation of impunity for serious human rights violations, crimes against humanity and war crimes, and violates the right to truth and reparation for the victims of these crimes and their families.

Later in the legal brief before the Court, *Amicus Curiae*, he addressed the notions of grave human rights violations, crimes against humanity and war crimes (Point III); the State's duty to guarantee (Point IV); the obligation to guarantee an effective remedy, reparation and truth (Point V); the obligation to investigate (Point VI); the obligation to judge and punish (Point VII); political crime and self-defense (Point VIII); and the principle of *Pacta sunt servanda* (Point IX). However, despite the importance of these concepts, they are summarized as follows:

III. Grave violations of human rights, crimes against humanity and war crimes.

International law considers torture, summary, extra legal or arbitrary executions and enforced disappearances to be serious human rights violations, among other acts. The United Nations General Assembly has repeatedly recalled that extrajudicial, summary or arbitrary executions and torture constitute grave violations of human rights. The Declaration on the Protection of All Persons from Enforced Disappearance reiterates that enforced disappearance is a serious violation of human rights. The jurisprudence of international human rights bodies is consistent in this area. The United Nations Human Rights Committee has repeatedly described, among other acts, torture, extrajudicial execution and enforced disappearance as grave violations of human rights.

With the creation of the International Military Tribunal in Nuremberg, the first definition of the crime against humanity - also called crimes against humanity - was provided. Francois de Menthon, Attorney General for France in the Nuremberg trial, defined them as those crimes against the human condition, as a capital crime against the consciousness that the human being has today of his own condition.

The notion of crime against humanity seeks the preservation, through international criminal law, of a core of fundamental rights whose safeguarding constitutes a peremptory norm of international law, since, as the International Court of Justice states in the *Barcelona Traction* judgment, given the importance of the rights at stake, States can be considered to have a legal interest in having those rights protected; the obligations in question are *erga omnes* obligations. This means that these obligations are enforceable on all States and by all States.

Because of the nature of these crimes, as an offence to the inherent dignity of the human being, crimes against humanity have several specific characteristics. They're imprescriptible crimes. They are attributable to the individual who commits them, whether or not he is an organ or agent of the State. According to the principles recognized in the Statute of the Nuremberg Tribunal, any person who commits an act of this nature "is internationally responsible for it and subject to sanction".

Similarly, the fact that the individual has acted as head of state or as an authority of the state does not absolve him from responsibility. Nor can he be exempted from criminal responsibility for having acted on the orders of a hierarchical superior: this means that the principle of due obedience cannot be invoked to avoid the punishment of these crimes. Persons responsible for or suspected of having committed a crime against humanity cannot be granted territorial asylum nor can they be granted refuge.

The concept of "grave breaches" of international humanitarian law - equivalent to "war crimes" - was originally restricted to international conflicts.

The notion of grave breach of international humanitarian law or war crime implies a special legal regime under international law, namely application of the principle of universal jurisdiction and imprescriptibility among others. However, this does not mean that breaches of international humanitarian law and "the laws and customs of war" committed in the context of an internal armed conflict escape judicial repression by the State.

Today, in accordance with the current development of international law, serious violations of international humanitarian law and "the laws and customs of war" committed in the context of an armed conflict are considered war crimes. The notion of war crimes applies to grave breaches committed during internal conflicts, despite the fact that under conventional law they are normally admitted only within the framework of international armed conflicts. In other words, serious violations of international humanitarian law committed in the context of an internal armed conflict constitute an international crime - a war crime - and as such are subject to the legal regime provided for by international law, and insofar as they are qualified as war crimes, they are subject to the principle of universal jurisdiction and are imprescriptible. Homicide; mutilation; torture; cruel, humiliating or degrading treatment; recruitment of children under the age of 15 or their active use in conflict; hostage-taking; rape, sexual slavery and forced prostitution during armed conflict or instigated by one of the parties to a conflict; and attacks against the civilian population as such are some of the grave breaches of Common Article 3 of the Geneva Conventions and "the laws and customs" of war that constitute war crimes under international law, both conventional and customary.

Under both conventional and customary international law, serious violations of human rights constituting international crimes, crimes against humanity and war crimes cannot be classified as political crimes, even if their perpetrators were politically or ideologically motivated to commit them. The consequences provided for by international law for political crimes do not apply to such crimes, especially as regards grounds for non-extradition and asylum. In addition to customary international law, a number of international instruments expressly prohibit, for extradition purposes, the consideration of serious human rights violations, crimes against humanity and war crimes as political offences. International law also prescribes that suspects or perpetrators of such crimes cannot benefit from asylum and refugee institutes. As the Inter-American Commission on Human Rights has pointed out: "States have accepted, through various sources of international law, that there are limitations on asylum, under which such protection cannot be granted to persons with respect to whom there are serious indications that they have committed international crimes, such as crimes against humanity (concept that includes forced disappearance of persons, torture and summary executions), war crimes and crimes against peace." The Inter-American Commission on Human Rights has stated that "States have accepted, through various sources of international law, that there are limitations on asylum, under which such protection cannot be granted to persons with respect to whom there are serious indications that they have committed international crimes, such as crimes against humanity (concept that includes forced disappearance of persons, torture and summary executions), war crimes and crimes against peace. This regulation of international law and

the application of the principles of universal jurisdiction and *aut dedere aut judicare* to repress these crimes confirm the State's obligation not to treat serious human rights violations, crimes against humanity and war crimes as political crimes.

IV.- The State's duty to guarantee.

International Human Rights Law imposes two major orders of obligations on the State: one a duty to refrain from violating human rights and the other a duty to guarantee these rights. The first is made up of a set of obligations directly related to the State's duty to refrain from violating - by action or omission - human rights, which also implies ensuring, through the necessary measures, the enjoyment and enjoyment of these rights. The second refers to the State's obligations to prevent violations, investigate them, prosecute and punish the perpetrators and repair the damage caused. The State thus places itself in a legal position as guarantor of human rights, from which essential obligations emerge for the protection and safeguarding of these rights. It is on this basis that jurisprudence and doctrine have elaborated the concept of the duty of guarantee, as the nuclear notion of the legal position of the State in the field of human rights. This Duty of Respect and Guarantee has its legal basis in both Customary International Law and Conventional International Law, and constitutes an international obligation. This legal duty is reaffirmed by numerous international treaties and instruments.

The Duty of guarantee is not limited to acts committed by official agents, i.e. *de jure* agents of the State, but also includes *de facto* agents of the State, such as self-defence groups. Indeed, international law expressly provides for this State responsibility. Likewise, the duty of guarantee extends with respect to acts of individuals that violate the effective enjoyment of human rights, even when they do not act under the instigation, consent or acquiescence of public officials. The Inter-American Court of Human Rights and the Human Rights Committee have specified in this regard that the State has a legal obligation to guarantee and protect the enjoyment of human rights against acts harmful to individuals, which means taking all necessary measures and acting with due diligence to investigate and punish the conduct of individuals that violate the effective enjoyment of human rights.

The jurisprudence of international human rights tribunals as well as quasi-jurisdictional human rights bodies, such as the United Nations Human Rights Committee and the Inter-American Commission and Court of Human Rights, agree that this duty of guarantee is made up of five essential obligations that the State must honour: the obligation to investigate; the obligation to bring to justice and punish those responsible; the obligation to provide an effective remedy to victims of human rights violations; the obligation to provide fair and adequate reparation to victims and their families; and the obligation to guarantee the right to the truth of victims and their families. The obligations that make up the duty of guarantee are certainly interdependent. Thus, the obligation to prosecute and punish those responsible for human rights violations is closely linked to the obligation to investigate the facts.

The obligation of the State to investigate the facts and punish those responsible does not tend to erase the consequences of the unlawful act on the affected person, but rather seeks to ensure that each State Party ensures in its legal order the rights and freedoms enshrined in the Convention. The Inter-American Commission on Human Rights has repeatedly affirmed that reparation measures for victims and their families, as well as the establishment of "Truth Commissions", in no case exonerate the State from its obligation to bring to justice those responsible for human rights violations and impose sanctions.

V.- The obligation to provide an effective remedy, reparation and truth.

The rights to an effective remedy, reparation and truth are enshrined in numerous treaties signed by Colombia, as well as in other international human rights instruments that bind the Colombian authorities. Every violation of a human right generates an obligation on the State to provide and guarantee an effective remedy as well as to repair the damage.

The right to reparation for human rights violations is reaffirmed in numerous conventional and declarative instruments. It has also been reiterated by international human rights courts and bodies. The Inter-American Court of Human Rights has reiterated that the State's obligation to provide reparation, correlative to the right to reparation that assists victims of human rights violations, is "a customary norm that constitutes one of the fundamental principles of contemporary international law regarding the responsibility of States. Thus, when a wrongful act attributable to a State occurs, the State's international responsibility for the violation of an international norm immediately arises, with the consequent duty to make reparation and to cease the consequences of the violation. The obligation to make reparation covers both violations of human rights and violations of international humanitarian law.

The modalities of reparation are diverse and include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Reparation must be adequate, fair and prompt and may be individual or collective, depending on the nature of the right violated and the human set affected. For example, in the case of enforced disappearance, the Inter-American Commission on Human Rights has considered that knowledge of the truth about the fate and destiny of the disappeared, as a form of reparation in the form of satisfaction, is "a right that society has."

If a State does not effectively guarantee the right to reparation, it commits its responsibility under international law. In this regard, it is important *to emphasize that the United Nations Set of Principles for the Protection and Promotion of Human Rights* through Action to Combat Impunity reaffirms that the denial of the right to reparation constitutes a form of impunity.

The jurisprudence of intergovernmental human rights bodies has concluded that the right to the truth means knowing the full, complete and public truth about the events that occurred, their specific circumstances and who participated in them. This scope of the right to the truth has been reiterated by international instruments. Similarly, the right to the truth has been characterized by jurisprudence and international instruments as an inalienable right.

The denial of the rights to an effective remedy, reparation and truth constitutes a violation of the obligations of the State and commits its responsibility under international law. It is also prescribed by the United Nations Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, a form of impunity.

VI.- The obligation to investigate.

The obligation to investigate gross violations of human rights is an international obligation, both under treaties and under customary international law, and is one of the components of the State's Duty to Guarantee. The United Nations General Assembly and Commission on Human Rights have repeatedly recalled that States have a legal obligation to conduct prompt, impartial and independent investigations into any act of torture, enforced disappearance, extrajudicial, summary or arbitrary execution.

The International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment, the Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on Forced Disappearance of Persons establish the obligation to investigate human rights violations. This obligation has been reiterated by numerous international human rights instruments. The Human Rights Committee has repeatedly stated that "[I]f a State Party [to the International Covenant on Civil and Political Rights] has the duty to investigate thoroughly alleged violations of human rights, in particular enforced disappearances of persons and violations of the right to life, [...]". The Inter-American Court of Human Rights recalled that, under its obligations under the American Convention on Human Rights, "The State has a legal duty [...] to investigate seriously, using the means at its disposal, violations committed within the scope of its jurisdiction in order to identify those responsible, to impose the pertinent sanctions, and to assure the victim adequate reparation.

The duty of investigation is one of those so-called media obligations. The authorities must diligently and seriously investigate all allegations of human rights violations, since, as pointed out by the Inter-American Court of Human Rights, the State has the legal duty [...] to investigate seriously with the means at its disposal. This means that such a duty of investigation is absolved by voluntarily carrying out the necessary activities to clarify the facts and circumstances surrounding them and to identify the perpetrators. This is a legal obligation and not merely a management of particular interests, as the Inter-American Court of Human Rights and the Human Rights Committee have rightly pointed out. The Inter-American Court of Human Rights has stated that: "To investigate is, like to prevent, an obligation of means or behavior that is not breached by the mere fact that the investigation does not produce a satisfactory result. However, it should be undertaken seriously and not as a simple formality condemned beforehand to be fruitless. It must have a meaning and be assumed by the State as a legal duty of its own and not as a simple management of particular interests, which depends on the procedural initiative of the victim or his relatives or on the private provision of evidence, without the public authority effectively seeking the truth. This assessment is valid whatever the agent to whom the violation may eventually be attributed, even private individuals, because, if their facts are not seriously investigated, they would be, in a certain way, aided by the public power, which would compromise the international responsibility of the State". In cases of enforced disappearances, the obligation to investigate persists until the fate and whereabouts of the disappeared person have been clarified with certainty, because of the permanent or continuing nature of this crime.

The obligation to investigate serious human rights violations must be carried out in good faith and any intention to use investigations to ensure impunity must be excluded. Thus, the Inter-American Court of Human Rights has considered that "[T]he investigation of the facts [...] is an obligation incumbent upon the State whenever a violation of human rights has occurred and that obligation must be seriously fulfilled and not as a mere formality. Thus, the Court has affirmed that "amnesty provisions, statutes of limitation and the establishment of liability exclusions intended to impede the investigation [...] of serious human rights violations such as torture, summary, extralegal or arbitrary executions and forced disappearances, all of which are prohibited for contravening non-derogable rights recognized by international human rights law, are inadmissible.

If the State does not adapt its domestic legislation and practice in order to ensure such an obligation, i.e. to guarantee the effective conduct of prompt, thorough, independent and impartial investigations, then it engages its international responsibility.

VII- The obligation to judge and punish.

The obligation to prosecute and punish perpetrators of serious human rights violations, as an expression of the duty of guarantee, has its legal basis in international treaties and other declaratory

instruments. The Human Rights Committee has recalled that: "[...] the State party [to the International Covenant on Civil and Political Rights] has the duty to investigate thoroughly alleged violations of human rights, in particular enforced disappearances of persons and violations of the right to life, and to prosecute, try and punish those held responsible for such violations. This duty applies a fortiori in cases where the perpetrators of such violations have been identified.

He recalled what the Inter-American Court of Human Rights reiterated when it affirmed that States parties to the American Convention on Human Rights have an international obligation to try and punish those responsible for serious violations of human rights, such as forced disappearances, extrajudicial executions and torture, concluding that in the case of serious violations of human rights - such as torture, forced disappearance and extrajudicial execution - crimes against humanity and war crimes, the obligation to prosecute and punish the perpetrators of these crimes is absolute.

Thus, the Inter-American Commission on Human Rights has made it clear that this obligation cannot be delegated and cannot be waived. In the case of crimes against humanity and war crimes, the Rome Statute of the International Criminal Court, signed by the Republic of Colombia, reiterates the legal duty of "every State to exercise its criminal jurisdiction against those responsible for international crimes". The Principles of International Cooperation in the Identification, Arrest, Extradition and Punishment of Persons Guilty of War Crimes or Crimes against Humanity prescribe that "War crimes and crimes against humanity, wherever and whenever committed, shall be the subject of an investigation, and persons against whom there is evidence of guilt in the commission of such crimes shall be sought, detained, prosecuted and, if found guilty, punished. The international obligation of a State to prosecute and punish those responsible for crimes against humanity is a peremptory norm of international law belonging to jus cogens. Those responsible for crimes against humanity cannot invoke any special immunity or privilege in order to evade justice.

The obligation to prosecute and punish must be carried out in accordance with the standards provided for in international law, including an independent and impartial tribunal, respect for due process guarantees and the imposition of penalties appropriate to the gravity of the crimes.

International law imposes an obligation to punish with penalties appropriate to the gravity of the acts persons found guilty of serious violations of human rights and crimes under international law. This principle is enshrined in numerous international human rights instruments.

The principle of proportionality of penalties, which requires that the penalties provided for in the rules and applied by the courts should not be arbitrary or disproportionate to the seriousness of the offences being punished. Certainly, the principle of proportionality must be assessed in the light of the seriousness of the offence as well as the penalties imposed in the legislation for offences of similar seriousness.

The imposition of derisory sanctions, in disregard of the principle of proportionality of penalties, constitutes a recognized form of de facto impunity under international law. The International Law Commission, in its work on the Draft Code of Crimes against Peace and Security, pointed out that the validity of the principle of ne bis idem cannot be recognized when the judicial proceedings were intended to simulate a trial or to impose penalties that were not in any way proportional to the gravity of the crime.

The Justice and Peace Law provides for alternative penalties - for serious crimes such as massacres, murders, torture, forced disappearances, crimes against humanity and war crimes - of up to eight years' deprivation of liberty, which can be reduced to six years and four months, since the permanence of the beneficiary of the Law in a concentration zone can be discounted for up to 18

months. The alternative penalty provided for in the Justice and Peace Law contrasts with the custodial sentences provided for in Colombian criminal law: hostage-taking, from 15 to 20 years; forced prostitution or sexual slavery, from 10 to 18 years; forced displacement of the civilian population, from 10 to 20 years; forced disappearance, from 20 to 30 years; kidnapping, from 12 to 20 years; torture, from 8 to 15 years; homicide, from 13 to 25 years; and homicide for terrorist purposes, from 25 to 40 years. The Justice and Peace Law constitutes a violation of the Colombian State's obligation to prosecute and punish the perpetrators of serious human rights violations, crimes against humanity and war crimes with penalties appropriate to the gravity of the crimes. The Justice and Peace Law is a violation of the Colombian State's legal duty to eradicate impunity.

VIII. Political crime and self-defense.

The principle of legality in respect of crimes and offences - *nullum crimen sine lege* - is universally recognised by human rights treaties. It is a fundamental principle of general criminal law and international criminal law as well as part of the general principles of law and a peremptory norm of international law. This principle means that acts qualified by law as criminal offences must be defined in a strict and unambiguous manner. The principle also means that criminal law, national or international, cannot be applied retroactively. Similarly, the principle has as a corollary, the principle of restrictive interpretation of criminal law and the prohibition of analogy. Thus, legal definitions that are vague, "nebulous", imprecise or that allow the criminalization of legitimate and/or lawful acts in the sense of International Law are contrary to International Human Rights Law and the "general conditions stipulated by International Law".

As the Inter-American Commission on Human Rights has pointed out, the principle of the legality of crimes is also violated when a criminal behavior is legally qualified under a different criminal type than the one that corresponds to it because of the legal assets affected, since the criminal illicit is denatured and confusion and ambiguities are created in the distinction of the different punishable conducts.

Treaties and other international instruments do not define political offences. However, international jurisprudence and doctrine has developed criteria to rule when a political infraction is configured, regardless of the denomination given to the illicit in the national legislation, and which takes up what is established by the criminal doctrine. Despite this lack of definition of political crime, it is regulated by international law in several fields. Thus, international law excludes political crimes from the scope of extradition. International law also provides that certain penalties, such as the death penalty and forced labour, cannot be imposed for political crimes. Likewise, the figure of political crime is closely related to the institutes of asylum and refuge. In American law, asylum was provided for political crimes.

International Law also denies the character of political infraction, and the legal consequences derived from it, to numerous crimes that could have been committed for political reasons, given their gravity and nature contrary to the most elementary principles of International Law, cannot be considered as political crimes for the purposes recognized by International Law. Such is the case of crimes against humanity, war crimes, serious violations of human rights, terrorism and the crime of "mercenary". The jurisprudence of international bodies is consistent in not recognizing the serious violations of human rights and crimes against humanity as political crimes.

Therefore, he considered of particular interest the decrees on amnesty and pardons and the crime of "political reaction" of 1954 promulgated under the military regime of General Rojas Pinilla. These decrees granted amnesty and pardons for political crimes, understanding by these not only the classic criminal figures of "sedition" and "rebellion" but also "all those committed by Colombians

[...] that can be explained by extralimitation in the support or adhesion [to the government] or by aversion or sectarianism. However, the Military Court of Cassation and Review ruled out its widespread application and considered that the "crime of political reaction" should only be limited to illegal acts committed by individuals in direct and concrete support of the legal tasks of the security forces against insurgent groups, and provided that there was a relation of cause and immediacy between seditious action and punishable reaction. Thus, deaths out of combat, killings of civilians, torture and massacres remained outside this nebulous criminal type, which would soon be suppressed from national legislation.

The Justice and Peace Law, by modifying the crime of "sedition" in such a way that it classifies as a political crime the membership or formation of self-defence groups, violates the principle of legality of crimes. Likewise, the modification of the "sedition" crime proposed by the Justice and Peace Law opens the door to impunity, since the Political Constitution of Colombia empowers Congress and the Government to grant amnesties and pardons for political crimes. It could also constitute an obstacle to initiatives for the exercise of universal jurisdiction by foreign courts, since there is a universal rule on extradition according to which one does not extradite for political crimes. Although this provision of the Justice and Peace Law only classifies as a political crime the formation or membership of paramilitary groups, and not expressly the commission of serious human rights violations, war crimes and crimes against humanity, it opens an immense door to impunity since the characteristic activity and raison d'être of these groups has been the commission of these crimes.

IX.- From the beginning Pacta sunt Servanda.

It is a general principle of international law and universally recognized that States must implement in good faith the treaties and the international obligations arising therefrom. The pacta sunt servanda principle applies equally to the State's obligations under customary international law. This general principle of international law has as a corollary that a country's authorities cannot argue domestic law obstacles to evade their international commitments. The existence of constitutional, legislative or regulatory rules or decisions of national courts may not be invoked in order not to implement international obligations or to modify their implementation. This is a general principle of the law of nations recognized by international jurisprudence. The pacta sunt servanda principle and its corollary have been enshrined in articles 26 and 27 of the Vienna Convention on the Law of Treaties, to which the Republic of Colombia is a State party.

If a law, decree or other legal act of a country violates rights protected by an international treaty or by customary international law and/or obligations arising therefrom, the State bears its international responsibility. The Inter-American Court of Human Rights has specified that: "The promulgation of a law manifestly contrary to the obligations assumed by a State when ratifying or acceding to the Convention constitutes a violation of the Convention and [...], in the event that such violation affects protected rights and freedoms with respect to specific individuals, generates international responsibility for the State.

When it comes to legal measures that allow impunity and, therefore, are incompatible with States' international obligations under the American Convention on Human Rights, the Inter-American Court of Human Rights has recalled that a law cannot serve as a justification for not fulfilling the duty to investigate and to judge and punish the perpetrators of serious violations of human rights and crimes under international law, as well as to guarantee the rights of victims and their families to an effective remedy, truth and reparation. The Human Rights Committee has also recalled that "national legislation may not modify a State party's international obligations under the Covenant.

Finally, he concludes his intervention by pointing out that:

- The Colombian State has an international obligation to investigate, prosecute and punish the perpetrators of serious human rights violations - such as torture, enforced disappearance and extrajudicial execution - war crimes and crimes against humanity with penalties appropriate to the gravity of the crimes. This obligation is a peremptory norm of international law and cannot be waived by the Colombian State.
- The Colombian State has the international obligation to guarantee, at all times and in all circumstances, the rights to an effective remedy, reparation and truth of the victims of serious violations of human rights, war crimes and crimes against humanity as well as of their relatives.
- The Colombian State has the international obligation to guarantee the full validity of the principle of legality of crimes.

Therefore, it points out that Law 975, and very particularly its articles 3, 5, 18, 29, 31 and 71, opens an avenue to enshrine impunity for serious human rights violations, crimes against humanity and war crimes. In so doing, the Colombian State is in breach of its international obligations - from both conventional and customary sources - to investigate, prosecute and punish the perpetrators of serious human rights violations, war crimes and crimes against humanity with penalties appropriate to the gravity of these crimes; to guarantee the victims of these crimes and their families the rights to an effective remedy, justice, reparation and truth; and to eradicate impunity for these serious international crimes.

4. INTERVENTION OF THE HUMAN RIGHTS COMMITTEE OF THE ASSOCIATION OF JURISTS. [BAR HUMAN RIGHTS COMMITTEE]

Ms. Sarah Lucy Cooper, representing the Bar Human Rights Committee and a member of its Executive Committee, supports the petitions of the Colombian Commission of Jurists and the National Movement of Victims of State Crimes on the charges of unconstitutionality of Law 975 of 2005.

With the necessary foresight on the application of the pronouncements of the European Court of Human Rights, Mrs. Cooper describes several cases brought before the European Court of Human Rights. In the first of these, the case of *McCann v. United Kingdom* is recounted. In this case, the European Court of Human Rights derived the duty to investigate the murders from the combination of the State's general duty to "ensure" the rights enshrined in the European Convention on Human Rights. In this sense, the intervention transcribes the decision of the High Court, which resulted in mentioning the existence of an obligation on the part of States to protect life, (established in the European Convention) "(...) read in conjunction with the general duty of the State...". (art. 1 of the Convention), to ensure rights and freedoms throughout its jurisdiction. In this regard, the need for some form of effective official investigation was pointed out, when these rights have been violated by State officials.

The intervention states that the case is similar to the strategy followed by the Inter-American Court of Human Rights. Nor does the American Convention on Human Rights "expressly" oblige the State to investigate alleged murders or acts of torture. Thus, in the *Velásquez-Rodríguez* case, the Inter-American Court of Human Rights established that the word "ensure" in Article 1 of the American Convention on Human Rights includes the obligation to investigate and punish human rights violations.

It states that the "investigation" dealt with in the European Convention on Human Rights is not limited to the investigation of murders by State officials. States must then investigate the murders of both State officials and private individuals. To this effect he refers to the case of *Ergi vr Turkey*, where the annotated reasoning on the duty to investigate was used. Moreover, he adds as an illustration the case of *Cyprus Vr Turkey*, where the European Court pointed out the duty to carry out an effective investigation, despite the doubt regarding the form of the crimes.

The intervention also refers to the duty to investigate inhuman and degrading treatment. To that end, he pointed out that the European Court of Human Rights had recognized the State's duty to investigate allegations of ill-treatment committed by State officials, presenting as an example the case of *Assenor et al. v. Bulgaria*, where the State's duty to effectively investigate inhuman, cruel and degrading treatment in accordance with the Convention had been mentioned. It also refers to the case of *Aydin v. Turkey*. In such an event, the Court derived from the right established in article 13 of the Convention, the State's duty to investigate complaints from persons who have been tortured by private individuals, at least from acts of torture that have resulted from the State's failure to protect persons from the acts of private individuals.

He points out that in any case an investigation of the crimes must be carried out in an "effective" manner, he presents as an example in this sense the case of *Kelly et al. v. The United Kingdom*. On this issue the European Court mentioned that by the term "*effective investigation*", it must be understood that it is capable of leading to a determination as to whether or not the force used was justified, and to the identification and punishment of those responsible and the securing of existing evidence.

Another aspect of the investigation of the crimes is pointed out by the intervener in specifying that the investigation must be open to public scrutiny and that of the families of the victims. He argues that in the *Kelly* case, the European Court of Human Rights advocated public scrutiny of the investigation or its results to ensure accountability.

With regard to the right to compensation, it states that in the event of a violation of Article 2 or 3 of the European Convention on Human Rights, and in order to comply with the requirements of Article 13, damages may be payable for non-pecuniary losses. In this regard, he gives the example of the case of *Kaya v. Turkey*.

It mentions that the right that was violated must have implications for the nature of the reparations that must be guaranteed for the benefit of the victim's next of kin. It argues that the European Court of Human Rights has emphasized the compensatory requirements of Article 13, which are permanent and distinct from any other investigative or procedural rights imposed on the State.

Now, when referring specifically to the investigation periods established in Law 975 of 2005, it maintains that under article 17 of the aforementioned law, the Attorney General's Office has only 36 hours after having received a "free version" from a paramilitary to accuse him of any crime, in which he can reasonably be inferred, that he participated. He then explains that if he is not charged within 36 hours, the paramilitary may receive a pardon under Law 782. He then states that if he is charged under Article 18 of Law 975, prosecutors must complete their investigations and bring him to trial within 60 days.

It follows from the above explanation that these provisions would violate the State's duty to conduct an "effective investigation", as recognized by the European Court of Human Rights. It points out that if these tight deadlines are met, it will not be possible to identify and punish those responsible or to secure evidence. It concludes that "*in the framework of large-scale demobilizations involving*

hundreds of paramilitaries who give "free versions" at the same time, it is unlikely that the investigations can make any significant progress, let alone be completed. It interprets that if articles 17 and 18 are applied, paramilitaries who have been responsible for crimes, including serious crimes such as murder and torture, would be given two possibilities: either they will not be charged or they will be charged but the trials will end in acquittals.

Additionally, it mentions that in the law being sued there is no requirement for full, sworn and true confessions. It points out that Article 17 establishes the requirements for a free version by the paramilitary, however, Ms. Cooper later states that there is no requirement for the paramilitary to make a full, sworn and true confession. He deduces, then, that "*there is no obligation for the paramilitaries to tell the whole truth,*" just as there is no incentive for them to be motivated to tell the truth.

Notwithstanding the above, he maintains that in the law there is "*an incentive for the paramilitaries to divulge as little as possible during their free versions.*" In such an event, he argues that the Attorney General's Office would have insufficient information to charge them and would allow paramilitaries to enter within the framework of Law 782.

On the subject of insufficient participation and scrutiny by the families of the victims and the general public, it states that article 15, which requires the investigation of the whereabouts of kidnapped or disappeared persons, has two shortcomings: **1.** It does not expressly provide that the families of the victims initiate or participate in the investigation. But it does provide for investigations to be carried out with the cooperation of demobilized persons. The European Court of Human Rights had stressed that in all cases the next of kin of the victims should participate in the proceedings. **2.** Explains that article 15 only obliges the judicial police to inform "family members in a timely manner" and makes no mention of the general public. It concludes that this fact ignores the requirement that the investigation should be open to public scrutiny, as mentioned by the European Court of Human Rights.

5. INTERVENTION OF THE INTERNATIONAL CONFEDERATION OF FREE TRADE UNION ORGANISATIONS. (ICFTU).

Mr Guy Ryder, a British citizen with passport No. 761036485, in his capacity as Secretary General of the International Confederation of Free Trade Unions (ICFTU), intervened to support the charges brought against Law 975 of 2005.

It argues that the demanded law will allow "*to maintain impunity for war crimes and crimes against humanity, as well as other serious human rights violations, including serious acts of anti-union violence*". The intervener relates the history of recent years related to violations of the rights of trade unionists in Colombia. It states that "*between January 2000 and 20 November 2005, 753 trade unionists have been murdered*".

It maintains that the State, through paramilitary groups, is responsible for trade union violence in Colombia. It is based on the report of the United Nations High Commissioner for Human Rights on human rights in Colombia.

It points out that investigations in Colombia do not lead to the identification and punishment of those responsible for crimes against freedom of association. It supports its argument in a report on statistics on cases of violation of trade union rights, submitted by the Office of the Attorney-General of the Nation in 2003, presented within the framework of the Inter-institutional Commission on Workers' Human Rights. After presenting some statistics on the progress of investigations related to

the violation of workers' rights in Colombia, he maintains that impunity in cases of violations of trade unionists' rights is almost absolute.

In detail and with respect to Law 975 of 2005, he specifies that "*impunity is reinforced and is in no way confronted by Law 975 of 2005*", and explains that the above is due to the fact that "*this law, in accordance with Decree 128 of 2003, will only subject to the procedure provided for therein those demobilized persons who, at the time of their demobilization, had judicial processes or convictions for crimes that are not amnestiable or pardonable in Colombia*".

It argues that in the report on Colombia submitted in 2005 to the United Nations Commission on Human Rights, the High Commissioner made recommendations to the Government, Congress and the judiciary, with a view to promoting appropriate standards and mechanisms to address the problem of impunity. The report also calls for an impetus to investigate cases of human rights violations.

The intervener also relies on the Report presented by the Inter-American Commission on Human Rights, in which it was pointed out that impunity in Colombia is structural and systemic. In the same vein, the Rapporteur of the UN Commission on Human Rights on the independence of judges and lawyers expressed concern about the lack of adequate investigation and trial in the case of human rights violations in Colombia.

It recounts the different pronouncements of international bodies, such as the ILO, in relation to impunity and lack of investigation in relation to the human rights of trade unionists. It even refers to a high-level tripartite ILO mission that visited Colombia to gather information on trade union rights and labour relations.

He noted that Law 975 of 2005, like Decree 128 of 2003, had been adopted by the National Government, without taking into account the observations submitted by the trade union organizations, with regard to the strengthening of impunity that would result from the way in which the negotiation process with paramilitary groups was being conducted.

In this regard, it mentions that the situation of impunity will be aggravated by the enactment of Law 975 of 2005, "*dramatically affecting the victims of anti-union violence in Colombia*". It points out that international human rights organizations have pointed out the shortcomings of the law demanded for not guaranteeing truth, justice and reparation. It refers to the report of the United Nations High Commissioner for Human Rights, in which it was stated that the law "*fails to bring together the essential elements advisable for establishing transitional justice that, in the interests of being an instrument of sustainable peace, provides incentives and benefits for illegal armed groups to demobilize and cease their hostilities, while adequately guaranteeing the rights of victims to truth, justice and reparation*". In one of the sections of the concept issued by the Inter-American Commission on Human Rights (press release of July 15, 2005) that is transcribed, it was stated that among the objectives of the law "*is not the establishment of the historical truth about what happened in the last decades of the conflict, nor about paramilitarism and the degree of involvement of the various actors in the commission of crimes against the civilian population, whether by action, omission, collaboration or acquiescence*".

The communiqué adds that "(...) *the provisions do not provide incentives for demobilized combatants to confess exhaustively the truth about their responsibility in exchange for the significant benefits they will receive*". It also maintains that the mechanisms in place will not make it possible to shed light on crimes. It also observes that the institutional mechanisms created by the norm do not possess "*the necessary strength to face with realistic perspectives of effectiveness the*

task of judicially clarifying the thousands of massacres, selective executions, forced disappearances, kidnappings, torture...". The International Organization is concerned about the short procedural deadlines for the investigation and trial of demobilized combatants.

The intervention maintains that Law 975 of 2005 will apply only to demobilized persons who have committed crimes that cannot be pardoned or amnestied and are being prosecuted or convicted for those acts. Thus, it concludes that Law 975 will only apply to demobilized combatants who already have trials or convictions against them. Consequently, he deduces that all crimes that have not been criminally investigated, or that have been investigated but do not have an individualized alleged perpetrator, will not be prosecuted by Law 975 and will not be investigated in any way. He states that the truth, justice and reparation will not be achieved, because the clarification of the crimes will depend on the will of the demobilized and not on the investigative activity of the State.

On the precise alternative punishment that is light if one takes into account "*the gravity of the crimes, the gravity that anti-union violence has for the validity of democracy, and the precarious realization of the rights to truth, justice and reparation*". For the above arguments, the International Confederation of Free Trade Unions (ICFTU) requests that the norm be declared unconstitutional.

6. INTERVENTION OF THE CITIZEN GUILLERMO OTÁLORA LOZANO

Mr. Guillermo Otálora Lozano intervened in this proceeding to rule on some of the charges brought by the plaintiffs and other aspects of the law so sued:

Regarding article 10 of Law 975 of 2005, it considered that contrary to what the plaintiffs asserted, there is no defect of form, but rather a material defect, since in the aforementioned article the Congress of the Republic delegates the exceptional power of the general pardon to the President of the Republic, who, by decree, may decide to whom pardoned and to whom not pardoned, this power being, as the Constitutional Court has said, non-delegable since the Congress of the Republic is the depositary of the popular will.

He explained that he is mistaken in stating that Law 975 is a pardon, as he considers it to be a procedural regime applicable to certain pardoned persons. Therefore, the law demanded did not require secret ballot or qualified majorities, since these requirements are aimed at laws with a general and concrete content, which refers to a collectivity whose members will receive certain benefits. In addition, there are two material requirements: that the pardon be granted for political crimes, and that it be granted on serious grounds of national convenience.

The unconstitutionality then is not in the process of Law 975 of 2005, but in the delegation of non-delegable powers through Article 10, where it authorizes the National Government to grant general pardons.

Consequently, it requested conditional exequibidad on the understanding that the demobilized group had previously been pardoned by the Congress of the Republic through an ordinary law that meets the requirements set forth in article 150, paragraph 7 of the Constitution and Law 5 of 1992.

In addition, it requested that the application of Article 11 be conditioned directly on 201.2 of the Charter. In other words, the demobilized person is linked to the procedure provided for in Law 975 as long as the latter only proceeds for political crimes and the Congress is periodically informed about the exercise of Article 11.

On Articles 48 and 58 (section 1.2.1.3 of the complaint) opposed the plaintiffs' conditioned request

for the expressions "*unnecessary damages*" and "*other persons*" and requested the enforceability of the same, considering that the plaintiffs base this charge on a false assumption that some rights are more fundamental than others.

3. With regard to the application of the accusatory penal system (section 1.2.2.3 of the demand). In their concept, the applicants confuse the limitation on the temporal application of the new Code of Criminal Procedure, which prohibited its application before 1 January 2005, with a non-existent limitation on its temporal validity. The temporary validity of the new Code of Criminal Procedure is freely established by law, and Law 975 of 2005 has decided that demobilized persons will be subject to the new accusatory system with absolute temporary validity, which implies that they will be investigated and tried in accordance with the rules established in Law 975 of 2005, Legislative Act 03 of 2002 and Law 906 of 2004, for all the crimes to be tried, regardless of when they were committed.

In addition, it considered that the applicants' conditional exequibidad proposal is manifestly unconstitutional for violating article 13 by establishing an unjustified inequality between demobilized individuals based solely on the time of the commission of the crimes, so that the newest demobilized individuals are tried under the new system and the oldest under an obsolete system to the detriment of their fundamental rights.

4. On article 31 (section 1.2.2.5 of the lawsuit) he requested to condition the interpretation of the same therefore that the exequibidad is declared in the understanding that the demobilized has not delinquished during his time of permanence in the zone of location, nor has left it.

5. In relation to the charge on the delivery of goods (section 1.2. 3.1 of the lawsuit) he pointed out that the expressions sued are exemptions from civil liability towards the victims, since the demobilized combatants do not have to answer with the totality of their patrimony for the damages caused. Therefore, it requested the Constitutional Court to condition the interpretation of the expressions demanded, so that it may be understood that when the goods delivered are not sufficient to fully compensate the victims, the State will be responsible for complying with the rest of the reparation.

6. On the regulatory system for granting pardons to perpetrators of crimes not eligible for pardon (section 1.2.5 of the application), he noted that the plaintiffs seek the annulment of the procedural regime in its entirety, because in certain cases unconstitutional consequences could occur.

For this reason, what is appropriate is not a declaration of unconstitutionality, but a declaration of conditional constitutionality, which declares that Law 975 of 2005 cannot be applied to perpetrators of crimes against humanity, operating in accordance with the international human rights treaties signed by Colombia, which prevail in the domestic order.

7. It pointed out that if the formal defect proposed by the plaintiffs on Article 70 does not succeed, it formulates a material defect per unit of matter and an unconstitutional pardon.

In the first place, it violates Article 158 of the Charter, which requires all laws to refer to a single issue, and any provision referring to a different issue must be deemed unconstitutional, since in the process it had to be rejected by the president of the respective commission.

In that sense, the Constitutional Court has also used a restrictive criterion, since not doing so would nullify the democratic principle. Only those provisions that do not have a substantive connection, and not merely a nominal one, should be removed from the legal system.

The expulsion from the legal system of such a legal provision, without taking account of the restrictive criterion, would be contrary to article 3 of the Constitution.

In order to demonstrate the lack of unity of matter, the thematic axis of the entire Law must be specified, establishing its initial purposes, its object, and the subject around which the various provisions it contains revolve. Subsequently, the purpose, objective, theme, and purpose of the provision being attacked are examined; confronting these attributes with each other.

The first is that, since the law to which it belongs deals with demobilizing armed groups, the rebate is limited to members of these groups who have been captured prior to the collective demobilization of their respective groups, be they self-defense groups or guerrillas.

However, others intend to give a broad application, making an exegetical and isolated interpretation of Article 70, where the aforementioned reduction is granted to all offenders. Such is the interpretation first applied by the Criminal Chamber of the Supreme Court of Justice. Article 70 was later disappplied by the same corporation, which deemed it unconstitutional.

The first interpretation is the one that violates the principle of unity of matter. If Law 975 of 2005 is about criminal proceedings concerning demobilized persons of armed groups outside the law, there would not be room for a general regulation of all criminals by the legislator, since criminals have nothing to do with the purpose of the Justice and Peace Law, and it is at that moment that the principle of unity of matter is violated.

However, regardless of the foregoing, article 70 is unconstitutional because it constitutes a general pardon without the constitutional requirements that this measure demands. Provisions of this kind, which imply an automatic measure of grace for those convicted under temporary circumstances, are unconstitutional. He recalled the Constitutional Court's ruling on the so-called "jubilee law" and requested that article 70 be declared unconstitutional on the charges filed.

8. On the charge consists of confronting article 71 with a concept of political crime drawn from ordinary doctrine and jurisprudence. He explained that these are impertinent rules, which have nothing to do with a constitutional trial. It is fallacious to affirm that article 71 is unconstitutional because it contradicts certain characteristics pointed out by the Supreme Court of Justice, since the Criminal Chamber of the Supreme Court of Justice makes such statements based on the legal system in force, and the elements of the criminal types in force of rebellion, assault and sedition up to now in force.

The plaintiffs do not demonstrate that the Constitution or the block of constitutionality restrict the configuring power of the legislator in this area in such a way as to prevent him from dispensing with a traditional element of political crime. It is obvious that this new typification contravenes the current legal system, and the current jurisprudence, because precisely that is the purpose of legislating: to change the legal system. In a constitutional trial, an argument about "legal tradition" is not acceptable, arguing that in Colombia paramilitarism has never been recognized as a political crime. If the Constitution does not prevent it, Congress may well begin to make that recognition. It is the duty of the plaintiffs to demonstrate the conflict between the legal norm and the Constitution or international treaties, and not between the legal norm and tradition, the legal norm and ordinary jurisprudence, or the legal norm and ideology of NGOs.

The plaintiffs argue that the political crime is based on the preamble of the Universal Declaration of Human Rights. They consider that this would exempt paramilitarism, since paramilitaries were born

under the protection of the State, were formed by State entities, and do not attack the State.

This does not imply that they defend the State, but rather that they supplant it and interfere with the Social Rule of Law, by implementing illegitimate and unconstitutional forms of government in different regions of the country. Paramilitarism originates because in Colombia there has been no rule of law to protect human rights, which has caused the formation of paramilitary groups.

For that reason, it requested the Constitutional Court to declare Article 71 unconstitutional for the material charge pointed out by the applicants, without prejudice to a declaration of unconstitutionality for the formal defect.

9. He summed up his requests like this:

"That article 10 of Law 975 of 2005 be declared EXEQUIBLE in the understanding that it is applicable to groups that have been pardoned by the Congress of the Republic. In subsidy, be declared INEXEQUIBLE

2. That article 11 of Law 975 of 2005 be declared EXEQUIBLE in the understanding that it is applicable whenever benefits are granted solely for political crimes, and the President submits reports to Congress on its application. In subsidy, that it is declared INEXEQUIBLE.

3. That the expressions "unnecessary damages" and "other persons" in articles 48.1 and 58 of Law 975 of 2005 be declared EXEQUIBLE. That articles 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 62 of Law 975 of 2005 be declared EXEQUIBLE, as to the charge for alleged violation of Legislative Act 03 of 2002.

4. That article 31 of Law 975 of 2005 be declared EXEQUIBLE in the understanding that the demobilized person cannot have left the location zone, nor have delinquished within it. In subsidy, that it is declared INEXEQUIBLE.

5. That articles 2, 3, 5, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 34, 37, 46, 47, 48, 54, 55, 58, 62 and 69 are declared EXEQUIBLE in the understanding that the benefits contemplated cannot be granted to perpetrators of crimes against humanity. In subsidy, they are simply declared EXEQUIBLE.

6. That article 70 of Law 975 of 2005 be declared INEXEQUIBLE.

7. That article 71 of Law 975 of 2005 be declared EXEQUIBLE for the material charge analyzed; without prejudice of a declaration of inexecutable by vicios of form."

10. Additional consideration on pardon.

It held that for some plaintiffs, Law 975 of 2005 grants a pardon, the requirements of which were clarified by the Constitutional Court in Judgment C-1404 of 2000.

To affirm that the Court is incompetent to hear the reasons for the pardon is tantamount to affirming that it is incompetent to hear the reasons for declaring a state of emergency. In essence, it is the same institution, since the declaration of a state of emergency is a legal response to situations that cannot be conjured up by ordinary institutional means. The general pardon, an exception that under our current Constitution has not yet been successfully practiced, is a renunciation of the punitive power of the State -whether total or partial- to conjure up a situation through various means of criminal action.

Clearly put, the very function of the Court is to undermine the will of the people when it is contrary to the Constitution, which is there to guarantee the rights and freedoms of all people, regardless of the general will.

According to the literal text of article 150-17, there are material requirements expressly indicated that must be fully complied with, because otherwise the pardon is invalid, and if the pardon is invalid, it is up to the Court to expel it from the juridical order.

The Court must then adopt a similar approach to states of exception. According to this criterion, you must check: (i) the general existence of the factual assumptions invoked by Congress, (ii) the need to use pardon to avert the crisis, dispensing with the punitive power of the State. That is to say, a strict proportionality test would be used, where the pardon would have to be necessary, and all the various options for pardon would be useless to alleviate the armed action against the State or the people it seeks to protect in their life, honor and property. This is affirmed because the pardon is an exception to article 13 of the Constitution, and when exceptions of this caliber are made, they must be suitable and necessary, otherwise one would be acting arbitrarily.

In conclusion, it considered that if the Court were to examine Law 975 as if it were a general and direct pardon, although in section 1 it tried to demonstrate the contrary, it would be unconstitutional for failure to comply with all the requirements, both in terms of form and the two material requirements, since the serious reasons of public convenience are not demonstrated in order for the Court to exercise the integral control that corresponds to it, nor are the political crimes for which the partial pardon would be granted determined.

11. Finally, on the petitions for conditions, the plaintiff pointed out that the Constitutional Court in its last pronouncement, by refraining from pronouncing on the merits of abortion, denied access to the administration of justice, for this reason, with concern affirms that the plaintiff under analysis could be the object of an unjust inhibitory ruling, which is why it requests a decision on the constitutionality or unconstitutionality of the provisions contained in the defendant law.

V. CONCEPT OF THE ATTORNEY GENERAL OF THE NATION.

The Attorney General of the Nation by means of concept No. E.03. 4030 February 15, 2005, presented its intervention before this Corporation in relation to the lawsuit filed by citizen Gustavo Gallón Giraldo and others, against articles 2, 3, 5, 9, 10, 11, 15, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 34, 37 numerals 5 and 7, 46, 47, 48, 54, 55, 58, 62, 69, 70 and 71 of Law 975 of 2005, and against the same in its entirety.

In its concept, the Public Prosecutor's Office requests the following:

"INHIBIT to issue a pronouncement on articles 2, 9, 10, 18, 23, 34, 62 and 69 of the Law, with respect to the charges indicated in numeral 9 of this concept.

To declare **EXEQUIBLE** Law 975 of 2005, in the face of the charges for defects of form that were presented in this opportunity.

Declare **EXEQUIBLE** articles 3, 5, 10, 11, 16, 17, 18, 23, 25, 26 paragraph 3°, 31, 37 numerals 38.5 and 38.7, 46, 54, 55, 70 and 71 of Law 975 of 2005, in the accused and except the expressions that are deemed inexecutable and stated in numeral 10.7.

Declare the **CONDITIONED CONSTITUTIONALITY** of article 29 of Law 975 of 2005, to be understood that:

One of the requirements for maintaining the benefit of the alternative penalty is that the demobilized person does not re-enter the crimes that were the object of the alternative penalty.

The extinction of the principal penalty shall only occur when the statute of limitations of the principal penalty is complied with.

The granting of an alternative penalty does not extinguish the State's obligation to investigate and punish all crimes that come to its attention and that are imputed to a demobilized person when he or she was part of the group outside the law. Obligation that will only prescribe in the terms of the statute of limitations of the criminal action, according to the crime.

To declare the **CONDITIONED CONSTITUTIONALITY** of article 47 of Law 975 of 2005, to understand that the expenses demanded by the rehabilitation of the victims must be covered by the convicted person, within his duty to fully compensate the victim and when the latter cannot, by the State, through the Fund, without the lack of budget justifying the breach of such duty.

Declare **INEXEQUIBLE**

The word "direct" in subsection 1, and subsections 2 of article 5 idem, the expression "or their relatives in the first degree of consanguinity" in article 47 and the expression "and that of their relatives in the first degree of consanguinity".

Article 5(3) and (4) of Law 975.

The expressions "when available" in article 11 numeral 11.5, "if available" in article 17, and "if available" in article 44 of Law 975 of 2005.

The expression "*and within sixty (60) days thereafter*" in article 18 of Law 975 of 2005, so that investigations for crimes committed are governed by the terms of Law 600 of 2000.

The expressions "of illicit origin" in article 13 numeral 4 and "of illicit origin that have been surrendered" in article 18 ejusdem, in order to guarantee the victims' right to reparation, allowing them to denounce and request precautionary measures on all the demobilized person's assets.

The text of article 25 of Law 975 of 2005, according to which "*without prejudice to the granting of the alternative penalty, in the event that it effectively collaborates in the clarification or accepts, orally or in writing, freely, voluntarily, expressly and spontaneously, duly informed by its defender, to have participated in its implementation and provided that the omission was not intentional. In this event, the convicted person may benefit from the alternative penalty. Alternative penalties shall be cumulated without exceeding the maximum penalties established in this Act.*

Taking into account the seriousness of the new trials, the judicial authority shall impose an increase of twenty per cent of the alternative sentence imposed and a similar extension of the period of probation.

The arguments put forward by the Attorney General in support of his decision are summarized below:

1. In relation to the suitability or substantial ineptitude of the claim.

The Public Prosecutor's Office states that the lawsuit raises several requests for conditional

exequibilidad of some of the provisions of Law 975 of 2005, a request that according to recent jurisprudence of this Court (C-1299 of 2005), is not compatible with the public action of unconstitutionality, since it is not an action of *interpretation*, a criterion that on several occasions has led this Constitutional Court to request the plaintiff to correct the claim on pain of being rejected or to a possible inhibition at the time of the substantive ruling.

However, the Fiscal Hearing requests this Corporation to review this criterion and to advance the substantive examination of the norms demanded in the present process, since it is a public action that allows the exercise of a constitutional right of a political nature and, inasmuch as, from the argumentation of the charges derives a reproach of unconstitutionality of the plaintiffs that must be resolved by the Constitutional Court. Additionally, given the importance of the provisions that are accused, in view of the interest, it is requested not to be inhibited in order to resolve the present lawsuit in depth.

3. The Political Constitution, in the interest of achieving the right to peace and reconciliation, allows recourse to various instruments and mechanisms within the current constitutional order.

The Political Constitution of 1991, the fruit of a consensus of various currents of thought, emerges as an instrument of reconciliation whose fundamental aim is peaceful coexistence through the creation of different instruments to facilitate the end of the factors of generalized violence in the country, within a framework of respect for the values and principles on which the Political Charter is based, among which are human dignity and respect for fundamental rights.

Precisely among the rights of individuals, article 22 of the Constitution defines peace as a fundamental right of a collective nature, and as an obligatory duty which, in accordance with articles 2 and 189 above, binds the State, and particularly the National Government, in the adoption of public policies aimed at preserving public order and maintaining peaceful coexistence. Individuals also by virtue of the provisions of article 95, numeral 6, *idem*, have the duty to promote the achievement and maintenance of peace.

One of the instruments at the disposal of the State for achieving the aforementioned goals is the design of a criminal policy that, within the framework of respect for and guarantee of the principles, values and rights enshrined in the Constitution, formulates a set of legal or other strategies to address the phenomena that cause social harm. In this regard, based on the constitutionalization of certain procedural guarantees contained in the International Covenant on Civil and Political Rights and the American Convention on Human Rights, and based on the recognition of human dignity as the cornerstone of the structure and functioning of the State, in the criminal sphere the system of penalties, as well as the rules and guiding principles of procedure, have been reconsidered in the criminal sphere. In this sense, the traditional linkage of the victim of the crime to the exclusively compensatory, patrimonial or economic interest has been abandoned in order to situate them in the recognition of rights not only in the field of reparation, but also in the right to know the truth and to obtain the punishment of those responsible, all of which imposes an arduous task on the State both in the investigative process and in the prosecution of crimes, especially when it is a question of conduct that violates human rights, as well as breaches of international humanitarian law.

This obligation of the State contained in the 1991 Constitution is also enshrined in various international human rights instruments that make up the constitutional bloc (CP. art. 93), hence when the legislature implements any public policy aimed at resolving the internal armed conflict, it has the obligation to respect the constitutional principles and the international conventions and treaties ratified by Colombia that recognize human rights and are part of international humanitarian

law or international criminal law.

Judicial officials, in turn, should have as a relevant interpretative criterion the doctrine elaborated by international treaty monitoring bodies, such as the Inter-American Commission on Human Rights and the jurisprudence of the Inter-American Court of Human Rights. It is a comprehensive vision of human rights that will make it possible to comply with international standards in the areas of human rights, international humanitarian law and international criminal law, of which the general principles of international law and international custom are also part. The challenge then, both for the legislator and the judges, is to establish the former, and apply the latter, legal mechanisms that allow the achievement of a real and lasting peace, without ignoring the constitutional postulates built on respect for human dignity and Colombia's international obligations in the area of human rights and international humanitarian law.

Thus, the Attorney General considers that this Constitutional Court, when exercising control over a norm aimed at resolving the internal armed conflict, must examine *"Law 975 of 2005, taking into account, moreover, that it is a restricted application order, aimed at overcoming a socio-political situation of conflict for the attainment of real peace, where there are minimums that cannot be unknown"*. This being so, it is necessary to understand that in order to obtain such reconciliation, the whole community must be willing to make certain concessions, without leading to the extreme that one party submits to the other. In the context of Law 975 of 2005, rights are recognized for victims, for society as a whole, and for those who demobilize, who enter into what International Humanitarian Law calls *ex-combatants*, with some rights, but also with obligations that have to be fulfilled that justify and make reasonable the benefits that are recognized in order to achieve peace.

4. Victims' rights.

Among the rights recognized for victims of an armed conflict, the Public Prosecutor's Office refers to the right to truth, justice and reparation.

The first is correlatively related to the obligation of States to provide adequate legal mechanisms to obtain and make known the truth about what happened. In that context, clarify the perpetrators, the circumstances, the motives and the fate of the direct victims.

The right to the truth, says the Fiscal Hearing, has three dimensions, namely: one individual, the right to know; another collective, the inalienable right to the truth; and another state, the duty to remember. In addition, it is a right that includes the right to non-repetition of conduct and the right to reparation. On the other hand, it adds that *"[t]he failure of the State duty to establish effective mechanisms that allow for its protection makes the State internationally responsible, particularly for serious violations of human rights, given that 'in order to truly achieve the observance of a just order (CP. Preamble and art. 2°), the State's duties to investigate and punish human rights violations and serious breaches of international humanitarian law are much more intense than its obligations to investigate and punish crimes in general, without this meaning that these latter obligations sanction of little significance' (Judgment C-004 of 2003).*

With regard to the victims' right to justice, the Public Prosecutor's Office argues that it is based on articles 2, 29 and 229 of the Constitution, and is also part of the guarantees enshrined in articles 4 and 25 of the American Convention on Human Rights and articles 14 and 26 of the International Covenant on Civil and Political Rights.

In the development of the right to justice, the State is obliged to investigate crimes, prosecute those responsible, find them guilty and impose appropriate and proportionate penalties.

After quoting the Inter-American Court of Human Rights in the Velásquez Rodríguez case, the Procurator states that in order to make the right to justice effective, it is necessary not only to carry out a serious, exhaustive and rapid investigation of the facts, aimed at avoiding impunity, but also to review all criminal action in relation to the guarantees that make up due process, with the open participation of the victims. It is precisely for the purpose of guaranteeing the right to justice that the international system has provided for the application of universal jurisdiction and international criminal justice, *the International Criminal Court*, when domestic judicial instruments are not sufficient to provide justice in the face of serious human rights violations and atrocious conduct that flagrantly violate international humanitarian law, such as genocide, torture, enforced disappearance, among others. In order to guarantee this right, the State is obliged to establish an effective judicial remedy, in accordance with the international instruments regulating the matter.

With regard to the right to reparation, the Attorney General points out that the victim has traditionally been compensated for the damage caused by the crime through financial reparation. However, that is not the only component of the right to reparation. Indeed, in the individual dimension, this right includes restitution, compensation and rehabilitation; and in the collective dimension, it includes a series of satisfaction measures aimed at repairing the moral damage caused by the commission of the violation of human rights and guarantees of non-repetition.

It adds that according to the *"Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights Law and International Humanitarian Law"*, it is incumbent on the State to respond not only when it is directly or indirectly responsible for the acts, whether by action or omission, but also when those responsible do not fulfil their obligation to make reparation or do not have sufficient resources to do so.

5. Content and scope of Law 975 of 2005.

In this segment, the Attorney General refers to the normative context in which the accused law finds itself. This refers to the laws that preceded it, namely Law 418 of 1997 and Law 782 of 2002, which provided for the extension of Law 418 and modified it in some respects. In particular, Law 418 enshrined some legal benefits in favour of members of illegal armed groups that carry out peace processes and have demonstrated their political will to return to civilian life and are investigated for political and related crimes, among which are: the inhibitory resolution, resolution of the preclusion of the investigation or the cessation of the procedure within the judicial actions that are in progress, or the pardon for nationals convicted for this type of crimes.

The Fiscal Hearing emphasises that the measures and legal benefits adopted by law are intended exclusively for members of illegal armed groups, accused, accused or convicted of political or related crimes. Further delineating the field of application and adjusting it to international law, Law 782 of 2002 specifies in Article 19 that the benefits set forth in the preceding paragraph shall not apply to *"those who engage in conduct constituting atrocious acts of ferocity or barbarism, terrorism, kidnapping, genocide, homicide committed out of combat placing the victim in a state of defenselessness"* and Article 21, Paragraph 2 of Decree 128 of 2003, which regulates this law, provides that *"those who are being prosecuted or have been convicted of crimes that according to the Political Constitution, the law or international treaties signed and ratified by Colombia, cannot receive this kind of benefits shall not enjoy any of the benefits mentioned above"*.

The Ministerio Público argues that the identification of the addressees of Act 418 of 1997 and Act 782 of 2002 is of the utmost importance since Article 2, paragraph 3, of the law demanded in this process establishes that it applies to persons, crimes and events in which it is inappropriate to resort

to the legal instruments and benefits of Act 782. Thus, bearing in mind that the pre-existing legislation does not provide for special rules for the investigation, prosecution and punishment of crimes other than political or related crimes committed by illegal groups during or on the occasion of their membership, the legislator issued Law 975 of 2005, in order to complement the measures adopted in the pre-existing legislation. Thus, article 1, paragraph 2 of Decree 4760 of 2005, which regulates Law 975, provided that "*[t]he granting of legal benefits contemplated by Law 782 of 2002 for political and related crimes does not exclude criminal liability for other punishable conducts, which may be made effective through the procedure provided for in Law 975 of 2005 or through that provided for in the laws in force at the time of its commission when it is not appropriate in accordance with legal requirements*".

Considers then the Fiscal Hearing, which is a progressive system of rules designed by the legislator in the development of the peace policy drawn up by the National Government, which seeks to provide the various powers of the State with the necessary legal tools to advance with possibilities of success, dialogues, negotiations or agreements with the target groups of such rules, with the clear purpose of fulfilling the constitutional mandate contained in Article 22 of the Political Charter.

Scope of Law 975 of 2005

In this regard, the Public Prosecutor's Office cites articles 1, 2 and 10 of Law 975 of 2005 to refer to persons who may avail themselves of the rules of investigation, trial and sanction and the legal benefits contained therein, provided that the conditions established in the law for this purpose are met. After referring to each of these conditions, the National Government will prepare a list that will be submitted to the Attorney General's Office with the names and identification of the persons who avail themselves of *the special procedure* contemplated in the questioned law and that will allow them access to the legal benefits that it contemplates. The preparation of this list does not follow a prior selection process by the National Government, but rather the identification of persons who have demobilized either individually or collectively, and have expressly expressed their willingness to avail themselves of the procedure and benefits enshrined in Law 975 "*[p]ostulation that is essential to give effect to this law*".

According to the Attorney General there are two additional aspects contained in Decree 4760 of 2005, regarding the scope of application of the accused law that cannot be overlooked. The first is the clarification made there regarding the temporary application of the law, in the sense that demobilized combatants may avail themselves of it for criminal conduct committed before July 25, 2005, not covered by the benefits of Law 782 of 2002 "*[p]ues the benefits granted for political and related crimes do not exclude criminal liability for other punishable conduct, which may be made effective by the procedure established in the law being sued or the law in force at the time it was committed*". The second aspect relates to the fact that the drawing up of the lists in question "*[n]o implies the automatic granting of the benefits provided for in the Law, nor the guarantee of compliance with the requirements contemplated*". This means that events may occur in which persons included in the lists will not obtain the benefits enshrined in Law 975, because they do not meet the conditions established for the effect, an aspect that will be determined by the judicial officer.

After pointing out the scope of application of Law 975 of 2005, the Attorney General refers to the procedural and punitive aspects of it, as well as the judicial benefits contained therein, for which he is subject to the provisions on these matters regulated by the accused law, to then pronounce on the procedural norms contained in the decree that regulates the defendant law (Decree 4760 of 2005), clarifying that yes the procedural legal panorama referred to, in no way includes a judgment on the constitutionality of the procedural scheme and the general system of benefits enshrined there

enshrined, in no way includes a judgment on the constitutionality of the procedural scheme and the general system of benefits there enshrined.

Once the Public Prosecutor's Office determines the dogmatic and interpretative framework of the challenged law, it enters the analysis of the charges of the lawsuit, starting from the examination of the defects of form, to later address the questioning of the normative content of the articles demanded by Law 975 of 2005.

6. Formal defects

6.1. It considers that the regulation of judicial procedures is not a matter that should be expedited through the legislative process of statutory laws, although they involve the affectation of fundamental rights. In fact, the Procurator considers that although the norms demanded are indisputably related to the victims' fundamental rights to truth, justice and full reparation, the right of access to the administration of justice and the right to peace, inasmuch as they establish mechanisms to guarantee them, the rules relating to judicial procedure, legal benefits and reduction of penalties enshrined in the accused law, When Article 152 of the Constitution determines that the regulation of fundamental rights is a matter of statutory law, it refers to the regulation that affects the essential nucleus, in the exercise and development of the rights that have entity, but not to any regulation that relates to them, nor to any regulation that refers to rights that although they have constitutional origin, are not fundamental.

It adds that constitutional jurisprudence has sufficiently settled the issue proposed in the lawsuit, and has held that not every matter that refers to or is related to the matters indicated in article 152 above should be regulated by statutory law, since the reservation of such laws is restrictive in view of the exceptional and very special nature of this legislative procedure, which seeks to provide greater stability to legal provisions that develop issues on which it is necessary to provide greater legal certainty, such as fundamental rights and the organization and structure of the administration of justice. Particularly with this last aspect, i.e. with the fundamental right to the administration of justice, it argues that since the examination of the statutory law on the administration of justice, it was upheld by the Court (C-036 of 1996), that such laws should only deal with the general structure of the administration of justice and the substantial and procedural principles that guide judges in resolving conflicts submitted to their knowledge, without it being possible in this way to regulate aspects relating to procedural codes since this should be subject to the procedure proper to ordinary laws, a doctrine that has been reiterated on several occasions.

In this regard, for the Public Prosecutor's Office, the matter regulated by Law 975 of 2005 is not subject to the reservation of a statutory law, since these are norms that, although they relate to the fundamental rights of victims and the accused, are norms that establish the rules of criminal procedure to which the judicial actions carried out against members of illegal armed groups that individually or collectively demobilize themselves and request the application of the norms established therein are subject. In addition, the provisions that do not deal with the administration of justice are part of the State's policy for the peaceful settlement of the internal armed conflict, which establishes bodies and commissions to monitor those policies and establishes mechanisms for the reintegration into civilian life of members of those illegal groups that are specific targets of the legal system under consideration.

Act No. 975 of 2005 does not seek to comprehensively regulate the fundamental rights of victims or to develop or supplement the content, limits and scope of the fundamental rights to truth, justice and reparation; rather, in relation to those rights, it is concerned with establishing parameters for the intervention of victims in criminal proceedings against members of illegal armed groups who

decide to demobilize and submit to the special rules of jurisdiction and procedure laid down in that legislation. Nor does the law in question contain provisions that fundamentally and fundamentally modify the general structure of the administration of justice or the organization of the judicial branch of government, nor does it establish general principles or parameters for the performance of judges, aspects that would need to be regulated by a statutory law. Now, the fact that the purpose of the accused law is to establish mechanisms that allow the demobilization and submission to justice of members of illegal groups as a mechanism for the achievement of peace, did not oblige either to follow the procedure of a statutory law, since Law 975 is not in charge of the integral development of the right to peace nor does it alter its essential nucleus.

6.2. Regarding the procedure to be followed in the event of discrepancies between Commissions and Plenaries, the Ministerio Público states that although the Constitution does not establish the procedure to be followed when differences arise between the constitutional commissions and the plenary, in relation to a matter denied or approved by the constitutional commission, Article 177 of Law 5 of 1992 provides that in the event of the latter's refusal to convert a particular paragraph, article or articles into law, the plenary may resolve that the regulation should be returned to the commission to reconsider its origin or reiterate its inconvenience. In that order of ideas, articles 70 and 71 of the bill that ended with the issuance of the law under consideration, which were denied by the constitutional commissions, had to be submitted to the procedure provided for by article 177 of the Regulations of Congress. However, the procedure for reviving these articles was that enshrined in article 159 of the Political Charter and developed by article 166 of the Rules of Procedure of Congress.

According to article 159 of the Constitution, *"A bill that has been denied in the first debate may be considered by the respective House at the request of its author, a member of the House, the Government or the spokesperson of the proponents in cases of popular initiative"*. In the development of this provision, article 166 of Law 5 of 1992 established the appeal mechanism, which involves the analysis by the Plenary of the Legislative Houses of the Commission's refusal to proceed with a bill or its decision to definitively file it. The Fiscal Hearing warns that, as stated in Ruling C-385 of 1997, this instrument has two purposes: (i) it allows the largest number of members of each legislative cell to express their willingness to convert a bill into law, or their refusal to process it; and (ii) it guarantees the author of the initiative the right to go to another higher instance to explain the reasons why he does not share the decision adopted in the Commission, and thus ensure that his bill is not dismissed with arguments that seek to ignore its real importance, necessity or convenience.

In the case *sub examine* as a result of the charge raised in the complaint, the question arises as to the merits of the appeal, bearing in mind that the provisions of article 177 of Law 5 of 1992 should have been applied in a strict sense. In this regard, the Attorney General maintains that as this Corporation has stated, *"the scope of constitutional control is limited to the completion of the stages that allow debate in the commissions and plenary sessions on a bill and to the fulfillment of the requirements they propose to ensure a space for democratic deliberation"*. This being so, not any procedural flaw constitutes a vice of unconstitutionality, in that order of ideas, and, in accordance with the principle of instrumentality of forms, for the Public Prosecutor's Office the defect demanded in relation to the formation of articles 70 and 71 do not affect their validity, since according to the mentioned principle *"procedural forms do not have a value in themselves and must be interpreted teleologically at the service of a substantive end"* (8C-737 of 2001).

The Public Prosecutor's Office considers that the appeal procedure contained in Article 166 of Law 5 of 1002, and that it was the one that arose in relation to the accused articles, is much more guaranteeing than the one foreseen in Article 177, *idem*, and in substance has the same effects:

reviving an article denied by the commissions when the Plenary insists that it should be dealt with. The difference is that in the case of an appeal, article 166 refers to *bills*, while article 177 refers expressly to *matters*.

However, the Fiscal Hearing emphasizes that the concept of *bill* wraps the content of it, it means each of the topics and matters contained in it. It is clear, then, that when the Constitution and/or the Regulations of Congress refer to *bills*, it is to differentiate that normative category from others, such as *bills for legislative acts*, but not to distinguish between the *bills* themselves and the rules that make them up, as the plaintiffs have interpreted in this lawsuit. Thus, it does not affect any substantive value that articles 70 and 71 defendants would have been revived through the appeal of article 166 of Law 5 of 1992. On the contrary, the principle of consecutivity materialized to the extent that these norms were debated as established by higher norms; the democratic principle was not affected because the appeal that was filed with respect to the articles in question did not influence the formation of the legislative will in the Chambers. In addition, it is clear that in any case the intention of the Constituent was that the decision of the Commission to reject *projects or matters* in process could be examined by the Plenaries of the Senate and the House of Representatives, as the case may be, with the understanding that the majorities of the Plenaries can weigh more fairly and equitably if they confirm or revoke the provisions of the Commission.

Consequently, the Attorney General states that it can be affirmed that "*[i]f the accused articles were 'revived' through a procedure that is not the one indicated in the Regulations of Congress to be applied in that event, with the mechanism used, the appeal, the democratic character of the procedure was undoubtedly guaranteed because the process of formation of the democratic will in the chambers was respected; no constitutional value was violated; nor were the legislative powers ordered by the Constitution ignored*".

6.3 For the Public Prosecutor's Office, Law 975 of 2005 should not have been processed in compliance with the specific ritual established by the Constitution for pardon laws, because that is neither the purpose nor the effects of the law in question.

The Attorney General's Office states that it will not examine whether or not the procedure established by article 150, numeral 17 and 201, numeral 2 of the Constitution was completed, for two reasons: firstly, because it is not the subject of the law, nor the purpose of the law to grant pardon to members of illegal armed groups for any kind of crimes, because precisely as its title expresses, through it "*provisions are issued for the reincorporation of members of illegal organized armed groups that contribute effectively to the achievement of peace and other provisions are issued for humanitarian agreements*"; secondly, inasmuch as by means of an indult the right of grace is developed over a certain person, through the total or partial pardon of the sentence that has been judicially imposed on him. Thus, the accused regulation has no applicability to political crimes, nor does it have the practical effect of pardoning, exonerating or exempting from punishment those perpetrators of crimes who are subject to the procedural rules set forth therein, that is, members of illegal groups who decide to demobilize and resolve their legal situation for crimes other than political and related crimes. The conditions for access to such benefits were enshrined in Law 782 of 2002, which rightly complements Law 975 of 2005 and does not develop it.

7. Background vices

7.1. The reference in articles 37, numeral 38.5 and 62 of Law 975 of 2005 is made to the Code of Criminal Procedure, does not contravene the transitional article 5 of Legislative Act 03 of 2002, as argued by the plaintiffs in affirming that these referrals authorize the application of provisions of the

accusatory scheme there implemented to criminal conduct committed before the entry into force of Law 906 of 2004, as well as procedural rules incompatible with the procedural structure of Law 975, based also on the scheme designed in the aforementioned constitutional reform. In the opinion of the plaintiffs, the provisions of Law 975 can only be applied to behaviour after 1 January 2005, when the new criminal procedure system came into operation.

To answer this charge, the Attorney General clarifies that the law in question was not issued for the purpose of establishing rules of criminal procedure to implement Legislative Act 03 of 2002, as this is dealt with by Law 906 of 2004. The rationale and purpose of Law 975 is different. This is a special procedure designed to facilitate the process of demobilization, reincorporation and national reconciliation, in accordance with the State's duty to promote the achievement and maintenance of real and lasting peace, in order to comply with article 22 of the Constitution.

It cannot be said that the law in question, insofar as it establishes figures similar to those established in the legislative act referred to in the preceding paragraph, such as the magistrate of guarantees, is part of this new criminal procedural system, so that, as indicated in article 5, it can only be applied to crimes committed after the entry into force of the law establishing it, in that case Law 906 of 2004, that is, those committed as of 1 January 2005.

Nor does it contradict the constitutional order that a law that determines special rules for conducting criminal proceedings against members of illegal armed groups who individually or collectively demobilize specifies that their gaps will be filled by the Code of Criminal Procedure, without specifying which of the current ones is referred to, for two reasons: first, because there are currently two criminal codes in force applicable in different places and for different crimes. In this case, it will be up to the judge in each case to determine which is the applicable law, that is, whether Law 600 of 2000 considering that the conduct took place before January 1, 2005; or Law 906 of 2004 because the events occurred after that date. Second, since it is the competence of the judicial officer in the particular and concrete case, and not of the law in general terms, to determine which of the norms of Law 600 of 2000 are compatible with the scheme established by the accused law, and may be applicable, and in which events of Law 906 of 2004, it is applicable to previous facts, by virtue of the principle of favorability.

To the above reasons that according to the Fiscal Hearing rule out the possible violation of article 5 of Legislative Act 03 of 2002, it adds another of a practical nature, which is that it is not advisable to refer to a particular law, even if there was only one code of criminal procedure, because it can be modified or repealed.

Thus, the references made in articles 37, numeral 38.7 and 62 of the accused law to the Code of Criminal Procedure are not contrary to the Political Constitution.

7.2 Another of the charges in the complaint relates to the definition of victim contained in article 5 of Law 975 of 2005, since in its view it is restrictive with respect to the international recognition of relatives up to the second degree of consanguinity as victims of human rights violations and breaches of international humanitarian law, which prevents these relatives from seeking reparation for the damage caused by the conduct.

The Procurator states that one of the aspects that should be highlighted in the first place is that the Political Constitution, although it refers to the victim as the recipient of special protection measures and the holder of the right to full reparation, does not expressly define who is the victim, nor does it make a distinction with respect to the victims, a circumstance that could from the outset guarantee the constitutionality of the accused norm. However, it finds that the plaintiffs are right inasmuch as

the definition of victim contained in article 5 does not conform to international standards, according to which the rights to truth, justice and reparation must be recognized for any person who has suffered harm as a result of criminal conduct.

After citing Principles 8 and 9 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights Law and International Humanitarian Law*, on what is meant by a victim^[5], and referring to both the Commission and the Inter-American Court of Human Rights, which have specified that not only can individuals be considered as victims, but in certain cases the communities themselves, indigenous peoples, political groups, among others, can be considered victims of a conflict, it is related to the national scope, in which this Corporation in the same judgment of constitutionality that consolidated the recognition of the rights to truth, justice and reparation, linked the concept of victim or injured party to the existence of a real, concrete and specific damage, not necessarily economic, derived from the criminal infraction, exceeding the exclusive reference to the relation of kinship with the direct victim as a causal that justifies its intervention within the penal action^[6].

In this context, the Public Prosecutor's Office considers that the legislator must guarantee intervention in criminal proceedings, both for direct victims and their successors, and for those harmed by violations of criminal law, and with greater rigour than for violations of human rights and serious breaches of international humanitarian law. In this regard, the law in question incorporates into the concept of victim the direct victims and the closest relatives, whose rights to truth, justice and reparation are recognized and guaranteed through the legal mechanisms enshrined therein, ignores international humanitarian law and constitutional jurisprudence, by virtue of which the status of holder of the aforementioned rights arises from the harm caused and not from the mere relationship of kinship. Despite the fact that the definition contained in the accused norm was intended to incorporate those who, according to Judgment C-228 of 2002, are defined as victims and injured in order to provide all those who may be affected by the conduct with mechanisms for the satisfaction of the aforementioned rights, this definition does not pass the constitutionality test, since it excludes categories of kinship by virtue of which damage may also be caused as a consequence of the crime, as may happen with the siblings of the disappeared person, when the latter has no ascendants, descendants, spouse or permanent partner.

For the Procurator, whatever the purpose of the rule, the truth is that it does not involve all persons who may suffer real and concrete damage as a result of the punishable conduct, thus ignoring not only international provisions but also the right to equality, since although the offence causes damage to several persons with different kinship relationships, only some of them, specifically the relatives specified in article 5 of Law 975, may resort to the process in order to defend and satisfy their rights as victims.

The inexistence of the norm is also evident in relation to the children and adoptive parents of kidnapped persons, who according to the contested norm are not direct victims, nor can they go to trial for the crime of neither homicide nor disappearance, nor do they recognize their rights to rehabilitation and to be recipients of measures of satisfaction and guarantees of non-repetition such as the restoration of dignity, reputation and their rights. This is derived from the reading of articles 47 and 48 of Law 975.

Now, the Attorney General argues that considering the principle of conservation of the norm and the importance of determining for the purposes of the accused law who are considered victims, he will request this Court to declare the inexplicability of the word "*direct*" in paragraph 1 and 2 of article 5 of Law 975; the expression "*or their relatives in the first degree of consanguinity*" in article 47; and the expression "*and that of their relatives in the first degree of consanguinity*", in

order to ensure that the concept of victim is not restricted and is in line with the definition advanced by constitutional and international jurisprudence, which for these purposes is binding on the constitutional judge.

As a last consideration on the questioned norm, the Fiscal Hearing states that it is not unknown that the definition of victim brought from national constitutional jurisprudence and international law, can increase the number of recipients of the rights recognized in the law to the victims, with the consequent problems that can be generated for the satisfaction of the rights that compromise economic resources. However, the solution of budgetary problems cannot be considered a valid argument that makes it reasonable and justifiable to deny the fundamental rights of the victims, who cannot be left to the swaying availability of the budget or of the State's perpetrators, who must assume the obligation to exhaust all mechanisms to achieve real compensation for the victims "*[t]he neutralization and elimination of the internal armed conflict and its direct and collateral effects*".

On the other hand, the definition of victim included members of the armed forces who have suffered injury or impairment of their rights as a result of the actions of illegal armed groups. In the Procurator's view, such incorporation is contrary to the norms of international humanitarian law insofar as it recognizes members of the armed forces as combatants and excludes them from the scope of application of Protocol II Additional to the Geneva Conventions, relating to the Protection of Victims of Non-International Armed Conflicts. Therefore, the inclusion of these members in the context of Law 975 as victims of the conflict is contrary to international standards, which is why it requests that they be declared unconstitutional, without affecting the rights of the members of the security forces, since by virtue of their special function they are protected by the State through other norms.

Lastly, it considers it unacceptable that members of the security forces or their families should have recourse to the Reparation Fund provided for in the Act in order to obtain compensation for their participation and damages suffered in combat or on the occasion thereof, when the State has established for them special and suitable institutions and mechanisms for that purpose.

It therefore requests that article 5, paragraphs 3 and 4, of Act No. 975 of 2005 be declared unconstitutional.

7.3 With regard to the victim participation mechanisms in the criminal proceedings conducted in accordance with the rules established by Law 975, various charges are raised by the plaintiffs, since the concept of the law does not establish mechanisms that guarantee the victim's active participation in the conduct of the criminal proceedings, which is detrimental to the rights to truth, justice and reparation.

7.3.1. One of these is access to the file. According to the charge, article 37, paragraph 38.5, according to which victims have the right "*to receive, from the first contact with the authorities and under the terms established in the Code of Criminal Procedure, relevant information for the protection of their interests*", is unconstitutional because article 136 of Law 906 of 2004 does not enshrine the right of development to information, the right of the victim to access to the file, which prevents the process regulated by Law 975 from being considered an effective mechanism of judicial protection.

While for the Attorney General the plaintiffs in this position actually promote the examination of a different provision that would in principle give rise to an inhibitory pronouncement, he considers that given the significance of the matter under consideration, it is indispensable to specify the scope of the victims' rights and, therefore, the position should be examined.

Thus, the Fiscal Hearing points out that since the accused provision expressly refers to the development of the right to information in the terms established in the Code of Criminal Procedure, the norms contained in that order, whether Law 600 of 2000 or Law 906 of 2004, must be interpreted and applied by the legal operators with observance of the clarifications that have been made in this regard by this Constitutional Court.

In this regard, it warns that neither of the two orders in question denies the victims the right of access to the file. On the other hand, if the procedure to be applied is that provided for by Act No. 600, there is a file to which the victim may have access, in accordance with the provisions of article 30 of that Act, without the need to become a civil party, in the event of the disappearance of that figure and the establishment of the incident of full reparation. In support of his argument, he cites excerpts from Judgment C-228 of 2002. And in the event that the applicable procedural code is Law 906, the judicial officer must also give scope to the sentence cited, since that law does not refer to this particular aspect, because part of the budget that the procedure is governed by the principle of orality.

It adds that, in any case, the right of access to the file is different and cannot be understood to be satisfied with the right to obtain information through petition rights, since, as this Court has held, *"[n]o is sufficient the mere information or reference on the content of the file that can be made by the accuser, who will hardly be able to illustrate to the investigator each and every one of the key elements of the process, since the risk of omitting some relevant questions will always be latent"* (T-1126 of 2003).

On the other hand, he adds, the assertion that the victim's participation takes place at the hearing for the acceptance of charges is not true, since, as the same lawsuit refers, article 37 recognizes the victims' right to be heard and to provide evidence in the course of the proceedings, not only in the hearing before the Justice and Peace Tribunal or in the incident of integral reparation.

7.3.2 Another of the mechanisms for victim participation in the process challenged by the plaintiffs is the right to apply during the trial. Law 975 of 2005 recognizes the right of victims to be assisted by a lawyer or by the Judicial Prosecutor's Office *during the trial*, without this meaning that they are restricted in their right to intervene directly in the whole process, from the moment they are initiated.

The purpose of the rule is to specify that during this stage is when the victim can intervene through his attorney or request the assistance of the Office of the Attorney General for Justice and Peace, but not before he can not participate, as wrongly deduced by the plaintiffs. That is why Decree 4760 of 2005, in Article 11, numeral 5, provides that: *"On the occasion of their participation in the process, victims shall have the right to be assisted by a trusted lawyer, or in their absence, by the Public Prosecutor's Office; without prejudice to the fact that they may intervene directly during the entire process"*.

Consequently, the Procurator requests the declaration of exequibilidad of article 37 numeral 38.7 of the accused law.

8. Against the charge of inexecutable of article 10, numeral 10.6 which imposes, as a condition of eligibility for access to the benefits of the law in question, that the kidnapped persons in their possession be released, by relative legislative omission, insofar as members of illegal groups are not required to report the whereabouts of the disappeared or their bodies in the event that their death was caused, argues the Procurator that although the actors direct their accusation exclusively against

the numeral in question, From the arguments presented, it can be concluded that the relative legislative omission covers the entire article, and in its concept, article 11 of Law 975 could even be affected, since in that case it is also obligatory for the member of the group to deliver all the information that allows establishing the whereabouts of the disappeared persons by the illegal armed organization that wishes to disassociate itself.

For the Public Prosecutor's Office, the duty to report the location of disappeared persons when the demobilized person admits to having participated in such conducts is a condition that must be met from the moment in which a free version is given if he wishes to obtain the benefits of the accused law, in accordance with articles 7, 15, subsection 3, 29, 43 and 44, otherwise it is *"absurd, not to say impossible for the demobilized person to be convicted in accordance with the procedure provided for in this law, for the crime of forced disappearance and to be obliged in the sentence to collaborate in the finding of the victim, if he did not accept having committed this conduct from the free version diligence that initiated the criminal action, and without having expressed there what was the fate of the disappeared person"*.

The Procurator argues that although articles 10 and 11 of Law 975 do not explicitly state this, demobilized persons who wish to avail themselves of the benefits of the law and obtain an alternative sentence for the crime of disappearance are obliged to provide all information related to that conduct, the conditions of time, manner and place in which it took place, the places where the disappeared person was taken, or to indicate where the body is located, in the free version of the proceedings, which constitutes one of the parameters for the formulation of the indictment and the charges. If that is not the understanding of the questioned article, the Colombian State would be failing to comply with its obligations regarding the trial and punishment of the crime of disappearance, with the consequent possibility of an intervention of international justice instances such as the International Criminal Court.

This being so, the Court is requested to declare articles 10 and 11 of Law 975 of 2005 enforceable after integration of the normative unit, under the understanding that it is an eligibility requirement to grant all information on the location of disappeared persons or their corpses.

9. The Public Prosecutor's Office argues that the accusation against Articles 48 and 58 for ignoring the right to the truth, insofar as they restrict the publication of judicial decisions and archives in order to avoid unnecessary harm to undetermined persons, may exceptionally restrict the publication of certain judicial actions under the terms established by law, as provided in Article 228 of the Charter^[7]. In this connection, the legislator may derogate from the principle of publicity in criminal matters. Nevertheless, the accused articles consecrate restrictions to the publicity not of the process, of the trial or of the action in progress, but to the judicial truth, that is to say, to the truth declared in the sentence and to the archives that must be preserved precisely to guarantee the right to the truth in its collective dimension, that is to say, the right to memory.

Bearing in mind that this is a restriction on the right to the truth in its dimensions, with direct repercussions on the right of victims to obtain reparation, consecration in accordance with the principle of legality is more demanding, in order to guarantee that the exception does not become a general rule, rendering harmless the essential content of the right to the truth. For this reason, the wording of the provisions in question manifestly ignores the principle of legality, because it incorporates indeterminate concepts such as *"unnecessary harm"* and *"other persons"*, so that the judicial officer can give the exception any scope he wants, since he can apply it to protect any person, including the perpetrator, and the quality of the harm will be left to his qualification, whether it is necessary or not.

It is therefore absolutely essential to point out that the concepts referred to be interpreted by the judicial officer or the custodian of the archives in a restrictive manner, as is appropriate when faced with measures that limit the exercise or enjoyment of constitutional rights, in accordance with international doctrine and jurisprudence, that is to say, on the understanding that the restriction on knowledge of the judicial truth and access to the archives only takes place to protect the victim, witnesses and persons other than the person prosecuted, who collaborated in the discovery of that truth and exclusively to protect the integrity and safety of those persons, reasons which should be made manifest by preventing publicity of the judgment or access to the archives.

10. Article 25 of Law 975 of 2005, insofar as it enshrines a second opportunity to obtain the benefits of the law as long as the omission was not intentional, is unconstitutional. It is clear that the State must look for mechanisms aimed at achieving peace and reconciliation, but they cannot be mocked. If the State has designed instruments by means of which certain concessions are established in order to obtain peace, it cannot be circumvented while waiting for certain benefits to be extended in the future. In this sense, the Public Prosecutor's Office does not understand, as the legislator admits in the second part of the questioned article, that persons who have already benefited from different mechanisms created by the law (Law 782 of 2002), can again be benefited by another law.

In this regard, the Attorney General explains that *"[t]he design and implementation of mechanisms or instruments for the peaceful solution of the conflict that the Colombian State is experiencing requires the good faith of all the actors; consequently, it is inadmissible for the State to renounce its obligation to duly punish those who at one time had the opportunity to contribute to the State's ends and did not do so. Consequently, a peace and reconciliation process requires all actors to express the real truth, which is why concessions such as those enshrined in article 25 cannot be allowed.*

To maintain the content of article 25 is to incite members of illegal armed groups who seek to avail themselves of the benefits of the law to conceal relevant facts to the detriment of the right of victims in the broadest sense to know the truth. This rule regarding the possibility of recourse to the alternative penalty must be declared unconstitutional, as it achieves a certain balance between the rights of the victims who have ceded their right to have the perpetrator drastically punished and the obligations imposed on him.

11. With respect to the loss of the benefit of the alternative penalty referred to in Law 975 of 2005, for partial delivery of goods of illicit origin, the Procurador concepts the following: "It is clear that failure to comply with any of the conditions established in the law for access to benefits, as well as to enjoy them, once granted, leads to the loss of the legal benefit contemplated in the law and the execution of the main sentence established in the sentence proceeds based on the punitive quantum indicated for the crimes that are imputed, as provided in paragraphs 29, paragraphs 2 and 5 idem.

In addition, in particular with regard to the delivery of goods, article 44, paragraph 45.1, states that the delivery to the State of goods unlawfully obtained for the reparation of victims is an act of comprehensive reparation, compliance with which is a condition for access to the benefits of Act No. 975 of 2005, to the extent that the sentenced person will not be able to enjoy probation if he or she has not carried out the delivery. According to the foregoing, the demobilized person will lose legal benefits if it is later proven that he did not deliver the illegally obtained goods in full.

However, part of the questioning is also structured in that the articles relating to individual demobilization specify that the member of the armed group must deliver the goods acquired illegally if he has them, and in the same way is contemplated in article 44 paragraph 2 of the law in commentary.

In this regard, it should be noted that the accused expression starts from the assumption that the possibilities of making such a surrender for the member of the armed group who individually appears before an authority to demobilize are much lower than those of the one who, together with the illegal group or faction to which he or she belongs, decides to demobilize. However, for the Public Prosecutor's Office it is also clear that the practical inconveniences do not justify the enshrinement of a rule that enables defendants to defraud the interests of the law and the right of victims to obtain reparation by resorting to maneuvers such as handing over goods to third parties, and insofar as they have not been in its possession, it is exempted from the obligation to hand them over for the reparation of victims. This is all the more so when it is clear that the loss of benefits arises from an unjustified failure to comply with the obligations imposed, since it is evident that in circumstances of force majeure it is not possible for the State to require compliance, since no one is obliged to the impossible.

Therefore, the Constitutional Court will be asked to declare the unconstitutionality of the expressions: "when available" in article 11, numeral 11.5, "if available" in article 17, and "if available" in article 44 of Law 975 of 2005.

12. For the Procurator, the 36-hour time limit for the filing of charges after free version proceedings does not offer any objection since it is a time limit that meets the need to guarantee the right to personal liberty under article 28, paragraph 2, of the Constitution, according to which the legal situation of a person deprived of liberty must be resolved within the following 36 hours.

On the contrary, in view of the 60-day period established in paragraph 3 of Article 18 of the challenged law for the National Unit of Justice and Peace Prosecutors to investigate and verify the facts, the Public Prosecutor's Office finds that this is an unreasonable term, given the unquestionable seriousness of the crimes to which the law in question will be applied, the complexity of their investigation due to the scenario in which they were committed, the number of infractions that can be attributed to each demobilized person, the length of stay and the number of violent actions by the armed group outside the law, all of which leads to serious evidentiary difficulties that cannot be overcome within the 60-day period established by law, which is therefore unreasonable.

This term also does not guarantee the right to justice in the face of conducts of such relevance as genocide, massacres, disappearances, kidnappings, to name a few, whose investigation is enormously complex, which is why it requires a much longer term than provided in the law to advance the investigation, especially when some of them the investigated entity may come to know until the time the free version is received.

This means that if the procedural terms established by the legislator are unreasonable, they do not constitute an effective judicial remedy for victims to claim their rights against violations of those rights, through a mechanism that offers guarantees of effectiveness and suitability for those claims.

After quoting the Inter-American Court of Human Rights, the Procurator requests this Court to declare the final paragraph of Article 17 enforceable and the unconstitutionality of the expression "*and within sixty (60) days thereafter*" of Article 18 of the Accused Law, so that investigations for crimes committed by those who avail themselves of the demobilization process are governed by the terms set forth in Law 600 of 2000, in view of the procedural stages provided for in Law 975 of 2005, the term of 30 days established in Law 906 of 2004, is also unreasonable for the purposes proposed, all the more so since the system under review does not provide for a preliminary investigation stage to collect evidentiary material, nor could it be, since one cannot lose sight of the

fact that the facts reported by the demobilized person in the free version constitute the axis on which the process enshrined in the law under review is structured, and any criminal investigation of the general conduct of the demobilized person that takes place without prior knowledge of the possible infraction of a crime would be unfounded, because it is only possible to take criminal action, as determined by article 250 of the Political Charter, when there is knowledge of facts that may constitute a crime, but not when it is suspected that a certain person, even when belonging to an illegal armed group, has engaged in other conduct punishable on the occasion of his belonging to the same.

13. As for the accusation against paragraph 3 of article 26 of the defendant law, for excluding the appeal in cassation from decisions of second instance, thereby sacrificing the realization of the material right and the guarantee of constitutional rights, in the opinion of the Procurator does not violate the Constitution, since it is an admissible exclusion because the Charter does not impose the obligation of such appeal in all events, as it does with the appeal in article 31, an appeal that was enshrined in article 26 whose competence corresponds to the Criminal Cassation Chamber of the Supreme Court of Justice. This means that while criminal proceedings do not reach the highest court of criminal justice by virtue of the extraordinary appeal in cassation, they do so through the appeal of decisions taken in application of the accused law.

14. Alternativity is a legal benefit that allows the conditional suspension of the sentence to serve the alternative sentence, but in no way can it be considered a pardon, since it does not mean total or partial pardon of the sentence. In effect, the main penalty assessed by the judicial officer in charge of the application of Law 975, is not the same alternative penalty, as wrongly interpreted by the actors. In accordance with the criminal procedure under the rules laid down in the accused law, the Court must impose in the conviction the principal and accessory penalties which are in accordance with the Criminal Code, that is to say, those established in a particular manner for the offences charged and within the established punitive limits. Thus, once the penalty has been imposed, the Court rules on the legal benefit of the alternative penalty and its recognition, which does not annul, invalidate or extinguish the main penalty imposed, because it only extinguishes when the alternative penalty imposed by the court has been served, and the beneficiary with it demonstrates compliance with all the other requirements within the time limits set by the legislator.

According to the Fiscal Hearing, the alternative penalty does not involve the modification of the punitive boundaries indicated in the Criminal Code for criminal conduct, such as kidnapping, forced disappearance, displacement, homicide, injuries, theft, or any of the crimes that can be advanced through the procedure of Law 975. The penalties laid down by the legislature for such conduct remain intact and, therefore, when the court carries out the procedure of punitive dosage or individualization of the applicable penalty, it must do so subject to the penalties that may be imposed under the respective criminal offences in the Criminal Code and in accordance with the rules set out therein, as provided for in article 29 of the Code of Criminal Procedure.

It does not follow from the content of Article 29 that the main penalty to be imposed in all cases will be 5 to 8 years. Articles 3, 29 and 61 of 2005 do not refer to the alternative penalty as a special type of main penalty, but to a legal benefit that operates in a manner similar to criminal subrogates, in compensation for the behaviour of the sentenced person, taking into account the circumstances of the offence and of the accused, by virtue of which, if the beneficiary fulfils all legally and judicially imposed obligations and exceeds the probationary period, he will be redeemed from full compliance with the main prison sentence set by the Court in the sentence. Otherwise, if he does not comply fully with the commitments assumed, he will be obliged to serve the time in prison set as the main penalty in the sentence, except for the exceptional recognition of some criminal subrogate of those established in Law 599 of 2000 amended by Law 890 of 2003, if applicable. On the other hand,

once the period established as an alternative sentence has elapsed, the sentence is also not understood to have been served, nor does the convicted person obtain unconditional personal freedom, until the probationary period has been completed.

The Attorney General argues that having specified the nature of the alternative penalty benefit, it is evident that the censorship carried out by the plaintiffs is the result of an erroneous interpretation of the content of the rules accused. It is therefore not appropriate to mention that the law grants a pardon to members of illegal groups, since those who are sentenced and condemned in accordance with the provisions of the accused law are imposed the principal and accessory penalties that are applicable in accordance with the rules and quantum established in the Criminal Code for any person who incurs the same criminal types, without prejudice to the granting of the benefit of the alternative penalty, which in no way replaces, extinguishes or replaces the principal penalty imposed.

In addition, it specifies that the benefit in question, as established in Article 29 of Law 975, is not compatible with the granting of criminal subrogation or penalty rebates, so that it cannot be said that the law grants more and better benefits to those who take advantage of it, as a result of effective collaboration with the administration of justice, compensation for damages to victims, effective demobilization and cessation of criminal activities, and contribution to the demobilization of the armed group outside the law to which it belongs. So it is not a free granting of a benefit to those who have engaged in the kind of conduct that is challenged in the accused law.

It is for this reason that the Public Prosecutor's Office considers that the legislator omitted to point out that the submission to Law 975 of 2005 of illegal groups or their individual members does not exempt the State from the obligation to continue investigating. Therefore, if crimes that were not confessed or investigated in the course of the demobilization process are found to exist, not only is the right to benefit lost, but the main penalty must be applied. The Procurator adds that the State's duty to investigate has only the limit of the *statute of limitations for criminal action*. This is another reason that justifies the declaration of unconstitutionality of a separate article 25 of Law 975, and that requires conditioning the enforceability of article 29, to the understanding that to be a beneficiary of the alternative penalty, the demobilized person must have confessed all the facts in which he participated under penalty of losing that benefit. This compensates for the fact that the alternative penalty is not proportional to the seriousness of the conduct that was the object of the benefit. If the articles mentioned were not conditioned in this way, the victims' right to justice would be mocked.

15. With regard to the censorship raised by the plaintiffs against the rule allowing the demobilized person's period of residence in the concentration zones to be regarded as completed, on the grounds that this violates the right to justice since it is in fact a covert pardon, the Procurator, after referring to the legal nature of those zones, cites article 9, paragraph 2, subparagraph 6, of Law 782 of 2002, which defines them, as well as the jurisprudence of this Corporation in which the matter in question has been examined, expresses that these zones have been created and established with the purpose of facilitating dialogues, negotiation processes or negotiations tending to conclude agreements with organized armed groups outside the law, by means of which a peaceful solution to the armed conflict is reached.

Although the areas of concentration are not, from the physical point of view, places of confinement in the strict sense, in the framework of a negotiation process it constitutes a restrictive measure of freedom that can validly be considered as part of the execution of the prison sentence that can be imposed on the addressees of Law 975 of 2005, without ignoring the right of the victims to have those responsible for the crimes sentenced and to serve a sentence in accordance with the serious

infraction committed.

This is so because the measures enshrined in the law are aimed at achieving peace, that is to say, it is not a question of the imposition and execution of a sentence deprived of liberty under normal conditions and on a common criminal, but of a particular form of compliance with the sanction, consistent with the demobilization process aimed at finding a peaceful solution to the armed conflict. In addition, given the particular situation in which the demobilized person decides to voluntarily surrender himself to the authorities, renounce his freedom, surrender his weapons, confess his crimes, assume the commitment to surrender illegally acquired assets and make reparations to the victims, it is not openly disproportionate, nor is there any disregard for the right to justice, that part of the time spent effectively in the concentration zone [up to 18 months] be calculated as the time of execution of the alternative sentence, since it undoubtedly entails a restriction of his right to locomotion and the exercise of other freedoms, since in these spaces control and security are the responsibility of the corresponding authorities.

16. In the view of the Procurator-General, articles 13, paragraph 4, and 18, paragraph 2, of Act No. 975 of 2005 violate the constitutional right to equality and reparation for victims, inasmuch as they allow only property derived from illicit activity to be affected by precautionary measures, when in ordinary criminal proceedings the convicted person must respond with all his or her assets if necessary.

In the face of more serious rights, the State's duty is maximized in the face of the victims' right to obtain full reparation, which is directly proportional to the harm suffered as a result of the criminal conduct. Thus, it is inadmissible that the rules demanded exclude the possibility of requesting and obtaining the affectation of all the goods of the defendant in order to obtain full reparation of the damage caused, a power that Laws 600 of 2000 and 906 of 2004 do recognize those affected with the punishable conduct.

The differential treatment between the victims of the processes submitted to the two procedures [the ordinary and special of Law 975 of 2005], is absolutely unjustified, because there is no objective reason that allows it, which otherwise ignores the right of the victims and as such is a privileged treatment for their aggressors.

17. Faced with the claim that articles 47 and 55 of Law 975 of 2005 are unconstitutional, by means of which the Fund for the reparation of victims is created and it is stipulated that the goods delivered will be part of it, the Public Prosecutor's Office, after referring to the purpose of the same in accordance with the provisions of article 54 *idem* and article 15 of Decree 4760 of 2005, argues that in accordance with those provisions and the integral content of the law, it is clear that the acts of disposition carried out by the Fund on the delivered goods must be preceded by a judicial decision declaring the extinction of the action or by a pronouncement in the judgment regarding their situation, inasmuch as until this happens, it will perform the functions of a kidnapper, will administer them and, as stated in article 15 referred to above, will be able to deliver them to the victims provisionally until they are resolved in the judgment. This being so, the charge relating to the loss of the victims' rights over the property delivered is unfounded, since the person who has been dispossessed of them may request the Fund to provisionally deliver them and then prove their ownership.

With respect to the question raised by the actors, in the sense that reparation is subject to the budgetary availability of the Fund, because it impedes the effectiveness of that right, the Fiscal Hearing requests inhibition to pronounce on the merits, For this reason, he argues that the text of the accused provisions does not allow the inference that the responsibility of the convicted person and

the State in the reparation of the victims is limited to the resources of the *Fund for the reparation of the victims*, since the function of this body is to serve as a channel for the resources destined to the satisfaction of this right, not that the one obliged to reparate the victims. It adds that the approach is also based on an uncertain factual assumption, namely that the resources of the national budget allocated to the Fund will be insufficient to meet the costs of complying with the judgements made under Law 975 of 2005.

The position is different with respect to article 47 of the law being sued, since in that case the law attributes this act of reparation [medical and psychological care] to the Fund and limits it to its budget, so that the eventual lack of resources may affect the effectiveness of the victims' right to reparation, which is why a ruling by this Constitutional Court is necessary, (b) The State shall ensure that the conditions for the enforceability of this rule are such that it is understood that the expenses demanded by the rehabilitation of the victims should be covered by the convicted person, as part of his duty to make full reparation to the victim or by the State through the Fund, without the lack of resources justifying the breach of that duty.

18. As for the accusation brought against article 29 of Law 975 of 2004, the Attorney General states that the plaintiffs are unaware that by virtue of articles 10 and 11 of the law, demobilized persons who decide to avail themselves of the legal benefits contemplated therein, and even more so when they have been granted, assume the commitment to cease all illegal activity, whatever it may be, and failure to comply with that obligation results in the loss of the benefit granted and the full execution of the main penalty imposed.

However, it states that the Court will be asked to declare the charges in question exequibidad, but under the understanding that the main penalty will only expire when the term of its prescription is fulfilled, ie that the benefit granted by the law is the suspension of its application, provided that the demobilized not again incur in the crimes for which he was granted the alternative penalty and that the State does not prove that he concealed criminal acts incurred when he belonged to the group outside the law.

19. For the Prosecutor, the typical description of the crime of sedition enshrined in article 71 of the accused law does not substantially modify the description enshrined in article 468 of Law 599 of 2000.

Before beginning the examination of the accused disposition, it clarifies that the conception of this Office on the political crime was already expressed on the occasion of the lawsuit filed against article 50 of Law 782 of 2002, which modified article 19 of Law 418 of 1997, and refers to it again as a parameter to solve the legal problem that arises in the case *sub iudice*.

In this regard, he argues, firstly, that the Political Constitution does not define political crime, granting the legislator a wide margin of normative configuration on this matter. Despite the fact that in the international context it has not been easy to conceive a definition of political crime that completely encompasses its content, historically it has been manifested that it is a lack of knowledge of criminal law by action or omission, committed by political, social or collective interest motives, aimed at conquering and holding power, through the change of the established constitutional order.

After quoting Professor Jiménez de Asúa, he refers to the doctrine of political crime in the international context, to indicate that it has been divided into: i) relative political crime, integrated by the complex crime, which harms the political order and common law; and, ii) related political crime, which harms common law but is linked to political action. Direct and indirect political

crimes are also spoken of at the international level. The former group together the actions that attack the state body head-on, the latter cause damage to some of the state's peripheral institutions.

After briefly referring to the causes, as well as to the differences with the common crime and the purposes in both cases, he expresses that the Constitutional States of Law, by reason of their nature, grant to the political crime a special treatment, with the purpose of persuading those who insist on developing activities outside the law, through the enshrinement of legal concepts such as pardon and amnesty, the former understood as the total or partial pardon of judicially imposed sentences by decision of one of the state powers and the latter as the extinction of criminal action, i.e., the State's renunciation of investigating and sanctioning.

In Colombia, political crime is manifested, among others, in the two aforementioned figures, and in the lack of inability to access public positions in cases of convictions for these types of crimes. Article 150 of the Political Charter establishes the special procedure to which the Congress of the Republic must submit in order to grant pardons or amnesties. Article 201, numeral 2 idem, establishes among the functions of the Government in relation to the judicial branch *"to grant pardons for political crimes, in accordance with the law, and to report to Congress on the exercise of this power. In no case will these pardons be able to understand the responsibility that the favoured ones have with respect to the particulars"*.

Thus, for the Public Prosecutor's Office it is clear that the benefit of pardon is only predictable in relation to the commission of political crimes, an aspect that was widely reiterated by this Corporation when it stated that the Constitution distinguishes political crimes from ordinary crimes in order to impose a more benevolent treatment on the former, thus maintaining a democratic tradition of humanitarian lineage [C-171 of 1993]. This is an assessment, he adds, completely valid for *pure and simple* political crime, that is. "Those manifestations that, although they are not justified in criminal law, do not use means that constitute atrocious crimes, such as terrorism, genocide, kidnapping, torture, disappearances, and among others catalogued as atrocious acts and acts against humanity, which are not compatible with the end sought by the political crime, however, the conception of political crime does not remain in the abstraction of its content, that is to say, that in many events there is an inessential connection with common crimes that can be object of pardon and the political illicit could not be appreciated without subsuming also punishable conducts that in principle are not of the essence of the same one, but that ultimately contribute to the persecuted end. This is the legal reality that the 1991 Constituent Assembly itself addressed when, in a transitional article 30, it provided that it authorized the National Government to grant pardons or amnesties for political and **related** crimes to members of guerrilla groups who are incorporated into civilian life.

"Therefore, on the subject of political crime, the purist theory of political crime is no longer predictable or applicable. Nevertheless, it is not admissible to affirm that all common crimes committed in order to carry out the first one are related; to make this affirmation is to ignore supreme constitutional values, such as human dignity, justice and other constitutional precepts, such as human dignity, justice and other precepts that throughout the Political Constitution vindicate the human being as the axis around which state activity revolves. Therefore, within the conception of the State that governs us, **it should never be admitted that the so-called atrocious crimes can be considered political crimes**, much less that they are subsumed in them.

The Procurator states that international law has insisted, after the great attacks suffered by humanity, on the need not only to proscribe conduct that threatens the integrity and dignity of the human being, but also to warn that they constitute crimes against humanity that cannot be the object of amnesties and pardons, in the hope that laws such as those of end point and due obedience issued

in Argentina and Chile will never be repeated, whose objective was none other than to leave in impunity the innumerable violations of human rights.

Entering the analysis of Article 71 of Law 975 of 2005, the Procurator states that the crime of sedition enshrined in Article 468 of the Criminal Code, both the type and the active subject are indeterminate, that is, committed by any person "[p]ues neither the Constitution nor the law, enshrine special characteristics that identify the persons or groups that may commit that crime and therefore sheltered by the privileges of political crime, i.e., that any individual if at the time of committing the crime is within the circumstances of the type, and its purpose is to subvert the constitutional and legal order, must be tried for sedition.

The Public Prosecutor's Office clarifies that although rebellion and sedition are classified by criminal law as political crimes, both have special characteristics that differentiate them and, therefore, the scope of the conducts in both cases must have a different treatment. In this sense, he adds that this Court has pointed out, referring to sedition, that this crime prevents public powers from fulfilling their constitutional function, be it a law, sentence, decree or any other obligatory measure, preventing the functioning of the legal order through armed coercion. In the rebellion it seeks the substitution of the ruling class totally or partially, while sedition attacks the operability of public powers, impeding their constitutional or legal development [C-099 of 1995].

In view of the foregoing, sedition cannot be confused with rebellion "[t]he argument is not that since illegal self-defense groups are '*allies of the State*' or do not fight against it, they cannot be subjects of sedition, since it is precisely the nature of such conduct that is the object of criminal reproach that does not seek either to change the system or to overthrow the government.

This means that, when article 71 of the Code defines punishable conduct, it is not referring to anything other than indicating that those who make up self-defence groups are also subject to the crime of sedition, without this meaning that members of such organizations become political criminals by law. The accused norm does not disfigure the conception of the political crime, since it maintains the essential elements in the specific event of the crime of sedition, which are attempts against the constitutional and legal order, situation that can be committed by any person, among them the self-defense groups, corresponding to the administration of justice to determine if the conduct committed by these groups conforms to the criminal type of sedition, which in any case is not related to crimes against humanity or drug trafficking; or, on the contrary, they are common crimes that must be judged according to the criminal law.

Under no circumstances should there be amnesties or pardons that preach the connection of political crimes with common crimes that constitute violations against humanity, such as genocide, kidnapping, forced disappearance, torture or displacement, among others. Similarly, amnesties and pardons disguised by laws in which, although in a strict sense they do not have the nature of the institution in question, they do impose derisory penalties in relation to the commission of crimes such as crimes against humanity. In this way, not only would the context of the political crime enshrined in the Charter be ignored, but also the precepts and principles accepted by the international community, through the development of International Human Rights Law and International Humanitarian Law, contained in the international human rights treaties that by force of the block of constitutionality are obligatory for the Colombian State.

Thus, the Procurator requests this Constitutional Court to condition the accused provision, in the sense that the declaration of the crime of sedition of the groups outside the law indicated therein does not imply the recognition of the connection of common crimes that constitute crimes against humanity, such as genocide, kidnapping, forced disappearance, torture, displacement.

20. Finally, the Attorney General of the Nation requests the inhibition to pronounce on the following articles: i) Articles 2, 9, 10, 18, 62 and 69 of the Accused, because they consider that some conducts committed by those who invoke Law 782 of 2002 go unpunished, since the questioning refers to the scope of that law, but not to the normative content of the accused precepts; ii) Article 34 of Law 975, because in the opinion of the actors, the Ombudsman's Office is not allowed to intervene during the entire process, but only during the process of integral reparation, since the law does not specify at any time the intervention of that entity in a particular procedural stage. This is an interpretation of the rule that is completely foreign to its content; and, (iii) of Article 23, because the plaintiffs do not raise a constitutionality issue, they do not formulate a charge that calls into question the enforceability of the accused rule, since the intention is that the Court impose a certain application of the provision.

VI CONSTITUTIONAL COURT CONSIDERATIONS

1. COMPETITION

Under article 241, paragraph 4, of the Constitution, the Constitutional Court is competent to hear actions of unconstitutionality against norms of legal rank, such as the one studied in this lawsuit.

2. STRUCTURE OF THIS JUDGMENT

Due to the diversity and complexity of the charges to be resolved by the Court at this time, the present judgment will follow the following structure:

2.1. First, the charges for defects in the formation procedure of Law 975 of 2005 will be studied.

2.2 Next, in order to analyze the charges of substantive defects, a brief account will be made of (a) the content of the rights to peace, justice, truth, reparation and non-repetition in international human rights law and Colombian constitutional law, as well as (b) the guidelines to be followed by the constitutional judge when it comes to weighing the relationship between peace, justice and the other rights of the victims of violations of human rights that constitute crimes.

2.3. Subsequently, each of the accused rules will be judged in the light of the charges made in the complaint.

3. EXAMINATION OF CHARGES FOR DEFECTS IN THE FORMATION PROCEDURE OF LAW 975 OF 2005.

3.1. Legal-constitutional problems which are the subject of this judgment

As can be deduced from the lawsuit that gave rise to this process, as well as from the various interventions and the concept rendered by the Attorney General of the Nation, the Court will have to analyze whether Law 975 of 2005, due to its content, should have been issued in accordance with the procedure established in the Constitution for statutory laws; whether it is in fact a law by which the Congress of the Republic decreed a pardon or an amnesty without saying so and, if consequently, that law should have been issued subject to the formalities proper to the laws of this kind; and whether or not articles 70 and 71 of the law in question complied with the formalities required by the Constitution to become part of a law of the Republic.

Once the above has been established, the Court will proceed with the examination of the charges for procedural defects raised by the plaintiffs, starting with those which, if successful, would affect the enforceability of the law in its entirety, and then proceed, if they do not succeed, with the analysis of the accusations proposed against some articles of Law 975 of 2005.

3.2. A matter judged in relation to the charge brought for not having processed Law 975 of 2005 through the proper processing of the statutory laws.

3.2.1. The plaintiffs argue that Law 975 of 2005 is unconstitutional because it violates the statutory law reserve. They affirm that this is a law that seeks to regulate and establish mechanisms for the protection of the fundamental rights to truth, justice and reparation, which are part of the right of all persons to have access to the administration of justice (P.C. 228 and 229), and of the procedural guarantees established in article 29 of the Political Charter, as well as the guarantees enshrined in articles 2 of the International Covenant on Civil and Political Rights and 125 of the American Convention on Human Rights. This being so, they affirm that the law in question should have been submitted to the constitutional procedure established in articles 152 and 153 of the Constitution, which was not done by the Congress that processed and issued it as ordinary law.

3.2.2 In this regard, the Court notes that in relation to this aspect of the accusation made in the application, the Court already pronounced itself in Judgment C-319 of 2006, which declared Law 975 of 2005 enforceable, in relation to the same charge now being raised, namely, the violation of articles 152 and 153 above because the respective bill had not been processed as a statutory law.

It should be recalled that in Ruling C-319 of 2006, the Court reiterated the jurisprudential criteria for determining when a law that refers to fundamental rights or to aspects related to the administration of justice must comply with the procedure established in Article 153 of the Constitution for statutory laws. In this ruling it was stated that not every legal regulation of fundamental rights has the nature of a statutory law, but only that which in some way touches its essential nucleus, that is, the set of attributions and powers without which the right would not be recognized, or by which the corresponding right is regulated in an "integral, structural or complete" manner. He explained that since neither of the two assumptions takes place in relation to the accused law, the procedure to be followed was not that of a statutory law. In the same judgment, the Corporation reaffirmed that the regulation of criminal procedure has no statutory law reserve, nor the criminalization of crimes nor the establishment of sanctions. On the other hand, it noted that Law 975 of 2005 does not create a special jurisdiction, but simply attributes to the ordinary jurisdiction a special procedure that must be provided before the Attorney General's Office and the higher courts, so that the general structure of the administration of justice is not affected, nor are general principles or substantial aspects of the Judicial Branch of public power touched upon, which is why this aspect should not be the subject of a statutory law either.

Thus, given that the phenomenon of constitutional *res judicata* has been configured in relation to the charge now formulated, what corresponds is to be based on what was resolved in the aforementioned ruling C-319 of 2006, and this will be indicated in the operative part of this ruling.

3.3 Law 975 of 2005 does not grant covert pardon or amnesty.

3.3.1 The applicants claim that Law 975 of 2005 is unconstitutional in that the requirements set out in the Political Charter for granting pardons and amnesties, namely, secret ballot and qualified majority, were not met, requirements that were not met because the law was processed and issued as an ordinary law.

3.3.2 As is well known, article 150, paragraph 17, of the Constitution establishes, in the interests of peace, the possibility of granting amnesties or general pardons for political crimes by means of a law.

Both amnesty and pardon are granted by the Congress of the Republic as representative of the people, for high reasons of public convenience, with the purpose of achieving peaceful coexistence that is disturbed by those who opted at a given time to subvert the legal-constitutional order. In this regard, rebellion, sedition and assault have been described as political crimes.

According to its purpose, the granting of amnesties or general pardons is exceptional. Given the importance of such decisions for society, the Constitution has established that the corresponding law must be approved by a qualified majority constituted by two thirds of the votes of the members of both Houses, a requirement which, according to the regulations of Congress, shall be fulfilled by secret ballot (CP. art. 150-17 and Law 5 of 1992, art. 131, literal c).

Amnesty extinguishes criminal action, while pardon is an institution that redeems the penalty for the crime. Through the former, the State forgets the crime; when it grants the pardon, it does not ignore it, but exempts it from the penalty that is its legal consequence. Since amnesty refers to the very exercise of the criminal action, its application corresponds to the judges. It is up to the executive to grant a pardon, since if a sentence has already been handed down and the respective sentence has been imposed, the Judicial Branch has already exhausted its functional competence, and once the jurisdiction has been exhausted, it is up to the executive to enforce the convictions. Thus, article 201 of the Constitution gives the Government, in relation to the Judicial Branch, the power to grant pardons for political offences under the law, and the duty to inform Congress of the exercise of that power.

Amnesty by its very nature prevents the continuation of a process that has already been initiated and that has not culminated in a sentence. The pardon does not exempt the criminal process, and if there is a conviction, it cannot be executed. However, if at the time the amnesty law is granted, it is applicable to persons against whom there has already been a conviction, the *res judicata* is excepted and since then the execution of the sentence ceases, for which reason the judge who issued the sentence in the first instance must be informed, an institution known by the doctrine as *improper amnesty*.

3.3.3 Once the notions preceding the analysis of Law 975 of 2005 have been applied, the Court notes that it does not provide for the extinction of criminal action in relation to the crimes that may be imputed to members of armed groups who decide to take advantage of this law.

With regard to the alleged granting of a pardon, there is also no evidence that any of the norms contained in the accused law provide that the penalty with which a process initiated against members of illegal armed groups who decide to avail themselves of that law once imposed by a judicial sentence ceases to be executed. In other words, Law 975 of 2005 does not contain a provision exempting the offender from the enforcement of the criminal sanction. Although it is true that it is subject to a less rigorous criminal legal treatment than that existing in the Criminal Code - if the offender meets certain requirements in relation to the victims and for cooperation with the administration of justice - the truth is that, even so, the penalty does not disappear. This is imposed, but the defendant can - with strict subjection to the requirements and conditions that the legislator pointed out - earn a benefit that could reduce the deprivation of liberty for a while, without it disappearing, a benefit that will be the object of detailed analysis later in this same order.

In the present case, therefore, the budgets defining amnesty and pardon are not given, and it could

therefore be wrong to require the Legislator to carry out a procedure reserved for this type of legal entity for the issuance of the accused law.

Nor does the accused law establish a veiled amnesty or pardon, given that the concept of alternative penal sanctions (art. 3), as well as the characteristics of this institute, are based on the fact that the judge will impose, in the sentence, the ordinary sentence that would correspond to the proven crimes. This point is analysed in detail in section 6.2.1.

3.3.4 In these circumstances, the charge proposed because Law 975 of 2005 was treated as ordinary, although it should have been dealt with under the special procedure provided for laws granting amnesties or general pardons, is not likely to succeed, and this will be stated in the operative part of this judgement.

Articles 70 and 71 of Law 975 of 2005 are unconstitutional due to procedural defects in their formation.

3.4.1 The plaintiffs accuse articles 70 and 71 of Law 975 of 2005 of unconstitutionality for procedural defects in their formation, as well as for substantive defects. With regard to the first aspect, the plaintiffs state that the referred norms correspond to articles 61 and 64 of Bill 293 of 2005 House and 211 of 2005 Senate, which were not approved in the joint session of the first committees of the Senate and the House of Representatives. They add that these articles were the subject of an appeal to the Plenary of the Senate of the Republic, which granted them and ordered their transfer to the Second Committee of the Senate of the Republic, which finally approved them. In the opinion of the plaintiffs, this procedure violated article 180 of Law 5 of 1992 and, consequently, the procedure provided for in the Constitution for draft laws was also unknown.

3.4.2 In this regard, the Court recalls that under the rule of law all inhabitants of the national territory are subject to the rule of the Constitution and the law, and are required to abide strictly by the rules of positive law in order to ensure peaceful coexistence.

Precisely that and no other reason why the exercise of the State's legislative power is attributed in democracies to a collegiate body of popular representation provided for in the Constitution, as it also establishes the rules to which it must be subject for the exercise of that function. In other words, in democracies it is important not only to establish *who* makes the law, but also *how* it is made.

It is for the above-mentioned reason that Title VI of the Constitution establishes rules on legislative procedure, and that constitutional control of laws may be exercised by the Constitutional Court not only because of their material content, but also because of procedural defects in their formation (CP. art. 241-4).

By Ministry of the Political Charter, the Congress of the Republic in addition in the processing of laws must strictly abide by its regulations, which is issued by an organic law to which the exercise of legislative activity is subject, by mandate of Article 151 of the Constitution.

3.4.3. Having examined the procedure printed by Congress on articles 70 and 71 of Law 975 of 2005, and the accusation against them for procedural defects in their formation, the Court found that the plaintiffs were right to have their unconstitutionality declared. The Court reaches such a conclusion for the following reasons:

3.4.3.1. Articles 70 and 71 of Law 975 of 2005 correspond in their order to articles 61 and 64 of Bill

293 of 2005 House and 211 of 2005 Senate.

3.4.3.2. The aforementioned Bill was studied in the first debate in a joint session of the Standing First Committees of the Senate and the House of Representatives.

3.4.3.3 Article 61 of that draft, which was put to the vote, was denied by both the First Committee of the Senate and the First Committee of the House of Representatives. Thus it appears in Act No. 9 of April 6, 2005, page 47, second column, Congressional Gazette No. 407 of June 27, 2005. As for the First Committee of the Senate, fourteen (14) votes were cast, four (4) of them affirmative and ten (10) negative; and the result of the vote in the First Committee of the House, out of a total of nineteen (19) votes cast, was eight (8) affirmative and eleven (11) negative.

3.4.3.4 At the same session, the above-mentioned decision was appealed by Senator Carlos Moreno de Caro and House Representative José Luis Arcila.

3.4.3.5. Article 64 of the aforementioned bill was denied by both the First Standing Committee of the Senate and the First Standing Committee of the House of Representatives. Thus it appears in Act No. 10 of the session of April 11, 2005, Congressional Gazette No. 408 of June 27, 2005, pages 26 and 27. In a first vote, in which a proposal to replace the original text was decided, fourteen (14) votes were cast for the First Committee of the Senate, distributed as follows: three (3) affirmative and eleven (11) negative; in the First Committee of the House of Representatives, twenty (20) votes were cast, three (3) affirmative and seventeen (17) negative.

The text proposed in the paper was then voted on, with the following result: in the First Committee of the Senate of the Republic out of a total of fourteen (14) votes cast, six were affirmative and eight (8) negative; in the First Committee of the House of Representatives out of a total of twenty (20) votes cast, thirteen (13) were affirmative and seven (7) negative.

3.4.3.6. Denied Article 64 of the Bill by the First Commission of the Senate of the Republic, Senator Hernán Andrade Serrano appealed the decision.

3.4.3.7. At the joint session of the First Committees of the Senate of the Republic and the House of Representatives, held on 12 April 2005, a proposal to reopen the discussion on article 61 of the bill was voted on (Congressional Gazette No. 409 of 17 June 2005). In the First Commission of the Senate, sixteen (16) votes were cast, of which six (6) were affirmative and ten (10) negative. In the First Committee of the House of Representatives of the total of twenty-two (22) votes, twelve (12) were affirmative, seven (7) negative, and three (3) Representatives did not vote because they were impeded.

3.4.3.8. Denied then the request to reopen the discussion of article 61 of the bill, Senator Moreno de Caro appealed the decision.

3.4.3.9. By proposal of Representative Reginaldo Montes and Senator Ciro Ramírez, the reopening of the discussion of the original article 64 of the paper was requested. Voted, the First Committee of the Senate cast thirteen (13) votes, of which five (5) were affirmative and eight (8) negative; the First Committee of the House cast sixteen (16) votes in total, fifteen (15) of which were affirmative and one (1) negative. At that time, the Secretariat reported that there was no "decision-making quorum in that legislative cell" (Act No. 10 of 11 April 2005, Congressional Gazette 408 of 27 June 2005, page 30).

3.4.3.10. On the basis of a report by Subcommittees appointed for this purpose, the Executive

Boards of the Senate of the Republic and the House of Representatives referred articles 61 and 64 of the bill in their order to the Second Committee of the Senate and the Third Committee of the House of Representatives, so that they could decide on appeals filed against the decision of the Permanent First Constitutional Committees to deny them.

3.4.3.11. In the Second Committee of the Senate, articles 61 and 64 of the bill were approved on 1 June 2005 and, on the same date, by the Third Committee of the House of Representatives (Congressional Gazette 318 of 3 June 2005).

3.4.3.12. Articles 61 and 64 of the bill were approved in the Plenary Session of the Senate on June 20, 2005, as it appears in Minute No. 54, published in the Congressional Gazette 522 of August 12, 2005. In addition, it was decided that these articles, which did not form part of the text approved by the Permanent First Constitutional Commissions, would be reinstated into the draft law.

3.4.3.13. In order to complete the processing of this bill, the President of the Republic convened extraordinary sessions of Congress by Decree 2050 of 20 June 2005, which were to be held on 21, 22 and 23 June of that year.

3.4.3.14. Once the processing of the bill was concluded in the extraordinary sessions, it was finally sanctioned by the President of the Republic as Law 975 of July 25, 2005.

3.4.3.15. The appeal of the decision of the Standing Constitutional Committees of the Senate and the House of Representatives was processed by invoking for this purpose articles 166 and 180 of Law 5 of 1992.

Synthesized as the procedure that was given to these appeals was, it must be established by the Court if there were procedural defects, or if on the contrary its processing conforms to the Political Constitution and the Rules of Procedure of Congress.

3.4.3.16. In accordance with the provisions of Article 157 of the Charter, any bill to become law requires, among other requirements, "To have been approved in the first debate in the corresponding permanent committee of each House," and then, "To have been approved in each House in the second debate.

The second debate does not come if it was denied in the first debate by the respective committee, which is hardly logical. However, the Constituent itself established the possibility of appealing this decision of the commission before the plenary of the respective chamber, for which it legitimized its author, a member of it, the government or the spokesperson of the proponents in cases of projects presented by popular initiative (CP. art. 159).

In line with the constitutional norm just mentioned, Law 5 of 1992 establishes that "Denied a bill **in its entirety** or filed indefinitely" (negrilla out of text), can be the subject of appeal before the plenary of the respective chamber, which after report of an accidental committee will decide whether to accept or reject the appeal in such a way that if the first occurs, "the presidency will refer the bill to another constitutional commission to complete the procedure in first debate" and, if the second occurs, the bill is filed.

However, the Political Constitution, in several of its provisions, assumes that a draft law refers to a specific matter whose regulation is proposed in several articles that make up a legal unit. Thus it appears that article 155 of the Constitution, when regulating popular initiative, refers to those who are legitimized to "present bills"; article 156 indicates that they will have special legislative

initiative to "present bills in matters related to their functions" some State agencies; article 157 establishes the requirements for a "bill" to become law; Article 158 states that "every bill must refer to the same subject matter"; Article 160 indicates a period of time that must mediate between the first and the second debate and between "the approval of the bill in one of the chambers and the initiation of the debate in the other"; Article 161 establishes that the accidental commissions that are authorized there must be named "when discrepancies arise in the chambers regarding a bill"; Article 162 provides that "no bill may be considered in more than two legislatures"; article 163 authorizes the President of the Republic to request an emergency procedure for any bill; the same article orders the joint deliberation of the standing committees of both houses when sending an emergency message if the bill is under consideration by a committee; Article 164 mandates the prioritization of bills approving human rights treaties; Article 165 provides that a bill approved by both houses passes to the government for sanction; Article 166 sets the term during which the government may return a bill to Congress with objections, depending on the number of articles making it up; Article 167 refers to the total or partial objection to the bill.

In this constitutional context, it is clear that article 159 of the Charter provides for the possibility of appealing to the plenaries of the respective chambers when *a bill* is not approved in the first debate by the relevant committee. Such a hypothesis is different from the simple negation of one of the articles making up the draft. It is evident that in the procedure foreseen in the Constitution for the formation of the law this can happen, without necessarily failing the process of the bill itself, since it can happen that the Congress approves the bill without one of the articles initially proposed.

However, the Constitution itself establishes that in the report to the full chamber for second debate it is the duty of the speaker to record all the proposals that were considered by the committee and the reasons that led to the rejection of some of them, and expressly states that in the second debate modifications, additions and deletions deemed necessary may be introduced into the draft (CP. art. 160). This means, as it is easy to see, that what was initially rejected could be presented as an addition in the second debate. This is the democratic sense of the formation of the law through the successive deliberation of the commissions and plenaries of each of the chambers, which excludes absolute identity and authorizes instead the flexible identity of the project.

In this regard, the Court said, with regard to the processing of a draft legislative act, which is applicable to the point, that: *"The question that arises is this: Does the improbability, in any debate of a provision included in the draft Legislative Act, imply the paralysis of the processing of it, in its entirety? For the Court, it is clear that the bill must continue to be processed and even more so, the precept not approved in the first debate may be included later by the plenary of the corresponding Chamber, since this is authorized by Article 160 of the Constitution, which states that "during the second debate each Chamber may introduce to the bill the modifications, additions and deletions it deems necessary". And, logically, it couldn't be any other way. Since if the majority of the plenary introduces a modification to the text approved in the Commission and in the Commission the change does not have the necessary majority of votes, it would have to be concluded that the will of a minority group of congressmen would prevail over the majority will of the respective corporation"*⁽¹³⁾.

3.4.3.17. In view of the procedure given by Congress to articles 61 and 64 of the bill in question, which became articles 70 and 71 of Law 975 of 2005, it is evident that articles 159 of the Political Constitution, 166 and 180 of Law 5 of 1992 were applied to them without it being appropriate, a circumstance that results in the unconstitutionality of the accused norms.

In fact, as has already been demonstrated by the bill of which articles 61 and 64 appear under numbers 70 and 71 of Law 975 of 2005 were part, it was never denied by the Permanent First

Constitutional Commissions of the Senate of the Republic and of the House of Representatives in its entirety. This means, then, that the factual hypothesis foreseen in article 159 of the Constitution was never configured to appeal it, since this norm of the Charter authorizes the appeal when *the project* had been denied in the first debate, which did not happen. This is evident if it is observed that a paper was submitted for second debate to the Plenary of the Senate without including the articles of the bill that had been denied in the First Commission, and it is reinforced even more with the report of the Second Commission on the approval by it of these two articles and the decision of the plenary to incorporate them into the bill that was then being processed.

As it is equally clear the mistake that led to an ostensible and serious infringement of Article 159 of the Charter, it also implied the violation of Article 166 of Law 5 of 1992, which - in order to develop that - precept that the decision of a committee may be appealed before the plenary of the respective chamber when a bill has been denied in its entirety or filed indefinitely. It also means that article 151 of the Charter, which directs Congress to submit to the organic law through which its regulations are issued in the exercise of legislative activity, was also violated.

In the same way, it is beyond any discussion that in any way could be applied in this case to Article 180 of Law 5 of 1992, which prescribes the admission for processing in plenary of amendments to the bill that without having been processed in the first debate are intended to correct errors or technical, terminological and grammatical errors, and adds that amendments denied in the first debate will not be considered, unless they are submitted through the appeal procedure.

Much less, it could be thought to advance the constitutionality of articles 70 and 71 of Law 975 of 2005 that are now being examined, that what was done by the Congress of the Republic to approve them, was to resolve a discrepancy that would have arisen between the plenaries of the chambers and the permanent constitutional commissions around the bill. The discrepancy arises when one and the other have points of divergence. But this does not exist if the plenary has not had the opportunity to pronounce on the matter. Here, it is absolutely clear that the first commissions pronounced on the draft and that this was the case before the respective plenary. This means that the plenary did not receive the unapproved articles, but the report of their rejection. If this is so, there was never any pronouncement of the latter on the article rejected in those. In other words, there was no disagreement on the matter. Moreover, what article 177 of Law 5 of 1992 regulates is a totally different hypothesis, since it precepts that discrepancies between plenary sessions and commissions on a bill, "shall not correspond to new matters, or not approved, or denied in the respective permanent commission. If so, the same commissions will reconsider the novelty and decide on it, after submitting the project prepared by the Corporation. What happened here is crystal clear: there was no disagreement for the reasons already said, and if it had existed on new matters, or not approved, or denied in the committees, what was appropriate was the referral of the draft to the same committees for reconsideration, which was not only because there was no disagreement, but also because if there had been, the referral of the draft should have been ordered to the respective committee and in the case under consideration it was sent to different committees. This circumstance necessarily leads to affirm that neither can article 177 of Law 5 of 1992 be invoked in this case to support the constitutionality of articles 70 and 71 of Law 975 of 2005, since the norm to which reference has been made is notoriously impertinent for that purpose.

In short, with the procedure given to articles 70 and 71 of Law 975/05, the principle of consecutivity was ignored, since as a result of the undue processing of the appeal presented in the Senate before the decision to deny them adopted by the Permanent First Constitutional Commissions, they were finally referred to Constitutional Commissions that were not competent; and once approved by the latter without having the competence to do so, they were introduced in an irregular manner in the second debate before the plenary of the Senate, as if they had been approved

by the Constitutional Commissions empowered to do so.

3.4.4. In these circumstances, it must be concluded that Articles 70 and 71 of the Code of Criminal Procedure are unconstitutional because of procedural defects in their formation, and this will be pointed out in the operative part of this judgment.

Since these articles are unconstitutional for the reasons noted above, it is not necessary for the Court to examine the other charges brought in the lawsuit against these articles.

4. THE RIGHTS TO PEACE, TRUTH, JUSTICE AND REPARATION IN INTERNATIONAL LAW AND IN CONSTITUTIONAL AND INTER-AMERICAN JURISPRUDENCE.

4.1. The Right to Peace.

4.1.1. Peace can be considered as one of the fundamental purposes of International Law. This is evident in the Preamble to the Charter of the United Nations, in several of the provisions of the Charter itself, in the Preamble to the Universal Declaration of Human Rights, as well as in the Preamble and Charter of the Organization of American States. Also in the American context, both in the Covenant on Civil and Political Rights and in the Covenant on Economic, Social and Cultural Rights, signed in 1966, Peace appears as the end to which the recognition of the rights mentioned therein is directed.

4.1.2 For its part, the Political Constitution in its Preamble also states that the people of Colombia *"in the exercise of their sovereign power, represented by their delegates to the National Constituent Assembly, invoking the protection of God, and in order to strengthen...peace..."* decree sanctions and promulgates the Constitution. In this way, Peace in the internal constitutional order also occupies the position of fundamental value, as the Constitutional Court has highlighted in this way:

"In the first place, the Court notes that peace occupies a very important place in the order of values protected by the Constitution. In the spirit that the Political Charter had the vocation to be a peace treaty, the Constituent Assembly protected the value of peace in different ways in various provisions. For example, in the Preamble, peace appears as an end that guided the constituent in the elaboration of the entire Constitution. In article 2, this cardinal national purpose is specified in an essential purpose of the State, which is to "ensure peaceful coexistence and the maintenance of a just order". In addition, article 22 goes further by stating that "peace is a binding right and duty". Among the many instruments to facilitate the achievement of peace, the Constitution regulated procedures for the institutional resolution of conflicts and the effective protection of fundamental rights, such as the tutela action (article 86 CP.). Furthermore, without being limited to a peace process, the Constitution allows for "serious reasons of public convenience" to grant amnesties or pardons for political crimes and established clear requirements for this to be in accordance with the Charter...".

4.1.3. However, Peace accepted as a collective national and international purpose can be considered as the absence of conflicts or violent confrontations (minimum nucleus), as an effective social harmony resulting from full compliance with the mandates of optimisation contained in human rights norms (maximum development) or as the attenuation of the rigours of war and the

"humanisation" of conflict situations (International Humanitarian Law as a manifestation of the right to Peace in times of war). These diverse ways of understanding Peace have led to different legal analyses of the concept, both in International Law and in Constitutional Law.

4.1.4. Indeed, from a first point of view, Peace in International Law has been understood as a *collective right* at the head of Humanity, within the third generation of rights; in this sense it is important to point out the doctrinal relevance of the preliminary draft of the International Covenant that enshrines Third Generation Human Rights, drawn up by the International Human Rights Foundation, which recognises the right to peace for all human beings taken collectively, both nationally and internationally. In the same sense, article 22 of the Political Constitution also confers on Peace this same character, saying that it is "*a right and a duty of obligatory fulfillment*". Certainly, this Corporation, explaining this scope of Peace as a collective right, which emanates from this superior provision, has expressed the following considerations:

"Article 22 of the N.C. contains the right to peace and the duty of its obligatory fulfillment, a **right that by its very nature belongs to the rights of the third generation**, and requires the assistance for its achievement of the most varied social, political, economic and ideological factors that, reciprocally, can be demanded of it without it becoming a reality due to its concursal or solidary nature. This interpretation finds an additional foundation in the provisions of Art. 88 of the N.C. that enshrines Popular Actions as a specialized mechanism for the protection of collective rights and interests related to heritage, space, security and public health..." and others of a similar nature that define it". This is how the legislator understood it when he issued Decree 2591 when he pointed out the impropriety of the Guardianship Action to protect collective rights such as peace and the others contemplated in Article 88 of the Political Constitution. (Bold and underlined out of original)

4.1.5. Notwithstanding the foregoing, peace is also increasingly emerging, both in international law and in constitutional case law, as a fundamental *subjective right* of each individual human being, who in turn has the corresponding *legal duty* to seek social peace. As far as international law is concerned, although peace is not yet explicitly enshrined in the Charter of the United Nations as a subjective right or duty, UNESCO adopted the following articles in November 1997:

"Article 1: Peace as a human right.

"Every human being has the right to the peace that is inherent in his dignity as a human person.

"War and any armed conflict, violence in all its forms, whatever its origin, as well as the insecurity of persons, are intrinsically incompatible with the human right to peace.

"The human right to peace must be guaranteed, respected and put into practice without any discrimination, both domestically and internationally, by all states and all members of the international community.

"Article 2: Peace as a duty

"All human beings, all states and other members of the international community and all peoples have the duty to contribute to the maintenance and construction of peace, as well as to the prevention of armed conflict and violence in all its forms. It is incumbent upon them to promote disarmament and to oppose by all legitimate means acts of aggression and systematic, massive and flagrant violations of human rights that constitute a threat to

peace.

Inequalities, exclusion and poverty are likely to lead to the violation of international peace and internal peace, and it is the duty of states to promote and stimulate social justice, both in their territory and in the international arena, particularly through a policy appropriate to sustainable human development.

In the same sense, it is interesting doctrinally the aforementioned draft International Covenant that enshrines Third Generation Human Rights, elaborated by the International Human Rights Foundation, which also recognizes the right to peace for all human beings as individuals.

4.1.6. Similarly, the Court has referred to this subjective aspect of peace, pointing out that "*(t)he minimum to peace thus constitutes a fundamental right since the effectiveness of the other civil and political rights of the person depends on its guarantee*". And as a legal duty of every citizen, it should be remembered that article 95 above, in listing the duties of the person and of the citizen, includes in its sixth numeral that of "*Propender to the achievement and maintenance of peace*". Regarding this norm, the Court has indicated that peace is not something that exclusively concerns State agencies and officials, but that it concerns all Colombians, as stated in Article 22 of the Constitution, whose tenor is a right of all and a duty of obligatory compliance.

4.1.7. Thus, both in international law and in the Political Constitution, peace has a multifaceted character, since it is both an end pursued by the international and national communities, a collective right within the third generation of rights, and under certain aspects a fundamental subjective right to which a personal duty corresponds. This Corporation has referred to this reality in the following manner:

"A peculiar characteristic of the right to peace is the multiplicity of its form of exercise. It is a right of autonomy insofar as it is forbidden to interference by public authorities and private individuals, which in turn demands a correlative legal duty of abstention; a right of participation, in the sense that its holder is empowered to intervene in public affairs as an active member of the political community; a power of exigency vis-à-vis the State and private individuals to demand the fulfilment of obligations to do. As a right that belongs to everyone, it implies for each member of the community, among other rights, that of living in a society that excludes violence as a means of resolving conflicts, that of preventing or denouncing the execution of acts that violate human rights and that of being protected against any act of arbitrariness, violence or terrorism. Peaceful coexistence is a basic end of the State and must be the ultimate motive of the forces of constitutional order. Peace is also a presupposition of the democratic process, free and open, and a necessary condition for the effective enjoyment of fundamental rights. " (Bold out of original)

4.1.8. In conclusion of all the above, it can be affirmed that Peace constitutes (i) one of the fundamental purposes of International Law; (ii) a fundamental end of the Colombian State; (iii) a collective right at the head of Humanity, within the third generation of rights; (iv) a subjective right of each one of the individually considered human beings; and (v) a legal duty of each one of the Colombian citizens, to whom it corresponds to tend to its achievement and maintenance.

Transitional justice towards peace in a democracy with stable and solid judicial institutions.

4.2.1. Since the second half of the twentieth century, international law has evolved towards a considerable increase in the commitments of States to respect and promote human rights as a guarantee of peace. Numerous international covenants and conventions of a universal or regional nature have since linked nations in this common commitment. In addition, judicial mechanisms have been strengthened to give effect to the international obligations of States in this area, the recognition and special protection of dignity and human rights have evolved even in times of war through the consolidation of international humanitarian law, and the individual criminal responsibility of perpetrators of serious human rights violations and the obligation to punish it has been universally accepted.

4.2.2. Within this panorama of evolution towards the international protection of human rights, the community of nations has turned its attention to those States in which processes of transition towards democracy or of re-establishment of internal peace and consolidation of the principles of the rule of law are underway. The international community has recognized the importance of achieving these social objectives of Peace, but has emphasized that these circumstances of transition cannot lead to a relaxation of the international obligations of States in the universal commitment to respect for dignity and human rights. In this context, it has been understood that the need to conclude political reconciliation agreements with broad social groups requires some flexibility in the application of the principles that dominate the exercise of the judicial function. With certain restrictions, amnesties, pardons, penalty reductions or judicial administration mechanisms are accepted that are quicker than ordinary ones, that encourage the prompt abandonment of arms or abuses, as mechanisms that facilitate the recovery of social harmony. The international community has recognized this reality, admitting a special form of administration of justice for these situations of transition to peace, which it has called "transitional justice" or "transitional justice," but has not yielded to its demand that violations of fundamental rights be investigated, prosecuted and repaired, and that the perpetrators contribute to identifying the truth of the crimes committed and receive some type of sanction.

4.2.3. In his 2004 annual report, the UN Secretary-General, referring to the notion of 'transitional justice', stated that *'it encompasses the full range of processes and mechanisms associated with a society's attempts to resolve problems arising from a past of large-scale abuses, in order to hold those responsible accountable for their actions, to serve justice and to achieve reconciliation'*. Such mechanisms, he added, *"can be judicial or extrajudicial, and have different levels of international participation (or lack thereof altogether) as well as encompassing the prosecution of persons, redress, truth seeking, institutional reform, vetting, removal from office or combinations of all of them.*

4.2.4. The previous declaration highlights the admission of a new notion of Justice in the context of the international community, which attends to the need to achieve the effectiveness of the right to peace in those societies in conflict situations, but which at the same time seeks to respond, even in these circumstances, to the imperative to prosecute and redress serious violations of human rights and international humanitarian law and to achieve the clarification of the truth in this regard, a new notion of justice that operates within the transition from one period of violence to another of peace-building and the rule of law, or from authoritarianism to another of respect for democratic pluralism.

4.2.5. Transitional justice thus admits a tension between the social objective of achieving an effective transition to peace or democracy, and the rights of victims to have rights violations investigated, prosecuted and punished by the state, and to have effective reparation achieved. In order to resolve this tension, International Law, on the basis that the commitments of States to

respect human rights are not suspended or interrupted by transitional circumstances, formulates certain guidelines in order to ensure minimum standards in the areas of justice, truth and reparation. The Court will then (i) briefly review the State's commitments contained in covenants or conventions on human rights and international humanitarian law regarding its obligation to investigate, prosecute and punish human rights violations, (ii) analyze the pronouncements of the Inter-American Court of Human Rights that contain the authoritative interpretation of the State's international obligations in the areas of truth, justice and reparation for such a category of violations, and (iii) study the guidelines established by other international bodies in the same area.

4.3. Treaties binding on Colombia.

4.3.1. The treaties on Human Rights and International Humanitarian Law do not specifically recognise the rights to peace, truth, justice and reparation, but they do relate (i) to the need for an effective remedy; (ii) to the duty of States to ensure access to justice; (iii) to the duty to investigate violations of Human Rights and International Humanitarian Law; and (iv) to the obligation of States to cooperate in the prevention and punishment of international crimes and serious violations of Human Rights, as they become apparent:

4.3.2. *International Covenant on Civil and Political Rights.* The State's obligations regarding the investigation, prosecution and punishment of human rights violations find a first explicit normative basis in the International Covenant on Civil and Political Rights. Article 2, paragraph 3 (a), of the Covenant provides that *"any person whose rights or freedoms as recognized in the present Covenant have been violated may avail himself of an effective remedy, even if such violation has been committed by persons acting in an official capacity"*.

With regard to this general legal obligation, the Human Rights Committee, in General Comment No. 31 of 26 May 2004, noted the following:

"15. Article 2, paragraph 3, provides that, in addition to effectively protecting the rights recognized in the Covenant, **States parties shall ensure that all persons have accessible and effective remedies to claim those rights. These resources must be adequately adapted to take into account the special vulnerability of certain classes of persons**, in particular children. **The Committee attaches importance to the State party establishing in domestic law adequate judicial and administrative mechanisms for hearing complaints about violations of rights.** The Committee notes that the judiciary may guarantee the enjoyment of Covenant rights in different ways, including through direct application of the Covenant, application of constitutional or similar legislative provisions, or the effect of interpretation of the Covenant on the application of domestic law. In particular, administrative mechanisms are required to implement the general obligation to investigate allegations of violations promptly, thoroughly and effectively by independent and impartial bodies. National human rights institutions with relevant powers may contribute to this end. **The failure of a State party to investigate allegations of violations may in itself constitute a violation of the Covenant.** The cessation of the violation is an indispensable element of the right to an effective remedy.

"16. Article 2, paragraph 3, requires States parties to provide redress to persons whose Covenant rights have been violated. **In addition to the explicit reparations indicated in articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally provides for appropriate compensation.** The Committee notes

that, where appropriate, reparation may take the form of restitution, rehabilitation and satisfaction measures, including public apologies and official testimonies, guarantees to prevent recidivism and reform of applicable laws and practices, and prosecution of perpetrators of human rights violations.

17. In general, the objectives of the Covenant would be shattered without the basic obligation under article 2 to take measures to prevent a repetition of a violation of the Covenant...". (Bold out of original)

As can be seen, the above interpretation of the State obligation assumed in subparagraph (a) of paragraph 3 of article 2 of the International Covenant on Civil and Political Rights implies that the remedies referred to in this norm (i) are available to everyone, and are adequate so that even particularly vulnerable subjects may have access to them; (ii) are effective in vindicating the fundamental rights protected by the Covenant, and (iii) guarantee that complaints of violations of rights are investigated in a prompt, detailed and effective manner by independent and impartial bodies. In addition, the interpretation of the norm requires that there be reparation for persons whose rights under the Covenant have been violated, which implies "generally" the granting of appropriate compensation.

Finally, it should be noted that the Commission considers that the international obligations assumed in the Covenant are substantially breached when the State party fails to investigate allegations of violations of protected rights, or when no redress is provided to persons whose rights have been violated.

4.3.3. American Convention on Human Rights. Articles 1, 2, 8, and 25 of the *American Convention on Human Rights* prescribe, with respect to state obligations to investigate and prosecute violations of human rights, that States Parties undertake to respect the rights and freedoms recognized in that Convention and "to guarantee the free and full exercise thereof to all persons subject to their jurisdiction, without discrimination of any kind" (Article 1-1); and to adopt "such legislative or other measures as may be necessary to give effect to such rights and freedoms" (Article 2). In addition, the Convention states that "**everyone has the right to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial court or tribunal previously established by law**", inter alia, for "**the determination of his rights and obligations of a civil, labour, fiscal or any other character**" (Article 8), and adds that "**everyone has the right to a simple and prompt remedy or any other effective remedy before the competent courts or tribunals for acts violating his rights ...**".

This normative plexus, as can be seen, is intended to impose on the signatory States the obligation to investigate and judge those who do not know the rights recognized in the aforementioned Convention, and to provide the victims of such violations with judicial remedies to demand such investigation and judgement. Analyzing the scope of the aforementioned norms of the American Convention, the Inter-American Commission on Human Rights has said the following:

"According to these norms and their authorized interpretation, the member states of the OAS have the duty to organize the governmental apparatus and all the structures through which public power is exercised in such a way that they are capable of legally guaranteeing the free and full exercise of human rights and of preventing, investigating, judging, and sanctioning their violation. This obligation is independent of whether the perpetrators of the crimes are agents of public power or private

individuals. Whenever the crimes are public action or prosecutable ex officio, the State is the owner of the punitive action and is responsible for promoting and promoting the different procedural stages, in compliance with its obligation to guarantee the right to justice of the victims and their families, seriously and not as a simple formality condemned beforehand to be unsuccessful.

From the foregoing interpretation, it emerges that it is a state obligation, which commits all organs of public power to establish mechanisms that allow them to prevent, investigate, judge, and punish the violation of human rights protected by the American Convention. In addition, with regard to the judicial process of investigation, trial, and punishment of such violations, the Inter-American Commission understands that the State is obligated to promote the corresponding procedural stages ex officio, so that the right to justice of the victims and their families does not turn out to be only formal, but that it reaches an effective realization.

4.3.4. *"Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"*, and the *"Inter-American Convention to Prevent and Punish Torture"*. These two conventions reaffirm that any act of torture or cruel, inhuman or degrading treatment or punishment constitutes an offence against human dignity and violates human rights, for which reason it is the commitment of the signatory States to adopt measures to prevent and punish them. Among the specific obligations assumed by States for these purposes is that of guaranteeing any person who alleges that he or she has been subjected to torture the right to have his or her case examined impartially. They also undertake to investigate ex officio any cases of torture that they have a complaint or good reason to believe have been committed, opening the relevant criminal proceedings, and to incorporate into national legislation rules guaranteeing adequate compensation for victims of the crime of torture.

4.3.5. *"Inter-American Convention on Forced Disappearance of Persons."* In this Convention, the American signatory States assume that the forced disappearance of persons violates multiple essential human rights, for which they undertake not to practice it or allow it to be practiced, and to punish the perpetrators of this crime, their accomplices and cover-ups. In addition, to take legislative measures to define the offence, the criminal action of which is not subject to the statute of limitations.

4.3.6. *Relevant provisions of international humanitarian law.* The Inter-American Commission on Human Rights has interpreted state obligations in the area of justice in the case of serious breaches of international humanitarian law, and without prejudice to what this Constitutional Court has already said regarding amnesties at the end of hostilities:

"The protections derived from the right to due process and judicial protection applicable in international and non-international armed conflicts, provided for in the Geneva Conventions, correspond substantially to the protections of international human rights law and require States to prosecute and punish persons who commit or order the commission of serious breaches of international humanitarian law. These obligations cannot be derogated from on account of the duration of the conflict. In cases where, for example, international humanitarian law prescribes minimum standards of due process, States cannot resort to permissible derogations under international human rights law. This criterion is supported by Articles 27 and 29 of the American Convention, which prohibit derogations inconsistent with the State's other obligations under

international law and prohibit any interpretation of the Convention that restricts the enjoyment of the exercise of a right or freedom recognized by virtue of another convention to which the State is a party. (Bold and underlined out of the original)

Note how the Commission shows that International Humanitarian Law enshrines protections derived from the right to due process and judicial protection applicable in non-international conflicts, and that these are guarantees that cannot be derogated from because of the duration of the conflict. In other words, the obligations of investigation and prosecution are inexcusable because of the conflict. This does not prevent Congress from adopting amnesty and pardon laws under certain strict conditions, but without ignoring the parameters set out in the Constitution and relevant international law.

4.3.7. Convention on the Prevention and Punishment of the Crime of Genocide.

This Convention is based on the assumption that genocide is a crime under international law, for which the contracting parties undertake to prevent and punish it criminally. The Convention defines what is to be understood by genocide, pointing out that in no case can this crime be considered to be of a political nature. Clarifies that persons accused of genocide shall be tried by a competent court of the State in which the crime was committed, or before the International Criminal Court which has jurisdiction over those Contracting Parties which have recognized its jurisdiction.

4.3.8. The Statute of the International Criminal Court.

The Rome Statute, which created the International Criminal Court, is probably the greatest international instrument for the protection of human rights and international humanitarian law. As defined in the Preamble to the Statute, the spirit that prompted the creation of this Court was the recognition that *"the most serious crimes of concern to the international community as a whole must not go unpunished and that, to this end, measures must be adopted at the national level and international cooperation intensified to ensure that they are effectively brought to justice.* However, the jurisdiction of the International Criminal Court is established for the trial of the most serious violations of fundamental rights and international humanitarian law, and is complementary in nature to that of the jurisdiction of the State party. This means that the jurisdiction of the International Criminal Court can only be exercised when one of the signatory States has no capacity or willingness to administer justice in respect of those cases for which the Court was established.

4.4. Inter-American Jurisprudence on the Right to Justice, to Investigation and Knowledge of the Truth, to Reparation for Victims, and to Non-Repetition.

4.4.1. Because of its relevance as a source of international law that is binding on Colombia, since these are decisions that express the authentic interpretation of the rights protected by the American Convention on Human Rights, the Court will transcribe some of the most relevant sections of some of the Judgments of the Inter-American Court of Human Rights relating to standards of justice, non-repetition, truth and reparation for the victims of serious violations of international human rights law and international humanitarian law. Among the matters specified in these decisions, without prejudice to the decisions adopted by a State to achieve peace within the respect of constitutional and international parameters, are (i) the obligation of the State to prevent serious violations of human rights, to investigate them when they occur, to prosecute and punish those responsible, and to obtain reparation for the victims; (ii) the incompatibility of amnesty laws, statutes of limitation, and the establishment of liability exclusions for serious violations of

fundamental rights recognized in the American Convention on Human Rights; (iii) the right of access to justice for victims of serious violations of human rights and the relationship of this right to the reasonableness of the deadlines within which judicial decisions must be taken; (iv) the non-derogation of the obligations of the States parties to the American Convention in matters of investigation, prosecution and punishment of human rights violations, while peace processes are underway; (v) the aspects included in the duty to make reparation for serious violations of human rights; (vi) the aspects involved in the right of family members and society in general to know the truth, etc.

4.4.2 Judgment of the Inter-American Court of Human Rights of January 20, 1989

This ruling is important in terms of the obligation of states to prevent, investigate, prosecute and punish violations of human rights recognized by the American Convention on Human Rights, as well as to compensate the victims of such atrocities. As for the *obligation to prevent* such attacks, the ruling states that, although it is a means and not a result, it involves the positive adoption of legal, political, administrative and even cultural measures, which, although they may be of various natures, must be aimed at preventing such acts from happening even though "it is not demonstrated that they have not been complied with by the mere fact that a right has been violated". As for the *obligation to investigate*, the judgement cited recalls that any situation in which the human rights protected by the Convention have been violated must be investigated, and that when individuals or groups of individuals are tolerated to act freely or with impunity to the detriment of such human rights, that obligation is substantially breached. The ruling adds that the obligation to investigate is also an obligation of means that is not breached by the mere fact that the investigation does not produce a satisfactory result. Finally, the Court warns that state responsibility for the prevention, investigation and prosecution of human rights violations recognized by the American convention subsists regardless of changes of government over time. In fact, on all these matters, the considerations of the Inter-American Court of Human Rights expressed at that time are transcribed *in extenso* below:

"The State has a legal duty to reasonably prevent human rights violations, to investigate seriously with the means at its disposal violations committed within the scope of its jurisdiction in order to identify those responsible, to impose appropriate sanctions on them and to ensure adequate reparation for the victim.

The duty of prevention encompasses all legal, political, administrative and cultural measures that promote the safeguarding of human rights and that ensure that possible violations of human rights are effectively considered and treated as an illegal act that, as such, is liable to result in sanctions for the perpetrator, as well as the obligation to compensate victims for its harmful consequences. It is not possible to enumerate in detail these measures, which vary according to the right in question and the specific conditions of each State party, although it is clear that the obligation to prevent is one of means or behaviour and is not demonstrated by the mere fact that a right has been violated.

...

187. The State is also obliged to investigate any situation in which the human rights protected by the Convention have been violated. If the State apparatus acts in such a way that such violation goes unpunished and the victim is not restored to the fullest extent of his rights as soon as possible, it can be said that he has failed in his

duty to guarantee the free and full exercise of those rights to persons subject to his jurisdiction. The same is true when individuals or groups of individuals are tolerated to act freely or with impunity to the detriment of the human rights recognized in the Convention.

In certain circumstances, it may be difficult to investigate facts that violate the rights of the individual. The obligation to investigate is, like the obligation to prevent, an obligation of means or behavior that is not breached by the mere fact that the investigation does not produce a satisfactory result. However, it should be undertaken seriously and not as a simple formality condemned beforehand to be fruitless. It must have a meaning and be assumed by the State as a legal duty of its own and not as a simple management of particular interests, which depends on the procedural initiative of the victim or his relatives or on the private provision of evidence, without the public authority effectively seeking the truth. This assessment is valid whatever the agent to whom the violation may eventually be attributed, even private individuals, because, if their facts are not seriously investigated, they would be, in a certain way, aided by the public power, which would compromise the international responsibility of the State.

...

The duty to investigate facts of this kind subsists as long as there is uncertainty about the final fate of the disappeared person. Even if legitimate circumstances of the domestic legal order do not permit the application of the corresponding sanctions to those individually responsible for crimes of this nature, the right of the victim's next of kin to know the fate of the victim and, if applicable, where his remains are found, represents a just expectation that the State must satisfy with the means at its disposal.

194. According to the international law principle of the identity or continuity of the State, responsibility subsists independently of changes of government over time and, specifically, between the time when the wrongful act giving rise to responsibility is committed and the time when it is declared. This is also true in the field of human rights although, from an ethical or political point of view, the attitude of the new government is much more respectful of those rights than that of the government at the time when the violations occurred.

4.4.3 Judgment of the Inter-American Court of Human Rights of March 14, 2001.

In this Judgment, the Inter-American Court referred to the inadmissibility of amnesty laws, statutes of limitation, and the establishment of liability exclusions for serious violations of fundamental rights recognized in the American Convention on Human Rights. It also upheld the right of family members to know the truth about human rights violations and the right to reparation for the same violations. Among the considerations that were presented in this regard are the following:

"Incompatibility of Amnesty Laws with the Convention

41. This Court considers inadmissible amnesty provisions, statutes of limitation and the establishment of liability exclusions intended to impede the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extralegal or arbitrary executions and forced

disappearances, all of which are prohibited for contravening non-derogable rights recognized by international human rights law.

42. The Court, as alleged by the Commission and not disputed by the State, considers that the amnesty laws adopted by Peru prevented the families of the victims and the surviving victims in the present case from being heard by a judge, in accordance with the provisions of Article 8.1 of the Convention; violated the right to judicial protection enshrined in Article 25 of the Convention; prevented the investigation, prosecution, capture, prosecution and punishment of those responsible for the events that occurred in Barrios Altos, in violation of Article 1.1 of the Convention, and obstructed the clarification of the facts of the case. Finally, the adoption of self-amnesty laws incompatible with the Convention failed to comply with the obligation to adapt domestic law enshrined in article 2 of the Convention.

43. The Court considers it necessary to emphasize that, in light of the general obligations enshrined in Articles 1(1) and 2 of the American Convention, **the States Parties have the duty to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective remedy, in the terms of Articles 8 and 25 of the Convention. That is why States Parties to the Convention that adopt laws that have this effect, such as self-amnesty laws, are in violation of Articles 8 and 25 in accordance with Articles 1.1 and 2 of the Convention. Self-amnesty laws lead to the defenselessness of the victims and the perpetuation of impunity, and are therefore manifestly incompatible with the letter and spirit of the American Convention. This type of law impedes the identification of individuals responsible for human rights violations, as it hinders investigation and access to justice and prevents victims and their families from knowing the truth and receiving reparation.**

44. As a consequence of the manifest incompatibility between the self-amnesty laws and the American Convention on Human Rights, the aforementioned **laws lack legal effects** and cannot continue to represent an obstacle to the investigation of the facts that constitute this case or to the identification and punishment of those responsible, nor can they have the same or similar impact with respect to other cases of violation of the rights enshrined in the American Convention that occurred in Peru. (Bold out of original)

4.4.4 Judgment of the Inter-American Court of Human Rights of November 25, 2003.

In this ruling, the Inter-American Court made special reference to the right of victims of human rights violations to an effective judicial remedy. In this regard, he recalled that the Judicial Corporation had previously established that "*(e)l clarificación de whether or not the State has violated its international obligations by virtue of the proceedings of its judicial organs may lead to the Tribunal having to deal with the examination of the respective internal processes*". Recalling the foregoing, the Inter-American Court proceeded to examine the domestic judicial proceedings carried out by Guatemalan judicial bodies to establish whether they met acceptable standards of judicial guarantees and protection against violations of human rights protected by the American Convention. He referred in particular to the concept of a "reasonable time" for a judicial decision. Among the considerations that were presented by the aforementioned Court on that occasion, the following are worth mentioning.

"the Court observes that since 9 February 1994, the date on which the Supreme Court of Justice of Guatemala opened proceedings against the alleged intellectual authors of the extrajudicial execution of Myrna Mack Chang, the defence has promoted an extensive series of articulations and appeals (requests for protection, unconstitutionality, challenges, incidents, incompetence, nullity, requests to invoke the National Reconciliation Law, among others), which have prevented the process from advancing to its natural conclusion.

209. This way of exercising the means that the law places at the service of the defence has been tolerated and permitted by the intervening judicial bodies, forgetting that their function is not limited to providing a due process that guarantees the defence in court, but must also ensure in a reasonable time the right of the victim or his next of kin to know the truth of what happened and to have those responsible punished.

210. The right to effective judicial protection then requires judges to direct the process so as to prevent undue delays and hindrances from leading to impunity, thus frustrating the due judicial protection of human rights.

211. In light of the foregoing, the Court considers that the judges as rectors of the process have the duty to direct and prosecute the judicial procedure in order not to sacrifice justice and due process in favor of formalism and impunity. Thus, if the authorities allow and tolerate the use of judicial remedies in this way, they transform them into a means for those who commit a criminal offence to delay and hinder the judicial process. This leads to a violation of the State's international obligation to prevent and protect human rights and undermines the right of the victim and his or her family members to know the truth of what happened, to have all those responsible identified and punished, and to obtain subsequent reparations.

(f) Reasonable time limit

The Court has proven that in the present case the limits of the reasonable time limit have been exceeded and the State has expressly accepted this since the recognition of international responsibility before the Inter-American Commission on March 3, 2000.

In addition, the Court notes that each of the points analysed above has contributed to the failure to issue a final judgement clarifying all the facts relating to the extrajudicial execution of Myrna Mack Chang and punishing all the perpetrators, intellectuals, participants and cover-ups responsible for the facts, despite the fact that more than thirteen years have elapsed since the murder.

4.4.5 Judgment of the Inter-American Court of Human Rights of July 8, 2004.

In this ruling, the Inter-American Court of Human Rights once again referred to the inadmissibility of the provisions of domestic law relating to the statute of limitations or any other circumstance conducive to preventing the investigation and punishment of those responsible for the violation of human rights, to the duty of the State to informally investigate acts of torture and to prevent the repetition of violations of this class of rights by adopting measures to ensure effective investigation

and punishment. It also defined the notion of *impunity*. In this regard, the Court of First Instance on this occasion indicated:

"The Court observes that, in the present case, the State has had to conduct a serious, impartial and effective investigation, subject to the requirements of due process, based on the complaint filed by the immediate relatives of the alleged victims, in order to clarify the facts relating to the detention, torture and extrajudicial execution of Rafael Samuel and Emilio Moisés Gómez Paquiyaury and, in particular, to identify and punish those responsible, especially the intellectual author or authors of the facts, in compliance with their obligation established in Article 1.1 of the Convention, to guarantee the rights to life and personal integrity.

"In spite of a domestic judicial process in which an alleged intellectual author of the facts was identified, up to the date of issuance of this judgment, more than thirteen years after the occurrence of the facts, he has not been sanctioned as responsible, despite the fact that he continues to file briefs through his attorney-in-fact in the case that is open in this regard, nor has the possible existence of more authors or perpetrators been investigated.

148. This has created a situation of grave impunity. In this regard, the Court understands impunity to mean

"The lack of investigation, prosecution, capture, prosecution and condemnation of those responsible for the violations of the rights protected by the American Convention, since the State has the obligation to combat such a situation by all available legal means, since impunity favors the chronic repetition of human rights violations and the total defenselessness of the victims and their families.

...

150.Regarding the possible statute of limitations in the pending case at the level of domestic law, the Court recalls what it pointed out in *Bulacio v. Argentina*, in the sense that statutes of limitations or any obstacle of domestic law by means of which it is intended to impede the investigation and punishment of those responsible for human rights violations are inadmissible. The Court considers that the general obligations enshrined in Articles 1(1) and 2 of the American Convention require States Parties to promptly adopt measures of all kinds to ensure that no one is deprived of the right to judicial protection enshrined in Article 25 of the American Convention.

...

152.In accordance with the general principles of international law and as follows from article 27 of the Vienna Convention on the Law of Treaties of 1969, decisions of international human rights protection bodies may not be hindered in their full application by rules or institutes of domestic law.

...

154. Article 8 of the Inter-American Convention against Torture expressly

establishes the State's obligation to proceed *ex officio* and immediately in cases such as the present, regardless of the victim's inactivity. In this sense, the Court has held that "in proceedings concerning human rights violations, the defense of the State cannot rest on the plaintiff's inability to gather evidence that, in many cases, cannot be obtained without the cooperation of the State. In the present case, the State did not act in accordance with those provisions.

155. The fact that acts of torture are not effectively investigated and go unpunished means that the State failed to take effective measures to prevent acts of that nature from occurring again in its jurisdiction, ignoring the provisions of article 6 of the Inter-American Convention against Torture. ”

4.4.6 Judgment of the Inter-American Court of Human Rights of 15 September 2005.

In this ruling, the Inter-American Court again specified the scope of the right of victims of human rights violations and their families to an effective judicial remedy, and the duty of the State to investigate and punish serious human rights violations. In a special way, he pointed out that peace processes, such as the one that Colombia is going through, do not free a State Party to the American Convention from its obligations established in the Convention in the area of human rights.

Among other considerations, the following was explained:

This Court has pointed out that the right of access to justice is not exhausted by internal proceedings, but that this must also ensure, within a reasonable time, the right of the alleged victims or their families to do everything necessary to know the truth about what happened and to have those responsible punished.

Certainly, the Court has established, with respect to the principle of the reasonable period of time contemplated in Article 8(1) of the American Convention, that it is necessary to take into account three elements in order to determine the reasonableness of the period in which a process takes place: a) complexity of the matter, b) procedural activity of the interested party, and c) conduct of the judicial authorities.

However, the Court considers that the relevance of applying these three criteria to determine the reasonableness of a trial period depends on the circumstances of each case.

In effect, it is necessary to remember that the present case is one of extrajudicial executions and in this type of case the State has the duty to initiate, *ex officio* and without delay, a serious, impartial and effective investigation. During the investigation process and the judicial process, victims of human rights violations, or their families, should have ample opportunities to participate and be heard, both in clarifying the facts and punishing those responsible, and in seeking just compensation. However, the effective search for the truth lies with the State, and does not depend on the procedural initiative of the victim, or his or her next of kin, or on the provision of evidence. In this case, some of the accused have been tried and convicted in absentia. In addition, the reduced participation of family members in criminal proceedings, either as a civil party or as witnesses, is a consequence of the

threats suffered during and after the massacre, the situation of displacement they faced and the fear of participating in those proceedings. Therefore, it could not be argued that in a case such as the present one, the procedural activity of the interested party should be considered as a determining criterion to define the reasonableness of the time limit.

220. In relation to the complexity of the case, the Court recognizes that the matter being investigated by the internal judicial organs is complex. Despite this, to date there have been concrete results in the investigations and criminal proceedings which, although insufficient, have resulted in the conviction of several members of the army, as well as members of paramilitary groups, for their participation in the events (*supra* para. 96.126 and *infra* para. 230).

The massacre was certainly perpetrated in the context of the internal armed conflict in Colombia; it involved a large number of victims - who were executed or displaced - and took place in a remote and inaccessible region of the country, among other factors. However, in this case the complexity of the matter is also linked to the difficulties caused in the investigation, which originated in the active and omitted conduct of the State's administrative and judicial authorities, as analysed in the next section. It is not sustainable, then, as the State claims, to justify the time spent on investigations in "vicissitudes and limitations on financial and technical resources, [...] as well as the critical public order situation prevailing in the areas where investigations and tests must be carried out".

Although more than eight years have passed since the events took place, the criminal process remains open and, despite the delays indicated, has produced certain results that must be taken into account. For this reason, the Court considers that, rather than based on an analysis of the reasonableness of the time elapsed in the investigations, the responsibility of the State in light of Articles 8(1) and 25 of the Convention should be established through an evaluation of the development and results of the criminal process, that is, of the effectiveness of the duty to investigate the facts in order to determine the truth of what happened, the punishment of those responsible, and the reparation of violations committed to the detriment of the victims.

223. As noted, in cases of extrajudicial executions, the jurisprudence of this Court is unequivocal: the State has the duty to initiate *ex officio*, without delay, a serious, impartial, and effective investigation (*supra* para. 219), not to be undertaken as a simple formality condemned beforehand to be unsuccessful.

In this regard, based on the United Nations Manual on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions, this Tribunal has specified the guiding principles to be observed when considering that a death could have been due to an extrajudicial execution. State authorities conducting an investigation should at a minimum attempt to, *inter alia*: (a) identify the victim; (b) recover and preserve evidentiary material relating to the death, in order to assist in any potential criminal investigation of those responsible; (c) identify possible witnesses and obtain their statements in relation to the death under investigation; (d) determine the cause, manner, place and time of death, as well as any pattern or practice that may have caused the death; and (e) distinguish between natural death,

accidental death, suicide and homicide. In addition, the crime scene must be thoroughly investigated, autopsies and analysis of human remains must be carried out rigorously by competent professionals using the most appropriate procedures.

...

232. One of the conditions that the State must create to effectively guarantee the full enjoyment and exercise of the right to life, as well as other rights, is necessarily reflected in the duty to investigate violations of that right. In this regard, the Court has developed in its jurisprudence the positive obligation that States have in this regard:

t]he fulfillment of Article 4 of the American Convention, related to Article 1.1 thereof, not only presupposes that no person is arbitrarily deprived of his life (negative obligation), but also requires States to take all appropriate measures to protect and preserve the right to life (positive obligation), under their duty to guarantee the full and free exercise of the rights of all persons under their jurisdiction. This active protection of the right to life by the State involves not only its legislators, but every state institution, and those who must safeguard security, be it its police forces or its armed forces. In view of the foregoing, States must take all necessary measures, not only to prevent, prosecute and punish deprivation of life as a consequence of criminal acts in general, but also to prevent arbitrary executions by their own security agents.

233. This duty to investigate derives from the general obligation of States parties to the Convention to respect and ensure the human rights enshrined in it, that is, the obligation established in Article 1.1 of that treaty in conjunction with the substantive law that should have been protected, protected or guaranteed. Thus, in cases of violations of the right to life, compliance with the obligation to investigate is a central element in determining State responsibility for failure to observe judicial due process and protection.

234. In this regard, in *Ergi v. Turkey* the European Court of Human Rights found that the State had breached Article 2 of the European Convention on the grounds that, although there was no reliable evidence that the security forces had caused the death of the victim, the State failed in its duty to protect the victim's right to life, taking into account the conduct of the security forces and the lack of an adequate and effective investigation.

235. In the present case, all the breaches of the established duties of protection and investigation have contributed to the impunity of the majority of those responsible for the violations committed. These shortcomings demonstrate a form of continuity of the same *modus operandi* of the paramilitaries in covering up the facts and have resulted in the subsequent ineffectiveness of the criminal process underway for the facts of the massacre, in which at least 100 paramilitaries participated directly with the collaboration, acquiescence and tolerance of members of the Colombian Armed Forces.

236. The Court observes that an operation of such proportions could not go unnoticed by senior military commanders in the areas from which they left and through which the paramilitaries transited. Some of the facts regarding the planning

and execution of the massacre are contained in the state acknowledgement of responsibility, and although some of those responsible for the massacre have been convicted, there is widespread impunity in the present case, insofar as neither the truth of the facts nor the totality of the intellectual and material responsibilities for them have been determined. In addition, it is a relevant fact that some of the convicted paramilitaries are not serving their sentences because the arrest warrants issued against them have not become effective.

The Court has repeatedly pointed out that the State has a duty to prevent and combat impunity, which the Court has defined as "the failure as a whole to investigate, prosecute, capture, prosecute, and convict those responsible for violations of the rights protected by the American Convention. In this regard, the Court has warned that

[...] the State has the obligation to combat such a situation by all available legal means, since impunity leads to the chronic repetition of human rights violations and the total defencelessness of the victims and their families.

238. In this regard, the **Court recognizes the difficult circumstances in Colombia in which its people and institutions are making efforts to achieve peace. However, the country's conditions, no matter how difficult, do not release a State Party to the American Convention from its obligations under that treaty**, which subsist particularly in cases such as the present one. The Court has held that by carrying out or tolerating actions aimed at carrying out extrajudicial executions, not investigating them adequately and not punishing those responsible, as the case may be, the State violates the duty to respect the rights recognized by the Convention and to guarantee their free and full exercise, both by the alleged victim and his next of kin, prevents society from knowing what happened and reproduces the conditions of impunity so that this type of act can be repeated.

4.4.7. Judgment of the Inter-American Court of Human Rights of June 15, 2005.

Among the various issues that were extensively addressed in this pronouncement, those relating to the duty of reparation generated by serious violations of human rights stand out. With regard to the State's responsibility to make reparation, it was stated on this occasion that *when a wrongful act attributable to a State occurs, the State's international responsibility immediately arises for the violation of the international norm in question, with the consequent duty to make reparation and to put an end to the consequences of the violation*. As to the conditions of reparation, it was pointed out that the reparation should be as full as possible, i.e. it should consist in the restoration of the situation prior to the violation; if this was not possible, it was indicated that other reparation measures should be taken, including the payment of compensatory compensation; furthermore, it was pointed out that reparation implies the granting of guarantees of non-repetition. See:

"Obligation to repair

"168. According to the considerations on the merits set forth in the previous chapters, the Court declared, based on the facts of the case, the violation of Articles 5, 22, 21, 8, and 25 of the American Convention, all in relation to Article 1(1) of said treaty. The Court has established, on several occasions, that any breach of an

international obligation that has caused harm carries with it a duty to make adequate reparation. To that effect, Article 63(1) of the American Convention provides that:

Whenever it decides that there has been a violation of a right or freedom protected in this Convention, the Court shall order that the injured party be guaranteed the enjoyment of his right or freedom that has been violated. It shall also provide, where appropriate, for reparation of the consequences of the measure or situation that has led to the infringement of those rights and the payment of fair compensation to the injured party. (The underlining is not from the original.)

"This article reflects a customary rule that constitutes one of the fundamental principles of contemporary international law on State responsibility. Thus, when a wrongful act attributable to a State occurs, the State's international responsibility for the violation of the international norm in question immediately arises, with the consequent duty to make reparation and cease the consequences of the violation.

"The reparation of damage caused by the breach of an international obligation requires, whenever possible, full restitutio *in integrum*, which consists in the re-establishment of the situation prior to the breach. If this is not possible, as in the present case, it is up to the international tribunal to determine a series of measures so that, in addition to guaranteeing respect for the rights infringed, the consequences produced by the infringements are remedied and, *inter alia*, the payment of compensation is established as compensation for the damage caused. The obligation to make reparation, which is regulated in all respects (scope, nature, modalities and determination of beneficiaries) by international law, cannot be modified or breached by the obligated State by invoking provisions of its domestic law.

"Reparations consist of measures that tend to make the effects of the violations committed disappear. Its nature and amount depend on the damage caused in the material and immaterial planes. Reparations cannot imply either enrichment or impoverishment for the victim or his successors."

4.4.8. Judgment of the Inter-American Court of Human Rights, November 22, 2000. (Repairs)

In this pronouncement, the Inter-American Court made particular reference to the right to the truth, pointing out that it implies that the victims know what happened and who was responsible for the facts. It considered that knowledge of the truth is part of the right to reparation. In the case of homicide, the possibility for the victim's next of kin to know where their remains are is a means of reparation and, therefore, an expectation that the State must satisfy the victim's next of kin and society as a whole. The right to the truth, moreover, was understood as a right of society and not only of the victims:

"73. In accordance with operative paragraph eight of the judgment on the merits handed down on November 25, 2000, Guatemala must conduct "an investigation to determine the persons responsible for the human rights violations referred to in [that] judgment, as well as publicly disclose the results of that investigation and

punish those responsible. Thus, among the reparations that the State must carry out is necessarily that of effectively investigating the facts, sanctioning all those responsible, and disseminating the results of the investigation.

"This Court has repeatedly referred to the right of the relatives of the victims to know what happened and who were the agents of the State responsible for the respective acts. "is an obligation incumbent upon the State whenever a violation of human rights has occurred and that obligation must be seriously fulfilled and not as a mere formality. In addition, this Court has indicated that the State "has the obligation to combat [impunity] by all available legal means since [impunity] favors the chronic repetition of human rights violations and the total defenselessness of the victims and their families. A State that leaves human rights violations unpunished would also be failing in its general duty to guarantee the free and full exercise of the rights of persons subject to its jurisdiction.

"75. Likewise, this Court established, in its judgment on the merits, that due to the characteristics of the case under study, the right to the truth was "subsumed in the right of the victim or his next of kin to obtain from the competent organs of the State the clarification of the violating acts and the corresponding responsibilities, through the investigation and the trial that Articles 8 and 25 of the Convention prevent". As this Court has pointed out, only if all the circumstances of the violations in question are clarified can the State be considered to have provided the victim and his or her next of kin with an effective remedy and to have fulfilled its general obligation to investigate.

"The right that every person has to the truth has been developed by international human rights law, and, as this Court has held on previous occasions, the possibility for the victim's next of kin to know what happened to the victim, and, if applicable, where his remains are found, constitutes a means of reparation and, therefore, an expectation that the State must satisfy the victim's next of kin and society as a whole.

"77. Finally, **it is the obligation of the State, in accordance with the general duty established in Article 1.1 of the Convention, to ensure that these serious violations are not repeated. It must therefore take all the necessary steps to achieve this end. Preventive and non-repetitive measures begin with the revelation and recognition of past atrocities, as ordered by this Court in the judgment on the merits. Society has the right to know the truth about such crimes so that it has the capacity to prevent them in the future.**

"Therefore, the Court reiterates that the State has the obligation to investigate the facts that generated the violations of the American Convention in the present case, as well as to publicly disclose the results of such investigation and punish those responsible. (Bold out of original)

4.5. As relevant conclusions for the constitutionality study now being carried out by the Corporation, taken from the Sentences just cited, the Court points out the following:

4.5.1. States have *an obligation as a means of preventing* violations of internationally protected

human rights, which implies the adoption of concrete measures aimed at preventing such violations from occurring. This obligation can be called the *obligation of prevention*.

4.5.2 In addition, the State has a duty to investigate such violations; this is also an obligation of means and not of result; however, failure to do so results in a situation of tolerance of impunity, which means failure to comply with the State's international obligations in the field of justice, and its subsequent international responsibility. This second obligation can be called the *obligation to investigate*.

4.5.3. The right of victims to judicial protection of human rights, through the exercise of a "*simple and effective remedy*," in the terms of Articles 8 and 25 of the American Convention on Human Rights, corresponds to the correlative state duty to judge and punish violations of such rights. This duty can be called the *obligation to prosecute and punish those* responsible for violations of internationally protected human rights.

4.5.4. The obligations to investigate, prosecute and punish judicially serious violations of internationally protected human rights, such as torture, summary, extralegal or arbitrary executions and enforced disappearances, are incompatible with laws or provisions of any kind that provide for such amnesty crimes, statutes of limitations or grounds for excluding responsibility. This type of law or provision, because it leads to the defenselessness of the victims and the perpetuation of impunity, entails a violation of Articles 8 and 25 in accordance with Articles 1.1 and 2 of the American Convention on Human Rights, and generates the international responsibility of the State. Moreover, for the same reasons, such laws "*have no legal effect*".

4.5.5. The state's duty to investigate, prosecute, and punish the perpetrators of serious violations of international human rights law is not fulfilled simply by advancing the respective process, but requires that it be completed within a "*reasonable time*". Otherwise, the right of the victim or his family members to know the truth of what happened and to have those responsible punished is not fulfilled.

4.5.6. Impunity has been defined by the Inter-American Court of Human Rights as "*the failure as a whole to investigate, prosecute, capture, prosecute and convict those responsible for violations of the rights protected by the American Convention*". States are under an obligation to prevent impunity, since it leads to the chronic repetition of human rights violations and the total defencelessness of the victims and their families. By virtue of this, they are obliged to investigate *ex officio* serious violations of human rights, without delay and in a serious, impartial and effective manner.

4.5.7. The State obligation to initiate *ex officio* investigations in cases of serious violations of human rights indicates that the effective search for the truth lies with the State, and does not depend on the procedural initiative of the victim or his next of kin, or on the provision of evidence.

4.5.8. The fact that a State goes through difficult circumstances that hinder the achievement of peace, as the Inter-American Court of Human Rights recognizes in the case of Colombia, does not free it from its obligations in matters of justice, truth, reparation and non-repetition, which emanate from the American Convention on Human Rights.

4.5.9. The obligations of reparation entail: (i) first, if possible, full *restitutio in integrum*, "*which consists of the restoration of the situation prior to the infringement*"; (ii) if this is not possible, it may involve a series of other measures which, in addition to ensuring respect for the rights infringed, taken as a whole, repair the consequences of the infringement, including compensatory compensation.

4.5.10. The right to the truth implies that in the head of the victims there is a right to know what happened, to know who the agents of the damage were, to have the facts seriously investigated and sanctioned by the State, and to have impunity prevented.

4.5.11. The right to the truth implies for the victim's next of kin the possibility of knowing what happened to the victim and, in the case of violations of the right to life, the right to know where the victim's remains are; in these cases, this knowledge constitutes a means of reparation and, therefore, an expectation that the State must satisfy the victim's next of kin and society as a whole.

4.5.12. Society also has a right to know the truth, which implies public disclosure of the results of investigations into serious human rights violations.

4.6. The Court notes with particular emphasis that the above conclusions come from Judgments of an international Tribunal whose jurisdiction has been accepted by Colombia. Article 93 above prescribes that the rights and duties enshrined in this Charter shall be interpreted in accordance with the international human rights treaties ratified by Colombia. However, if a binding international treaty for Colombia concerning rights and duties enshrined in the Constitution provides for the existence of a body authorized to interpret it, as is the case, for example, with the Inter-American Court of Human Rights, created by the Inter-American Convention on Human Rights, its jurisprudence is relevant to the interpretation of such rights and duties in the domestic order. For this reason, the Corporation has recognized the legal relevance of the jurisprudence of the judicial bodies created by human rights conventions ratified by Colombia. Thus, for example, with respect to the jurisprudence established by the Inter-American Court of Human Rights in Judgment C-010 of 2000, the following concepts were expressed in this respect:

"Directly linked to the foregoing, the Court agrees with the intervener that the doctrine developed by the Inter-American Court of Human Rights, which is the judicial body authorized to authorize the interpretation of the Inter-American Convention, is particularly relevant in this matter. Indeed, as this Constitutional Court has pointed out on several occasions, to the extent that the Charter states in article 93 that constitutional rights and duties must be interpreted "in accordance with the international human rights treaties ratified by Colombia", there is no doubt that the jurisprudence of the international bodies responsible for interpreting those treaties constitutes a relevant hermeneutical criterion for establishing the meaning of the constitutional norms on fundamental rights.

4.7. The "Body of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity", proclaimed by the UN in 1998.

The "Body of Principles for the protection and promotion of human rights through action to combat impunity", proclaimed by the UN Commission on Human Rights in 1998, finds its main historical antecedent in the *"Final Report of the Special Rapporteur on impunity and set of principles for the protection of human rights through action to combat impunity"*. This last document, which dates back to 1992, was the response to the request made to Louis Joinet in 1991 by the Sub-Commission for the Prevention of Discrimination and Protection of Minorities of the United Nations Commission on Human Rights (now the Sub-Commission for the Promotion and Protection of Human Rights), to systematize the basic principles of international law regarding the rights of victims considered as subjects of rights. According to this report, hereinafter called the "Joinet

Report", victims are entitled to the following rights:

- (a) The victim's right to know;
- (b) The victim's right to justice; and
- (c) The victim's right to reparation.

4.7.2. The Joinet Report gathers forty-two principles taken from International Human Rights Law, International Humanitarian Law, the jurisprudence of international tribunals, international custom, the experiences lived in different societies and the principles of law referring to the obligation of States to administer justice in accordance with International Law, on the basis of which the UN Commission on Human Rights subsequently proclaimed in 1998 the aforementioned "*Set of Principles for the Protection and Promotion of Human Rights through the Fight against Impunity*", a document that has been subsequently updated. Thus, this Set includes the guidelines formulated by the United Nations that contain normative and jurisprudential guidelines of International Law, as well as historical experience from processes of transition to democracy or consolidation of the Rule of Law in different nations, and that form a conceptual framework of great value as a source of International Law.

4.7.3. Within the guidelines, definitions and recommendations contained in the "Body of Principles," the following may be summarized in a very brief manner, which the Court considers to be especially relevant to the study of constitutionality that it is carrying out:

4.7.3.1. Processes with a view to the restoration of democracy and/or peace or the transition to democracy and/or peace.

According to the Principles, the expression "*processes with a view to the restoration of democracy and/or peace or the transition towards them*" refers to "*situations in which, as part of a process leading to a national dialogue in favour of democracy or peace negotiations to put an end to an armed conflict, an agreement is reached, in whatever form, by virtue of which the protagonists or parties concerned agree to take measures against impunity and the repetition of human rights violations*".

4.7.3.2. The right to know.

With regard to the right to the truth exercised within the processes for the restoration or transition to democracy and/or peace, the Set of Principles in question specifies that it is not only the individual right of every victim or his or her relatives to know what happened, but also a collective right that has its *raison d'être* in the need to prevent violations from recurring. By virtue of this, the State has the "*duty of memory*" in order to prevent the deformations of history.

As for the victims and their families, the Principles define that they have "*the imprescriptible right to know the truth about the circumstances in which the violations were committed and, in the event of death or disappearance, about the fate of the victim*".

In order to achieve the above objectives, the Principles contain two categories of proposals: one refers to the advisability of States in the process of consolidating democracy or advancing peace processes and returning to the rule of law setting up non-judicial commissions of inquiry in the short term. The second set of measures tends to preserve archives related to human rights violations.

4.7.3.3. The right to justice.

a. The right to a fair and effective remedy.

This right implies that every victim has the possibility of asserting his or her rights by benefiting from a fair and effective remedy, mainly in order to get his or her aggressor to be judged and to obtain reparation. This, the Principles say, is because *"there is no just and lasting reconciliation without an effective response to the desire for justice"*. However, it is also stated in the Principles that *"(t)he right to justice confers on the State a series of obligations: that of investigating violations, prosecuting their perpetrators and, if their guilt is established, ensuring their sanction. If the initiative to investigate lies first and foremost with the State, the complementary rules of procedure must provide that all victims may be a civil party and, in the absence of public powers, take the initiative itself."*

Prima facie, the jurisdiction of national courts should be the norm, but where such courts are unable to provide impartial justice or are materially unable to function, the jurisdiction of an *ad hoc* international tribunal or a permanent international tribunal, such as the International Criminal Court, should be considered. In any case, the rules of procedure must meet due process criteria.

With regard to the legal concept of the statute of limitations on criminal proceedings or penalties, the Principles affirm that it cannot be opposed to serious crimes which, under international law, are considered crimes against humanity. Nor can the prescription run during the period where there is no effective remedy. Likewise, it cannot oppose civil, administrative or disciplinary actions brought by victims. With regard to amnesty, it is stated that it cannot be granted to the perpetrators of violations until the victims have obtained justice through an effective remedy. It should also have no legal effect on victims' actions relating to the right to reparation.

With regard to the reduction of penalties, it is stated that *"as part of a process of restoring or making a transition to democracy, laws are often adopted on those who have repented; these may lead to a reduction in penalties, but they should not totally exonerate the perpetrators; a distinction should be made on the basis of the risks taken by the perpetrator, depending on whether he or she has disclosed during or after the period in which the serious violations were committed."*

b. The right to reparation.

This right, the Principles say, involves both individual measures and general and collective measures. See:

"At the individual level, victims, whether direct victims, relatives or dependants, should benefit from an effective remedy. (...) This right includes the following three types of measures:

- (a) Restitution measures (aimed at enabling the victim to return to the situation prior to the rape);*
- (b) Compensation measures (psychological and moral harm, as well as loss of opportunity, material damage, damage to reputation and costs of legal assistance); and*
- (c) Rehabilitation measures (medical care including psychological and psychiatric care)".*

At the collective level, the guidelines of the "Set of Principles" mention that *"measures of a symbolic nature, by way of moral reparation, such as public and solemn recognition by the State of its responsibility, official declarations restoring the dignity of the victims, commemorative ceremonies, designations of public roads, monuments, make it possible to better assume the duty of*

memory".

4.7.3.4. *Guarantee of non-repetition of violations.*

According to the Principles from the Joinet Report, the same causes produce the same effects, so that *"three measures are imposed to prevent victims from being confronted again with violations that may infringe their dignity:*

"(a) Dissolution of paramilitary armed groups: this is one of the most difficult measures to implement because, if not accompanied by reintegration measures, the remedy may be worse than the disease;

"(b) Abrogation of all laws and jurisdictions of exception and recognition of the intangible and non-derogable character of the habeas corpus remedy; and

"(c) Removal of senior officials involved in serious violations that have been committed. These must be administrative rather than repressive measures of a preventive nature and officials may benefit from guarantees."

Finally, the Principles contain provisions aimed at guaranteeing the return of society to peace, among which the following stands out:

"PRINCIPLE 37. DISMANTLEMENT OF PARASTATAL ARMED FORCES/DEMobilIZATION AND SOCIAL REINTEGRATION OF CHILDREN

Parastatal or unofficial armed groups will be demobilized and dismantled. Their position in or links with State institutions, including in particular the armed forces, police, intelligence and security forces, should be thoroughly investigated and the information thus acquired should be made public. States must establish a reconversion plan to ensure the social reintegration of all members of such groups..."

In summary, the Court appreciates that, among the main conclusions drawn from the *"Set of Principles for the Protection and Promotion of Human Rights through the Fight against Impunity"* in its last update, it is worth mentioning the following, of special relevance for the constitutionality study it conducts: (i) during the transition to peace processes, such as the one carried out by Colombia, victims are assisted by three categories of rights: a) the right to know, b) the right to justice and c) the right to reparation; (ii) the right to know is imprescriptible and implies the possibility of knowing the truth about the circumstances in which the violations were committed and, in case of death or disappearance, about the fate of the victim; (iii) the right to know also refers to the collective right to know what happened, which has its *raison d'être* in the need to prevent the violations from being reproduced and which implies the obligation of public *"memory"* of the results of the investigations; (iv) the right to justice implies that every victim has the possibility of asserting his or her rights by benefiting from a fair and effective remedy, principally to ensure that his or her aggressor is tried, obtaining reparation; (v) the right to justice corresponds to the state duty to investigate violations, prosecute their perpetrators and, if their guilt is established, to ensure their sanction; (vi) within the criminal process victims have the right to become parties to claim their right to reparation. (vii) In any case, the rules of procedure must meet due process criteria; (viii) the prescription of criminal action or penalties cannot be opposed to serious crimes that under international law are considered crimes against humanity nor run during the period where there was no effective remedy; (ix) As for the reduction of sentences, *"laws of repentance"* are admissible within peace transition processes, *"but the perpetrators must not be totally exonerated"*; (x)

reparation has a double dimension (individual and collective) and at the individual level covers restitution, compensation and rehabilitation measures; (xi) at the collective level, reparation is achieved through measures of a symbolic or other nature that are projected onto the community; (xii) within the guarantees of non-repetition, the dissolution of armed groups accompanied by reinsertion measures is included.

4.8. The reports of the Inter-American Commission on Human Rights.

The Inter-American Commission on Human Rights has produced reports specifying the concepts of justice, truth and reparation within processes of transit or restoration of peace and/or democracy. Among them, the *"Report on the Demobilization Process in Colombia"*, issued on 13 December 2004, stands out for its particular relevance to the present cause.

Within this Report, the Commission poured, among others, the following concepts around the concepts of truth, justice and reparation within processes of transition to peace, which constitute, as can be seen, a summary of all the international parameters previously commented on, coming from the various sources of international law:

a. On the right to the truth, the Commission reiterated that the right to the truth should not be curtailed through legislative or other measures. He added that this right implies that the design of the process aimed at establishing the truth provides for the free exercise of the right to seek and receive information, and at the same time enables the judiciary to undertake and complete the corresponding investigations. The Commission also recalled that according to the jurisprudence of the Inter-American Court, the right to the truth is subsumed in the right of the victim or his next of kin to obtain from the State the clarification of the facts and the trial of those responsible, in accordance with the parameters of Articles 8 and 25 of the American Convention.

However, in any case, the Commission recalled that the right to the truth is not limited to the families of the victims, but that society as a whole has the right to know the conduct of those who have been involved in the commission of serious violations of human rights or international humanitarian law, especially in cases of massivity or systematicity.

b. On the right to justice, the Commission's report stated with particular emphasis that every time crimes against humanity, war crimes and/or human rights violations occur through the commission, among others, of assassinations, forced disappearances, sexual violations, forced transfers or displacements, torture, In accordance with international customary law and treaties, States had a peremptory obligation to investigate the facts and to prosecute and punish those responsible. He added that under international law, this type of crimes were imprescriptible, not subject to amnesty, and if they were not clarified by the State, they could give rise to international State responsibility and *"enable universal jurisdiction in order to establish the individual criminal responsibility of those involved."*

Also on the right to justice, the Commission emphasized that States had an obligation to combat impunity by all available legal means, since impunity fosters the chronic repetition of human rights violations and the total defencelessness of victims and their families.

On the same law, he also recalled that the guarantees deriving from the right to due process and judicial protection applicable in international and non-international armed conflicts, provided for in the Geneva Conventions, corresponded to the guarantees of international human rights law and required States to try and punish persons who committed or ordered to commit serious breaches of international humanitarian law. It also confirmed that these obligations could not be derogated from

because of the duration of the conflict.

For the Commission, it follows from International Law that, in concrete terms, the right to justice must imply *that States adopt "the necessary measures to facilitate victims' access to adequate and effective remedies both to denounce the commission of these crimes and to obtain reparation for the harm suffered and thereby contribute to preventing their recurrence. The "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights Law and International Humanitarian Law" state that States should: (b) adopt, during judicial, administrative or other proceedings affecting the interests of the victims, measures to protect their privacy, as appropriate, and to ensure their safety, as well as that of their families and witnesses, against any act of intimidation or reprisal; (c) use all appropriate diplomatic and legal means to enable victims to exercise their right to a remedy and reparation for violations of international human rights law or international humanitarian law."*

c. On the right to reparation, the Commission reiterated that victims of crimes committed during the armed conflict have the right to adequate reparation for the harm suffered, which must be materialized through individual measures of restitution, compensation and rehabilitation, measures of collective satisfaction and guarantees of non-repetition, all together aimed at restoring their situation, without discrimination.

Finally, the Commission included among the aspects concerning the right to reparation the need for guarantees of non-repetition, which require the adoption of measures aimed at preventing new human rights violations. In this regard, it maintained that these guarantees of non-repetition *"require the dissolution of parastatal armed groups; the repeal of norms that favor the commission of violations of human rights or international humanitarian law; the effective control of the Armed Forces and security by civilian authority; the use of military tribunals exclusively for crimes of function; strengthening the independence of the judiciary; protecting the work of justice officials, human rights defenders and journalists; training citizens and State agents in human rights and compliance with codes of conduct and ethical standards; and creating and improving mechanisms for preventive intervention and conflict resolution."*

4.9. Justice and victims' rights in Colombian constitutional jurisprudence.

4.9.1. Referring to the principles that should govern the exercise of the judicial function, especially in criminal matters, and the subjective right of access to justice, the Constitutional Court has established a jurisprudence that specifies certain constitutional parameters, which, although they do not specifically refer to standards applicable within peacebuilding processes and the transition to the full force of the rule of law, are unavoidable for the legislator at all times, since they find a permanent basis in the higher norms that are not suspended during such transition processes. Such parameters relate to issues such as victims' rights to justice, truth, reparation and non-repetition, the reasonableness of judicial terms, the conditions under which amnesties or pardons may be granted, the imprescriptibility of criminal action in respect of certain crimes, and the need for certain judicial remedies recognized within the criminal process to be established not only in favour of the accused but also in favour of the victims, when the crime constitutes a serious violation of human rights or international humanitarian law.

4.9.2 Specifically on the rights of victims of violations of fundamental rights to know the truth, to have access to justice and to obtain reparation, in Judgment C-228 of 2002 the Court recognised that there is a worldwide trend, also enshrined in the Constitution, according to which the victim or injured party of a crime not only has the right to economic reparation for the damages caused to him, but also has the right to have the truth about what happened established and justice done

through the criminal process. With regard to the Constitution, the ruling recalled that paragraph 4 of article 250 of the Constitution states that the Attorney-General of the Nation must *"watch over the protection of victims"*. In addition, he stressed that the right of victims to participate in the criminal process is linked to respect for human dignity and added that *"the dignity of victims and those harmed by punishable acts would be seriously violated if the only protection provided to them is the possibility of obtaining economic reparation"*. After a review of the constitutional norms that determine other types of rights and interests of victims, which can be protected through criminal proceedings, the judgment cited concluded that the constitutional conception of the fundamental rights of persons affected by a crime is not limited solely to material reparation.

4.9.3. In this same pronouncement, based on the provisions of Article 93 of the Constitution, according to which *"the rights and duties enshrined in this Charter shall be interpreted in accordance with the international human rights treaties ratified by Colombia"*, the Court accepted that multiple international instruments enshrine the right of every person to an effective judicial remedy, and that the international community rejects internal mechanisms that lead to impunity and the concealment of the truth of what happened. Finally, after a study of comparative law on the rights of victims according to the model of criminal procedure established in different legal systems, the Court concluded the following:

"From the foregoing, it arises that in international law, comparative law and our constitutional order, the rights of victims and injured parties for a punishable act enjoy a broad conception - not restricted exclusively to economic reparation - based on the rights that they have to be treated with dignity, to participate in decisions that affect them and to obtain effective judicial protection of the real enjoyment of their rights, among others, and that requires the authorities to direct their actions towards the integral restoration of their rights when they have been violated by a punishable act. This is only possible if the victims and those harmed by a crime are guaranteed, at the very least, their rights to the truth, to justice and to economic reparation of the damages suffered.

"In such a way that the victim and those harmed by a crime have interests in addition to mere pecuniary reparation. Some of their interests have been protected by the 1991 Constitution and are translated into three relevant rights to analyze the norm demanded in the present process:

"The right to the truth, that is, the possibility of knowing what happened and in seeking a coincidence between the procedural truth and the real truth. This right is particularly important in the face of serious human rights violations.

"The right to have justice done in the specific case, that is, the right not to have impunity.

"The right to reparation for the damage caused to him through financial compensation, which is the traditional way in which the victim of a crime has been compensated.

"Although the guarantee of these three rights is traditionally in the interest of the civil party, it is possible that in certain cases the civil party is only interested in establishing the truth or achieving justice, and neglects to obtain compensation. This may be the case, to cite but one example, in the case of crimes against public

morality, public property, or collective rights, or where the material damage caused is negligible - because, for example, the damage is diffuse or the public property has already been restored - but the truth of the facts has not been established, nor has it been determined who is responsible, in which case the victims have a real, concrete and direct interest in having their rights to the truth and to justice guaranteed through the criminal process.

"However, this does not mean that any person who alleges that he or she has an interest in the truth being established and justice being done can become a civil party - claiming that the crime affects all members of society - nor that extending the possibilities of participation to civil actors interested only in the truth or justice can transform the criminal process into an instrument of retaliation against the accused. There must be real damage, *not necessarily of a specific, concrete, patrimonial content*, that legitimizes the participation of the victim or of the injured in the criminal process in order to seek the truth and justice, which must be appreciated by the judicial authorities in each case. Once the quality of victim has been demonstrated, or in general that the person has suffered a real, concrete and specific damage, whatever the nature of this, he is legitimated to constitute himself as a civil party, and can orient his claim to obtain exclusively the realization of justice, and the search for truth, leaving aside any patrimonial objective. Moreover, even if the property damage is compensated, when it exists, if it has an interest in truth and justice, it can continue to act as a party. This means that the only essential procedural budget to intervene in the process is to prove the concrete damage, without being able to demand a claim tending to obtain the patrimonial reparation.

"The determination in each case of who has the legitimate interest to intervene in the criminal process also depends, among other criteria, on the legal good protected by the norm that typified the conduct, of its injury by the punishable act and of the damage suffered by the person or persons affected by the prohibited conduct, and not only on the existence of a quantifiable patrimonial damage. (Bold out of original)

Based on the foregoing considerations, the Court not only conditioned the constitutionality of several articles of the Code of Criminal Procedure (specifying that the civil party not only has the right to redress but also the right to truth and justice), but also declared unconstitutional article 47 of that procedural statute, which limited the civil party's access to prior investigation.

4.9.4. In its jurisprudence, the Constitutional Court has pointed out that the right of victims of crimes to know the truth about what happened and the right of society to clarify macro-criminal processes that massively and systematically affect the human rights of the population are constitutional rights (in particular, see judgement C-228 of 2002). As mentioned in a previous section of this ruling, these rights derive from the right of access to the administration of justice (arts. 29 and 229 C.N.), the right not to be subjected to cruel, inhuman or degrading treatment (art. 12), as well as the State obligation to respect and fully guarantee the rights, due process and the right to an effective judicial remedy, enshrined in articles 1, 8 and 25 of the Inter-American Convention on Human Rights. As is well known, these rights cannot be suspended in states of exception and, consequently, they integrate the block of constitutionality in the strict sense. In this regard, it is worth recalling that the Inter-American Court of Human Rights, the authoritative interpreter of the above provisions, has repeatedly pointed out the scope of the right to the truth. Thus, for example, in the Judgment of November 22, 2000 (Reparations), that Corporation said:

"This Court has repeatedly referred to the right of the relatives of the victims to know what happened and who were the agents of the State responsible for the respective acts. "is an obligation incumbent upon the State whenever a violation of human rights has occurred and that obligation must be seriously fulfilled and not as a mere formality. And he further stated: "The right that every person has to the truth has been developed by international human rights law, and, as this Court has held on previous occasions, the possibility for the victim's next of kin to know what happened to the victim, and, if applicable, where his remains are found, constitutes a means of reparation and, therefore, an expectation that the State must satisfy the victim's next of kin and society as a whole.

4.9.5. On another occasion, referring to the reasonableness of judicial terms, when examining the constitutionality of article 579 of Law 522 of 1999 (Military Criminal Code), in Judgment C-178 of 2002 the Court considered that the brevity of the terms provided for in that provision to advance the investigation of certain crimes within the competence of the Military Criminal Jurisdiction constituted a violation of the superior norms relating to the right to due process, especially the right to defense of the union, the right to justice of the victims, as well as the impossibility of clarifying the truth:

"Thus, the first question to be resolved is the following: do the terms established in the defendant provisions affect the structure of the military criminal process and the guarantees referred to in Article 29 of the Constitution?

"In military criminal matters, the determination of responsibility in the commission of a punishable act is one of the purposes of the administration of justice which, although it must be carried out avoiding unjustified delays, is not achieved when procedural terms are established that reduce the exercise of the right of defence of the accused, denying the justice that the accused and the victims of the crime demand; which impede the clear establishment of the truth of the facts being studied at the pre-trial or trial stage, a circumstance which may even increase levels of impunity in criminal matters; or which deny victims the right to obtain reparation.

"Such violations of due process are configured when the brevity of the terms affects, for example, the basic functions of the criminal process by confusing criminal investigation and trial at the same stage, or when the possibility of exercising the right to a defence is precluded by ignoring procedural moments in which the accused or accused must have the possibility of knowing the actions of the competent authorities and challenging them in the terms established by law. Thus, speed in the administration of justice and the possibility of promptly defining the situation of members of institutions devoted to the service and protection of the community are legitimate purposes to which an abbreviated process contributes, but such regulation becomes unreasonable when the right to due process is ignored in the design of the process, either because the structure of the criminal process is distorted or because a procedure is structured that does not consider the complexity of the punishable acts to which it applies, formally and materially preventing the truth of the acts being investigated from being established in the short period of time allowed for investigation and trial, and hindering the effective exercise of the right to a defence."

4.9.6. Later, in Ruling C-578 of 2002, in studying the constitutionality of Law 742 of 2002 by which the statute of the International Criminal Court was approved, explaining the importance of this Court, this Corporation referred to several issues that are relevant to the legal design of transitional justice mechanisms. In this regard, he first stressed the importance of recognizing international individual criminal responsibility for serious human rights violations, pointing out that the creation of such a Court *"marks a milestone in the construction of international institutions to effectively protect the core of minimum rights, through trials of individual criminal responsibility"*. He also explained the ethical importance of enforcing individual criminal responsibility for serious violations of human rights, stressing that the punishable conduct under the jurisdiction of the International Criminal Court *"includes violations of the fundamental parameters of respect for human beings that cannot be unknown, even in situations of international or internal armed conflict, which have been gradually identified and defined by the international community over several centuries in order to overcome barbarism"*.

On the other hand, in this same pronouncement the Corporation once again referred to the central importance of the fight against impunity, and to the rights to truth, justice and reparation in relation to the serious violations of human rights, recognizing that these were the central objectives of the creation of the International Criminal Court. In this sense the Sentence said in quotation:

"The International Criminal Court has been created by a statute that has as one of its core purposes to avoid impunity for transitory holders of power or those protected by them, up to the highest hierarchy, and to guarantee the effectiveness of the rights of victims and injured persons to know the truth, to obtain justice and to receive fair reparation for the damages that such conduct has caused them, so that such conduct will not be repeated in the future.

Of notorious importance as a jurisprudential precedent are also the considerations expressed in this ruling regarding the importance of peace as a constitutional value, the legal institutions of amnesty and pardon as mechanisms to consolidate it, as well as the circumstances and crimes in respect of which these legal figures are not acceptable because they imply impunity and ignorance of the rights to truth, justice and reparation. Among these considerations, those relating to the fact that amnesties issued for the purpose of consolidating peace have been considered instruments compatible with respect for international humanitarian law, provided that they do not constitute an obstacle to effective access to justice, stand out.

"In the first place, the Court notes that peace occupies a very important place in the order of values protected by the Constitution. In the spirit that the Political Charter had the vocation to be a peace treaty, the Constituent Assembly protected the value of peace in different ways in various provisions. For example, in the Preamble, peace appears as an end that guided the constituent in the elaboration of the entire Constitution. In article 2, this cardinal national purpose is specified in an essential purpose of the State, which is to "ensure peaceful coexistence and the maintenance of a just order". In addition, article 22 goes further by stating that "peace is a binding right and duty". Among the many instruments to facilitate the achievement of peace, the Constitution regulated procedures for the institutional resolution of conflicts and the effective protection of fundamental rights, such as the tutela action (article 86 CP). In addition, without limiting itself to a peace process, the Constitution allows "for serious reasons of public convenience" to grant amnesties

or pardons for political crimes and established clear requirements for this to be in accordance with the Charter, among which are the following: (i) the body that grants them is the Congress of the Republic where the various political forces representing the Nation meet, (ii) that the corresponding decision be adopted by a qualified majority of two thirds of the votes of the members of both chambers, (iii) that the crimes subject to these benefits belong to the category of "political crimes" and (iv) that in the event that the favored are exempted from civil liability with respect to individuals, "the State shall be bound by any compensation that may be due" (article 150, numeral 17, CP). in addition, it is incumbent upon the government in relation to the judicial branch to grant pardons for political crimes, in accordance with the law, and to report to Congress on the exercise of this power (article 201, numeral 2, CP)

"The Court finds that the Statute is not intended to restrict the powers of States exercised for the purpose of achieving the purposes of the Statute, in particular, to prevent further violations of international humanitarian law. Hence, article 10 of the Statute provides that "nothing in this Part shall be construed as limiting or impairing in any way existing or developing rules of international law for purposes other than this Statute".

"Secondly, the Court emphasizes that amnesties issued for the purpose of consolidating peace have been considered to be instruments compatible with respect for international humanitarian law. This is stated, for example, in Article 6(5) of Protocol II Additional to the Geneva Conventions of 1949:

"Article 6. Criminal Proceedings. (...)

"5. Upon cessation of hostilities, the authorities in power shall endeavour to grant the widest possible amnesty to persons who have taken part in the armed conflict or who are deprived of their liberty, interned or detained for reasons related to the armed conflict".

"Notwithstanding the foregoing, and in order to make peace compatible with the effectiveness of human rights and respect for international humanitarian law, international law has considered that the domestic instruments used by States to achieve reconciliation must guarantee victims and injured parties of criminal conduct the possibility of access to justice in order to know the truth about what happened and obtain effective judicial protection. For this reason, the Rome Statute, which reflects the international consensus on the matter, does not prevent the granting of amnesties that meet these minimum requirements, but does prevent amnesties that are the product of decisions that do not offer effective access to justice.

"Figures such as end-point laws that impede access to justice, blank amnesties for any crime, self-amnesties (i.e., the criminal benefits that legitimate or illegitimate holders of power grant to themselves and to those who were complicit in the crimes committed), or any other modality that has the purpose of preventing victims from having an effective judicial remedy to assert their rights, have been considered to violate the international duty of States to provide judicial remedies for the protection of human rights, as enshrined in instruments such as the American Declaration of Human Rights, the Universal Declaration of Human Rights, the American Convention on Human Rights, and the "Declaration on Fundamental

Principles of Justice for Victims of Crime and Abuse of Power.”

"In addition, international law has recognized the non-derogability of rules of *jus cogens*, which is undoubtedly relevant to the analysis of this question. In this regard, international law has criminalized the most serious crimes of concern to the international community as a whole. Without disregarding international law, Colombia has granted amnesties and pardons specifically for political crimes.

"Therefore, the principles and norms of international law accepted by Colombia (article 9 CP.), the Rome Statute, and our constitutional order, which only allows amnesty or pardon for political crimes and with the payment of any compensation (article 150. numeral 17 of the CP.), do not allow the granting of self-amnesties, blank amnesties, laws of end point or any other modality that prevents the victims from exercising an effective judicial remedy as has been emphasized by the Inter-American Court of Human Rights".

4.9.7. In Ruling C-580 of 2002, the Court referred to the non-applicability of statutory limitations to criminal action in the face of serious human rights violations. On that occasion, in reviewing the constitutionality of Law 707 of 2001, through which the Inter-American Convention on Forced Disappearance of Persons was approved, the Corporation showed how the non-applicability of statute of limitations to criminal proceedings in respect of this crime constituted a guarantee against impunity; the Court then said:

"extending the prohibition of non-applicability of statutory limitations to criminal proceedings is a guarantee of due process in the face of the possibility of the State exercising *ius puniendi* in a timeless manner. However, this guarantee cannot be absolute. Its scope depends on the constitutional value of the interests protected by the specific criminal action against which it seeks to oppose.

Depending on the crime it intends to prosecute, the State seeks to protect interests of diverse constitutional value by initiating a criminal action. For this reason, it is reasonable for the legislator to treat the term of the statute of limitations of the criminal action differently depending on the crime. Indeed, this is possible among other reasons due to the different constitutional value of the protected legal interests or assets.

"Of course, this does not mean that the only reasonable criterion for determining the term of prescription of the criminal action is the seriousness of the conduct, since within the design of the criminal policy of the State the legislator can determine the term of prescription from other evaluative criteria that from a constitutional perspective are equally valid to dogmatic or axiological considerations. These include the need to eradicate impunity for crimes for which it is particularly difficult to collect evidence or effectively prosecute those responsible.

"In the case of enforced disappearance, the prohibition enshrined in article 12 imposes a special duty of protection on the State. This duty implies, in turn, an extension of the set of powers available to the legislator to satisfy the interest in eradicating impunity. This extension of the configuring power of the legislator is specifically translated into the power to extend the term of prescription. In the first

place, because of the interest in eradicating impunity, for which it is necessary for society and those affected to know the truth, for the corresponding individual and institutional responsibilities to be attributed, and in general for the victims' right to justice to be guaranteed. Secondly, by the right of victims to receive reparation for damages. Third, because of the difficulty of gathering the necessary evidence and effectively judging those who habitually engage in such conduct".

4.9.8. In Judgment C-004 of 2003, the Court considered that a norm that, in development of the principle of *non bis in idem*, established the action for review only in favor of the accused prevented the victims of the punishable act from exercising it, thus preventing the integral reparation of the damages incurred, and was therefore unconstitutional when the crime constituted a serious violation of human rights. In order to reach this conclusion, it considered it necessary to draw a distinction between punishable acts in general and serious breaches of international humanitarian law. This Corporation said at that time:

"11- The general meaning of the cause of review being thus specified, the restriction attacked by the plaintiff indicates that it operates only for the benefit of the defendant, since it only applies in the case of convictions, and only to establish the defendant's innocence or innocence.

...

"The foregoing examination seems to imply that the accused apart is a possible legislative development, supported by the principle of *non bis in idem*. And that conclusion would be irrefutable if the mandate according to which no person can be tried twice for the same act (CP art. 29), represented an absolute right, which could not be the object of any weighting against any other constitutional right or principle. Indeed, if such were the meaning of that constitutional guarantee, it is evident that the action for review by evidence or new facts could never proceed against the defendant himself. However, the truth is that the principle of *non bis in idem* is not absolute...

"the normative force of *non bis in idem* indicates that the acquitted person should not be tried again, despite such new evidence and facts; however, the duty of the State to investigate crimes and protect the rights of victims in order to achieve a just order seems to imply that the person must be tried again, especially if the crimes in question constitute human rights violations. The question that arises then is whether the rights of the victims of punishable acts are of such a magnitude that they not only authorize but even demand a limitation of the *non bis in idem* in the regulation of the action of review. In order to answer this question, the Court will briefly recall its doctrine on the rights of victims and the duties of the State in this matter, and then analyze its relationship with the *non bis in idem* and with the action for review. This analysis will make it possible to determine whether or not the restriction on the review action imposed by the accused provision is proportionate to the rights of the victims.

"..."

"The Constitutional Court has then concluded that the 1991 Charter recognizes the rights of victims and injured parties for a punishable act that go beyond the field of economic reparation, since they also include the right to the truth and to justice. This Corporation has pointed out that "*victims of crimes have a right to truth and justice, which goes beyond the field of simple reparation, as has been clearly stated in international human rights doctrine, which is relevant to interpreting the scope of*

constitutional rights (CP art. 93)".

"..."

"If the victims have the right not only to be compensated but also to know what happened and to have justice done, then the State has the correlative duty to seriously investigate punishable acts. This state obligation is all the more intense the more social damage the punishable act has caused. That is why this State duty is particularly important in cases of human rights violations.

"..."

"the Court considers that it is necessary to distinguish between, on the one hand, punishable acts in general and, on the other hand, violations of human rights and serious breaches of international humanitarian law...."

"human rights violations and serious breaches of international humanitarian law shape those behaviours that most intensely disregard the dignity of persons and cause the most pain to victims and injured persons. Thus, the rights of victims and victims of such abuses merit the most intense protection, and the duty of the State to investigate and sanction such behaviour takes on greater significance.

Furthermore, in this same ruling the Court made it clear that the law could not tolerate impunity, which was even more serious if, in the face of international law, it could be attributed to the fact that the Colombian State failed in its duty to investigate. The foregoing, bearing in mind that the victims' rights to truth, justice and reparation were internationally recognized. For all of the above reasons, on this occasion the Court, in the operative part of the Judgment in quotation, declared constitutional numeral 3 of article 220 of Law 600 of 2000 or the Code of Criminal Procedure, on the understanding that the action for review on this ground also proceeds in cases of preclusion of the investigation, cessation of proceedings and acquittal, as long as it concerns human rights violations or serious breaches of international humanitarian law, and a domestic judicial pronouncement, or a decision of an international human rights monitoring and control body, formally accepted by our country, has established the existence of the new fact or evidence not known at the time of the debates. Likewise, the action for review against the preclusion of the investigation, the cessation of proceedings and the acquittal, in proceedings for violations of human rights or serious breaches of international humanitarian law, even if there is no new fact or evidence not known at the time of the debates, provided that a domestic judicial decision or a decision of an international body for supervision and control of human rights, formally accepted by our country, find a protruding failure of the obligations of the Colombian State to investigate seriously and impartially the aforementioned violations.

4.9.9. The Court has also referred to the constitutional rights of victims within the criminal process, especially when they act as a civil party. Thus, for example, in Judgment T-1267 of 2001, the Court explained that a criminal sentence imposed could be aggravated in the second instance, as a consequence of the appeal filed by the civil party, inasmuch as the victim of the crime was entitled to the fundamental right of access to the administration of justice, with a view to satisfying his subjective rights to truth, justice and reparation. These considerations were then poured out:

"It is true that the legal regulation confers on the civil party an essentially indemnifying claim, but this does not preclude the latter from appealing an acquittal for the following two reasons:

"On the one hand, victims of crimes have a right to truth and justice, which goes

beyond the field of simple reparation, as the international doctrine on human rights, which is relevant for interpreting the scope of constitutional rights, has clearly pointed out (CP art. 93). For this reason, the rights of victims transcend the purely patrimonial field.

On the other hand, even if it is considered that the civil party has a purely compensatory vocation, it is obvious that she can appeal an acquittal, since she will only achieve her claim by means of a condemnatory sentence.

...

Whoever represents the civil party in the criminal process is also entitled to the fundamental right of access to the administration of justice and, therefore, the judicial authorities have the duty to deal with their requests and resolve them in the terms provided by law. Being considered a procedural subject and being entitled to lodge appeals, the attorney-in-fact of the civil party will be treated on an equal footing, within the conditions indicated by the legislator. Under such conditions, the representative of the civil party could well appeal the acquittal at first instance."

4.9.10. Finally, also in the seat of tutelage, in Judgment T-249 of 2003, the Court addressed the issue of the collective right to the truth, and the possibility of satisfying it through the popular actor within the criminal process. Among the considerations on the collective right to the truth regarding serious violations of human rights, the following should be highlighted:

"In direct relation to this point, the Court has pointed out that there are punishable acts with respect to which "the interest of the victims and the injured in knowing the truth of the facts and in establishing individual responsibilities is projected to society as a whole".

"According to the foregoing, it could be argued that there are circumstances in which the commission of a crime activates the interest of society as a whole in establishing the truth and achieving justice, for which a popular actor would be qualified as a civil party.

"“ ...

"16.2 Article 45 of Law 600 of 2000 authorizes the constitution of the civil party as a popular actor "in the case of direct injury to collective legal assets". Accordingly, there is a restriction on the legitimacy of the case to become a popular actor in the criminal process, consisting of harming a "collective legal good". One question is obligatory: does the commission of crimes against humanity - a relevant issue in this case - imply the affectation of collective juridical goods?

"“ ...

"The Court has noted, it was seen, that there is an interest at the head of society - truth and justice - in enforced disappearance, which is a crime against humanity. According to the above, it is reasonable to assume that there is a relationship between the

seriousness of the punishable act and the existence of a society's interest in knowing the truth and doing justice. The punishable acts that are of such gravity will be those that involve serious violations of human rights and international humanitarian law and a severe endangerment of collective peace.

"“ ...

"Peace -art. 22 of the C.P.- is a collective good to which citizens have rights, their respect is a duty on their part and on the part of the public authorities, who also have the obligation to ensure its preservation. In Ruling T-008 of 1992, the Constitutional Court pointed out that peace is a right of collective nature, which can only be understood by understanding collective juridical goods.

"In this order of ideas, it must be admitted that in the presence of punishable acts involving serious violations of human rights and international humanitarian law and a serious endangerment of collective peace, valued by the respective judge or prosecutor, the participation of society - through a popular actor - as a civil party in the criminal process must be admitted.

"The Constitutional Court does not hesitate to include in such serious conduct the commission of crimes against humanity, since the commission of one of such crimes significantly alters the minimum order of civility and implies ignorance of the founding principles of the prevailing social order.

4.9.11. The following important conclusions can be validly drawn from the case law of the Court as set out above for the constitutionality review which is now before it:

4.9.11.1 Superior Article 250 states that the Attorney General of the Nation must "*watch over the protection of the victims*", it follows that the victim or injured party of a crime enjoys constitutional protection. This protection, in a systematic interpretation of the Constitution, especially the right of access to justice and the constitutional bloc, includes, among others, the rights to truth, justice and reparation.

4.9.11.2. The rights of victims of serious abuses of their human rights are closely linked to the principle of human dignity.

4.9.11.3. The Court has accepted that many international instruments enshrine the right of everyone to an effective judicial remedy and that, in the event of serious violations of human rights, the international community rejects domestic mechanisms that lead to impunity and concealment of the truth of what happened. It has also accepted the right to reparation at the head of the victims.

4.9.11.4. The Court has understood the right to the truth as the possibility of knowing what happened and of seeking a coincidence between the procedural truth and the real truth. The right to justice as the right that proscribes impunity in each specific case. And the right to reparation, such as the right to obtain financial compensation, but which is not limited to this, but includes individual and collective measures aimed, as a whole, at restoring the situation of the victims.

4.9.11.5. For the Court, the disproportionately reduced procedural terms entail the curtailment of the right to defense of the accused and the denial of the right to justice of the victims, since they prevent the truth of the facts from being clearly established and fair reparation from being obtained.

4.9.11.6. Victims' rights are also unaware of the procedural rules that reduce their interest in obtaining damages at the final stage of criminal proceedings.

4.9.11.7. Amnesties issued with a view to consolidating peace have been considered compatible instruments, under certain conditions such as the cessation of hostilities, with respect for international humanitarian law, provided that they do not constitute an obstacle to effective access to justice.

4.9.11.8. Criminal proceedings are imprescriptible in respect of crimes such as the forced disappearance of persons. This is for several reasons: the interest in eradicating impunity, the need for society and those affected to know the truth and to attribute the corresponding individual and institutional responsibilities, and in general to guarantee the right of victims to justice and reparation for damages.

4.9.11.9. Punishable acts involving serious violations of human rights and international humanitarian law and a severe endangerment of collective peace allow for the participation of society - through a popular actor - as a civil party in the criminal process, in order to satisfy the collective right to know the truth.

5. THE NEED TO APPLY THE WEIGHTING METHOD TO RESOLVE THE CHARGES MADE IN THE COMPLAINT. THE TERMS IN WHICH ITS APPLICATION IS TO BE CARRIED OUT AND RESPECT FOR THE LEGISLATOR'S MARGIN OF CONFIGURATION.

5.1. The previous chapter of the judgement recalled the constitutional and international importance of peace, justice and the rights of victims. And it has been pointed out that the tension between these rights manifests itself differently depending on various factors, among which the adoption of legislative and judicial instruments to promote the transition to peace in a democratic context stands out. Based on these general considerations about the elements that are in tension when judging a law that tends to achieve peace, the Court goes on to point out the way in which this tension must be resolved.

5.2. First of all, it should be pointed out that it is up to the legislator to identify the dimensions in which this tension is expressed and to define the formulas for overcoming it, in the exercise of the powers clearly entrusted to him by the Constituent. Thus, the legislator can design the mechanisms he or she considers conducive to achieving peace, assessing the specific circumstances of each context. This does not mean that this broad competence of the legislator lacks constitutional limits. It is up to the constitutional judge to identify such limits and have them respected, without sacrificing any of the constitutional elements in tension and without substituting the legislator in the exercise of his own competences.

5.3 The Legislator approved Law 975/05 as an instrument to materialize peace in the country; that is, as a means to overcome the internal armed conflict that has affected Colombia for several decades. This is not only deduced from the title of the law - *"By which provisions are made for the reincorporation of members of organized armed groups outside the law, which contribute effectively to the achievement of national peace and other provisions are made for humanitarian agreements"*, The purpose of this law is to facilitate peace processes and the individual or collective reincorporation into civilian life of members of illegal armed groups, guaranteeing the victims' rights to truth, justice and reparation. The value of peace has different manifestations in the 1991 Constitution, as noted above. Among them, it is worth noting that peace is a right as well as a duty

(article 22, C.P.). In order to achieve the constitutional value of peace, Congress enshrined in the Act various formulas that, in general terms, imply a reform of criminal procedure with repercussions in the area of justice -understood as an objective value and also as one of the rights of the victims of human rights violations. Thus, certain criminal benefits and a special procedure before certain specific authorities are established for those who opt, individually or collectively, to demobilize from illegal armed groups and re-enter civilian life. This reflects a political decision taken by the Legislator and enshrined in the Act under consideration: in the interests of peace, a specific and distinct regime of criminal procedure was established as a means of achieving justice. And it is precisely because of the existence of this conflict between constitutionally protected values - peace and justice - that the demand for the reference has been promoted. In addition, the petitioners argue that the formulas designed by the Legislator are detrimental to the other rights of the victims, namely, the rights to truth, reparation, and non-repetition of conduct that violates the human rights that constitute a crime.

Thus, in the present case, there is a collision between different constitutional rights, and it is on the basis of this conflict that the various charges in the lawsuit are formulated. When this type of conflict arises, the constitutional judge is called upon to apply the method of *weighting*, that is, to weigh the constitutional rights that are in collision, in order to achieve harmonization among them, if possible, or to define which should prevail.

5.5. The weighting method is appropriate for the resolution of the problems posed by this case, since it is not possible to fully materialise, simultaneously, the different rights at stake, namely justice, peace, and the rights of victims. The achievement of a stable and lasting peace that removes the country from the conflict through the demobilization of illegal armed groups may be subject to certain restrictions on the objective value of justice and the correlative right of victims to justice, since otherwise, because of the factual and legal situation of those who have taken part in the conflict, peace would be an unattainable ideal; this has been demonstrated by the historical experience of various countries that have overcome internal armed conflicts. This is a political and practical decision of the Legislator, which is oriented towards the achievement of a constitutional value. In this sense, Law 975 of 2005 is a development of the 1991 Constitution. But peace doesn't justify everything. The value of peace cannot be given an absolute scope, since it is also necessary to guarantee the materialization of the essential content of the value of justice and of the victims' right to justice, as well as the other rights of victims, despite the legitimate limitations imposed on them in order to put an end to the armed conflict. The Legislator has already opted for concrete formulas of harmonization between such values and rights, which as was said, restrict the scope of effectiveness of the value and the right to justice in order to achieve peace, through the granting of criminal and procedural benefits to the demobilized. It is therefore for the Court to determine, through the method of weighing up such values and rights, whether the harmonization designed by Congress and embodied in the standards accused respects the minimum content protected by the Constitution.

5.6. Once it has been established that weighting is the appropriate method to apply in this case, it is necessary to define the terms in which such weighting will be carried out; that is to say, what are the constitutional values or rights that will have to be located on both sides of the extremes of the collision described above, in order to evaluate their comparative weight when judging each one of the accused norms. In this regard, the Court notes that three different options are open, covering the constitutional conflict from different levels:

5.6.1. A first option, the most restricted, would require the Court to limit its analysis to the strictly procedural and punitive mechanisms enshrined in the respondent law, and contrast its design and application with those that form part of the ordinary criminal and procedural criminal system,

applicable to other citizens. This option, however, implies excluding important elements from the analysis, such as the very value of peace or justice, as well as the rights of victims. Thus, the constitutionality trial that the Court is called upon to make must recognize, as a first measure, the complexity of the collision between constitutional values and rights generated by the accused Law, and not restrict its scope to the merely punitive and procedural facets of the same. This option will then be discarded.

5.6.2. A second option involves weighing up constitutional *values*, which in this case would be those of peace and justice in their objective dimension. However, like the previous possibility, this formulation of the conflict to be resolved excludes from the analysis the rights of victims of violations of human rights that constitute a crime, thus ignoring the fact that the formulas adopted by the Legislator have the potential to have a significant impact on those rights, either to promote them or to limit them.

5.6.3. The third alternative is to ponder peace, justice as an objective value, justice as a right of the victims and the other rights of the victims - e.g. the rights to truth, reparation and non-repetition. This is the option that best respects the complexity of the legal problems to be solved because it does not exclude any of the constitutionally relevant values and rights from the constitutional analysis.

5.7. In this order of ideas, the Court observes that it was the Legislator himself who, in opting for formulas limiting the value and right to justice in order to achieve peace, established the essential terms from which the weighting trial is to be carried out. In fact, as noted above, the law in question establishes different mechanisms - such as alternative sentencing and specific procedural rules - that imply, from the outset, an affectation of the objective value of justice and the correlative right of victims to justice. Therefore, in judging criminal benefits, one of the extremes of weighting must be that of justice, as a value and as a right of the victims. The weighting must therefore be carried out between the different ways in which the norms demanded affect justice and the other values and constitutional rights to be protected, namely: peace, the right to truth, the right to reparation and the right to non-repetition of conduct that violates human rights. It should be noted that the novel problem posed by Law 975 of 2005 is that of how to ponder peace. The issue is complex not only because of its novelty but also because of the enormous importance that the 1991 Constitution assigned to peace.

5.8. It is pertinent to reiterate at this point the constitutional importance of peace - although in section 4.1 above the constituent elements of peace as a value and as a right were explored in detail, at the international and constitutional levels. Such was the importance given to peace by the 1991 Constituent, that peace was enshrined in the Preamble of the Charter as one of the purposes for which the fundamental text was promulgated, in Article 2 as one of the essential purposes of the State, in Article 22 as a fundamental right of every person and at the same time as a duty of obligatory fulfillment, in Article 95 as one of the duties incumbent upon every person and citizen, and in the transitory articles as one of the immediate purposes towards which the State as a whole would have to propend the State as a whole. Ultimately, the 1991 Constitution itself was conceived by its managers as a peace treaty. Consequently, it is evident that peace is a value of great constitutional weight, and this weight must be recognised when making the appropriate weighting judgement in this case.

5.9. It must be stressed, however, that despite its importance within the constitutional order, peace cannot be transformed into a kind of State reason that automatically prevails, and to the extent necessary, over any other constitutional value or right. In such a hypothesis, peace - which is still a concept of high indeterminacy - could be invoked to justify any type of measure, including some

nugatory measures of constitutional rights, which is not admissible in the light of the block of constitutionality.

5.10. It is relevant to underline that justice is also of great constitutional importance, with various projections throughout the Political Charter. First, justice is the foundation of one of the branches of public power - the Administration of Justice - as well as of several constitutional provisions that seek to materialize justice in each specific case and avoid impunity. Secondly, it is one of the founding values of the constitutional order, for the materialisation of which the Constitution was promulgated - as can be seen from the Preamble to the Charter. Third, it constitutes one of the essential purposes of the State - since article 2 Superior enshrines among such purposes that of ensuring "the validity of a just order"; therefore, justice as the foundation of a just order must be considered as one of the fundamental principles of the Colombian constitutional system. Fourth, justice is a right of every person - manifested, inter alia, in the rules of due process, in the right of access to the administration of justice and in the right of victims of criminal acts to justice.

In addition, it should be noted that justice is not necessarily opposed to peace. The administration of justice contributes to peace by resolving disputes and conflicts through institutional channels. In that sense, justice is a permanent peace budget.

5.11. The foregoing does not imply that justice can, in turn, be elevated to the category of an absolute right, to such an extent that peace is sacrificed or its realization impeded. Justice can be the object of different types of materialization, for which the Legislator has not only a wide margin of configuration but also express constitutional authorizations. For example, the Political Charter itself enshrines the possibility of adopting, by means of laws, amnesties or pardons, provided that certain constitutional conditions, requirements and limits are respected.

5.12. However, amnesties or pardons are not the only ways in which the State can limit justice in the interests of peace. Congress can indeed design different alternatives as instruments to put an end to the armed conflict, but in these hypotheses it is necessary that justice is not ignored, nor that the rights of the victims are violated. In other words, the Legislator may reduce the scope of the right to justice in order to promote other constitutional rights. For example, in these hypotheses, the reduction in the scope of the value and the right to justice, when configured as an instrument for the materialization of peace, may in turn constitute a means to realize the rights of victims to non-repetition - to the extent that the armed conflict ceases - to truth - if those who demobilize reveal the criminal conducts committed - to reparation - if in the demobilization process rules are enshrined that lead demobilized persons to satisfy that right of victims. It is up to the Legislator to define such instruments, taking into account the characteristics of the context within which the corresponding law is issued.

5.13. The Legislator's competence to design the instruments of criminal order aimed at achieving peace is broad, but not unlimited. Its breadth lies in the fact that in criminal matters there are multiple alternatives for regulation compatible with the Constitution, and the legislator can adopt the normative design that best suits the purposes it seeks to achieve in each context. When penal regulation is aimed at achieving peace, the width of the Legislator's margin of configuration is even greater.

5.14. For this reason, the Constitutional Court, in applying the weighting judgment, must be respectful of this wide margin of configuration that the Charter has attributed to the Legislator in these matters. This means, as it has reiterated in its jurisprudence, that in judging the means designed by the Legislator to achieve the legitimate ends it seeks to achieve, the Court will analyze whether these means are adequate to achieve them and whether such means do not imply a

manifestly disproportionate affectation of other constitutional rights.

5.15. However, when judging provisions of a law that - like Law 975 of 2005 - has been conceived as a comprehensive and specific set of rules aimed at achieving peace in a given context, the weighting judgement cannot fail to assess that a given measure is concatenated with another, embodied in a different rule. Thus, for example, an instrument that limits the scope of the right to justice may in turn promote the right to truth. This holistic view is essential in carrying out the weighting trial in this case, without this meaning that the Court must judge the entire law simultaneously.

5.16. From this point of view, the Court will proceed to examine, by means of the weighting method, the different accused norms.

6. EXAMINATION OF THE CHARGES OF CONSTITUTIONALITY BROUGHT AGAINST THE DEFENDANT RULES.

6.1. PRELIMINARY CONSIDERATIONS.

6.1.1. Inhibition of some of the objections raised

The Court warns that some of the censorship proposals in the lawsuit do not comply with the requirements established by the jurisprudence of this Corporation for the construction of charges of unconstitutionality, so it must refrain from making a substantive pronouncement on these matters. To resolve this dispute, the Court shall adopt the following methodology. In the first place, it will synthesize the central aspects of the doctrine on the conditions applicable to charges of unconstitutionality. It will then identify the positions that do not meet the above requirements and group them according to their common thematic aspects. Finally, it will establish the arguments that lead to the conclusion of the ineptitude of the lawsuit with respect to these censorship proposals.

6.1.1.1. Requirements for Arguments Supporting Charges of Unconstitutionality

Constitutional jurisprudence has repeatedly and uniformly established that the reasons supporting charges of unconstitutionality must comply with certain requirements that allow the fulfillment of the purposes of public action as a democratic exercise through which citizens come before the Constitutional Court in defense of the provisions of the Political Charter. If the action of unconstitutionality is understood as an instance of dialogue between the citizenry and the judicial instance in charge of preserving the supremacy of the Constitution, it is evident that the motives presented in the lawsuit, which constitute the concept of the violation, must accredit some minimum arguments that allow the Court to adequately advance the judgment of unconstitutionality. From this perspective, this Court has considered that the construction of a position of unconstitutionality must meet the conditions of clarity, certainty, specificity, relevance and sufficiency.

The clarity of a charge is preached when the lawsuit contains an argumentative coherence such that it allows the Court to clearly identify the content of the censorship and its justification. Although the public nature of the action of unconstitutionality does not require the adoption of a specific technique, as is the case in other judicial proceedings, the plaintiff is not relieved from presenting the reasons for the proposed charges in such a way that they are fully understandable.

The certainty of the arguments of unconstitutionality refers to the fact that the charges are directed against a normative proposition effectively contained in the accused provision and not against a different one, inferred by the plaintiff, implicit or part of norms that were not the object of the

complaint. What this requirement demands, then, is that the charge of unconstitutionality challenge a verifiable legal content based on the interpretation of the accused text.

The specificity requirement is accredited when the complaint contains at least one specific charge, of a constitutional nature, against rules that are perceived to be contrary to the Political Charter. This requirement refers, in these conditions, to the fact that the arguments presented by the plaintiff are precise, on the understanding that *"the constitutionality trial is based on the need to establish whether there really exists an objective and verifiable opposition between the content of the law and the text of the Political Constitution, making it inadmissible that it should be decided on its inexecutable basis of "vague, indeterminate, indirect, abstract and global" arguments that are not specifically and directly related to the provisions being accused. Undoubtedly, this omission to concretize the accusation impedes the development of the discussion proper to the constitutionality trial."*

The reasons that sustain the concept of violation are pertinent insofar as they are constructed on the basis of arguments of a constitutional nature, that is, founded *"on the appreciation of the content of a Superior norm that exposes itself and confronts the precept demanded. In that sense, charges based on (i) simple legal or doctrinal considerations; (ii) the subjective interpretation of the norms accused by the plaintiff and their application to a particular and concrete problem; or (iii) the analysis of the appropriateness of the provisions considered unconstitutional, among other censorships, do not comply with the requirement of relevance of the charge of unconstitutionality.*

Finally, the condition of sufficiency has been defined by jurisprudence as the need for the reasons of unconstitutionality to be related *"in the first place, with the exposition of all the elements of judgment (argumentative and evidentiary) necessary to initiate the study of constitutionality with respect to the precept object of reproach; (...) On the other hand, the sufficiency of the reasoning directly appeals to the persuasive scope of the lawsuit, that is, to the presentation of arguments that, although they do not succeed first facie in convincing the magistrate that the norm is contrary to the Constitution, if they raise a minimum doubt about the constitutionality of the challenged norm, in such a way that it really initiates a process aimed at distorting the presumption of constitutionality that protects every legal norm and makes a pronouncement by the Constitutional Court necessary."*

Having determined the essential components of the doctrine on the predictable requirements of the reasons for an unconstitutionality charge, the Court proceeds to deal separately with each of the charges in which it will declare an inhibitory decision.

6.1.1.2 Inhibition of the charge for violation of the right to justice for "the restricted investigation of facts as law 975 of 2005 residual to decree 128 of 2003".

The applicants consider that certain provisions of Articles 2, 9, 10, 18, 62 and 69 of Law 975/05 are contrary to the Constitution, since they presuppose that the application of the procedure laid down in that provision would be applicable only to demobilised combatants who are unable to access the benefits contained in Decree 128/03, This circumstance would ultimately result in all demobilized combatants who, at the time of demobilization, do not have judicial proceedings or convictions against them for serious crimes, not being subject to judicial investigation, even though they have committed this type of conduct. Therefore, the actors consider that in order for the accused norms not to serve as support for an "instrument of impunity", it is essential that both one and the other group of demobilized combatants be submitted to the procedure established by Law 975/05.

The Court warns that the proposed position does not meet the requirements of certainty and

relevance discussed above. Regarding the first aspect, it is clear that the censorship exposed is directed not only against the accused articles, but also with respect to the application of other provisions contained in Law 782/02 and its Regulatory Decree 128/03, norms that were not the object of a lawsuit in this opportunity. Therefore, it is not possible for the Court to pronounce on the merits of the charge in question, given that the actors did not establish the complete legal proposal necessary to pronounce on the merits of the matter.

In addition, it should also be pointed out that it is not possible to infer from the interpretation of the normative content of the accused articles the legal consequences described by the plaintiffs, but only with the assistance of what is regulated by Law 782/02 and Decree 128/03. This argument reinforces the Court's conclusion regarding the non-compliance with the certainty requirement of the charge of unconstitutionality.

The above-mentioned shortcoming further explains the lack of relevance of the reasons for the censorship subject to examination. In fact, the arguments put forward by the actors in this section deal with the practical consequences, in the personal sphere of a group of demobilized combatants, of the application of the accused articles, as well as other provisions that were not the subject of the lawsuit. Therefore, the present case is not about the opposition between the accused articles and the constitutional norms that are considered violated, but about the alleged contradiction between the provisions of the Charter and the practical and particular consequences that the actors infer from the application of the provisions of the lawsuits and others that, it is insisted, were not the object of public action.

In accordance with the foregoing, in the absence of the requirements to which reference has been made, the Court shall adopt an injunction in relation to the following sections of Law 975/05: The final paragraph of article 2; the second paragraph of article 9; the expression "*and those established in Law 782 of 2002*" contained in the paragraph of article 10; article 62 and article 69. It should be clarified that the defendant paragraph of Article 18 is excluded from the declaration of noncompliance, since this provision will be the subject of a substantive pronouncement in a later paragraph of this judgment and for a different charge to that studied at this time.

6.1.1.3. Inhibition with respect to some expressions of articles 10 and 16 of Law 975/05

The lawsuit presents a complex charge against several provisions of Law 975/05, among them the expressions "*provided they are in the list that the National Government sends to the Attorney General of the Nation*" contained in the first paragraph of Article 10 of Law 975/06 and "*the, or the names of*" provided in the first paragraph of Article 16 of the same rule. For the actors, the group of accused provisions are part of a legal complex that "*as a system is a veiled pardon and a covert amnesty*."

In order to support the above conclusion, the plaintiffs make a general presentation on the content, scope, conditions and limitations of the laws enshrining amnesties and pardons. They also state the legal reasons that, in their opinion, determine the incompatibility of the application of these figures in the case of crimes that constitute serious violations of human rights and international humanitarian law. For the specific case of the above mentioned normative sections, the lawsuit warns of the condition of "*veiled pardon*" of the alternative penalty mechanism provided for in Law 975/05; this assertion is supported, among other aspects, by the fact that the penalty reduction systems provided for in this law are not applied in an impersonal and abstract manner, but are directed solely towards a particular group of persons.

With respect to the proposed charge of unconstitutionality, the Court finds that it precludes a

substantive determination, since it fails to meet the requirements of certainty and specificity. The first, insofar as the proposed censorship does not make any argument aimed at maintaining that from the interpretation of the accused expressions, in themselves considered, the legal consequences that the actors preach of them can be inferred. Second, in view of the fact that the reasons for ascribing implications contrary to the Constitution to the paragraphs being sued are of an eminently global nature, without it being possible to determine a particular and specific charge aimed at demonstrating the incompatibility between the precepts being sued and the provisions of the Political Charter. On this particular point, it must be reiterated that the control of constitutionality is subject to a clear and specific approach of a potential contradiction between the censored norms and the Superior Statute. In this sense, a global censorship, which does not establish a comparison in the terms exposed, becomes an inhibitory decision due to the lack of minimum requirements for the construction of the reasons that support the concept of violation.

6.1.1.4 Inhibition of the charge against articles 21, 22, 23, 26, 27, 28 and 62 (partial) of Law 975/05, based on the violation of the right to justice by application of the provisions of Legislative Act 03 of 2002.

The complaint considers that articles 17, 18, 19, 20, 21, 22, 23, 24, 26, 27 and 28 of Law 975/05, in their entirety, as well as the section "*and the Code of Criminal Procedure*" contained in article 62 *ejusdem*, violate the constitutional right to justice. This is to the extent that such norms incorporate legal institutes of the system of criminal prosecution foreseen in Legislative Act 03 of 2002 and that, in this sense, necessarily refer to the Code of Criminal Procedure adopted by Law 906 of 2004. Therefore, the accused norms violate the Political Charter, because they would be applied with respect to conducts previous to the validity of the mentioned Legislative Act. From this perspective, the plaintiffs ask the Corporation to declare the constitutionality conditioned of the articles demanded, "*under the interpretation that the procedure provided therein is only applicable to crimes committed after January 1, 2005. For all other purposes, such rules are unconstitutional.*"

The censorship proposed in the aforementioned terms, in the Court's opinion, does not constitute a true charge of unconstitutionality, since it fails to comply with the requirements of certainty and pertinence that the constitutional jurisprudence foresees for the reasons that make up the concept of violation. With regard to the first condition, the charge presented, in the same way as indicated in the previous section, is based on the contradiction between the subjective interpretation that plaintiffs make of the accused precepts and the constitutional norms that they consider violated by the attacked norms. In fact, the particular understanding that the actors receive of the accused norms leads them to ascribe them to the modality of criminal procedure foreseen in the Constitution after the enactment of Legislative Act 03 of 2002. Therefore, the charge of unconstitutionality is not directed against the specific content of the accused norms, but against the consequences that the plaintiffs confer on them from their own understanding. A censorship of this kind, which takes as its object the control of constitutionality not the accused normative content but a particular interpretation of it, prevents the Court from issuing a substantive pronouncement and, therefore, should be inhibited.

In the same way, the position under consideration does not meet the requirement of relevance. This is because it seeks to build the contradiction of the norms accused with the Political Charter on the basis of, as indicated, the particular and concrete legal consequences derived from the actors' interpretation of such precepts. A comparison of this kind, which is based not on the content of the standards demanded, but on the possible implications of their particular use, is not apt to promote a lawsuit of unconstitutionality.

Based on the foregoing, the Court shall inhibit itself with respect to Articles 21, 22, 23, 26 (with the

exception of paragraph 3 thereof), 27 and 28 of Law 975/05. The other articles accused by the present charge are excluded from the declaration of inhibition, because they will be the object of an in-depth study by the Court with respect to other censorship, as will be explained in a later section.

6.1.1.5 Inhibition of the charge against article 23 of Law 975/05, concerning the violation of the right to reparation of victims.

The plaintiffs consider that article 23 of Law 975/05, which establishes the procedure applicable to the incident of integral reparation, affects the constitutional right of victims to reparation. To this end, the actors warn that this procedure is not the only judicial means for victims to obtain such reparation, but that based on the provisions of articles 42, 43 and 45 of the same Law, there are other instruments for this purpose. In this way, the lawsuit maintains that *"if the victim does not request that the incident of reparation be opened, he does not lose the right to be repaired"*.

In accordance with this argument, the plaintiffs conclude that it is necessary for the Court, in order to guarantee such reparation, to declare Article 23 enforceable, subject to the condition that in cases in which the victims do not attend the reparation incident, the Court's judgment must establish the damages and order the pertinent reparation measures or that, in any case, the victims may request reparation before the Court, in the terms of Article 45.

In the Court's opinion, the reasons given are not apt to constitute a charge of unconstitutionality, as well as ignorance of the specificity requirement. It should be noted that the arguments expressed by the plaintiffs are aimed at requesting that the Court establish interpretative guidelines with respect to some articles of the Law being challenged, but do not account for an objective and verifiable opposition between article 23 and the constitutional precepts. Ultimately, there is no specific accusation against the defendant article, which is why it is not possible to make a constitutional judgment on it.

6.2. CONSIDERATIONS OF PROPOSED SUBSTANTIVE CHARGES

The Court proceeds to judge the accused rules on the basis of the general considerations set out above - on peace, justice, the rights of victims (paragraph 4) and the method of weighting (paragraph 5) - warning that the trial will be based on an interpretation of the charges in the complaint, grouping them thematically as far as possible.

6.2.1. The concept of alternative sentencing adopted by Law 975 of 2005. Joint study of articles 3, 19 (partial), 20, 24, and 29 (partial).

6.2.1.1 The basic charge in the lawsuit against Law 975 of 2005 is that it constitutes a system of impunity, the central axis of which is the granting of an alternative criminal benefit by virtue of which those who have committed extremely serious crimes, in the context of the internal armed conflict, can be exonerated from a significant part of the penalty that would ordinarily correspond to them to serve for the commission of such crimes, without complying with the conditions established in International Humanitarian Law and International Human Rights Law for the validity of such measures. The plaintiffs assert, repeatedly throughout the lawsuit, that the granting of this benefit, together with certain specific aspects of Law 975/05, does not exceed a strict proportionality judgment, as it constitutes an excessive affectation of the victims' rights to truth, justice, reparation and non-repetition, as well as other constitutional values, principles and rights.

6.2.1.2. To issue a substantive pronouncement on this charge, reference must be made to the institute referred to in the law as 'alternativity'. To this end, it is necessary to undertake a joint study of

articles 3, referring to "alternativity", 19 relating to the acceptance of charges; 20 relating to the accumulation of proceedings and penalties; 24 regulating the content of the sentence; and 29 specifically referred to as "alternative punishment", without prejudice to the fact that with respect to the latter article emphasis is placed on the specific charge of violation of the victims' right to reparation.

6.2.1.3. Scope of the provisions under consideration. In order to approach the systematic study of the so-called alternativity, it is useful to transcribe the content of the norms:

"ARTICLE 3. ALTERNATIVITY. Alternativity is a benefit consisting of suspending the execution of the sentence determined in the respective sentence, replacing it with an alternative sentence that is granted by the contribution of the beneficiary to the achievement of national peace, collaboration with justice, reparation to victims and their adequate resocialization. The concession of the benefit is granted according to the conditions established in the present law".

ARTICLE 19. ACCEPTANCE OF CHARGES. At the arraignment hearing, the accused may accept those presented by the Public Prosecutor's Office, as a consequence of the free version or the investigations under way at the time of demobilization.

For it to be valid, it must be done freely, voluntarily, spontaneously and with the assistance of its defender. In this event, the Magistrate exercising the function of control of guarantees shall immediately send the proceedings to the Registry of the Chamber of the Superior Court of the Judicial District to which his knowledge corresponds.

Upon receipt of the action, the corresponding Chamber shall convene a public hearing within ten (10) days to examine whether the acceptance of charges has been free, voluntary, spontaneous and assisted by its counsel. If it is found to be in accordance with law, within ten (10) days it will summon a sentencing hearing and an individualization of the sentence.

PARAGRAPH 1 If at this hearing the accused does not accept the charges, or retracts those admitted in the free version, the National Unit of the Attorney General's Office for Justice and Peace shall refer the action to the competent official in accordance with the law in force at the time of the commission of the conduct under investigation.

PARAGRAPH 2 When there is a request for integral reparation, the provisions of article 23 of the present law shall be complied with beforehand".

"ACCUMULATION OF PROCESSES AND PENALTIES. For the procedural purposes of this law, the proceedings in progress for criminal acts committed during and on the occasion of the demobilized person's membership in an armed group organized outside the law shall be accumulated. In no case shall the accumulation of punishable conduct committed prior to the demobilized person's membership of the illegal armed group proceed.

"ARTICLE 24. CONTENTS OF THE JUDGMENT. In accordance with the criteria laid down by law, the main penalty and the accessory penalties shall be laid down in the conviction. In addition, the alternative penalty provided for in the present law shall be included, as well as the commitments of conduct for the term provided by the Court, the obligations of moral and economic reparation to the victims, and the extinction of ownership of the property to be used for reparation.

The relevant Chamber shall be responsible for evaluating compliance with the requirements laid

down in this law for access to alternative punishment.

ARTICLE 29. ALTERNATIVE PENALTY. *The competent Chamber of the High Judicial District Court shall determine the appropriate penalty for the offences committed, in accordance with the rules of the Criminal Code.*

In the event that the convicted person has complied with the conditions set forth in this law, the Chamber shall impose an alternative sentence consisting of deprivation of liberty for a minimum period of five (5) years and not more than eight (8) years, assessed according to the gravity of the crimes and their effective collaboration in the clarification of the same.

In order to qualify for the alternative sentence, the beneficiary must undertake to contribute to his or her resocialization through work, study or teaching during the time he or she is deprived of liberty, and to promote activities aimed at demobilizing the armed group outside the law to which he or she belonged.

Upon completion of the alternative sentence and the conditions imposed in the sentence, he shall be granted probation for a term equal to half of the alternative sentence imposed, during which period the beneficiary undertakes not to repeat the crimes for which he was convicted under this law, to appear periodically before the High Court of the Judicial District concerned and to report any change of residence.

Once these obligations have been fulfilled and the trial period has elapsed, the principal penalty shall be declared extinguished. Otherwise, the probation shall be revoked and the initially determined sentence shall be served, without prejudice to the subrogation provided for in the corresponding Criminal Code.

Paragraph. In no case will penal subrogations, additional benefits or complementary rebates be applied to the alternative penalty.

6.2.1.4. The alternativity in Law 975/05 obeys a specific concept defined by the Congress of the Republic. Its nature and characteristics in accordance with the law.

6.2.1.4.1. In essence, alternative sentencing is a benefit consisting of suspending the execution of the ordinary sentence applicable under the general rules of the Criminal Code, so that instead of serving this ordinary sentence, the convicted person serves a lesser alternative sentence, of a minimum of 5 years and a maximum of 8 years. In the sentence of conviction, first, the ordinary sentence (the principal and the accessories) is set, and second, the sentence is replaced, the execution of which is suspended by the ministry of law, by the alternative sentence of 5 to 8 years, among other determinations to be taken in the sentence. In the concept of alternative sentencing adopted in Law 975 of 2005, the ordinary sentence does not disappear, but is fixed in the sentence. What happens is that the convicted person who meets the requirements set out in that law benefits from a lower alternative penalty that must also be set in the sentence. It is this alternative penalty that the convicted person must effectively serve.

6.2.1.4.2. According to the transcribed provisions the institute of alternativity is conceived by the legislator as a legal benefit in which the following elements concur:

- a. The benefit entails the suspension of the penalty determined in the respective sentence. This

- penalty is the one that would correspond in accordance with the general rules of the Penal Code, i.e. the ordinary penalty (the principal and accessory) (Art.3).
- b. Its replacement by an alternative penalty that is granted for the beneficiary's contribution to the achievement of national peace, collaboration with justice, reparation to victims, and their appropriate resocialization. (Art. 3).
 - c. The concession of the benefit is granted according to the conditions established in the law itself. (Art.3°). It is up to the Chamber of the relevant Court to evaluate compliance with the requirements laid down in the law for access to alternative punishment. (Art. 24)
 - d. The sentence shall specify the principal and accessory penalties, in accordance with the criteria laid down in the criminal law (Criminal Code). (Art. 24).
 - e. In addition, if the convicted person complies with the conditions laid down in the law, the alternative penalty provided for therein, consisting of deprivation of liberty for a minimum period of five (5) years and not exceeding eight (8) years, shall be included. (Art. 29).
 - f. In the same sentence, the commitments of behavior for the term that the court orders, the obligations of moral and economic reparation to the victim, and the extinction of the dominion of the goods that will be destined to reparation will be imposed. (Art.24).
 - g. Upon completion of the alternative sentence and the conditions imposed in the sentence, he shall be granted probation for a term equal to half of the alternative sentence imposed, during which period the beneficiary undertakes not to repeat the crimes for which he was convicted under this law, to appear periodically before the respective court and to report any change of residence. (Art.29).
 - h. Once these obligations have been fulfilled and the probationary period has elapsed, the principal penalty shall be declared extinguished. Otherwise, the probation shall be revoked and the initially determined sentence shall be served, without prejudice to the subrogation provided for in the Criminal Code. (Art. 29).
 - i. In no case shall criminal subrogation, additional benefits or additional rebates be applied to the alternative penalty (Art.29).
 - j. For procedural purposes, it is feasible to accumulate proceedings in progress for criminal acts committed during and on the occasion of the demobilized person's belonging to an armed group outside the law (Sec. 20).
 - k. In no case shall the accumulation of punishable conduct committed prior to the demobilized person's belonging to the illegal armed group proceed (Sec. 20).
 - l. Legal cumulation of penalties is appropriate when the demobilized person has been previously convicted for criminal acts committed during and on the occasion of belonging to an armed group organised outside the law. However, the law stipulates that "in no case may the alternative penalty be greater than that provided for in the present law". (art.20)

6.2.1.4.3 The Court notes, on the basis of the characterization of the institute referred to by the law as *alternative*, that it is in fact a *benefit* that incorporates a significant punitive reduction, to which members of an organized armed group outside the law who are subject to a process of reincorporation into civil life and who have been perpetrators or participants in criminal acts committed during and on the occasion of belonging to those groups may have access. The granting of the benefit is conditioned on the fulfillment of certain requirements established in the law, aimed at fully satisfying the victims' rights to truth, justice, reparation and non-repetition.

6.2.1.4.4. This benefit, which involves a significant reduction of the penalty for the beneficiaries of the law, is based on a purpose of national pacification, an interest that is of unquestionable constitutional relevance; however, simultaneously, in the configuration of the mechanisms aimed at achieving this constitutional purpose, other values and rights are affected, such as the value of justice and the victims' rights to truth, justice, reparation and non-repetition. Although the legislator enjoys a wide margin of configuration for the design of instruments aimed at achieving the proposed

ends, in particular peace, this power is not unlimited. It is for the Court, as stated above, to analyze whether the means designed by the legislator in the norms under examination are adequate to achieve the proposed end, and whether such means do not imply a manifestly disproportionate affectation of other constitutional rights, in particular the rights of victims.

6.2.1.4.5. The Court observes that in principle a benefit that involves a punitive reduction constitutes one of the multiple alternatives that the legislator can resort to to achieve the constitutional good of peace. However, it must be established whether its design produces disproportionate effects on other constitutional rights that are intolerable in the face of the constitutional order. Apparently, a sentence ranging from five to eight years in prison could be disproportionately low when it comes to serious criminality. It is then necessary to determine the meaning and scope of the law on punitive imposition in order to unravel the nature of that penalty and whether it violates the value of justice or the rights of victims.

6.2.1.4.6. In this regard, the Court highlights some parts of the law that contribute to characterize the figure known as alternativity:

a. Article 3 conceives the benefit of the punitive discount as a *"suspension of the execution of the sentence determined in the respective sentence"*.

b. Article 24 stipulates that *"in accordance with the criteria laid down by law, the sentence shall include the principal penalty and the accessory penalties"* and *"the alternative penalty provided for in this Act shall be included in addition"*.

c. Article 29 states that *"once these obligations have been fulfilled and the probationary period has elapsed, the principal penalty shall be declared extinguished. Otherwise, the probation shall be revoked and the sentence initially determined shall be served."*

6.2.1.4.7. From the above provisions derive the essential elements of the so-called alternative penalty, as provided for in the law, which, because of its importance, should be systematised, on the basis of what is said in point 6.2.1.4.2, as well:

(i) It is a punitive benefit that entails conditional suspension of the execution of the sentence determined in the respective sentence, which responds to specific characteristics and purposes.

(ii) It is judicial and substitutes the ordinary penalty: the competent judicial authority shall impose in the sentence the principal penalty and the accessories that ordinarily correspond to the crime according to the criteria established in the criminal law. This understanding is explicitly and systematically derived from articles 3, 19, 20, 24 and 29.

(iii) It is alternative: the penalty that the sentenced person would ordinarily have to serve is replaced by a lower penalty so that the sentenced person must pay the alternative penalty, not the ordinary penalty initially imposed.

(iv) It is conditional: its imposition is conditional on the compliance with the specific budgets provided for in this law. Once compliance has been verified, the Court will impose what the law calls an alternative penalty.

(v) It constitutes a custodial sentence of 5 to 8 years, which must be effectively served without being affected by other criminal subrogation, additional benefits or complementary rebates, additional to the alternative penalty itself. (Par. Art. 29).

(vi) Its maintenance depends on probation: once the alternative sentence has been effectively served, as well as the conditions imposed in the sentence according to the law (article 24), probation shall be granted for a term equal to half of the alternative sentence imposed, during which time the sentenced person must comply with certain commitments: not to repeat certain criminal activities, periodic presentations and information on change of residence (article 29).

(vii) Extinction of the ordinary penalty initially determined: Once the obligations imposed in the sentence or established by law have been fulfilled, and after the probationary period has elapsed, the ordinary penalty initially determined shall be declared extinguished.

(viii) Revocation of the alternative penalty and execution of the sentence initially determined: if during the execution of the alternative penalty or the period of probation, it is established that the beneficiary has failed to comply with any of the obligations imposed in the sentence or provided by law, for the enjoyment of the benefit, the alternative penalty shall be revoked and the principal and accessory penalties initially imposed in the sentence shall become effective.

6.2.1.4.8. Such a legal benefit, thus conceived, does not conceal a pardon, as the plaintiffs erroneously understand it, since it does not mean forgiveness of the penalty. As indicated above, in accordance with the rules laid down in the accused law, the Court must impose in the conviction the principal and accessory penalties laid down in the Criminal Code for the relevant offences, within the punitive limits laid down therein. In addition to imposing the penalty for the offence(s) in question, the Court shall decide on the recognition of the legal benefit of the alternative penalty, provided that the beneficiary fulfils all the requirements for its award. The imposition of an alternative penalty does not annul, invalidate or extinguish the original penalty. The extinction only occurs once the alternative penalty imposed, the probationary period and the obligations derived from all the requirements imposed for the granting of the benefit have been fulfilled.

6.2.1.4.9. This configuration of the so-called alternative penalty, as a measure aimed at achieving peace, is consistent with the Constitution in that, as derived from articles 3 and 24, it does not entail a disproportionate affectation of the value of justice, which is preserved by the imposition of an original penalty (principal and accessory), within the limits established in the Criminal Code, proportional to the offence for which the offender has been convicted, and which must be served if the demobilized person convicted fails to comply with the commitments under which the benefit of the suspension of the sentence was granted. These aspects of weighting have been analysed in sections 5, 6.2.1.7. and 6.2.2. of this providence.

6.2.1.4.10. However, the Court considers that some expressions in Articles 3, 20 and 29 deserve special consideration inasmuch as they may contain measures which, although oriented towards the achievement of peace, could entail a disproportionate affectation of the value of justice and particularly of the right of victims.

6.2.1.5. Collaboration with justice and the effective enjoyment of victims' rights

6.2.1.5.1. This is the case with the expression of article 3, which conditions the suspension of the execution of the sentence determined in the respective sentence, to "collaboration with justice". This requirement formulated in such generic terms, stripped of specific content, does not satisfy the right of victims to the effective enjoyment of their rights to truth, justice, reparation and non-repetition. This collaboration could be limited to providing some information on the conduct of other members of an illegal armed group, rather than consisting of fully and reliably disclosing the facts within which the crimes for which the benefit of alternation is sought were committed. Thus understood,

collaboration would not respect the victims' right to the truth. The same could be said of the right to reparation. Collaboration with the judiciary could consist of handing over the illicit proceeds of criminal activity, which would be manifestly insufficient to ensure the effective enjoyment of the victims' right to reparation. The alternative punishment would seem to disproportionately affect the rights of the victims if the "collaboration with justice" did not include all the rights of such victims, and if it did not require from those who aspire to access such benefit concrete actions aimed at ensuring the effective enjoyment of these rights, which seem to be enunciated in Law 973 of 2005 itself.

6.2.1.5.2. Consequently, the Court will declare Article 3 constitutional, on the understanding that "collaboration with justice" must be directed to the effective achievement of the victims' rights to truth, justice, reparation and non-repetition.

6.2.1.5.3 Special consideration should also be given to Article 20 of Law 975 of 2005, which provides for the cumulation of proceedings and penalties, which will be analysed in the following section.

6.2.1.6. The accumulation of processes and penalties, as part of the alternativity.

6.2.1.6.1 Without going into the specific paragraphs of Article 20, which are generally accused of being part of the system of alternation and which, in the view of the plaintiffs, grant a disguised pardon, it should be noted that Article 20 sets out several hypotheses.

6.2.1.6.2. As for the accumulation of legal proceedings
.....
.....:

a. In the first place, the possibility of the accumulation of proceedings in progress for criminal acts committed during and on the occasion of the demobilized person's belonging to an armed group outside the law.

b. Secondly, it establishes that in no case shall there be any accumulation of punishable conduct committed prior to the demobilized person's membership in an armed group organized outside the law.

c. Thirdly, Article 20 provides for the legal cumulation of penalties, in accordance with the penal code, for the event in which the demobilized person has previously been convicted of criminal acts committed during and on the occasion of belonging to an armed group, but links this hypothesis to a condition.

d. Finally, it establishes the following condition: "in no case may the alternative penalty be greater than that provided for in this Act".

6.2.1.6.3 The Court observes that with respect to the first three hypotheses, these reconcile the purposes of pacification of the law with the demands of justice, insofar as they are oriented towards establishing procedural instruments, such as the accumulation of processes and the legal accumulation of penalties, which promote the demobilization of persons who have committed crimes during and on the occasion of their belonging to the armed group outside the law. At the same time, however, it requires that the processes liable to accumulate refer to conducts with respect to which the law may operate as soon as they have been committed during and on the occasion of membership in the armed group in the process of demobilization. In addition, the accumulation of

legal penalties demands a determination and imposition of the original penalty in accordance with the nature and gravity of the act. The concurrence of these last demands allows a balance between the interest of peace encouraged by the law and its pretensions of justice.

6.2.1.6.4. The value of justice is not disproportionately affected by the fact that the legal cumulation of penalties, determined in accordance with the rules laid down for this purpose in the penal code, operates in relation to the main penalties that may be imposed or imposed, in respect of the various offences perpetrated during and on the occasion of the sentenced person's belonging to the respective group, which are the subject of the cumulation. The foregoing does not mean that in these cases they cease to be benefited by what the law has called criminal alternatives. In such a way that if the demobilized person previously convicted for criminal acts committed during and on the occasion of his or her membership of an organized armed group outside the law is covered by Law 975 of 2005, and fulfils the corresponding requirements, such prior conviction shall be legally cumulated with the new sentence that may be imposed as a result of his or her free version and the investigations carried out by the Public Prosecutor's Office. After this legal cumulation has taken place, the judge shall fix the ordinary sentence (principal and accessory sentence), the execution of which shall be suspended and the benefit of the alternative sentence of 5 to 8 years in relation to the cumulative sentence shall be granted, if the requirements of Law 975 of 2005 are met. If, after the time of the alternative sentence and the probationary period has elapsed, the sentenced person has fully complied with the obligations established by law, the sentence initially determined in the sentence as a result of the legal accumulation shall be declared extinguished. Otherwise, it will be revoked and the sentenced person will have to serve the accumulated sentence, initially determined in the sentence (articles 24 and 29).

6.2.1.6.5 The same does not apply to the expression *"but in no case may the alternative penalty be greater than that provided for in the present law"* in paragraph 2 of article 20, which is unconstitutional. This segment completely eliminates convictions for criminal acts committed prior to demobilization, since it conditions the legal accumulation of penalties from which the ordinary penalty, the execution of which is to be suspended, is to be determined in the sentence. Such a total removal of the previous conviction amounts to a manifestly disproportionate affectation of the victims' right to justice and could be interpreted as a disguised pardon.

6.2.1.6.6. Consequently, the Court will declare, for the charges examined, the enforceability of Article 20, with the exception of the expression *"but in no case may the alternative penalty be greater than the penalty provided for in this law,"* which is declared unconstitutional.

6.2.1.7. Analysis of the charge for violation of the right to obtain guarantees of non-repetition of conduct prejudicial to the rights of victims. Article 29 (partial).

6.2.1.7.1. In this point, the following expressions of article 29 of Law 975/05 are indicated as defendants:

"Article 29. Alternative penalty. The competent Chamber of the High Judicial District Court shall determine the appropriate penalty for the offences committed, in accordance with the rules of the Criminal Code.

In the event that the convicted person has complied with the conditions set forth in this law, the Chamber shall impose an alternative sentence consisting of deprivation of liberty for a minimum period of five (5) years and not more than eight (8) years, assessed according to the gravity of the crimes and their effective collaboration in the clarification of the same.

In order to qualify for the alternative sentence, the beneficiary must undertake to contribute to his or

her resocialization through work, study or teaching during the time he or she is deprived of liberty, and to promote activities aimed at demobilizing the armed group outside the law to which he or she belonged.

Upon completion of the alternative sentence and the conditions imposed in the sentence, he shall be granted probation for a term equal to half of the alternative sentence imposed, during which period the beneficiary undertakes not to repeat the crimes for which he was convicted under this law, to appear periodically before the High Court of the Judicial District concerned and to report any change of residence.

Once these obligations have been fulfilled and the probationary period has elapsed, the principal penalty shall be declared extinguished. Otherwise, the probation shall be revoked and the initially determined sentence shall be served, without prejudice to the subrogation provided for in the corresponding Criminal Code.

Paragraph. In no case shall criminal subrogation, additional benefits or rebates be applied in addition to the alternative penalty".

6.2.1.7.2 The claim states that the right to reparation includes the State obligation to take measures to ensure that the acts of violence that harmed the victims are not repeated.

They then explain that although article 8 of Law 975/05 establishes guarantees of non-repetition as part of the right to reparation, "in clear contradiction to article 8, other provisions of the law are contrary to the State's duty to guarantee non-repetition: no benefits are lost by relapsing into criminal activities, no benefits are lost if the demobilized person does not collaborate in the demobilization of the armed group, and no measures are taken to prevent those who access the benefits from continuing to commit crimes.

According to the plaintiffs, the accused expressions imply that the demobilized persons to whom the alternative sentences are applied are not obliged to cease completely their illicit activities in order to benefit from the corresponding reduction in sentence.

They express that paragraph 4, in order to adequately respect the rights of victims and achieve the objective of peace it pursues, must be adjusted in such a way that the commission of any intentional crime during the period of probation entails the loss of the benefit of the alternative penalty. For their part, they consider that paragraph 5 contains a relative legislative omission, since it does not establish the conditions to which the demobilized person must be subjected after having completed the probationary period: "*Once the probationary period has been completed, the demobilized persons must make commitments that adequately respond to the reason for their demobilization, that is, they must behave in such a way that the reduction of the penalties from which they benefited has as a consideration an effective contribution to peace. Therefore, the commitment of the demobilized person must be not to commit any intentional crime, at least for the duration of the main penalty.*

Accordingly, the petitioners make the following request to the Court:

"To declare the unconstitutionality of the expressions 'the' and 'for which he was convicted in the framework of the present law', underlined in paragraph 4 of article 29 of Law 975 of 2005.

- Declare the relative legislative omission of paragraph 5 of article 29, indicating that the demobilized person undertakes not to commit any fraudulent crime during the time of the main penalty, otherwise he will lose the benefit of the alternative penalty.

6.2.1.7.3. With regard to article 29, the Court notes that, as paragraph 4 is worded, the commitment acquired by the beneficiary of the alternative penalty during the period of probation consists of "*not relapsing into the crimes for which he was convicted in the framework of the present law*". This expression entails a disproportionate affectation of the value of justice and of the right of victims to non-repetition, since it allows the coexistence of the benefit of sentence reduction with phenomena of recidivism in relation to crimes other than those for which they were convicted. No contribution to peace or justice can make such a permissive measure. The benefits granted must be linked to the convicted person's unwavering commitment not to intentionally engage in criminal conduct of any kind, and to the beneficiary's effective contribution to the attainment of peace. The purposes of resocialization and reinsertion that animate these benefits become innocuous with an expression such as the one in question. The intentional commission of a new crime during the period of probation, whatever its nature, generates the revocation of the benefit. Since they violate the value of justice and the victims' rights to non-repetition, without correlatively implying the promotion of peace, the Court will declare the inexistence of the expressions "*the*" and "*for which they were condemned in the framework of the present law*" of paragraph 4 of Article 29.

6.2.1.7.4. With regard to article 29, paragraph 5, the plaintiffs accuse the legislature of an omission that they consider unconstitutional, consisting of the fact that the law does not include a commitment by the demobilized person not to commit any intentional crime during the time of the main penalty.

6.2.1.7.5. As has been pointed out in the legislator's case law on omissions, the Court is only competent to rule on those charges that are based on relative omissions. An omission is relative, the Court has said, "*when it is linked to a specific aspect within a specific norm; but it becomes constitutionally reprehensible if it is preached of an element that, for logical or legal reasons - specifically for constitutional reasons- should be included in the normative system in question, so that its absence constitutes an imperfection of the regime that makes it inequitable, inoperative or inefficient*". These omissions often lead to violations of the right to equality or the right to due process.

6.2.1.7.6. The Court finds that the omission charged by the plaintiffs does not refer to a matter that can be normatively linked to the accused provision. In effect, the plaintiffs consider that the legislator should have included in a normative segment that regulates the extinction of the principal penalty or the revocation of probation, a budget for the revocation of the benefit. Thus, the normative content that the plaintiffs miss does not have a direct and specific relationship with the demanded segment, which is the basic budget for a position to prosper by legislative omission.

Although it is not appropriate to declare that there was a relative legislative omission, the Court considers it pertinent to emphasize that, with respect to the conditioning requested by the plaintiffs, this is unnecessary given that the Court declared unconstitutional the expressions of the fourth paragraph just indicated. This unconstitutionality is due to the need to ensure that those who have benefited from the criminal alternative do not engage in intentional criminal conduct after the benefit has been granted. Obviously, revocation of benefit and loss of probation do not operate automatically. It is for the competent judge to analyse in each case the significance of the crime committed and its circumstances, in the light of the purposes of Law 975/05, in order to determine whether the victims' right to non-repetition has been violated.

On the other hand, the fifth paragraph that is accused raises different legal problems related to the guarantee of the right to the truth, an issue that the Court will address in the section of this ruling on this right.

6.2.1.8. Conclusion on Articles 3, 20, 24 and 29 (partial)

With regard to this charge, the Court will declare Article 3 enforceable for the charges examined, on the understanding that collaboration with justice must be aimed at achieving the effective enjoyment of the victims' rights to truth, justice, reparation, and non-repetition.

It shall also declare article 20 enforceable on the charges examined, except for the expression "*but in no case may the alternative penalty exceed that provided for in this Act*", which is declared to be unconstitutional.

Article 24 shall be declared constitutional for the charges analysed.

Inasmuch as it shall declare the following expressions of the fourth paragraph of article 29 unconstitutional: "*the*" and "*for which he was convicted in the framework of this law*".

6.2.2. Charges for alleged ignorance of the right to the truth, as part of the right to justice.

In three separate charges, the plaintiffs indicate that Law 975 of 2005 violates the right to the truth of which the victims of the crimes committed by the beneficiaries of that law are holders, as well as the right to the memory of Colombian society as a whole. The Court will proceed to study, one by one, the charges filed, in the order in which they were filed in the lawsuit.

6.2.2.1. Alleged ignorance of the right to the truth by article 25 of Law 975, for "the absence of loss of benefits for not confessing all the crimes committed".

Article 25 of the Respondent Act provides as follows:

Article 25. Facts known after the sentence or pardon. If members of illegal armed groups who received the benefits of Law 782 of 2002, or who benefited from the alternative penalty under this law, are subsequently charged with crimes committed during and on the occasion of their membership and before their demobilization, these conducts will be investigated and judged by the competent authorities and the laws in force at the time of the commission of these conducts, without prejudice to the granting of the alternative penalty, in the event that it collaborates effectively in the clarification or accepts, orally or in writing, freely, voluntarily, expressly and spontaneously, duly informed by its defender, to have participated in its realization and provided that the omission has not been intentional. In this event, the convicted person may benefit from the alternative penalty. Alternative penalties shall be cumulated without exceeding the maximum penalties established in this Act.

Taking into account the seriousness of the new facts tried, the judicial authority will impose an extension of twenty per cent of the alternative sentence imposed and a similar extension of the time of probation.

6.2.2.1.1. In the plaintiffs' view, the underlined paragraph allows combatants who benefit from the Act to be relieved of their duty to contribute to the truth. The petitioners consider that, by virtue of the norm demanded, in order to access the benefits granted by the law the demobilized are not in the duty to contribute to the truth, not even to confess the crimes for which a judicial benefit is sought; and that the benefit obtained as a consequence of the first free version will never be lost, since the law does not foresee the figure of loss of benefits. In the view of the plaintiffs, this rule "*hinders the*

realization of the right to the truth of the victims of the omitted facts because, in this way, the demobilized combatant does not really have the duty to contribute to the truth about the facts that he knows and in which he participated. Therefore, such a provision violates the Colombian State's obligation to adopt legislative measures to realize the right to the truth, "and it is even contradictory to the principles and provisions set forth in the body of Law 975 itself, in which it is established that its purpose is to facilitate peace processes by guaranteeing, among others, the right to the truth (arts. 1, 4, 7, 8, 15, 32, 37, 48.1 and 57)".

In addition, in a later charge referring to the right to reparation, the plaintiffs maintain that the violation of the right to truth compromises, in turn, the right to reparation of the victims, insofar as, with respect to the unconfessed crimes, *"those responsible for the crimes will not be established, nor will the circumstances in which they occurred, for which reason the victims will have no one to turn to in order to claim for the rights that were violated"*. They specify that the omission of information on crimes violates the right of victims to reparation, and that such omission is especially serious when demobilized combatants benefit from significant reductions in sentence, *"in exchange for which they should be obliged to tell the truth and repair the victims"*.

Consequently, they request that the Court declare the underlined paragraphs unconstitutional, *"and, on the contrary, point out that the concealment of the truth has as a consequence the loss of the benefit of the alternative penalty for the confessed crime and the impossibility of accessing such benefit for the known crime after the sentence or pardon"*.

6.2.2.1.2. The Ministry of the Interior and Justice considers that the rule is enforceable because, in its opinion, the intentional omission of the demobilized person generates criminal consequences that become incentives for people to confess all their crimes. In this regard, it points out that the partially demanded norm must be systematically interpreted with articles 15 and 16 of the Law that order the Attorney General's Office to investigate crimes committed by those who use the Law.

6.2.2.1.3 However, some interveners, such as the International Center for Transitional Justice, point out that the accused provision violates the rights of victims of human rights violations and the State's obligations in this regard. In this regard, after referring to the protection of the right to the truth in international treaties ratified by Colombia, he brings up the South African experience in which, in exchange for amnesty or pardon for the crimes committed, the perpetrators were required to disclose publicly and comprehensively the criminal acts in which they had been involved. Those who did not avail themselves of amnesty laws in the term defined by them or who did not fully and publicly reveal the truth of what happened, lost their benefits and were prosecuted under ordinary criminal law. These revelations allowed South African society to recognize the full dimension of the crimes committed, decisively helped to provide reparation to the victims and allowed the State to adopt serious and sustainable measures of non-repetition of the facts. In this regard, they conclude their intervention by pointing out that *"the South African case demonstrates that the perpetrators' contribution to fact-finding is achieved through a series of incentives associated with the serious risk of prosecution and the full exercise of jurisdiction by the State"*.

6.2.2.1.4 For its part, the Attorney General finds that the defendant in article 25 of Law 975 of 2005 should be declared unconstitutional. In his opinion, the State has an inalienable constitutional obligation to promote the right to the truth of society and of the victims. It considers that the respondent provision violates this obligation insofar as, through it, the State renounces punishing in due form those who *"at one time had the opportunity to contribute to the ends of the State and did not do so"*. In its opinion, the declaration of unconstitutionality of the defendant achieves a more adequate constitutional weighting between the right of society to peace and the right of the victims and of society itself to know the truth of what happened.

6.2.2.1.5. Joint analysis of Articles 17 partial, 25 partial and 29 partial of Law 975 of 2005

In the terms that have been described and especially from the integral reading of the Law, as requested by the Ministry of the Interior and Justice, the Court finds that in order to carry out the constitutional analysis of the partially demanded provision it is necessary to study them together. In effect, Article 25 of the Defendant Law enshrines the consequence of failing to comply with one of the procedural requirements necessary to access the benefit covered by Law 975 of 2005. This requirement is enshrined in article 17 of the Act - an article that has also been challenged in this lawsuit - according to which, in order to obtain criminal benefits for the crimes committed, eligible persons who wish to submit to the Act must submit a free version of the facts of which the Public Prosecutor's Office is aware and the others "by which they avail themselves of this Act".

However, if, in submitting the "free version" referred to in article 17, persons do not confess all the criminal acts to which they are committed, "committed during and on the occasion of belonging to these groups and before their demobilization", that is, in their capacity as members of a specific armed group outside the law, in a specific place in the national territory, the provisions of article 25 apply.

As we have seen, the plaintiffs, some of the interveners and the Attorney General consider that conferring substantive criminal benefits to those who have committed crimes that because of their gravity are not amnestiable or pardonable, without asking them in exchange to give the State and the victims all the information about the crimes perpetrated, violates the right to the truth of those affected and the right to the memory of society. The charge, as can easily be warned, seeks to have the Court declare unconstitutional the granting of substantive criminal benefits in exchange for a partial confession of the facts. It is clear from the foregoing that the rule challenged is contained both in Article 17 - challenged in other chapters of the Complaint - and in the separate Respondent of Article 25. Indeed, if the charges in the Complaint were successful, there would be no coherence to prevent benefits from being granted to those who have not made a full confession but not to require those who pursue the application of the Law to fully confess the criminal acts they committed.

The above analysis on the guarantee of the victims' right to the truth raises an additional question that can be synthesized as follows: can the person who has benefited from the criminal alternative, who is proven to have concealed a significant crime in the light of the purposes of Law 975/05, in any case retain the benefit that was granted to him? The fifth paragraph of Article 29 sets out the conditions under which, during the period of probation, the benefit of alternative treatment granted must be revoked. However, this rule does not make explicit the requirement that the commission of all crimes on the occasion of the person's belonging to the specific block or front to which he or she belonged has been fully and reliably disclosed in the free version.

In effect, according to article 29, upon finding that the procedural requirements for access to the benefit of alternativity were not met, the accused is obliged to serve the ordinary sentence that should have been imposed in the judgement by virtue of the definition of "alternative criminal" (articles 3, 24 and 29). If, as indicated by the plaintiffs, one of the requirements is the full confession of the offences committed, the consequence of their proven non-compliance during the probation period would be the loss of the benefit granted. For these reasons, in this paragraph the Court will rule on three separate articles being sued: partial Article 17, partial Article 25 and partial Article 29, as regards the requirements for the benefit of probation.

6.2.2.1.6. Legal problem

The Court wonders whether the rule that, in exchange for a substantial reduction in the effective penalty to be served (alternative criminal penalty) requires, in order to grant the benefit, the recognition of the crimes imputed to it by the State or those that the implicated party voluntarily wants to confess is constitutional, but does not order the full confession of all the criminal acts in which the person participated as a member of a specific armed group and confers additional criminal benefits with respect to these non-confessed crimes when the State cannot demonstrate that the omission was intentional.

In other words, the Court asks whether the rule that, in order to achieve peace, grants substantive criminal benefits through a scheme of criminal alternation, without requiring the beneficiary to confess the totality of the crimes committed, and confers additional criminal benefits with respect to the crimes that were not originally confessed, as long as the State cannot prove that the omission was intentional, violates the victims' rights.

6.2.2.1.7. Study of the legal problem raised

6.2.2.1.7.1. As already mentioned, Law 975 of 2005 constitutes one of the most important pieces of the legal framework for peace processes in Colombia. To encourage these processes, the law establishes a substantial reduction in prison sentences for those who have committed extremely serious crimes. Indeed, persons responsible for such crimes under national law could be liable to up to 60 years' imprisonment and under international criminal law could even be sentenced to life imprisonment. However, Colombian law grants them the benefit of an effective sentence of between 5 and 8 years, which undoubtedly affects constitutional rights and principles such as the right to justice of victims and society and the principle of equality.

6.2.2.1.7.2. However, as the Court has pointed out, this substantial reduction of sentences pursues a constitutionally imperative purpose which is none other than the pursuit of peace. In this sense, it should not be forgotten that the pursuit of this objective, through the granting of criminal benefits, may justify important limitations to the rights, principles and values of the constitutional State, in particular, to the right to justice. In effect, as already mentioned, in the weighting of constitutional goods, the right to justice can be the object of different types of materialization, for which the Legislator has not only a wide margin of configuration but also express constitutional authorizations, as long as certain constitutional conditions, requirements and limits are respected.

6.2.2.1.7.3 With regard to the latter issue, the Court has already indicated that negotiation processes with irregular groups must respect minimum standards, the essential core of which, as mandated by the Constitution itself, appears as the unbreakable constitutional limit to the exercise of the State's negotiating power (arts. 5, 93, 94, 150-17, 201-2 and 214 of the Charter). These minimum standards, additionally recognized in international provisions that have been freely and sovereignly incorporated into domestic law, link the State to the fulfillment of a series of unrenounceable obligations related to the satisfaction of the rights of victims of human rights violations or breaches of international humanitarian law and to the prevention of crimes committed, that is to say, to the real consolidation of the important purpose sought by this type of law.

6.2.2.1.7.4. In the terms established in the first part of this ruling, the task that the Court must advance is to identify whether the limitation that the norms demanded produce on the right to justice - in particular on the component of individual and collective truth that incorporates this right - is proportionate. This judgment, as indicated, results from identifying whether the means designed by the Legislator to achieve the legitimate ends he intends to achieve are adequate to achieve them and whether such means do not imply a manifestly disproportionate affectation of other

constitutional rights. In this regard, it should be noted that, according to constitutional doctrine, any rule that goes beyond the minimum or non-negotiable limits that the Charter imposes on the power of legislative configuration of Congress at any time is manifestly disproportionate.

6.2.2.1.7.5. The standards demanded establish that persons who have committed crimes as members of specific armed groups are entitled to a substantial reduction in the effective penalty to be served. In order to obtain this benefit it would seem, according to one interpretation, that they do not have to confess all the crimes in which they participated as members of a block or front. They could confine themselves exclusively to recognizing the crimes for which they are held responsible by the State without providing any additional information. If in the future the State finds that not all the crimes were confessed, the person does not lose the benefits that have already been imposed on him in respect of the crimes he accepted to commit. In addition, he may have access to new benefits in respect of unconfessed offences if the State cannot prove to him that the omission was intentional. The Court considers that this regulation ignores the victims' right to the truth, whose constitutional and international dimension was previously reiterated (section 4).

6.2.2.1.7.6. The minimum content of the victims' right to the truth protects, in the first place, the right to have the most serious crimes investigated. This implies that such crimes must be investigated and that the State is liable by action or omission if there is no serious investigation in accordance with national and international standards. One of the forms of violation of this right is the non-existence of measures that sanction justice fraud or incentive systems that do not seriously take into account these factors or seriously and decisively promote the attainment of the truth.

6.2.2.1.7.7. In addition, the right to the truth incorporates the right to know the causes and the circumstances of time, manner and place in which the crimes were committed. All this leads the victim to publicly acknowledge his pain and his full citizenship in terms of his recognition as a subject of rights. It also leads to those affected being able to know, if they so wish, the reasons and conditions under which the crime was committed.

6.2.2.1.7.8. On the other hand, when it comes to the crime of forced disappearance of persons, the right to the truth includes the right to know the final fate of the disappeared person. As established by international jurisprudence, keeping the relatives of a victim of enforced disappearance in uncertainty about the fate of their loved one violates the right not to be subjected to cruel, inhuman or degrading treatment.

6.2.2.1.7.9. Naturally, all these rights entail the inalienable duty of the State to investigate seriously and exhaustively the crimes committed and to report on the outcome of its investigations.

6.2.2.1.7.10. As far as the collective dimension of truth is concerned, its minimum content includes the possibility for societies to know their own history, to elaborate a relatively reliable collective account of the facts that have defined it and to have memory of those facts. To this end, impartial, comprehensive and systematic judicial investigations must be carried out into the criminal acts for which an historical account is sought. A system that does not benefit the reconstruction of historical truth, or establishes only weak incentives for it, could compromise this important right.

6.2.2.1.7.11. As the Court has pointed out, in a constitutional state under the rule of law such as Colombia, the minimum protection of this plexus of rights cannot be ignored under any circumstances. In other words, public powers are not authorized to disregard these rights in the name of another constitutional good or value, since they constitute the limit to the power of congressional configuration, government management, and judicial interpretation. As was pointed out in the previous section of this decision, these are constitutionally binding rules for all public

authorities, the effectiveness of which is not reduced or suspended because the State is in times of emergency or in peace processes. Indeed, according to the provisions of the constitutional bloc, concealment, silence or lying about the crimes committed cannot be the basis of a negotiation process that conforms to the Constitution. However, a genuine and reliable account of the facts, accompanied by serious and exhaustive investigations and recognition of the dignity of the victims, can be the basis of a negotiation process in which even the waiver of the imposition or full application of the penalties established by ordinary criminal law, including for the most serious crimes considered by humanity as a whole, can be constitutionally accepted.

6.2.2.1.7.12. The Court wonders whether the rules demanded to allow the reintegration into civilian life of persons who have committed serious crimes constitute adequate procedural mechanisms to satisfy the right of victims of human rights violations, - on whom a limitation of their right to justice is imposed - to have (1) the crime committed against them recognized by the State and investigated within a reasonable time; (2) those responsible for it be known; and (3) the causes and circumstances be established in the manner, time and place in which it was committed. In addition, the Corporation wonders whether such legal mechanisms will adequately serve the reconstruction of the macro-criminal phenomenon and the investigation of crimes, including those that humanity as a whole has considered to be of the greatest gravity.

6.2.2.1.7.13. As has already been pointed out, the State is obliged to adopt all the legal mechanisms at its disposal to fully satisfy the rights that have been mentioned. The question then is whether, in the present case, the State is honouring such obligations or whether, on the contrary, it is renouncing the duty to take all measures at its disposal to ensure that judicial proceedings can satisfy the right to the truth.

6.2.2.1.7.14. For the Court, the defendant law does not clearly establish the necessary and sufficient judicial mechanisms to shed light on the macro-criminal phenomenon being faced. Nor does it establish judicial mechanisms to ensure the disclosure of the truth about specific crimes committed by members of specific groups who demobilize. Indeed, the persons who will benefit from the benefits of the law, have the only obligation to accept the crimes that the State is able to impute to them. This is important for satisfying the rights affected and reconstructing the history of what happened, but it is completely insufficient to guarantee the minimum constitutional content of the right to the truth.

6.2.2.1.7.15. First, the mechanisms designed by the Law do not effectively promote full disclosure of the truth. These mechanisms do not assign a consequence to lying or concealment of serious facts that the State has been unable to elucidate, nor do they encourage full and reliable disclosure of the truth about crimes committed as members of such specific groups. There are two reasons for this assertion. In the first place, the system designed by the Law does not establish, as a consequence of false or incomplete versions, the loss of criminal benefits conferred during the period of probation, which leads to the reduction of the effective sentence to be served being maintained in spite of the fact that the whole truth has not been revealed. Secondly, the burden on those who have lied or failed to provide important information to dismantle the specific group to which they belonged, and even to clarify the facts, may be non-existent and in the worst case scenario for that person will not exceed 4 years and 6 months of effective deprivation of liberty. The Court comes in to explain these issues.

6.2.2.1.7.16. According to the accused law, the absence of a reliable or complete confession has no effect on the benefits already granted. If the person accepted the commission of a series of crimes but omitted to relate the facts about other crimes committed as a member of the specific armed group or even lied about it, the benefits conferred on the crimes that the person accepted will not

affect this behavior at all. Indeed, the benefits in respect of each offence do not depend on whether the confession is complete or reliable. According to the accused law, they only depend on the acceptance of all the charges that the State is in a position to impute.

What can happen, according to the Law, is that the person who did not confess a crime will be judged again, but only for the new crimes that are imputed to him. This new process will in no way affect the benefit already granted in respect of the crimes for which the person accepted responsibility and for which he or she was previously sentenced to the effective payment of the alternative penalty.

6.2.2.1.7.17. However, in the case of new crimes revealed by State investigations and not by the collaboration of their perpetrators, ordinary criminal law shall apply provided that it is shown that the omission in the confession was not intentional, in accordance with the law accused. Since the evidence on this fact cannot lie in the person who failed to confess such crimes, given that in no way does the law admit the obligation to prove indefinite denials, it will then be up to the State to provide evidence that proves, in a reliable manner, that the omission was intentional. If it is not possible to provide this proof and the person accepts the new charges, he or she is entitled to have the benefits enshrined in Act No. 975 of 2005 applied to him or her again. Thus, the person responsible for crimes committed during and on the occasion of belonging to these groups before their demobilization, which he did not confess at the time, will probably benefit again from the alternative punishment, according to the accused law.

6.2.2.1.7.18. Given the phenomenon of accumulation of alternative penalties established by law, the new sentence - for crimes that could consist of massacres, forced displacement or mass abductions - may not result in an effective prison sentence. In fact, given that the law establishes that the new alternative penalty not only legally accumulates to the first alternative penalty imposed, but in no case may this accumulation exceed the maximum of 8 years dealt with in the law, the truth is that it may well happen that the person has already paid the maximum penalty of 8 years. Therefore, despite being subject to a new alternative penalty, she would not be obliged to pay a single day's imprisonment since the actual penalty could not exceed 8 years.

6.2.2.1.7.19. This description clearly shows that the Law does not design an effective incentive system that promotes full and faithful disclosure of the truth. Indeed, the person who lies or omits to clarify the criminal acts in which he has been involved on the occasion of his belonging to the block or front knows that in a new trial he can be the object of generous benefits to the point that he is completely relieved of paying a single day of jail. However, for the reasons that the Court goes on to explain, the full and reliable cooperation of the perpetrators is an indispensable measure to satisfy the victims' right to the truth and society's interest in the construction of historical memory.

6.2.2.1.7.20. It should not be lost sight of the fact that this Act is designed to apply to persons who have committed multiple and serious crimes. Due to the difficulties involved in these investigations, in many cases state action is not enough for these crimes to be fully clarified or their perpetrator identified. The manipulation of evidence, the intimidation and murder of witnesses, investigators and judges, the terror on the population, are measures that the illegal armed groups, with the capacity to commit these crimes, have adopted to hide the dimension and the evidence of these crimes. In this sense, it does not seem irrelevant to recall that in many cases the commission of serious crimes has gone unpunished. For this reason it is not possible to state categorically that the State, years after the crimes committed, will reveal, thanks exclusively to its own investigations, the truth about them. Mass graves in inhospitable places, displacement of populations that have dispersed throughout the national territory, in short, multiple crimes can remain silent and forgotten if their own perpetrators, those who have decided to take part in a peace process and who intend to

live under the protection and with the guarantees and advantages of the rule of law, do not fully confess them.

6.2.2.1.7.21. For the reasons that have been expressed, in cases such as these, in addition to relying on the good-faith will of those who decide to enter into legality, the State must adopt suitable procedural mechanisms to ensure that those who benefit through the imposition of reduced alternative penalties for the crimes committed, collaborate effectively in satisfying the right to the truth of their own victims. In this way, the people who will have the benefits of living in a State governed by the rule of law will also have the proportional burdens that the law imposes on them. In this way, the right to peace and the rights of victims, especially the right to the truth, can be weighed. Otherwise, the State would be renouncing its duty to conduct serious and exhaustive investigations into the facts within a reasonable period of time, and would be disproportionately sacrificing the victims' right to know the full and reliable truth about what happened.

6.2.2.1.7.22. In this sense, it should not be overemphasized that in the face of the type of crimes referred to in the demanded law, only the complete identification of the chain of crimes committed by each of these specific armed groups makes it possible to know the real dimension of what happened, identify the victims, repair them, and adopt serious and sustainable measures of non-repetition. The secrecy about what happened, the manipulation of the truth and the denial of serious crimes committed by such groups not only compromises the rights of each person who has had to suffer the pain of the violation of their rights but also the interest of society as a whole to know what happened in all its magnitude and to take measures so that these crimes never happen again.

6.2.2.1.7.23. In short, the law demanded in the articles analyzed does not incorporate suitable mechanisms so that the right to the truth can be effectively and truly satisfied. On the one hand, persons who confine themselves to recognizing the crimes imputed to them by the State as members of such groups but who do not confess to additional crimes prior to the demobilization of the specific group to which they belonged and committed on the occasion of the action of the respective bloc or front do not lose the benefits that the law confers on them over the recognized crimes. Despite silence and concealment, if the State fails to identify them as perpetrators of other crimes, they will continue to enjoy the benefits of the law, despite the fact that the right to the truth of the victims of such crimes will be seriously affected. However, if the State is able to demonstrate that these persons were linked to other crimes on the occasion of their belonging to the specific armed group before demobilization, it must also prove that the omission in the confession was intentional. Otherwise, the benefits that the law provides will be applied to the perpetrator again. In those terms, the person would be sentenced to pay an "alternative penalty" which may even include immediate release.

6.2.2.1.7.24. When it comes to the concealment of crimes, including such serious crimes as massacres, mass kidnappings, murders and disappearances, the bombing of villages or places of worship, the massive recruitment of minors, among others, the transit of their perpetrators to civilian life stimulated by the benefit of the reduction of the effective penalty to be served implies, at the very least, that they fully and reliably satisfy the victims' right to the truth.

6.2.2.1.7.25. Consequently, the Court will declare unconstitutional the second paragraph and the following paragraph of the first paragraph of article 25 of the defendant law: "*without prejudice to the granting of the alternative penalty, in the event that it collaborates effectively in the clarification or accepts, orally or in writing, freely, voluntarily, expressly and spontaneously, duly informed by its defender, to have participated in its realization and provided that the omission was not intentional. In this event, the convicted person may benefit from the alternative penalty. Alternative penalties shall be cumulated without exceeding the maximum penalties established in this Act.*"

6.2.2.1.7.26. In addition, and under these same circumstances, in the operative part of this ruling, article 17 shall be declared constitutional for the charges analyzed, on the understanding that the free version must be complete and truthful.

6.2.2.1.7.27. The Court warns that the fifth paragraph of Article 29, aimed at regulating the cases of revocation of probation and of the benefit of alternative sentencing, uses an overly broad expression, e.g., "fulfilled these obligations". Such obligations may be those of the immediately preceding paragraph, which would leave the victims' right to the truth completely unprotected. On the other hand, the second paragraph of that article refers to "the conditions provided for in this law", which includes multiple requirements, without specifying which ones. This is especially important with regard to the right to the truth, which would be mocked if the convicted person could maintain the benefit of the alternative sentence despite the discovery of a crime committed on the occasion of his belonging to the specific armed group, imputable to the beneficiary and which he had concealed in his free version. According to this interpretation, the beneficiary of the alternative would continue to enjoy the alternative penalty despite having concealed, not any crime, but one in which he participated as a member of the block or to which he belonged. Where the concealed offence is also directly related to his membership of a specific demobilised group, or from which he individually decided to separate in order to demobilise, it is manifestly disproportionate to admit that the convicted person retains the benefit. In effect, this interpretation would render the alternative inoperative and inefficient in the face of the ends of justice, and would excessively affect the right to truth. For these reasons, the Court shall declare constitutional paragraph 5 of article 29 on the understanding that the benefit of alternation shall also be revoked when the beneficiary has concealed in the free version his participation as a member of the group in the commission of a crime directly related to his belonging to the group.

However, since the purpose of the law is to promote peace and to protect, in this respect, the victims' right to the truth in essence, it is not sufficient for the benefit granted to be revoked if, during the period of probation, someone alleges that the truth was concealed in the free version or denounces the beneficiary for the commission of any crime not mentioned in the free version. The concealed offence must be real, not the result of imagination or suspicion, which requires that there be a court judgement giving certainty during the period of probation about the commission of the concealed offence. The existence of a judicial sentence is important, because it will imply for the convicted person to serve an ordinary sentence of long duration, given the magnitude of the crimes committed, which presupposes that there is certainty about their participation in such crimes. In addition, the hidden crime on the action of the block or front must have relevance within the peace process by its entity and significance for the clarification of the truth, as a pillar of reconciliation, an aspect that must be assessed by the judge in such a way that the revocation of the benefit, possible during the period of probation, is necessary in light of the purposes that justify Law 975/05.

6.2.2.1.7.28. Thus, the Court will have to declare the fifth paragraph of article 29 enforceable, on the understanding that the benefit will also be revoked when the participation of the demobilized individual as a member of the group in the commission of a crime directly related to his or her belonging to the group has been concealed in the free version. To the extent that the benefit of alternative sentencing encourages the revelation of the truth of crimes committed by the person as a member of an armed group outside the specific law, the limitation of the right to justice resulting from the reduction of the effective penalty to be served, under the aforementioned conditions, is a suitable means for promoting the right to the truth. On the other hand, if the criminal benefit is irrevocable, even in circumstances in which a member of a block or front conceals his participation in the commission, not of any crime, but precisely of one that is directly related to his belonging to that specific group and committed on the occasion of his attachment to it, the affectation of the

victims' right to the truth would be manifestly disproportionate. Hence the need for the enunciated conditioning, which will be embodied in the operative part of this sentence.

6.2.2.1.7.29. In short, by virtue of the decisions taken and in strict application of the Constitution, the criminal benefits that the defendant law allows to be granted to those who have committed extremely serious crimes can only be granted to those who have fully satisfied the right of the victims to the truth, on which depends, also, the satisfaction of the interest of society in building a collective memory of what happened during the armed conflict. To do so, they must have confessed, in a complete and truthful manner, all the criminal acts in which they have participated as members of such groups. In this regard, however, it is necessary to recall that, according to the jurisprudence of the Court, the State must ensure that the confession is fully conscious, free and voluntary. Otherwise, the right to freedom from self-incrimination would be violated.

6.2.2.1.7.30. Thus, with respect to these articles, the Court considers both the victims' right to the truth and the right to peace to be harmoniously protected. Finally, it should not be forgotten that, in any case, in the processes of design of legislative norms as well as in political or administrative actions and in the adoption of judicial decisions, public servants must seek the integral satisfaction of the right to the truth in the terms established by this Corporation.

6.2.2.2. Violation of the right to the truth by article 10 of Law 975, for having omitted "to stipulate the obligation of demobilized persons to indicate the whereabouts of disappeared persons".

6.2.2.2.1. The complaint questions numeral 6 of article 10 of Law 975/05, which provides:

"Article 10. Eligibility requirements for collective demobilization. Members of an organized armed group outside the law who have been or may be charged, accused or convicted as perpetrators or participants in criminal acts committed during and on the occasion of belonging to those groups, when they cannot benefit from some of the mechanisms established by Law 782 of 2002, may access the benefits established by this law, provided that they are on the list that the National Government submits to the Attorney General's Office and that they also meet the following conditions:

10.1. That the organized armed group in question has been demobilized and dismantled in compliance with the agreement with the National Government.

10.2. That the goods resulting from the illegal activity are delivered.

10.3. That the group make all recruited minors available to the Colombian Family Welfare Institute.

10.4. That the group cease all interference with the free exercise of political rights and civil liberties and any other illicit activity.

10.5. The group is not organised for drug trafficking or illicit enrichment.

10.6. That the kidnapped persons, who are in their possession, be released.

Paragraph. The members of the organized armed group outside the law who are deprived of their liberty may have access to the benefits contained in this law and those established in Law 782 of 2002, provided that the corresponding judicial decisions determine that they belong to the respective group.

This standard defines the eligibility requirements for the event of collective demobilizations, that is, when a specific armed group decides to begin its process of reincorporation into civilian life. The eligibility requirement is to release hostages held by the specific demobilizing group and its members.

6.2.2.2.2 For the plaintiffs, in approving the accused norm, there was a relative legislative omission,

consisting of the fact that demobilized combatants are not required to indicate, at the time of demobilization, the whereabouts of the disappeared persons. They go on to explain why in the present case the five conditions laid down in constitutional jurisprudence (judgement C-185 of 2002) for the creation of a relative legislative omission, namely, are met: (ii) such a rule excludes from its legal consequences cases which, being assimilable, should be contained in its normative text, or which omits to include an ingredient or condition which, under the Constitution, is essential to harmonize the text of the rule with the mandates of the Political Charter; (iii) that the exclusion of the cases or elements in question lacks a principle of sufficient reason; (iv) that by virtue of the lack of justification and objectivity alluded to, the cases excluded from the legal regulation remain in a situation of negative inequality compared to those that are protected by the consequences of the norm; and (v) that the omission results from the breach of a specific duty imposed on the legislator by the Constituent.

6.2.2.2.3 The Court wonders whether, in the light of constitutional norms, the legislature is authorized to confer extensive criminal benefits on perpetrators of the crime of enforced disappearance, without requiring them, as a prerequisite for obtaining such benefits, not only to have decided to demobilize collectively but also to indicate the whereabouts of the persons for whose disappearance they are responsible.

6.2.2.2.4 As explained in a previous section of this decision, Article 12 of the Constitution, which prohibits the forced disappearance of persons, and the Inter-American Convention on Forced Disappearance of Persons, which forms part of the constitutional bloc, contain, inter alia, the State's obligation to seriously investigate the crime of forced disappearance of persons and to inform the victims and their families about the outcome of the investigations and the fate of the disappeared persons. This duty is immediate and informal and does not require victims to encourage or promote investigations. Additionally, the satisfactory fulfillment of this duty demands that the State adopt the necessary measures to find the whereabouts of the disappeared persons in the shortest possible time, since the delay in the investigation or in the delivery of information to the interested persons in turn leads to a violation of the right not to be the object of cruel treatment on behalf of the relatives of the disappeared person, as reiterated by the Court when reviewing the bill on the urgent search mechanism for disappeared persons.

6.2.2.2.5 To this extent, it is unconstitutional for the Colombian State to grant criminal benefits to persons who are responsible for the crime of enforced disappearance, without requiring, as a condition for granting the benefit, that they have decided to demobilize under this law that those responsible for the crime have indicated, from the moment their eligibility is defined, the whereabouts of the disappeared persons. Indeed, as noted in the previous case, the State cannot renounce using all the mechanisms at its disposal to prevent extremely serious crimes and, in the case in which they were committed, to interrupt their effects on the victim or on his or her next of kin.

6.2.2.2.6 In this regard, it is important to recognize that the obligation to release abducted persons is similar in nature to the constitutional obligation to disclose the fate of missing persons. In both cases, the aim is to halt the continuing violation of the fundamental rights to life, integrity and freedom of the victims and the integrity of their loved ones. However, there does not appear to be any reason why the legislator failed to establish as an eligibility requirement the disclosure of the fate of disappeared persons while enshrining as a condition for access to the benefits of the law the release of kidnapped persons, in the event of collective demobilization. Since there is no principle of sufficient reason for this distinction and there is, however, the inalienable obligation of the State to adopt all measures to clarify this crime in the shortest possible time and to report on the whereabouts of the disappeared, it does not seem constitutionally adequate to exclude the one

mentioned in the present judgment.

6.2.2.2.7. In sum, for the reasons expressed both now and in the previous one apart from this judgment, the Court considers that the omission of the legislator of which the lawsuit accounts is the result of the failure to comply with a specific constitutional duty at the head of state. This duty consists in taking all the measures at its disposal to establish, in the shortest possible time, the whereabouts of the disappeared persons. The silence on this requirement at the time of applying for the application of the Law demanded before the decision to demobilize collectively, is equivalent to a waiver of the State to fulfill this duty, waiver to which the legislator is not authorized.

6.2.2.2.8. In this regard, it is important to note that the duty to account for disappeared or abducted persons and their fate is an indispensable condition for the effectiveness of victims' rights to truth and justice and should therefore be an eligibility requirement when the entire specific armed group decides to demobilize collectively in order to access criminal benefits. In this way, the State satisfies its obligation to take all appropriate measures to satisfy the rights of victims. In addition, it goes without saying that this information must be provided in full by the members of the specific armed group during the so-called "free version" and, in any case, the person responsible for these crimes when he does not know the exact whereabouts of the person he kidnapped or disappeared is obliged to collaborate effectively with the justice system in order to find out his whereabouts. These obligations cannot be voluntarily postponed by the State until the moment of the final sentence of the criminal trial. On the contrary, due to the importance of the legal assets they protect and the specificity of the legal norms that establish the duties of the State in this respect, they must be fulfilled from the very moment in which the collective demobilization process begins, with the decision of each block or front, and its satisfactory fulfillment must be evaluated during the process.

6.2.2.2.9. In this regard, it is relevant to point out that if information on the whereabouts of disappeared or abducted persons is provided at the beginning of the process, the victim's next of kin have different procedural opportunities to verify its veracity and promote its completeness and reliability. From this point of view, demanding that the disclosure of the fate of the kidnapped and disappeared appear as a condition of eligibility for collective demobilization guarantees the right to an effective remedy at the head of the victims, a right that, as already mentioned, is part of the block of constitutionality, which creates the conditions for the State to quickly begin the investigation of those responsible for the crime of enforced disappearance.

6.2.2.2.10. For these reasons, the Court cannot find it in conformity with the Constitution to postpone, until the execution of the judicial sentence, the delivery to the State and to the victims and their families of information on the fate of the disappeared, just as it would not be in conformity with the Constitution to postpone information on the whereabouts of the kidnapped persons. According to the constitutional and international norms that have been cited, this information is of such importance that it must be considered as an initial requirement, to be applied from the moment of the demobilization decision adopted by each block or front, in order to access the concession of the benefits for the collective demobilization of each specific armed group and its reliability must be demonstrated during the respective criminal process in each case with respect to the corresponding front or block.

6.2.2.2.11. Consequently, in defense of the rights to the truth, to life, to personal integrity, to personal liberty and to an effective judicial remedy, the Court considers that the legislator's omission is unconstitutional. In consideration of the foregoing arguments, the Court shall declare constitutional paragraph 10.6. of Article 10 of the Respondent Law, on the understanding that they must also report in each case on the fate of the disappeared persons.

Violation of the right to the truth by articles 48 (partial) and 58 (partial) of Law 975/05, since they are unaware of the obligation to disseminate the truth in full.

6.2.2.3.1. The actors demand some paragraphs of Articles 48 and 58 of Law 975/05, which provide:

"Satisfaction measures and guarantees of non-repetition. Satisfaction measures and guarantees of non-repetition, adopted by the various authorities directly involved in the national reconciliation process, should include:

49.1 (sic) Verification of the facts and full and public disclosure of the judicial truth, to the extent that it does not cause further unnecessary harm to the victim, witnesses or other persons, or create a danger to their safety.

Article 58. Measures to facilitate access to archives. Access to archives should be facilitated in the interest of victims and their relatives to assert their rights.

When access is requested in the interest of historical research, authorization formalities shall only be for the purpose of access control, custody and proper maintenance of the material, and not for purposes of censorship.

In any case, the necessary measures should be taken to safeguard the right to privacy of victims of sexual violence and of child and adolescent victims of illegal armed groups, and not to cause further unnecessary harm to the victim, witnesses or other persons, or create a danger to their safety.

6.2.2.3.2. The plaintiffs explain that, in principle, the transcribed articles enshrine restrictions on the dissemination of the truth and access to archives that are legitimate and proportionate insofar as they restrict the right to the truth, since their purpose is not to generate further damage for the victims and to protect the security of witnesses who have contributed to the clarification of reality. However, they consider that the paragraphs underlined allow two interpretations, one of which is unconstitutional.

6.2.2.3.3. Indeed, it is stated that *"an unconstitutional interpretation of these rules would allow the dissemination of the truth or access to archives to be limited in order to avoid causing any kind of harm to any person, including, for example, demobilized combatants or persons who have supported them. Such an interpretation would be a denial of the right to the truth of victims of human rights violations and breaches of international humanitarian law, as it would again override the interests of the perpetrators over the interests of the victims and reaffirm the conditions under which they have been oppressed. This would be particularly feasible if it were interpreted as harm, for example, the moral damage that those responsible for the crimes would suffer because the truth of the facts is publicly known, or the moral damage of any other kind that may be suffered by persons who have not directly perpetrated the crimes but who have collaborated with, financed or supported the activity of armed groups from the public, political or economic spheres"*.

6.2.2.3.4. The partially challenged provisions reiterate the constitutional right of access to public information, and project this right as a tool to satisfy the interest in the collective truth of which the Colombian society is the owner. In this sense, the rules are in line with the provisions of the Constitution and the right to the truth that has been mentioned so many times in this decision. However, the defendant expressions seem to establish a reservation to the publicity of such information.

6.2.2.3.5. In effect, numeral 49.1 (sic) of article 48 establishes that the authorities directly involved

in the process of national reconciliation must include within the catalogue of measures of satisfaction and non-repetition of criminal acts "The verification of the facts and the full and public dissemination of the judicial truth, to the extent that it does not cause more unnecessary harm to the victim, witnesses or other persons, nor create a danger for their safety."

6.2.2.3.6 On the other hand, article 58 states that the authorities must take the necessary measures to safeguard the right to privacy of victims of sexual violence and of child and adolescent victims of illegal armed groups, and not to cause further unnecessary harm to the victim, witnesses or other persons, or create a danger to their safety.

6.2.2.3.7. In the Court's opinion, the expressions "demandas" must be interpreted in accordance with the constitutional rules on publicity and confidentiality of public information and in the context of the Law itself. In this sense, these provisions cannot be understood as a general clause authorizing public officials to establish the reservation of documents which, in their personal judgement, "generate unnecessary harm" to "other persons", since such an authorization would be unconstitutional. In this sense, a systematic reading of the provisions partially sued makes it possible to understand that what those provisions do is to refer to the application of the rules in force which clearly and precisely establish the type of information which may be subject to reservation under the conditions laid down by the rule.

6.2.2.3.8. In this regard, the Constitutional Court has already pointed out that in principle the Constitution orders the publication and transparency of all documents and public actions. In this regard, Article 74 C.P. states: *"Everyone has the right of access to public documents except as provided by law."*

6.2.2.3.9. Under the terms of the Constitution, the general rule of publicity can only have exceptions by virtue of laws that specifically establish the specific cases in which certain clearly defined authorities can establish that certain information is reserved. In addition, a reservation is only appropriate if the legislator provides sufficient reasons to justify it. In this regard, the Court has set strict conditions for the legislator to derogate from the general rule in Article 74 Superior. In this regard, constitutional jurisprudence foresees that such limitations will be admissible when proven: (i) the existence of a legal reservation in relation to the limitation of the right; (ii) the need for such restrictions to be subject to the principles of reasonableness and proportionality and to be related to the protection of fundamental rights or constitutionally protected values, such as national security and defence; and (iii) the temporary nature of the restriction, to the extent that the law must set a time period after which documents become public domain.

6.2.2.3.10. From this point of view, the rule in question can only be interpreted as referring to legal provisions which, in compliance with the aforementioned requirements, enshrine the possibility of a reservation, since the Constitution does not admit the existence of open clauses establishing generic or indeterminate restrictions on the right of access to documents and public information. In fact, the Charter only authorizes exhaustive restrictions that are fully justified and whose application does not infringe on the essential content of other constitutional rights, in particular the right of victims and society to know the truth.

6.2.2.3.11. Consequently, in the light of the Constitution and in application of the democratic principle and specifically of the principle of the preservation of rights, it must be argued that the provisions being sued are not establishing a general reservation clause but referring to the other legal rules in force that allow the reservation of certain actions, for example, to protect the life, integrity and safety of witnesses in criminal cases or to guarantee the right to privacy of minors or victims of sexual offences. In addition, the accusations provide normative criteria for their

application.

6.2.2.3.12. On the other hand, the Court finds that this interpretation of the expressions demanded is entirely consistent with the principles that guide the general law of which they are part and, especially, with the content and purpose of the specific norms that they comprise.

6.2.2.3.13. In fact, the law under consideration, in accordance with the Constitution and the international norms that bind the Colombian State, aims to promote national reconciliation on the basis of the reduction of the effective penalty to be served, but on the condition that the victims' minimum rights to truth, justice and reparation are guaranteed. In this measure, the legislator understood that one of the most important measures to satisfy the rights to truth and reparation, to promote the duty of collective memory and to ensure the adoption of adequate measures of non-repetition, was the reconstruction of a historical account that can be nourished by the actions that take place under the protection of the Law. That is why he dedicated several articles to the protection of this right and a complete title to the guarantee of memory.

6.2.2.3.14. This legislative decision is in line with the general framework established by the rules that make up the constitutional bloc. In this regard, it is important to recall once again the jurisprudence of the authoritative interpreter of the Inter-American Convention on Human Rights who, in the area of publicity of information, pointed out:

"77. Finally, it is the obligation of the State, in accordance with the general duty established in Article 1.1 of the Convention, to ensure that these serious violations are not repeated. It must therefore take all the necessary steps to achieve this end. Preventive and non-repetitive measures begin with the revelation and recognition of past atrocities, as ordered by this Court in the judgment on the merits. Society has the right to know the truth about such crimes so that it has the capacity to prevent them in the future.

"Therefore, the Court reiterates that the State has the obligation to investigate the facts that generated the violations of the American Convention in the present case, as well as to publicly disclose the results of such investigation and punish those responsible.

6.2.2.3.15. In this sense, the fact that multiple articles of the law demanded are ordered to the public authorities the exhaustive investigation of the facts and their public diffusion as a condition for the satisfaction of the rights of the victims and for the adoption of measures of non-repetition does not escape the Court. To mention just a few examples, article 7 of the Act expressly enshrines the right of society and victims to know all the information on the facts under investigation. In the same vein, it points out that judicial processes will not prevent other non-judicial truth reconstruction mechanisms from being implemented in the future. In order for such mechanisms - such as truth commissions - to operate fully, it is necessary that there be no reservation on relevant information, unless it is a matter, as also established by law, of protecting the privacy, life, integrity or security of victims and witnesses. The same article 7 establishes that victims have the right to satisfaction or moral compensation for the damage caused and that such compensation includes, among other things, the obligation to "disseminate the truth about what happened". In turn, article 49, of which one of the provisions demanded is a part, refers to the measures of satisfaction and guarantees of non-repetition to which the Colombian State is bound. The defendant provision could then be misinterpreted as being contrary to the purpose and objectives of the article to which it belongs.

Finally, article 58 is entitled *Measures to guarantee access to the Archives* and is inserted in Chapter X of the Law, aimed integrally at ensuring the duty of memory and the reconstruction of a historical account of the phenomena to which the Law applies. In these terms, it cannot be understood that the norm demanded allows, by way of exception, to sacrifice the goods, values and rights pursued by the entire Chapter X within which it is inserted. Systematic and teleological interpretation criteria must be imposed on the interpreter of the law, by virtue of which it must be understood that the provisions demanded are limited exclusively to referring to the rules in force on judicial reserve in order to protect the life and safety of witnesses. This interpretation, as already mentioned, satisfies the principle of preservation of the right, as it allows the provision to remain in the legal order.

6.2.2.3.16. In short, in the Court's view, it is not possible to understand, as the plaintiffs appear to do, that the respondent rules are establishing a general clause of confidentiality of information whenever the public officials concerned so wish. Nor does it establish a reserve of information in favour of the persons responsible for the crimes under investigation or on facts relevant for the historical clarification of the phenomenon or for the reparation of the victims. In this sense, the only adequate interpretation of these provisions is that according to which the reservation of certain information is allowed, but in the terms in which the specific laws on the subject establish it, in such a way as to guarantee the rights of victims and the rights to life, integrity or security of persons who have collaborated with the justice system in terms of the ordinary legislation in force on the protection of victims and witnesses.

6.2.2.3.17. On the basis of the foregoing considerations, the Court shall proceed to declare the expression "other persons" and "further unnecessary damage" in article 48, paragraph 49.1, exequitable for the charges examined, and to declare the expressions "further unnecessary damage" and "other persons" in article 58, paragraph three, exequitable for the charges examined.

6.2.3. Charges for violation of the right to justice in the strict sense

6.2.3.1. Analysis of the charge based on the violation of the right to justice due to the reduced terms of investigation enshrined in Law 975/05. Articles 17 and 18.

6.2.3.1.1. The charge is brought against the defendants of Articles 17 and 18 of Law 975 of 2005:

"Article 17. Free version and confession. The members of the illegal armed group, whose names the National Government submits to the consideration of the Attorney General's Office, who expressly invoke the procedure and benefits of the present law, will render a free version before the delegated prosecutor assigned to the demobilization process, who will question them on all the facts of which he has knowledge.

In the presence of their defender, they shall state the circumstances of time, manner and place in which they participated in the criminal acts committed on the occasion of their membership of these groups, which precede their demobilization and for which they are covered by this law. In the same diligence they will indicate the goods that are given for reparation to the victims, if they have them, and the date of their entrance to the group.

The version submitted by the demobilized person and the other actions taken in the demobilization process shall be made immediately available to the National Unit of Justice and Peace Prosecutors' Offices so that the deputy prosecutor and the Judicial Police assigned to the case may prepare and develop the methodological programme to initiate the investigation, verify the veracity of the information provided and clarify those facts and all those of which they have knowledge within their sphere of competence.

The demobilized person shall immediately be placed at the disposal of the magistrate

exercising the function of control of guarantees in one of the detention facilities determined by the National Government in accordance with article 31 of this Act, who shall, within the following thirty-six (36) hours, signal and hold a hearing on the formulation of the indictment, at the request of the prosecutor hearing the case.

Article 18. Formulation of imputation. When from the evidentiary material elements, physical evidence (sic), legally obtained information, or from the free version can be inferred. (sic) reasonably that the demobilized person is the author or participant in one or more crimes under investigation, the prosecutor delegated for the case will request the magistrate exercising the function of control of guarantees to schedule a preliminary hearing for the formulation of the accusation. At this hearing, the public prosecutor shall make the factual imputation of the charges under investigation and request the magistrate to order the pretrial detention of the accused in the appropriate detention centre, in accordance with the provisions of this Act. It shall also request the adoption of precautionary measures on goods of illicit origin that have been delivered for purposes of reparation to the victims.

After this hearing and within sixty (60) days thereafter, the National Unit of the Attorney General's Office for Justice and Peace, with the support of its judicial police group, will carry out the work of investigation and verification of the facts admitted by the accused, and all those of which it has knowledge within the scope of its competence. At the end of the term, or sooner if possible, the prosecutor of the case shall request the magistrate exercising the function of control of guarantees to schedule a hearing for the formulation of charges, within ten (10) days following the request, if applicable.

With the formulation of the accusation, the statute of limitations of the criminal action is interrupted."

6.2.3.1.2 The plaintiffs consider that the procedure established in these rules does not constitute an effective remedy, since it provides for excessively short terms of investigation: "Law 975 establishes a term of 36 hours from the free version of the accused for the Public Prosecutor's Office to formulate the imputation of the facts (art. 17) and a term of 60 days for the hearing to formulate charges (art. 18). Such terms are insufficient to ensure an adequate and full investigation of the facts. At the most, this term can constitute the mechanism for verifying the facts for which the demobilized combatant was already prosecuted or convicted and which, moreover, are accepted by him in the new free version".

The plaintiffs make a comparison between the pertinent norms of Law 906 of 2004, which contemplate the terms of investigation, and the norms of the defendant law to indicate that the latter contemplates substantially short terms that obstruct the adequate exercise of the duty of investigation that is incumbent on the State. They highlight the complexity of the crimes that the justice system must investigate within the framework of the law being sued in order to reinforce its approach to the inadequacy of the terms provided for in the paragraphs being sued.

6.2.3.1.3. Regulatory unit. In application of the rules established by the jurisprudence, the Chamber will proceed to integrate the normative unit of the accused expression "*within the next thirty-six (36) hours*", with all the last paragraph of the norm, in order to give meaning to the normative segment demanded, which is essential to issue a substantive pronouncement.

6.2.3.1.4. In order to determine whether, as the complaint states, the procedural terms established in the highlighted segments constitute restrictions on the State's exercise of an adequate duty to investigate, which correlatively violate the right to justice, the Court will have to make (i) a brief

reference to the content of the State's duty to investigate as a correlate of the victim's right to justice; and (ii) to establish the scope of each of the provisions challenged, in order to determine whether they meet minimum standards that allow for a serious, thorough, diligent and effective investigation.

6.2.3.1.5. The duty to investigate as part of the right to justice:

6.2.3.1.5.1. The State obligation to investigate human rights violations is part of the right to justice and is firmly established in international law. This is a duty which, however, has a strong link with the obligation to punish those responsible and has an autonomous content. In this sense, international jurisprudence has emphasized, based on Articles 8 and 25 of the American Convention on Human Rights, that States have the duty to investigate thoroughly, seriously and diligently conduct that violates human rights. It has also indicated that the research that States must undertake must be carried out with due diligence to ensure its effectiveness. This requirement has been linked to two additional requirements such as the *reasonable time limit* and the *need* for diligences aimed at obtaining a satisfactory result.

6.2.3.1.5.2 On the concept of *reasonable time*, the jurisprudence of this Court has stated: "*Article 8.1 of the American Convention on Human Rights provides, inter alia, that everyone has the right to be heard, with due process, within a reasonable time by an impartial, competent and independent Court or Judge. The jurisprudential development of this normative prescription carried out by the inter-American organs of protection -Commission and Interamerican Court of Human Rights- meets the parameters set by the European Court of Human Rights, at the point of the right of the subjects to which the States process without unjustified delays the processes that are under their jurisdiction.*

The parameters indicated by these entities define the reasonableness of the time limit according to (i) the complexity of the case, (ii) the procedural activity of the interested party and (iii) the conduct of the judicial authorities and (iv) the overall analysis of the procedure".

6.2.3.1.5.3. With regard to the *need* for diligences, this is a verification that takes account of the complexity of the matter and the overall analysis of the procedure.

It should be noted that, as some of the participants in this process have pointed out, the "Set of Principles against Impunity" also recognizes the obligation of states to undertake effective investigations for the clarification of human rights violations. Thus, Principle 19 states that "*States shall undertake prompt, thorough, independent and impartial investigations into violations of human rights and international humanitarian law.*

From this point of view, international jurisprudence has also been very critical of delays in investigations, stressing that the determination of a "*reasonable time limit*" must take into account the complexity of the facts, which determines the complexity of the investigations, as well as the starting point of the investigation.

6.2.3.1.5.4. Likewise, the State's duty to investigate extremely serious crimes must be fulfilled in terms that respect its obligations under international humanitarian law and international human rights law; in this regard, the provisions of the statute of the International Criminal Court, duly signed and ratified by Colombia, in relation to which this Corporation affirmed in Ruling C-578 of 2002, are particularly relevant: "*The exercise of the sovereign powers of States to define sanctions and criminal procedures for serious human rights violations such as genocide, crimes against humanity or war crimes should be done in a manner that is consistent with international human rights law, international humanitarian law and for the purposes of combating impunity as*

highlighted in the Rome Statute.

On this brief framework, the Court proceeds to establish whether the terms of investigation established in Law 975/905 respect the standards established to guarantee a serious, exhaustive, diligent and effective investigation.

6.2.3.1.6. The charge against Article 17

6.2.3.1.6.1. Article 17 regulates the procedure for the free version and confession of demobilized persons, which is submitted to the Deputy Prosecutor assigned for the demobilization process. The purpose of the diligence is to:

- a. Receive the demobilized person's version of the circumstances of time, manner and place in which they participated in the criminal acts committed on the occasion of their membership of the armed group, which were prior to their demobilization and for which they are covered by the law.
- b. In the same diligence, the demobilized person shall indicate the goods he delivers for the reparation of the victims and the date of his entry into the group.
- c. Once the diligence has been completed, the action will immediately be made available to the National Unit of Justice and Peace Prosecutors' Offices, so that the respective prosecutor and the judicial police may prepare and develop the methodological program to initiate the investigation, verify the veracity of the information provided, and clarify the confessed facts and all those of which they have knowledge within the framework of their competence.
- d. The demobilized person shall immediately be left at the disposal of the magistrate exercising the function of control of guarantees, who within the following 36 hours shall signal and conduct the hearing for the formulation of the indictment, at the request of the prosecutor hearing the case.

6.2.3.1.6.2. The Court notes that the partially challenged rule establishes, in general terms, reasonable criteria that guarantee a prompt, impartial and exhaustive investigation of the facts that the demobilised person brings to the attention of the prosecutor's office. Several aspects support this view: a). In the first place, it should be borne in mind that the prosecutor's verification work is based on the existence of a confession, which in fact provides a framework for the investigation; (b) Secondly, it is relevant for the purposes of the investigation that the law establishes that the investigative bodies (the prosecutor's office and the judicial police) must draw up and **develop** a methodological programme, which is regulated by article 207 of the Code of Criminal Procedure, in order to make the demobilized person confessed available to the judge responsible for supervising guarantees; c) and thirdly, it should be noted that the 36-hour term established by the rule cannot be interpreted as the term of investigation, as understood by the plaintiffs, but rather as the term established for the magistrate of control of guarantees to signal and conduct the hearing for the formulation of the accusation, once the prosecutor hearing the case has requested it. The foregoing implies that the provision of the demobilized person before the judge of control of guarantees is conditional upon the elaboration and development of the methodological program as derived from the third paragraph of the partially challenged norm.

6.2.3.1.6.3. This is the only interpretation that is consistent with the State's duty to seriously investigate the facts brought to its attention by demobilized combatants who avail themselves of the law; the purpose of the term, as derived from an adequate understanding of the law, is not to restrict the spaces for investigation, but to guarantee the speed with which the judge of control of guarantees must process the hearing of the indictment after the request of the prosecutor who hears

the case. This interpretation allows the coexistence of the purposes of the search for peace that animate the law, with the imperatives of justice, in particular with its dimension relating to the duty of investigation with a view to guaranteeing the victims' right to the truth. It is also derived from the text of the rule linking the 36-hour term to the proceedings of the judge, not the prosecutor. It is the prosecutor who requests the magistrate to conduct the hearing for the formulation of the indictment. This request must be made when the prosecutor considers that he or she has fully developed the methodological program of the investigation because only then will the State have constructed the case to support the accusations that will be made to the person who gave the free version.

6.2.3.1.6.4. By virtue of these considerations, the Court shall declare exequible, for the charges examined, the expression "*within the following thirty-six hours, it shall signal and conduct an indictment hearing*" contained in article 17, on the understanding that the placing at the disposal of the person under the orders of the magistrate exercising the function of control of guarantees and the request for an indictment hearing shall be presented when the methodological program set forth in the third paragraph of the same article has been fully developed, and in accordance with the provisions of article 207 of the Code of Criminal Procedure.

6.2.3.1.6.5 However, the Court warns that the expression that does seem to set a term for the prosecutor that excessively reduces the possibility of constructing a case before the arraignment hearing is the one that heads the judged paragraph. In effect, the rule states that "the demobilized person shall immediately be left at the disposal of the judge exercising the function of control of guarantees". This duty is to be fulfilled "immediately" after a fact which the rule does not specify, but which is inferred from the essential object of the rule, i.e. the receipt of the free version. Therefore, upon receipt of the free version, the prosecutor must immediately place the demobilized person at the disposal of the guarantee control magistrate, who will have 36 hours to conduct an indictment hearing. This clearly makes it impossible for the methodological programme of the investigation to be fully developed, which manifestly disproportionately affects the victims' right to justice and makes the State's duty to investigate unfeasible. Consequently, the expression "immediately" shall be declared unconstitutional. Of course, the development of such a methodological research programme must take place within a reasonable period of time, in accordance with the case law on the subject mentioned above, given that crimes have already been confessed and that in the light of the purposes of the law, the situation of each demobilized person must be defined in a timely manner.

6.2.3.1.7. The charge against Article 18

6.2.3.1.7.1 The plaintiffs state that the period of 60 days provided for in Article 18 of the Convention is unconstitutional, because it is insufficient to carry out a serious investigation, which in turn is an effective remedy that allows the truth to be properly ascertained and justice to be done.

6.2.3.1.7.2. The scope of the standard. Article 18 of the impugned law configures the hearing of formulation of imputation, based on the following rules:

- a. The prosecutor shall request the magistrate to carry out the functions of control of guarantees to schedule a hearing for the formulation of an indictment.
- b. This request must be based on legally obtained evidence from which it can reasonably be inferred that the demobilized person is the author or participant in one or more of the crimes under investigation.
- c. At the hearing, the prosecutor shall make a factual imputation of the charges under investigation and request the magistrate to order the pretrial detention of the accused in the corresponding detention centre.

- d. At the same hearing, he shall request the adoption of precautionary measures on the goods that have been delivered for reparation to the victims.
- e. The prosecutor's office has a term of sixty (60) days from the date of the indictment hearing to carry out the investigation and verification of the facts confessed by the accused, and of all those of which it has knowledge within the scope of its competence.
- f. At the end of the above term, or sooner if possible, if it finds merit, the prosecutor shall request the magistrate to schedule a arraignment hearing within ten (10) days of the request.
- g. The formulation of an indictment interrupts the statute of limitations of the criminal action.

6.2.3.1.7.3 According to this configuration, the Court must analyze whether the 60-day period established by the legislator to carry out the investigation to determine whether there is room for the formulation of charges is adequate to achieve the constitutional goals at stake: the search for peace and the achievement of justice, or whether, on the contrary, it entails a disproportionate affectation of the duty to investigate as a component of the victims' right to justice.

6.2.3.1.7.4. As the jurisprudence of this Court has repeatedly established, the regulation of procedures forms part of the power of configuration enjoyed by the legislator. However, it has also pointed out that such a power is not unlimited, inasmuch as it finds its limit in respect for fundamental rights and constitutional principles and values.

6.2.3.1.7.5. With respect to the 60-day term established by the accused segment, the Court finds that it is oriented to a very specific task, which is the investigation and verification of the facts confessed by the accused and all those of which he has knowledge within the scope of his competence. For the Court, as it has already established on previous occasions, it is not contrary to the Constitution to establish procedural terms in accordance with the nature and specific objectives of the procedure in question, in order to establish clearly the rules and rhythms of the criminal process, which is important both for the victims and for those under investigation. What must be constitutionally analyzed is whether the 60-day term represents a manifestly disproportionate affectation of the victims' right to justice and the search for truth, insofar as it is alleged to prevent the prosecutor from adequately constructing a case.

6.2.3.1.7.6. The Court emphasizes that the 60-day term begins to run "from" the arraignment hearing, not from the time the free version was received. In turn, the hearing for the formulation of the indictment should only be held when the prosecutor requests it from the magistrate for the control of guarantees, given that the methodological programme of investigation has already been fully developed. In other words, the prosecutor has previously had the possibility of adequately constructing a case, especially if the expression "immediately" in the last paragraph of article 17 is declared unconstitutional. The 60-day timeframe is the maximum term, after the above stages have been completed, for the prosecutor to request "the scheduling of a arraignment hearing.

6.2.3.1.7.7. The Chamber thus finds that the 60-day time limit established with a view to establishing the basis for the formulation of charges constitutes a legislative measure that does not entail a disproportionate affectation of the right to justice and the search for truth. It responds to a research purpose that is inserted in a procedure that has its own objectives and particularities. For this reason, the terms of the ordinary procedure cannot be taken as a benchmark.

6.2.3.1.7.8. For the Court, the legislative measure in question is constitutional, insofar as it is inserted in a purpose of seeking peace, and does not entail a disproportionate affectation of the right to justice that underlies the duty of serious and exhaustive investigation on the part of the authorities. The procedure, insists the Court, is based on a fact that imprints its own dynamics of investigation, such as the confession of the accused.

Accordingly, the Court shall declare Article 18 enforceable in relation to the charges discussed in this part.

6.2.3.2. Analysis of the charge based on violation of the victims' right to access to an effective judicial remedy for (i) limitations on access to the file, (ii) limitation of their prosecutorial powers and (iii) suppression of the appeal in cassation.

Plaintiffs recall that the right to justice includes the right of victims to have access to an effective judicial remedy that allows them to participate in the processes in which their rights are to be defined; and that this right is related to the guarantee of their rights to honor and good name, among others.

However, some of the norms of Law 975 "make inane the real possibility of participation of victims in the procedure", as explained below.

6.2.3.2.1. Limitations on access to file

6.2.3.2.1.1. The plaintiffs accuse Article 37, in the segment underlined:

"Article 37. Rights of victims. The State shall ensure that victims have access to the administration of justice. In development of the foregoing, victims shall have the right: 38.5 [sic] To receive, from the first contact with the authorities and under the terms established in the Code of Criminal Procedure, relevant information for the protection of their interests; and to know the truth of the facts that make up the circumstances of the crime of which they have been victims.

The plaintiffs consider that the reference to the code of criminal procedure should be understood as a reference to Law 600 of 2000, and in accordance with the scope that the Court's ruling C-228 of 20002 gave to the victims' right to access to justice.

6.2.3.2.1.2. The normative segment accused is inserted in the norm that regulates the rights of victims in the process that forms Law 975/05, in particular the right to receive relevant information for the protection of their interests, from the first contact with the authorities. It refers in this regard to the Code of Criminal Procedure for the purpose of establishing the terms under which this right will be guaranteed.

In order to address the study of the charge, a brief reference should be made to international and national jurisprudence on the right of victims to access criminal proceedings, specifying in this specific point what has already been said in general on the rights of victims in paragraph 4.

6.2.3.2.1.3. The victim's access to criminal proceedings. One of the most relevant contributions that international jurisprudence has made in the area of victims' rights is the consolidation of their right to enjoy the broadest opportunities to participate in criminal proceedings for the crimes perpetrated against them, which includes full access and capacity to act at all stages and instances of the corresponding investigation and trial. The Court emphasizes that these victims' rights enjoy, today, practically universal recognition, and that they must be guaranteed within the Colombian constitutional and legal order, regardless of the specific status that these victims have within the system of criminal procedure enshrined in national codes.

6.2.3.2.1.4. As this Court has noted on previous occasions, with support in the set of principles for the protection and promotion of human rights through the fight against impunity (principles 1 to 4), the right to the truth and the right to know, form an essential part of the complex of rights of victims of crimes.

6.2.3.2.1.5. The right to the truth, as it has also reiterated, has, in addition to its collective dimension aimed at 'preserving the collective memory from oblivion', an individual dimension, the effectiveness of which is essentially achieved in the judicial sphere, through the victims' right to an effective judicial remedy, as recognised by the jurisprudence of this Court.

6.2.3.2.1.6. Constitutional jurisprudence has determined that the right to *access the truth* implies that people have the right to know what actually happened in their case. A person's human dignity is affected if he or she is deprived of information that is vital to him or her. Access to the truth is thus intimately linked to respect for human dignity, memory and the image of the victim.

6.2.3.2.1.7. has also pointed out that the right of access to justice has as one of its natural components the right to justice. This right involves a true constitutional right to criminal process, and the right to *participate* in criminal process, since the right to process in the democratic state must be eminently participatory. This participation is expressed, for example, in "*that the relatives of the deceased and their legal representatives shall be informed of and have access to the hearings to be held, as well as to any information relevant to the investigation and shall have the right to present other evidence*".

6.2.3.2.1.8. In Ruling C-228 of 2002, in which the Court consolidated a rethinking of the victims' rights that was already being developed in the jurisprudence, it stated that the civil party's view only interested in economic reparation should be abandoned. The victim of a crime or those harmed by it have the right to participate in criminal proceedings not only to obtain pecuniary compensation, but also to enforce their rights to truth and justice. It can even intervene with the sole purpose of seeking truth and justice, without being required to prove a pecuniary damage or a claim of this nature, thus overcoming a precarious conception of the rights of victims limited only to economic reparation.

6.2.3.2.1.9 Bearing in mind the ambiguity and uncertainty that the expression being sued introduces into the norm under review, generating multiple interpretations in an aspect of constitutional relevance such as the victims' right to the truth, in obvious connection with the right to justice, the Court will proceed to condition the content of the provision in the sense that the expression "*and in the terms established in the Code of Criminal Procedure*" in numeral 38.5 of article 37, alludes to article 30 of Law 600 of 2000 which regulates "access to the file and the provision of evidence by the injured party", provided that it is interpreted in accordance with the conditioned exequibilidad of this rule declared by judgement C-228 of 2002, by virtue of which, the victim or injured parties can directly access the file from its initiation, to exercise the rights to truth, justice and reparation. In these terms, the conditioned constitutionality of numeral 38.5 of article 37 shall be declared.

6.2.3.2.1.10. The Court emphasizes that timely access to the file allows victims and their families to identify gaps in the information available to the prosecutor and to provide through institutional channels factual elements from before the free version is received or at a later stage, all with a view to collaborating with the prosecutor's office in fulfilling its duty of thorough investigation.

6.2.3.2.2. Limitations on the prosecutorial powers of victims.

Articles 17, 18 and 19 of Law 975/05, as transcribed above, as well as the expression "and within

the framework of this law" in article 34, and the expression "during the trial" in article 37, numeral 38.7 (sic), are charged in their entirety with this point.

6.2.3.2.2.2. This would be consistent with article 37 of the same law, under which the procedure must guarantee victims' right of access to the administration of justice, including their right to be heard, "which implies that they have the opportunity to be present in the proceedings, assisted by a lawyer who provides them with a technical defense of their interests and that they have all the legal faculties required to participate effectively in the construction of the procedural truth and access to integral reparation that is determined in accordance with the facts and criminal responsibilities proven with their participation. To that extent, they request the Court to declare the conditional constitutionality of Articles 17, 18 and 19 accused, on that understanding.

Finally, they affirm that the accused expression of article 38-7 must be declared unconstitutional, since it *"limits the exercise of the victims' rights to the trial stage, excluding the rest of the procedure.*

The petitioners make their petition in this sense as well:

"H is requested. Court that declares the conditional constitutionality of articles 17, 18 and 19, and the expression 'within the framework of the present law' of article 34, under the understanding that suitable and effective mechanisms must be guaranteed so that the victims are able to learn of the initiation of the procedure, can exercise the right to be heard, allowing them to witness the proceedings, be assisted by a lawyer who will provide them with a technical defence of their interests and have all the legal powers required to participate effectively in the construction of procedural truth and access to comprehensive reparation determined in accordance with the facts and proven criminal responsibilities with their full participation. // The unconstitutionality of the expression 'during the trial' in article 37.8 of the law is also requested.

6.2.3.2.2.3. Examination of Articles 17, 18 and 19. For the complainants, the procedure enshrined in the accused provisions does not allow victims the real and effective possibility of their interests being taken into account when defining their rights. They explain that Article 17 does not provide for the participation of the victim in the free version proceedings, so *"he does not have the opportunity to know the version of the facts given by the defendant"*. Nor does article 18 expressly provide for the victim's participation in the formulation of the charge; and article 19 expressly omits to provide for the victim's participation in the arraignment hearing. *"The first diligence in which express mention is made of the participation of the victims in the process is at the hearing to verify the voluntariness of the acceptance of the charges and refers to the initiation of the incident of reparation that is given at their request (art. 23).*

6.2.3.2.2.4. The censorship of the plaintiffs against these norms is framed within a global questioning of what they consider to be a precarious and incomplete guarantee of access of the victims to the process. In this sense, they understand that the fact that the contested norms do not explicitly mention the victim as a participant in the process of free version and confession (art.17); formulation of imputation (art.18) and acceptance of charges (art.19), leads to their exclusion.

6.2.3.2.2.5 The restrictions that the complainants accuse the victims' rights of access to the process at the stages indicated are merely apparent. The content of such provisions as they relate to the prosecutorial powers of victims requires a reading in accordance with other provisions of the law that regulate this specific matter. In particular, they are grouped under Chapter VIII, which regulates

the "Rights of victims with regard to the administration of justice", in which their rights to "be heard and to be provided with evidence" are enshrined (38.4) to receive, from the first contact with the authorities and in the terms established in the Code of Criminal Procedure, relevant information for the protection of their interests, and to know the truth of the facts that make up the circumstances of the crime of which they have been victims (38.5), a norm that must be interpreted in the sense established by the Court in this same decision; to be informed of the final decision relating to criminal prosecution and to lodge appeals when necessary.

6.2.3.2.2.6 In addition, the system of procedural guarantees established by law must be based on the principles governing the law (art. 1), according to which one of its objectives is to guarantee victims' rights to the truth and to justice and reparation, which is specified in the wording of article 37, which states that the state "shall guarantee victims' access to the administration of justice.

6.2.3.2.2.7 On the other hand, the application of the law must be subject to the developments that constitutional jurisprudence, based on international law, has made with respect to the scope of the victims' procedural rights; in accordance with them, as already pointed out in another part of this decision and reiterated here, the right to justice entails a genuine constitutional right to criminal proceedings, and the right to *participate* in criminal proceedings, inasmuch as the right to trial in the democratic state must be eminently participatory. This participation is expressed, for example, in "*that the relatives of the deceased and their legal representatives shall be informed of and have access to the hearings to be held, as well as to any information relevant to the investigation and shall have the right to present other evidence*".

6.2.3.2.2.8. Thus, the Court finds that the perception of the plaintiffs is not correct in the sense that the accused provisions exclude the participation of the victim in the proceedings that are regulated there. A systematic view of the rules relating to the victim's procedural faculties within the framework of the principles that animate it and the jurisprudential developments in force in the matter, allow us to conclude that, contrary to what was affirmed in the lawsuit, the law guarantees the participation of victims in the proceedings of free version and confession, formulation of accusations and acceptance of charges. This conclusion is reinforced by the law's clear choice of a markedly accusatory procedural system that is developed through hearings to which victims' access cannot be obstructed.

6.2.3.2.2.9 With respect to article 19, paragraph three, it should be pointed out that it establishes a kind of legality control on the diligence of acceptance of charges of the demobilized person, which the law lies in the judge of knowledge, which for this purpose is the corresponding chamber of the Superior Court of the Judicial District. It establishes the norm under examination that "if in accordance with the law", the acceptance of charges, this judicial authority will proceed to summon a hearing for sentence and individualization of penalty. For the Court, this control, which is assigned to the judge of knowledge, is of particular importance and should be understood as a material control of the legality of the criminal charge that arises from the acceptance of the charges. This implies that the judge of knowledge must control the legality of the acceptance of charges in relation to the legal qualification of the facts, in the sense that it must effectively correspond to the facts in the file. This interpretation is the only one that conforms to the guarantee of effectiveness of the victims' rights to justice and truth. It could not be argued that the objective of this control is the verification of compliance with the guarantees of freedom, spontaneity, voluntariness and defense that must indisputably surround the act of acceptance of charges by the defendant. This is not the case since for that specific objective the same judge of knowledge has already held a prior hearing, as indicated in the provision itself (Section 3, art. 19). Additionally, this is an aspect that is surrounded by due process as the hearing of acceptance of charges is held before a judge of control of guarantees. Thus, the only possible content attributable to the expression "to be in conformity

with the law" is the material control over the legal qualification of the facts, and the Court will declare so in a condition that to the expression analyzed. It is that the correct *nomen juris* of the facts constituting a criminal offence is integrated with the victims' rights to truth and justice.

6.2.3.2.2.10. Consequently, the Court shall declare constitutional the expression "*in accordance with the law*" of the third paragraph of Article 19, on the understanding that the judge shall control that the legal qualification corresponds to the facts in the file.

The Court shall declare Articles 17 and 18 enforceable in relation to the charges analyzed here, i.e., the victims' right of access to the proceedings provided for therein.

6.2.3.2.3. Analysis of article 26, paragraph 3. Deletion of the appeal in cassation

6.2.3.2.3.1. The plaintiffs contest the provisions of paragraph 3 of article 26, by virtue of which "*No appeal against the decision of second instance shall be admissible*".

They affirm that although the Legislator has the power to regulate the appeal in cassation, he cannot do so to generate discriminatory treatment in cases of human rights violations, "in relation to which the procedural guarantees must be extreme in order to adequately guarantee the realization of justice. This aspect of the law, in the view of the plaintiffs, involves a sacrifice of the material right and weakens the procedural rights and guarantees of the victim and the defendant. They point out that the ordinary procedural law provides for this remedy for cases similar to those submitted to the procedure of Law 975/05.

6.2.3.2.3.2 The contested normative segment forms part of article 26 of Law 975/05, the purpose of which is to regulate the resources contemplated by the law. This rule provides for reversal as a means of contesting all decisions, except the judgement, in respect of which an appeal is provided for. The appeal is also directed against all the orders on the merits adopted during the hearings.

6.2.3.2.3.3 The appeal is filed before the Criminal Cassation Chamber of the Supreme Court of Justice, establishing for its processing a priority over the other matters under the jurisdiction of this chamber, with the exception of that related to tutelage actions. The extraordinary action of review before the Plenary Chamber of that Corporation is contemplated and cassation is excluded with respect to the second instance decision, an aspect against which the charge under examination is directed.

6.2.3.2.3.4. The Court notes that the law establishes a careful and permanent system of control over decisions made in the course of the process, through ordinary means of challenge and extraordinary action for review. In the development of its freedom to configure procedures, the legislator provided for a regime of challenge that covers all decisions.

6.2.3.2.3.5. The exclusion of an appeal in cassation as a means of challenging the sentence issued in second instance by the Supreme Court of Justice, Criminal Chamber, does not affect the rights and procedural guarantees of the participants in the process, nor the impossibility of materializing the substantial right, as the plaintiffs point out. It is certainly not the only remedy of cassation that is suitable for guaranteeing the effectiveness of such rights. The freedom of configuration of the procedures that is assigned to the legislator entails a requirement to adapt them to the specificities of the processes, their nature and objectives. It is evident that Law 975/05 regulates a procedure that has its own particularities, one of them, perhaps the most relevant is that it is structured from the full and trustworthy confession of the accused, which also generates specific procedural needs. Consequently, it is not fortunate to maintain that the provision excluding cassation in this procedure

is unconstitutional with regard to the assertion of alleged discriminatory treatment of participants in the special procedure, taking as a parameter of comparison the ordinary procedure, which responds to different nature and purposes.

6.2.3.2.3.6. The Court does not warn that the legislator, in exercising his power to configure the procedures, would have exceeded the limits set by the Constitution with regard to respect for fundamental rights, and particularly due process, in the design of the means of challenge. On the contrary, it observes a concern to protect all decisions made in the course of the process with some control mechanism.

6.2.3.2.3.7. For the foregoing reasons the office does not succeed, the exequibilidad of paragraph 3 of article 26 of Law 975 of 2005 shall be declared accordingly.

6.2.3.2.4. Analysis of Article 34.

6.2.3.2.4.1 Paragraph 2 of article 34 relating to the "Public Defender's Office" is partially accused, according to which the Public Defender's Office shall assist the victims in the exercise of their rights *"within the framework of the present law"*.

6.2.3.2.4.2 For the plaintiffs, the accused expression implies a restriction of the rights of victims to be assisted in criminal proceedings.

6.2.3.2.4.3. The Court warns that limiting the possibilities of assistance that victims can obtain from the Ombudsman's Office to the framework of the "present" law introduces a disproportionate limitation on the exercise of their rights. It can be seen that the partially challenged provision forms part of Chapter VII on "Institutions for the execution of this law", from which it follows that the possibilities of defence assistance cannot be restricted to merely procedural ones, nor to those deriving from this Law. The purpose of the chapter is to establish an entire support structure for the implementation of the Law, and the promotion and defense of victims' rights. The victims are undoubtedly one of the most vulnerable sectors of the population to which the Ombudsman's Office, within the framework of its competencies, can develop a whole range of possibilities for advice, assistance and protection, in the development of the powers attributed to it by the laws that deal with this important institution. The expression "present" in the normative segment challenged in effect introduces a severe restriction on the possibilities of assistance to victims by the Ombudsman's Office, which conflicts with the broad conception of victims' rights that has been referred to repeatedly in this judgment.

6.2.3.2.4.4. Consequently, the Court will declare that the expression "present" in paragraph 2 of Article 34 is unconstitutional in order to extend the possibilities of defense assistance to those that derive from law, in a generic sense.

6.2.3.2.5. Analysis of article 37, numeral 38.7 (partial).

6.2.3.2.5.1 For the plaintiffs, the expression *"during the trial"*, which is part of article 37, paragraph 38.7 (sic), should be declared unconstitutional insofar as it limits the exercise of the victims' right of defence to the trial stage, excluding the other stages of the proceedings.

6.2.3.2.5.2 Article 37, paragraph 38.7 (sic), belongs to the chapter that regulates the rights of victims with respect to the administration of justice, in particular the right to be assisted "during the trial" by a trusted lawyer or by the judicial procurator's office covered by this law.

6.2.3.2.5.3 This rule, like all those regulating the rights of victims in criminal proceedings, must be interpreted in accordance with the current state of development of constitutional jurisprudence in this area. From this perspective, it is clear that the reductive conception of the victims' rights to a simple claim for compensation has now been overcome. The adaptation of victims' rights to international standards through jurisprudence implies the recognition that the universal rights to truth, justice and reparation imply the power to intervene in all phases of the action, in the development of the right to access justice in conditions of equality. This equal access derives from the bilateral nature of the right to an effective judicial remedy by virtue of which the rights of victims cannot be diminished in relation to those assisting the defendant. The contemporary consideration of the victim as the active protagonist of the process leads to the enjoyment of standards of protection similar to those of other participants in the process.

6.2.3.2.5.4. Consequently, the fact that the contested rule explicitly establishes the right of victims to judicial representation during the trial cannot be interpreted as excluding the exercise of the right of nomination at other stages of the process. Such explicit recognition of the right to be represented by counsel at trial should be without prejudice to the appointment of judicial representatives at other stages of the proceedings.

6.2.3.2.5.5 Under this understanding, the Court shall declare the exequibilidad of the expression "during the trial" of numeral 38.7 of article 37 of Law 975/05.

6.2.3.3. Charge based on violation of the right to justice for "ignorance of the State's obligation to punish those responsible for serious human rights violations with real custodial sentences".

6.2.3.3.1. This point is accused of the provisions of Article 31 of Law 975/05, which provides:

"Article 31. Time spent in concentration zones. The time that members of illegal armed groups linked to processes for collective reincorporation into civilian life have remained in a concentration zone decreed by the National Government, in accordance with Law 782 of 2002, shall be computed as the time of execution of the alternative sentence, which may not exceed eighteen (18) months.

The official designated by the National Government, in collaboration with the local authorities where appropriate, shall be responsible for certifying the time spent in the concentration zone by members of the armed groups covered by this Act.

6.2.3.3.2 In the view of the plaintiffs, this article is unconstitutional in that it provides that part of the sentence may be served in "locational areas".

They affirm that one of the components of the right to justice in cases of serious crimes is its adequate sanction, and maintain that *"it is evident that the obligation to punish the perpetrators of serious crimes cannot be reduced to a mere formality, but must be translated into the fulfillment of an effective sanction.*

Consequently, they request that the Court declare article 31 accused unconstitutional.

6.2.3.3.3. Regulatory integration. The Court notes that Article 31 of the Defendant Law forms part of Chapter VI of Law 975/05, relating to the regime of deprivation of liberty. The chapter consists of two provisions: 30 and 31, the first regulating the "establishment of confinement" and the second

"the length of stay in concentration areas". The Court also observes that the norm in question (Art. 31) is intrinsically related, due to its direct thematic connection, to Article 30, since both, by regulating certain aspects related to the place of execution of the sentence, allow it to be served in establishments that are not subject to the legal norms on prison control, and consequently the Court must rule on both to avoid a harmless sentence. Furthermore, from the point of view of the right to justice, there is a direct link between the two provisions, since the imposition of a reduced sentence in application of the benefit of alternative sentencing requires that the sentence be effectively served in places that have the characteristics of places of detention. In addition, since the various provisions enshrining the benefit of alternative sentencing were challenged, it is necessary for the Court to examine the conditions under which the alternative sentences granted will be effectively enforced. This situation allows the application of the rules of origin of the integration of the normative unit in accordance with the jurisprudence of the Court. Consequently, the Court proceeds to extend the constitutionality study that this charge raises to article 30 of Law 975/05 that it establishes:

"Article 30. Places of confinement. The National Government shall determine the establishment of confinement where the effective sentence must be served.

Detention facilities must meet the safety and austerity conditions of the facilities administered by Inpec.

The sentence may be served outdoors".

6.2.3.3.4. Unconstitutionality of paying for the time spent in the concentration zones for the mere voluntary act of locating oneself in them without there being a previous act restricting freedom.

6.2.3.3.4.1 The Court proceeds to examine whether the way in which the system of execution of deprivation of liberty was configured by the legislator in Law 975/05 (art. 30), and the possibility of paying as part of the sentence imposed the time spent by the sentenced person in the so-called concentration zone, violate the Constitution insofar as they allow those convicted on the basis of this law to evade the sentence of deprivation of liberty imposed.

6.2.3.3.4.2 It should be recalled that in order to facilitate dialogue, negotiations and agreements in the context of the demobilization of organized armed groups outside the law, the National Government has created, in agreement with the spokespersons of these groups, the so-called zones of temporary location or concentration in certain areas of the national territory. It should be noted that entry into these areas constitutes a voluntary act by members of illegal armed groups. In some cases this concentration has an immediate utility consisting in the suspension of the execution of the arrest warrants that weigh against the members representing these groups, in order to favor the negotiations.

6.2.3.3.4.3. At the same time, it should be pointed out that, as the lawsuit states, the State has a duty to impose and enforce effective sanctions against those who violate criminal law, an imperative that is even more relevant in the case of serious crime. Effective sanctions are those that do not conceal phenomena of impunity, insofar as they constitute just and adequate state reactions to the crimes perpetrated, taking into consideration the specific criminal policy objectives that the law entails.

6.2.3.3.4.4 In addition, it should be remembered that the execution phase of the sentence corresponds to one of the most transcendental expressions of the exercise of state *ius puniendi*. In

the constitutional state of law, the exercise of *ius puniendi* requires the intervention of all public powers: the legislator in its configuration phase, the judges in their imposition phase, and the prison authorities in their execution phase.

6.2.3.3.4.5. Even within the framework of an instrument that invokes as its fundamental purpose the materialization of peace in the country, the penalty cannot be stripped of its attribute of fair and adequate reaction to criminality, nor can it take place outside of the state interventions that the exercise of *ius puniendi* demands in the constitutional rule of law. The first would lead to undesirable phenomena of impunity, even in the context of a pacification process, and the second to the loss of legitimacy of the sanctioning power of the State. The punitive regime that falls into one or the other phenomenon is contrary to the Constitution.

6.2.3.3.4.6. Under these assumptions, the Court observes that article 31 assimilates to the serving of a *sentence* the circumstance of being located in a concentration zone, in spite of the fact that there has not been any State measure that has led people to be in that place. In that sense, it does not constitute a penalty inasmuch as it does not involve the coercive imposition of the restriction of fundamental rights. Generally, the permanence in a concentration zone by members of organized armed groups outside the law, in the process of demobilization, is due to a voluntary decision of those persons, which contributes to exclude any possibility of equating a situation of such nature to the execution of a sentence, which dispenses with and displaces the state interventions that characterize the state monopoly of sanctioning power.

Article 31 shall therefore be declared unconstitutional.

6.2.3.3.4.7. Similar situation is noted in paragraph 2 of article 30, which states that "*detention facilities must meet conditions of security and austerity typical of facilities administered by INPEC*". This norm conceals an evident subtraction of the control of the penitentiary authorities of the places of reclusion in which those who submit to Law 975/05 will have to serve their sentences, which would operate outside of the penitentiary policies that the state must develop through its specialized organs, which have been embodied in the juridical norms on penitentiary control.

6.2.3.3.4.8. However, from the point of view of the victims' rights to justice, based on the principle of dignity, it is manifestly disproportionate to subject them to what could be considered, from the point of view of their affliction, as impunity. The collective dimension of the right to justice could also be affected by the perception of impunity derived from adding to the significant punitive benefits enshrined in the law, other benefits in the execution of the sentence that completely distort it.

6.2.3.3.4.9. In view of the foregoing, the Court shall declare article 30, paragraph 2, constitutional for the charges examined, on the understanding that such establishments are fully subject to the legal regulations on prison control, and article 31 of Law 975/05 is unconstitutional.

6.2.3.3.4.10. As a result of the declaration of unconstitutionality of article 31, the expression "*in one of the detention facilities determined by the National Government in accordance with article 31 of this Act*", contained in article 17 of Law 975/05, must also be declared unconstitutional.

6.2.4. Alleged violation of the right to reparation

After referring to the content and scope of the right to reparation for victims of human rights violations, the plaintiffs point out that the Law being sued, as well as the legal framework within which the demobilizations of members of groups outside the law are taking place, violate the

minimum content of that right. In the following sections of this Order, the Court will consider the specific charges brought against specific provisions of Law 975 of 2005 for alleged violation of the right to reparation.

6.2.4.1. Violation of the right to reparation by the rules according to which only illegally acquired goods, or other goods, contribute to reparation if the demobilized person had them.

6.2.4.1.1. The applicants consider that the paragraphs underlined in Articles 10(2), 11(5), 13(4), 17, 18 and 46 infringe the victims' right to reparation insofar as these rules stipulate that only illegally obtained goods contribute to the payment of compensation. The defendants are the following:

"Article 10. Eligibility requirements for collective demobilization. (...) 10.2. That the goods are delivered as a result of the illegal activity. (...)

Eligibility requirements for individual demobilization. (...) 11.5. To deliver the goods resulting from the illegal activity, so that the victim can be repaired when they are available. (...)

Article 13. Celerity. (...) The following cases will be dealt with in a preliminary hearing: (...) 4. The application for and decision to impose interim measures on assets of unlawful origin. (...)

Free version and confession. The members of the illegal armed group, whose names the National Government submits to the consideration of the Attorney General's Office, who expressly invoke the procedure and benefits of the present law, will render a free version before the delegated prosecutor assigned to the demobilization process, who will question them on all the facts of which he has knowledge.

In the presence of their defender, they shall state the circumstances of time, manner and place in which they participated in the criminal acts committed on the occasion of their membership of these groups, which precede their demobilization and for which they are covered by this law. In the same diligence they will indicate the goods that are given for reparation to the victims, if they have them, and the date of their entrance to the group. (...)

Article 18. Formulation of imputation. When from the evidentiary material elements, physical evidence (sic), legally obtained information, or from the free version can be inferred. Reasonably (sic) that the demobilized person is the author or participant of one or more crimes under investigation, the prosecutor delegated for the case will request the magistrate exercising the function of control of guarantees to schedule a preliminary hearing for the formulation of the indictment.

At this hearing, the public prosecutor shall make the factual imputation of the charges under investigation and request the magistrate to order the pretrial detention of the accused in the appropriate detention centre, in accordance with the provisions of this Act. It shall also request the adoption of precautionary measures on goods of illicit origin that have been delivered for purposes of reparation to the victims. (...)

Article 46. Restitution. Restitution implies the performance of acts that tend to return the victim to the situation prior to the violation of his rights. It includes the restoration of liberty, the return to their place of residence and the return of their property, if possible.

6.2.4.1.2 The plaintiffs state that it is the constitutional and international duty of the State to guarantee fair reparation to the victims (Article 2 of the C.N., Article 2.3 of the International Covenant on Civil and Political Rights, and Articles 1 and 63 of the American Convention on Human Rights). However, they consider that the defendant provisions violate this duty by not establishing the obligation to respond with lawful or own property for the damage caused. In this regard, they point out that *"the law refers repeatedly to the delivery of goods of illicit origin, a limitation aggravated by the difficulty in distinguishing between goods of 'lawful' origin and those of illicit origin.* On the other hand, they indicate that the accused provisions establish that demobilized persons must deliver their goods 'if they have them', 'when they have them', or 'if possible', all of which facilitates the fraud of the law since demobilized persons may exempt themselves from their obligation to repair by indicating that they do not have goods or that they cannot dispose of the goods that were their property. They explain that the law *"does not indicate through what procedure or in what terms the legal operator will be able to investigate cases in which the demobilized person commits fraud to the detriment of the victims; and in the case in which the Public Prosecutor's Office has elements to consider that there is a possible fraud, it will result in the very difficult practice that within the 60 days foreseen for the investigation diligences are also carried out to verify that the demobilized person has not incurred in fraud and to obtain that the goods are delivered for reparation"*.

As a consequence of the foregoing arguments, they request that the Court declare the paragraphs sued to be unconstitutional.

6.2.4.1.3 In turn, the Ministry of the Interior and Justice considers that the defendant law adequately satisfies the victims' right to reparation. After mentioning all the articles of the law in which some general principles in the matter are recognized, the Ministry points out, in the first place, that the persons who fail to report illicit activities or to denounce goods of illicit origin will submit in these aspects to the ordinary laws that, for the effect of the goods, are the laws of extinction of dominion. On the partial application of Article 17 indicates that the person must indicate all goods to be delivered for repair without being limited exclusively to illicit goods. In addition, it points out that the expressions "if available" in article 17 or "if possible" in article 46 refer to hypotheses in which the assets may be in the hands of other persons of the group to which the beneficiary of the law belongs. It concludes by pointing out that in any case the reparation of victims is fully guaranteed, to the extent that the resources for this purpose will come from the Fund for Victims' Reparations financed, in addition, with resources from the budget and donations.

6.2.4.1.4. Sobre este tema, el Centro Internacional para la Justicia Transicional señala que las normas demandadas y, en general la Ley 975 de 2005, exigen al responsable de la obligación de concurrir con su patrimonio a la indemnización de los daños que hubiere causado. Consideran que esto vulnera el derecho de las víctimas a un recurso efectivo y a obtener reparación. A su juicio, la Ley parece ordenar que la reparación a las víctimas se pague con bienes de procedencia ilícita, bienes que serán entregados al Fondo de Reparaciones por los responsables de los delitos investigados. Con ello, sin embargo, se priva a la víctima del derecho a recibir, directamente del responsable del daño causado, la indemnización o compensación económica por los perjuicios sufridos. Señala al respecto que las normas internacionales que vinculan al Estado colombiano reconocen el derecho de las víctimas o de sus herederos a un recurso efectivo para dirigirse contra el autor del daño con el propósito de obtener, cuando menos, la restitución de los bienes de que han sido despojadas y la compensación económica por el daño causado.

6.2.4.1.5. En su intervención, el Procurador General de la Nación solicita a la Corte declarar inexecutable las expresiones demandadas de los artículos 11.5, 13.4, 17, 18 y 46. En su criterio, estas normas vulneran el derecho a la reparación integral de las víctimas de violaciones de derechos

humanos, pues no garantizan la entrega de bienes lícitos ni permiten afectar con medidas cautelares aquellos bienes producto de la actividad lícita de los responsables del daño causado. Indica que estas disposiciones adicionalmente vulneran el derecho a la igualdad dado que en un proceso penal común el condenado debe responder con su patrimonio si hay lugar a ello.

6.2.4.1.6. Del estudio de las normas demandadas surgen dos tipos de problemas jurídicos. Un primer problema general cuya respuesta incide en las restantes decisiones y una serie de problemas jurídicos específicos relacionados con las diferentes medidas que las normas parcialmente demandadas establecen.

6.2.4.1.7. En primer lugar es necesario definir si, en procesos de justicia transicional como el que la ley demandada regula, es constitucionalmente exigible que los responsables de delitos concurren con su patrimonio al pago de las indemnizaciones a que haya lugar y adopten todas las medidas que estén a su alcance para restituir los bienes que por motivo de sus delitos fueron objeto de despojo.

6.2.4.1.8. Si la respuesta a la pregunta anterior fuera negativa las normas parcialmente demandadas serían exequibles. Sin embargo, si la respuesta fuere positiva, la Corte tendría que establecer (1) si es constitucionalmente obligatorio que las personas que aspiran a ser beneficiarias de la Ley deban entregar, como requisito de elegibilidad, bienes lícitos destinados a la reparación de las víctimas; (2) si el derecho fundamental a la reparación comporta la facultad de solicitar medidas cautelares sobre el patrimonio lícito de quien está siendo juzgado; (3) si vulnera el derecho de las víctimas a la reparación integral las disposiciones que establecen que la obligación del responsable del delito de entregar bienes sólo se hace efectiva “si los tuviere” o que condicionan el derecho a la restitución del bien objeto de despojo con la expresión: “de ser posible”. Procede la Corte a dar respuesta a las cuestiones planteadas.

6.2.4.1.9. Se pregunta la Corte si el derecho a la reparación integral garantiza que, incluso en procesos de justicia transicional, los responsables de delitos respondan con su propio patrimonio por los daños que su actividad criminal ha producido.

6.2.4.1.10. En principio podría sostenerse que si bien en la justicia ordinaria se aplica el principio general de derecho según el cual quien causa un daño debe repararlo, en procesos de justicia transicional a través de los cuales se enfrentan violaciones masivas y sistemáticas de derechos humanos y ante un universo enorme de víctimas directas e indirectas, quien debe responder es el Estado y no los perpetradores. Incluso podría sostenerse que puede ser una condición de quienes deciden someterse a un proceso de paz tras un legado de violaciones masivas y sistemáticas de derechos humanos, que el componente patrimonial de las reparaciones sea asumido por el Estado y no por los responsables del daño, quienes no estarían dispuestos a arriesgar su patrimonio personal que se vería completamente menguado si con él tuviera que sufragarse los cuantiosos daños producidos. Finalmente podría sostenerse que esta forma de reparación – a través de recursos públicos y no del patrimonio personal de los responsables – no supone una violación del derecho de las víctimas pues finalmente estas recibirán algún tipo de reparación, sin importar la fuente a través de la cual se financian.

6.2.4.1.11. Este argumento sin embargo tiene una serie de debilidades constitucionales que la Corte no puede dejar de advertir. En primer lugar, como entra a explicarse, no parece existir una razón constitucional que permita excepcionar el principio general según el cual todo aquel que cause un daño antijurídico está obligado a repararlo y trasladar el costo total de la reparación a los ciudadanos y ciudadanas. En segundo término, incluso si se aceptara que el Estado puede efectuar este traslado de responsabilidad, lo cierto es que no está autorizado para perdonar – ni penal ni civilmente – a quien ha cometido delitos atroces o al responsable de actos de violencia masiva o sistemática.

Eximir completamente de responsabilidad civil al causante del daño equivale a una amnistía integral de la responsabilidad debida. Finalmente, parece constitucionalmente desproporcionado renunciar a perseguir el patrimonio de los responsables del daño, al menos, en aquellos casos en los cuales pueda comprobarse que las personas responsables tienen inmensas fortunas mientras que quienes han sufrido dicho daño, por efecto de este, se encuentran en dolorosas condiciones de pobreza y desarraigo. Entra la Corte a explicar cada una de estas cuestiones.

6.2.4.1.12. En primer lugar, al menos en principio, no parece existir una razón constitucional suficiente para que, frente a procesos de violencia masiva, se deje de aplicar el principio general según el cual quien causa el daño debe repararlo. Por el contrario, como ya lo ha explicado la Corte, las normas, la doctrina y la jurisprudencia nacional e internacional han considerado que la reparación económica a cargo del patrimonio propio del perpetrador es una de las condiciones necesarias para garantizar los derechos de las víctimas y promover la lucha contra la impunidad. Sólo en el caso en el cual el Estado resulte responsable – por acción o por omisión – o cuando los recursos propios de los responsables no son suficientes para pagar el costo de reparaciones masivas, el Estado entra a asumir la responsabilidad subsidiaria que esto implica. Y esta distribución de responsabilidades no parece variar en procesos de justicia transicional hacia la paz.

6.2.4.1.13. En efecto, en contextos de transición a la paz, podría parecer proporcionado que el responsable de delitos que ha decidido vincularse a un proceso de negociación, conserve una parte de su patrimonio de forma tal que pueda vivir dignamente e insertarse plenamente en la sociedad democrática y en el Estado de derecho. Lo que sin embargo parece no tener asidero constitucional alguno es que el Estado exima completamente de responsabilidad civil a quienes han producido los daños que es necesario reparar y traslade la totalidad de los costos de la reparación al presupuesto. En este caso se estaría produciendo una especie de amnistía de la responsabilidad civil, responsabilidad que estarían asumiendo, a través de los impuestos, los ciudadanos y ciudadanas de bien que no han causado daño alguno y que, por el contrario, han sido víctimas del proceso macrocriminal que se afronta. La Corte no desconoce que frente al tipo de delitos de que trata la ley demandada parece necesario que los recursos públicos concurren a la reparación, pero esto solo de forma subsidiaria. Esto no obsta, como ya se mencionó, para que el legislador pueda modular, de manera razonable y proporcionada a las circunstancias de cada caso, esta responsabilidad. Lo que no puede hacer es relevar completamente a los perpetradores de delitos atroces o de violencia masiva, de la responsabilidad que les corresponde por tales delitos. De esta manera, resulta acorde con la Constitución que los perpetradores de este tipo de delitos respondan con su propio patrimonio por los perjuicios con ellos causados, con observancia de las normas procesales ordinarias que trazan un límite a la responsabilidad patrimonial en la preservación de la subsistencia digna del sujeto a quien dicha responsabilidad se imputa, circunstancia que habrá de determinarse en atención a las circunstancias particulares de cada caso individual.

6.2.4.1.14. Como lo señala el Ministerio del Interior y de la Justicia, los grupos armados al margen de la ley y sus cabecillas han acumulado inmensas fortunas o “*grandes recursos económicos*”. Adicionalmente, como también lo señala el Ministerio, hacen partes de complejas estructuras y organizaciones. En estos casos, como bien lo señalan algunos de los intervinientes, resulta verdaderamente difícil distinguir todos los bienes que han sido fruto de la actividad legal de aquellos fruto de la actividad ilegal. Usualmente los bienes obtenidos ilícitamente han sido escondidos o trasladados a testaferros o incluso a terceros de buena fe a través de los cuales “lavan” los correspondientes activos. Sin embargo, las víctimas de los grupos armados suelen ser personas humildes que, además de haber sido vulneradas en su dignidad y derechos, han sido despojadas de sus propiedades, desarraigadas de su tierra, privadas de las personas que aportaban el sustento familiar, en fin, completamente desposeídas. Al respecto la Corte ya ha tenido oportunidad de constatar la existencia de cientos de miles de personas en situación de desplazamiento forzado, y

condenadas a la miseria a causa de la acción de los grupos armados ilegales para quienes ha sido diseñada la Ley que se estudia. Dado que la ley ha sido creada específicamente para permitir el tránsito a la legalidad de estos grupos y de sus cabecillas, resulta indispensable incorporar, al juicio de proporcionalidad, estos elementos del contexto en el cual habrá de ser aplicada. Por las razones mencionadas, la aplicación de la ley, al menos en los casos que han sido anotados, implica una afectación manifiestamente desproporcionada de otros derechos constitucionales, como los derechos de las víctimas a la reparación integral.

6.2.4.1.15. Finalmente, no sobra señalar que, en todo caso, la reparación no puede quedar absolutamente sometida a la voluntad política de quienes definen las normas de presupuesto, pues es un derecho de las víctimas que debe ser satisfecho, especialmente, en procesos que persigan la paz y la reconciliación. Por ello, resulta razonable que la reducción de las penas que la norma establece se encuentre acompañada de la adopción de otras medidas que, como el pago de los daños y la restitución de los bienes, puedan constituir un marco justo y adecuado para alcanzar de forma sostenible la finalidad buscada.

6.2.4.1.16. Por las razones expuestas, debe sostenerse que según la Constitución, los miembros del grupo armado organizado al margen de la ley a quienes se aplique la Ley 975 de 2005, responden con su propio patrimonio para indemnizar a las víctimas de los actos violatorios de la ley penal por los que fueron condenados.

6.2.4.1.17. Ahora bien, se pregunta la Corte si existiendo el deber personal del responsable de reparar a la víctima con su propio patrimonio, resulta necesario que se establezca como condición de elegibilidad para poder acceder a los procesos judiciales que pueden culminar con los beneficios de que trata la Ley demandada, que las personas entreguen los bienes lícitos que integran su patrimonio.

6.2.4.1.18. Los requisitos de elegibilidad de que tratan los artículos 10 y 11 parcialmente demandados, son requisitos “para acceder a los beneficios que establece la presente ley”, es decir, son condiciones de accesibilidad. En estas circunstancias no parece necesario que en esta etapa la persona entregue parte de su patrimonio lícito, pues al menos técnicamente, no existe aún un título para dicho traslado. Ciertamente, los bienes de procedencia ilícita no le pertenecen y, por lo tanto, la entrega no supone un traslado de propiedad sino una devolución a su verdadero propietario – mediante la restitución del bien – o al Estado. Sin embargo, su patrimonio lícito le pertenecerá hasta tanto no exista una condena judicial que le ordene la entrega. En cambio, los bienes producto de la actividad ilegal, todos ellos sin excepción, deben ser entregados como condición previa para acceder a los beneficios que establece la Ley 975/05. El legislador puede establecer ese requisito de elegibilidad, tanto para la desmovilización colectiva como para la desmovilización individual. Por estas razones la Corte no encuentra inexecutable las expresiones “producto de la actividad ilegal” del numeral 10.2 del artículo 10 de la Ley y “producto de la actividad ilegal” del numeral 11.5 del artículo 11 de la misma Ley. Así se declarará en la parte resolutive de esta providencia.

6.2.4.1.19. En segundo lugar, como fue mencionado, corresponde a la Corte establecer si resultan inconstitucionales las expresiones demandadas de los artículos 13.4 y 18 que restringen la posibilidad de solicitar medidas cautelares a los bienes ilícitos de quienes se acogieren a la Ley 975 de 2005.

6.2.4.1.20. Ahora bien, constata la Corte que si los beneficiarios de la ley deben responder con su propio patrimonio por los daños producidos, lo cierto es que no existe ninguna razón para impedir que las medidas cautelares puedan recaer sobre sus bienes lícitos. En efecto, esta prohibición lo que hace es disminuir la efectividad de la acción estatal encaminada al logro de la reparación integral de

las víctimas. Por estas razones, la Corte procederá a declarar inexecutable las expresiones “de procedencia ilícita” del numeral 4 del artículo 13 y “de procedencia ilícita que hayan sido entregados” del inciso segundo del artículo 18 de la Ley demandada.

La parte restante del citado artículo 18 será declarada executable, por las diversas razones expuestas en los apartes 6.2.3.1.7. y 6.2.3.2.2. de la presente providencia.

6.2.4.1.21. Finalmente, debe la Corte definir si, como lo señalan los demandantes, algunos intervinientes y el Procurador General, las disposiciones que establecen que los desmovilizados han de entregar sus bienes ‘si los tuvieren’, ‘cuando se disponga de ellos’, o ‘de ser posible’, facilita el fraude a la ley dado que los desmovilizados podrán eximirse de su obligación de reparar al señalar que no tienen bienes o que no pueden disponer de los bienes que fueran de su propiedad, en desmedro de los derechos de las víctimas a la reparación.

6.2.4.1.22. Como ya ha sido mencionado, las personas beneficiarias de la ley estudiada tienen la obligación de reparar con su propio patrimonio y de adelantar la totalidad de los actos destinados a la reparación de los derechos de las víctimas. En ese sentido, tal y como se exige a las víctimas y a la sociedad que acepten el tránsito a la legalidad de quienes han cometido delitos de extrema gravedad y crueldad, también cabe esperar que los beneficiarios de la ley actúen de buena fe para restituir la propiedad a quienes fueron despojados de ella y compensar económicamente los daños causados por su actuación ilegal. Así, la persona que busca el beneficio de la ley, debe declarar la totalidad de los bienes que puede aportar para reparar a quienes han sufrido por su causa. Frente a este deber, la ley no puede avalar con expresiones ambiguas que se oculten bienes con el fin de evadir el deber de reparar a las víctimas.

6.2.4.1.23. Será entonces el juez quien defina la suerte de tales bienes e incluso de aquellos otros que no fueron indicados al Estado en su debido momento pero que hacen parte del patrimonio del procesado o que son bienes de procedencia ilícita que este no denunció. Al respecto no sobra recordar que el derecho, en un Estado democrático, tiene ya incorporados mecanismos que sirven simultáneamente para evitar el fraude a la ley de quienes oculten sus bienes sin exigir lo imposible. Son reglas básicas que guían la actividad del juez pero cuya ambigua consagración en la ley bajo estudio genera importantes dudas de constitucionalidad. Ciertamente, tal y como lo señalan los demandantes, algunos intervinientes y el Procurador, las cláusulas parcialmente demandadas pueden ser interpretadas de forma tal que al desmovilizado no se le exige esfuerzo alguno para deshacer los negocios que le han permitido ocultar su patrimonio o para encontrar bienes de procedencia ilícita que tiene claramente identificados pero que no se encuentran en su poder. Este comportamiento no honra en absoluto la obligación de reparar que la Constitución, las normas civiles y los tratados internacionales exigen. Por esta razón, la Corte declarará inexecutable las expresiones “cuando se disponga de ellos” del numeral 11.5 del artículo 11, “si los tuvieren” del inciso segundo del artículo 17, y “de ser posible” contenida en el artículo 46.

6.2.4.1.24. Finalmente, la Corte procederá a integrar la unidad normativa con la expresión “si los tuviese” contenida en el inciso segundo del artículo 44, pues esta expresión tiene el mismo contenido normativo que las expresiones que la Corte considera inconstitucionales y, en consecuencia, se configura una de las tres causales excepcionales de integración. En efecto, como lo ha señalado la Corporación, la unidad normativa tiene lugar cuando ello sea necesario para evitar que el fallo sea inocuo o cuando resulta indispensable para pronunciarse de fondo sobre un asunto. Estas hipótesis se configuran en uno de los siguientes tres casos: en primer lugar, cuando es preciso integrar la proposición jurídica para que la norma demandada tenga un significado jurídico concreto. En segundo término, cuando resulte imprescindible integrar la unidad normativa de manera tal que el fallo no sea inocuo. Y, en tercer término, cuando la disposición impugnada se

encuentre íntima e inescindiblemente relacionada con otra norma que parece inconstitucional. En el presente caso, la unidad normativa resulta imprescindible para evitar que el fallo de constitucionalidad resulte parcialmente inocuo pues mientras se excluye del ordenamiento jurídico la cláusula contenida en los artículos 11.5 y 17, se mantendría aquella contenida en el artículo 44, produciendo con ello los efectos jurídicos inconstitucionales que la Corte esta llamada a evitar. En consecuencia, se procederá a la declaratoria de inexecutable de la expresión “si los tuviese” contenida en el inciso segundo del artículo 44 de la Ley demandada.

6.2.4.2. Presunta violación del derecho a la reparación por cuanto no todas las víctimas podrán reclamar una reparación.

6.2.4.2.1. Se demandan los apartes subrayados de los artículos 5, 47 y 48 de la Ley, así:

"Article 5. Definition of victim. For the purposes of this law, a victim is a person who, individually or collectively, has suffered direct damages such as temporary or permanent injuries that cause any type of physical, psychic and/or sensory (visual and/or auditory) disability, emotional suffering, financial loss or impairment of fundamental rights. The damage must be the result of actions that have violated criminal law, carried out by organized armed groups outside the law.

The victim shall also be the spouse, companion or permanent companion, and relative in the first degree of consanguinity, first civil of the direct victim, when the victim has been killed or has disappeared.

The status of victim is acquired regardless of whether the perpetrator of the punishable conduct is identified, prosecuted or convicted, and regardless of the family relationship between the perpetrator and the victim.

Members of the security forces who have suffered temporary or permanent injuries that cause any type of physical (sic), psychic and/or sensory (visual or auditory) disability, or impairment of their fundamental rights, as a consequence of the actions of any member or members of organized armed groups outside the law, shall also be considered as victims.

Likewise, the spouse, companion or permanent companion and relatives in the first degree of consanguinity of members of the security forces who have lost their lives in the course of acts of service, in connection with the same or outside it, as a consequence of acts performed by a member or members of groups organized outside the law, shall also be considered as victims.

(...) Article 47. Rehabilitation. Rehabilitation should include medical and psychological care for victims or their first-degree relatives in accordance with the Victims' Reparations Fund Budget.

Social services provided by the government to victims, in accordance with existing laws and regulations, are part of reparation and rehabilitation.

Satisfaction measures and guarantees of non-repetition. Satisfaction measures and guarantees of non-repetition, adopted by the various authorities directly involved in the national reconciliation process, should include: (...)

49.3 (sic) A judicial decision that restores the dignity, reputation and rights of the victim and those of the victim's relatives in the first degree of consanguinity.

6.2.4.2.2. Para los actores, la definición del concepto de víctima consagrada en estos artículos es restrictiva pues excluye a personas que han sufrido daños y que tienen derecho a un recurso judicial para reclamar ante las autoridades la satisfacción de sus derechos. Al respecto señalan que “los hermanos de una persona desaparecida forzosamente o asesinada, u otros familiares que no estén en primer grado de consanguinidad, no tendrían derecho a reclamar una reparación. Tratándose de un

miembro de la fuerza pública que haya sido asesinado en el marco del conflicto armado, sólo serán víctimas el ‘cónyuge, compañero o compañera permanente y familiares en primer grado de consanguinidad’. En cuanto a la rehabilitación, la ley prevé que únicamente la víctima directa y los familiares en primer grado de consanguinidad recibirán atención médica y psicológica”.

6.2.4.2.3. Indican que en contraste con estas disposiciones, la Corte Interamericana de Derechos Humanos, en la sentencia del caso “19 comerciantes vs. Colombia” del 5 de julio de 2004, así como en la sentencia del caso “Myrna Mack Chang vs. Guatemala” del 25 de noviembre de 2003, consideró que los hermanos de las víctimas directas también son víctimas y deben ser reparados; lo que es más, en la primera de estas sentencias consideró a un primo de la víctima como afectado y titular del derecho a la reparación.

6.2.4.2.4. Por lo tanto, afirman que la limitación del concepto de víctima, y por ende de la obligación de reparación, es inconstitucional y contrario a la regulación internacional de la materia: “Al restringir el concepto de víctimas por debajo de los parámetros definidos por la normatividad y la jurisprudencia nacional e internacional en la materia, la ley 975 contradice la Constitución de manera múltiple, tanto en relación con el preámbulo, como con el artículo 2, el 5, el 9, el 93 y el 213.2, entre otros”.

Consequently, they request that the Court declare the constitutionality of the paragraphs being sued conditioned, in the following sense:

"For the purposes of the definition of victim established in article 50 of Law 975 of 2005, the spouse, companion or permanent companion, and family member in the first and second degree of consanguinity and the first degree of civil consanguinity are considered as victims.

- The medical and psychological rehabilitation care provided for in article 47 of Act No. 975 of 2005 is extended to the spouse, permanent partner and family member in the first and second degree of consanguinity and the first degree of civil consanguinity.

- The judicial decision referred to in article 48.3 (erroneously referred to as 49.3 in the text of the law published in the Official Gazette) by means of which the criminal process is terminated in accordance with the provisions of Law 975 of 2005, must re-establish the rights of the spouse, companion or permanent companion, and relative in the first and second degree of consanguinity and the first degree of civil consanguinity.

6.2.4.2.5. Para analizar este cargo específico no es posible juzgar aisladamente las expresiones acusadas. En efecto, estas se inscriben en incisos en los cuales se enuncian elementos atinentes a la definición de víctima, elementos que rebasan el del parentesco. El cabal entendimiento de lo acusado exige hacer una integración normativa con todo el inciso correspondiente, es decir, los incisos 2 y 5 del artículo 5.

6.2.4.2.6. Los demandantes consideran que las disposiciones demandadas establecen una restricción al limitar a los parientes en primer grado de consanguinidad el derecho a ser reconocidos como víctimas para los efectos de la Ley que se estudia. Al estudiar las expresiones demandadas partiendo de todo el inciso en el cual se inscriben, la Corte encuentra que las mismas establecen una presunción a favor de los parientes en primer grado de consanguinidad y primero civil de la víctima directa. En efecto, tales incisos empiezan diciendo que “también se tendrá por víctima” o “asimismo”. La cuestión entonces reside en determinar si tales disposiciones pueden dar lugar a la exclusión del reconocimiento de la calidad de víctimas de otros familiares (como los hermanos,

abuelos o nietos) que hubieren sufrido un daño como consecuencia de cualquier conducta violatoria de la ley penal cometida por miembros de grupos armados ilegales que decidan someterse a la Ley estudiada.

6.2.4.2.7. Como ya se mencionó en un aparte anterior de esta providencia, todas las personas que hubieren sido víctimas o perjudicadas por un delito, tienen derecho a un recurso efectivo para solicitarle al Estado la satisfacción de sus derechos a la verdad, la justicia y la reparación. La limitación arbitraria del universo de personas con capacidad de acudir a las autoridades judiciales para la satisfacción de sus derechos, da lugar a la violación del derecho de acceso a la administración de justicia, al debido proceso y a un recurso judicial efectivo, consagrados en los artículos 1, 2, 29 y 229 de la Constitución y 8 y 25 de la Convención Interamericana sobre Derechos Humanos.

6.2.4.2.8. Ahora bien, el derecho internacional de los derechos humanos reconoce que los familiares de las personas víctimas de violaciones a los derechos humanos como por ejemplo, del delito de desaparición forzada, tienen derecho a ser consideradas víctimas para todos los efectos legales, constitucionales y convencionales. Adicionalmente, el Protocolo I reconoce el "derecho que asiste a las familias de conocer la suerte de sus miembros", lo cual no está referido únicamente a la posibilidad de obtener una indemnización económica. Así mismo, el artículo 79 del Estatuto de la Corte Penal Internacional establece: "Por decisión de la Asamblea de los Estados Partes se establecerá un fondo fiduciario en beneficio de las víctimas de delitos de la competencia de la Corte y de sus familias".

6.2.4.2.9. La Corte Constitucional y la Corte Interamericana de Derechos Humanos han entendido que son víctimas o perjudicados, entre otros, las víctimas directas y sus familiares, sin distinguir, al menos para reconocer su condición de víctimas del delito, el grado de relación o parentesco. En este sentido la Corte Interamericana ya ha señalado lo siguiente:

“216. Este Tribunal ha señalado que el derecho de acceso a la justicia no se agota con el trámite de procesos internos, sino éste debe además asegurar, en tiempo razonable, el derecho de las presuntas víctimas o sus familiares a que se haga todo lo necesario para conocer la verdad de lo sucedido y para que se sancione a los eventuales responsables.”

6.2.4.2.10. En el mismo sentido, por sólo citar algunos casos adicionales, en la Sentencia de 14 de marzo de 2001, la Corte reconoció el derecho de los familiares – sin distinción por grado de parentesco - al conocimiento de la verdad respecto de las violaciones de derechos humanos y su derecho a la reparación por los mismos atropellos. Al respecto, entre otras consideraciones, la Corte señaló: “Este tipo de leyes (se refiere a las leyes de autoamnistia) impide la identificación de los individuos responsables de violaciones a derechos humanos, ya que se obstaculiza la investigación y el acceso a la justicia e impide a las víctimas y a sus familiares conocer la verdad y recibir la reparación correspondiente.”. En el mismo sentido en la Sentencia de la Corte Interamericana de Derechos Humanos de 25 de noviembre de 2003, señaló: “su función (se refiere a la función de los órganos judiciales) no se agota en posibilitar un debido proceso que garantice la defensa en juicio, sino que debe además asegurar en un tiempo razonable el derecho de la víctima o sus familiares a saber la verdad de lo sucedido y a que se sancione a los eventuales responsables. Finalmente, en la Sentencia de la Corte Interamericana de Derechos Humanos de 15 de septiembre de 2005, se señaló: “219. En efecto, es necesario recordar que el presente es un caso de ejecuciones extrajudiciales y en este tipo de casos el Estado tiene el deber de iniciar ex officio y sin dilación, una investigación seria, imparcial y efectiva. Durante el proceso de investigación y el trámite

judicial, las víctimas de violaciones de derechos humanos, o sus familiares, deben tener amplias oportunidades para participar y ser escuchados, tanto en el esclarecimiento de los hechos y la sanción de los responsables, como en la búsqueda de una justa compensación.”: En suma, el intérprete autorizado de la Convención Interamericana de Derechos Humanos, cuyo artículos 8 y 25 hacen parte del bloque de constitucionalidad, ha señalado que los parientes, sin distinción, que puedan demostrar el daño, tienen derecho a un recurso efectivo para exigir la satisfacción de sus derechos a la verdad, a la justicia y a la reparación.

6.2.4.2.11. Por su parte, la Corte Constitucional ha señalado que debe tenerse como víctima o perjudicado de un delito penal a la persona ha sufrido un daño real, concreto y específico, cualquiera sea la naturaleza de éste y el delito que lo ocasionó. Subraya la Corte que en las presunciones establecidas en los incisos 2 y 5 del artículo 5 se incluyen elementos definitorios referentes a la configuración de ciertos tipos penales. Así, en el inciso 2 se señala que la condición de familiar víctima se concreta cuando a la “víctima directa” “se le hubiere dado muerte o estuviere desaparecida”. Es decir, que los familiares en el grado allí señalado se tendrán como víctimas solo en tales supuestos. Esto podría ser interpretado en el sentido de que los familiares, aun en el primer grado establecido en la norma, no se consideran víctima si un familiar no fue muerto o desaparecido. Esta interpretación sería inconstitucional por limitar de manera excesiva el concepto de víctima a tal punto que excluiría de esa condición y, por lo tanto, del goce de los derechos constitucionales propios de las víctimas, a los familiares de los secuestrados, de los que sufrieron graves lesiones, de los torturados, de los desplazados forzosamente, en fin, a muchos familiares de víctimas directas de otros delitos distintos a los que para su configuración exigen demostración de la muerte o desaparición. Esta exclusión se revela especialmente gravosa en casos donde tal delito recae sobre familias enteras, como sucede con el desplazamiento forzado, o donde la víctima directa estando viva o presente ha sufrido un daño psicológico tal que se rehúsa a hacer valer para sí misma sus derechos, como podría ocurrir en un caso como la tortura. Las víctimas que demuestren haber sufrido un daño real, concreto y específico, así como sus familiares que cumplan los requisitos probatorios correspondientes, pueden hacer valer sus derechos.

6.2.4.2.12. En este sentido, afectaría el derecho a la igualdad y los derechos al debido proceso y de acceso a la administración de justicia, que el legislador tuviera como perjudicado del delito sólo a un grupo de familiares y sólo por ciertos delitos, sin atender a que en muchos casos el grado de consanguinidad deja de ser el factor más importante para definir la magnitud del daño causado y la muerte o la desaparición no son los únicos aspectos relevantes para identificar a las víctimas de grupos armados ilegales. Al respecto la sentencia citada señaló:

Se requiere que haya un daño real, no necesariamente de contenido patrimonial, concreto y específico, que legitime la participación de la víctima o de los perjudicados en el proceso penal para buscar la verdad y la justicia, el cual ha de ser apreciado por las autoridades judiciales en cada caso. Demostrada la calidad de víctima, o en general que la persona ha sufrido un daño real, concreto y específico, cualquiera sea la naturaleza de éste, está legitimado para constituirse en parte civil, y puede orientar su pretensión a obtener exclusivamente la realización de la justicia, y la búsqueda de la verdad, dejando de lado cualquier objetivo patrimonial. Es más: aun cuando esté indemnizado el daño patrimonial, cuando este existe, si tiene interés en la verdad y la justicia, puede continuar dentro de la actuación en calidad de parte. Lo anterior significa que el único presupuesto procesal indispensable para intervenir en el proceso, es acreditar el daño concreto, sin que se le pueda exigir una demanda tendiente a obtener la reparación patrimonial. La determinación en cada caso de quien tiene el interés legítimo para intervenir en el proceso penal, también depende, entre otros

criterios, del bien jurídico protegido por la norma que tipificó la conducta, de su lesión por el hecho punible y del daño sufrido por la persona o personas afectadas por la conducta prohibida, y no solamente de la existencia de un perjuicio patrimonial cuantificable.

6.2.4.2.13. Más adelante, en la Sentencia C-578 de 2002, al estudiar la constitucionalidad de la Ley 742 de 2002 por medio de la cual se aprobó el estatuto de la Corte Penal Internacional, al referirse a los criterios de ponderación de los valores de justicia y paz, dijo la Corte:

“No obstante lo anterior, y con el fin de hacer compatible la paz con la efectividad de los derechos humanos y el respeto al derecho internacional humanitario, el derecho internacional ha considerado que los instrumentos internos que utilicen los Estados para lograr la reconciliación deben garantizar a las víctimas y perjudicados de una conducta criminal, la posibilidad de acceder a la justicia para conocer la verdad sobre lo ocurrido y obtener una protección judicial efectiva. Por ello, el Estatuto de Roma, al recoger el consenso internacional en la materia, no impide conceder amnistías que cumplan con estos requisitos mínimos, pero sí las que son producto de decisiones que no ofrezcan acceso efectivo a la justicia.”

6.2.4.2.14. En suma, según el derecho constitucional, interpretado a la luz del bloque de constitucionalidad, los familiares de las personas que han sufrido violaciones directas a sus derechos humanos tienen derecho a presentarse ante las autoridades para que, demostrado el daño real, concreto y específico sufrido con ocasión de las actividades delictivas, se les permita solicitar la garantía de los derechos que les han sido vulnerados. Esto no significa que el Estado está obligado a presumir el daño frente a todos los familiares de la víctima directa. Tampoco significa que todos los familiares tengan exactamente los mismos derechos. Lo que sin embargo sí se deriva de las normas y la jurisprudencia citada, es que la ley no puede impedir el acceso de los familiares de la víctima de violaciones de derechos humanos, a las autoridades encargadas de investigar, juzgar, condenar al responsable y reparar la violación.

6.2.4.2.15. Por las razones expuestas, la Corte considera que viola el derecho a la igualdad y los derechos de acceso a la administración de justicia, al debido proceso y a un recurso judicial efectivo las disposiciones de la Ley demandada que excluyen a los familiares que no tienen primer grado de consanguinidad con la víctima directa, de la posibilidad de que, a través de la demostración del daño real, concreto y específico sufrido con ocasión de las actividades delictivas de que trata la ley demandada, puedan ser reconocidos como víctimas para los efectos de la mencionada Ley. También viola tales derechos excluir a los familiares de las víctimas directas cuando éstas no hayan muerto o desaparecido. Tales exclusiones son constitucionalmente inadmisibles, lo cual no obsta para que el legislador alivie la carga probatoria de ciertos familiares de víctimas directas estableciendo presunciones como lo hizo en los incisos 2 y 5 del artículo 5 de la ley acusada.

6.2.4.2.16. En consecuencia, la Corte procederá a declarar exequibles, por los cargos examinados, los incisos segundo y quinto del artículo 5º, en el entendido que la presunción allí establecida no excluye como víctima a otros familiares que hubieren sufrido un daño como consecuencia de cualquier otra conducta violatoria de la ley penal cometida por miembros de grupos armados al margen de la ley. Adicionalmente, procederá a declarar exequible la expresión “en primer grado de consanguinidad de conformidad con el Presupuesto del Fondo para la reparación de las víctimas”, contenida en el artículo 47, sin perjuicio de analizar otro cargo sobre este mismo artículo con

posterioridad (aparte 6.2.4.3.3.), en el entendido que no excluye como víctima a otros familiares que hubieren sufrido un daño como consecuencia de cualquier otra conducta violatoria de la ley penal cometida por miembros de grupos armados al margen de la ley. Finalmente, declarará la exequibilidad de la expresión “en primer grado de consanguinidad” del numeral 49.3, en el entendido que no excluye como víctima a otros familiares que hubieren sufrido un daño como consecuencia de cualquier otra conducta violatoria de la ley penal cometido por miembros de grupos armados al margen de la ley.

6.2.4.3. Cargos relativos a las limitaciones presupuestales aplicables al Fondo para la Reparación de las Víctimas.

Los demandantes han formulado cargos contra distintos apartes de los artículos 47, 54 y 55 de la Ley 975 de 2005, por considerar que en ellos se establecen limitaciones de índole presupuestal para la reparación de los daños sufridos por las víctimas de violaciones de derechos humanos cometidas por los desmovilizados que se acojan a los beneficios penales y procedimentales que se estudian; por su conexidad temática, estos cargos serán resueltos en el presente capítulo.

6.2.4.3.1. Inconstitucionalidad de la sujeción de las indemnizaciones decretadas judicialmente a la disponibilidad de recursos en el Presupuesto General de la Nación.

6.2.4.3.1.1. La Corte se pronunciará en primer lugar sobre el cargo formulado contra el numeral 56.1 del artículo 55 de la Ley 975/05. Según este artículo, corresponde a la Red de Solidaridad Social la función de “liquidar y pagar las indemnizaciones judiciales de que trata la presente ley dentro de los límites autorizados en el presupuesto nacional”. Los actores consideran que la limitación de la liquidación y pago de las referidas indemnizaciones judiciales a la disponibilidad presupuestal establecida en el Presupuesto General de la Nación constituye una violación del derecho de las víctimas a la reparación, puesto que equivale a sujetar la obligación estatal de garantizar dicha reparación a la existencia de suficientes recursos para ello. Explican que, por el contrario, en caso de que se decrete judicialmente una determinada indemnización para las víctimas, el Gobierno Nacional está obligado a apropiarse los recursos presupuestales necesarios para pagarla; y afirman que el Estado colombiano “no puede excusarse de pagar las indemnizaciones con el argumento de que los recursos disponibles para el efecto en el fondo respectivo son inferiores a los montos ordenados por cualquiera de estos tribunales”.

6.2.4.3.1.2. La Corte considera necesario detenerse en el contenido preciso de la norma que se estudia para dilucidar este cargo de inconstitucionalidad. En virtud de tal disposición, la Red de Solidaridad, al momento de liquidar y pagar las indemnizaciones que hayan sido decretadas por los jueces de conformidad con las disposiciones establecidas en la misma Ley 975 de 2005, habrá de sujetarse a los límites establecidos para ello en el Presupuesto Nacional. Ello implica que, en virtud de esta norma, pueden presentarse situaciones en las cuales una indemnización que ha sido reconocida y ordenada por un juez, creando así un derecho cierto y concreto en cabeza de una o más víctimas, puede ser limitada al momento de su liquidación y pago por parte de la Red de Solidaridad Social, en caso de que no exista suficiente disponibilidad de recursos en el Presupuesto Nacional para ello. En otras palabras, la norma que se estudia permite que la materialización de un derecho cierto y reconocido judicialmente –v.g. el derecho a recibir una indemnización decretada judicialmente en tanto elemento de la reparación por los daños sufridos en virtud de violaciones de los derechos humanos- quede sujeta a una contingencia posterior, consistente en que existan suficientes recursos dentro del Presupuesto Nacional para pagarla.

6.2.4.3.1.3. En criterio de la Corte, esta limitación es desproporcionada, y constituye una afectación excesiva del derecho de las víctimas a la reparación. Una vez que se ha ordenado, como

consecuencia de un proceso judicial adelantado con las formalidades de la ley, que una persona que ha sido víctima de una violación de sus derechos humanos tiene derecho a recibir una determinada suma de dinero en calidad de indemnización, se consolida a su favor un derecho cierto que no puede estar sujeto a posteriores modificaciones, mucho menos cuando éstas se derivan de la disponibilidad de recursos en el Presupuesto General de la Nación. Una vez se haya llegado a una decisión judicial sobre el monto de la indemnización a decretar para reparar los daños sufridos por las víctimas, ésta genera un derecho cierto que no puede ser modificado posteriormente por la Red de Solidaridad Social, en su función de liquidador y pagador de dichas indemnizaciones.

6.2.4.3.1.4. Adicionalmente, el deber de reparar recae sobre el responsable del delito que causó el daño, de tal forma que el presupuesto general de la nación no es la única fuente de recursos para financiar el pago de las indemnizaciones judicialmente decretadas. La norma juzgada parecería eximir al condenado de su deber de reparar en cuanto al elemento de la indemnización.

6.2.4.3.1.5. Lo anterior no significa que la disponibilidad de recursos públicos sea irrelevante o que la Comisión Nacional de Reparación y Rehabilitación pierda su facultad de fijar criterios para distribuir los recursos destinados a la reparación (artículo 52.6). Lo que sucede es que el derecho cierto no se puede desconocer en virtud de los recursos disponibles en una determinada vigencia fiscal. Las limitaciones presupuestales justifican medidas de distribución equitativas y temporales de los recursos escasos, pero no el desconocimiento del derecho judicialmente reconocido, situación diferente a aquella en la cual se puede encontrar quien no cuenta a su favor con una providencia judicial específica que ya haya definido el monto de la indemnización a que tiene derecho.

6.2.4.3.1.6. Por las anteriores razones, al constituir una afectación desproporcionada del derecho de las víctimas a la reparación que violenta las obligaciones constitucionales e internacionales del Estado colombiano en la materia, la expresión “*dentro de los límites autorizados en el Presupuesto Nacional*” del numeral 56.1 del artículo 55 será declarada inexecutable.

6.2.4.3.2. *Inhibición respecto de la expresión acusada del primer inciso del artículo 55.*

6.2.4.3.2.1. Por las mismas razones, se controvierte en la demanda lo dispuesto en el primer inciso del artículo 55 de la Ley 975/05, que atribuye ciertas funciones a la Red de Solidaridad Social en relación con el Fondo para la Reparación de las Víctimas, y sujeta su cumplimiento al presupuesto asignado a dicho Fondo. Para los actores, condicionar el derecho de las víctimas a la reparación a la existencia de suficientes recursos en el presupuesto del Fondo de Reparación constituye un desconocimiento de las obligaciones constitucionales e internacionales de Colombia.

6.2.4.3.2.2. Sin embargo, para la Corte el cargo que se formula contra el primer inciso del artículo 55 no guarda una debida correspondencia con el contenido de esta norma. En efecto, el inciso en comento contiene una enunciación de tipo general, que no se refiere concretamente a la reparación debida a las víctimas de violaciones de derechos humanos, sino que establece en términos genéricos que la Red de Solidaridad Social, cuyo Director es el ordenador del gasto del Fondo para la Reparación de las Víctimas, tendrá ciertas atribuciones concretas, que habrá de ejercer de conformidad con el presupuesto con el que cuente dicho fondo. En este inciso no se determina cuál habrá de ser la composición de dicho presupuesto, ni cómo se habrá de destinar al pago de reparaciones en casos concretos, ni cuáles habrán de ser los criterios o límites a respetar cuando se destinen sus recursos a satisfacer el derecho a la reparación.

6.2.4.3.2.3. En consecuencia, dado que la norma que se ha acusado no se refiere al derecho de las víctimas a la reparación, y que su posible incidencia sobre casos concretos habrá de determinarse en cada circunstancia particular sin que de su texto se derive una afectación expresa del derecho de las

víctimas a obtener reparación por los daños sufridos, concluye la Corte que el cargo que contra ella se formula no guarda correspondencia con su tenor literal. No compete a esta Corporación efectuar interpretaciones de este inciso que trasciendan lo que expresamente se dispone en él, que se repite, constituye un enunciado general sobre el funcionamiento del Fondo, y no una disposición que explícitamente afecte el derecho de las víctimas a la reparación. Por lo tanto, en relación con esta disposición la Corte se declarará inhibida para resolver.

6.2.4.3.3. *Constitucionalidad del primer inciso del artículo 47.*

6.2.4.3.3.1. Controvierten los demandantes el primer inciso del artículo 47 de la Ley 975/05, en virtud del cual la rehabilitación –que se define en el artículo 44 ibídem como uno de los posibles elementos de la reparación, junto con la restitución, la indemnización y la satisfacción- “*deberá incluir la atención médica y psicológica para las víctimas o sus parientes en primer grado de consanguinidad de conformidad con el Presupuesto del Fondo para la Reparación de las Víctimas*”. En su criterio, la expresión “*de conformidad con el Presupuesto del Fondo para la Reparación de las Víctimas*” constituye una afectación del derecho a la reparación, por cuanto sujeta la efectividad de ésta a que existan recursos suficientes en dicho presupuesto.

6.2.4.3.3.2. Ya se ha pronunciado la Corte en apartes anteriores de esta misma sentencia sobre el hecho de que esta norma contiene una presunción sobre quiénes se han de considerar como *víctimas*, esto es, cuáles parientes de los directamente afectados por hechos de violencia se deben considerar incluidos dentro de la respectiva presunción, para efectos de acceder al derecho a la rehabilitación que allí se consagra –presunción que, como ya se explicó, no se puede interpretar en el sentido de excluir a otras personas que pueden haber sido afectadas por tales hechos delictivos-. Dentro de este mismo entendimiento, considera la Corte que la expresión “*de conformidad con el Presupuesto del Fondo para la Reparación de las Víctimas*” ha de leerse no como una limitación presupuestal -en el sentido de que únicamente se puede otorgar el beneficio de la rehabilitación cuando exista disponibilidad de recursos para ello-, sino como una disposición técnica-presupuestal destinada a financiar la referida presunción sobre quiénes tienen la condición de víctima. En otras palabras, la Corte discrepa de la lectura que hacen los demandantes de la expresión acusada, puesto que ésta no constituye una limitación del alcance de la rehabilitación en casos concretos, sino una disposición de tipo general destinada a armonizar la noción de víctima consagrada en el artículo 47 con el alcance del presupuesto del Fondo para la Reparación de las Víctimas; de tal manera, al momento de establecer el referido presupuesto, las autoridades competentes han de tener en cuenta necesariamente el alcance de la presunción plasmada en el artículo 47 de la Ley 975/05 sobre quiénes tienen la condición de *víctima* y, por ende, *prima facie* pueden acceder al derecho a la rehabilitación.

6.2.4.3.3.3. Lo anterior no excluye que otras víctimas de grupos armados al margen de la ley, como pueden ser en algunos eventos los desplazados de ciertas zonas del país, puedan invocar y demostrar su condición de tales para efectos de exigir rehabilitación, de ser ella pertinente en el caso concreto.

6.2.4.3.3.4. En estos términos, considerando que la expresión “*de conformidad con el Presupuesto del Fondo para la Reparación de las Víctimas*” no es una expresión que limite el alcance de la rehabilitación en casos concretos sino que, por el contrario, busca armonizar el presupuesto del Fondo para la Reparación con el alcance de la noción de “víctima” consagrada en este artículo, dicha norma se habrá de declarar exequible, en los términos establecidos en los apartes anteriores de esta sentencia – es decir, entendiendo que la referida definición de víctima no excluye de tal categoría a otros familiares que hubieren sufrido un daño como consecuencia de las conductas delictivas cometidas por miembros de grupos armados al margen de la ley.

6.2.4.3.4. Exequibilidad del artículo 54, inciso segundo, únicamente por los cargos examinados. La necesidad de un condicionamiento sobre el deber de reparación de quienes pertenecieron a un grupo armado específico por los delitos cometidos por dicho grupo.

6.2.4.3.4.1. Por último, controvierten los demandantes lo dispuesto en el inciso segundo del artículo 54 de la Ley 975/05, en virtud del cual el Fondo para la Reparación de las Víctimas estará integrado “por todos los bienes o recursos que a cualquier título se entreguen por las personas o grupos armados organizados ilegales a que se refiere la presente ley” –expresión que se acusa-, así como por recursos del presupuesto nacional y donaciones nacionales o extranjeras. En otros apartes de esta providencia, la Corte se pronuncia sobre la responsabilidad que asiste a los desmovilizados de grupos armados ilegales, en el sentido de que su propio patrimonio debe quedar afecto al pago de las indemnizaciones a las que haya lugar por los delitos cometidos con ocasión de su pertenencia a un grupo armado ilegal específico, tanto en forma individual como solidaria. Ahora debe la Corte estudiar el cargo según el cual esta disposición es violatoria del derecho a la *restitución* en tanto componente del derecho a la reparación, por cuanto no se establece explícitamente en la norma que los bienes que hayan sido usurpados violentamente a personas concretas que tenían derecho sobre ellos –como propietarios, poseedores, ocupantes o tenedores- deben ser restituidos a tales personas en las mismas condiciones en que los tenían antes del despojo, en vez de ingresar a la masa general de bienes que integran el Fondo para la Reparación de las Víctimas.

6.2.4.3.4.2. En relación con este cargo específico, sin embargo, considera la Corte que no están dados los presupuestos para adoptar un pronunciamiento, por cuanto no se ha demandado en el presente proceso la norma de la Ley 975/05 sobre el alcance de la restitución en tanto elemento de la reparación, y no están dadas las condiciones para acudir a la integración normativa en este punto específico. En efecto, los demandantes controvierten una norma general sobre los bienes que han de integrar el Fondo para la Reparación de las Víctimas y solicitan a la Corte que interprete tal afirmación general a la luz de ciertas normas nacionales e internacionales sobre el deber de restitución; sin embargo, la norma de la misma ley que establece el alcance del deber de restitución no ha sido demandada para integrar debidamente el cargo. Ello no implica que en una oportunidad futura, en la cual se demande efectivamente la norma legal que regula el alcance de la restitución en casos concretos, la Corte no pueda pronunciarse sobre el asunto y resolver así los cargos contenidos en la demanda. De esta forma, el efecto de cosa juzgada que tendrá la decisión adoptada en la presente sentencia sobre el artículo 54 se limitará únicamente a los cargos atinentes a la responsabilidad patrimonial que asiste a los miembros de grupos armados ilegales específicos desmovilizados en relación con el derecho de sus víctimas a la reparación.

6.2.4.4. La responsabilidad civil solidaria de los grupos armados al margen de la ley

6.2.4.4.1. Se demandan en este segmento los apartes subrayados del artículo 54:

"Article 54. Victims' Reparations Fund. Establish the Fund for Victims' Reparations as a special account without legal personality, the authorising officer of which will be the Director of the Social Solidarity Network. The resources of the Fund shall be implemented in accordance with the rules of private law.

The Fund shall be made up of all assets or resources delivered in any capacity by the illegal organized armed persons or groups referred to in this law, by resources from the national budget and donations in cash or in kind, national or foreign.

The resources administered by this Fund shall be under the supervision of the Office of the Comptroller General of the Republic.

6.2.4.4.2. Advierte la Corte que la satisfacción integral del derecho a la reparación de las víctimas exige una referencia a la responsabilidad de los grupos armados organizados al margen de la ley que incurrir en conductas delictivas.

6.2.4.4.3. Conforme se establece de los antecedentes de la ley 975 de 2005 y de su propia denominación “*por la cual se dictan disposiciones para la reincorporación de miembros de grupos armados organizados al margen de la ley, que contribuyan de manera efectiva a la consecución de la paz nacional (...)*”, los destinatarios de la ley son los miembros de los grupos armados organizados al margen de la ley, en razón a su pertenencia a un grupo específico como tal.

6.2.4.4.4. El objeto de la ley es facilitar de los procesos de paz y la reincorporación a la vida civil, de los miembros de los *grupos* armados organizados al margen de la ley . Tales grupos pueden consistir en bloques o frentes, es decir, en grupos armados específicos que realizaron sus actividades delictivas en una zona determinada del territorio nacional (art. 1°).

6.2.4.4.5. El ámbito de aplicación de la ley es lo concerniente a la investigación, procesamiento, sanción y beneficios judiciales de las personas vinculadas a *grupos* armados organizados al margen de la ley, como autores o partícipes de hechos delictivos cometidos *durante y con ocasión de la pertenencia a los grupos específicos* que hubieren decidido desmovilizarse y contribuir decididamente a la reconciliación nacional (Art. 2°).

6.2.4.4.6. El acceso a los beneficios penales que contempla la ley está explícitamente condicionado, desde el punto de vista del sujeto, a la pertenencia a un grupo armado específico y a la desmovilización colectiva de dicho grupo o individual de algunos de sus integrantes, y, desde el punto de vista causal, a los hechos delictivos cometidos durante y con ocasión de la pertenencia a un grupo armado específico (Arts. 10 y 20).

6.2.4.4.7. Lo anterior conduce a señalar que para la ley bajo examen resulta particularmente relevante la causalidad existente entre los hechos punibles judicializados y la actividad de los grupos armados específicos que después de haberse organizado para cometer delitos decidan desmovilizarse. Esta relación entre la actividad de los individuos que se desmovilizan y su pertenencia al grupo específico dentro del cual delinquieron, genera un nexo de causalidad entre la actividad del grupo específico y los daños ocasionados individual o colectivamente por ese grupo específico dentro del cual realizaron las actividades delictivas. Si bien la responsabilidad penal continúa siendo individual, la responsabilidad civil derivada del hecho punible admite el elemento de la solidaridad, no solamente entre los penalmente responsables sino respecto de quienes por decisión judicial hayan sido calificados como miembros del grupo armado específico, entendido como el frente o bloque al que se impute causalmente el hecho constitutivo del daño, en virtud de la relación de causalidad que se estructura entre las conductas delictivas que generan el daño y la actividad en concreto de ese grupo específico que actúa al margen de la ley al cual pertenecieron los desmovilizados. Todos los hechos punibles sometidos al ámbito de la Ley 975/05 exigen que su perpetración se produzca durante y con ocasión de la pertenencia de los individuos desmovilizados a los grupos armados, lo que fundamenta la responsabilidad civil del grupo específico al amparo del cual se cometieron los delitos juzgados por parte de miembros de un grupo armado determinado, calificados como tales judicialmente.

6.2.4.4.8. Aunque estas precisiones sobre el ámbito de la responsabilidad civil se efectúan

específicamente respecto de los hechos que caen bajo el ámbito de la Ley 975/05, y en atención a sus especificidades y particularidades, no es extraño a la tradición jurídica colombiana la solidaridad en la responsabilidad civil derivada del hecho punible, o su ampliación a personas distintas a los penalmente responsables. Así conforme a esta tradición los daños causados con la infracción deben ser reparados por los penalmente responsables, en forma solidaria, y por los que conforme a la ley sustancial, están obligados a responder. De acuerdo con esta concepción de la responsabilidad están obligados a reparar los daños derivados de una conducta punible (i) los penalmente responsables; (ii) los que de acuerdo con la ley sustancial deben responder por los hechos cometidos por otros, es decir los conocidos como terceros civilmente responsables, y (iii) los que se enriquecen ilícitamente con el delito.

6.2.4.4.9. Ahora bien, la figura de la responsabilidad patrimonial solidaria por perjuicios producidos a terceros tiene clara aplicación en otros ámbitos del ordenamiento colombiano. Así, por ejemplo, en el campo del derecho comercial el propio Legislador ha establecido el principio de responsabilidad solidaria cuando, de hecho, varias personas se asocian para realizar ciertas actividades, así estas no sean necesariamente delictivas: el artículo 501 del Código de Comercio, al regular la responsabilidad de los integrantes de las sociedades de hecho, dispone que en este tipo de agrupaciones “todos y cada uno de los asociados responderán solidaria e ilimitadamente por las operaciones celebradas”, y que “los terceros podrán hacer valer sus derechos y cumplir sus obligaciones a cargo o a favor de todos los asociados de hecho o de cualquiera de ellos”. En el caso de la Ley 975/05 se trata de conductas delictivas y de grupos ilegales armados, lo cual explica que la propia ley haya establecido mecanismos de responsabilidad colectiva para efectos de la reparación (artículo 42 de la Ley 975 de 2005).

6.2.4.4.10. Para la Corte es claro que si los beneficios que establece la ley son para el grupo específico, o para sus miembros en razón a la pertenencia al bloque o frente correspondiente, éste debe tener correlativas responsabilidades de orden patrimonial, incluso al margen de la determinación de responsabilidades de índole penal, siempre y cuando se establezca el daño y la relación de causalidad con la actividad del grupo específico y se haya definido judicialmente la pertenencia del desmovilizado al frente o bloque correspondiente. Los daños anónimos, es decir aquellos respecto de los cuales no ha sido posible individualizar al sujeto activo, no pueden quedar exentos de reparación; comprobado el daño y el nexo causal con las actividades del bloque o frente armado ilegal cuyos miembros judicialmente identificados sean beneficiarios de las disposiciones de la ley, tales miembros deben responder a través de los mecanismos fijados en la ley.

6.2.4.4.11. El artículo 54, bajo examen establece que el fondo para la reparación de las víctimas estará integrado por todos los bienes o recursos que a cualquier título se entreguen por las personas o grupos armados organizados ilegales a que se refiere la ley, por recursos provenientes del presupuesto nacional y por donaciones en dinero o especie, nacionales o extranjeras. La satisfacción del principio de reparación exige la observancia de un orden en la afectación de los recursos que integran el fondo. Así, los primeros obligados a reparar son los perpetradores de los delitos, en subsidio y en virtud del principio de solidaridad, el grupo específico al que pertenezcan los perpetradores. Antes de acudir a recursos del Estado para la reparación de las víctimas, debe exigirse a los perpetradores de los delitos, o al bloque o frente al que pertenecieron, que respondan con su propio patrimonio por los daños ocasionados a las víctimas de los delitos. El Estado ingresa en esta secuencia sólo en un papel residual para dar una cobertura a los derechos de las víctimas, en especial a aquellas que no cuentan con una decisión judicial que fije el monto de la indemnización al que tienen derecho (inciso segundo del artículo 42 de la Ley 975 de 2005) y ante la eventualidad de que los recursos de los perpetradores sean insuficientes.

6.2.4.4.11. No obstante, si bien el artículo 54, inciso segundo, señala que el Fondo para la

Reparación se nutre de “*los bienes o recursos que a cualquier título se entreguen por las personas o grupos armados organizados ilegales a que se refiere la presente ley*”, no señala a qué título responden los miembros del grupo específico, es decir, del bloque o frente dentro del cual realizaron actividades delictivas. Tampoco indica en qué situación se encuentran las víctimas de cada frente o bloque en punto a la indemnización de los perjuicios que tales grupos específicos le ocasionaron. De tal manera que dicho artículo establece un mecanismo de reparación colectiva, sin indicar aspectos esenciales de la responsabilidad en que dicha reparación colectiva encuentra fundamento. Esto crea una ambigüedad sobre las bases y los alcances de dicha responsabilidad, a tal punto que se podría concluir que las víctimas solo tienen derecho a la reparación en la medida en que el perpetrador específico del delito que les ocasionó el daño cuente con recursos suficientes para pagar la correspondiente indemnización, lo cual sería una afectación desproporcionada de dicho derecho que quedaría librado a la disponibilidad de recursos de cada individuo perpetrador del delito. Esa interpretación es manifiestamente inconstitucional en el contexto de la desmovilización de grupos armados al margen de la ley estimulada por beneficios penales. Por eso, es necesario condicionar la exequibilidad de la norma, sin impedir que el Fondo de Reparación sea alimentado por recursos del presupuesto nacional y por donaciones, habida cuenta del goce efectivo del derecho a la reparación de las víctimas que podría verse seriamente disminuido si el Fondo de Reparación fuera integrado exclusivamente con bienes o recursos de los integrantes de cada frente o bloque armado ilegal.

6.2.4.4.12. Los argumentos relativos a la necesidad de proteger los derechos de las víctimas a la reparación se atienden con el condicionamiento que la Corte introducirá a la norma, en el sentido que quienes judicialmente hayan sido calificados como integrantes del grupo armado específico responden civilmente, de manera solidaria, con su patrimonio, por los daños ocasionados a las víctimas por otros miembros del bloque o frente al cual pertenecieron, no solo por los perjuicios derivados de los delitos por los cuales fueren individualmente condenados.

6.2.4.4.13. En consecuencia la Corte declarará exequible, por los cargos examinados, el inciso 2° del artículo 54, en el entendido que todos y cada uno de los miembros del grupo armado organizado al margen de la ley, responden con su propio patrimonio para indemnizar a cada una de las víctimas de los actos violatorios de la ley penal por los que fueren condenados; y también responderán solidariamente por los daños ocasionados a las víctimas por otros miembros del grupo armado específico al cual pertenecieron.

6.3. Efecto general inmediato de la presente sentencia

Finalmente, la Corte no concederá efectos retroactivos a estas decisiones, como lo solicitaron los demandantes, según lo resumido en el apartado 3.1.5. de los Antecedentes de esta sentencia. Por lo tanto, se aplican las reglas generales sobre efecto inmediato de las decisiones de la Corte Constitucional, de conformidad con su jurisprudencia.

VII. DECISION

En mérito de lo expuesto, la Corte Constitucional, administrando justicia en nombre del pueblo y por mandato de la Constitución,

RESUELVE

Primero.- ESTARSE A LO RESUELTO en la sentencia C-319 de 2006, que declaró EXEQUIBLE la Ley 975 de 2005, en relación con el cargo formulado por no haberse tramitado

como ley estatutaria.

Segundo.- Declarar **EXEQUIBLE** la Ley 975 de 2005, en cuanto hace referencia a los cargos formulados según los cuales debería haber sido expedida con sujeción a los trámites propios de una ley de concesión de amnistía o indulto general.

Tercero.- Declararse **INHIBIDA** respecto del inciso final del artículo 2º de la Ley 975 de 2005.

Cuarto.- Declarar **EXEQUIBLE** el artículo 3º de la Ley 975 de 2005, por los cargos examinados, en el entendido de que la colaboración con la justicia debe estar encaminada a lograr el goce efectivo de los derechos de las víctimas a la verdad, la justicia, la reparación y la no repetición.

Quinto.- Declarar **EXEQUIBLES**, por los cargos examinados, los incisos segundo y quinto del artículo 5º de la Ley 975 de 2005, en el entendido que la presunción allí establecida no excluye como víctima a otros familiares que hubieren sufrido un daño como consecuencia de cualquier otra conducta violatoria de la ley penal cometida por miembros de grupos armados al margen de la ley.

Sexto.- Declararse **INHIBIDA** respecto del inciso segundo del artículo 9º de la Ley 975 de 2005.

Séptimo.- Declararse **INHIBIDA** respecto de la expresión “*siempre que se encuentren en el listado que el Gobierno Nacional remita a la Fiscalía General de la Nación*” del inciso primero del artículo 10 de la Ley 975 de 2005, y de la expresión “*y a los establecidos en la Ley 782 de 2002*” del párrafo del mismo artículo.

Octavo.- Declarar **EXEQUIBLE**, por los cargos analizados, la expresión “*producto de la actividad ilegal*” del numeral 10.2 del artículo 10 de la Ley 975 de 2005, y **exequible** el numeral 10.6 del mismo artículo en el entendido de que también deben informar en cada caso sobre la suerte de las personas desaparecidas.

Noveno.- Declarar **INEXEQUIBLE** la expresión “*cuando se disponga de ellos*” del numeral 11.5 del artículo 11 de la Ley 975 de 2005, y **EXEQUIBLE** la expresión “*producto de la actividad ilegal*” del mismo numeral.

Décimo.- Declarar **INEXEQUIBLE** la expresión “*de procedencia ilícita*” del numeral 4º del artículo 13 de la Ley 975 de 2005.

Décimo primero.- Declararse **INHIBIDA** respecto de las expresiones “*el o los nombres de*” del inciso primero del artículo 16 de la Ley 975 de 2005.

Décimo segundo.- Declarar **EXEQUIBLE**, por los cargos analizados, el artículo 17 de la Ley 975 de 2005, en el entendido de que la versión libre debe ser completa y veraz, e **INEXEQUIBLE** la expresión “*si los tuvieren*” del inciso segundo. Además, declarar **INEXEQUIBLES** las expresiones “*inmediatamente*” y la expresión “*en uno de los establecimientos de reclusión determinados por el Gobierno Nacional de acuerdo con el artículo 31 de la presente ley*” del inciso cuarto.

Décimo tercero.- Declarar **EXEQUIBLE**, por los cargos examinados, la expresión “*dentro de las treinta y seis (36) horas siguientes señalará y realizará audiencia de formulación de imputación*” del inciso cuarto del artículo 17 de la Ley 975 de 2005, en el entendido que la puesta a disposición de la persona a órdenes del magistrado que ejerza la función de control de garantías y la solicitud de audiencia de imputación de cargos, se presentará cuando se haya desarrollado a cabalidad el programa metodológico dispuesto en el inciso tercero del mismo artículo, y de conformidad con lo

previsto en el artículo 207 del Código de Procedimiento Penal.

Décimo cuarto.- Declarar **EXEQUIBLE**, por los cargos analizados, el artículo 18 de la Ley 975 de 2005, salvo la expresión *“de procedencia ilícita que hayan sido entregados”* del inciso segundo, que se declara **INEXEQUIBLE**.

Décimo quinto.- Declarar **EXEQUIBLE** el artículo 19 de la Ley 975 de 2005, por los cargos examinados, y la expresión *“de hallarse conforme a derecho”* del inciso tercero, en el entendido que el magistrado controlará que la calificación jurídica corresponda a los hechos que obran en el expediente.

Décimo sexto.- Declarar **EXEQUIBLE** el artículo 20 de la Ley 975 de 2005, por los cargos examinados, salvo la expresión *“pero en ningún caso la pena alternativa podrá ser superior a la prevista en la presente ley”*, que se declara **INEXEQUIBLE**.

Décimo séptimo.- Declararse **INHIBIDA** respecto de los artículos 21, 22 y 23 de la Ley 975 de 2005.

Décimo octavo.- Declarar **EXEQUIBLE** el artículo 24 de la Ley 975 de 2005, por los cargos analizados.

Décimo noveno.- Declarar **EXEQUIBLE**, por los cargos examinados, el artículo 25 de la Ley 975 de 2005, salvo el inciso segundo y el siguiente apartado del inciso primero: *“sin perjuicio del otorgamiento de la pena alternativa, en el evento que colabore eficazmente en el esclarecimiento o acepte, oralmente o por escrito, de manera libre, voluntaria, expresa y espontánea, debidamente informado por su defensor; haber participado en su realización y siempre que la omisión no haya sido intencional. En este evento, el condenado podrá ser beneficiario de la pena alternativa. Se procederá a la acumulación jurídica de las penas alternativas sin exceder los máximos establecidos en la presente ley”*, que se declaran **INEXEQUIBLES**.

Vigésimo.- Declarar **EXEQUIBLE**, por los cargos examinados, el parágrafo 3º del artículo 26 de la Ley 975 de 2005, y declararse **INHIBIDA** respecto del resto de la disposición.

Vigésimo primero.- Declararse **INHIBIDA** respecto de los artículos 27 y 28 de la Ley 975 de 2005.

Vigésimo segundo.- Declarar **INEXEQUIBLES** las siguientes expresiones del inciso cuarto del artículo 29 de la Ley 975 de 2005: *“los”* y *“por los cuales fue condenado en el marco de la presente ley”*, y **EXEQUIBLE** el inciso quinto, en el entendido de que también se revocará el beneficio cuando haya ocultado en la versión libre su participación como miembro del grupo en la comisión de un delito relacionado directamente con su pertenencia al grupo.

Vigésimo tercero.- Declarar **EXEQUIBLE**, por los cargos examinados, el inciso segundo del artículo 30 de la Ley 975 de 2005, en el entendido de que dichos establecimientos quedan sujetos integralmente a las normas jurídicas sobre control penitenciario.

Vigésimo cuarto.- Declarar **INEXEQUIBLE** el artículo 31 de la Ley 975 de 2005.

Vigésimo quinto.- Declarar **EXEQUIBLE** la expresión *“y en el marco de la ley”* del inciso segundo del artículo 34 de la Ley 975 de 2005, e **INEXEQUIBLE** la expresión *“presente”* de la misma disposición.

Vigésimo sexto.- Declarar **EXEQUIBLES** las expresiones “y en los términos establecidos en el Código de Procedimiento Penal” del numeral 38.5 del artículo 37 de la Ley 975 de 2005, en el entendido que conforme al artículo 30 de la Ley 600 de 2000, y de acuerdo con la exequibilidad condicionada de esa norma declarada mediante la sentencia C-228 de 2002, la víctima o los perjudicados pueden acceder directamente al expediente desde su iniciación, para ejercer los derechos a la verdad, justicia y reparación, y **EXEQUIBLE** la expresión “*durante el juicio*” del numeral 38.7 del artículo 37 de la Ley 975 de 2005.

Vigésimo séptimo.- Declarar **INEXEQUIBLE** la expresión “*si los tuviese*” contenida en el inciso segundo del artículo 44 de la Ley 975 de 2005.

Vigésimo octavo.- Declarar **INEXEQUIBLE** la expresión “*de ser posible*” contenida en el artículo 46 de la Ley 975 de 2005.

Vigésimo noveno.- Declarar **EXEQUIBLE** la expresión “*en primer grado de consanguinidad de conformidad con el Presupuesto del Fondo para la reparación de las víctimas*”, contenida en el artículo 47 de la Ley 975 de 2005, en el entendido que no excluye como víctima a otros familiares que hubieren sufrido un daño como consecuencia de cualquier otra conducta violatoria de la ley penal cometida por miembros de grupos armados al margen de la ley.

Trigésimo.- Declarar **EXEQUIBLES**, por los cargos examinados, las expresiones “*otras personas*” y “*más daños innecesarios*” del numeral 49.1 del artículo 48 de la Ley 975 de 2005 y “*en primer grado de consanguinidad*” del numeral 49.3 del artículo 48 de la Ley 975 de 2005, en el entendido que no excluye como víctima a otros familiares que hubieren sufrido un daño como consecuencia de cualquier otra conducta violatoria de la ley penal cometida por miembros de grupos armados al margen de la ley.

Trigésimo primero.- Declarar **EXEQUIBLE**, por los cargos examinados, el inciso segundo del artículo 54 de la Ley 975 de 2005, en el entendido que todos y cada uno de los miembros del grupo armado organizado al margen de la ley, responden con su propio patrimonio para indemnizar a cada una de las víctimas de los actos violatorios de la ley penal por los que fueren condenados; y también responderán solidariamente por los daños ocasionados a las víctimas por otros miembros del grupo armado al cual pertenecieron.

Trigésimo segundo.- Declararse **INHIBIDA** respecto de la expresión “*de acuerdo con el presupuesto asignado para el Fondo*” del inciso primero del artículo 55 de la Ley 975 de 2005, y declarar **INEXEQUIBLE** la expresión “*dentro de los límites autorizados en el Presupuesto Nacional*” del numeral 56.1 del mismo artículo.

Trigésimo tercero.- Declarar **EXEQUIBLES**, por los cargos examinados, las expresiones “*más daños innecesarios*” y “*otras personas*” del inciso tercero del artículo 58 de la Ley 975 de 2005.

Trigésimo cuarto.- Declararse **INHIBIDA** respecto del artículo 62 de la Ley 975 de 2005.

Trigésimo quinto.- Declararse **INHIBIDA** respecto del artículo 69 de la Ley 975 de 2005.

Trigésimo sexto.- Declarar **INEXEQUIBLE** el artículo 70 de la Ley 975 de 2005, por vicios de procedimiento en su formación.

Trigésimo séptimo.- Declarar **INEXEQUIBLE** el artículo 71 de la Ley 975 de 2005, por vicios de

procedimiento en su formación.

Notifíquese, comuníquese, publíquese, insértese en la Gaceta de la Corte Constitucional y archívese el expediente

JAIME CÓRDOBA TRIVIÑO
Presidente

JAIME ARAUJO RENTERÍA
Magistrado
CON SALVAMENTO Y ACLARACION ESPECIAL DE VOTO

ALFREDO BELTRÁN SIERRA
Magistrado
CON SALVAMENTO DE VOTO

MANUEL JOSÉ CEPEDA ESPINOSA
Magistrado

RODRIGO ESCOBAR GIL
Magistrado

MARCO GERARDO MONROY CABRA
Magistrado

HUMBERTO SIERRA PORTO
Magistrado
CON SALVAMENTO DE VOTO

ALVARO TAFUR GALVIS
Magistrado

CLARA INÉS VARGAS HERNÁNDEZ
Magistrada

MARTHA VICTORIA SACHICA MENDEZ
Secretaria General

**SALVAMENTO DE VOTO DEL MAGISTRADO JAIME ARAUJO RENTERIA A LA
SENTENCIA C- 370 DE 2006**

LEY DE JUSTICIA Y PAZ-Vulneración de reserva de ley estatutaria (Salvamento de voto)

La Ley definía el núcleo esencial de los derechos fundamentales de las víctimas a la verdad, a la justicia y a la reparación, lo que le daba la naturaleza, además, de ley estatutaria. Por no haberse tramitado de conformidad con el artículo 152 superior, toda la ley era contraria a la Constitución Política. La Jurisprudencia de la Corte Constitucional, señala que cuando una materia es de ley estatutaria, obliga a que toda su regulación se tramite por ese procedimiento, aun cuando algunas de sus normas sean ordinarias.

TRAMITE LEGISLATIVO DE LEY DE JUSTICIA Y PAZ-Indebida tramitación de apelación acarrea la inconstitucionalidad de toda la ley (Salvamento de voto)

En el primer debate la Ley 975 de 2006 en su integridad se tramitó de manera irregular, ya que no se respetó el artículo 159 de la Constitución Política, pues no se apeló todo el proyecto de ley. Por este motivo se declararon inconstitucionales los artículos 70 y 71 de la Ley. La razón por la cual se caen esos dos artículos, es la misma para que se hubiese caído toda la ley, pues toda la ley tenía que tener el mismo procedimiento; y si se acepta que una parte tuvo un procedimiento irregular, es tanto como afirmar que el resto, o la otra parte de la ley, también lo tuvo.

TRAMITE LEGISLATIVO DE LEY DE JUSTICIA Y PAZ-Exigencia de mayoría especial (Salvamento de voto)

DERECHOS DE LAS VICTIMAS DE DELITOS-Comprende el derecho a la verdad, la justicia y a la reparación (Salvamento de voto)

PROYECTO DE SENTENCIA DE CONSTITUCIONALIDAD-Debate y decisión (Salvamento de voto)

ACUMULACION DE PENAS-No extinción de pena anterior (Salvamento de voto)

Acumular las penas o los procesos no es subsumir o comprimir sanciones hasta el límite de leyes nuevas como la 975 de 2005, pues ese no es el alcance de lo dispuesto por el Código Penal como norma genérica a que se hace constante referencia. Tampoco implica que las penas anteriores se extingan y se contraigan a las nuevas sanciones, pues los jueces de la República que han dictado esas providencias anteriores merecen que se respeten; lo mismo que las consecuencias del delito que pueden ser campo de debate en torno de la posible indemnización.

REF.: EXPEDIENTE: D - 6032

Speaker Magistrates:
MANUEL JOSE CEPEDA ESPINOSA
JAIME CORDOBA TRIVIÑO
RODRIGO ESCOBAR GIL
MARCO GERARDO MONROY CABRA
ALVARO TAFUR GALVIS
CLARA INES VARGAS HERNANDEZ

Con el respeto acostumbrado por las decisiones de la mayoría, pero con la claridad de siempre; me permito manifestar que no comparto la decisión adoptada por la Sala Plena en el asunto de la referencia porque considero que la Ley 975 de 2006, es inconstitucional en su totalidad, por tres razones procesales y una sustancial:

1) Porque como lo afirmé en una votación anterior, en el proyecto del Doctor Humberto Sierra, la Ley definía el núcleo esencial de los derechos fundamentales de las víctimas a la verdad, a la justicia y a la reparación, lo que le daba la naturaleza, además, de ley estatutaria. Por no haberse tramitado de conformidad con el artículo 152 superior, toda la ley era contraria a la Constitución Política. La Jurisprudencia de la Corte Constitucional, señala que cuando una materia es de ley estatutaria, obliga a que toda su regulación se tramite por ese procedimiento, aun cuando algunas de sus normas sean ordinarias.

2) En el primer debate la Ley 975 de 2006 en su integridad se tramitó de manera irregular, ya que no se respetó el artículo 159 de la Constitución Política, pues no se apeló todo el proyecto de ley. Por este motivo se declararon inconstitucionales los artículos 70 y 71 de la Ley. La razón por la cual se caen esos dos artículos, es la misma para que se hubiese caído toda la ley, pues toda la ley tenía que tener el mismo procedimiento; y si se acepta que una parte tuvo un procedimiento irregular, es tanto como afirmar que el resto, o la otra parte de la ley, también lo tuvo.

3) De conformidad con el artículo 150, numeral 17 de la Constitución Política, es posible conceder amnistías o indultos por delitos políticos, no por delitos comunes. Las Leyes sobre delitos políticos permiten rebajas de penas, pero deben ser tramitadas con unas mayorías especiales, 2/3 de los votos de una u otra cámara, lo que no sucedió en este caso y eso hace toda la ley inconstitucional.

4) La posición del suscrito sobre los derechos de las víctimas quedó claramente reflejada desde su ingreso como magistrado de esta corporación en la sentencia **C-1149 de 2001 M.P. JAIME ARAUJO RENTERIA que fue la primera sentencia de la nueva Corte que se pronuncio sobre el tema**

“ 7. De los Derechos que genera la comisión de un delito: 1) Derecho a la verdad; 2) Derecho a la justicia y; 3) Derecho a obtener reparación.

El derecho de las víctimas o perjudicados con el ilícito penal a acudir al proceso penal, comprende tres (3) derechos importantes y que deben ser garantizados por igual dentro del respectivo proceso, a saber: a) Derecho a saber la verdad de los hechos; b) Derecho a la justicia y; c) Derecho a la reparación del daño.

Como quedó claramente establecido, dentro del proceso penal militar se garantiza única y exclusivamente el derecho a la verdad conocido también como derecho a saber, excluyendo los derechos a la justicia y a la reparación del daño, sin razón legal ni constitucionalmente atendible.

Cada vez que se comete un delito la víctima o perjudicado con el ilícito tienen derecho a conocer la verdad, a la justicia y a la reparación, como se ha dejado claramente establecido por la Subcomisión de Prevención de Discriminaciones y Protección de las Minorías de la Comisión de Derechos Humanos de las Naciones Unidas en Informe Final sobre la impunidad de los autores de violaciones de los derechos humanos (derechos civiles y políticos) de conformidad con la resolución 1996/119 de la Subcomisión y titulado: “La administración de justicia y los derechos humanos de los

detenidos”.

Se señala en dicho documento que la estructura general del conjunto de principios y sus fundamentos en relación con los derechos de las víctimas consideradas como sujetos de derechos, se concretan en:

- a) El derecho de las víctimas a saber;
- b) El derecho de las víctimas a la justicia; y
- c) El derecho a obtener reparación.”

5) Las víctimas tienen derecho a la verdad, a la reparación y a la justicia como un haz inescindible. La paz, que es un valor importante, no es absoluto ni único. No hay paz sin justicia. La paz no se puede lograr al precio de una injusticia extrema. La injusticia extrema no es derecho, como dijera el ius filósofo Gustav Radbruch. La ley que consagra una injusticia extrema no es derecho y por no ser derecho, la ley nunca surge a la vida jurídica. Esta tesis ha sido avalada, en el caso de los Centinelas del muro de Berlín, por el Tribunal Constitucional Federal Alemán y el Tribunal Europeo de los Derechos Humanos. En idéntico sentido se ha pronunciado la Corte de Justicia de la Nación Argentina, en los casos de la última dictadura militar.

Igual resolución ha adoptado la Corte interamericana de derechos humanos en el caso **Barrios Altos (Chumbipuma Aguirre y otros vs. Perú)** Sentencia de 14 de Marzo de 2001, donde se pronunció sobre leyes de autoamnistías explícitas, aplicable con mayor razón a las implícitas

En la *ratio decidendi* dijo: “ 44. Como consecuencia de la manifiesta incompatibilidad entre las leyes de auto amnistía y la Convención Americana sobre Derechos Humanos, las mencionadas leyes carecen de efectos jurídicos y no pueden seguir representando un obstáculo para la investigación de los hechos que constituyen este caso ni para la identificación y el castigo de los responsables, ni puedan tener igual o similar impacto respecto de otros casos de violación de los derechos consagrados en la Convención Americana acontecidos en el Perú.”

En la parte decisoria adoptada por unanimidad dijo: “4.Declarar que las leyes de amnistía N° 26479 y N° 26492 son incompatibles con la Convención Americana sobre Derechos Humanos y, en consecuencia, carecen de efectos jurídicos. (Subraya, cursiva y negrilla nuestra)

6) Como con posterioridad a la decisión sobre el tema de la acumulación de penas se han dado por el Presidente de la Corte distintas versiones, debo dejar mi versión de cómo percibí el asunto.

La manera como yo percibí el debate y decisión:

- a) No se decidió en la sala el denominado efecto general inmediato de la presente sentencia que aparece en la parte motiva, antes de la resolutive.
- b) Respecto de condenas anteriores, estas seguían vivas y ese fue el motivo para declarar inconstitucional el último aparte del inciso 2° del artículo 20 de la Ley 975 de 2006 que decía: “Cuando el desmovilizado haya sido previamente condenado por hechos delictivos cometidos durante y con ocasión de su pertenencia a un grupo armado organizado al margen de la ley, se tendrá en cuenta lo dispuesto en el Código Penal sobre acumulación jurídica de penas pero en

ningún caso, la pena alternativa podrá ser superior a la prevista en la presente ley”.. Este artículo es el que prevé el tema de que pasa que las personas que ya tenían condenas (acumulación de penas). Al ser declarado inconstitucional, la parte final “pero en ningún caso, la pena alternativa podrá ser superior a la prevista en la presente ley”, se obligaba a pagar la pena anterior ya impuesta y también pagar la nueva pena (de 5 a 8 años). Mediante un razonamiento o argumento *a contrario sensu*, la pena alternativa podía ser, ahora; superior a los ocho (8) años, que era la máxima prevista en la presente ley.

Este entendimiento, que yo tuve en la Sala Plena, emanó objetivamente, de los ejemplos que planteó en la Sala el Presidente de la Corte Constitucional (cuarenta (40) años de una pena anterior, más cinco (5) años de los nuevos delitos, en el caso de aplicar el mínimo de la nueva ley; para un total por ejemplo, de cuarenta y cinco (45) años). Este mismo entendimiento fue el señalado por el Presidente de la Corte, el mismo día de la decisión en la rueda de prensa que dio el día jueves 18 de mayo de 2006; y cuya rueda de prensa solicito se tenga como prueba en su integridad. Idéntico entendimiento sobre el tema fue el que expresó el Presidente en la mañana del día viernes 19 de mayo, cuando explicó por “La W radio” la sentencia, a las 6:03 de la mañana, intervención que anexo a esta constancia con el fin de que forme parte de este salvamento de voto.

La nueva posición de la corte crea una absoluta confusión, pues altera la sentencia anterior y la cosa juzgada lo que conlleva a un absoluto desconocimiento de los presupuestos para la acumulación de penas, que en modo alguno hace relación a alteraciones de la cosa juzgada, sobre todo si se consideran los requisitos establecidos genéricos establecidos en el artículo 31 del Código Penal que es la norma a la cual remiten. No se entiende lo referente a la acumulación respetuosa de las reglas y los efectos del Código Penal, si se ha sostenido en la providencia que por razón de dicha aplicación se tenga que recurrir a sólo los efectos benéficos de la ley 975 de 2005.

Esto por cuanto se refiere la sentencia a un respeto por presupuestos legales establecidos como norma general, pero contrario sensu advierte una especie de perdón y olvido que no está contemplado en el sentido de la norma a la que se acude, ni mucho menos se puede desprender de los efectos de la acumulación jurídica de penas, que en sano rigor se refieren a un ajuste formal para efectos de impedir la consagración de violaciones al tope máximo fijado por la ley (esto es, sesenta años), y por el otro impedir que las penas sean sumadas de manera meramente matemática.

La nueva interpretación que no consulta los efectos de la mencionada acumulación de penas que resulten del proceso de desmovilización, con las penas ya impuestas en precedencia que hicieron tránsito a cosa juzgada, todo porque del resultado de la ejecución de la ley 975 de 2005, no puede devenir una excepcional pérdida de la ejecución de la pena a la que no se refiere el nuevo estatuto para los desmovilizados.

Consultada la referida norma a que se hace tanta alusión, por ninguna parte se está sosteniendo que la acumulación devenga en una ausencia de relación de los delitos ya sancionados o de las penas ya impuestas, en la sentencia en la que se hace la acumulación, y tampoco se dispuso un olvido de conductas ya juzgadas, todo porque la sentencia es fuente de obligaciones que no han sido eliminadas o condonadas, y que hacen del cumplimiento de los objetivos de la ley 975 de 2005 una realidad, como se evidencia cuando se advierte la necesidad de verdad, justicia y reparación.

Los hechos, son presupuestos ineludibles de la sentencia que haga la acumulación jurídica, y debe obviamente hacer referencia concreta a las penas y los delitos por los que estas procedieron en sentencias ejecutoriadas que hicieron tránsito a cosa juzgada. La institución de la acumulación, que no estamos inventando por primera vez en Colombia, ni en el derecho penal, cualquiera que sean los delitos que se acumulan de ninguna manera manda que no se haga mención ni referencia a los

delitos ya sancionados. Esta fuera de toda discusión en el ámbito procesal penal, y por el contrario es requisito sine quanon, que deben en cualquier acumulación de penas, señalarse y especificarse las penas, la sentencia que se dictó y tiene alcances de cosa juzgada material y formal, para que haya lugar a la acumulación jurídica.

El juez que aplicará la ley 975 de 2005, no puede de ninguna manera proceder a acumular, sin determinar el objeto acumulado, y este no es otro que las penas y las sentencias que se tienen que traer a colación para finiquitar la evaluación de la punibilidad por acumulación.

Dicho Instituto, entre otras cosas, no implica una mera referencia, sino una relación sucinta que respalde y deje incólumes los aspectos indemnizatorios que provienen del hecho punible, en razón de que la acumulación no es una medida eliminadora de sanciones. Acumular las penas o los procesos no es subsumir o comprimir sanciones hasta el límite de leyes nuevas como la 975 de 2005, pues ese no es el alcance de lo dispuesto por el Código Penal como norma genérica a que se hace constante referencia. Tampoco implica que las penas anteriores se extingan y se contraigan a las nuevas sanciones, pues los jueces de la República que han dictado esas providencias anteriores merecen que se respeten; lo mismo que las consecuencias del delito que pueden ser campo de debate en torno de la posible indemnización.

Suponer que el último apartado que se declaró inconstitucional, permitía borrar la pena, no es más que una burla, o un recurso retórico para justificar a posteriori el cambio de posición de la Corte, entre el primero y segundo comunicado.

En primer lugar, el juez debe tomar las penas y hacer referencia de ellas en modo concreto, adicionando de modo obligatorio las sentencias en las que se impusieron y que son tránsito a cosa juzgada, lo que conlleva a referir los hechos que condujeron a la providencia finiquitada y ejecutoriada. Posteriormente procede a acumular jurídicamente las penas que se impusieron y por supuesto reseñaron y las que provienen de la aplicación de la ley 975 de 2005. por otra parte, se ha hecho énfasis en que la acumulación implica partir de la pena más grave y a ella acumular las restantes, por extensión de las normas del concurso, pero sin llegar al extremo de sostener que la acumulación viene contrariando esa regla: Partir de la menor, acumular la anterior y dictar la sentencia con base en la ley 975 de 2005; esto sería un grave atentado contra la seguridad jurídica y una contradicción de la H. Constitucional al haber sostenido que no era viable la alternatividad del inciso segundo del Art. 20. En mi criterio, las penas se acumulan de la forma tradicional, sin que se desconozcan las reglas generales del Código Penal, pues así quedo al declararse inconstitucional el ultimo aparte del inciso 2. No se puede proceder a la extinción velada de sanciones que tienen como sujetos de indemnización, reparación y justicia a terceras personas que de alguna manera vieron realizadas sus aspiraciones de justicia, las cuales se verían seriamente afectadas por una especie de perdón y olvido que trae la interpretación de una acumulación extintiva de las penas.

El juez debe proceder a regular cada delito con su respectiva pena, el delito concreto, las posibles omisiones en que se haya incurrido, la tasación de cada pena fijada por la sentencia, para que las víctimas tengan la oportunidad de acudir a una reparación por perjuicios y se respete el marco legal fijado para cada delito. Debe hacerse una relación sucinta de los hechos presupuestos de las penas, no dejando márgenes para la acumulación abstracta, sino concreta, individualizando cada hecho punible, describiéndolo (así como citando el juzgado concreto que dictó la sentencia a la que se acumula la proveniente de la aplicación de la ley 975 de 2005), pues la sentencia no se escapa de los requisitos normales de las providencias judiciales, la dosificación debe hacer mención para que se cumpla el ideal de una sentencia fundada en la verdad. La acumulación no es una mera referencia a penas anteriores, deben sostener en la parte motiva los hechos acumulados, todos, íntegros, por ser este un fundamento de la decisión a tomar en la dosificación punitiva, pues lo contrario es cercenar

las providencias para acumular y no citar concretamente lo que resulta de dicha valoración jurídica.

7) El suscrito no será responsable de condenas contra Colombia proferidas por los tribunales internacionales en defensa de los derechos humanos de las victimas.

Fecha ut supra,

JAIME ARAÚJO RENTERÍA

Magistrado

**ADICIÓN AL SALVAMENTO DE VOTO DEL MAGISTRADO JAIME ARAUJO
RENTERIA A LA SENTENCIA C- 370 DE 2006**

PRINCIPIO DE COHERENCIA DEL ORDEN JURIDICO-Finalidad (Adición al Salvamento de voto)

PRINCIPIO DE COHERENCIA DEL ORDEN JURIDICO-Aplicación en sentencias (Adición al Salvamento de voto)

SENTENCIA DE LA CORTE CONSTITUCIONAL-Elementos para resolver contradicción entre parte motiva y resolutive (Adición al Salvamento de voto)

Reference: file D-6032

Speaker Magistrates:

Dr. MANUEL JOSE CEPEDA ESPINOSA

Dr. JAIME CORDOBA TRIVIÑO

Dr. RODRIGO ESCOBAR GIL

Dr. MARCO GERARDO MONROY CABRA

Dr. ALVARO TAFUR GALVIS

Dra. CLARA INES VARGAS HERNANDEZ

Estando dentro del término legal para consignar mi salvamento de voto y en relación con la contradicción creada por la mayoría de la Sala Plena, al declarar inconstitucional el último aparte del artículo 20 de la Ley 975 de 2006.

Uno de los principios fundamentales sobre cualquier orden jurídico, es de la coherencia del orden jurídico (además de la unidad y la plenitud del orden jurídico); con este principio se busca que el orden jurídico no sea contradictorio, antinómico.

Este postulado de la coherencia es igualmente válido para las sentencias de los jueces que no pueden ser contradictorias. La contradicción mayor en una sentencia se presenta cuando la parte resolutive dice una cosa y la motiva dice lo contrario.

Esto es, cuando en la parte resolutive se declara la inexequibilidad y en la parte motiva se afirma lo contrario de aquello que se deduce lógica y jurídicamente de la inexequibilidad.

Es importante recordar las normas que rigen esta hipótesis:

El artículo 48 de la Ley 270 de 1996, Estatuto de la Administración de Justicia dice: *“Alcance de las sentencias en el ejercicio del control constitucional. Las sentencias proferidas en cumplimiento del control constitucional tiene el siguiente efecto: 1. Las de la Corte Constitucional dictadas como resultado del examen de las normas legales, ya sea por vía de acción, de revisión previa o con motivo del ejercicio del control automático de constitucionalidad, serán de obligatorio cumplimiento y con efecto erga omnes en su parte resolutive. La parte motiva constituirá criterio auxiliar para la actividad judicial y para la aplicación de las normas de derecho en general. La interpretación que por vía de autoridad hace tiene carácter obligatorio genera...”*

El artículo 14 del Decreto 2067 de 1991 dice: *“...En todo caso de contradicción entre la parte*

resolutiva y la parte motiva de un fallo, se aplicará lo dispuesto en la parte resolutiva... ”.

Estos son los elementos para resolver la contradicción que creó la mayoría de la Corte Constitucional.

Fecha ut supra,

JAIME ARAÚJO RENTERÍA
Magistrado

**SALVAMENTO DE VOTO DEL MAGISTRADO ALFREDO BELTRAN
SIERRA A LA SENTENCIA C-370 DE 18 DE MAYO DE 2006. (Expediente
D-6032)**

DELITO POLITICO Y DELITO COMUN-Distinción (Salvamento de voto)

DELITOS DE LESA HUMANIDAD-No pueden ser considerados como delitos políticos (Salvamento de voto)

DELITO DE SEDICION EN LEY DE JUSTICIA Y PAZ-Inconstitucionalidad por incluir delitos comunes (Salvamento de voto)

Surge como conclusión ineludible por su evidencia la inconstitucionalidad del artículo 71 de la Ley 975 de 2005, pues al disponer que el delito de sedición también incluye a “quienes conformen grupos guerrilleros o de autodefensa cuyo accionar interfiera con el normal funcionamiento constitucional y legal”, no excluye de la ampliación del tipo penal contemplado en el artículo 468 del Código Penal, ninguna conducta delictiva que constituya delito común, pues lo cierto es que siempre todo delito interfiere con el normal funcionamiento del orden jurídico y precisamente por eso respecto de ella se ejerce por el Estado el ius puniendi. Es decir, que por esa vía y con la redacción que se le da al inciso que ahora se agrega al citado artículo 468 del Código Penal no quedaría ningún hecho delictuoso fuera del delito de sedición, lo que contraría abiertamente la Constitución, las tratados internacionales y la jurisprudencia constitucional, por las razones ya expuestas.

DERECHOS DE LAS VICTIMAS A LA VERDAD JUSTICIA Y REPARACION- Alcance (Salvamento de voto)

PENA ALTERNATIVA EN LEY DE JUSTICIA Y PAZ-Desconoce el derecho a la igualdad ante la ley, principio de legalidad y especificidad de la pena (Salvamento de voto)

Resulta evidente que la regla contenida en el artículo 29 de la Ley acusada conforme a la cual al condenado que haya cumplido con las condiciones previstas en ella se impondrá una pena alternativa que consiste en privación de la libertad por un período no menor de cinco años ni mayor de ocho según la gravedad de los delitos y la colaboración prestada para el esclarecimiento de los mismos, establece una excepción de carácter subjetivo y personal que riñe abiertamente con el derecho a la igualdad ante la Ley. Se quebranta además en virtud de esa circunstancia personal y subjetiva de pertenecer a un grupo armado irregular para beneficiarse con una pena menor, el principio de la predeterminación y legalidad de la pena, como quiera que en el sistema del código penal vigente cuando se cometieron los hechos gravemente lesivos de derechos humanos y del derecho internacional humanitario, a cada una de esas conductas ilícitas correspondía según la Ley una pena determinada conforme a la gravedad de los delitos. Por las mismas razones anteriores, se rompe así el principio de la especificidad según la gravedad de los hechos delictivos y la modalidad en que ellos se sucedieron

ZONAS DE CONCENTRACION EN LEY DE JUSTICIA Y PAZ-Desconoce la igualdad de tratamiento de personas a quienes se aplica el Código Penal ordinario (Salvamento de voto)

En el artículo 31 de la Ley acusada se establece que el tiempo de permanencia de los desmovilizados en las zonas de concentración decretadas por el Gobierno para los efectos de esa

Ley y de conformidad con la Ley 782 de 2002, se computará como tiempo de ejecución de la pena alternativa, sin que pueda exceder de 18 meses. De la simple lectura de esta disposición, aparece con claridad absoluta que aún cuando respecto de tales desmovilizados no ha sido dictado ni siquiera un auto de detención preventiva, se asume que se encuentran privados de libertad por decisión del Estado y que, en consecuencia, ese tiempo de permanencia en las zonas de concentración mencionadas, deberá ser descontado de la pena alternativa impuesta, lo que significa que la pena efectiva que se imponga en la sentencia se reducirá en año y medio (dieciocho meses), o sea que la mínima desciende de cinco años a tres años y medio y la máxima se rebaja de ocho años a seis años y medio. Es esta una norma que rompe la igualdad de tratamiento con el resto de las personas a quienes llegare a aplicarse por alguna razón el Código Penal ordinario y, como salta a la vista, es evidentemente una nueva desproporción que se agrega a la que ya contiene la pena alternativa, lo que significa que el citado artículo 31 de la Ley es inconstitucional.

ACUMULACION DE PENAS-No extinción de pena anterior (Salvamento de voto)

Si se considera que conforme a las reglas del Derecho Penal, cuando se produce la acumulación de penas, la menor se acumula a la mayor, asunto sobre el cual jamás ha existido discusión alguna en el Derecho Colombiano; además, lo que eso significa es que no desaparece la pena anterior que ya se encuentre ejecutoriada, sino que aplicadas las normas propias de la acumulación jurídica de penas, habrá de imponerse al sindicado la que resulte de esa operación, desde luego antes de aplicar cualquier subrogado penal o cualquier beneficio porque de lo contrario este se aplicaría a un delito anterior, ya juzgado, y respecto del cual ya existía una condena. Ahora, la novedosa tesis de la Corte lleva a que se aplique la denominada pena alternativa al primer delito, de tal manera que la condena anterior, así fuera por ejemplo de 40 años de prisión, queda bajo el manto de la impunidad al reducirla a la pena alternativa de 5 a 8 años.

Con el respeto debido por las decisiones de la Corte Constitucional, salvo el voto en relación con lo resuelto en la sentencia C-370 de 18 de mayo de 2006, por las razones que a continuación se expresan:

Como ponente inicial que fui del proceso radicado bajo el número D-6032, presenté proyecto de sentencia en el cual se adoptaban algunas de las decisiones que finalmente fueron aprobadas por la Sala Plena, en lo que hace relación a los derechos de las víctimas y de la sociedad, a la verdad, a la justicia y a la reparación. Tales derechos forman una unidad inescindible, no pueden separarse a voluntad del intérprete, como quiera que se encuentran íntimamente relacionados. Forman ellos un solo haz. De manera tal que si uno se afecta, se rompe la unidad; si uno se sacrifica, a todos se extiende el sacrificio; si uno de ellos no tiene operancia, se la efectividad de todos la que resulta afectada.

Precisamente, por esa concepción unitaria, de manera simultánea fueron tratados en el proyecto sin perder la perspectiva de la unidad jurídica, para guardar la debida correspondencia y armonía. Sin embargo, la decisión de la Corte Constitucional contenida en la sentencia C-370 de 18 de mayo de 2006, de manera, a mi juicio equivocada, optó por otro camino. Aceptó declarar la inconstitucionalidad de algunas normas de la Ley 975 de 2005 que afectan el derecho a la verdad, y algunas de las que vulneran el derecho a la reparación. Pero, cuando se analizó lo referente a la justicia de la cual no puede separarse la pena en el Derecho Penal, que precisamente a ello debe su denominación, la Corte se detuvo y le dio vía libre a la institución denominada por la ley “pena alternativa”, a la cual aluden numerosas disposiciones de la misma, es decir, se incurrió por la Corte en el rompimiento de la unidad jurídica de los derechos a la verdad, a la justicia y a la reparación, para dejar de lado todo lo atinente a la proporcionalidad mínima de las penas a imponer a quienes

forman parte de grupos armados al margen de la ley, y en ejercicio de esa actividad han cometido numerosos delitos atroces, que son delitos comunes y no delitos políticos, razón esta última que también me llevó a proponer a la Sala Plena que se declarara la inexecutable del artículo 71 de la ley mencionada, no solo por los vicios de trámite en su formación, sino también por razones de fondo.

En tales condiciones, el proyecto presentado a consideración de la Sala Plena por el suscrito Magistrado, sería improbadable en sus aspectos medulares, y además, la decisión que finalmente se adoptó resulta incoherente y falta de unidad en una concepción filosófica-jurídica integral de los derechos de las víctimas y de la sociedad a la verdad, a la justicia y a la reparación, razón esta por la cual hube entonces de salvar el voto. Para facilitar la comprensión de esa posición, las razones del salvamento de voto son las mismas aducidas en el proyecto que no se convirtió en sentencia.

1. La justicia y la paz en la Constitución Colombiana.

1.1. El Derecho como delicado instrumento creado por la civilización al servicio de la humanidad, necesariamente tiene que entenderse en función de asegurar a los asociados la libertad y la justicia en todos los aspectos para que sea posible la convivencia pacífica. No se trata entonces de imponer la paz por el simple acatamiento a la autoridad del Estado, sino del establecimiento de reglas jurídicas para que éste pueda garantizar a todos la esfera jurídica de la libertad individual de tal manera que cada uno de los asociados tenga la garantía del respeto a sus propios derechos, de lo cual surja necesariamente la armonía social, la que resultaría imposible si al propio tiempo ella no se edifica sobre los postulados de la justicia.

En la medida en que progresa el concepto de la universalización del Derecho, la justicia y la paz no se consideran ya asuntos de interés particular de cada Estado, sino que trascienden los límites territoriales de éste para adquirir dimensión ecuménica. Por ello, desde la extinguida Liga de las Naciones hasta la Organización de las Naciones Unidas ha sido preocupación constante la protección de los derechos humanos, incluidos los de orden cultural, económico y social, la garantía efectiva de la libertad, la persecución de los delitos de lesa humanidad y los crímenes de guerra mediante la celebración de tratados que vinculen a los distintos Estados, el establecimiento de tribunales y organismos internacionales, para alcanzar el fin supremo de la paz sin sacrificio de la justicia material.

Es esa una vieja aspiración de la humanidad a la cual han prestado su concurso desde siempre los más ilustres pensadores desde distintas vertientes de orden filosófico, como puede apreciarse al repasar someramente la evolución histórica de las ideas políticas y de la teoría del Estado. No es esta sentencia la que pueda ocuparse a profundidad sobre ese análisis, dado lo prolijo que ello resultaría en una providencia judicial, pero lo que si ha de resaltarse es que se encuentra superado por la historia el concepto de la paz como producto de la victoria y de la imposición de un Estado sobre otro para sojuzgar a los vencidos, como algunos quisieron imponerlo bajo la concepción de la *pax romana*, ni tampoco resulta aceptable la paz que surge del silencio de los cementerios, ni la que se edifica sobre la injusticia social. La paz, para que tenga vocación de permanencia, como lo propuso Immanuel Kant, tiene que tener como soporte necesario el respeto a la dignidad de la persona humana, la garantía de la libertad y la realización de la justicia en las relaciones sociales por medio del Derecho.

1.2. En la evolución jurídico-política de la República, ha sido preocupación constante del Constituyente que las instituciones de Colombia tengan como valores supremos el reconocimiento de la dignidad de la persona humana, la justicia, la libertad y la paz. Ello explica que tanto en el preámbulo de la Constitución derogada como en la que nos rige, se invoquen de manera expresa

como valores que inspiran el ordenamiento jurídico y que, en consecuencia, se impongan al intérprete de la Constitución y la ley. Respecto de la fuerza vinculante del Preámbulo se dijo por la Corte en sentencia de 6 de agosto de 1992, que: *“da sentido a los preceptos constitucionales y señala al Estado las metas hacia las cuales debe orientar su acción; el rumbo de las instituciones jurídicas. Lejos de ser ajeno a la Constitución, el preámbulo hace parte integrante de ella. Las normas pertenecientes a las demás jerarquías del sistema jurídica están sujetas a toda la Constitución y, si no pueden contravenir los mandatos contenidos en su articulado, menos aún les está permitida la transgresión de la bases sobre las cuales se soportan y a cuyas finalidades apuntan”*.

La Constitución Colombiana por lo que hace a la paz, no se limita a aludir a ella en el preámbulo como valor fundante del Estado, sino que de manera específica se ocupa de la misma en varias de sus disposiciones. Así, en el artículo 2 señala como uno de los fines esenciales del Estado *asegurar la convivencia pacífica*, para hacer efectivos los principios, deberes y derechos consagrados en la Carta; en el artículo 22 la consagra como un derecho y un deber de obligatorio cumplimiento; en el artículo 95-4 establece como uno de los deberes de la persona y del ciudadano, la defensa y difusión de los derechos humanos como fundamento de la convivencia pacífica, y en el numeral 6 del mismo artículo, incluye el deber de propender por el logro y mantenimiento de la paz.

Dada la unidad jurídico-política de la Constitución, para el logro de los propósitos ya enunciados, se dispuso por el Constituyente que las tres ramas del poder público dentro de la órbita propia de sus funciones contribuyan a la realización de la paz como fin constitucional. Por ello, al Congreso de la República le corresponde dictar normas legales en todos los ramos de la legislación, lo cual incluye la expedición de los distintos códigos tanto sustantivos como de procedimiento (CP. art. 150-2), en tanto que a los jueces se les asigna la función de administrar justicia conforme a la ley (CP. arts. 29, 113 y 228), y al Ejecutivo se le impone como un deber, el de prestar a los funcionarios judiciales la colaboración necesaria para hacer efectivas sus providencias (C.P. art. 201-1). Es obvio que en circunstancias de normalidad así se logra el imperio del ordenamiento jurídico para la garantía efectiva de los derechos de las personas, con lo cual se obtiene la pacífica convivencia de los asociados.

La Constitución Política en la misma dirección, le asigna al Presidente de la República de manera permanente la función de conservar el orden público en todo el territorio nacional y restablecerlo donde fuere turbado (CP. art. 189-4), así como lo faculta para decretar el estado de conmoción interior en caso de grave perturbación del orden público que atente de manera inminente contra la estabilidad institucional, la seguridad del Estado o la convivencia ciudadana cuando no pueda ser conjurada la perturbación mediante el uso de las atribuciones ordinarias de las autoridades de policía (CP. art. 213).

Del mismo modo, aun cuando la Constitución toma partido por la paz en las relaciones internacionales, también previó que muy excepcionalmente puede presentarse un *casus belli* y, por ello establece como función del Senado de la República autorizar al Gobierno para declarar la guerra a otra Nación (CP. art. 173-5), autorización que corresponderá ejercer al Presidente de la República (CP. art. 189-6), quien además se encuentra facultado para ponerle fin al estado de guerra exterior mediante la celebración de tratados de paz como Jefe del Estado, sujetos desde luego, como todo tratado, a la aprobación del Congreso (CP. arts. 224 y 150-16), y al control de exequibidad por la Corte Constitucional (CP. art. 241-10).

La Constitución va más allá. Prevé de manera específica que en circunstancias excepcionales pueda el Congreso de la República conceder amnistías e indultos generales por delitos políticos, mediante leyes que para su expedición exigen mayoría de los dos tercios de los miembros de una y otra

Cámara, cuando existan para el efecto graves motivos de conveniencia pública (CP. art. 150-17); al Presidente de la República le asigna por mandato constitucional la función de aplicar en concreto a una persona determinada la ley de concesión del indulto (CP. art. 201-2), en tanto que la amnistía concedida de manera general por el Congreso mediante ley, se individualiza por los jueces según las reglas del Código de Procedimiento Penal.

La Carta Política vigente, acoge el ordenamiento universal de protección de los derechos humanos, y por ello lo hace suyo mediante una disposición específica de carácter integrador a través del artículo 93 de la Constitución, según el cual *“Los tratados y convenios internacionales ratificados por el Congreso, que reconocen los derechos humanos y prohíben su limitación en los estados de excepción, prevalecen en el orden interno”*, a lo cual agrega luego que los derechos y deberes consagrados en la Carta deben ser siempre interpretados de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia.

Es claro entonces que conforme a la Constitución Colombiana, tanto en la parte dogmática como en la orgánica el Constituyente se ocupó expresamente de la paz y la justicia como valores y como principios que inspiran la Carta, al igual que como derechos y deberes a los cuales las distintas autoridades deben orientar su actividad en el ejercicio específico de sus funciones. No puede reducirse ni restringirse en manera alguna el contenido axiológico y jurídico de la paz y la justicia en el Estado y en la sociedad colombiana. No se trata, ni puede tratarse, de conceptos o valores excluyentes, sino complementarios. Es decir, la interpretación constitucional ha de ser cuidadosa en extremo en este punto para que no se sacrifique ninguna de las dos, teniendo siempre claro que el Derecho se encuentra al servicio del hombre y es un instrumento para la realización y garantía de la libertad y de la dignidad humana.

1.3. Sentado lo anterior, se procederá por la Corte al examen de los cargos planteados por los demandantes, a partir de aquellos que de prosperar afectarían la exequibilidad de la ley en su integridad, para proseguir luego, si ellos no prosperan, con el análisis de las acusaciones propuestas contra algunos artículos de la Ley 975 de 2005.

2. Los artículos 70 y 71 de la Ley 975 de 2005, son inconstitucionales razones de fondo.

2.1. En cuanto a los vicios materiales, respecto de los artículos 70 y 71 de la Ley 975 de 2005, expresan los demandantes que el primero de ellos introdujo una norma que no guarda ninguna relación con el resto del articulado ni con los propósitos de la ley, razón por la cual estiman que se infringió el artículo 158 de la Constitución Política. En lo que toca con el segundo de los artículos demandados, afirman los actores que la modificación introducida al artículo 468 del Código Penal para adicionar la tipificación del delito de sedición rompe la Constitución en la medida en que a conductas que son configuradas por el legislador como delitos comunes, se les transforma ahora en el delito político de sedición pese a que no se reúnen los requisitos esenciales para el efecto.

2.2. En el Estado de Derecho todos los habitantes del territorio nacional se encuentran sometidos al imperio de la Constitución y de la ley. Se les exige el acatamiento estricto a las normas de derecho positivo para asegurar de esa manera la convivencia pacífica. Si los ciudadanos acatan la ley, lo hacen bajo el supuesto previo de su legitimidad, la cual se deriva de que su expedición provenga del órgano competente para ello, con estricta sujeción a los procedimientos previamente establecidos para legislar.

Precisamente, es esa y no otra la razón por la cual el ejercicio de la potestad legislativa del Estado se atribuye en las democracias a un órgano colegiado de representación popular previsto en la Constitución como igualmente en ella se establecen las reglas a las cuales debe sujetarse para el

ejercicio de esa función. Es decir, en las democracias resulta igualmente importante establecer *quién* hace la ley y *cómo* la hace.

De tal trascendencia para la legitimidad de la ley surge que en el título VI de la Constitución Política se adopten normas sobre el procedimiento legislativo y que el control constitucional de la leyes pueda realizarse por la Corte Constitucional no sólo por su contenido material, sino, también, por vicios de procedimiento en su formación (CP. art. 241-4).

Por ministerio de la Carta Política, el Congreso de la República además en la expedición de las leyes debe estricto acatamiento a su reglamento, el que es expedido mediante una ley orgánica a la cual se somete el ejercicio de la función legislativa, por mandato del artículo 151 de la Constitución.

2.3. Para el examen de la constitucionalidad del artículo 71 de la Ley 975 de 2005 por la acusación que le fue formulada, ha de referirse la Corte Constitucional inicialmente a la distinción entre delito político y delito común, así como a la libertad de configuración del legislador al respecto, para descender luego a examinar si éste puede válidamente conforme a la Carta Política ampliar la conducta tipificada en el Código Penal como delito político, para que en ella queden comprendidos actos ilícitos constitutivos de delitos comunes conforme a la legislación anterior.

2.4. Estado uno de cuyos fines es garantizar la convivencia pacífica de los asociados, se ve compelido a describir algunas conductas como ilícitas que por constituir en sí mismos una ofensa a toda la sociedad son hechos merecedores de reproche por el ordenamiento jurídico y en tal virtud, sancionables mediante una pena no sólo para restablecer la juridicidad sino para que adicionalmente se procure la rehabilitación del infractor. Es decir, el Estado en virtud de su soberanía ejerce el *ius puniendi*, pero siempre bajo el principio de la necesidad de sancionar una conducta ilícita cuando con ella se atacan valores o bienes merecedores de tutela estatal y de tal manera que además se observe el principio de proporcionalidad y de utilidad de la pena teniendo en cuenta para el efecto no sólo la naturaleza y gravedad de la infracción sino también los fines sociales que ésta ha de cumplir.

De las varias clasificaciones que de los delitos existen desde antiguo, se ha distinguido entre los delitos comunes y los delitos políticos. Nuestra Constitución no ha definido el delito político, ni tampoco el delito común sino que ha dejado el asunto al legislador. Ello explica que la tipificación de las conductas que configuran uno u otro se realice en el Código Penal o en leyes especiales. Sin embargo, la Constitución le da un tratamiento privilegiado a los delitos políticos teniendo en cuenta su propia naturaleza, los fines altruistas que con ellos se persiguen, las circunstancias en que se realizan y los móviles que determinan a sus actores a promoverlos o a participar en ellos. Es claro que con el delito político se ataca el régimen constitucional y legal en cuanto la organización política de la sociedad y sus formas de gobierno o para derrocar a las autoridades que detentan el poder cuya legitimidad se desconoce o cuyos abusos se pretende terminar, y todo el actuar se justifica entonces por el beneficio superior de la sociedad. En el delito común, en cambio los móviles carecen de nobleza, su comisión ataca bienes jurídicos que toda la sociedad necesita proteger en defensa de la vida, de los bienes y de la convivencia pacífica. Por eso, se tiene por establecido que el delito político es de menor gravedad que el común, ya que los bienes jurídicos que mediante él se atacan no son de aquellos que el grupo social tiene instituidos como indispensables para la vida diaria. De ahí que la legislación atendido lo expuesto le dé a los delitos políticos un tratamiento más benigno que a los delitos comunes y que, atendidas circunstancias concretas y específicas el legislador, por motivos de conveniencia pública le dé prevalencia a la paz como valor constitucional y autorice extender la amnistía o el indulto a delitos conexos con los delitos políticos.

Nuestra Constitución si bien no define el delito político, como ya se dijo, si le otorga un tratamiento especial que se refleja en varias de sus disposiciones. Así por ejemplo, el artículo 35 prohíbe la extradición por delitos políticos, el 150 numeral 17 atribuye al Congreso entre sus funciones la de otorgar mediante ley amnistías e indultos para los delitos políticos, norma que guarda íntima relación con el artículo 201, numeral 2, en cuanto a la concesión de indultos por el Ejecutivo en casos concretos y con la obligación de dar cuenta al Congreso por el ejercicio de esa facultad; el artículo 179, numeral 1, prohíbe a quienes hayan sido condenados en cualquier época a pena privativa de la libertad, ser miembros del Congreso salvo que la condena hubiere sido por delitos políticos o comunes culposos, prohibición que se extiende por disposición del artículo 299 de la Carta a quienes aspiren a ser elegidos diputados a las asambleas departamentales; y, de igual forma constituye inhabilidad para ser magistrado de la Corte Constitucional, de la Corte Suprema de Justicia y del Consejo de Estado, haber sido condenado a pena privativa de la libertad excepto por delitos políticos o culposos.

De acuerdo con lo expuesto, le está vedado al legislador transformar los delitos comunes en delitos políticos, pues ello significa que con la alteración de su naturaleza se abre la puerta para el quebranto de las normas constitucionales que no le extienden a los delitos comunes el tratamiento privilegiado y especial que se le da a los delitos políticos. Así, si conforme al artículo 35 de la Carta se prohíbe la extradición por delitos políticos, cambiarle la naturaleza a un delito común para considerarlo delito político, significaría legitimar el quebranto de esa prohibición; de igual modo, si la condena por un delito común no culposo constituye inhabilidad para ser miembro del Congreso o Magistrado de las Corporaciones Judiciales de orden nacional, las normas constitucionales que así lo establecen (CP. arts. 179, 232-3), podrían ser convertidas en rey de burlas si el Congreso, pretextando la potestad de libre configuración legislativa despojara del reproche como delitos comunes a conductas que sí lo son de esa especie, para transformarlas en delitos políticos. De manera pues que, lo que surge de este análisis es una limitación al legislador por el Constituyente para que se respete el marco jurídico propio de los delitos políticos sin que a él puedan tener acceso conductas que conforme al derecho vigente son tipificadas como delitos comunes. Cosa distinta es que en determinadas circunstancias y por muy elevados motivos de conveniencia pública y atendiendo a los valores superiores de la paz, pueda el legislador amparar bajo el manto de la amnistía o el indulto delitos conexos con los delitos políticos, pero ello no podrá ocurrir jamás por una ley ordinaria como la que ahora se examina, sino cuando el Congreso ejerza en nombre del pueblo la muy delicada función de conceder amnistías o indultos, mediante ley que requiere una mayoría de dos tercios de los votos de los integrantes de una y otra Cámara y mediante votación secreta para buscar el mayor consenso democrático posible.

Precisamente, este Tribunal Constitucional en sentencia C-171 de 1993, Magistrado Ponente, Vladimiro Naranjo Mesa, sostuvo que:

“Constituye flagrante quebrantamiento de la justicia, y de la propia Constitución, el dar al delincuente común el tratamiento de delincuente político. La Constitución distingue los delitos políticos de los delitos comunes para efectos de acordar a los primeros un tratamiento más benévolo con lo cual mantiene una tradición democrática de stirpe humanitaria, pero en ningún caso autoriza al legislador, ya sea ordinario o de emergencia para establecer por vía general un tratamiento más benigno para cierto tipo de delitos comunes, con exclusión de otros. El Estado no puede caer en el funesto error de confundir la delincuencia común con la política. El fin que persigue la delincuencia común organizada, particularmente a través de la violencia narcoterrorista, es el de colocar en situación de indefensión a la sociedad civil, bajo la amenaza de padecer males irreparables, si se opone a sus proditorios designios. La acción delictiva de la criminalidad común no se dirige contra el Estado como tal, ni contra el sistema político vigente, buscando sustituirlo por otro distinto, ni persigue finalidades altruistas, sino que se dirige contra

los asociados, que se constituyen así en víctimas indiscriminadas de esa delincuencia. Los hechos atroces en que incurre el narcoterrorismo, como son la colocación de carobombas en centros urbanos, las masacres, los secuestros, el sistemático asesinato de agentes del orden, de jueces, de profesionales, de funcionarios gubernamentales, de ciudadanos corrientes y hasta de niños indefensos, constituyen delito de lesa humanidad, que jamás podrán encubrirse con el ropaje de delitos políticos.

Admitir tamaño exabrupto es ir contra toda realidad y contra toda justicia. La Constitución es clara en distinguir el delito político del delito común. Por ello prescribe para el primero un tratamiento diferente, y lo hace objeto de beneficios como la amnistía o el indulto, los cuales sólo pueden ser concedidos, por votación calificada por el Congreso Nacional, y por graves motivos de conveniencia pública (art. 50, num. 17), o por el Gobierno, por autorización del Congreso (art. 201, num. 2o.). Los delitos comunes en cambio, en ningún caso pueden ser objeto de amnistía o de indulto. El perdón de la pena, así sea parcial, por parte de autoridades distintas al Congreso o al Gobierno, -autorizado por la ley, implica un indulto disfrazado.

Como si el anterior razonamiento no fuera suficiente, el artículo transitorio 30 de la Constitución, que autoriza el Gobierno para conceder indultos o amnistías por delitos políticos o conexos, cometidos con anterioridad a la promulgación de la Constitución de 1991, a miembros de grupos guerrilleros que se incorporen a la vida civil en los términos de la política de reconciliación, excluye expresamente de tal beneficio a quienes hayan incurrido en delitos atroces:

"Artículo transitorio 30. Autorízase al Gobierno Nacional para conceder indultos o amnistías por delitos políticos y conexos, cometidos con anterioridad a la promulgación del presente Acto Constituyente, a miembros de grupos guerrilleros que se incorporen a la vida civil en los términos de la política de reconciliación. Para tal efecto el Gobierno Nacional expedirá las reglamentaciones correspondientes. Este beneficio no podrá extenderse a delitos atroces ni a homicidios cometidos fuera de combate o aprovechándose del estado de indefensión de la víctima".

De la misma manera, no pueden tampoco incluirse como delitos políticos conductas que por su barbarie y atrocidad son constitutivas de graves atentados contra la humanidad, pues con éstas no sólo se causa daño a una persona determinada sino que la acción resulta lesiva de la dignidad y condición humana en general. Es esa la razón por la cual a tales hechos delictuosos se les reprocha por las normas consuetudinarias del derecho aceptado por las distintas naciones del orbe, normas que se entienden incorporadas al ordenamiento jurídico universal que son de obligatorio cumplimiento y que ningún Estado puede desconocer en ninguna circunstancia. Conforman lo que se ha denominado el *jus cogens*, es decir el conjunto de reglas del Derecho Internacional Humanitario. Estas, en tal virtud se integran al ordenamiento constitucional colombiano por expreso mandato del artículo 93 de la Constitución en el que se ordena que los tratados y convenios internacionales sobre derechos humanos que hubieren sido ratificados por el Congreso prevalecen en el orden interno y no pueden limitarse ni siquiera durante los estados de excepción.

Precisamente a este respecto la Corte Constitucional en sentencia C-127 de 1993, Magistrado Ponente Alejandro Martínez Caballero, expresó que:

"La Corte Constitucional en sentencia sobre la exequibilidad del Protocolo I adicional de los Convenios de Ginebra relativo a la protección de las víctimas de los conflictos armados internacionales⁹, estableció que los Protocolos hacen parte del Ius Cogens y que en ellos están consagradas las garantías fundamentales para la protección de las víctimas de los conflictos

armados no internacionales. Estas garantías se encuentran definidas en el artículo 4° del Protocolo II, así:

Artículo 4 (Garantías fundamentales)

1. Todos aquellos que no tomen parte directa o que hayan dejado de tomar parte en las hostilidades, tanto si su libertad ha sido restringida como si no, tienen derecho al respeto a su persona, su honor, sus convicciones y sus prácticas religiosas. En todas las circunstancias recibirán un trato humano, sin ninguna distinción que les perjudique...

2. Sin perjuicio para las líneas generales de lo que antecede, quedan prohibidos en el presente y en el futuro, en todo lugar y ocasión, los siguientes actos contra aquellos a quienes se refiere el párrafo 1:

a) La violencia contra la vida, la salud y en bienestar físico o mental de las personas, especialmente el asesinato, así como los tratos crueles, como las torturas, mutilaciones o cualesquiera formas de castigo corporal;

...

d) Los actos de terrorismo.

...

h) Las amenazas de llevar a cabo cualquiera de los actos anteriores.

El ius cogens está recogido y positivizado en el inciso 1° del artículo 15 del Pacto Internacional de Derechos Civiles y Políticos, que establece:

*1. Nadie será condenado por actos u omisiones que en el momento de cometerse no fueran delictivos **según el derecho nacional o internacional**. Tampoco se pondrá pena más grave que la aplicable en el momento de la comisión del delito. Si con posterioridad a la comisión del delito la ley dispone la imposición de una pena más leve, el delincuente se beneficiará de ello (negrillas no originales).*

Con fundamento en el artículo citado anteriormente y que aparece de igual forma en el artículo 9° de la Convención Americana sobre Derechos Humanos, "Pacto de San José de Costa Rica", el concepto del principio de legalidad de la acción y de la pena se refiere no sólo a la tipicidad nacional sino también a la internacional. Es ésta una norma que debe ser observada por los ordenamientos internos de cada uno de los estados Partes.

Y el inciso 2° del citado artículo 15, consagra:

*2. Nada de lo dispuesto en este artículo se opondrá al juicio y a la condena de una persona por actos u omisiones que, en el momento de cometerse, fueren delictivos **según los principios generales del derecho** reconocidos por la comunidad internacional.*

De conformidad con este inciso, además de establecer tipos cerrados, se permite la consagración de tipos abiertos, según se desprende de la expresión "principios generales".

En respuesta, la comunidad internacional reconoció que determinadas conductas merecen un tratamiento especial por atentar contra la dignidad inherente a la persona, pues todos los derechos se derivan de su respeto, como se desprende del segundo considerando del Pacto Internacional de Derechos Civiles y Políticos".

*En esa misma dirección la Convención de Viena de 1969 sobre el Derecho de los Tratados, de manera expresa e inequívoca prescribe que el *ius cogens* como norma imperativa de Derecho*

Internacional, esto es, como norma que rige para todos los Estados no admite acuerdo en contrario y sólo puede ser modificada por una norma ulterior de Derecho Internacional General que tenga el mismo carácter (art. 53). A este respecto en sentencia C-574 de 1992, Magistrado Ponente Ciro Angarita Barón, sostuvo que:

“En síntesis los principios de derecho internacional humanitario plasmados en los convenios de Ginebra y en sus dos protocolos, por el hecho de constituir un catálogo ético mínimo aplicable a situaciones de conflicto nacional o internacional, ampliamente aceptado por la comunidad internacional, hacen parte del ius cogens o derechos consuetudinario de los pueblos. En consecuencia, su fuerza vinculante proviene de la universal aceptación y reconocimiento que la comunidad internacional de los Estados en su conjunto le ha dado al adherir a esa axiología y al considerar que no admite norma o práctica en contrario.

(...)

Todo lo anterior permite entonces concluir que la obligatoriedad del derecho internacional humanitario se impone a todas las partes que participen en un conflicto armado, y no sólo a las Fuerzas Armadas de aquellos Estados que hayan ratificado los respectivos tratados. No es pues legítimo que un actor armado irregular, o una fuerza armada estatal, consideren que no tienen que respetar en un conflicto armado las normas mínimas de humanidad, por no haber suscrito estos actores los convenios internacionales respectivos, puesto que, - se repite- la fuerza normativa del derecho internacional humanitario deriva de la universal aceptación de sus contenidos normativos por los pueblos civilizados y de la evidencia de los valores de humanidad que estos instrumentos internacionales recogen. Todos los actores armados estatales o no estatales, están entonces obligados a respetar estas normas que consagran aquellos principios mínimos de humanidad que no pueden ser derogados ni siquiera en las peores situaciones de conflicto armado”.

Así las cosas, los delitos que constituyan graves violaciones a los derechos humanos no pueden ser objeto del tratamiento benigno que por razones superiores se les da a los delitos políticos sino que, por el contrario, sus autores se encuentran sujetos a las reglas del derecho común. En esa dirección la Corte Constitucional en sentencia C-578 de 2002, Magistrado Ponente, Manuel José Cepeda Espinosa, al examinar la Ley 742 de 2002 aprobatoria del Estatuto de Roma que creó la Corte Penal Internacional, expresó que:

“(…) Figuras como la ley de punto fina que impiden el acceso a la justicia, las amnistías en blanco para cualquier delito, las autoamnistías (es decir, los beneficios penales que los detentadores legítimos o ilegítimos del poder se conceden a sí mismos y a quienes fueron cómplices de los delitos cometidos), o cualquiera otra modalidad que tenga como propósito impedir a las víctimas un recurso judicial efectivo para hacer valer sus derechos, se han considerado violatorias del deber internacional de los Estados de proveer recursos judiciales para la protección de los derechos humanos, consagrados en instrumentos como, por ejemplo, la declaración americana de los derechos del hombre, la declaración universal de derechos humanos, la convención americana de derechos humanos y la declaración sobre los principios fundamentales de justicia para las víctimas de delitos y del abuso del poder...”.

En armonía con la jurisprudencia vigente de la Corte Constitucional, surge entonces como conclusión obligada que los hechos delictivos que constituyen grave violación del derecho internacional humanitario, es decir, atentados de lesa humanidad repudiados en el mundo civilizado, como los homicidios fuera de combate y a personas civiles, la violación sexual intimidatoria y humillante, actos de crueldad y barbarie para producir pánico en la población civil, como las masacres, las torturas, secuestros, los desplazamientos forzados, los ataques armados

indiscriminados a poblaciones, la coacción violenta que impide el ejercicio de los derechos fundamentales, así como el prohijamiento, la financiación, el planeamiento y la dirección de tales conductas, y en fin, toda forma de participación en ellas, no pueden ser considerados como delitos políticos.

De lo anteriormente expuesto y como corolario obligado, surge como conclusión ineludible por su evidencia la inconstitucionalidad del artículo 71 de la Ley 975 de 2005, pues al disponer que el delito de sedición también incluye a “quienes conformen grupos guerrilleros o de autodefensa cuyo accionar interfiera con el normal funcionamiento constitucional y legal”, no excluye de la ampliación del tipo penal contemplado en el artículo 468 del Código Penal, ninguna conducta delictiva que constituya delito común, pues lo cierto es que siempre todo delito interfiere con el normal funcionamiento del orden jurídico y precisamente por eso respecto de ella se ejerce por el Estado el *ius puniendi*. Es decir, que por esa vía y con la redacción que se le da al inciso que ahora se agrega al citado artículo 468 del Código Penal no quedaría ningún hecho delictuoso fuera del delito de sedición, lo que contraría abiertamente la Constitución, los tratados internacionales y la jurisprudencia constitucional, por las razones ya expuestas. Es más, el propio legislador así lo entendió y por ello le hizo una salvedad en el segundo inciso del artículo 71 cuestionado, a la amplísima regla que abrió de par en par las puertas de la impunidad para los delitos comunes cometidos por miembros de grupos irregulares armados, y es esa la razón para que se declare en ese inciso que “Mantendrá plena vigencia el numeral 10 del artículo 3 de la Convención de las Naciones Unidas Contra el Tráfico ilícito de Estupefacientes y Sustancias Psicotrópicas, suscrito en Viena el 20 de diciembre de 1988 e incorporado a la legislación nacional mediante ley 67 de 1993”. Ello es así, pues la vigencia de esa Convención no depende de que así se diga en la Ley 975 de 2005, y si hubo de acudir a hacer tal manifestación, la única explicación lógica es que caben en el delito de sedición con la adición que a él se le introdujo en la ley en cuestión, todos los delitos comunes, por lo que se hizo indispensable la excepción aludida.

3. El derecho de las víctimas a la verdad, a la justicia y a la reparación. Deber del Estado de garantizarlos en forma efectiva.

Del deber jurídico que corresponde al Estado de garantizar y proteger los derechos humanos para asegurar la convivencia pacífica de los asociados surge, como ya se dijo, el derecho de acceso a la administración de justicia para obtener una tutela judicial efectiva. De aquí se desprende que no sólo las víctimas, sino también la sociedad, tienen el derecho a que se establezca la verdad y a conocerla, a que se administre justicia conforme a ella, y a la reparación de los daños causados en todas sus modalidades.

Por lo que hace al derecho a la verdad quienes hubieren sido víctimas de graves infracciones por violación de los derechos humanos y del derecho internacional humanitario, tienen el derecho a conocer todo lo realmente ocurrido no sólo en relación con el hecho ilícito en sí mismo, sino sobre las circunstancias de tiempo, de modo y de lugar en que los hechos se sucedieron, así como quienes fueron sus autores, sus determinadores y copartícipes y en general quienes estuvieron vinculados a la comisión de las conductas ilícitas. Del mismo modo, ese derecho al conocimiento de la verdad le asiste a la sociedad entera, como víctima que también lo fue del accionar de grupos irregulares armados por la comisión de delitos de lesa humanidad, pues tales conductas afectan, en forma grave, la propia condición humana.

Del derecho a la verdad, surge para el Estado el deber de garantizarlo de manera concreta y efectiva. Por ello, la Comisión Interamericana de Derechos Humanos sobre el particular expresó que:

“223. Las interpretaciones de la Corte Interamericana en el caso Castillo Paéz y en otros

relacionados con las obligaciones genéricas del artículo 1 de la Convención Americana, permiten concluir que el “derecho a la verdad” surge como una consecuencia básica e indispensable para todo Estado Parte en dicho instrumento, puesto que el desconocimiento de hechos relacionados con violaciones de los derechos humanos significa, en la práctica, que no se cuenta con un sistema de protección capaz de garantizar la identificación y eventual sanción de los responsables”.

Adicionalmente, la misma Comisión Interamericana de Derechos Humanos, sostuvo lo siguiente:

“221. El derecho a conocer la verdad con respecto a los hechos que dieron lugar a las graves violaciones de los derechos humanos que ocurrieron en El Salvador, así como el derecho a conocer la identidad de quienes participaron en ellos, constituye una obligación que el Estado debe satisfacer respecto a los familiares de las víctimas y la sociedad en general. Tales obligaciones surgen fundamentalmente de lo dispuesto en los artículos 1(1), 8 (1), 25 y 13 de la Convención Americana”.

Cumple adicionalmente una función social, jurídica e histórica, el derecho a la verdad y el deber de establecerla. Sólo de esa manera será posible a la sociedad la fijación en la memoria común de hechos repudiables en tal grado que la comunidad donde ellos acaecieron no puedan repetirse jamás. La recordación futura de los mismos y de los horrores de los padecimientos con ellos infringidos, servirán en el futuro como muro de contención para que no puedan repetirse, es decir que la memoria colectiva al recordarlos y repudiarlos de manera permanente tendrá un efecto disuasorio para que la perversidad no vuelva a ensañarse ni con los individuos en particular ni con la humanidad en general.

Con respecto a la garantía del derecho a la obtención de la verdad tanto individual como colectivamente, la Comisión Interamericana de Derechos Humanos en el “Informe sobre el Proceso de Desmovilización en Colombia”, señaló lo que a continuación se transcribe:

“30. Ante esta realidad, el derecho a la verdad no debe ser coactado a través de medidas legislativas o de otro carácter. La CIDH ha establecido que la existencia de impedimentos fácticos o legales –tales como la expedición de leyes de amnistía- al acceso de información sobre los hechos y circunstancias que rodearon la violación de un derecho fundamental, y que impidan poner en marcha los recursos judiciales de la jurisdicción interna, resultan incompatibles con el derecho a la protección judicial previsto en el artículo 25 de la Convención Americana.

31. La Corte Interamericana ha establecido en su jurisprudencia que el derecho a la verdad se encuentra subsumido en el derecho de la víctima o sus familiares a obtener de los órganos competentes del Estado el esclarecimiento de los hechos y el juzgamiento de los responsables conforme a los parámetros de los artículo 8 y 25 de la Convención Americana.

32. En cualquier caso, el goce de este derecho a conocer la verdad sobre la comisión de crímenes de derecho internacional no se limita a los familiares de las víctimas. La Comisión y la Corte Interamericana han manifestado que las sociedades afectadas por la violencia tienen, en su conjunto, el irrenunciable derecho de conocer la verdad de lo ocurrido así como las razones y circunstancias en las que delitos aberrantes llegaron a cometerse, a fin de que esos hechos no vuelvan a ocurrir en el futuro. La sociedad en su conjunto tiene derecho a conocer la conducta de quienes se hayan involucrado en la comisión de violaciones graves a los derechos humanos o el derecho internacional humanitario, especialmente en caso de pasividad o sistematicidad; comprender los elementos de carácter objetivo y subjetivo que contribuyeron a crear las condiciones y circunstancias dentro de las cuales conductas atroces fueron perpetuadas e identificar los factores de índole normativa y fáctica que dieron lugar a la aparición y el

mantenimiento de las situaciones de impunidad; contar con elementos para establecer si los mecanismos estatales sirvieron de marco a la consumación de conductas punibles; identificar a las víctimas y sus grupos de pertenencia así como a quienes hayan participado de actos de victimización; y comprender el impacto de la impunidad”.

La realización concreta del derecho de acceso a la administración de justicia implica que el Estado asuma a plenitud el deber de investigar los hechos constitutivos de violaciones graves a los derechos humanos o al derecho internacional humanitario, y que, como consecuencia de tales investigaciones se someta a juzgamiento a los presuntos responsables para imponer, si es del caso las sanciones correspondientes conforme a la ley.

Parte esencial del derecho a la justicia necesariamente ha de ser la garantía a las víctimas para acceder desde su inicio al expediente respectivo, con la posibilidad de formular peticiones, interponer recursos, solicitar pruebas, y en general realizar todos los actos procesales indispensables para que la verdad real se refleje en el proceso, de tal manera que éste último corresponda a la realidad de los hechos y las circunstancias de tiempo, de modo y de lugar en que se sucedieron.

La justicia como supremo fin del Derecho exige que el Estado encamine como tal toda su actividad en el propósito de obtenerla especialmente cuando se trate de violación de los derechos humanos y del derecho internacional humanitario máxime si se tiene en cuenta que la legitimación del Estado se hace ostensible y clara por su grado de compromiso con la defensa de los valores superiores de la humanidad. En esa dirección, la impunidad resulta como la negación de la justicia y siendo ello así la sociedad y la comunidad internacional podrían reprochar a cualquier Estado la omisión de actividad de sus agentes que conduzca a la negación del derecho a la justicia, que no es sólo individual sino colectivo como ya se dijo.

De igual manera, si el juez en ejercicio de la soberanía del Estado cumple la función de administrar justicia, no puede dictar las sentencias respectivas a su prudente arbitrio o conforme a su concepto personal de la justicia, porque ello conduciría a la arbitrariedad y a la anarquía. De ahí que, resulta aplicable en el Estado de Derecho el antiguo aforismo romano conforme al cual *judex judica*, pero *judica secundum jus*. Significa lo anterior que si el juez se encuentra sometido en su labor judicial al imperio de la ley, es de inmensa trascendencia el contenido mismo de la ley, cuyos límites se trazan por la Constitución.

Acorde con lo dicho, ha de darse por sentado que ontológicamente es una sola la jurisdicción del Estado, aunque desde el punto de vista orgánico-funcional para la mejor prestación de esa función pública la Constitución establezca varias especies de ella, lo cual pone de manifiesto la existencia de unidad en la diversidad. Así, no es extraño entonces, que para la defensa del orden jurídico y de los derechos fundamentales aparezca el Derecho Penal como la *última ratio* a la que se acude por el Estado como manifestación concreta del *ius puniendi*. El Derecho Penal en las situaciones ordinarias de normalidad ha de ajustarse, como es obvio, a la Constitución; y, con mucha mayor razón cuando se dictan por el Estado normas jurídico-penales tanto sustantivas como procesales para superar especiales situaciones de degradación en el respeto a la vida, a la integridad y a la dignidad de la persona humana causadas por actos ilícitos de carácter violento, normas que se expiden con el propósito de llegar a la paz pero sin el sacrificio de la justicia.

Precisamente, en virtud del principio cardinal de la justicia de obligatoria observancia por todos los Estados, la Corte Interamericana de Derechos Humanos ha señalado que parte del derecho a la justicia impone el deber de prevenir la comisión de hechos ilícitos que lesionen los derechos humanos y el derecho internacional humanitario. A este respecto, expresó que:

*“El deber de **prevención** abarca todas aquellas medidas de carácter jurídico, político, administrativo y cultural que promuevan la salvaguarda de los derechos humanos y que aseguren que las eventuales violaciones a los mismos sean efectivamente consideradas y tratadas como un hecho ilícito que, como tal, es susceptible de acarrear sanciones para quien las cometa, así como la obligación de indemnizar a las víctimas por sus consecuencias perjudiciales”.* (Negrilla fuera de texto).

No obstante, como quiera que pese a la prevención a que se ha hecho referencia los hechos ilícitos violentos atentatorios de los derechos humanos pueden ocurrir, en tal evento al Estado corresponde el deber jurídico ineludible de avocar la investigación respectiva de manera oportuna, seria e integral, asunto este sobre el cual la Corte Interamericana de Derechos Humanos, en el mismo caso ya mencionado, señaló lo siguiente:

*“El Estado está obligado a **investigar** toda situación en la que se hayan violado los derechos humanos protegidos por la Convención. Si el aparato del Estado actúa de modo que tal violación quede impune y no se restablezca, en cuanto sea posible a la víctima en la plenitud de sus derechos, puede afirmarse que ha incumplido el deber de garantizar su libre y pleno ejercicio a las personas sujetas a su jurisdicción. Lo mismo es válido cuando se tolere que los particulares o grupos de ellos actúen libre o impunemente en menoscabo de los derechos humanos reconocidos en la Convención”* (Negrilla fuera de texto).

Los deberes jurídicos de prevención e investigación, aunque forman parte del derecho a la justicia no lo agotan. A la investigación que permita la fijación de los hechos con las más amplias garantías para que las víctimas participen en el proceso desde su iniciación hasta su culminación con términos suficientes y oportunidades probatorias que no resulten simplemente ilusorias, sigue como consecuencia el deber de juzgar a los presuntos responsables y, si la situación procesal así lo indica, imponerles las sanciones correspondientes. Por ello, el Comité de Derechos Humanos en el caso de la investigación por la desaparición forzada, las torturas, violación y muerte de Nidia Erika Bautista, expresó que:

“El Estado Parte tiene el deber de investigar a fondo las presuntas violaciones de los derechos humanos, en particular las desapariciones forzadas de personas y las violaciones del derecho a la vida, y de encauzar penalmente, juzgar y castigar a quienes sean considerados responsables de esas violaciones. Este deber es aplicable a fortiori en los casos en que los autores de esas violaciones han sido identificados”.

Corolario de lo anteriormente dicho, surge como conclusión que el derecho a la justicia no sólo es individual, sino colectivo; que él comienza por el deber de prevención respecto de las conductas ilícitas que quebranten o amenacen quebrantar los derechos humanos o el derecho internacional humanitario; que si no obstante llegan a perpetrarse hechos constitutivos de tales conductas al Estado se le impone el deber de investigarlas con el mayor rigor posible para identificar a sus autores, copartícipes y auxiliares, así como las circunstancias temporales, de modo y de lugar en que los hechos se sucedieron. Esto resulta imposible si no se garantiza el derecho de las víctimas a intervenir en el proceso desde su inicio, a pedir pruebas, a controvertir las que obren en el proceso, a presentar alegaciones, a interponer recursos, es decir, a hacer efectivo su derecho a participar en el mismo en forma activa para lograr que se dicte por el Estado una sentencia justa.

La jurisdicción del Estado no se agota con la decisión de condena cuando ella sea del caso por las conductas violatorias de los derechos humanos o del derecho internacional humanitario, pues en estos delitos, como en todos los demás, existe adicionalmente la obligación de reparación por el daño infringido a las víctimas. Es esa la razón jurídica que en la Constitución Política llevó al

Constituyente a preceptuar que aun en los casos en que se conceda por graves motivos de convivencia pública amnistía o indulto general por delitos políticos si a los favorecidos con ellos se les exime de la responsabilidad civil respecto de los particulares, esa obligación se asume directamente por el Estado (CP. art. 150-17).

Conforme a una concepción meramente patrimonial, la reparación fue entendida simplemente como un derecho de carácter indemnizatorio y por ello, sólo al aspecto económico se circunscribía la pretensión de la parte civil en los procesos penales. Sin embargo, hoy ese criterio se encuentra superado por la doctrina y la jurisprudencia, asunto este sobre el cual la Corte Constitucional en sentencia C-228 de 2002, se pronunció *in extenso* y, al respecto expresó que:

“La visión tradicional de los derechos de la víctima de un delito, restringida al resarcimiento económico se ha ido transformando en el derecho internacional, en particular en relación con las violaciones a los derechos humanos desde mediados del siglo XX, dentro de una tendencia hacia una concepción amplia del derecho a una tutela judicial idónea y efectiva, a través de la cual las víctimas obtengan tanto la reparación por el daño causado, como la claridad sobre la verdad de lo ocurrido, y que se haga justicia en el caso concreto. La Constitución de 1991 recogió esta tendencia que cobró fuerza a finales de los años sesenta y se desarrolló en la década de los ochenta.

En el derecho internacional se ha considerado como insuficiente para la protección efectiva de los derechos humanos, que se otorgue a las víctimas y perjudicados únicamente la indemnización de los perjuicios, como quiera que la verdad y la justicia son necesarios para que en una sociedad no se repitan las situaciones que generaron violaciones graves a los derechos humanos y, además, porque el reconocimiento de la dignidad intrínseca y de los derechos iguales e inalienables de todos los seres humanos, exige que los recursos judiciales diseñados por los Estados estén orientados hacia una reparación integral a las víctimas y perjudicados, que comprenda una indemnización económica y, el acceso a la justicia para conocer la verdad sobre lo ocurrido y para buscar, por vías institucionales, la sanción justa de los responsables.

En 1948, tanto la Declaración Americana de Derechos del Hombre como la Declaración Universal de Derechos Humanos, marcan el inicio de una tendencia en el derecho internacional por desarrollar instrumentos que garanticen el derecho de todas las personas a una tutela judicial efectiva de sus derechos, a través de la cual no sólo obtengan reparación por el daño sufrido, sino también se garanticen sus derechos a la verdad y a la justicia”.

En esa misma sentencia, se agregó por la Corte lo siguiente:

Las principales objeciones a una concepción amplia de los derechos de la parte civil no restringida exclusivamente a la reparación material, provienen del argumento según el cual en un Estado de tradición liberal, el lugar de las víctimas y los perjudicados por un delito es accesorio, pasivo y reducido a un interés económico puesto que es el Estado el único legitimado para perseguir el delito dentro del marco de limitaciones y salvaguardas establecidas por la Constitución y la ley. Por eso resulta relevante que en esta subsección se examine brevemente la forma como se ha regulado en algunos sistemas jurídicos liberales el papel que puede asumir la parte civil dentro del proceso penal y los derechos asociados a esas posibilidades de intervención, así como las tendencias al respecto.

Tanto en los sistemas romanos germánicos, como en los de tradición anglosajona, los derechos de las víctimas, los perjudicados y la parte civil han sido considerados como relevantes. Sin embargo, los derechos que se le han reconocido, así como los espacios en que se ha permitido su intervención, han tenido una evolución distinta en uno y otro sistema. Cinco son las cuestiones que

interesan en este caso: i) la posibilidad de intervención de las víctimas y los perjudicados dentro del proceso penal; ii) la posibilidad de que la víctima o los perjudicados impulsen el proceso penal ante una omisión del Estado; iii) la finalidad de la intervención de la víctima y de los perjudicados dentro del proceso penal; iv) el ámbito de protección de los derechos de la víctima dentro del proceso penal; y v) los mecanismos a través de los cuales se puede garantizar una reparación integral a la víctima.

En cuanto a la posibilidad de intervención de las víctimas y los perjudicados en el proceso penal se identifican dos grandes tendencias. En los sistemas romano germánicos generalmente se ha admitido la intervención de las víctimas dentro del proceso penal a través de su constitución en parte civil. En los sistemas de tradición anglosajona, aun cuando tradicionalmente la víctima y los perjudicados no tienen el carácter de parte dentro del proceso penal y su intervención es la de un simple testigo, esta posición ha ido variando, hasta otorgarles incluso el derecho a impulsar la investigación criminal y el proceso penal.

En cuanto al momento en el que las víctimas o perjudicados pueden intervenir en el proceso penal, la mayor parte de los países que permiten su intervención la prevén tanto para la etapa de instrucción como durante la etapa de juzgamiento. Sin embargo, en los sistemas donde aún prevalece un sistema inquisitivo de investigación penal, las víctimas o perjudicados no tienen la posibilidad de intervenir durante la etapa de investigación. Esa es la situación de Bélgica, donde la parte civil no puede intervenir durante la etapa de instrucción, pues es una etapa vedada a todas las partes del proceso, no sólo a la parte civil. Sin embargo, desde 1989 esta característica ha sido considerada como contraria a la Convención Europea de Derechos del Hombre.

En relación con la posibilidad de que las víctimas puedan impulsar el proceso penal ante la omisión del Estado, se han adoptado distintos esquemas de solución en consideración a los principios de oportunidad y de legalidad. En los sistemas orientados por el principio de legalidad la ocurrencia de un hecho punible obliga al Estado a iniciar la acción penal en todos los casos. En los sistemas que reconocen el principio de oportunidad, el ente acusador goza de mayor discrecionalidad para decidir cuándo no iniciar una acción penal. En esos casos, aun cuando en principio el Estado es quien tiene el monopolio de la acción penal, se permite el ejercicio de acciones privadas y se han desarrollado mecanismos para que las víctimas o perjudicados puedan oponerse a la decisión estatal de no ejercer la acción penal en un determinado caso.

En los sistemas con énfasis en el principio de oportunidad, donde el Ministerio Público tiene mayor discrecionalidad para decidir si inicia o no la acción penal, las víctimas y los perjudicados pueden actuar directamente ante el ente acusador en el impulso de la acción penal, en los casos expresamente señalados por la ley. En principio dentro de las razones para no iniciar la acción penal se encuentra, la ausencia de víctimas o perjudicados, la extrema juventud o vejez del delincuente, la poca importancia de la infracción, la falta de interés público, la existencia de un acuerdo previo de reparación entre la víctima y el delincuente, o la aceptación del delincuente de un tratamiento previo, como ocurre en los Estados Unidos. Por ejemplo, en el caso inglés, la víctima puede impulsar mediante una especie de acción privada el proceso penal en los casos de los delitos cuya investigación corresponda a la Policía. En otros sistemas, como el belga, son los jueces quienes, a solicitud de la víctima o el perjudicado, ejercen un control de legalidad sobre la decisión del Ministerio Público de no iniciar la acción penal.

En los sistemas con énfasis en el principio de legalidad, el Ministerio Público está obligado a iniciar la acción penal en todos los casos. Ese es el caso de Alemania, España e Italia. En principio, la única razón por la cual no se inicia la acción penal es porque no existen elementos de prueba suficientes para determinar la ocurrencia del hecho punible o la posible responsabilidad de los implicados. No obstante, con el fin de hacer menos rígido este sistema se han consagrado varias excepciones. Por ejemplo, en Alemania, la víctima o los perjudicados pueden impulsar la

investigación y el proceso penal en el caso de delitos querellables, de delitos que afecten la intimidad de las personas y de ciertos delitos de gravedad menor. Cuando se trata de delitos más graves, la víctima o los perjudicados pueden apelar la decisión de no iniciar la acción penal ante el Procurador General y si este se niega a iniciarla, pueden acudir incluso hasta la Corte de Apelaciones para obligar al Ministerio Público a ejercer la acción penal.

En cuanto a la finalidad de la intervención de las víctimas y perjudicados dentro del proceso penal, en un principio esa intervención sólo estaba orientada a la reparación de perjuicios materiales. No obstante, esa posibilidad ha evolucionado hacia una protección más integral de los derechos de la víctima y hoy se reconoce que también tienen un interés en la verdad y la justicia. Así ha sucedido en el sistema francés, donde se permite que quien ha sufrido un daño personal y directo, se constituya en parte civil, aun cuando tal intervención no está subordinada a la presentación de una demanda de daños. El ejercicio de la acción civil ante la jurisdicción penal en Francia tiene un doble propósito: 1) obtener un juicio sobre la responsabilidad de la persona y 2) obtener la reparación del perjuicio sufrido. Estos derechos de la víctima han ido ampliándose desde 1906, cuando la Corte de Casación admitió que la víctima de un delito pudiera acudir directamente ante el juez de instrucción para iniciar el proceso penal ante la inacción del Ministerio Público. Esa jurisprudencia fue recogida luego por el Código de Procedimiento Penal y ha evolucionado hasta reconocer que el proceso penal debe garantizar a las víctimas el derecho a la verdad, tal como ocurrió recientemente, cuando el Fiscal decidió continuar con una investigación criminal para el establecimiento de la verdad de los hechos a favor de las víctimas, en un caso en que el asesino se había suicidado después de disparar y matar a varios miembros de un consejo regional. La búsqueda de la verdad fue la razón que permitió impulsar el proceso penal, a pesar de que el responsable directo había muerto.

El ámbito de protección de los derechos de las víctimas dentro del proceso también se ha ido ampliando. En un principio se entendió que tal protección se refería exclusivamente a la garantía de su integridad física y en consecuencia se adoptaron mecanismos para proteger su identidad y seguridad personal y familiar; posteriormente, esa protección se ha extendido para asegurar el restablecimiento integral de sus derechos y, por ello, se le han reconocido ciertos derechos dentro del proceso penal: el derecho a ser notificadas de las decisiones que puedan afectar sus derechos, a estar presente en determinadas actuaciones y a controvertir decisiones que resulten contrarias a sus intereses en la verdad, la justicia o la indemnización económica. La mayor parte de sistemas reconocen a la parte civil el derecho a aportar pruebas dentro del proceso, el derecho a ser oída dentro del juicio y a ser notificada de actuaciones que puedan afectarla, el derecho a que se adopte una resolución final dentro de un término prudencial, el derecho a que se proteja su seguridad, el derecho a una indemnización material, pero también a conocer la verdad de lo sucedido.

En los Estados Unidos, desde 1982, varias constituciones estatales han reconocido a las víctimas cuatro derechos básicos: i) el derecho a ser tratadas con justicia, dignidad y respeto; ii) el derecho a que se las mantenga informadas del avance de la investigación y del proceso permanentemente; iii) el derecho a ser informadas cuándo se llevarán a cabo las distintas audiencias del proceso; y iv) el derecho a escuchar ciertos asuntos dentro del proceso que sean relevantes para el testimonio que van a presentar. Esta tendencia llevó a que en 1996, finalmente, se presentara una enmienda a la Constitución de los Estados Unidos dirigida a proteger los derechos de la víctima. Los derechos específicos de esta enmienda, aún no aprobada, y de las constituciones estatales, no se limitan a proteger el interés en la reparación del daño, sino que comprenden actuaciones relativas al interés en el esclarecimiento de los hechos en aras de la verdad, como al interés en el derecho a que la víctima sea escuchada cuando se negocie la condena o se delibere sobre una medida de libertad condicional.

En cuanto a los mecanismos diseñados para garantizar una reparación a la víctima y perjudicados, aún en materia de indemnización económica la tendencia ha sido hacia una reparación integral. Muchos sistemas jurídicos han creado fondos especiales para indemnizar a las víctimas y perjudicados tanto por el daño emergente como por el lucro cesante causados por el hecho punible, en aquellos eventos en los que el condenado no tiene medios económicos suficientes para pagar a la víctima.

De lo anterior surge que en los distintos sistemas jurídicos de tradición liberal se reconoce que las víctimas y perjudicados tienen un interés para intervenir en el proceso penal, el cual no se reduce a la búsqueda de una reparación material. Igualmente, se observa que, la participación de la víctima y de los perjudicados en el proceso penal, no lo ha transformado en un mecanismo de retaliación contra el procesado, ni ha colocado en el mismo plano el interés económico de quien resulte perjudicado y la libertad de quien está siendo procesado, pues ante la ocurrencia de un hecho punible son también ponderados todos los derechos que han sido vulnerados con la conducta punible lesiva de los bienes jurídicos por ella tutelados.

Además, la participación de la parte civil dentro del proceso penal no ha implicado, como se podría temer dentro de la tradición liberal, una privatización de la acción penal. Como en las democracias no existe una confianza absoluta en el poder sancionador del Estado, en el derecho penal también se han desarrollado mecanismos para corregir la inacción o la arbitrariedad en el ejercicio del ius punendi y, en determinados casos, se ha permitido que la víctima y los perjudicados impulsen el proceso penal, como se anotó anteriormente”.

Significa lo anterior, que el derecho a la reparación del daño causado a la víctima en caso de graves violaciones a los derechos humanos o al derecho internacional humanitario, empieza por el establecimiento de la verdad en toda su extensión, pues incluye el derecho a saber lo realmente ocurrido, así como a la fijación de los hechos en la memoria colectiva para precaver su repetición en el futuro, pues si alguna lección ha de deducirse por las generaciones futuras es que tales hechos lesivos de la dignidad de la humanidad no puedan sucederse jamás. Es cierto que la indemnización civil puede revestir alguna importancia, pero en casos como estos no es lo fundamental para satisfacer el derecho de las víctimas a obtener la plena reparación del daño sufrido. La dignidad de la persona humana que fue objeto de graves lesiones ha de ser reparada, y, de allí surge para el Estado el deber jurídico de establecer distintos mecanismos para el efecto, los cuales no quedan satisfechos simplemente con una obligación dineraria, pues la ofensa social es en estos casos de tal magnitud que desborda el campo puramente patrimonial.

Viene entonces de lo dicho, que ontológicamente la noción de justicia que se impone en el derecho moderno trasciende su noción formal y que resulta omnicomprendensiva para incluir en ella, desde el punto de vista material como supuesto previo el deber jurídico de establecer la verdad, con una legislación que impida la impunidad y permita la sanción de los responsables de las conductas ilícitas, de tal suerte que los jueces se encuentren dotados de los instrumentos necesarios para que sus sentencias tengan legitimidad ante la sociedad en la medida en que así interpreten y hagan efectivos los principios y valores que sobre la dignidad de la persona humana consagra la Constitución y los tratados sobre derechos humanos.

4. Alternatividad y Pena Alternativa. Análisis de los artículos que las contemplan en la Ley 975 de 2005

4.1. Acusan los demandantes por este aspecto los Artículos 3 y 29 de la Ley 975 de 2005 de inconstitucionalidad por cuanto, a su juicio, la pena alternativa consistente en privación de la libertad por un período de 5 años y no superior a 8 años que podrá ser impuesta a los miembros de

grupos armados irregulares que decidan acogerse a la Ley mencionada, establece un beneficio para éstos que es contrario a los principios de proporcionalidad, igualdad y legalidad de la pena, pues autorizan que a delitos de lesa humanidad y a graves violaciones de los derechos humanos y del derecho internacional humanitario se les sancione con una pena irrisoria que implica burla al derecho de las víctimas y de la sociedad a la justicia, la verdad y la reparación.

4.2. Como es suficientemente conocido, con anterioridad a la revolución francesa las penas impuestas por la comisión de delitos fueron configuradas como *aflicciones* que debería soportar el autor de tales conductas ilícitas, de tal manera que existiera una correspondencia lo más cercana posible entre la calidad del delito y la calidad de la pena.

Con el advenimiento de una nueva concepción filosófica del Estado se proclamó la igualdad de los ciudadanos ante la Ley y, como consecuencia de ello se abrió paso el principio según el cual la tipificación y formalización de las penas no debe obedecer para su configuración a imponer al reo el sufrimiento de aflicciones, sino que las penas deben consistir en privaciones de derechos. A este respecto, Luigi Ferrajoli tras citar a Filangieri y Pagano, expresa que tales privaciones se refieren a los “tres específicos derechos para cuya tutela, como escribió Locke, se constituye y se justifica el Estado moderno: la vida, la libertad y la propiedad. Los tres tipos de penas consistentes en la privación de estos tres tipos de bienes o derechos – la *pena de muerte* que priva de la vida, las *penas privativas de libertad* que privan de la libertad personal y las *penas patrimoniales* que privan de bienes o potestades económicas – son todas configurables, en efecto, como formalmente *iguales*, golpeando en igual medida y con el mismo tipo de sufrimiento, al margen de las condiciones personales del reo y sobre la base solamente del tipo de delito. Desde este punto de vista, son un fruto de la revolución política burguesa, que marca el nacimiento de la figura del “ciudadano” y del correspondiente principio de abstracta igualdad ante la Ley”.

De manera pues que, conforme a lo antes dicho, superada la Edad Media y como una consecuencia necesaria de la revolución francesa si el ciudadano es igual ante la Ley, las penas deben ser abstractas e iguales con respecto al delito de que se trate, sin que importe para nada la condición personal o social del autor del hecho ilícito. Es decir, la pena, en consecuencia debe ser predeterminada por la Ley, conmensurable y cuantificable, de manera general e impersonal por el legislador, para que luego el juez la determine de manera individual en el caso particular y concreto. Se cumple así con el principio básico del Estado de Derecho conforme al cual la Ley debe ser impersonal, abstracta y objetiva, en acatamiento al principio de igualdad para que de allí se descienda a su aplicación individual y concreta.

4.3. Precisamente atendiendo a este nuevo criterio, la pena que priva del derecho a la libertad personal como sanción abstracta e igual prevista por el legislador, exige que se establezca una cuantificación del tiempo de libertad de que puede privarse al autor del delito, el cual se determina de un mínimo a un máximo, que fija el *quantum* de la pena. Esa generalidad de la Ley al señalar la pena privativa de la libertad de manera abstracta e igual permite que para su aplicación deba realizarse por el juzgador en el caso específico un cálculo de la pena para determinarla de manera concreta no sólo teniendo en cuenta el mínimo y el máximo que señaló el legislador, sino además otros criterios también predeterminados por éste que permiten aumentarla o disminuirla por las circunstancias agravantes del hecho delictivo o por las circunstancias atenuantes de éste, u otros criterios señalados previamente por el legislador. De tal suerte que de aquí surge necesariamente que la pena en el derecho moderno debe ser, además, *proporcional*. Ese *principio de la proporcionalidad* significa que las penas deben graduarse según la gravedad de los delitos sobre la base de la mayor o menor jerarquía de los bienes jurídicos objeto de la tutela penal por el Estado, y atendidas las modalidades del hecho delictivo. Significa, además, este principio que los hechos delictivos según su naturaleza deben sancionarse con penas diferentes y a cada delito se debe

aplicar, según la gravedad del hecho la pena correspondiente en mayor o menor cantidad, es decir, que la proporcionalidad ha de ser tanto cualitativa como cuantitativa.

El principio de proporcionalidad a que se ha hecho alusión ha sido preocupación filosófico jurídica desde antiguo, como puede apreciarse supone, adicionalmente que el Estado sólo se encuentra legitimado para imponer las penas que resulten necesarias, esto es que deben ser las mínimas posibles para obtener el fin de la prevención de comisión de nuevos delitos. A este respecto así se expresaron para consagrarlo como garantía las primeras cartas constitucionales como freno a penas excesivas. En efecto, el Artículo 8 de la Declaración de los Derechos del Hombre y del Ciudadano de 1.789, expresó que “La Ley no debe establecer más que penas estricta y evidentemente necesarias”, principio que repitieron las constitución francesa de 1.793 en su artículo 16 y el artículo 12 de la constitución de ese país expedida en 1.795. Significa ello que la pena tiene entonces un límite en el respeto a la dignidad de la persona humana. El hecho de que no exista una coincidencia absoluta entre el delito y la pena no excluye que esta última deba ser adecuada al primero en alguna medida. Por ello, la doctrina moderna ha señalado que “el principio de proporcionalidad expresado en la antigua máxima *poena debet commensurari delicto* es en suma un corolario de los principios de legalidad y de retributividad, que tiene en éstos su fundamento lógico y axiológico”, conforme anota Luigi Ferrajoli, autor éste que recuerda que ese principio ya había sido proclamado por Platón en “Las leyes” y por la Carta Magna de 1.215 en sus apartados 20 y 21 en los que se habló de “proporción” entre la transgresión y la pena.

En idéntico sentido, por su parte, también se pronunciaron Montesquieu, Becaría y Carrara, como es ampliamente conocido.

En la misma dirección Eugenio Raúl Zaffaroni, Alejandro Alagia Alejandro Slokar, expresan que:

“La criminalización alcanza un límite de irracionalidad intolerable cuando el conflicto sobre cuya base opera es de ínfima lesividad o cuando, no siéndolo, la afectación de derechos que importa es groseramente desproporcionada con la magnitud de la lesividad del conflicto. Puesto que es imposible demostrar la racionalidad de la pena, las agencias jurídicas deben constatar, al menos, que el costo de derechos de la suspensión guarde un mínimo de proporcionalidad con el grado de la lesión que haya provocado. A este requisito se le llama principio de proporcionalidad mínima de la pena con la magnitud de la lesión (...) Esto obliga a jerarquizar las lesiones y a establecer un grado de mínima coherencia entre las magnitudes de penas asociadas a cada conflicto criminalizado, no pudiendo tolerar, por ejemplo, que las lesiones a la propiedad tengan mayor pena que las lesiones a la vida, como sucedía en el caso del derogado art. 38 del decreto-ley 6582/58, razón por la que había sido declarado inconstitucional por la CS, criterio que luego fue alterado con fundamentos que importan ignorar la función hermenéutica de la Constitución tanto como hacer renuncia expresa a la función controladora”

4.4. Uno de los problemas modernos que plantea el derecho penal en función del respeto a la dignidad de la persona humana es superar la crisis que afecta la existencia de las penas privativas de la libertad. A este efecto, se trataría de sustituir con unas nuevas y diferentes sanciones a las privativas de la libertad, así como éstas sustituyeron en su momento a las penas corporales y afflictivas. A ese propósito, no es lo mismo una nueva pena distinta a la que implique privación total o parcial de la libertad que una medida alternativa al internamiento continuo y temporal del condenado en un establecimiento carcelario. Dentro de las denominadas “medidas alternativas”, se incluyen algunas modalidades como el arresto domiciliario, la concesión de libertad vigilada durante cierto tiempo, la reclusión solo por el fin de semana, la reclusión sólo nocturna o semilibertad. Pero es evidente que estas medidas, todas, implican restricción a la libertad, es decir son una modalidad de la privación de ese derecho.

Si las que hoy serían simplemente “*medidas alternativas*” frente a la privación de la libertad de manera temporal y continua en establecimientos oficiales carcelarios se adoptaran por el legislador en reemplazo de la pena de prisión temporal y permanente y como formas autónomas de punir, pasarían a ser penas principales y no modalidades de aquella. Dicho de otra manera, la pena alternativa supone el desaparecimiento de una pena anterior que tenía el carácter de principal, para que su lugar sea ocupado por otra pena distinta que la sustituye por completo y la convierte, en principal. No es posible confundir, conforme a ello la disminución de la duración de la pena privativa de la libertad con la eliminación de esta pena principal, pues lo que ocurre en este caso es tan sólo, una reducción temporal, que de ninguna manera la reemplaza por otra diferente.

4.5. El código penal vigente en cuanto hace referencia a la fijación de las penas cumple los principios conforme a los cuales éstas deben ser abstractas, predeterminadas, ajustarse a la igualdad, la proporcionalidad, contener reglas para su cuantificación y calculabilidad en el caso específico. Esos principios, aparecen brusca e injustificadamente vulnerados por la Ley 975 de 2005, afirmación esta para cuya fácil comprensión se inserta a continuación un cuadro comparativo de las penas que el código penal establece para los distintos delitos y las que corresponderían si a éstos se aplicara el artículo 29 de la Ley acusada y las normas de la misma Ley concordantes con éste.

TIPOS PENALES	
<i>Delitos Contra la Vida y la Integridad Personal</i>	
Genocidio	480 a 600 meses
Genocidio por conductas diversas al homicidio	160 a 450 meses
Apología al genocidio	96 a 180 meses
Homicidio	208 a 450 meses
Homicidio agravado	400 a 600 meses
Homicidio preterintencional	104 a 150 meses
Muerte de hijo fruto de acceso carnal violento, abusivo, o de inseminación artificial o transferencia de óvulo fecundado no consentidas.	64 a 108 meses
Homicidio culposo	32 a 108 meses
Homicidio culposo agravado	37 a 162 meses
Lesiones personales	
• Deformidad física transitoria	16 a 108 meses
• Deformidad física permanente	32 a 126 meses
• Deformidad en el rostro transitoria	21.3 a 144 meses
• Deformidad en el rostro permanente	42 a 168 meses
• Perturbación funcional transitoria de un órgano o miembro	32 a 126 meses
• Perturbación funcional permanente de un órgano o miembro	48 a 144 meses
• Perturbación síquica transitoria	32 a 126 meses
• Perturbación síquica permanente	48 a 162 meses

<ul style="list-style-type: none"> • Pérdida anatómica de un órgano o miembro 	96 a 240 meses
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Parto o Aborto preterintencional		
<ul style="list-style-type: none"> • Incapacidad mayor de 90 días 	42 a 135 meses	60 a 96 meses
<ul style="list-style-type: none"> • Deformidad física transitoria 	21.3 a 162 meses	60 a 96 meses
<ul style="list-style-type: none"> • Deformidad física permanente 	42 a 189 meses	60 a 96 meses
<ul style="list-style-type: none"> • Deformidad en el rostro transitoria 	28.4 a 216 meses	60 a 96 meses
<ul style="list-style-type: none"> • Deformidad en el rostro permanente 	56 a 252 meses	60 a 96 meses
<ul style="list-style-type: none"> • Perturbación funcional transitoria de un órgano o miembro 	42 a 189 meses	60 a 96 meses
<ul style="list-style-type: none"> • Perturbación funcional permanente de un órgano o miembro 	64 a 216 meses	60 a 96 meses
<ul style="list-style-type: none"> • Perturbación síquica transitoria 	42 a 189 meses	60 a 96 meses
<ul style="list-style-type: none"> • Perturbación síquica permanente 	64 a 243 meses	60 a 96 meses
<ul style="list-style-type: none"> • Pérdida funcional de un órgano o miembro 	128 a 270 meses	60 a 96 meses
<ul style="list-style-type: none"> • Pérdida anatómica de un órgano o miembro 	128 a 360 meses	60 a 96 meses
Lesiones personales agravadas		
<ul style="list-style-type: none"> • Incapacidad mayor de 90 días 	42 a 135 meses	60 a 96 meses
<ul style="list-style-type: none"> • Deformidad física transitoria 	21.3 a 162 meses	60 a 96 meses
<ul style="list-style-type: none"> • Deformidad física permanente 	42 a 189 meses	60 a 96 meses
<ul style="list-style-type: none"> • Deformidad en el rostro transitoria 	28.4 a 216 meses	60 a 96 meses
<ul style="list-style-type: none"> • Deformidad en el rostro permanente 	56 a 252 meses	60 a 96 meses
<ul style="list-style-type: none"> • Perturbación funcional transitoria de un órgano 	42 a 189 meses	60 a 96 meses

o miembro		
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• Perturbación funcional permanente de un órgano o miembro	64 a 216 meses	60 a 96 meses
• Perturbación síquica transitoria	42 a 189 meses	60 a 96 meses
• Perturbación síquica permanente	64 a 243 meses	60 a 96 meses
• Pérdida funcional de un órgano o miembro	128 a 270 meses	60 a 96 meses
• Pérdida anatómica de un órgano o miembro	128 a 360 meses	60 a 96 meses
Lesiones personales culposas agravadas		
• Incapacidad mayor de 90 días	37.3 a 135 meses	60 a 96 meses
• Deformidad física transitoria	18.6 a 162 meses	60 a 96 meses
• Deformidad física permanente	37.3 a 189 meses	60 a 96 meses
• Deformidad en el rostro transitoria	24.85 a 216 meses	60 a 96 meses
• Deformidad en el rostro permanente	49 a 253 meses	60 a 96 meses
• Perturbación funcional transitoria de un órgano o miembro	37.3 a 189 meses	60 a 96 meses
• Perturbación funcional permanente de un órgano o miembro	56 a 216 meses	60 a 96 meses
• Perturbación síquica transitoria	37.3 a 189 meses	60 a 96 meses
• Perturbación síquica permanente	56 a 243 meses	60 a 96 meses
• Pérdida funcional de un órgano o miembro	112 a 270 meses	60 a 96 meses
• Pérdida anatómica de un órgano o miembro	112 a 360 meses	60 a 96 meses
Aborto sin consentimiento	64 a 180 meses	60 a 96 meses
Abandono	32 a 108 meses	60 a 96 meses

Abandono en lugar despoblado o solitario	42.6 a 144 meses
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Repetibilidad de ser humano	32 a 108 meses
<i>Delitos Contra Personas y Bienes Protegidos por el Derecho Internacional Humanitario</i>	
Homicidio en persona protegida por el DIH	480 a 600 meses
Lesiones personales en persona protegida por el DIH	
• Incapacidad mayor de 90 días	42.6 a 120 meses
• Deformidad física transitoria	21.3 a 144 meses
• Deformidad física permanente	42.6 a 168meses
• Deformidad en el rostro transitoria	28.4 a 192meses
• Deformidad en el rostro permanente	56 a 224 meses
• Perturbación funcional transitoria de un órgano o miembro	42.6 a 168 meses
• Perturbación funcional permanente de un órgano o miembro	64 a 192 meses
• Perturbación síquica transitoria	42.6 a 168 meses
• Perturbación síquica permanente	64 a 216 meses
• Pérdida funcional de un órgano o miembro	128 a 240 meses
• Pérdida anatómica de un órgano o miembro	128 a 320 meses
Tortura en persona protegida por el DIH	160 a 360 meses
Acceso carnal violento en persona protegida por el DIH	160 a 324 meses
Actos sexuales violentos en persona protegida por el DIH	64 a 162 meses
Acceso carnal violento en persona protegida por el DIH agravado	213.3 a 336meses
Actos sexuales violentos en persona protegida por el DIH agravado	85.3 a 243 meses
Prostitución forzada y esclavitud sexual de persona protegida por el DIH agravado	160 a 324 meses
Utilización de medios y métodos de guerra ilícitos	96 a 180 meses
Perfidia	48 a 144 meses
Actos de terrorismo	240 a 450 meses
Actos de barbarie	160 a 270 meses
Tratos inhumanos y degradantes y experimentos biológicas en persona protegida	80 a 180 meses
Actos de discriminación racial	80 a 180 meses
Toma de rehenes	320 a 540 meses
Detención ilegal y privación del debido proceso	160 a 270 meses
Constreñimiento a apoyo bélico	48 a 108 meses
Despojo en el campo de batalla	48 a 180 meses
Obstaculización de tareas sanitaria y humanitarias	48 a 108 meses
Obstaculización de tareas sanitaria y humanitarias	72 a 162 meses
Destrucción y apropiación de bienes protegidos	80 a 180 meses
Destrucción de bienes e instalaciones de carácter sanitario	80 a 180 meses
Destrucción o utilización ilícita de bienes culturales y de lugares de culto	48 a 180 meses
Ataque contra obras e instalaciones que contienen fuerzas peligrosas	160 a 270 meses
Ataque contra obras e instalaciones que contienen fuerzas peligrosas	240 a 360 meses
Deportación, expulsión, traslado o desplazamiento forzado de población civil	160 a 360 meses
Atentados a la subsistencia y devastación	80 a 180 meses
Omisión de medidas de protección a la población civil	64 a 144 meses
Reclutamiento ilícito	96 a 180 meses

Exacción o contribuciones arbitrarias	96 a 270 meses
Destrucción del medio ambiente	160 a 270 meses
<i>Delitos Contra Libertad Individual y Otras Garantías</i>	
Desaparición Forzada	320 a 540 meses
Desaparición forzada agravada	480 a 600 meses
Secuestro simple	192 a 360 meses
Secuestro simple atenuado	96 a 180 meses
Secuestro extorsivo	320 a 504 meses
Secuestro extorsivo agravado	448 a 600 meses
Secuestro extorsivo atenuado	224 a 300 meses
Apoderamiento de aeronaves, naves o medios de transporte colectivo	160 a 270 meses
Apoderamiento de aeronaves, naves o medios de transporte colectivo agravado	240 a 472.5 meses
Tortura	128 a 270 meses
Tortura agravada	170.6 a 360 meses
Desplazamiento forzado	96 a 216 meses
Desplazamiento forzado agravado	128 a 288 meses
Inseminación artificial transferencia de óvulo fecundado no consentidas.	32 a 108 meses
Inseminación artificial transferencia de óvulo fecundado no consentidas en menor de 14 años	48 a 162 meses
Trafico de migrantes	96 a 144 meses
Trafico de migrantes agravado	128 a 216 meses
Trata de personas	156 a 276 meses
Trata de personas agravada	208 a 414 meses
Violación ilícita de comunicaciones o correspondencia de carácter oficial	48 a 108 meses
Violación ilícita de comunicaciones o correspondencia de carácter oficial agravado	64 a 144 meses
Sabotaje	16 a 108 meses
Sabotaje agravado	21.3 a 144 meses
Violación a libertad religiosa	16 a 36 meses
<i>Delitos Contra la Libertad, Integridad y Formación Sexuales</i>	
Acceso carnal violento	128 a 270 meses
Acto sexual violento	48 a 108 meses
Acceso carnal en persona puesta en incapacidad de resistir	128 a 270 meses
Acto sexual en persona puesta en incapacidad de resistir	48 a 108 meses
Acceso carnal abusivo con menor de 14 años	64 a 144 meses
Acceso carnal con incapaz de resistir	64 a 144 meses
Acceso carnal violento agravado	170.6 a 405 meses
Acto sexual violento agravado	64 a 162 meses
Acceso carnal en persona puesta en incapacidad de resistir agravado	170.6 a 405 meses
Acto sexual en persona puesta en incapacidad de resistir agravado	64 a 162 meses
Acceso carnal abusivo con menor de 14 años agravado	85.3 a 216 meses
Acto sexuales con menor de 14 años agravado	64 a 135 meses
Acceso carnal con incapaz de resistir agravado	85.3 a 216 meses
Acto carnal abusivo con incapacidad de resistir agravado	64 a 135 meses
Constreñimiento a la prostitución	80 a 162 meses
Inducción a la prostitución agravado	42.6 a 108 meses
Constreñimiento a la prostitución agravado	106.6 a 243 meses
Estímulo a la prostitución de menores	96 a 144 meses
Estímulo a la prostitución de menores agravado	128 a 216 meses

Pornografía de menores	96 a 144 meses
Pornografía de menores agravada	106.6 a 243 meses
Utilización o facilitación de medios de comunicación para ofrecer servicios sexuales de menores	80 a 180 meses
Utilización o facilitación de medios de comunicación para ofrecer servicios sexuales de menores de 12 años	120 a 270 meses
<i>Delitos Contra La Integridad Moral</i>	
Calumnia agravada	18.6 a 108 meses
<i>Delitos Contra la Familia</i>	
Adopción irregular agravada	24 a 157.5 meses
<i>Delitos Contra el Patrimonio Económico</i>	
Hurto	32 a 108 meses
Hurto calificado	48 a 144 meses
Hurto agravado	37.3 a 162 meses
Extorsión	192 a 288 meses
Extorsión agravada	256 a 384 meses
Estafa	32 a 144 meses
Estafa agravada	64 a 144 meses
Abuso de confianza calificado	48 a 108 meses
Acceso ilegal o prestación ilegal de los servicios de telecomunicaciones	64 a 180 meses
Gestión indebida de recursos sociales	48 a 108 meses
Daño en bien ajeno agravado	21.3 a 120 meses
<i>Delitos Contra la Fe Pública</i>	
Falsificación de moneda nacional o extranjera	96 a 180 meses
Tráfico de moneda falsificada	48 a 144 meses
Tráfico, elaboración y tenencia de elementos destinados a la falsificación de moneda	48 a 108 meses
Emisiones ilegales	48 a 180 meses
Falsificación de efecto oficial timbrado	16 a 108 meses
Falsedad marcaria agravada	64 a 144 meses
Falsedad ideológica en documento público	64 a 144 meses
Falsedad material en documento público	48 a 108 meses
Falsedad material en documento público agravada	64 a 144 meses
Obtención de documento público falso	48 a 108 meses
Falsedad en documento privado	16 a 108 meses
Uso de documento falso	32 a 144 meses
Destrucción, supresión u ocultamiento de documento público	32 a 144 meses
Destrucción, supresión y ocultamiento de documento privado	16 a 108 meses
<i>Delitos contra el Orden Económico y Social</i>	
Acaparamiento	48 a 108 meses
Especulación	48 a 108 meses
Agiotaje	32 a 144 meses
Agiotaje agravado	48 a 216 meses
Pánico económico	32 a 144 meses
Pánico económico agravado	48 a 216 meses
Daño en materia prima, producto agropecuario e industrial	32 a 144 meses
Violación de reserva industrial o comercial agravada	48 a 126 meses
Exportación o importación ficticia	32 a 144 meses
Ejercicio ilícito de actividad monopolística de arbitrio rentístico agravado	64 a 120 meses
Evasión fiscal	32 a 108 meses

Utilización indebida de fondos captados del públicos	32 a 108 meses
Operaciones no autorizadas con accionistas o asociados	32 a 108 meses
Captación masiva y habitual de dineros	32 a 108 meses
Manipulación fraudulenta de especies inscritas en el registro nacional de valores e intermediarios	32 a 108 meses
Manipulación fraudulenta de especies inscritas en el registro nacional de valores e intermediarios agravada	48 a 162 meses
Urbanización ilegal	48 a 126 meses
Urbanización ilegal agravado	72 a 189 meses
Favorecimiento contrabando de hidrocarburos y sus derivados	48 a 108 meses
Defraudación a las rentas de aduana	80 a 144 meses
Lavado de activos	96 a 270 meses
Lavado de activos agravado	128 a 405 meses
Omisión de control	32 a 108 meses
Testaferrato	96 a 270 meses
Enriquecimiento ilícito de particulares	96 a 180 meses
<i>Delitos Contra los Recursos Naturales y el Medio Ambiente</i>	
Violación de fronteras para la explotación de recursos naturales	64 a 144 meses
Manejo ilícito de microorganismos nocivos	32 a 108 meses
Daños en los recursos naturales	32 a 108 meses
Contaminación ambiental	48 a 108 meses
Contaminación ambiental con fines terroristas	56 a 162 meses
Experimentación ilegal en especies animales o vegetales	32 a 108 meses

Invasión de áreas de especial importancia ecológica	32 a 144 meses
Invasión de áreas de especial importancia ecológica agravada	48 a 180 meses
Explotación ilícita de yacimiento minero y otros materiales	32 a 144 meses
<i>Delitos Contra la Seguridad Pública</i>	
Concierto para delinquir	48 a 108 meses
Entrenamiento para actividades ilícitas	240 a 360 meses
Concierto para delinquir agravado	56 a 162 meses
Entrenamiento para actividades ilícitas agravado	320 a 540 meses
Terrorismo	160 a 270 meses
Terrorismo agravado	192 a 360 meses
Administración de recursos relacionados con actividades terroristas	96 a 216 meses
Utilización ilegal de uniformes e insignias	48 a 108 meses
Instigación a delinquir	80 a 180 meses
Incendio	16 a 144 meses
Daño en obras de utilidad social	32 a 180 meses
Provocación de inundación o derrumbe	16 a 180 meses
Siniestro o daño de nave	16 a 126 meses
Tenencia, fabricación y trafico desustancias u objetos peligrosos	48 a 144 meses
Tenencia, fabricación y trafico de sustancias u objetos peligrosos agravado	72 a 216 meses
Empleo o lanzamiento de sustancias u objetos peligrosos con fines terroristas	80 a 180 meses
Introducción de residuos nucleares y de desechos tóxicos	48 a 180 meses
Perturbación de instalación nuclear o radiactiva	48 a 144 meses
Trafico, transporte y posesión de materiales radiactivos o sustancias nucleares	32 a 108 meses
Trafico, transporte y posesión de materiales radiactivos o sustancias nucleares agravado	48 a 144 meses
Fabricación, trafico y porte de armas de fuego y municiones agravada	32 a 144 meses

Fabricación, tráfico y porte de armas de fuego y municiones de uso privativo de las fuerzas armadas	48 a 180 meses
Fabricación, tráfico y porte de armas o y municiones de uso privativo de las fuerzas armadas agravado	96 a 360 meses
Fabricación, importación, tráfico posesión y uso de armas químicas, biológicas y nucleares	96 a 180 meses
Fabricación, importación, tráfico posesión y uso de armas químicas, biológicas y nucleares agravado	144 a 270 meses
Empleo, producción, comercialización y almacenamiento de minas antipersona	160 a 270 meses
Ayuda e inducción al empleo producción y transferencia de mina antipersona	96 a 180 meses
<i>Delitos Contra la Salud Pública</i>	
Propagación del virus de inmunodeficiencia humana o de la hepatitis B	48 a 144 meses
Contaminación de aguas con fines terroristas	21.3 a 135 meses
Corrupción de alimentos productos médicos o material profiláctico	32 a 144 meses
Corrupción de alimentos productos médicos o material profiláctico agravado	48 a 216 meses
Corrupción de alimentos productos médicos o material profiláctico con fines terroristas	80 a 180 meses
Imitación o simulación de alimentos, productos o sustancias	32 a 108 meses
Fabricación y comercialización de sustancias nocivas para la salud	32 a 108 meses
Conservación o financiación de plantaciones	96 a 216 meses
Conservación o financiación de plantaciones atenuada	20 a 108 meses
Tráfico, fabricación o porte de estupefacientes	128 a 360 meses
Tráfico, fabricación o porte de estupefacientes atenuada	64 a 108 meses
Destinación ilícita de muebles e inmuebles	96 a 216 meses
Estímulo al uso ilícito	48 a 144 meses
Suministro o formulación ilegal	48 a 144 meses
Suministro a menor	96 a 216 meses
Tráfico de sustancias para procesamiento de narcóticos	96 a 180 meses
Tráfico de sustancias para procesamiento de narcóticos atenuado	64 a 108 meses
Existencia, construcción y utilización ilegal de pistas de aterrizaje	64 a 180 meses
<i>Delitos Contra Mecanismos de Participación Democrática</i>	
Perturbación de certamen democrático	32 a 108 meses
Perturbación de certamen democrático por medio de violencia	64 a 144 meses
Perturbación de certamen democrático por un servidor público	42.6 a 162 meses
Constreñimiento al sufragante	48 a 108 meses
Constreñimiento al sufragante por un servidor público	64 a 162 meses
Fraude en inscripción de cédulas	48 a 108 meses
Fraude en inscripción de cédulas por un servidor público	64 a 162 meses
Corrupción de sufragante por un servidor público	62 a 135 meses
Alteración de resultados electorales por servidor público	42.6 a 135 meses
Ocultamiento, retención y posesión ilícita	16 a 54 meses
Denegación de inscripción	16 a 54 meses
<i>Delitos Contra la Administración Pública</i>	
Peculado por apropiación	96 a 270 meses
Peculado por apropiación agravado	144 a 405 meses
Omisión del agente recaudador o retenedor	48 a 108 meses
Concusión	96 a 180 meses
Cohecho propio	80 a 144 meses
Cohecho impropio	64 a 126 meses
Cohecho por dar u ofrecer	48 a 108 meses
Violación del régimen legal o constitucional de inhabilidades en incompatibilidades	64 a 216 meses

Interés indebido en la celebración de contratos	64 a 216 meses
Contrato sin cumplimiento de requisitos legales	64 a 216 meses
Tráfico de influencias de servidor público	64 a 144 meses
Enriquecimiento ilícito	96 a 180 meses
Prevaricato por acción	48 a 144 meses
Prevaricato por acción agravado	64 a 120 meses
Prevaricato por omisión agravado	42.6 a 120 meses
Soborno transnacional	96 a 180 meses
<i>Delitos Contra la Eficaz y Recta Impartición de Justicia</i>	
Falsa denuncia contra persona determinada	64 a 144 meses
Falsa denuncia contra persona determinada agravado	85.3 a 192 meses
Falso testimonio	72 a 144 meses
Favorecimiento agravado	64 a 216 meses
Receptación	32 a 144 meses
Receptación agravado	64 a 144 meses
Fuga de presos	48 a 108 meses
Favorecimiento de la fuga	80 a 144 meses
Favorecimiento de la fuga agravado	106.6 a 192 meses
Fraude procesal	72 a 144 meses
Amenazas a testigos agravado	60 a 144 meses
Ocultamiento, alteración o destrucción de elemento material probatorio	48 a 144 meses
<i>Delitos contra la Existencia y Seguridad del Estado</i>	
Menoscabo de la integridad nacional	320 a 540 meses
Hostilidad militar	160 a 360 meses
Traición diplomática	80 a 270 meses
Traición diplomática agravada	106.6 a 360 meses
Instigación a la guerra	160 a 360 meses
Instigación a la guerra agravada	213.3 a 480 meses
Atentados contra hitos fronterizos	64 a 144 meses
Actos contrarios a la defensa de la nación	80 a 270 meses
Espionaje	64 a 216 meses
Delitos Contra el Régimen Constitucional y Legal	
Rebelión	96 a 162 meses
Sedición	32 a 144 meses
Rebelión agravada	144 a 243 meses
Sedición agravada	48 a 216 meses

4.6. Resulta evidente que la regla contenida en el artículo 29 de la Ley acusada conforme a la cual al condenado que haya cumplido con las condiciones previstas en ella se impondrá una pena alternativa que consiste en privación de la libertad por un período no menor de cinco años ni mayor de ocho según la gravedad de los delitos y la colaboración prestada para el esclarecimiento de los mismos, establece una excepción de carácter subjetivo y personal que riñe abiertamente con el derecho a la igualdad ante la Ley que preside el ordenamiento jurídico colombiano (Artículo 13 Constitución Política).

La denominada pena alternativa a que se ha hecho referencia solamente se aplica a los miembros de grupos armados al margen de la Ley que decidan incorporarse individual o colectivamente a la vida civil y por hechos acaecidos con anterioridad a la vigencia de la Ley, según los Artículos 1, 2 y 72 de la misma. Ello significa que por un hecho cometido antes de la vigencia de la Ley por quien no

era miembro de uno de esos grupos armados, como por ejemplo un homicidio, un delito contra la propiedad, o el constreñimiento ilegal a una autoridad pública para que realice o se abstenga de realizar acto propio de sus funciones, se le aplica una pena diferente y mayor a la que habría de aplicarse a un miembro de un grupo armado irregular que cometió un hecho idéntico y, también, antes de la vigencia de la Ley. Es decir, la pertenencia del segundo a un grupo armado irregular le autoriza beneficiarse de un trato diferente en virtud de esa disposición legal, lo que significa un privilegio carente de justificación, una discriminación para otorgarle favorabilidad por haberse armado, delinquir y formar parte de un grupo irregular. Pero además si ese hecho se comete por quien no forma parte de uno de esos grupos después de la vigencia de la Ley, también se le aplica la pena señalada en el código penal, lo que demuestra de manera fehaciente el abrumador rompimiento del principio de la igualdad.

4.7. Se quebranta además en virtud de esa circunstancia personal y subjetiva de pertenecer a un grupo armado irregular para beneficiarse con una pena menor, el principio de la predeterminación y legalidad de la pena, como quiera que en el sistema del código penal vigente cuando se cometieron los hechos gravemente lesivos de derechos humanos y del derecho internacional humanitario, a cada una de esas conductas ilícitas correspondía según la Ley una pena determinada conforme a la gravedad de los delitos, como sucedía por ejemplo con respecto a los homicidios a personas civiles fuera de combate, las masacres, los genocidios, las violaciones humillantes, el desplazamiento de personas, a la apropiación de sus tierras y otros bienes, el secuestro, la desaparición de personas, su enterramiento en fosas comunes sin indicar a sus familiares ni siquiera el lugar de la sepultura, y ahora, luego de expedida la Ley que se acusa, en lugar de la pena individualizada para cada uno de esos hechos ilícitos horrendos, se establece una pena genérica que a todos los iguala desde el punto de vista cuantitativo y cualitativo, y a todos les reduce la pena inicial.

4.8. Por las mismas razones anteriores, se rompe así el principio de la especificidad según la gravedad de los hechos delictivos y la modalidad en que ellos se sucedieron, pues no es lo mismo la comisión de un hecho delictual antecedido de su preparación ponderada, su ejecución con crueldad y sufrimiento prolongado de la víctima, la sevicia del victimario, la indefensión de la víctima y el terror generalizado en la población, que un hecho ilícito cometido sin que existan estas circunstancias. La pena no puede ser la misma en los dos casos, porque se produce una transgresión al principio de proporcionalidad de las penas, que el ordenamiento jurídico rechaza.

4.9. Con la reducción de las penas establecidas en el Código Penal para que solo pueda imponerse una pena de cinco a ocho años de manera general para todos los delitos que se imputen a los miembros de grupos irregulares armados cometidos antes de la vigencia de la Ley que se acusa, nada significa tampoco que un mismo delito se hubiere cometido varias veces y en distintas víctimas, sin importar su gravedad, pues de todas maneras la pena no podría exceder de ocho años, como sucedería por ejemplo si el miembro armado de un grupo irregular hubiere dado muerte a una, a dos o a veinte o a cuarenta personas, si hubiere participado en una o en varias masacres, si fuere autor del desaparecimiento de una o de varias personas, si hubiere despojado de sus bienes a una o a varias de sus víctimas, lo que demuestra una vez más que la norma contenida en el Artículo 29 de la Ley que ahora se analiza por la Corte no se ajusta ni al principio de la igualdad, ni al de la proporcionalidad, ni al de la cuantificabilidad y predeterminación de la pena para cada delito.

4.10. Para soslayar las conclusiones precedentemente expuestas, podría aducirse que en el mismo artículo 29 de la Ley cuya atención ocupa ahora a la Corte señala en su inciso primero que la Sala competente del respectivo Tribunal Superior determinará la pena que corresponda por los delitos cometidos de acuerdo con las reglas del Código Penal, y luego impondrá la pena alternativa de privación de la libertad de cinco a ocho años, a la cual sigue un período de libertad a prueba por un término igual a la mitad de la pena alternativa impuesta; y se agregaría para sacar adelante la

constitucionalidad de esta norma que si transcurre el período de prueba si se cumplen por el condenado las obligaciones de compromiso a no reincidir en los delitos que originaron la condena, se extingue la pena principal o, en caso contrario, se le revoca esa libertad a prueba “*y se deberá cumplir la pena inicialmente determinada, sin perjuicio de los subrogados previstos en el código penal que correspondan.*”

Tal argumentación carece de fuerza convictiva. En efecto no se trata de una pena principal y una pena alternativa, como se afirma. A la pena privativa de la libertad prevista en el código penal para los hechos ilícitos graves mediante los cuales se violan los derechos humanos y el derecho internacional humanitario, no se le sustituye o reemplaza por una pena diferente en su naturaleza, sino que simplemente se reduce el quantum de privación de la libertad al victimario. La pena que se impone no es la determinada en el Código Penal, sino la pena alternativa. Esta no es entonces un subrogado penal que aplase la ejecución de la condena, sino una rebaja de la misma, lo que se pone mayormente de relieve si se revocara la libertad a prueba pues habría que descontar la parte de la pena ya cumplida por el infractor. De nuevo salta a la vista que haberse armado y cometer delitos en serie formando parte de un grupo irregular en vez del reproche de la sociedad convierte al agresor de las víctimas y de la misma sociedad en un privilegiado para la aplicación benigna del derecho punitivo, tratamiento que sólo se explica por la fuerza de las armas y la actitud violenta de quienes ostentan con ellas poder intimidatorio.

4.11. Por las mismas razones anteriores, lo que se predica del artículo 29 se extiende igualmente al artículo 3 de la Ley 975 de 2005, que tan sólo define lo que allí se denomina alternatividad, para desarrollarlo luego en la primera de las normas citadas que le da concreción a esa definición previa.

4.12. El artículo 24 de la Ley 975 de 2005 en el que se establece cuál ha de ser el contenido de la sentencia condenatoria para señalar allí que en ella se fijarán la pena principal y las penas accesorias, así como la pena alternativa que ya se analizó, en realidad forma una unidad jurídica con los artículos 3 y 29 que fueron objeto de análisis anteriormente, y que por lo mismo si aquellos no subsisten también debe desaparecer del ordenamiento jurídico.

4.13. En el propio texto de la Ley 975 de 2005 que constituye una unidad jurídica, se hace alusión en otros de sus artículos a la pena alternativa. En consecuencia, en virtud de esa unidad normativa, son también inconstitucionales.

4.14. Así aparece en el artículo 20, en el cual se regula lo atinente a la acumulación de procesos y de penas y a este efecto se establece que si el desmovilizado ha sido condenado con anterioridad por hechos delictivos cometidos durante o con ocasión de su pertenencia al grupo armado del que formaba parte, será procedente la acumulación jurídica de penas “*pero en ningún caso, la pena alternativa podrá ser superior a la prevista en la presente Ley*”. Como puede observarse, lo que ahora se dispone es un límite a esa acumulación jurídica de penas, que no podrá exceder en ningún caso de 8 años de privación de la libertad, sin importar ni la clase de delitos cometidos, ni el número de éstos, ni las modalidades de su ejecución, lo que constituye una modalidad de impunidad que, además, restringe de manera desproporcionada la pena que correspondería si se aplicara la legislación ordinaria sobre el particular y constituye, entonces, un privilegio con relación a personas que también hubieren delinquido por comisión de delitos similares, pero que por no pertenecer a un grupo armado irregular tendrían penas mayores.

4.15. Por la misma causa, si en el artículo 25 de la Ley acusada se señala que cuando la omisión no haya sido intencional respecto de algunos hechos delictivos confesados por el miembro de un grupo armado al margen de la Ley al rendir versión libre por primera vez, se le permite con posterioridad

y en una segunda oportunidad aceptar su participación en su realización, y a continuación se dispone que *“en este evento el condenado podrá ser beneficiario de la pena alternativa. Se procederá a la acumulación jurídica de las penas alternativas sin exceder los máximos establecidos en la presente Ley”*, el texto acabado de transcribir resulta inexecutable por las mismas razones que ya se expresaron con respecto a la falta de proporcionalidad y violación del derecho a la igualdad con la limitación de ocho años impuesta para la acumulación de penas por el artículo 20 de la Ley, según ya se dijo.

4.16. Por otra parte, en el artículo 31 de la Ley acusada se establece que el tiempo de permanencia de los desmovilizados en las zonas de concentración decretadas por el Gobierno para los efectos de esa Ley y de conformidad con la Ley 782 de 2002, se computará como tiempo de ejecución de la pena alternativa, sin que pueda exceder de 18 meses. De la simple lectura de esta disposición, aparece con claridad absoluta que aún cuando respecto de tales desmovilizados no ha sido dictado ni siquiera un auto de detención preventiva, se asume que se encuentran privados de libertad por decisión del Estado y que, en consecuencia, ese tiempo de permanencia en las zonas de concentración mencionadas, deberá ser descontado de la pena alternativa impuesta, lo que significa que la pena efectiva que se imponga en la sentencia se reducirá en año y medio (dieciocho meses), o sea que la mínima desciende de cinco años a tres años y medio y la máxima se rebaja de ocho años a seis años y medio. Es esta una norma que rompe la igualdad de tratamiento con el resto de las personas a quienes llegare a aplicarse por alguna razón el Código Penal ordinario y, como salta a la vista, es evidentemente una nueva desproporción que se agrega a la que ya contiene la pena alternativa, lo que significa que el citado artículo 31 de la Ley es inconstitucional.

4.17. De lo precedentemente expuesto queda claro que se viola además la garantía del debido proceso, la tutela efectiva de los derechos humanos, el derecho a la administración de justicia, garantizados por los artículos 1, 2, 13, 29, 228 y 93 de la Constitución Política, así como los artículos 4 y 25 de la Convención Interamericana de Derechos Humanos y los artículos 14 y 26 del Pacto Internacional sobre Derechos Civiles, Sociales, Políticos y Culturales aprobado en Colombia por la Ley 74 de 1968, normas estas últimas que forman parte del bloque de constitucionalidad.

Conforme al Derecho Internacional el restablecimiento de la paz cuando ella ha sido perturbada no puede obtenerse a cualquier precio. Precisamente por ello la exoneración de las penas o su reducción a niveles ínfimos generadores de impunidad resultan violatorios de los principios de Derecho Internacional. Así ocurrió en efecto en relación con el juzgamiento de violaciones graves de los derechos humanos en la antigua Yugoslavia, razón por la cual el Tribunal Internacional que se creó para ese juzgamiento no dio aceptación a la aplicación de leyes que concedieron amnistías a grupos armados de oposición por la práctica de torturas. La Comisión Interamericana de Derechos Humanos tampoco consideró legítimas las amnistías concedidas a miembros del Ejército Farabundo Martí para la Liberación Nacional por crímenes comunes en donde el número de personas involucradas fuera inferior a veinte, pues se entendió entonces que el Estado se encuentra en ese caso incurso en la violación del deber de investigar y penalizar las violaciones de Derechos Humanos y el Derecho Internacional Humanitario. Del mismo modo las Naciones Unidas expresaron su reserva a la inclusión de las violaciones del Derecho Internacional Humanitario por los actos delictuales en Sierra Leona. Por ello, no ha de extrañarse tampoco que entre otras sentencias la Corte Interamericana haya condenado recientemente al Estado Colombiano el 5 de junio de 2004, en septiembre de 2005 y en febrero de 2006 por faltar a su deber de investigar, juzgar y sancionar oportunamente a quienes participaron en la perpetración de masacres de las que fueron víctimas en su orden 19 comerciantes en Santander, más de 40 campesinos en Mapiripán y 43 campesinos en Puerto Bello, zona de Urabá.

En tales circunstancias, tampoco podría sorprenderse el Estado Colombiano si como consecuencia

de la aplicación de la Ley 975 de 2005, aun luego de proferida esta sentencia llegare a apreciarse en casos concretos de perpetración de masacres y delitos de lesa humanidad que las sanciones que llegaren a imponerse establezcan en realidad una impunidad que haga indispensable la aprehensión del conocimiento de tales conductas ilícitas por la Corte Penal Internacional, sobre lo cual, en todo caso, pese a haberlo advertido en las deliberaciones de la Sala, no queda al suscrito camino distinto al de expresar tal preocupación en este voto disidente.

5. Adicionalmente a lo ya expresado, al momento de suscribir esta sentencia surgen al suscrito Magistrado dos reflexiones adicionales:

5.1. En la consideración que aparece bajo el número 6.2.1.6., titulada “**La acumulación de procesos y penas, como parte de la alternatividad**”, se afirma que “si el desmovilizado condenado con anterioridad, por hechos delictivos cometidos durante y con ocasión de su pertenencia al grupo armado organizado al margen de la ley, se acoge a la Ley 975 de 2005, y cumple los requisitos correspondientes, dicha condena previa se acumulará jurídicamente a la nueva condena que se llegare a imponer como resultado de su versión libre y de las investigaciones adelantadas por la Fiscalía. Después de efectuada dicha acumulación jurídica, el juez fijará la condena ordinaria (pena principal y accesorias), cuya ejecución se suspenderá y se concederá el beneficio de la pena alternativa de 5 a 8 años en relación con la pena acumulada si se cumplen los requisitos de la Ley 975 de 2005”.

Lo que acaba de ser transcrito, significa ni más ni menos, que hacer nugatoria la declaración de inexequibilidad de la expresión “pero en ningún caso la pena alternativa podrá ser superior a la prevista en la presente ley”, decisión esta que se adoptó, en este caso por unanimidad en las sesiones de la Sala Plena, puesto que en ello coinciden los magistrados de la mayoría con los de la minoría en cuanto estos votaron por la inexequibilidad total de la ley.

La aseveración precedente, queda demostrada si se considera que conforme a las reglas del Derecho Penal, cuando se produce la acumulación de penas, la menor se acumula a la mayor, asunto sobre el cual jamás ha existido discusión alguna en el Derecho Colombiano; además, lo que eso significa es que no desaparece la pena anterior que ya se encuentre ejecutoriada, sino que aplicadas las normas propias de la acumulación jurídica de penas, habrá de imponerse al sindicado la que resulte de esa operación, desde luego antes de aplicar cualquier subrogado penal o cualquier beneficio porque de lo contrario este se aplicaría a un delito anterior, ya juzgado, y respecto del cual ya existía una condena. Ahora, la novedosa tesis de la Corte lleva a que se aplique la denominada pena alternativa al primer delito, de tal manera que la condena anterior, así fuera por ejemplo de 40 años de prisión, queda bajo el manto de la impunidad al reducirla a la pena alternativa de 5 a 8 años. Dicho de otra manera ello equivale a desaparecer del panorama jurídico como si jamás hubiera existido la primera condena para subsumirla en la pena alternativa, en caso de haberse cometido por el mismo delincuente dos conductas punibles distintas, una de las cuales habría sido juzgada e impuesta la condena respectiva sin que se hubiera acogido a la Ley 975 de 2005, lo que resulta abiertamente contrario no solo al texto mismo de esta, sino a las más elementales nociones del Estado de Derecho y de la justicia punitiva.

No obstante, ese efecto perverso de la sentencia constituye apenas un *obiter dicta* que no afecta la decisión.

5.2. Por otra parte, sin que ello hubiere sido objeto de reflexión expresa de la Corte por cuanto no se hizo necesario, se advierte en el fallo en el numeral 6.3. que la sentencia tendrá “**Efecto general inmediato**”, como si se tratara de una novedad, cuando precisamente es eso lo que ocurre con todas las sentencias de constitucionalidad, a menos que la Corte opte por darle efectos retroactivos o

decida diferirlos, como en ocasiones lo ha hecho con algunos salvamentos de voto.

Sobre el particular, y para evitar equívocos que impidan darle correcta aplicación a la Ley 975 de 2005, ha de observarse que conforme al artículo 17 de la misma, los miembros de grupos armados organizados al margen de la ley, cuyos nombres se sometan por el Gobierno Nacional a consideración de la Fiscalía General de la Nación, sólo se acogen a la ley cuando manifiesten que lo hacen “en forma expresa”, tanto “al procedimiento” como a los “beneficios” instituidos por ella.

De manera pues que, salvo fraude a la ley, no podría predicarse que el 18 de mayo de 2006 ya se hubiere iniciado la aplicación de la Ley 975 de 2005, pues para entonces no había iniciado el funcionamiento de las Salas Especiales creadas en los dos tribunales en que así se decidió hacerlo (Bogotá y Barranquilla), ni mucho menos se había rendido versión libre por alguno de los miembros de grupos armados a los cuales podría aplicarse esa ley sólo si expresamente a ella se hubieren acogido, lo que no podrían hacer con anterioridad a la práctica de esa diligencia.

En los anteriores términos salvo el voto.

Fecha ut supra

ALFREDO BELTRÁN SIERRA
Magistrado

SALVAMENTO DE VOTO DEL MAGISTRADO HUMBERTO ANTONIO SIERRA PORTO A LA SENTENCIA C-370 DE 2006.

DERECHOS DE LAS VICTIMAS-Carácter fundamental (Salvamento de voto)

LEY DE JUSTICIA Y PAZ-Vulneración de reserva de ley estatutaria/**LEY ESTATUTARIA**-Finalidad de la exigencia de trámite especial y agravado para su expedición (Salvamento de voto)

La reserva de ley estatutaria, que se materializa en un procedimiento agravado para su expedición, tiene claras finalidades constitucionales tales como asegurar consensos democráticos para temas esenciales para la vida social, garantizar la supremacía constitucional y la seguridad jurídica. En esa medida, la inexecutable de la Ley 975 de 2005 no deviene del contenido de sus disposiciones, sino de no haber sido surtido su trámite de conformidad con el procedimiento agravado previsto por la Carta. Esta exigencia se deriva de la importancia del tema por ella regulado, a saber, los derechos de las víctimas del conflicto armado colombiano, materia de gran sensibilidad en la vida nacional y sobre la cual, sin duda, han de existir amplios consensos democráticos. Cabe anotar adicionalmente que en la sentencia de la cual me aparto se hace un extenso recuento de los derechos de las víctimas a la luz de los tratados internacionales de derechos humanos que integran el bloque de constitucionalidad, e incluso adicionalmente se afirma que la ley guarda relación con otros derechos fundamentales tales como el derecho a la paz, el cual es definido como “un derecho subjetivo de carácter fundamental”, de lo cual se deduce aún con más fuerza el carácter iusfundamental de las materias reguladas por la Ley 975 de 2005.

CONTROL DE CONSTITUCIONALIDAD DE LEY ESTATUTARIA-Ventajas de que sea previo (Salvamento de voto)

El control previo de una ley que regule temas de esta trascendencia evita que sus posibles destinatarios puedan controvertir el momento exacto de entrada en vigencia de sus mandatos. De esta manera todas las discusiones sobre la supuesta aplicabilidad de aquellas disposiciones finalmente declaradas inexecutable, a las personas que presuntamente se desmovilizaron antes que la ley fuera sometida a control, en virtud del principio de favorabilidad, quedarían sin piso porque de acogerse la tesis que se trataba de una ley de carácter estatutario sus preceptos sólo entrarían en vigor una vez surtida la revisión del proyecto por parte de la Corte Constitucional.

ACUMULACION DE PENAS EN LEY DE JUSTICIA Y PAZ-Inconstitucionalidad expresión “pero en ningún caso la pena alternativa podrá ser superior a la prevista en la presente ley” (Salvamento de voto)

La declaratoria de inexecutable de la expresión “pero en ningún caso la pena alternativa podrá ser superior a la prevista en la presente ley” , contenida en el inciso 2° del artículo 20, enunciado que regula la acumulación de la pena alternativa con las condenas previas de los desmovilizados, se torna inocua, de conformidad con las razones expuestas en la sentencia, pues no tiene efecto alguno sobre el monto de la pena alternativa.

CONTROL DE CONSTITUCIONALIDAD DE LEY DE JUSTICIA Y PAZ-Inconvenientes de no aplicar reserva de ley estatutaria (Salvamento de voto)

Reference: file D-6032

Demanda de inconstitucionalidad contra los artículos 2, 3, 5, 9, 10, 11.5, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 34, 37 numerales 5 y 7, 46, 47, 48, 54, 55, 58, 62, 69, 70 y 71 de la Ley 975 de 2005 “*por la cual se dictan disposiciones para la reincorporación de miembros de los grupos armados organizados al margen de la ley, que contribuyan de manera efectiva a la consecución de la paz nacional y se dictan otras disposiciones para acuerdos humanitarios*”.

Demandante: Gustavo Gallón Giraldo y otros.

Speaker Magistrates:

Dr. MANUEL JOSÉ CEPEDA ESPINOSA

Dr. JAIME CÓRDOBA TRIVIÑO

Dr. RODRIGO ESCOBAR GIL

Dr. MARCO GERARDO MONROY CABRA

Dr. ÁLVARO TAFUR GALVIS

Dra. CLARA INÉS VARGAS HERNÁNDEZ

Con el acostumbrado respeto, el suscrito Magistrado disiente de la decisión adoptada en el proceso de la referencia.

La mayoría estimó que la Ley 975 de 2005 no debió ser tramitada como una ley estatutaria, razón por la cual me veo obligado a reiterar los argumentos planteados en el salvamento de voto a la sentencia C-319 de este año, los cuales consignó a continuación.

La Ley 975 de 2005 es un estatuto legal con dos contenidos principales, por un lado regula lo concerniente a la investigación, procesamiento, sanción y beneficios judiciales de las personas vinculadas a grupos armados organizados al margen de la ley, como autores o partícipes de hechos delictivos cometidos durante y con ocasión de la pertenencia a esos grupos, que hubieren decidido desmovilizarse y contribuir decisivamente a la reconciliación nacional. Pero adicionalmente define el alcance del concepto de víctimas para efectos de la aplicación de sus preceptos normativos, y fija el alcance de sus derechos a la verdad a la justicia y a la reparación.

En su reciente jurisprudencia esta Corporación se ha pronunciado profusamente sobre los derechos de las víctimas de los hechos punibles. Una de las primeras decisiones en abordar sistemáticamente la cuestión fue la sentencia C-228 de 2002. En esta oportunidad al examinar algunas disposiciones de la Ley 600 de 2000 la Corte Constitucional se pronunció sobre el concepto de víctima, el alcance y la naturaleza de sus derechos. Respecto de este último tópico sostuvo esta Corporación:

En un Estado social de derecho y en una democracia participativa (artículo 1, CP), los derechos de las víctimas de un delito resultan constitucionalmente relevantes. Por ello, el constituyente elevó a rango constitucional el concepto de víctima. Así, el numeral 4 del artículo 250 Superior, señala que el Fiscal General de la Nación debe “velar por la protección de las víctimas”(…)

El derecho de las víctimas a participar en el proceso penal, se encuentra ligado al respeto de la dignidad humana. Al tenor de lo dispuesto en el artículo primero de la Constitución, que dice que “Colombia es un Estado social de derecho fundado en el respeto de la dignidad humana”, las víctimas y los perjudicados por un hecho punible pueden exigir de los demás un trato acorde con su condición humana. Se vulneraría gravemente la dignidad de víctimas y perjudicados por hechos punibles, si la única protección que se les brinda es la posibilidad de obtener una reparación de tipo económico. El principio de dignidad impide que el ser humano, y los derechos y bienes jurídicos protegidos por el derecho penal para promover la convivencia pacífica de personas igualmente libres y responsables, sean reducidos a una tasación económica de su valor (...)

En consonancia con lo anterior, el artículo 229 de la Carta garantiza “el derecho de toda persona para acceder a la administración de justicia”. Ese derecho comprende, tal como lo ha reconocido esta Corte, contar, entre otras cosas, con procedimientos idóneos y efectivos para la determinación legal de derechos y obligaciones, la resolución de las controversias planteadas ante los jueces dentro de un término prudencial y sin dilaciones injustificadas, la adopción de decisiones con el pleno respeto del debido proceso, la existencia de un conjunto amplio y suficiente de mecanismos para el arreglo de controversias, que se prevean mecanismos para facilitar el acceso a la justicia a los pobres y que la oferta de justicia permita el acceso a ella en todo el territorio nacional. Y, aun cuando en relación con este tema el legislador tiene un amplio margen para regular los medios y procedimientos que garanticen dicho acceso, ese margen no comprende el poder para restringir los fines del acceso a la justicia que orientan a las partes hacia una protección judicial integral y plena de los derechos, para circunscribir dicho acceso, en el caso de las víctimas y perjudicados de un delito, a la obtención de una indemnización económica. Por lo cual, el derecho a acceder a la administración de justicia, puede comprender diversos remedios judiciales diseñados por el legislador, que resulten adecuados para obtener la verdad sobre lo ocurrido, la sanción de los responsables y la reparación material de los daños sufridos.

El derecho de las víctimas a participar dentro del proceso penal para lograr el restablecimiento de sus derechos, tienen también como fundamento constitucional el principio participación (artículo 2, CP), según el cual las personas pueden intervenir en las decisiones que los afectan. No obstante, esa participación deberá hacerse de conformidad con las reglas de participación de la parte civil y sin que la víctima o el perjudicado puedan desplazar a la Fiscalía o al Juez en el cumplimiento de sus funciones constitucionales, y sin que su participación transforme el proceso penal en un instrumento de retaliación o venganza contra el procesado.

Finalmente, los derechos a la verdad, a la justicia y a la reparación económica reconocidos a las víctimas o perjudicados por un hecho punible, pueden tener como fundamento constitucional otros derechos, en especial el derecho al buen nombre y a la honra de las personas (arts 1º, 15 y 21, CP), puesto que el proceso penal puede ser la única ocasión para que las víctimas y los perjudicados puedan controvertir versiones sobre los hechos que pueden ser manifiestamente lesivas de estos derechos constitucionales, como cuando durante el proceso penal se hacen afirmaciones que puedan afectar la honra o el buen nombre de la víctimas o perjudicados.

La anterior exposición fue sistematizada en la sentencia C-873 de 2002 en el sentido que los derechos de las víctimas están fundamentados en valores, como son la justicia, el acceso al

conocimiento, y el carácter participativo del Estado, y su estrecha relación con derechos fundamentales.

Posteriormente en la sentencia C-004 de 2003 la Corte Constitucional reiteró la jurisprudencia anterior en relación con los derechos de las víctimas y profundizó en torno a una distinción que ya había enunciado en decisiones anteriores respecto de los derechos de las víctimas en general y los derechos de las víctimas y los perjudicados por violaciones a los derechos humanos y el derecho internacional humanitario y sostuvo:

Los derechos de las víctimas adquieren una importancia directamente proporcional a la gravedad del hecho punible. Entre más daño social ocasione un delito, mayor consideración merecen los derechos de quienes fueron víctimas o perjudicados por ese comportamiento. Igualmente, la obligación estatal de investigar los hechos punibles es también directamente proporcional a la manera como el hecho punible pudo afectar bienes jurídicos fundamentales. Entre más grave sea un hecho punible, mayor debe ser el compromiso del Estado por investigarlo y sancionar a los responsables, a fin de lograr la vigencia de un orden justo.

La anterior distinción condujo en ese caso concreto a una sentencia de exequibilidad condicionada de los preceptos demandados por establecer una restricción desproporcionada de los derechos de las víctimas de esta última modalidad de conductas punibles, es decir, las víctimas de violaciones de derechos humanos y del derecho internacional humanitario.

La jurisprudencia constitucional también ha encontrado que los derechos de las víctima son se reducen al ámbito del derecho penal sino que se extienden al derecho disciplinario, y encontró que también podía predicarse la condición de víctima de las faltas disciplinarias constitutivas de una violación del derecho internacional de los derechos humanos o del derecho internacional humanitario. Las víctimas e faltas disciplinarias de esta naturaleza “... *están legitimadas para intervenir en el proceso disciplinario para que en éste se esclarezca la verdad de lo ocurrido, es decir, para que se reconstruya con fidelidad la secuencia fáctica acaecida, y para que en ese específico ámbito de control esas faltas no queden en la impunidad. Es decir, tales víctimas o perjudicados tienen derecho a exigir del Estado una intensa actividad investigativa para determinar las circunstancias en que se cometió la infracción al deber funcional que, de manera inescindible, condujo al menoscabo de sus derechos y a que, una vez esclarecidas esas circunstancias, se haga justicia disciplinaria*”.

La extensión de los derechos de las víctimas a este ámbito del derecho sancionatorio estatal se justificaba, entre otras razones, porque “(...) *las democracias constitucionales se fundan en el respeto de la dignidad del ser humano y que este fundamento produce efectos en todos los ámbitos de ejercicio del poder público y respecto de todas las personas que en él se encuentran involucradas, se comprendió que los derechos de las víctimas de una conducta punible no se agotaban en la reparación del daño patrimonial causado con el delito, pues un Estado constitucional de derecho es prioritariamente un Estado de justicia y la justicia, en el caso del delito, no se agota simplemente en esa reparación patrimonial. Por lo tanto, se debían generar espacios para el reconocimiento a las víctimas de otros derechos, pues éstos resultaban ineludibles, al menos si de lo que se trataba era de hacer efectiva su dignidad y de realizar múltiples fines estatales que tocan con ella*”.

En fecha más reciente sostuvo esta Corporación sobre el fundamento constitucional de los derechos

de las víctimas de hechos punibles:

Tal como lo ha reconocido esta Corporación, en un Estado Social de Derecho y en una democracia participativa (artículo 1, CP), los derechos de las víctimas de un delito resultan constitucionalmente relevantes y, por ello, el Constituyente elevó a rango constitucional el concepto de víctima. Al respecto cabe recordar que el numeral 4 del artículo 250 Superior antes de su reforma por el Acto Legislativo 03 de 2002, señalaba que el Fiscal General de la Nación debía “velar por la protección de las víctimas.” Además, el numeral 1 del mismo artículo decía que deberá “tomar las medidas necesarias para hacer efectivos el restablecimiento del derecho y la indemnización de los perjuicios ocasionados por el delito”. Actualmente en dicho artículo 250 se señala que en ejercicio de sus funciones la Fiscalía General de la Nación, deberá: “1.Solicitar al juez que ejerza las funciones de control de garantías las medidas necesarias que aseguren la comparecencia de los imputados al proceso penal, la conservación de la prueba y la protección de la comunidad, en especial, de las víctimas.” Así mismo según el numeral seis deberá “Solicitar ante el juez de conocimiento las medidas judiciales necesarias para la asistencia a las víctimas, lo mismo que disponer el restablecimiento del derecho y la reparación integral a los afectados con el delito. El mismo artículo señala en el numeral 7 que deberá : Velar por la protección de las víctimas, los jurados, los testigos y demás intervinientes en el proceso penal” al tiempo que señala que “la ley fijará los términos en que podrán intervenir las víctimas en el proceso penal y los mecanismos de justicia restaurativa” Es decir que con dicho Acto Legislativo el énfasis dado a los derechos de las víctimas resulta evidente. (resalta la Corporación).

Ello coincide con el planteamiento hecho por la Corte en el sentido de que en un Estado Social de Derecho, que consagra como principios medulares la búsqueda de la justicia (CP preámbulo y art. 2) y el acceso a la justicia (CP art. 229), “el derecho procesal penal no sólo debe regular y controlar el poder sancionador del Estado en beneficio del acusado -esto es en función de quien padece el proceso- sino que debe también hacer efectivos los derechos de la víctima -esto es de quien ha padecido el delito-, puesto que ‘la víctima es verdaderamente la encarnación viviente del bien jurídico que busca ser protegido por la política criminal’ ”.

Con posterioridad al fallo antes citado la Corte Constitucional declaró la inexecutable de la expresión *absolutorio* contenida en el numeral 4 del artículo 193 de la Ley 906 de 2004, por infringir precisamente los derechos de las víctimas e igualmente condicionó la executable del inciso segundo del artículo 69 del mismo estatuto para que su interpretación se ajustara a los derechos de las víctimas.

Por otra parte, en numerosas decisiones de tutela la Corte Constitucional ha otorgado el amparo constitucional solicitado en aquellos eventos en los cuales las autoridades judiciales desconocen la finalidad del proceso penal de proteger los derechos de las víctimas y adoptan decisiones que contribuyen a la impunidad. Así por ejemplo, en la sentencia T-694 de 2000, la Corte encontró que se habían desconocido los derechos de la víctima, al precluir la investigación penal sin haber respondido a la solicitud de pruebas de la parte civil, y sin que durante el tiempo en que el caso estuvo bajo conocimiento de las autoridades, éstas hubieran asumido con seriedad y rigor la defensa de los derechos de las partes procesales dentro de la investigación penal. En la sentencia T-556 de 2002, la Corte encontró que el fiscal había incurrido en una vía de hecho por defecto sustantivo al precluir la investigación y el proceso penal acudiendo a criterios puramente formales, desconociendo los hechos y las pruebas que obraban en el proceso. Por su parte, en la sentencia T-249 de 2003, la Corte encontró que se desconocían los derechos de las víctimas al negarse a

constituir en parte civil a un actor popular en un proceso penal por delitos de lesa humanidad, desconociendo la jurisprudencia constitucional sobre los derechos de las víctimas de delitos. Finalmente, en la sentencia T-114 de 2004, la Corte consideró que se había incurrido en una vía de hecho por defecto sustantivo al aplicar una norma de derecho sin que se reunieran los hechos determinantes del supuesto legal y, como consecuencia de ello, se archivó arbitrariamente el proceso penal y se impidió el acceso a la administración de justicia de la parte civil con miras al reconocimiento de sus derechos a la verdad, a la justicia y a la reparación. En el mismo sentido en la sentencia T-453 de 2005 hizo una detallada exposición de los derechos de las víctimas de delitos sexuales, y sobre su conexidad con los derechos fundamentales a la vida íntima y al debido proceso, y finalmente concluyó que la práctica de pruebas relacionadas la vida íntima de la víctima con anterioridad o posterioridad a los hechos era irrazonable, desproporcionada y violaba los derechos de la víctima. Igualmente, en la sentencia T-589 de 2005 consideró que la negativa de los fiscales a reconocer que la acción civil en el proceso penal lejos de tener como única finalidad la obtención de una reparación económica, también puede promoverse, como se hizo en este caso, para lograr el esclarecimiento de la verdad y la aplicación efectiva de la justicia, constituía una vía de hecho por defecto sustantivo.

Por otra parte la jurisprudencia constitucional ha encontrado fundamento de los derechos de las víctimas en el bloque de constitucionalidad y en el artículo 93 de la Constitución. Así, se ha afirmado que estos derechos hacen parte del bloque de constitucionalidad por haber sido recogidos y desarrollados en múltiples instrumentos internacionales de derechos humanos y derecho internacional humanitario que hacen parte del bloque de constitucionalidad tales como la Convención Americana de Derechos Humanos, en la cual se consagra el derecho de toda persona a un recurso judicial efectivo, el cual ha sido interpretado por la Corte Interamericana de Derechos Humanos, no sólo como el derecho a una reparación económica, sino además como el derecho a que la verdad sobre los hechos sea efectivamente conocida y se sancione justamente a los responsables. Igualmente, el Pacto de Derechos Civiles y Políticos consagra el deber de los Estados partes de proveer recursos judiciales eficaces para la protección de los derechos humanos.

Del mismo modo han sido recogidos en el Derecho Internacional Humanitario, pues el Protocolo I adicional a los Convenios de Ginebra reconoce el "derecho que asiste a las familias de conocer la suerte de sus miembros", lo cual no está referido únicamente a la posibilidad de obtener una indemnización económica, y en el Estatuto de la Corte Penal Internacional se consagran expresamente los derechos de las víctimas a presentar observaciones sobre la competencia de la Corte o la admisibilidad de la causa, a que se haga una presentación completa de los hechos de la causa en interés de la justicia, a ser tratadas con dignidad, a que se proteja su seguridad e intimidad, a que se tengan en cuenta sus opiniones y observaciones, a ser reparadas materialmente y apelar ciertas decisiones que afecten sus intereses.

Del anterior recuento jurisprudencial se desprende que esta Corporación ha reconocido a los derechos de las víctimas el carácter de derechos constitucionales y ha encontrado su fundamento en principios, valores y derechos fundamentales tales como el Estado social de derecho, la dignidad humana, la participación, la justicia, el derecho de acceso a la administración de justicia, el derecho al buen nombre, el derecho a la honra, el derecho a la intimidad y el derecho al debido proceso. Así mismo, ha reconocido que se trata de derechos reconocidos en instrumentos internacionales de derechos humanos que hacen parte del bloque de constitucionalidad e igualmente ha otorgado el amparo constitucional, por medio de la acción de tutela en casos en los cuales han sido infringidos por parte de las autoridades judiciales.

Se tiene entonces que si bien no se ha declarado expresamente su carácter de derechos fundamentales, por múltiples vías interpretativas se puede llegar a la conclusión que revisten esta

naturaleza.

En primer lugar, si se acude a criterios materiales a los cuales ha acudido desde tiempo atrás la jurisprudencia de esta Corporación para determinar la fundamentalidad de un derecho. En efecto los derechos de las víctimas guardan estrecha relación con principios y valores constitucionales a los cuales ya se ha hecho alusión, específicamente con el principio de dignidad humana el cual según la jurisprudencia constitucional ha sido definido como el valor central de nuestro ordenamiento jurídico y principio de principios. Ha sostenido esta Corporación de manera reiterada que el derecho de las víctimas a participar en el proceso penal, se encuentra ligado al respeto de la dignidad humana, pues *las víctimas y los perjudicados por un hecho punible pueden exigir de los demás un trato acorde con su condición humana*. Igualmente ha reconocido que son una manifestación del principio de participación pues permite que los afectados por un hecho punible puedan *intervenir en las decisiones que los afectan por medio de los cauces procesales establecidos para tal efecto*.

En el mismo sentido los derechos de las víctimas son manifestaciones concretas del derecho de acceso a la administración de justicia, del derecho al debido proceso o del derecho a la intimidad en ciertos casos y por lo tanto constituirían lo que la doctrina denomina normas adscritas de derechos fundamentales, cuya violación en eventos concretos supone la violación de tales derechos fundamentales y en tal medida es tutelable. Finalmente hacen parte del bloque de constitucionalidad al haber sido reconocidos por tratados internacionales de derechos humanos ratificados por Colombia y al haber sido recogidos por el derecho internacional humanitario.

Una vez establecido el carácter fundamental de los derechos de las víctimas se puede concluir sin lugar a dudas que la Ley 975 de 2005 vulnera la reserva de ley estatutaria establecida en el literal a del artículo 152 constitucional al tratarse de una ley ordinaria que regula derechos de carácter fundamental.

En efecto, resulta manifiesto que la Ley 975 de 2005 actualiza, configura y define los derechos de las víctimas de hechos punibles y en esa medida vulnera la reserva de ley estatutaria establecida por el literal a) del artículo 152 constitucional. Este cuerpo normativo tiene como finalidad la actualización de los derechos de las víctimas para adaptarlos a los recientes desarrollos que se han producido en el derecho internacional de los derechos humanos y en el derecho internacional humanitario en la materia. Adicionalmente configura tales derechos, es decir, fija sus alcances o ámbito de aplicación, pues define el derecho a la verdad, a la justicia y a la reparación y enlista el ámbito de conductas protegidas por tales derechos, de manera análoga, por ejemplo, a la forma como la Ley Estatutaria del derecho a la Libertad Religiosa y de Cultos, desarrolla los distintos contenidos de dicha libertad.

Se podría argumentar que se trata de una actualización, configuración y delimitación parciales que sólo tiene lugar dentro de procedimientos judiciales que se adelanten en virtud de la Ley 975 de 2005. Sin embargo, la Corte Constitucional en otras oportunidades ha declarado inexecutable disposiciones que regulan de manera parcial derechos fundamentales, es decir, en un ámbito específico del tráfico jurídico, por violación del principio de reserva de ley estatutaria, como ha ocurrido por ejemplo en materia del derecho a la autodeterminación informativa.

Por otra parte, cabe señalar que las víctimas a las que hace referencia esta ley y cuyos derechos actualiza, configura y define son precisamente las víctimas de violaciones a los derechos humanos y al derecho internacional humanitario, pues se trata de las víctimas del conflicto armado, tal como se desprende de la definición del artículo sexto del mismo cuerpo normativo. Se trata entonces de víctimas cuyos derechos tienen una connotación especial, como ha reconocido la jurisprudencia constitucional antes citada, y frente a las cuales la reserva de ley estatutaria ha de aplicarse aun de

manera más estricta.

En definitiva, la Ley 975 de 2005 actualiza, configura y define los derechos de las víctimas de los delitos cometidos por las personas vinculadas a grupos armados organizados al margen de la ley, durante con ocasión a la pertenencia a estos grupos, y en esta medida vulnera la reserva de ley estatutaria establecida por el literal a) del artículo 152 constitucional.

Se podría argumentar que la manera como aparecen actualizados, definidos y configurados los derechos de las víctimas en el cuerpo normativo objeto de examen corresponde a los desarrollos jurisprudenciales y doctrinales de la materia y que en esa medida la regulación contenida en la Ley 975 de 2005 no es inconstitucional porque –como sostiene uno de los intervinientes– *“las disposiciones contenidas en el texto acusado buscan garantizar el acceso de las víctimas a la administración de justicia, asegurar la efectividad de sus derechos y facilitar y agilizar su actuación dentro del proceso”*, sin embargo, cabe recordar que la previsión de un tipo legislativo especial por parte del Constituyente para regular ciertas materias no obedece exclusivamente a un mero propósito formal sino que responde a la importancia de las materias contempladas en el artículo 152 constitucional, cuya regulación exige amplios consensos democráticos. Así, en la sentencia C-162 de 2003 se afirmó:

“En razón de la importancia de esas materias y de las implicaciones que su desarrollo tiene en el plexo normativo, el constituyente estableció el procedimiento legislativo especial inherente a las leyes estatutarias. A través de él se busca que la regulación de esos temas sea fruto de un amplio debate democrático en el que se garantice y fomente la participación de todos los grupos asentados en las Cámaras Legislativas. En el mismo sentido, a través de ese procedimiento cualificado se promueve la vigencia de textos normativos cuya compatibilidad con la Carta Política se halle garantizada con mucha más fuerza que la presunción de constitucionalidad que ampara a todas las leyes y de allí por qué tales textos se sometan al control previo del Tribunal Constitucional. Finalmente, las mayorías calificadas exigidas para la promulgación de la norma permiten también que ésta tenga vocación de permanencia y generen seguridad pues esas mismas mayorías se exigen también para su modificación o derogatoria.”

En esa medida las distintas etapas del trámite especial y agravado previsto para la expedición de las leyes estatutarias responden a ese claro propósito constitucional pues como ha sostenido esta Corporación *“(…) el establecimiento de un procedimiento especial y cualificado para la expedición de las leyes estatutarias, asegura que temas esenciales para la vida social, surtan un amplio debate en las cámaras legislativas, con un control previo sobre la exequibilidad del proyecto como parte inherente al régimen de este tipo de leyes, a fin de evitar que entren en vigencia sin la plena garantía de sujeción a la Constitución, dada la importancia que para la comunidad representan los temas que regula”* (negritas fuera del texto).

Entonces, el control previo constitucional resulta también una parte esencial del procedimiento de elaboración de estas leyes. Sobre este extremo resulta ilustradora la sentencia C-523 de 2004:

Por lo tanto, consideró el constituyente de 1991, que no era suficiente para las leyes estatutarias su entrada en vigencia con la sola presunción de constitucionalidad que ampara a todas las leyes, sino que, respecto de aquellas era necesario garantizar con mucha más fuerza su sujeción a la Carta Política, promoviendo que al entrar en vigencia, sus textos normativos

ya estuvieran sujetos al principio de supremacía constitucional y por supuesto al de seguridad jurídica.

Cabe recordar, que la supremacía constitucional consiste en un conjunto normativo que no se deriva de otro, y a su vez, constituye la fuente primigenia de todo el ordenamiento jurídico. Y, el establecimiento de Tribunales Constitucionales, siguiendo el modelo kelseniano, precisamente tuvo como uno de sus fundamentos asegurar la vigencia de este cardinal principio. En cuanto a la preservación de la seguridad jurídica, principios fundante también del Estado Social de Derecho, implica la certeza que tiene la comunidad acerca de que determinadas situaciones jurídicas no serán modificadas o alteradas sino por los medios preestablecidos en el derecho vigente, lo cual confiere tranquilidad a las personas destinatarias de las normas y coadyuva al mantenimiento de la paz social.

En conclusión la reserva de ley estatutaria, que se materializa en un procedimiento agravado para su expedición, tiene claras finalidades constitucionales tales como asegurar consensos democráticos para temas esenciales para la vida social, garantizar la supremacía constitucional y la seguridad jurídica. En esa medida, la inexecutable de la Ley 975 de 2005 no deviene del contenido de sus disposiciones, sino de no haber sido surtido su trámite de conformidad con el procedimiento agravado previsto por la Carta. Esta exigencia se deriva de la importancia del tema por ella regulado, a saber, los derechos de las víctimas del conflicto armado colombiano, materia de gran sensibilidad en la vida nacional y sobre la cual, sin duda, han de existir amplios consensos democráticos.

Cabe anotar adicionalmente que en la sentencia de la cual me aparto se hace un extenso recuento de los derechos de las víctimas a la luz de los tratados internacionales de derechos humanos que integran el bloque de constitucionalidad, e incluso adicionalmente se afirma que la ley guarda relación con otros derechos fundamentales tales como el derecho a la paz, el cual es definido como “*un derecho subjetivo de carácter fundamental*”, de lo cual se deduce aún con más fuerza el carácter iusfundamental de las materias reguladas por la Ley 975 de 2005.

Adicionalmente, el control previo de una ley que regule temas de esta trascendencia evita que sus posibles destinatarios puedan controvertir el momento exacto de entrada en vigencia de sus mandatos. De esta manera todas las discusiones sobre la supuesta aplicabilidad de aquellas disposiciones finalmente declaradas inexecutable, a las personas que presuntamente se desmovilizaron antes que la ley fuera sometida a control, en virtud del principio de favorabilidad, quedarían sin piso porque de acogerse la tesis que se trataba de una ley de carácter estatutario sus preceptos sólo entrarían en vigor una vez surtida la revisión del proyecto por parte de la Corte Constitucional.

Desconocer el carácter estatutario de la Ley 975 de 2005 no sólo ha originado problemas de carácter práctico, sino también ha obligado a un control parcial, casuístico, inconexo y descontextualizado de la ley, cuyos resultados distan mucho de convencer y que ha generado innecesarias controversias. En efecto, en la sentencia de la cual me aparto son declarados inexecutable expresiones contenidas en distintos artículos de la Ley sin que los argumentos expuestos para apoyar tal declaratoria de inexecutable logren dar razones convincentes para tal declaratoria, pues se emplean argumentos de conveniencia que distan de tener carácter constitucional, y en otras oportunidades las declaratorias de inexecutable se tornan inocuas por los argumentos expuestos en la propia sentencia.

Así, por ejemplo, la declaratoria de inexecutable de la expresión “*pero en ningún caso la pena*

alternativa podrá ser superior a la prevista en la presente ley” , contenida en el inciso 2° del artículo 20, enunciado que regula la acumulación de la pena alternativa con las condenas previas de los desmovilizados, se torna inocua, de conformidad con las razones expuestas en la sentencia, pues no tiene efecto alguno sobre el monto de la pena alternativa.

En definitiva, las desafortunadas controversias a las que dio lugar la decisión de la cual me aparto hubieran podido ser evitadas de haberse acogido la tesis que se trataba de una ley estatutaria, objeto de un control previo, carácter que a mi juicio tiene de manera indiscutible la Ley 975 de 2005 por la índole de las materias que trata.

Fecha ut supra.

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