

On “Tempered Complementarity”: The International Criminal Court and the Colombian Peace Process

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The 2016 peace deal between the Colombian government and FARC rebels was negotiated against the backdrop of the International Criminal Court’s (ICC) potential jurisdiction over, and ongoing preliminary examination of, war crimes and crimes against humanity committed during decades of civil war. The Final Accord creates a Special Jurisdiction for Peace (SJP), which would make some perpetrators of serious crimes eligible for relatively short sentences of “effective restriction of liberty and rights.” With critics condemning the SJP as a form of amnesty, the Colombia situation is not only a case study in the functioning of the Court’s complementarity mechanism, but the first serious test of the Court’s tolerance for alternative justice measures at the admissibility stage. This article frames the public pronouncements of the ICC’s Office of the Prosecutor (OTP) on the Colombian situation on the one hand, and the text of the peace accord on the other, as a dialogue. Analysis of this dialogue shows how the OTP has effectively leveraged the ICC’s potential jurisdiction to influence the content of the Final Accord, and has actively sought to maintain Colombia’s domestic jurisdiction, suggesting a new “tempered complementarity” approach.

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L'accord de paix conclu en 2016 entre le gouvernement colombien et les rebelles des Forces armées révolutionnaires de Colombie (FARC) a débouché sur ce que l'on appelle l'Accord final. Cet article traite de cet accord et de la Juridiction spéciale pour la paix (JSP), un organe de type judiciaire qui en est issu et qui constitue un mode substitutif d'exercice de la justice. Certains détracteurs condamnent la JSP, qui serait une forme d'amnistie selon eux, puisqu'elle rend des auteurs de crimes de guerre graves admissibles à des peines relativement courtes. Le présent article propose qu'il est erroné de formuler de telles critiques sans tenir compte du fait que l'accord de paix a été négocié dans le contexte de l'intervention potentielle de la Cour pénale internationale relativement aux crimes de guerre et aux crimes contre l'humanité commis pendant les décennies de guerre civile en Colombie, ainsi que de l'examen en cours de ces crimes. L'auteur suggère d'aborder la situation en Colombie non seulement comme une étude de cas faisant état du fonctionnement du mécanisme de complémentarité de la Cour, mais aussi comme un test sérieux de la tolérance de celle-ci à l'égard des mesures substitutives de justice. Elle met en parallèle et fait dialoguer les déclarations publiques du Bureau du procureur (BDP) de la Cour pénale internationale sur la situation en Colombie et le texte de l'accord de paix. L'analyse de ce dialogue montre comment le BDP a su tirer parti de la compétence potentielle de la Cour pénale internationale pour influencer le contenu de l'Accord final tout en cherchant activement à maintenir la compétence nationale de la Colombie, ce qui suggère une nouvelle approche en matière de « complémentarité tempérée ».

I. Introduction: A Colombian Peace in an International Legal Order

In August 2016, after a half-century of civil war, the Colombian government and the Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (FARC) guerrilla movement announced that peace talks in Havana, Cuba had yielded an agreement.¹ Through the implementation of a “Special Jurisdiction for Peace” (SJP), the proposed peace deal included a mechanism tailor-made to meet the FARC precondition that none of their fighters be subject to imprisonment.² The SJP effectively diverts cases from the ordinary criminal justice system and prescribes alternative penalties for those willing to confess their crimes, including war crimes and crimes against humanity. Due to the non-carceral nature of the alternative penalties, the SJP has been widely described as an amnesty and has attracted criticism from domestic and international human rights and criminal justice communities,³ despite the best efforts of the Colombian government to avoid this characterisation.⁴

The international community’s concerns cannot be lightly brushed aside: Colombia is a state party of the International Criminal Court (ICC)⁵ and, since 2004, international crimes alleged to have been committed on its territory have been the subject of a preliminary examination by the ICC’s Office of the Prosecutor (OTP).⁶ This examination has remained at the admissibility stage for many years, in which, having established that it has *prima facie* jurisdiction over the situation, the OTP works to ascertain whether genuine national proceedings exist that are sufficient to render cases at the ICC inadmissible. This assessment lies at the heart of the ICC’s complementarity regime, in which domestic proceedings are preferred and the ICC’s residual jurisdiction is asserted only in the absence of such proceedings.⁷ Thus, in order to assess

¹ *August Accord, Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, 24 August 2016* [August Accord]. As will be discussed below, the August Accord was ultimately rejected by plebiscite and was replaced by a final amended version announced in November 2016 (the “Final Accord”, *infra* note 33). Where appropriate, I refer to these peace agreements collectively as the “Accords”.

² For citation and context of SJP, see “Comprehensive System of Truth, Justice, Reparations and non-Repetition, including the Special Jurisdiction for Peace, and Commitment on Human Rights” (the SJP is part of the section on “Justice” (section 5.1.2) [SJP].

³ For example, see Human Rights Watch, “Colombia: Amend ‘Legal Framework for Peace’ Bill” (31 May 2012), online: *Human Rights Watch* <www.hrw.org/news/2012/05/31/colombia-amend-legal-framework-peace-bill> [perma.cc/J87W-XZMP].

⁴ For further analysis of the Colombian government’s attempts to avoid the characterization of the SJP as an amnesty, see the text accompanying notes 35 and 36.

⁵ Colombia’s instrument of accession can be found at: “Status of Treaties - Chapter XVIII Penal Matters 10. Rome Statute of the International Criminal Court” (24 September 2019), online: *United Nations Treaty Collection* <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en#EndDec> [perma.cc/YB35-HYJF].

⁶ “Preliminary Examinations - Colombia”, online: International Criminal Court <www.icc-cpi.int/colombia> [perma.cc/JGT6-C49C].

⁷ The complementary jurisdiction of the ICC is set out in article 17 of the *Rome Statute of the International*

whether those accused of international crimes in Colombia should be tried through the SJP or the ICC, it must first assess whether Colombia is living up to its obligation to prosecute perpetrators of international crimes.

While Colombia has had to grapple with its obligations under the Statute of the International Criminal Court (commonly referred to as the “Rome Statute”), so too must the ICC confront the reality of a domestic peace process that seems determined to succeed. As this article will set out, for a number of years, the OTP has followed developments on the ground, interjecting periodically in an apparent effort to avoid future complementarity issues. As the SJP’s implementation now rolls out, we can begin to assess whether this dialectic has produced a balance that both the ICC and Colombia can live with, and where that balance lies.

In this article, I assess the claim that the peace deal indeed offers a form of amnesty by taking a close look at the particulars of the SJP programme, as well as both the ICC’s and Colombia’s competing international criminal law obligations. Following this, I will consider the OTP’s expressed position on the SJP – both as it evolved during negotiations, in the Accords, and during the initial roll-out period – focusing in particular on the ICC’s potential assertion of its complementary jurisdiction in the context of current international legal tolerance for alternative justice procedures. Considering each as essential parts of a dialogue, I will look at the OTP statements and the text of the Colombian Accords to demonstrate how the Final Accord’s text has evolved in a manner responsive to the expressed concerns of the OTP. I will conclude by describing the OTP’s approach to the Colombian peace process as a form of what I term ‘tempered complementarity’; an approach that balances the Court’s mission to end impunity while demonstrating its obvious reluctance to interfere with domestic efforts at transitional justice.

II. The Special Jurisdiction for Peace in Context

The half-century old civil conflict in Colombia is a dangerous hydra with many heads. Government forces, right-wing paramilitaries, and leftist FARC and Ejército de Liberación Nacional (ELN) rebel movements (among others) have long competed for territorial control, with drug trafficking activities financially fuelling the conflict and attracting international intervention. While the conflict is complex, its devastating effects on the people of Colombia are plain: between 1958 and 2012, over 200,000 people were killed, of which over 80% were civilians, and more than 5.7 million were forcibly displaced.⁸ As has

Criminal Court, 17 July 1998, 2187 UNTS 38544 (entered into force 1 July 2002) [Rome Statute].

⁸ “Estadísticas del conflicto armado en Colombia” (2012), online: *Centro Nacional de Memoria Histórica* <www.centrodememoriahistorica.gov.co/micrositios/informeGeneral/estadisticas.html> [perma.cc/NHM5-GUMN].

been well documented by local and international NGOs and the ICC, horrific war crimes and crimes against humanity were committed by all sides in the civil war. For example, FARC notoriously engaged in hostage taking, the use of child soldiers and torturing and killing prisoners of war. For their part, government troops – under pressure to show progress in combating militias – killed thousands of civilians and then framed the murder victims as guerrillas, with these victims coming to be known as “false positives”.⁹

A. The Road to Havana

Efforts have been ongoing for many years to demobilise the armed groups. The precursor to the 2016 peace deal between the government and FARC was the Justice and Peace Law (JPL) passed by the Colombian Congress in 2005.¹⁰ The JPL sought to induce paramilitaries to lay down their arms by offering reduced sentences of 5 to 8 years’ imprisonment to those who cooperated with justice, fact-finding, and victim reparation processes. While the JPL was primarily directed at the right-wing paramilitaries, members of any armed group were eligible for a reduced sentence under the JPL.¹¹

At the time of its adoption, the JPL attracted significant opprobrium from within and outside Colombia,¹² with some even suggesting that it was a mere smokescreen to repel the threat of ICC jurisdiction.¹³ It was also the subject of a constitutional challenge, with the applicants alleging, among other things, that the scheme constituted a “system of impunity”¹⁴ that did not adequately meet Colombia’s obligations to provide an effective remedy to victims.¹⁵ In May 2006, the Colombian Constitutional Court upheld the law as constitutional as long as a specific interpretive framework was followed.¹⁶ A few months

⁹ This phenomenon has been well documented by Human Rights Watch, most recently in José Miguel Vivanco, “How the Perverse Incentives in ‘False Positives’ Worked” (12 November 2018), online: *Human Rights Watch* <www.hrw.org/news/2018/11/12/how-perverse-incentives-behind-false-positives-worked> [perma.cc/6G5B-LTD4]. As will be detailed below, “false positives” have been recognised and been a point of focus for the OTP preliminary examination in Colombia.

¹⁰ Law 975 of 2005.

¹¹ *Ibid.*

¹² For example, see: Human Rights Watch, “Colombia - Smoke and Mirrors: Colombia’s demobilization of paramilitary groups”, online: (2005) 17 Human Rights Watch 3(B) <www.hrw.org/reports/2005/colombia0805/> [perma.cc/4VLG-4UCC].

¹³ Jennifer S Easterday, “Deciding the Fate of Complementarity: A Colombian Case Study” (2009) 26 *Ariz J Intl & Comp L* 49 at 96.

¹⁴ Colombian Constitutional Court, Bogotá, 18 May 2006, *Gallon Giraldo and 104 others representing themselves or non-governmental organizations v Ministry of Interior and Justice and ors*, para III.1.2.1.-III.1.2.1.11, Oxford Reports on International Law (Colombia).

¹⁵ *Ibid* at paras III.1.2.1.1-III.1.2.1.11. Such obligations arise under the Colombian Constitution, the American Convention on Human Rights, and the Rome Statute of the International Criminal Court.

¹⁶ Colombian Constitutional Court, *supra* note 14. The specific interpretive conditions are most succinctly summarised (and translated) in “Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia” (1 August 2006), online: <www.cidh.org/countryrep/Colombia2006eng/Pronunciamento.8.1.06eng.htm> [perma.cc/6GZH-XDW2].

later, the Inter-American Commission on Human Rights (IACHR) issued a statement specifying that the JPL would meet Colombia's obligations under the American Convention on Human Rights (ACHR) if it strictly complied with the particular interpretive prescriptions of the Constitutional Court's judgment.¹⁷ These prescriptions included a requirement that perpetrators truthfully and comprehensively cooperate with investigations, as well as a recognition of the right of victims both to participate in all judicial procedures and to receive redress and assurances of non-repetition from the perpetrators.¹⁸

The Commission's view on the JPL can only be understood in the context of broader Inter-American jurisprudence on alternative justice mechanisms.¹⁹ Notably, the Inter-American Court of Human Rights (IACtHR) has invalidated amnesties for serious human rights violations due to their "manifest incompatibility" with the American Convention on Human Rights, including the right to an effective remedy.²⁰ This view of amnesty quickly trickled down into Colombian domestic law; when called upon to determine the validity of a legislative provision excluding the possibility of amnesty or pardon for certain crimes in 2002, the Constitutional Court upheld the provision, explicitly drawing upon the IACtHR's reasoning.²¹ The effect of this 2002 decision is the significant attenuation, by operation of Colombian law itself, of Colombia's sovereign right to grant mercy through the use of amnesties or pardons with respect to specific categories of crimes.²²

Despite efforts to implement the JPL in accordance with the Constitutional Court's clarifications, the program remained problematic. There were concerns that the incentives offered through the JPL might promote discretion rather than secure demobilisation, given the close ties between the paramilitaries

¹⁷ *Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia*, *supra* note 16 at para 58.

¹⁸ *Ibid.*

¹⁹ This jurisprudence is well-cannvassed in Christina Binder, "The Prohibition of Amnesties by the Inter-American Court of Human Rights" (2011) 12 *German LJ* 1203, online: <www.corteidh.or.cr/tablas/r26381.pdf> [perma.cc/KG9W-CDML]. For a more critical take, see also Louise Mallinder, "The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws" (2016) 65:3 *ICLQ* 645 [Mallinder].

²⁰ See, for example, a summary of the landmark decision of the Inter-American Court of Human Rights: Kathryn Benson "Barrios Altos v Peru, Case Summary", (14 March 2001), online (pdf): iachr.ils.edu/sites/default/files/iachr/Cases/Barrios_Altos_v_Peru/benson_barrios_altos_v_peru.pdf [perma.cc/JE7T-APBY].

²¹ Corte Constitucional [C.C.] [Constitutional Court], 28 August 2002, Colombian Constitutional Court, Sentencia C-695-02. Available at Corte Constitucional, "Sentencia C-695-02", (28 August 2002) at para 13, online: <www.corteconstitucional.gov.co/relatoria/2002/C-695-02.htm> [perma.cc/4JMU-2ASF]. This decision also ties in the obligations assumed by Colombia by its then-recent accession to the International Criminal Court.

²² For a discussion of amnesties as an expression of the sovereign right to mercy, see for example, Kieran McEvoy and Louise Mallinder, "Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy" (2012) 39:3 *JL & Soc'y* 410. Based on extensive research by Mallinder, the authors note that the frequency of amnesties has remained constant despite jurisprudential trends: *ibid* at 415.

and the government.²³ Moreover, there were complaints that the JPL did not seriously consider the needs and rights of the victims of the right-wing paramilitaries, many of whom happened to be left-wing political opponents of the government.²⁴ However, the JPL process ultimately faltered because it was ineffective.²⁵ Although dozens of paramilitary units were formally disbanded and about 50,000 individuals demobilised, a significant number formed new organisations (referred to in Colombia as “BACRIM”) and few individuals were prosecuted.²⁶

However, even if the JPL programme had been effective, it was never a process in which FARC was interested in engaging. FARC’s long-held precondition for demobilisation was that its fighters would not be imprisoned, so even an offer of reduced sentences was a non-starter.²⁷ In order to begin peace talks with FARC, a new framework would have to be designed, one that acknowledged the legal limits that had been established by the JPL experiment and the jurisprudence on amnesties.

²³ For example, see Human Rights Watch, “Smoke and Mirrors: Colombia’s demobilization of paramilitary groups” (31 July 2005), online: <www.hrw.org/report/2005/07/31/smoke-and-mirrors-colombias-demobilization-paramilitary-groups> [perma.cc/BM7Z-WZVV]. See also Felipe Gómez Isa, “Paramilitary Demobilisation in Colombia: Between Peace and Justice” (2008) *FRIDE* at 9, online: <www.tiempodelosderechos.es/seminarioJusticia/ColombiaFRIDE.pdf> [perma.cc/3TVY-YLQA]. Gomez notes that “[t]he discomfort of remembering can become unbearable for a state like Colombia, with its well-established ties with the emergence, development and consolidation of the paramilitary phenomenon...”. Finally, see also René Uruña, “Prosecutorial Politics: the ICC’s Influence in Colombian Peace Processes, 2003-2017” (2017) 11:1 *AJIL* 104 at 117.

²⁴ Gómez Isa, *supra* note 23 (generally).

²⁵ Kai Ambos provides a comprehensive assessment of the difficulties encountered in implementing the JPL scheme in Kai Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: an Inductive, Situation-based Approach* (Berlin: Springer, 2010). Uruña, *supra* note 23 at 115, suggests that it was the extradition of 14 paramilitary leaders to the US to face drug trafficking charges that may have signaled the end of the JPL process (as well as significantly circumscribing ICC influence in Colombia more generally).

²⁶ Republic of Colombia, *Justice and Peace Law: an experience of truth, justice and reparation*, Doc No RC/ST/PJ/M.1 of the Review Conference of the Rome Statute (1 June 2010) at 9. A good account of the travails of the JPL can be found in Isabella Bueno and Andrea Diaz Rozas, “Which Approach to Justice in Colombia under the Era of the ICC?” in Dawn L Rothe et al, *The Realities of International Criminal Justice* (Leiden: Martinus Nijhoff Publishers, 2013) at 211-47. According to Uruña, *supra* note 23 at 110 footnote 37, citing statistics published by the Colombian prosecutor, of 4,408 demobilised AUC militants (the Autodefensas Unidas de Colombia, a coalition of regional paramilitary groups), only 35 sentences have been passed. By the time of its 2017 Report on Preliminary Examinations, the OTP had received information on 63 judgments issued by Colombian courts on matters that could fall under ICC jurisdiction, including JPL proceedings: Office of the Prosecutor – International Criminal Court, “Report of Preliminary Examination Activities 2017” (4 December 2017) at para 130, online (pdf): <www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf> [perma.cc/ULV4-NVTT].

²⁷ For example, see Juan Forero & José de Córbona, “Colombia, FARC Rebel Group Reach Breakthrough Agreement in Peace Talks” (23 September 2015), online: *Wall Street Journal* <www.wsj.com/articles/colombia-farc-guerrillas-make-key-advance-in-peace-talks-1443027656> [perma.cc/FK2H-3Q99] noting that “FARC commanders frequently said they had committed no crimes and had no intention of negotiating a peace pact that would include prison time.”

B. The Legal Framework for Peace

In June 2012, the Colombian Senate passed the Legal Framework for Peace (LFP), a constitutional amendment designed to open up space for transitional justice in the Colombian legal system.²⁸ Just as the JPL had been primarily targeted at the demobilisation of paramilitaries, the LFP was aimed at encouraging FARC and ELN guerrillas to stand down.

Under the LFP, a system of “structured selectivity” was created that prioritised the investigation and prosecution of those individuals primarily responsible for the gravest crimes; in return for their demobilisation, criminal investigations against lower-level perpetrators would be delayed or dropped.²⁹ All of those prosecuted under the LFP would be eligible for reduced, alternative, or even suspended sentences (through what would later be known as the Special Jurisdiction for Peace).

Not surprisingly, the LFP was the subject of significant criticism, with some describing it as a form of “disguised amnesty”.³⁰ However, as negotiations with FARC had ended in failure in 2002 and 2007, it seems unlikely that an agreement could have been reached without the adoption of the LFP. A legal challenge of the LFP proved unsuccessful, with the Constitutional Court upholding the LFP on the basis that “to reach stable and lasting peace, it is legitimate to adopt transitional justice measures like the mechanisms of selection and ranking”.³¹

C. The Special Jurisdiction for Peace

The LFP laid the groundwork for a first deal between the Colombian government and FARC, announced on August 24, 2016 (the “August Accord”), which was to be approved by a popular plebiscite. The August Accord addressed a number of outstanding issues – including rural land reform,

²⁸ The text of the Legal Framework for Peace (el Marco jurídico para la paz) is found in Acto Legislativo - No 1 (31 July 2012), online at: <www.altocomisionadoparalapaz.gov.co/desarrollos-legislativos-paz/marco-juridico-para-la-paz/Documentos%20compartidos/Acto-Legislativo-N-01-del-31-de-julio-de-2012-4.pdf> [perma.cc/WD36-CTXV] [LFP].

²⁹ The LFP also included other measures, including the integration of former FARC guerrillas into the political sphere, but those measures, and the controversies surrounding lustration in international law, are beyond the scope of this article.

³⁰ For example, see Human Rights Watch, “Colombia: Amend ‘Legal Framework for Peace’ Bill”, *supra* note 3. See also *El Universal*, “Congreso de Colombia aprueba reforma para eventual diálogo con guerrilleros” (14 June 2012), online: *El Universal* <www.eluniversal.com/internacional/120614/congreso-de-colombia-aprueba-reforma-para-eventual-dialogo-con-guerril-imp> [perma.cc/GGU2-P5CR]. Notably, this article quotes a government minister as specifically averring that the LFP complied with ICC and Inter-American standards.

³¹ Helen Murphy, “Colombia’s high court rules FARC peace talks law constitutional” (29 August 2013), online: *Reuters* <www.reuters.com/article/us-colombia-rebels-law-idUSBRE97S06C20130829> [perma.cc/JBM9-J9UL]. As Urueña details, *supra* note 23 at 118, the OTP was an active interlocutor during the constitutional case, writing to the President of the Constitutional Court, expressing concern about both case prioritisation and the possibility of suspended sentences.

narco-trafficking and political participation. The crucial part of the agreement, for the purpose of this article, is Part 5, on the Victims of the Conflict and the establishment of the “Sistema Integral de Verdad, Justicia, Reparación y No Repetición (SIVJRNR), incluyendo la Jurisdicción Especial Para la Paz (Special Jurisdiction for Peace, or SJP); y Compromiso sobre Derechos Humanos”.³² The SIVJRNR is, briefly put, the overall transitional justice scheme of the peace agreement, of which the SJP is the justice process mechanism.

The broad, and often competing, objectives of the SIVJRNR were a testament to the complex dilemmas of doing justice in the course of peacemaking: protecting victims’ rights, including satisfying their right to justice; the establishment of truth for Colombian society; contributing to the achievement of a stable and lasting peace; and achieving all of this while providing legal certainty for all those who participated directly or indirectly in the armed conflict, including those who engaged in grave violations of international humanitarian and human rights law.³³ While diverting cases from the ordinary courts, the Special Jurisdiction for Peace was set up to function very much like a court, with guarantees of due process and independent magistrates.³⁴

Perhaps in an effort to stave off anticipated criticism, the Accord endeavoured to explicitly articulate the parties’ position on amnesty. The Accord provided amnesty for political crimes, noting that international humanitarian law encourages parties of non-international armed conflicts to extend as broad an amnesty as possible at the conclusion of hostilities.³⁵ On the other hand, in recognition of international obligations, the Accord explicitly excluded amnesty for crimes included in the Rome Statute and other enumerated serious human rights violations and systematic violations of international humanitarian law.³⁶ However, while perpetrators of such crimes were not eligible for amnesty, they could be tried under the SJP and subject to the relatively lenient sanctions set out at section 5.1.2(III)60 of the Accord.³⁷ Specifically, those who provided information and accepted responsibility for their actions would be eligible for adjudication under the SJP, regardless of the severity of their crimes (including Rome Statute crimes).³⁸ Any crime

³² SJP, *supra* note 2.

³³ August Accord, *supra* note 1, s 5.1.2 (I) at para 2. This provision is duplicated in the final accord announced in November: *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, 12 November 2016 online (pdf): <especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf> [perma.cc/3GLC-48F7] [Final Accord].

³⁴ August Accord, *supra* note 1; Final Accord, *supra* note 33, s 5.1.2 (I) at para 14.

³⁵ See August Accord, *supra* note 1; Final Accord, *supra* note 33, s 5.1.2 (II) at paras 23, 38-39. The Accord makes reference to Article 6(5) of Additional Protocol II of the Geneva Conventions.

³⁶ The Accord makes specific reference to the applicability of international human rights law and international humanitarian law, and when the Accord was renegotiated in October-November 2016, explicit reference was also made to international criminal law: August Accord, *supra* note 1; and Final Accord, *supra* note 33, s 5.1.2 (II) at paras 19, 25, and 40.

³⁷ August Accord, *supra* note 1.

³⁸ August Accord, *supra* note 1; Final Accord, *supra* note 33, s 5.1.2(I) at para 13.

sentenced under the SJP was subject to a sentence of no less than 5 years, but no more than 8 years, of “effective restriction of liberty and rights” (such as freedom of residence and movement), rather than incarceration, subject to guarantees of non-repetition.³⁹

It is widely believed that the combination of lenient sanctions and vague language like “effective restriction of liberty”, which tended to attract epithets like “disguised amnesty”, caused the August Accord plebiscite to narrowly fail in October 2016.⁴⁰ When the negotiators consulted civil society in the wake of the failed plebiscite, harsher sentences were among the amendments sought.⁴¹

While the range of sentences ultimately remained the same in the Final Accord, the amended Accord provided a list of specific criteria for magistrates to consider when sentencing offenders.⁴² These criteria included the specification of the maximum area for the restricted zones of liberty, and a requirement to exercise significant supervision over the execution of the sentence. Nonetheless, the Final Accord continued to reflect FARC’s demand that the effective restriction of liberty not include imprisonment. For some critics of the SJP, this was tantamount to Colombia providing *de facto* amnesties to alleged perpetrators of international crimes, violating its legal obligations, including those arising from the Rome Statute.⁴³

III. The International Criminal Court, Amnesty and Alternative Justice

In order to assess this critique of the Final Accord, it is useful to identify the general legal position of the ICC on amnesties and alternative justice mechanisms. Questions about the legitimacy of amnesty in the face of mass atrocity have arisen since the origins of the Court in the anti-impunity movement, a movement inspired by the infamous amnesty laws passed in Chile, Argentina and Uruguay in the 1970s and 80s.⁴⁴ These laws provided

³⁹ August Accord, *supra* note 1; Final Accord, *supra* note 33, s 5.1.2 (III) at para 60.

⁴⁰ For example, see BBC News, “Colombia referendum: Voters reject FARC peace deal” (3 October 2016), online: *BBC News* <www.bbc.com/news/world-latin-america-37537252> [perma.cc/NM7N-F6D8].

⁴¹ International Crisis Group, “In the Shadow of ‘No’: Peace after Colombia’s Plebiscite” (31 January 2017) at 4, online (pdf): <d2071andvip0wj.cloudfront.net/060-in-the-shadow-of-no-peace-after-colombia-s-plebiscite.pdf> [perma.cc/BT5A-5232].

⁴² Final Accord, *supra* note 33, s 5.1.2 (III) at para 60.

⁴³ For example, see Human Rights Watch, “Human Rights Watch Analysis of Colombia-FARC Agreement” (21 December 2015), online: *Human Rights Watch* <www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement> [perma.cc/SVU4-FF9E].

⁴⁴ For a contemporaneous account of the anti-impunity movement, see the “Introduction” of Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press, 1995) at 3-6. In retrospect, Louise Mallinder catalogues the evolution of attitudes towards amnesties in South America in Mallinder, *supra* note 19. As Mallinder notes, one should be cautious in assuming that the practice of amnesty in South America is a thing of the past; in this respect, see also BBC News,

blanket amnesty, and thus are markedly different from the conditional, individualised diversion in Colombia's Final Accord. Nonetheless, the debate about whether any form of amnesty can adequately provide accountability for atrocity crimes is an important question of principle.

Both defenders and critics of alternative justice mechanisms are prone to mischaracterising the issue of amnesties. For example, in 2005, Amnesty International sent an open letter to the Prosecutor of the ICC stating that amnesty "and similar measures of impunity" for genocide, crimes against humanity and war crimes were incompatible with the objectives of the ICC,⁴⁵ implying equivalence between amnesty and impunity. Such equivalence is based on the premise that all amnesties are created equal, a premise profoundly challenged by the South African truth and reconciliation process, one that has loomed large over all of the peace processes that have followed.⁴⁶

Thus, as a starting point, it is not particularly constructive to think about amnesties as a specific legal form. Amnesties are a varied breed: they may be explicit or disguised, intentional acts of grace or mere opportunism, unconditional or highly structured bargains. It is not always easy to know whether a particular mechanism is an amnesty or not; and whether or not a mechanism bears the label of amnesty is not always decisive. Amnesty tends to be described in the negative: as the antithesis of ordinary, individualised criminal prosecution, in which a convicted person is subject to a sentence proportionate to the underlying crime. Under that framework, the grave crimes contemplated by international criminal law would ordinarily attract significant carceral sentences, leading to a starting presumption that amnesties are conceptually incompatible with international criminal law.⁴⁷

A. The "Creative Ambiguity" of the Rome Statute

The Rome Statute, unlike the statutes of some other international criminal tribunals, is silent on the question of amnesties and the historical record indicates that this omission was deliberate.⁴⁸ The position of the Rome Statute

"Venezuela Crisis: Guaidó hints at 'amnesty' for Maduro" (24 January 2019) online: *BBC News* <www.bbc.com/news/world-latin-america-46997555> [perma.cc/XEG4-QW2V].

⁴⁵ Amnesty International, "Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice" (17 June 2005), online: *Amnesty International* <www.amnesty.org/download/Documents/84000/ior400232005en.pdf> [perma.cc/EL9L-PDLK].

⁴⁶ Kai Ambos advocates a bifurcated approach to amnesties, one that distinguishes between blanket amnesties and conditional/accountable ones: Kai Ambos, "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC" in Kai Ambos et al (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development The Nuremberg Declaration on Peace and Justice* (Berlin: Springer-Verlag, 2009) at 54-67.

⁴⁷ This view will be discussed in detail in "The Incompatibility of Amnesties" section, *infra*.

⁴⁸ Notably, cf Article 10 of the *Statute of the Special Court of Sierra Leone*, United Nations and Sierra Leone, 16 January 2002 (entered into force 12 April 2002); and *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, Article 40. See, for example: Bos, Adriaan, "From the International Law Commission to the Rome Conference

on the issue of amnesties has been described as one of “creative ambiguity.”⁴⁹ This has largely been interpreted by commentators in a number of ways, largely falling into three camps: (i) amnesties are incompatible with the Rome Statute, given the objective of the ICC to end impunity and duties under international law to prosecute core crimes;⁵⁰ (ii) the Statute’s silence permits discretion, as exercised by the Prosecutor or the Trial Chamber, to consider domestic amnesties when deciding whether to proceed in a particular case;⁵¹ and (iii) choices made by domestic authorities to grant amnesty have no legal effect on the Court, and therefore, can simply be ignored.⁵² Each of these interpretations can be supported by international law and the wording of the Rome Statute itself.⁵³

There are some amnesty opponents who assert that the question was largely resolved at the ICC’s Review Conference in Kampala in 2010; if this is the case, it is not at all evident from the historical record. The debate on amnesty and alternative justice mechanisms was certainly ongoing at a “[s]tocktaking” roundtable on Peace and Justice held on June 2, 2010.⁵⁴

(1994-1998)” in Antonio Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary* 1 (2002) 35 at 57; Michael Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court” (1999) 32:3 Cornell Intl LJ 507 at 508; Ruth Wedgwood, “The International Criminal Court: An American View” (1999) 10 Eur J Intl L 93 at 95; and Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court” (2003) 14(3) Eur J Intl L 481 at 483.

⁴⁹ The President of the Rome Conference, and later President of the ICC, Philippe Kirsch, is quoted as saying that the adopted wording reflects “creative ambiguity” which could potentially allow the prosecutor and judges of the ICC to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court: Scharf, *supra* note 48 at 522.

⁵⁰ See section below on the “The Incompatibility of Amnesties” for a review of this literature.

⁵¹ For example, Richard J Goldstone and Nicole Fritz, “‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers” (2000) 13:3 Leiden J Intl L 655 at 662; and Kenneth A Rodman, “Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court” (2009) 22:1 Leiden J Intl L 99 at 104. An excellent summary of the debate, with some proposed guidelines for interpretation, can be found in Carsen Stahn, “Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court” (2005) 3:3 Journal of International Criminal Justice 695.

⁵² Max Pensky, “Amnesty on trial: impunity, accountability, and the norms of international law” (2008) 1 Ethics & Global Politics 1 at 14. Such a position might be inspired by some of the reasoning in the judgment of *Prosecutor v Kallon & Kamara* (2004) (SCSL Appeals Chamber, Sierra Leone), online (pdf): <www.worldcourts.com/scsl/eng/decisions/2004.03.13_Prosecutor_v_Kallon_Norman_Kamara.pdf> [perma.cc/DL8J-8LGG] [*Kallon*]. However, the SCSL Appeals Chamber was operating under a different statutory framework (the *SCSL Statute*, which was not silent on the issue of amnesties) and substantially different facts.

⁵³ Those portions of the Rome Statute that have most often been the subject of relevant scrutiny are Article 16 (Security Council deferral), Article 17 (complementarity), Article 20 (*ne bis in idem*), Article 53, subparagraphs 1(c) and 2(c) (prosecutorial discretion to consider whether an investigation is in the interests of justice): see for example, Claudia Angermaier, “The ICC and Amnesty: Can the Court Accommodate a Model of Restorative Justice?” (2004) 1:1 Eyes on the ICC 131 at 143-45; Jessica Gavron, “Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court” (2002) 51:1 ICLQ 91 at 108-11; Goldstone & Fritz, *supra* note 51 at 660-63; Scharf, *supra* note 48 at 521-26.

⁵⁴ International Criminal Court, *Annex VB: Stocktaking of International Criminal Justice, Peace and Justice, Moderator’s Summary* (2010), online (pdf): <asp.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.V.b-ENG.pdf> [perma.cc/RUN7-5A5J] [*Moderator’s Summary*].

However, by this time, the issue was no longer hypothetical as it was an ongoing issue in Colombia, with papers having been circulated about the legality and effectiveness of the JPL process. Moreover, it had also come up in a case that had moved well beyond the admissibility phase, the situation in Uganda.

Barney Afako was one of the participants at the stocktaking roundtable. Between 2006 and 2008, he had acted as the Legal Advisor to the Chief Mediator in the Juba Peace Talks between the Ugandan government and the Lord's Resistance Army (LRA). After 17 years of bloody civil war in Northern Uganda, the government of Uganda had "self-referred" the conflict to the ICC in 2004. By the time that the Juba talks were convened two years later, the ICC had issued indictments against several members of the LRA, including its leader, Joseph Kony. At the Peace Talks, there was a tremendous appetite for an end to the conflict and Ugandan President Museveni had expressed a willingness to offer the leaders of the LRA guarantees of safety in return for peace.⁵⁵ However, the Ugandan government's ability to bargain was significantly limited by the extant indictments, as any domestic failure to prosecute the LRA leaders under ICC indictment would trigger the ICC's complementary jurisdiction. Ultimately, the LRA refused to sign a peace deal. Two years later at the roundtable, Afako expressed his view that the ICC arrest warrants "had played a role in the LRA leadership's decision not to sign the Juba agreement."⁵⁶ This account demonstrates the potential costs of excluding amnesty from the bargaining process, albeit without including the possibility of a countervailing benefit.

Ultimately, the 2010 Kampala Review Conference did not result in a formal resolution regarding the ICC's 'creative ambiguity', despite all of the jurisprudential pieces for and against an explicit prohibition of amnesties in the Rome Statute being on the table and discussed. Nonetheless (or perhaps as a result), pressure is mounting, as if the legal standard might be constructed through repetition and sheer force of will. Amnesties have certainly been problematic in the context of international human rights law, even beyond the Inter-American system, and there has been resistance to amnesties that cover international crimes, which are now impermissible under United Nations policy.⁵⁷ The passion for criminal prosecution is a rather surprising turn for

⁵⁵ Line Engbo Gissel, "Legitimising the Juba Peace Agreement on Accountability and Reconciliation: the International Criminal Court as a third-party actor?" (2017) 11:2 *J Eastern African Stud* 367 at 371.

⁵⁶ *Moderator's Summary*, *supra* note 54 at para 15.

⁵⁷ In 2009, the Office of the United Nations High Commissioner for Human Rights (OHCHR) released a highly influential policy paper describing the limited availability of amnesties in transitional settings: *Rule-of-Law Tools for Post-Conflict States: Amnesties*, OHCHR, 2009, UN Doc HR/PUB/09/02. While this does not have a specific legal effect, it is recognition of an emerging norm, and has the practical effect of preventing the inclusion of amnesties for international crimes in any peace negotiations in which the UN participates.

those accustomed to the traditional alignment of human rights concerns with the treatment of criminal justice defendants.⁵⁸ Karen Engle has chronicled this development in detail, noting the particular irony of Amnesty International's anti-amnesty position.⁵⁹

In the context of the SJP, I suggest that the term 'amnesty' acts as something of a placeholder, a linguistic shorthand for a conceptual threshold beyond which alternative justice mechanisms cease to offer the kind of accountability required by the international criminal justice system. In the debate over whether the SJP suffices to repel the ICC's complementary jurisdiction, whether the specific label of amnesty 'sticks' to the SJP matters less than whether it is fair to say that the SJP is incompatible with the fundamental goals of international criminal justice. As such, it is worth exploring the extent to which alternative mechanisms, and the type of amnesty they provide, are incompatible with the Rome Statute.

B. The Incompatibility of Amnesties

An established rule for interpreting international treaties requires that they be interpreted "in light of their object and purpose".⁶⁰ There is some debate about whether the Rome Statute should be read as a treaty.⁶¹ Regardless, it does not seem possible for the OTP to determine its legal duties absent a purposive understanding of two defining characteristics of the Court: its complementary jurisdiction and its objective to "put an end to impunity".⁶² While each will be discussed in turn, it is important to recognise that these characteristics are meant to operate in tandem, both with each other and with national proceedings, to provide a seamless and comprehensive criminal law. However, their seamlessness may be tempered in a country like Colombia, where thousands of people have participated in the commission of atrocities

⁵⁸ Karen Engle, "Anti-Impunity and the Turn to Criminal Law in Human Rights" (2015) 100:5 Cornell L Rev 1069 [Engle 2015]; as well as Karen Engle, "A Genealogy of the Criminal Turn" in Karen Engle et al, *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016) [Engle 2016].

⁵⁹ Engle (2015), *supra* note 58 at 1072. See also Isabella Bueno & Andrea Diaz Rozas, "Which Approach to Justice in Dawn L. Rothe et al, eds, *The Realities of International Criminal Justice* (Boston: Martinus Nijhoff Publishers, 2013) at 211; writing specifically about Colombia, Bueno and Rojas express concern that transitional justice has been "tainted by a legalistic vision of justice" (at 216), and that the ICC's potential jurisdiction has effectively limited the possibility of restorative justice (at 232).

⁶⁰ Article 33, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [VCLT].

⁶¹ See, for example, Dov Jacobs, "International Criminal Law" in Jorg Kammerhofer & Jean D'Aspremont, eds, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press, 2014) at 451-474, in which Jacobs argues, contrary to the prevailing assumption, that VCLT interpretation is not appropriate with respect to the Rome Statute because it is incompatible with the principle of legality in international criminal law. While the debate is intriguing, it need not be resolved here as, in my view, the question of the extent to which amnesties are acceptable under the Rome Statute are different in kind from the types of interpretive dilemmas raised by Jacobs.

⁶² Rome Statute, *supra* note 7 at 1.

over decades, and such atrocities could continue indefinitely in the absence of a negotiated settlement.

i. The Complementarity Regime

Unlike its immediate predecessors, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the ICC's jurisdiction is specifically intended not to supplant domestic criminal jurisdiction over international crimes. States are encouraged to assert their jurisdiction, with the ICC only filling the so-called impunity gap when a state fails to act. In this respect, the Court's jurisdiction is complementary to the domestic jurisdiction of the affected state(s). The structure of complementarity is derived from Article 17 of the Rome Statute, which states that cases are inadmissible before the ICC if they have been investigated or prosecuted by a state having jurisdiction, unless that state is "unwilling or unable genuinely" to investigate or prosecute.⁶³ This is considered the classical view of complementarity, in which the threat of the ICC's potential jurisdiction incentivises states to fulfill their duties under the Rome Statute.⁶⁴

But what happens when a state acts, but chooses not to follow a prosecutorial or, as is the case with the Colombian SJP, a carceral path? To what extent can the ICC afford that state a 'margin of appreciation' to determine its own approach, and at what point will it identify a gap and decide that it must intervene? This debate is most often fought at its extremes. At one end, there is an absolute insistence that any action that falls short of criminal prosecution and that does not result in imprisonment upon conviction cannot trigger deference by the Court. This conclusion is, admittedly, largely supported by the language of Article 17 of the Rome Statute.⁶⁵ At the other extreme, there is the assertion that whatever process is chosen by local authorities should be respected, without further debate or explanation. In 1999, Daniel Nsereko, a former judge of the ICC from Uganda, said that, where a state has decided not to prosecute and grant amnesty, the state:

[D]oes not have to disclose the reasons for declining to prosecute. But if it does, and says that it has done so in the interests of peace and national reconciliation, the Court will have to listen sympathetically. It should not dismiss out of hand the State's efforts at national reconciliation as unwillingness or inability to prosecute. Peace and national reconciliation are legitimate goals for any country to pursue.⁶⁶

⁶³ *Ibid*, art 17(1).

⁶⁴ Carsen Stahn, "Taking Complementarity Seriously" in Carsen Stahn and Mohamed M El Zeidy, eds, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011) at 251.

⁶⁵ Rome Statute, *supra* note 7, art 17.

⁶⁶ Daniel D Ntanda Nsereko, "The International Criminal Court: Jurisdictional and Related Issues" (1999) 10:1 *Crim LF* 87 at 119.

While suggesting quite a wide margin of appreciation, Nsereko surely does not advocate for an unbridled freedom of national choice. By acceding to the Rome Statute, states have constrained their sovereignty and accepted the ICC as having primacy in determining whether state conduct meets the standard necessary to preclude the ICC's complementary jurisdiction.⁶⁷

While the ICC has primacy in assessing jurisdiction, it does not have, or seek to aggressively assert, jurisdiction in Colombia. From the earliest days of the Court, the OTP has pursued an explicit policy of "positive complementarity", in which it actively encourages and even assists states in bringing domestic proceedings.⁶⁸ In justifying this policy, former Chief Prosecutor Luis Moreno-Ocampo said that, as a court of last resort, the ICC should handle relatively few cases.⁶⁹ Other commentators have suggested that positive complementarity is less of a policy than a mask, covering the ICC's institutional weaknesses and limited capacity.⁷⁰ In any event, a certain reluctance to intervene is the unspoken consequence of positive complementarity, and is the affective dimension of what I term "tempered complementarity". Whether this reluctance is motivated by a commitment to the policy of positive complementarity, a "qualified deference" (as advocated by commentators like Mark Drumbl) or a realistic assessment of institutional constraints, such reluctance has been demonstrated in the OTP's approach to Colombia.⁷¹

In assessing complementarity in Colombia, it is apparent that Colombia believes that the SJP includes judicial mechanisms that meet the standard of criminal investigation and prosecution. Rather, domestic opposition and OTP concern has been focused on punishment. Through the 2012 LFP, Colombia may

⁶⁷ Philippe Sands, "After Pinochet: the role of national courts" in Philippe Sands, ed, *From Nuremberg to the Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003) at 80; see also Gerhard Hafner et al, "A Response to the American View as Presented by Ruth Wedgwood" (1999) 10 *Eur J Intl L* 108 at 113.

⁶⁸ International Criminal Court - Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor* (September 2003) at 3, online (pdf): <www.icc-cpi.int> [perma.cc/9YHU-WGMT] [OTP 2003 *Policy Paper*]. This paper first sketches out what will become its policy of "positive complementarity", a policy that would find its way into the OTP's Strategic Plan: International Criminal Court - Office of the Prosecutor, *Prosecutorial Strategy 2009-2012* (1 February 2010) at para 15, online (pdf): <www.icc-cpi.int> [perma.cc/R4VQ-D48K]. An overview of the OTP's strategy is outlined in "The Strategy of Positive Complementarity" in Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Cham: Springer, 2015).

⁶⁹ Luis Moreno-Ocampo, "A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor" in Carsen Stahn and Mohamed M El Zeidy, eds, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011) at 21-22.

⁷⁰ Stahn, *supra* note 64 at 235; Nichols, *supra* note 68 at 29. On a more positive note, William Burke-White has argued that described an approach of "proactive complementarity" is the most promising way forward if the ICC is to meet its objective of ending impunity: William W Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" (2008) 49 *Harv Intl LJ* 53.

⁷¹ Mark A Drumbl, "Policy through Complementarity: the Atrocity Trial as Justice" in Stahn and El Zeidy, *supra* note 69 at 222-232.

have created greater domestic constitutional space, but it remains to be seen how much forbearance (or qualified deference) it can expect internationally as the OTP assesses domestic mechanisms that, by removing carceral sentences even in the most serious cases, certainly tests the boundaries of impunity.

ii. *The ICC's Goal to End Impunity*

Given the centrality of the ICC's anti-impunity mission, it is surprising that the scholarly literature on the Court tends to leave the term 'impunity' largely undefined. Impunity in this context cannot literally mean what the etymology of the word suggests, the absence of punishment, as punishment is never assured in a fair trial in which an accused enjoys a presumption of innocence. Rather, some have argued that the Rome Statute must be interpreted in light of an existing international legal duty to prosecute core crimes.⁷² If there exists such an obligation, the ICC cannot defer to a regime that fails to prosecute perpetrators.

There is considerable debate as to whether the duty to prosecute core crimes has fully crystallised, given the widespread and continuous state practice of amnesties.⁷³ Moreover, any asserted duty to prosecute must surely acknowledge at least two practical limitations. First of all, states in a period of post-civil conflict transition may simply be too fragile to launch a series of what may be perceived as politically-motivated prosecutions.⁷⁴ Secondly, in situations such as Colombia, where the civil war has involved hundreds of thousands of perpetrators at all levels, it is impossible, practically speaking, to prosecute all alleged perpetrators. Thus, there will necessarily be a degree of selectivity injected into the duty to prosecute. This is implicitly accepted

⁷² This literature on the relationship between duty to prosecute and amnesties is well canvassed in Mark Freeman & Max Pensky, "The Amnesty Controversy in International Law" in Francesca Lessa & Leigh A Payne, eds, *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge: Cambridge University Press, 2012). More specifically on the impermissibility of amnesties under the Rome Statute, see Michael Kourabas, "A Vienna Convention Interpretation of the Interests of Justice Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements, and the Situation in Northern Uganda: A Great Qualitative Step forward, or a Normative Retreat?" (2007) 14:1 UC Davis J Intl L & Pol'y 59.

⁷³ See, for example: Louise Mallinder, *Amnesty, Human Rights and Political Transitions* (Oxford: Hart, 2008) at 9, noting, in particular the continued practice, and increased frequency, of introducing amnesties for all types of crimes. Professor Mallinder adds that the fact that these amnesties have been actively introduced, instead of simply existing *de facto*, may in fact be more indicative of state practice. See also the more recent work of McEvoy and Mallinder, *supra* note 22.

⁷⁴ Indeed, this seems to be true even of states that seems to be considerably less fragile: there was a widespread hope in the human rights community that, upon his taking office in January 2009, then-US President Barack Obama would seek to investigate and prosecute what appeared to be fairly clear cases of torture by US officials. Torture is one of the instances in which there is an unambiguous international law requirement to prosecute, both pursuant to the Convention Against Torture (to which the US was then, and remains, a party) and customary international law: *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* (2012) (International Court of Justice), online (pdf): <www.icj-cij.org/files/case-related/144/17086.pdf> [perma.cc/6MJL-7JYX]. And yet, the Obama administration declined to do so precisely because it would be seen as politically divisive.

by the OTP in its own case selection policy, which prioritises those deemed most responsible for the most serious crimes.⁷⁵ Even if all perpetrators could somehow be prosecuted – and there are statements by the OTP that imply that it would be the duty of states to do this⁷⁶ – it is a significant imposition for the OTP to insist that a state in transition choose to allocate its resources to a vast number of individualised criminal proceedings, undoubtedly at the expense of other important reconstruction projects.⁷⁷

Moreover, even those commentators who have most strenuously advocated a legal duty to prosecute crimes against humanity make some exception for the South African TRC process: although they may disapprove of amnesties generally, they respect and often – perhaps reluctantly – applaud the South African process. Former Secretary-General of the United Nations Kofi Annan, while pioneering the position that amnesties are unacceptable for international crimes,⁷⁸ has nonetheless argued that international prosecutions would be unthinkable for South Africa:

No one should imagine that [the ICC] would apply to a case like South Africa's, where the régime and the conflict which caused the crimes have come to an end, and the victims have inherited power.

It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.⁷⁹

Is it still inconceivable that the Court would substitute its judgment for that of a country in transition? Recently, commentators perceiving the trend in international law against amnesty have expressed doubt that the South African process would survive ICC scrutiny today.⁸⁰ In other words, if the South

⁷⁵ International Criminal Court - Office of the Prosecutor, *Paper on Case Selection and Prioritisation* (15 September 2016), online (pdf): <www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> [perma.cc/ZJ72-2CGQ].

⁷⁶ *The OTP's 2003 Policy Paper*, *supra* note 68 at 3 (expressing the intention that states (not necessarily the territorial state) would fill any resulting "impunity gap" by prosecuting lower-level offenders themselves).

⁷⁷ Indeed, Stahn argues that domestic and international prosecutions targeted at the most responsible are compatible with the objectives of the Rome Statute: Stahn, *supra* note 51 at 707.

⁷⁸ This was the position taken by the Secretary-General's envoy at the Lomé Peace negotiations in Sierra Leone in 1999; see *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, UN Doc S/1999/836 (30 July 1999). This was further formalized in his 2004 report to the Security Council titled *The rule of law and transitional justice in conflict and post-conflict societies*, UN Doc S/2004/616 (23 August 2004) in which he sets out criteria for peace negotiations that include the rejection of any amnesty for core crimes and the stipulation that any such existing amnesty shall not be a bar before any "United Nations-created or assisted court".

⁷⁹ Speech at Witwatersrand University, 1 September 1998, cited in, *inter alia*, Charles Villa-Vicencio, "Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet" (2000) 49 *Emory LJ* 205-22 at 222.

⁸⁰ DM Davis, "The South African Truth Commission and the AZAPO Case: A Reflection Almost Two Decades Later" in Karen Engle et al, *Anti-Impunity and the Human Rights Agenda* (Cambridge: Cambridge University Press, 2016) at 142. Davis and others frequently cite Juan E Méndez, "Foreword" in Francesca Lessa and Leigh A Payne (eds), *Amnesty in the Age of Human Rights Accountability* (Cambridge: Cambridge University Press, 2012) at xxiii. Notably, Méndez himself goes no further than to say that "the rapid evolution of

African amnesty came to be the subject of an OTP admissibility assessment – like the Colombian SJP is today – the OTP might take the position that those amnesty hearings did not suffice to repel the complementary jurisdiction of the ICC.

Nonetheless, the special conceptual place that tends to be reserved for the South African scheme can serve to illuminate the animating concerns of the international criminal justice project. While impunity itself may not be well-defined, the condemnation of impunity emphasises the promise of accountability, which includes a transition to the rule of law, both in the (re) assertion of legal norms and in breaking the cycle of retributive violence and, in turn, creating the conditions for sustainable peace.⁸¹ Understood as an antonym for accountability, impunity is a failure to act, to ignore that a crime has been committed.⁸² Impunity of this kind fails to acknowledge that there is anything for which an accounting is required, and thereby implies a complete lack of regard for the rights or equal dignity of the victims.⁸³

The tacit approval of the South African approach suggests that the crucial distinction between acceptable and unacceptable justice mechanisms is not one of form, but of substance, between mechanisms that hold perpetrators accountable and those that do not. Such a model tries to distinguish between the *de facto* impunity enjoyed by those for whom prosecution is never contemplated, and the conscious choice of an alternative path to accountability, such as South Africa's amnesty programme and, perhaps, Colombia's SJP.⁸⁴ Rather than ignoring the underlying violations, such 'amnesties' assume that

international law since [1994] suggests that today, even a conditional amnesty *would be inconsistent with international law if it covered war crimes, crimes against humanity ... or torture.*" (emphasis added)

⁸¹ See, for example, Office of the High Commissioner for Human Rights, "Impunity and the Rule of Law" (2011) at 44, online (pdf): <www2.ohchr.org/english/ohchrreport2011/web_version/ohchr_report2011_web/index.html> [perma.cc/D84W-9J75]; Yves Beigbeder, *International Justice Against Impunity: Progress and New Challenges* (Leiden: Brill, 2005) at 1-2.

⁸² This is consistent with the views of former ICC Chief Prosecutor Luis Moreno Ocampo, who, in his first policy paper, specified that, as a general rule, the ICC would investigate only those situations where there was a "clear case of failure to take national action": *OTP 2003 Policy Paper*, *supra* note 68 at 2 and 5.

⁸³ In "Between Impunity and Show Trials" in Jochen Abr Frowein, Rüdiger Wolfrum, Christiane Philipp, 6, *Max Planck Yearbook of United Nations Law* (The Hague, Netherlands: Kluwer Law International, 2002) at 1-36, Martti Koskeniemi suggests that, historically, the significance of war crimes trials must lie elsewhere than in the punishment of an individual offender, an act that tends to pale against the enormity of the underlying crimes. At 4: "Recording 'the truth' and declaring it to the world through the criminal process ... has been thought necessary so as to enable the commencement of the healing process in the victim: only when the injustice to which a person has been subjected has been publicly recognised, the conditions for recovering from trauma are present and the dignity of the victim may be restored."

⁸⁴ This general point made by a number of commentators, including: Scharf, *supra* note 48 at 512; Mallinder, *supra* note 73 at 3; Louise Mallinder and Kieran McEvoy, "Rethinking Amnesties: Atrocity, Accountability and Impunity in Post-Conflict Societies" (1 February 2011) 6:1 *Contemporary Social Science* 107 at 111; and Leila Sadat, *The International Court and the Transformation of International Law: Justice for the New Millennium* (Ardslay: Transnational Publishers, 2001), at 68. At least one other commentator would distinguish the South African amnesties from 'true' amnesties, describing the South African process 'as not so much an amnesty as a form of plea bargaining ...': Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, 3rd (London: Penguin Books, 2006) at 318.

a crime has occurred, and require a positive act of acknowledgement on the part of the perpetrator in order to access alternative justice mechanisms.⁸⁵ Notably, the Colombian SJP is designed to go significantly further than the South African amnesty process in meeting these objectives.

Under this kind of model, the prevention of impunity is not an end in itself: we care about impunity because we want to recognise the dignity, and vindicate the rights, of victims, including the complementary (and sometimes countervailing) rights of victims to peace, truth, and reparations.⁸⁶ In light of the ICC's anti-impunity mission, when assessing the relative adequacy of domestic processes and international criminal jurisdiction, the OTP must be focused on the extent to which they are able to provide that kind of vindication. Undue emphasis on the classical model of prosecution is misguided if it fails to deliver on the promise of accountability.⁸⁷

IV. Colombia and the International Criminal Court: A Dialogue

Colombia was a relatively early supporter of the ICC. It signed the Court's Statute in December 1998, shortly after it was adopted at the Rome Conference, and ratified the Statute in August 2002, just over a month after it came into force.⁸⁸ When Colombia became a member of the Court, it did so acutely aware that crimes subject to the jurisdiction of the Court were being committed on its territory: indeed, Colombia attached a declaration to its instrument of accession excluding war crimes from the jurisdiction of the ICC for a seven-year period.⁸⁹

The Colombian government could not have been surprised when, on the strength of a number of communications submitted to the ICC Prosecutor, a file was opened on the "Situation in Colombia" in 2004.⁹⁰ The ICC's process of

⁸⁵ Mallinder, *supra* note 73 at 5.

⁸⁶ See Kai Ambos, *supra* note 46 at 33-39. All of these rights are specifically articulated in the Accords. Indeed, the section on justice specifically opens with a quote from an IACtHR case to the effect that there is a human right to peace: August Accord, s 5.1.2 (I) at para 1 (footnote 7, citing the concurring opinion in *Caso Masacre de El Mozote y lugares Aledaños vs El Salvador* (25 October 2012)). This, like much of the August Accord, was reproduced verbatim in the Final Accord.

⁸⁷ Drumbl, among many others, suggests that the ICC should be open-minded about the possibility of a variety of justice outcomes delivered through a variety of mechanisms: Drumbl, *supra* note 71 at 222. García and Engle express concern that a focus on formal criminal justice tends to crowd out other, perhaps even more important, claims to distributive justice: Helena Alviar García & Karen Engle, "The Distributive Politics of Impunity and Anti-Impunity: Lessons from Four Decades of Colombian Peace Negotiations" in Karen L Engle et al (eds), *supra* note 58 at 216. And Blumenson emphasizes that the capacity of criminal trials to deliver solidarity and vindication for victims is often contingent on their success: Eric Blumenson, "National Amnesties and International Justice" (2005) 2 *Eyes on the ICC* 1.

⁸⁸ See Colombia's instrument of accession, *supra* note 5.

⁸⁹ *Ibid* at para 5. This was an optional declaration permissible under Article 124 of the Rome Statute.

⁹⁰ By 2017, 199 communications had been received by the Office on alleged international crimes in Colombia: Office of the Prosecutor, "Report on Preliminary Examination Activities" (4 December 2017) at 28, online

preliminary examination has run parallel to the peace negotiations with both the paramilitaries and FARC, and thus the negotiation and rollout of both the JPL and SJP processes. For the purpose of this piece, I will largely confine my analysis to the current peace process, although the OTP was actively engaged in Colombia before then.⁹¹ It is my contention that through the mechanism of the preliminary examination process, the OTP has deliberately engaged in a dialogue with Colombia, one that has contributed – and continues to contribute – to establishing the respective roles of the OTP and Colombian authorities in holding the perpetrators of Rome Statute crimes accountable.

A. The 2012 Interim Report: the OTP's View on the Legal Framework for Peace

In an interim report on its Colombian preliminary examination issued in November 2012, the OTP detailed international crimes committed by various state and non-state actors within Colombia, as well as efforts within Colombia to bring those responsible to justice.⁹² The crimes cited included the systematic murder of civilians, forcible transfer of population, torture, rape and sexual violence, severe deprivations of liberty (abductions, imprisonment), enforced disappearance, hostage-taking and the use of child soldiers.

This interim report, the first of its kind,⁹³ was issued within weeks of the peace talks between the Colombian government and FARC beginning in October 2012, and five months after the announcement of the Legal Framework for Peace. This was not the first time, nor would it be the last, that the OTP's intervention in Colombia would be so timely. Having advised the Colombian government of its preliminary examination in March 2005,⁹⁴ the OTP was well placed to express its concerns when the JPL was adopted in June of that year. Reviewing the overall record, it now seems clear that the OTP has been issuing reports and comments specifically to engage in a dialogue with Colombian authorities, and thereby actively participate in the peace process. Indeed, this was explicitly confirmed by some recent comments made in Bogotá in May

(pdf): <www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf> [perma.cc/5YHN-JUZ8].

⁹¹ For an account detailing the interventions of the OTP with Colombian authorities in the earlier period, I strongly recommend Urueña, *supra* note 23 at 104-16. This piece also discusses ICC involvement in the FARC peace process, at 116-123.

⁹² Office of the Prosecutor, "Situation in Colombia: Interim Report" (November 2012), online (pdf): *International Criminal Court* <www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf> [perma.cc/KL25-Z6MD] [Interim Report].

⁹³ While, since 2013, the OTP has issued annual reports on its preliminary examination activities, and has issued reports on specific situations at the conclusion of different phases (subject matter, admissibility) of the preliminary examination process, the interim report on Colombia is the only time (to date) that the OTP has issued an interim report on a specific situation. This at least suggests that it was issued as a deliberate intervention in the peace process.

⁹⁴ Interim Report, *supra* note 92 at para 27.

2018 by the Deputy Prosecutor of the ICC, James Stewart, who said that the Prosecutor had “endeavoured to convey clear messages ... in the hope that her views would assist the Colombian authorities on important aspects of the system of transitional justice that they were designing as part of the peace.”⁹⁵

As part of this dialogue, the OTP’s 2012 Interim Report commented at length on the LFP. Noting that the LFP was “of direct relevance” to the ICC’s assessment of admissibility,⁹⁶ the Interim Report remarked that “it would view with concern any measures that appear designed to shield or hinder the establishment of criminal responsibility of individuals for crimes within the jurisdiction of the Court”,⁹⁷ and:

[P]roceedings related to the alleged commission of war crimes or crimes against humanity should ensure that as much as possible is known about the specific crimes committed by each accused person, because such information is likely to be of considerable utility in reconstructing the operational behaviour of each group as well as internal leadership roles.⁹⁸

This Report emphasises that all perpetrators of war crimes and crimes against humanity, at all levels, must be identified and processed, although it notably falls short of requiring criminal prosecution of all perpetrators. Indeed, it seems to acknowledge that the greatest value of interviewing these lower-level perpetrators would be to get a better sense of the whole organisation, rather than establishing the interviewee’s individual liability (or seeking to punish them). This approach echoes the concerns of many critics of a criminal justice approach to transitional settings who opine that an undue focus on individuals fails to acknowledge the distinct nature, and establish an accurate picture, of mass violence as perpetrated by political or social organisations.⁹⁹ In addition, this kind of systemic approach takes a realistic position on the extent of the ICC’s jurisdictional reach.

B. Tempered Complementarity

In its Interim Report, the OTP tacitly acknowledges that the ICC’s complementary jurisdiction is limited by institutional constraints. Under a seamless ideal of international criminal justice, the ICC, in stamping out impunity, would scoop up any perpetrators left unprosecuted by the state. Instead, the ICC has long had a policy of focusing its efforts on the “most

⁹⁵ “The Role of the ICC in the Transitional Justice Process in Colombia”, speech by James Stewart, Deputy Prosecutor of the ICC (30 May 2018) at paras 14-15, online (pdf): *International Criminal Court* <www.icc-cpi.int/iccdocs/otp/201805SpeechDP.pdf> [perma.cc/CXZ5-SQ4G].

⁹⁶ Interim Report, *supra* note 92 at para 203.

⁹⁷ *Ibid.* at para 205.

⁹⁸ *Ibid.*

⁹⁹ A number of the authors included in Engle 2016, *supra* note 58 make this point, not least Engle herself in “A Genealogy of the Criminal Turn in Human Rights” at 44-46.

responsible".¹⁰⁰ Indeed, very shortly after the announcement of the August Accord, the OTP released a Policy Paper establishing that in selecting cases for prosecution it would focus on those most responsible for the most serious crimes.¹⁰¹

This acknowledgment, now explicit in the OTP's case selection policy, has the effect of operationally tempering the ICC's complementary jurisdiction. If, in theory, the intention of the OTP is that all perpetrators of international crimes should be subject to criminal prosecution, either domestically or internationally, then the 'threat' of the ICC's complementary jurisdiction is necessarily limited to those cases that it would, itself, be interested in prosecuting. The suggestion that the ICC is going to step in if Colombia fails to prosecute what may be tens of thousands of low-level perpetrators not only strains credulity, it explicitly contradicts current OTP policy. The threat of admissibility is only real – but it is likely very real – for high-level perpetrators, particularly notorious ones.

Thus, the Interim Report implied a pragmatically light touch when it came to the threat of ICC jurisdiction in the Colombian situation. Nonetheless, the OTP has leveraged a potential finding of ICC admissibility to shine a light on international crimes that might otherwise have been neglected by the Colombian government, including sexual or gender-based crimes, the forced displacement of civilian populations, and "false positives".¹⁰² And, to this day, the OTP remains engaged in Colombia through its ongoing preliminary examination. In the context of its broader policy of positive complementarity, the OTP does "consider the extent to which preliminary examination activities can serve to stimulate genuine national proceedings" in Colombia.¹⁰³ Indeed, as will be detailed below, the OTP seems to be using the ongoing preliminary examination to assume a broadly supervisory role for itself.

¹⁰⁰ *OTP 2003 Policy Paper*, *supra* note 68 at 3 and 6-7.

¹⁰¹ See International Criminal Court, "Policy Paper on Case Selection and Prioritisation" (15 September 2016), online (pdf): <www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf> [perma.cc/PS7E-4FPZ]. Cf Urueña, *supra* note 23 at 117, who argues that the OTP's criticism of the case prioritisation strategy in its 2012 Interim Report on Colombia (*supra* note 92) marked a shift from earlier acquiescence.

¹⁰² See for example, Office of the Prosecutor, International Criminal Court, "Report of Preliminary Examination Activities 2018" (5 December 2018) at paras 135-150, online (pdf): <www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> [perma.cc/MSP5-NC2G].

¹⁰³ International Criminal Court - Office of the Prosecutor, "Interim Report on Preliminary Examination Activities" (13 December 2011) at para 15, online (pdf): <www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf> [perma.cc/PJ8E-2PER] [*Interim Report on Preliminary Examination Activities*]. Similar language was adopted in: International Criminal Court - Office of the Prosecutor, "Policy Paper on Preliminary Examinations" (November 2013) at para 18, online (pdf): <www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf> [perma.cc/AS3M-AA5R].

C. Where the Rubber Meets the Road: Alternative Sentences

However, as indicated above, the real controversy lies with the question of punishment. As to alternative sentencing, the 2012 Interim Report goes on to say:

The Office will consider the issue of sentences, including both reduced and suspended sentences, in relation to the facts and circumstances of each case. In particular, the Office will assess whether, in the implementation of such provisions, reasonable efforts have been made to establish the truth about serious crimes committed by each accused person, whether appropriate criminal responsibility for such crimes has been established, and *whether the sentence could be said, in the circumstances, to be consistent with an intent to bring the person concerned to justice* [emphasis added].¹⁰⁴

Other than for low-level perpetrators, who will avoid the justice mechanisms of the Accord altogether, the SJP is well designed to meet the first two criteria: the establishment of both truth and criminal responsibility. Indeed, the SJP, by offering reduced non-carceral sentences, provides a significant incentive to perpetrators to confess their crimes. But, the question of whether the sentence is “consistent with an intent to bring the person concerned to justice”, as the Interim Report required, is a much trickier legal assessment.¹⁰⁵ It is a problem that the OTP would have seen coming since the LFP reflected FARC’s precondition that their fighters not be subject to imprisonment. Given how controversial reduced terms of imprisonment were under the JPL, the elimination of formal imprisonment under the LFP, and ultimately SJP, was always going to be a very difficult needle to thread.

As a result, as the peace talks progressed, the OTP was active on the ground in Colombia. After the Colombian government and FARC issued a joint statement of principles on the rights of victims to truth, justice, and reparations in June 2014 – presaging the key terms of what would become Part 5 of the August Accord – the ICC scheduled two missions for the first half of 2015. The second of these missions concluded with a high-profile address by the Deputy Prosecutor of the ICC, James Stewart, in which he publicly commented on a variety of sentencing alternatives and their compatibility with the Rome Statute. He started by outlining some general principles:

While the Rome Statute does provide for sentences in ICC proceedings, *it does not prescribe the specific type or length of sentences that States should impose for ICC crimes. In sentencing, States have wide discretion. National laws need only produce investigations, prosecutions and sanctions that support the overarching goal of the Rome Statute system of international criminal justice – to end impunity for mass atrocity crimes.*

Effective penal sanctions may thus take many different forms. They should, however, *serve appropriate sentencing goals, such as public condemnation of the criminal conduct,*

¹⁰⁴ Interim Report on Preliminary Examination Activities, *supra* note 103 at para 206.

¹⁰⁵ *Ibid.*

recognition of victims' suffering, and deterrence of further criminal conduct. Such goals, in the context of international criminal law, protect the interests of victims and vindicate basic human rights.¹⁰⁶

These principles imply a wide discretion, within parameters. While Stewart left the door open for non-custodial sentences that do not promote impunity, such sanctions might encounter difficulties in proportionality, adequately addressing the victims' suffering, or deterring criminal conduct.

With respect to the possibility of suspended sentences, Stewart noted that "at the national level, a sentence that was manifestly inadequate, in light of the gravity of the crime and the degree of responsibility of the convicted person, could *vitiating the apparent genuineness of the proceedings*" and could "suggest that proceedings were conducted in a manner that was inconsistent with an intent to bring the persons concerned to justice."¹⁰⁷ In other words, suspended sentences could trigger ICC jurisdiction, and intriguingly, Stewart revealed that the Colombian authorities had been forewarned:

So important were the implications of sentence suspension for the Prosecutor's assessment of the admissibility of cases before the ICC, that in 2013 the Office conveyed the position I have just outlined to the Colombian authorities. This was done confidentially and in advance of formal negotiations on the sentencing issue in the peace talks. The step was prompted by our concern to alert the national authorities to our interpretation of the provisions of the Rome Statute in a timely way, and not after the fact, in view of the Government's stated interest in negotiating a peace agreement that was compatible with the Rome Statute.¹⁰⁸

Stewart re-emphasised this warning by the OTP that suspended sentences might provoke a finding of admissibility by the OTP, which effectively took them off the table in the peace negotiations if ICC jurisdiction was to be avoided.¹⁰⁹ This message seems to have been received: while suspended sentences are mentioned in the LFP,¹¹⁰ they are absent from the SJP, and the Accords more generally.

But Stewart offers an alternative. Speaking on reduced sentences, Stewart suggested that while the compatibility of a reduced sentence with "Rome Statute principles" would "depend upon the particular circumstances of the case",¹¹¹ he conceded:

These circumstances could include transitional justice measures designed to end armed conflict, for example, by requiring the convicted person to fulfil certain

¹⁰⁶ James Stewart, "Transitional Justice in Colombia and the Role of the International Criminal Court" (delivered at the Center for Transitional Justice and Coalition for the International Criminal Court, 13 May 2015) at 10, online (pdf): *International Criminal Court - The Office of the Prosecutor* <www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf> [perma.cc/NZX9-UJL6].

¹⁰⁷ *Ibid* at 11 (emphasis added).

¹⁰⁸ *Ibid*.

¹⁰⁹ *Ibid*.

¹¹⁰ LFP, *supra* note 28 at art 1.

¹¹¹ James Stewart, *supra* note 106 at 11.

conditions, such as

- an acknowledgement of criminal responsibility,
- demobilization and disarmament,
- a guarantee not to repeat the conduct,
- full participation in the process of establishing the truth about serious crimes,
- a possible temporary ban from taking part in public affairs,
- and so on.¹¹²

Stewart emphasised that “considerations such as these figured in the Prosecutor’s assessment of the national proceedings carried out within the Peace and Justice [JPL] framework”,¹¹³ under which the OTP had not found any cases to be admissible. Stewart used this as an example of the “wide margin” enjoyed by states to choose mechanisms “designed to establish truth and that are also consistent with the Rome Statute goal of ending impunity for the most serious crimes.”¹¹⁴ Stewart’s acknowledgment that states have multiple objectives, particularly in peace processes, and that these will be taken seriously in assessing the adequacy of a state’s approach to sentencing is significant, and may have led to the explicit articulation of these objectives in the Accords.

However, a reduced sentence still assumes that there will be some period of incarceration, at least as Stewart describes it. He knew then, and we know now, that such a model was not contemplated in the final deal. Thus, he was forced to discuss alternative sentences and his reluctance to do so *in abstracto* is readily apparent. In assessing “whether sentences were consistent with a genuine intent to bring the convicted persons to justice”,¹¹⁵ he sets out a list of specific factors, including national practice, proportionality, and the “type and degree of restrictions on liberty”.¹¹⁶ He concludes by saying:

In the end, the question will be whether alternative sentences, *in the context of a transitional justice process, adequately serve appropriate sentencing objectives for the most serious crimes.* The answer to that question will depend on the sort of sentences that are contemplated, when weighed against the gravity of the crimes and the role and responsibility of the convicted persons in their commission.¹¹⁷

Although Stewart’s comments were admittedly speculative, they can only be interpreted as expressing some significant concerns about whether an eventual peace deal would meet Colombia’s Rome Statute obligations.

¹¹² *Ibid* at 12.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid* at 13.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid* (emphasis added).

D. The Dialogue Continues: Admissibility and the Special Jurisdiction for Peace

The public dialogue between the OTP and Colombian authorities continued once the August Accord was announced, and is ongoing. The first comment on the August Accord was issued by the Prosecutor, Fatou Bensouda, who gave a brief statement broadly welcoming the agreement just over a week after its announcement.¹¹⁸ While expressing her hope for lasting peace in Colombia, she linked the question of peace with accountability:

The paramount importance of genuine accountability – *which by definition includes effective punishment* – in nurturing a sustainable peace cannot be overstated. As a State Party to the Rome Statute of the International Criminal Court, Colombia has recognised that grave crimes threaten the peace, security and well-being of the world and stated its determination to put an end to impunity for the perpetrators and thus contribute to the prevention of such crimes. *I note, with satisfaction, that the final text of the peace agreement excludes amnesties and pardons for crimes against humanity and war crimes under the Rome Statute.*¹¹⁹

It is worth pausing here for a moment to make two observations about this statement. First of all, the Prosecutor has flagged the issue of “effective punishment”, indicating that it is against this standard that the OTP’s assessment of the SJP will be made. This language, intentionally or not, mirrors the SJP’s own reference to “effective restrictions of liberty”,¹²⁰ which implies that the question may come down to whether the restrictions of liberty are, in fact, punitive. Secondly, by specifically highlighting the Accord’s exclusion of amnesties for crimes against humanity and war crimes, Bensouda is acknowledging the Accord’s formal nod to this emerging international law standard (and existing Colombian legal standard). But is she doing more than that? Given the popular interpretation of the SJP as a form of disguised amnesty, is Bensouda trying to suggest that the amnesty epithet is inappropriately levelled? Presumably, if the OTP wished to leave itself a *marge de manoeuvre* in assessing the SJP, it would be important that it not be seen as countenancing an amnesty.

Bensouda’s statement then goes on to specifically refer to the SJP:

The peace agreement acknowledges the central place of victims in the process and their legitimate aspirations for justice. These aspirations must be fully addressed, including by *ensuring that the perpetrators of serious crimes are genuinely brought to justice*. The Special Jurisdiction for Peace to be established in Colombia is expected to perform this role and to focus on those most responsible for the most serious crimes

¹¹⁸ “Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army” (1 September 2016), online (pdf): <www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia> [perma.cc/B4PH-SX8S].

¹¹⁹ *Ibid* (emphasis added).

¹²⁰ Final Accord, *supra* note 33, s 5.1.2(III) at para 60.

committed during the armed conflict. The promise of such accountability must become a reality, if the people of Colombia are to reap the full dividends of peace.

...

The ends of sustainable peace are intrinsically linked to justice being done and seen to be done. As Colombia opens a new chapter in its history towards the promise of peace, my Office will continue to support those efforts in accordance with its mandate under the Rome Statute with independence, impartiality and objectivity.¹²¹

The overall tone in these paragraphs fits with the OTP's policy of positive complementarity, i.e. to support domestic efforts to bring perpetrators of Rome Statute crimes to justice. In this early statement, there is no immediate indication that the alternative sentences of the SJP are a non-starter for the ICC, nor does the statement explicitly express concern that some low-level perpetrators might be overlooked, unlike Stewart's remarks a year earlier. There is an emphasis on the positive, sending a clear signal that the OTP is supportive of the peace process.¹²²

However, at no time in this statement does the OTP pretend that the admissibility issue is resolved, and the OTP's next comment on the SJP, in the OTP's 2016 Report on Preliminary Examination Activities, makes that ongoing assessment explicit. The timing of the 2016 Report was critical: it was released just a month after the August Accord's defeat in the plebiscite, and the OTP clearly shares the Colombian public's concerns about the non-carceral nature of the sentences:

At this stage of the preliminary examination, the OTP has not formed a specific or final position regarding the Special Jurisdiction for Peace, which is yet to be established. The SJP seems designed to establish individual criminal responsibility, bring perpetrators to account and to fully uncover the truth, while also seeking to fulfil sentencing objectives of deterrence, retribution, rehabilitation and restoration. Fulfilment of these objectives will not only depend on the procedures and conditions set forth in the Agreement, but also on the *effectiveness of restrictions on liberty imposed on individuals, the nature of which have yet to be clearly laid out*. The OTP would also have to consider whether any substantive lacunae in the laws applied by the competent SJP authorities, including in relation to command responsibility, could hinder their ability to genuinely proceed in relation to the potential cases which are likely to arise from an investigation into the situation.¹²³

Notably, and perhaps responsively, the two concerns raised in this

¹²¹ Fatou Bensouda, *supra* note 118 (emphasis added).

¹²² Hectór Olasolo explains the Prosecutor's "cautious optimism" as a function of the greater prominence of criminal justice in the August Accord as compared to its marginal role in the predecessor LFP: Hectór Olasolo, "The Special Jurisdiction for Peace in Colombia and the Cautious Optimism of the Prosecutor of the International Criminal Court" (2015) 1:1 *Peace Processes Online Rev 1*, online (pdf): <www.peaceprocesses.it/images/pdf/h._olasolo_-_the_special_jurisdiction_for_peace_in_colombia.pdf> [perma.cc/5PY6-BVGV].

¹²³ International Criminal Court - Office of the Prosecutor, "Report of Preliminary Examination Activities 2016", (14 November 2016) at para 257 (emphasis added), online (pdf): <www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf> [perma.cc/DJR8-B2EF] [November 2016 Report].

comment were the subject of amendments in the Final Accord. The “nature” of the restrictions on liberty referred to in the Report was to some extent clarified by additional factors and supervisory powers provided to magistrates.¹²⁴ Moreover, references to Article 28 of the Rome Statute were specifically added to the paragraphs dealing with command responsibility.¹²⁵

However, it is clear that this latter effort did not go far enough for the OTP. In her next public comment, an opinion piece published in the Colombian magazine *Semana* in January 2017, Bensouda expressed serious concern about the definition of command responsibility, tacitly indicating that there is a type of offence and offender that might not be contemplated by the SJP, but that would be contemplated by the Rome Statute.¹²⁶ Presumably, this would be one of the potential “substantial lacunae” that the OTP had expressed concern about in its 2016 report.

By September 2017, as the Final Accord took hold and the groundwork began to be laid for the SJP, the OTP was back on the ground in Colombia “to obtain clarifications on certain aspects of the future SJP, as well as information about the status of relevant national proceedings”.¹²⁷ In comments made during the visit and quoted in *Semana*, Bensouda delved further into the operational details of the SJP’s rollout, as well as other areas of transitional justice in Colombia.¹²⁸ This visit also confirmed that there were multiple interlocutors in this dialogue, with Bensouda not only meeting with a variety of government officials, but also with “representatives of Colombian civil society, whose views and concerns continue to inform the [OTP’s] assessment of the situation.”¹²⁹

E. The Way Forward: Dialogue as Supervision

A few months later, the OTP issued its December 2017 Report on Preliminary Examinations.¹³⁰ If earlier comments had been broad and optimistic, this Report gave a clear indication that the devil of complementarity lay in the details: specific crimes were listed, as were requests for information on the status (and absence) of particular investigations and indictments. For example, the OTP noted that it had “identified” 29 commanding officers who were “reportedly in

¹²⁴ Final Accord, *supra* note 33, s 5.1.2(III) at para 60.

¹²⁵ *Ibid*, s 5.1.2(III) at paras 44 and 59.

¹²⁶ Fatou Bensouda, “El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad”, *Semana* (21 January 2017), online: <www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820> [perma.cc/U3C7-WQBV]. Interestingly, Bensouda did not raise the question of effective punishment in this piece.

¹²⁷ Report of Preliminary Examination Activities 2017, *supra* note 26 at para 152.

¹²⁸ “Seguimos preocupados de cara a una posible impunidad en el future” (*Semana*, 13 September 2017), online: <www.semana.com/nacion/articulo/fatou-bensouda-en-bogota-habla-de-la-jep/540197> [perma.cc/5ZLF-3HGX].

¹²⁹ Report of Preliminary Examination Activities 2017, *supra* note 26 at para 152.

¹³⁰ *Ibid*.

charge” of specific divisions and brigades allegedly responsible for hundreds of “false positives” between 2002 and 2008. Of these, only 17 had seen any proceedings instituted against them by Colombian authorities,¹³¹ and the OTP was monitoring whether “concrete and progressive steps” were being taken even in those 17 investigations.¹³² “False positive” cases were one of three categories of crimes specifically mentioned in this Report,¹³³ along with forced displacement,¹³⁴ and sexual and gender-based crimes.¹³⁵ The inclusion of the ‘false positive’ cases gave a strong indication that the OTP felt that these crimes were being overlooked by authorities.

Moreover, having now reviewed the legislation implementing the SJP, the December 2017 Report outlined four aspects that “may raise issues of consistency or compatibility with customary international law and the Rome Statute”. These aspects included definitions of command responsibility and “grave” war crimes, clarification of the scope of “active or determinative” participation in crimes, and the “implementation of sentences involving ‘effective restrictions of freedom and rights’”.¹³⁶ On this last point, the OTP returned to the question of effectiveness, indicating that it would be monitoring the following dimensions: (i) the nature and scope of measures combining to “form a sanction”; (ii) the degree to which they served sentencing objectives and provided redress for victims; (iii) how they were implemented and verified; and (iv) whether other activities “such as participation in political affairs, do not frustrate the object and purpose of the sentence.”¹³⁷ And, on the question of the amnesty (available to those who had committed ‘political crimes’ that were not on the list of excluded crimes¹³⁸), the OTP expressed concern that Colombia was applying the wrong criteria in determining whether a war crime was “grave” (and therefore ineligible for amnesty).¹³⁹ As such, it explicitly left the door open for the ICC to try cases in which a perpetrator of such a crime had been amnestied.¹⁴⁰

On the whole, the OTP’s report gave unequivocal notice that it was retaining the right to continue assessing admissibility, which is to say that ICC jurisdiction was still a live issue. If earlier interventions had evinced a ‘tempered complementarity’, this was the OTP seizing a supervisory role for itself, keeping the pressure on the Colombian authorities to continue to investigate and prosecute specific cases, whether against Colombian forces,

¹³¹ *Ibid* at paras 134-35.

¹³² *Ibid* at para 135.

¹³³ *Ibid* at paras 131-35.

¹³⁴ *Ibid* at paras 136-38.

¹³⁵ *Ibid* at paras 139-42.

¹³⁶ *Ibid* at para 144.

¹³⁷ *Ibid* at para 148.

¹³⁸ Pursuant to the Final Accord, *supra* note 33, s 5.1.2(II), e.g. at paras 23-24, 37-39.

¹³⁹ Report of Preliminary Examination Activities 2017, *supra* note 123 at para 146.

¹⁴⁰ *Ibid*.

paramilitaries, or opposition fighters.¹⁴¹ In comments made in Colombia in May 2018, the ICC's Deputy Prosecutor, James Stewart, explained the Prosecutor's supervisory role as "satisfying herself that the array of transitional justice measures applied in the situation in Colombia meet, in a genuine way, the Rome Statute goals of ending impunity and contributing to prevention."¹⁴² In these comments, Stewart followed up on a number of the specific issues raised in the 2017 report, including command responsibility,¹⁴³ amnesties,¹⁴⁴ and "effective restrictions of rights and freedoms".¹⁴⁵

In an address to the Bogota Chamber of Commerce in November 2018, Stewart would again confirm the Prosecutor's ongoing supervision, emphasising the question of command responsibility.¹⁴⁶ However, by then another concern had popped up. In June, Iván Duque was elected President of Colombia largely on a promise to roll back the peace accord.¹⁴⁷ While his capacity to do so was significantly constrained by Colombian law,¹⁴⁸ articles were inserted into the SJP's Rules of Procedure restricting the scope of the investigation of armed forces, and effectively halting the trial of any member of the military until a separate procedure was established.¹⁴⁹ This led Stewart to warn the government that setting up a separate procedure and delaying justice "would necessarily be seen negatively by the ICC Prosecutor",¹⁵⁰ and that Bensouda would have to consider "whether recent initiatives, if put into practice, would have an impact on the admissibility on particular cases identified by the OTP."¹⁵¹ Interestingly, in the process of criticising these new developments, Stewart expressed significant support for the SJP more generally.¹⁵² These concerns would be echoed in the Prosecutor's 2018 Report

¹⁴¹ This might be seen as a more muscular version of what Stahn characterizes as the managerial dimensions of positive complementarity: Stahn, *supra* note 64 at 263.

¹⁴² Stewart, *supra* note 95 at para 218.

¹⁴³ *Ibid* at paras 96-120.

¹⁴⁴ *Ibid* at paras 123-31.

¹⁴⁵ *Ibid* at paras 132-55.

¹⁴⁶ James Stewart, "El artículo 28 del Estatuto de Roma" (1 November 2018) at paras 53 and 55, online (pdf): <www.icc-cpi.int/itemsDocuments/20181102-dp-bogota.pdf> [perma.cc/PNZ3-N6Y4].

¹⁴⁷ "Uncertainty for FARC peace deal as Ivan Duque wins in Colombia", *Al Jazeera* (18 June 2018), online: <www.aljazeera.com/news/2018/06/conservative-ivan-duque-wins-colombia-presidential-election-180617215223568.html> [perma.cc/Q54A-4TLU].

¹⁴⁸ Gonzalo Ramirez-Cleves, "The Colombian Constitutional Court Rules that Peace Agreement is Mandatory for Three Presidential Terms", *I-CONNECT blog* (26 October 2017), online (blog): *I-CONNECT Blog of the International Journal of Constitutional Law* <www.iconnectblog.com/2017/10/the-colombian-constitutional-court-rules-that-the-peace-agreement-is-mandatory-for-three-presidential-terms/> [perma.cc/PA3R-MNQJ].

¹⁴⁹ These provisions are detailed in Stewart's November 2017 remarks in "El artículo 28 del Estatuto de Roma", *supra* note 146.

¹⁵⁰ *Ibid* at para 54 [translated by author].

¹⁵¹ *Ibid* at para 60 [translated by author].

¹⁵² *Ibid* at paras 64, 66 and 70. Stewart concludes his comments as follows: "[...] if I have a message to deliver on this occasion with respect to the application of the principle of complementarity [...] it is this: let the magistrates of the SJP do their work; support them in all aspects; peace with justice and accountability is the most effective guarantee that peace will be sustainable and lasting." *Ibid* at para 70 [translated by

on Preliminary Activities, delivered a month later.¹⁵³

V. Conclusion: On Tempered Complementarity and the Enemy of the Good

The Final Accord between the Colombian government and FARC has become a powerful symbol of the possibility of peaceful transition, even after generations of bloodshed. Undeterred by the failed plebiscite on the August Accord in early October, the negotiators immediately consulted anew with civil society and the leaders of the 'No' campaign about what amendments would render the deal acceptable; within six weeks, a new agreement was announced. By the end of November 2016, the Colombian Congress had approved the Final Accord.¹⁵⁴

In its preliminary examination of the Colombian situation, the OTP has interpreted the seemingly uncompromising language of the ICC's mission to end impunity in the context of the compromising messiness of peacemaking and its own limited capacity. In doing so, it has illustrated the principle that the perfect must not be allowed to be the enemy of the good, and has adopted an approach of tempered complementarity, one which recognises that the ICC's complementary jurisdiction is effectively limited by the Court's capacity to intervene.

In the almost 15 years that it has been involved in Colombia, the OTP has leveraged the ICC's potential jurisdiction to highlight forgotten atrocities, provide victims with a channel of communication and redress, and remind the Colombian state – and the Colombian people – of their commitment to accountability. Crucially, as peace talks unrolled, the OTP used its preliminary examination to create a dialogue with Colombian authorities, thereby inserting itself as a necessary third party. This article has sought to demonstrate that the OTP's influence on the recent peace negotiations between the Colombian government and FARC is evident in the text, and even the spirit, of the Final Accord. But to be a party to negotiations is to be willing to compromise, and not overplay your hand. The limitations of the ICC, particularly its capacity to deliver its preferred form of justice on a wide scale, are well-known and explicitly acknowledged by the OTP itself, which is why the complementary jurisdiction of the ICC is necessarily tempered. This tempered complementarity,

author].

¹⁵³ Office of the Prosecutor, International Criminal Court, "Report of Preliminary Examination Activities 2018", *supra* note 102 at para 159 (noting that these provisions were being challenged at the Colombian Constitutional Court. This report also indicated that the OTP had filed an amicus curiae brief with the Colombian Constitutional Court in October 2017, while the Constitutional Court was deciding on the constitutionality of the SJP, at paras 154-58).

¹⁵⁴ Helen Murphy, "Colombian peace deal passed by Congress, ending 52-year war", *Reuters* (30 November 2016), online: <www.reuters.com/article/us-colombia-peace/colombian-peace-deal-passed-by-congress-ending-52-year-war-idUSKBN13P1D2> [perma.cc/K8SL-7CRH].

in turn, dictates that the OTP afford states a 'wide margin' in pursuing peace, as has been the case in Colombia.

However, recent developments are clearly straining the OTP's patience, and the limits of its deference. The OTP has signalled that efforts to withdraw government forces from the jurisdiction of the SJP and limit investigation into their alleged crimes may well make the admissibility of some cases before the ICC unavoidable. In its December 2018 report, the OTP warned that it has five cases ready to move forward against the Colombian government forces if Colombia undermines efforts to bring those involved to justice.¹⁵⁵ In this respect, there has been a subtle, but unequivocal shift from a posture of tempered complementarity, or even positive complementarity, to the more classical version. While the OTP has been willing to give the benefit of the doubt to a government who sincerely seemed to want peace, it will be hard-pressed to show the same forbearance to a government actively seeking to subvert the state's own justice efforts.

This apparent regression has caused the OTP to be less reserved in its expression of support for the SJP. While opponents of the Final Accord both inside and outside Colombia accused the former government of trading amnesty for peace, the terms of the SJP are significantly more complex. In a country in which demobilisation was traded for blanket amnesties in the past – in deals made with the M-19, EPL, and MAQL rebels in the 1990s – there is no mistaking the SIVJRNR for that kind of amnesty. The Final Accord does not forget the atrocities of the past: perpetrators of war crimes, crimes against humanity and grave human rights violations on all sides will be required to account for their crimes if they want to access the special procedures and non-carceral sentences of the SJP, or risk prosecution and sentencing in the regular courts. However, given the ICC's tempered complementarity, those low-level perpetrators who do not realistically fear prosecution in domestic courts also have no realistic cause to fear it in the ICC. After 52 years of war, there is no way to prosecute everyone, in Colombia or The Hague.¹⁵⁶

In articulating the need for justice to be a fundamental value of the peace process, the OTP has advocated for the true victims of the Colombian civil war, those civilians who have been dispossessed, displaced, and devastated by the conflict; perhaps conscious that it is precisely those communities most affected that voted overwhelmingly in favour of the August Accord.¹⁵⁷ If the

¹⁵⁵ OTP, Report on Preliminary Examination Activities 2018 Report, *supra* note 102 at para 135.

¹⁵⁶ This has been explicitly acknowledged by the Deputy Prosecutor: Stewart, *supra* note 95 at paras 180, 197, and 203.

¹⁵⁷ "Colombia referendum: Voters reject FARC peace deal", *supra* note 40. This article notes that it is conflict-affected regions that showed the most robust support for the deal: with 80% in Choco, 78% in Vaupes, and "[i]n the town of Bojayá, where more than a hundred people were killed by a FARC mortar bomb against a church, 96 per cent of residents voted for the peace deal." Choco and Vaupes Departments also voted, by significant margins, for the leftist Gustavo Petro in the 2018 presidential election, who favoured the peace

SJP represents an agonising compromise, the anguished were ready to make that deal in return for peace. If one of the aims of international criminal justice is to recognise victims' suffering, there is value in prioritising the end of that suffering. Furthermore, not only does the Final Accord promise an end to the conflict between the government and FARC, it has paved the way for peace talks with the largest remaining opposition guerrilla movement, the ELN.¹⁵⁸

What justice means has been at the heart of the dialogue between the OTP and government of Colombia. The OTP came to the table seeking to ensure that all offenders guilty of crimes falling within ICC jurisdiction face effective punishment. In accepting that the kind of punishment to be meted out under the SJP will fall short of its expectations, the OTP has had to be nimble in adapting its own definitions of justice, for example by emphasising accountability over punishment. In an effort to ensure accountability, the OTP seems intent on maintaining its dialogue with Colombia. Ultimately, the OTP knows that the threat of ICC jurisdiction only goes so far and that its complementary jurisdiction is tempered. Therefore, by necessity, its most effective strategy has been, and will continue to be, reminding the people of Colombia of their mutual commitment to ending impunity and doing all that it can to support those efforts.

deal.

¹⁵⁸ Sibylla Brodzinsky, "Colombia starts peace talks with ELN, country's second-biggest guerrilla group", *The Guardian* (30 March 2016), online: <www.theguardian.com/world/2016/mar/30/colombia-starts-peace-talks-with-eln-countrys-second-biggest-guerrilla-group> [perma.cc/S5]5-2TLS]. Unfortunately, these negotiations have not been successful, and may have irreparably broken down in recent months.