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Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers* – Arte dei Maestri di Pietra e Legname – *was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

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The ICC Involvement in Colombia: Walking the Fine Line Between Peace and Justice

Marina Aksenova*

9.1. Introduction

This chapter explores the involvement of the International Criminal Court ('ICC') in Colombia. In particular, it focuses on the approach of the Office of the Prosecutor ('OTP') to Colombia's compliance with its obligations under the Rome Statute and general international law on the one hand, and Colombia's reception of international oversight of the peace deal negotiations and its prior transitional justice efforts on the other. The OTP preliminary examination reports of 2012, 2014, and 2016 as well as other communication from the ICC show a great deal of discretion afforded to Colombia in designing and implementing its local accountability mechanisms. Such flexibility became particularly important as the Colombian government and the leaders of the Revolutionary Armed Forces of Colombia ('FARC') initiated peace talks in Havana in 2013 to end the protracted civil war. James Stewart, Deputy Prosecutor of the ICC, expressly noted in his public address in Bogota in May 2015 that the peace agreement would affect the Prosecutor's assessment of the situation in Colombia.[1] The OTP further observed the importance for its evaluation of

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1 James Stewart, "Transitional justice in Colombia and the role of the International Criminal Court", Speech delivered by the ICC Deputy Prosecutor in Bogota on 13 May 2015, p. 9 (http://www.legal-tools.org/doc/05d0ce/).

contextualizing crimes and appraising suspended or reduced sentences rendered by domestic courts in the light of the circumstances of each individual case.[2] At the same time, the OTP consistently stressed the importance of the effective punishment for those most responsible for crimes committed during the protracted civil war.[3]

The chapter adopts a socio-legal approach. It relies on a number of interviews with members of the Colombian Constitutional Court, civil society actors and the office of the Attorney General of Colombia conducted in Bogota in March 2017. It also contrasts the legal framework applicable to preliminary examinations of the ICC with the provisions of the peace deal and domestic criminal law. While it is essential to note that the ICC in conducting preliminary examinations is not specifically tasked with passing judgments on the quality of domestic law, this factor nonetheless plays a role in evaluating Colombia's ability and willingness to conduct its own investigations. The architecture of the ICC is such that by virtue of ratifying the Rome Statute of the ICC, States subscribe to, at least, some of its norms when implementing local transitional justice mechanisms aimed at tackling mass atrocities. The Court is complementary to national criminal jurisdictions.[4] Complementarity is thus one way of ensuring dissemination of international criminal law values via alternative means – that is, not through international criminal trials. Pursuant to this principle, the ICC monitors domestic actors for the purpose of establishing whether there exist "reasonable grounds to proceed to investigation at an international level".[5] Such an evaluative framework for assessment presents a perplexing question: how much flexibility do national authorities enjoy in implementing local standards conceived internationally? In other words, can complementarity be compared to the doctrine of

[2] ICC Office of the Prosecutor ('OTP'), Situation in Colombia: Interim Report, November 2012, paras. 206, 210 ('OTP 2012 Report') (http://www.legal-tools.org/doc/7029e5/); see also J. Easterday, "Beyond the 'shadow' of the ICC: struggles over control of the conflict narrative in Colombia", in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: the Politics and Practice of the International Criminal Court*, Cambridge University Press, Cambridge, 2015, pp. 448-49, at p. 448.

[3] Stewart, 2015, p. 8, see *supra* note 1; OTP 2012 Report, para. 11; OTP, 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 ('Bensouda Statement') (http://www.legal-tools.org/doc/c64dd0/).

[4] Rome Statute of the International Criminal Court, 17 July 1998, Article 17 ('ICC Statute').

[5] *Ibid*., Article 53(1).

the margin of appreciation embedded, for example, in the jurisprudence of the European Court of Human Rights?[6]

In its most recent report on preliminary examination activities dated 14 November 2016, the OTP adopted a cautious approach to the issue by pledging to continue examining developments related to peace negotiations, in particular the changes to the text of the agreement, *to the extent relevant to preliminary examinations*.[7] Based on the text of the report, the ICC retained considerable discretion for any future assessment, while at the same time affording Colombia a wide margin of appreciation in implementing the peace deal, including the creation of the Special Jurisdiction for Peace ('SJP'), which is the mechanism tasked with investigating and prosecuting those most responsible for conflict-related crimes.[8] The OTP stressed a plethora of objectives sought by the new mechanism and challenges in achieving them:

> The SJP seems designed to establish individual criminal responsibility, bring perpetrators to account and to fully uncover the truth, while also seeking to fulfill sentencing objectives of deterrence, retribution, rehabilitation and restoration. Fulfillment 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.[9]

Colombia has been under preliminary examination by the ICC since 2004. The engagement of the ICC in the country had started even earlier, however, with the signature by the government of President Andres Pastrana of the Rome Statute of the ICC in 1998. Pastrana, who had initiated peace talks with the members of the FARC, believed that the ratification of the Statute could act as deterrent for guerrillas and promote a commit-

6 This doctrine grants national authorities discretion in implementing their obligations under the European Convention on Human Rights. See S. Greer, *The Margin of Appreciation: Interpretation and Discretion under European Convention on Human Rights*, Council of Europe Publishing, 2000.

7 OTP, *Report on Preliminary Examinations Activities 2016*, 14 November 2016, para. 265, emphasis added ('OTP 2016 Report') (http://www.legal-tools.org/doc/834809/).

8 *Ibid*., para. 257.

9 *Ibid*.

ment to the peace process.[10] From the start of preliminary examinations, the OTP has been active in Colombia, imparting international criminal law values through both formal and informal means. The OTP issued a number of country reports on preliminary examinations conducted by the ICC covering, among others, Colombia.[11] The Chief Prosecutor sent private letters to the members of the Colombian Constitutional Court, and gave interviews to the press on some of the most contentious issues, such as the applicable standard for command responsibility.[12] In 2015, ICC Deputy Prosecutor James Stewart delivered a public lecture at one of the universities in Bogota, during which he clarified the position of the OTP on sentencing and prioritization of cases in the domestic context.[13] The OTP conducted multiple country visits to Colombia: the members of the prosecution met with different local actors including the Colombian Attorney General, members of the Constitutional Court, General Prosecutor and civil society organizations. Finally, the OTP issued a number public statements on its website, most prominently endorsing the peace deal initially signed on 24 August 2016[14] – the date on which, after four years of negotiations, the government of President Juan Manuel Santos and the FARC guerrillas reached a much-celebrated peace deal marking the end of a protracted civil war.

The signing of the peace deal was seen by the international community and by many in Colombia as essential in effectuating necessary societal changes and putting to rest one of the longest civil wars in history. The eventual deal reflected agreement on various items of the negotiating agenda, including rural reform, solutions to the illicit cultivation of drugs, bilateral cessation of hostilities and demobilization, guarantees of political participation for the FARC, and, finally, justice for victims (item 5 of the

10 N. Sanchez Leon, *Acceptance of International Criminal Justice: Country Study on Colombia*, International Nuremberg Principles Academy, 2016, p. 4.

11 OTP, *Report on Preliminary Examination Activities 2011*, 13 December 2011 ('OTP 2011 Report') (http://www.legal-tools.org/doc/4aad1d/); OTP 2012 Report; *idem*, *Report on Preliminary Examination Activities 2014*, 2 December 2014 ('OTP 2014 Report') (http://www.legal-tools.org/doc/3594b3/); *idem*, *Report on Preliminary Examination Activities 2015*, 12 November 2015 ('OTP 2015 Report') (http://www.legal-tools.org/doc/ac0ed2/); OTP 2016 Report.

12 A. Alsema, "Prosecutor warns ICC will try military commanders if Colombia transitional justice fails", in *Colombia Reports*, 26 January 2017.

13 Stewart, 2015, see *supra* note 1.

14 Bensouda Statement.

agenda).[15] The deal was put to a popular vote five weeks after its signature with a view to ensuring its legitimacy and with the high expectations of approval. Strikingly, however, the Colombian voters rejected the deal by a narrow margin on 2 October 2016.[16] The government, nonetheless, proceeded with the adoption of its revised version by engaging fast track powers to pass legislation through Congress.[17] This move allowed avoiding the risk of holding a second referendum and losing. The deal is therefore currently at the stage of implementation. The ICC, within the framework of preliminary examinations, closely monitors this process. A recent example of this activity is a column published in Colombian weekly *Semana* in January 2017 by Fatou Bensouda, where she observed with concern the removal of all references to Article 28 of the Rome Statute from the revised peace deal. This provision sets the standard for command responsibility. Bensouda warned that the ICC would take over the cases of senior military and guerrilla commanders if Colombia fails to effectively prosecute them for war crimes and crimes against humanity in the absence of appropriate legal standard.[18]

The interaction between the ICC and Colombian domestic actors can thus be described as a 'dialogical model'. This model can be contrasted with a simple linear way of communication, whereby information is transmitted in a linear, unidirectional way.[19] In contrast, the dialogical model presupposes active engagement of both the transmitter and the receiver of information in the process of constructing its meaning.[20] Language is seen as a social practice rather than a mere device for communication.[21] The OTP transmits international criminal law messages by en-

15 Colombia, Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, 24 August 2016 (http://www.legal-tools.org/doc/d6c6a1/).

16 "Colombia referendum: Voters reject Farc peace deal", in *BBC News*, 3 October 2016 (http://www.legal-tools.org/doc/b386a8/).

17 Colombia, Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, 24 November 2016 (http://www.legal-tools.org/doc/30a81e/) ('Peace Deal').

18 A. Alsema, "Prosecutor warns ICC will try military commanders if Colombia transitional justice fails", see *supra* note 12.

19 M. Colombo, "Theoretical Perspectives in Media-Communication Research: From Linear to Discursive Models", in *Forum: Qualitative Social Research*, May 2004, vol. 5, no. 2, art. 26.

20 *Ibid*.

21 *Ibid*.

gaging with various stakeholders, using different techniques. What is important is that the underlying principles and values of the discipline are clearly communicated and endorsed in the process of domestic transitional justice building. In this sense, the principle of complementarity allows for the fulfilment of the overarching symbolic purpose of international criminal law within the domestic context. Saffon and Uprimny note that in the field of disarmament and peace negotiations with armed groups, the principles of international criminal justice have acted as "virtuous restrictions" in Colombia for they harnessed the political dynamics of the peace negotiations and as a result, included the interests and expectations of antagonistic actors.[22]

The chapter proceeds as follows. Section 9.2. explains the complementarity framework employed by the ICC in Colombia and provides a timeline for the Court's involvement in the country. It outlines the modalities of the ICC's engagement. It also sheds light on the deeper legitimacy deficit of the peace agreement, which results from the government's decision to move forward with the updated version of the peace agreement without a second popular referendum. Section 9.3. explores the compatibility of specific international criminal law standards with the provisions of the peace deal and implementing legislation. These questions open up space for a closer and more tangible interaction between the ICC and domestic law actors. The discourse pertaining to the appropriate legal standards can be seen as more superficial as compared to a deeper legitimacy deficit discourse. It nonetheless provides for an important opportunity for the ICC to engage in an active dialogue with local actors, thereby backing transitional justice processes in Colombia so long as they comply with standards developed at the international level. The problem here is the degree of flexibility afforded to domestic actors in enforcing these standards. This section focuses on the following legal issues: the nature of the deal, the policy of prioritization of cases, penalties for those found responsible, and the appropriate standard of command responsibility. Some conclusions are drawn in the final section of the chapter.

[22] Maria P. Saffon and Rodrigo Uprimny, "Uses and Abuses of Transitional Justice in Colombia", in Morten Bergsmo and Pablo Kalmanovitz (eds.), *Law in Peace Negotiations*, Torkel Opsahl Academic EPublisher, Oslo, 2007.

9.2. The Dialogical Model of the ICC Involvement in Colombia

The ICC prosecution team has been conducting preliminary examinations in Colombia since 2004. Preliminary examination is a technical implementation of the principle of complementarity, which gives primacy to national jurisdictions.[23] The Rome Statute specifies that the purpose of preliminary examinations is to establish whether there is reasonable basis to proceed with an investigation pursuant to criteria set out in Article 53 of the Statute.

In accordance with the Rome Statute, the OTP is responsible for making this determination with reference to jurisdiction, admissibility and the interests of justice.[24] Admissibility consideration comprises complementarity and gravity assessments, meaning that the prosecution evaluates "the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office" in the light of the policy of focusing on those most responsible for the most serious crimes within the jurisdiction of the Court. Where national proceedings exist, the OTP examines their genuineness.[25] Gravity assessment includes the evaluation of the scale, nature, and manner of commission of the crimes, and their impact;[26] while the 'interests of justice' is a countervailing consideration allowing for not proceeding with investigations if this would not serve the interests of justice, taking into account the gravity of crime and interests of victims.[27]

As one of the core pillars of the ICC, the principle of complementarity appears in Article 1 of the Rome Statute, which sets main parameters of the Court's operation:[28]

> An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal

[23] ICC Statute, Article 17.

[24] OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013 ('*Policy Paper on Preliminary Examinations* 2013') (http://www.legal-tools.org/doc/acb906/).

[25] *Ibid*., para. 8.

[26] *Ibid*., para. 9.

[27] ICC Statute, Article 53(1)(c); *Policy Paper on Preliminary Examinations* 2013, para. 10.

[28] *Ibid*., Article 17. The Article gives detailed account of the principle of complementarity.

> jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Inclusion of the principle of complementarity in the introductory provision of the Rome Statute reflects one of the principal concerns of many States during the preparation of the document – that is, maintaining and preserving national criminal jurisdiction. The negotiating parties were well aware of the primary jurisdiction of the *ad hoc* tribunals for the former Yugoslavia and Rwanda established by the UN Security Council under Chapter VII of the UN Charter as temporary mechanisms aimed at deterring and punishing atrocities in the respective regions. Parties to the Rome Statute were reluctant to give similar broad powers to the ICC, a permanent and treaty-based body, as this would have entailed, in the eyes of the negotiators, giving up sovereignty over domestic prosecutions of possible international crimes committed in their territory or by their nationals. Among the most challenging issues during the drafting of the Rome Statute was therefore finding a way to *supplement* the exercise of national jurisdiction.[29] Complementarity was found to be the solution: the ICC acts only when national courts are 'unable and unwilling' to perform their tasks. Such design leaves domestic authorities with a lot of wiggle room in complying with standards set out in the Rome Statute.

As mentioned earlier, the nature of the ICC's involvement in Colombia can be assessed within the framework of 'dialogical model'.[30] Table 1 (at the end of this section) maps the chronology and type of interactions between the ICC and domestic actors in Colombia. In addition to legal communications in the form of statements and reports, the ICC provided limited support, mostly in terms of expertise and outreach, for peace negotiations between the government and FARC guerrilla forces. This type of activity falls under the umbrella of 'positive complementarity'. The term refers to the Court's efforts to promote capacity building and domestic compliance.[31] It may be conceptualized as a second pillar of the broader notion of complementarity, the first one dealing strictly with ad-

[29] Roy S. Lee, "Introduction: The Rome Conference and Its Contributions to International Law", in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, 1999, p. 27, emphasis added.

[30] Colombo, 2004, see *supra* note 19.

[31] Especially after the Kampala Review Conference. See ICC Assembly of States Parties, Review Conference of the Rome Statute of the International Criminal Court: Official Records, 11 June 2010 (http://www.legal-tools.org/doc/146df9-1/).

missibility assessment. Positive complementarity is achieved via different routes including outreach activities, adjusting prosecutorial strategy, promoting States' engagement, involving civil society and consolidating academic efforts to this effect.[32]

What follows is that since the beginning of preliminary examinations in Colombia, the OTP engaged with local actors through a sequence of symbolic communications that had the effect of producing limited international backing for transitional justice processes in the country, as well as shaping to some extent public discourse and pointing to potential pitfalls in designing local transitional justice mechanisms. This dialogical way of engagement with local actors is thus reflective of the idea of symbolic power discussed by Bourdieu.[33] This power embodies the possibility to impose visions and divisions of the social world.[34] This process of imposition through law and legal institutions results in law becoming the force capable of transforming social reality. Values contained in law go beyond strict legal constructs or limitations of a particular case or situation. One may object that the possibility of commencing formal investigations in Colombia amounts to exercising actual rather than symbolic power. The ICC OTP has yet not made a decision to move to the formal stage of investigation but it has not ruled out such prospect in the future. Interviews with the local actors revealed, however, that they are more affected by the reputational damage potentially resulting from the incompatibility of domestic transitional justice mechanisms with international law standards, rather than the actual threat of the ICC investigations as such. It is well understood that even if the ICC commences proceedings, its reach would be very limited.

The dialogical model of the ICC's engagement in Colombia is well demonstrated by the controversy related to the letters privately sent by the ICC Chief Prosecutor Fatou Bensouda to the Constitutional Court of Co-

[32] Morten Bergsmo, Olympia Bekou and Anika Jones, "Complementarity After Kampala: Capacity Building and the ICC's Legal Tools", in *Goettingen Journal of International Law*, 2010, vol. 2, no. 2, p. 793. See also Philip Ambach, "A Look Towards the Future – the ICC and 'Lessons Learnt'", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2016, p. 1281.

[33] P. Bourdieu, *Language and Symbolic Power*, Harvard University Press, 1991.

[34] P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", in *Hastings Law Journal*, 1987, vol. 38, no. 5, p. 839, cited by J.V.H. Holtermann and M.R. Madsen, "European New Legal Realism and International Law: How to Make International Law Intelligible", in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, pp. 211–30.

lombia in July 2013. One of the letters criticized the possibility of suspended sentences for war crimes, crimes against humanity and genocide under the Legal Framework for Peace (*Marco Legal/Jurídico para la Paz*, hereinafter 'LFP'). The law, passed in 2012, provided for a transitional justice mechanism primarily tackling crimes committed by the paramilitaries and included the possibility of suspending sentences in non-prioritized cases.[35] Bensouda argued that a sentence that is grossly and manifestly inadequate would invalidate the authenticity of domestic proceedings, thereby rendering the case admissible to the ICC.[36] The other letter disapproved of the practice of prioritization of cases under the LFP.[37] The ICC Prosecutor criticized the law and warned against replicating international prosecutorial guidelines at the domestic level for there is a difference between the ICC and State's internal obligations. Eduardo Montealegre, Colombia's Attorney General at the time, held a different view. He supported the practice of prioritization of cases under LFP and as a possible solution for the future agreement with the FARC.[38]

The letters by the OTP created a backlash within domestic legal community.[39] Local actors viewed such a move as insensitive due to its timing – the letters were sent prior to the relevant ruling by the Constitutional Court on the matter and shortly after the peace talks with the FARC commenced in Havana, which added tension to the situation. The local audience perceived the letters as interference by the ICC in the domestic application of international criminal law standards. The question raised by many with the Colombian legal community was whether the Rome Statute imposes on a State a duty to prosecute. This particular instance of interaction exposed the lack of a clear understanding as to the degree of flexibility afforded to domestic actors under the complementarity framework when it comes to designing domestic transitional justice mechanisms. James Stewart, Deputy Prosecutor at the ICC, corrected the OTP position on prioritization during his public lecture at El Rosario University in Bo-

35 Congress of Colombia, Legislative Act 01, 31 July 2012 ('Legislative Act 01, 2012') (http://www.legal-tools.org/doc/dee32b/).

36 "Una 'carta bomba': La Fiscal de la Corte Penal Internacional se le atraviesa al Marco Jurídico para la Paz", in *La Semana*, 17 August 2013 (http://www.legal-tools.org/doc/791aa4/).

37 *Ibid.*

38 *Ibid*.

39 *Ibid*.

gota in 2015, when he praised national authorities for making meaningful progress investigating and prosecuting crimes of paramilitaries, despite difficulties prioritizing cases.[40] He further stressed that the focus of the ICC is on those most responsible for the most serious crimes, thereby narrowing the scope of possible scrutiny of domestic proceedings by the OTP.[41]

Another important consequence of the dialogical method of ICC's involvement in Colombia is the inevitable practice of balancing peace and justice considerations when imparting international criminal law values. In deciding the format of interactions with domestic actors, the OTP undeniably showed some degree of deference to the peace process. Since 2007, the formal position of the Office has been to distinguish the 'interests of justice' and 'interests of peace', the latter falling outside of the mandate of the OTP.[42] In practice, however, the ICC paid close attention to peace talks and currently closely monitors its implementation. Statements by Fatou Bensouda on 24 September 2015 and 1 September 2016 praised milestones achieved in peace negotiations but also stressed the importance of genuine accountability.[43]

The dialogical engagement of the ICC in Colombia proved generally beneficial for the advancement of the international criminal justice principles and shaping the transitional justice landscape in Colombia. Nonetheless, there are points of tension created by the lack of clear agreement as to the degree of flexibility afforded to domestic actors within the complementarity framework of the ICC. At the core of interaction between the ICC and domestic actors in Colombia is the quest for the appropriate idea of justice for victims and perpetrators of mass atrocities as conceived at an international and domestic level. The process of preliminary examinations exposes the degree of convergence between the

40 Stewart, 2015, see *supra* note 1, p. 7. See also N. Leon, "Symposium on the Colombian Peace Talks and International Law: Could the Colombian Peace Accord Trigger the ICC Investigation on Colombia?", in *AJIL Unbound*, 2016, vol. 110, p. 175.

41 *Ibid*., p. 9.

42 OTP, *Policy Paper on the Interests of Justice*, 2007 (http://www.legal-tools.org/en/doc/bb02e5/). See also Stewart, 2015, *supra* note 1, p. 17.

43 Bensouda Statement. See also OTP, Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia, 24 September 2015 (http://www.legal-tools.org/doc/e1fe89/).

idea of justice promoted by the ICC and in Colombia through the peace deal.

There is one aspect of the peace deal where the involvement of the ICC is rather limited, however. The deeper issue in the discourse surrounding the peace deal and its implementation in Colombia is the legitimacy deficit ensuing from the government's decision to press ahead with the deal despite the 'no' vote in the referendum. In order to secure approval of the second deal, the President chose not to risk holding a second referendum but rather invoked his special powers in passing 'fast-track' legislation through Congress. The fast-track solution means that the main laws implementing the peace deal were adopted as a 'package deal' in a 'yes' or 'no' vote in Congress. Such laws enter into force upon their adoption and prior to their review by the Constitutional Court. This is in contrast with the regular procedure, whereby the Constitutional Court scrutinizes the project of the law before it enters into force. While the Constitutional Court retains its critical review powers with respect to fast-track laws, the fact they are already in force make it more difficult to strike them down from a political point of view. It is noteworthy that the Constitutional Court in May 2017 retracted the fast-track mechanism, which means that all future laws implementing the deal will have to be adopted according to a regular procedure.[44]

Despite the government's decision not to hold the second referendum, it has tried to mitigate the effects of the 'no' vote. Over the course of several weeks following the initial rejection of the deal, the government of President Santos introduced amendments, for instance, providing for a more limited role of international judges within the newly created SJP and guaranteeing special treatment for the army.[45] The scope of possible amendments to the deal was, however, rather limited as the negotiators balanced conflicting interests of different stakeholders – 'yes' and 'no' campaigns, the FARC, and the civil society.

The legitimacy deficit of the deal caused by the lack of popular support is one of the biggest obstacles on the way to its successful execution because unresolved concerns of the 'no' campaign keep reappearing during the process of adoption of implementing legislation. The Colombi-

[44] A. Alsema, "All eyes on Santos as Colombia's peace process spirals out of control", in *Colombia Reports*, 22 May 2017 (http://www.legal-tools.org/doc/721a64/).

[45] Peace Deal, paras. 19, 65 and 66.

an Congress has already passed two laws in the peace deal package. The first one is the amnesty law for minor offences committed during armed conflict, which was approved by Colombia's Congress on 6 December 2016, despite strong opposition of the right-wing Democratic Centre party.[46] The amnesty law was essential in securing demobilization of the FARC by guaranteeing amnesties for political crimes (such as rebellion or sedition). The second law in the package concerned the most contentious part of the peace deal, namely the issue of justice and reparations, and was approved by the Congress on 4 April 2017.[47] Despite multiple disagreements, the Colombian Congress passed amendments to the Constitution creating the 'Integral System of Truth, Justice, Reparation and Non-repetition' (*Sistema Integral de Verdad, Justicia, Reparación y no Repetición*) (hereinafter '*El Sistema* law').[48] The new law creates a unique transitional justice mechanism oriented towards truth and reparations to victims.[49] One result of lingering disagreements in Congress is that the *El Sistema* law deviates somewhat from the original peace deal as it creates two separate legal regimes – one for the army and largely regulated by Colombian law, and the other for the FARC under the auspices of international law.[50] The law introduces a separate chapter dedicated exclusively to the army and designates it as *lex specialis*.

The legitimacy question can only be addressed if the peace deal is viewed in continuum. One of the pitfalls of the international community and many local actors in Colombia around the time of the signing of the deal was to regard it as a decisive victory and an end in itself.[51] Arguably, a more constructive position would be to situate the deal as one of the steps in Colombia's complex transitional justice process. At the moment, the key to the survival of the deal is its effective implementation. The relevance of the ICC engagement at this broader legitimacy level is limited. The ICC stays in the background, providing its support for the deal

46 "Colombia approves amnesty deal for thousands of Farc rebels", in *The Guardian*, 29 December 2016 (http://www.legal-tools.org/doc/f816d6/).

47 Peace Deal, Section 5.

48 Congress of Colombia, Legislative Act 01, 4 April 2017 (http://www.legal-tools.org/doc/6305d2/).

49 See also Peace Deal, para. 5.1(a), stating that SJP's objective is satisfaction of victims' rights.

50 Chapter VII of the *El Sistema* law applies only to State agents.

51 H.A. Garcia, Keynote Address at the American Society of Comparative Law, Younger Comparativists Committee, 6th Annual Conference, Koç University, 28-29 August 2017.

and successive transitional justice measures, while carefully pointing out potential pitfalls. It can be said that international criminal law adds legitimacy to the deal, while simultaneously exposing itself to the possibility of being 'hijacked' by those who campaign against the peace deal. In this sense, the principles of international criminal justice can be used to justify strikingly different views. For instance, in 2015, the General Prosecutor, in defending the peace process, argued that international law does not require actual imprisonment of the guerrillas. In contrast, the Attorney General, in opposing the process, invoked international standards of fighting impunity to insist that it is necessary for the FARC leadership to serve jail sentences.[52]

Year(s)	Type of Interaction
1998	Andres Pastrana initiated talks with the FARC with the hope that adoption of the Rome Statute would help with peace talks.
2002	Colombia ratified the Rome Statute of the ICC.
2004	The OTP opened preliminary examination in Colombia.
2004–2012	Colombia sent in total 114 communications to the OTP.
2005	Colombia adopted the Justice and Peace Law used to investigate paramilitaries as well as politicians linked to illegal armed groups.
2004–2010	The Supreme Court of Colombia carried out trials of politicians allied with paramilitary groups pursuant to the Justice and Peace Law (2005). The situation became tense because the public viewed visits by the OTP as endorsement by the ICC of the activity of the Supreme Court convicting over 50 congressional representatives.[53]
13 December 2011	The OTP issued an annual interim report on Colombia identifying the crimes committed in the context of the civil war, including killings, enforced disappearances, rape and sexual violence, forcible transfer of the population, torture and conscription of children[54] and responsible groups, including illegal armed

[52] D. Valero, "Claves de lo que dijo la CPI sobre Colombia y la paz", in *Diario El Tiempo*, 16 May 2015.

[53] Leon, 2016, p. 7, see *supra* note 10.

[54] OTP 2011 Report, paras. 65-71.

	groups, paramilitaries, police and army officials, and politicians with links to illegal armed groups.[55] The OTP in light of its positive approach to complementarity welcomed the efforts of the Colombian government at seeking international support for its national proceedings.[56]
19 June 2012	The Colombian Senate approved the LFP, a transitional justice measure which included prioritization and selection of cases against those bearing greatest responsibility for crimes against humanity and war crimes, while providing for conditional suspension of all other non-selected cases and ensuing sentences.[57]
November 2012	The OTP issued a full interim report on Colombia and stressed the issues of false positives (killings of civilians by the army with the purpose of falsely presenting them as guerrilla fighters), sexual and gender-based crime and enforced disappearances.
1 July 2013	Start of the peace talks in Havana, Cuba.
26 July 2013	ICC Chief Prosecutor Fatou Bensouda sent a letter to the Constitutional Court of Colombia criticizing the possibility of suspended sentences for war crimes, crimes against humanity and genocide under the LFP. She argued that a sentence that is grossly and manifestly inadequate would invalidate the authenticity of domestic proceedings rendering the case admissible to the ICC.[58]
7 August 2013	ICC Chief Prosecutor Fatou Bensouda sent another letter to the Colombian Constitutional Court criticizing the practice of prioritization of cases under the LFP. Bensouda warned against replicating international prosecutorial guidelines at the domestic level for there is a difference between the ICC and State's internal obligations. In contrast, Eduardo Montealegre, Colombia's Attorney General at the time, supported the practice of prioritization of cases under LFP and as a possible solution for the future agreement with the FARC.[59]
28 August	The Constitutional Court issued its ruling C579 in which it up-

55 *Ibid*., para. 74.

56 *Ibid*., para. 85.

57 Legislative Act 01, 2012.

58 "Una 'carta bomba'", in *La Semana*, see *supra* note 36.

59 *Ibid*.

2013	held domestic prioritization of cases under LFP based on Article 12 of the Constitution declaring peace to be a duty of State.[60] The Constitutional Court also ruled out the practice of suspended sentences for grave international crimes. The Court recognized the need to strike a balance between different principles and values such as peace and reconciliation and the rights of victims to truth, justice, reparation and guarantee of non-repetition.
2 December 2014	The OTP issued its interim report on Colombia in which it praised peace negotiations and on-going discussion relating to the recognition of victims and their rights.[61] The OTP pledged to continue engaging with relevant domestic authorities regarding the admissibility criteria set out in the Rome Statute in an effort to ensure that any eventual peace deal remains compatible with the Statute.[62] The OTP further stressed that it would continue monitoring the justice agenda to make sure there is no impunity for senior perpetrators.[63]
13 May 2015	Deputy ICC Prosecutor James Stewart outlined the OTP position with respect to Colombia in El Rosario University in Bogota. He corrected a previous misunderstanding caused by the private letters of Bensouda, stating that the policy of prioritization at the domestic level is compatible with the obligations under the Rome Statute. He argued that (i) the Rome Statute does not prescribe the specific type or length of sentences; (ii) in sentencing, States have wide discretion; and (iii) effective penal sanctions may take many different forms.[64]
24 September 2015	ICC Chief Prosecutor Fatou Bensouda commended the SJP – an agreement on justice reached within the framework of peace negotiations.[65] She stressed that justice is a pillar for peace and her office would continue to review the agreed provisions in detail.

60 Sentencia de Constitucionalidad Nº 579/13 de Corte Constitucional, 28 de Agosto de 2013. See also Washington Office on Latin America, "Colombia Peace Process Update", 15 November 2013 (http://www.legal-tools.org/doc/f6a3d6/).

61 OTP 2014 Report, para. 113.

62 *Ibid*., para. 114.

63 *Ibid*., para. 131.

64 J.I. Acosta-López, "The Inter-American Human Rights and the Colombian Peace: Redifining the Fight Against Impunity", in *AJIL Unbound*, November 2016, vol. 110, p. 182.

65 Bensouda Statement.

12 November 2015	The OTP issued its interim report on Colombia in which it assessed the progress of peace negotiations.[66] The OTP noted progress in investigating high-ranking officials for 'false positives' cases, but delay in providing evidence demonstrating "concrete and progressive" investigative steps in cases relating to the focus of preliminary examinations, in particular sexual violence cases.[67]
1 September 2016	ICC Chief Prosecutor Fatou Bensouda praised the peace deal as a historic achievement.[68] She noted, however, that of paramount importance are genuine accountability, which includes effective punishment. She noted with satisfaction that the peace deal excludes amnesties for crimes against humanity and war crimes and stressed the ICC's ongoing support of Colombia's peace efforts.
14 November 2016	The OTP issued its annual interim report on Colombia, in which it stressed the problem of 'false positives'. The report stated that the Colombian authorities have carried out a significant number of investigations and prosecutions against mid- and low-level perpetrators of the Colombian army, but the information of commanding officers is limited.[69] The same report identified gaps in information on prioritizing sexual offences and analysed the specifics of the future SJP created by the peace deal. The OTP pledged to continue examining developments related to the peace deal agreement.[70]
6 December 2016	The Colombian Congress passed the first law in the peace deal implementation package: the amnesty law for minor offences committed during armed conflict.
4 April 2017	The Colombian Congress passed the *El Sistema* law amending the Constitution and creating the 'Integral System of Truth, Justice, Reparation and Non-repetition'.[71]

Table 1: Overview of ICC's engagement in Colombia.

66 OTP 2015 Report, para. 149.

67 *Ibid*., para. 154.

68 Bensouda Statement.

69 OTP 2016 Report, paras. 243-44.

70 *Ibid*., para. 263.

71 See *supra* note 48.

9.3. Compatibility of Standards

The influence of international criminal law, and the ICC as the institution monitoring compliance with its norms, on the Colombian transitional justice mechanism is more tangible when it comes to specific questions of compatibility of legal standards enshrined in the Rome Statute and the ones applicable in the domestic context.

9.3.1. New Vision of Justice – Less Retribution, More Reparations

One of the fundamental features of the peace deal is its reliance on restoration and reparation in crafting the idea of justice.[72] The justice component of the deal combines retributive and restorative elements under the same umbrella. Item 5 of the peace deal agenda dealing with justice matters presented particular challenges during the negotiations, as the FARC initially insisted on the idea of collective, rather than individual, responsibility for crimes committed during the protracted civil war. The underlying rationale was that it was structural deficiencies in the country that provoked criminality; therefore, responsibility must be attributed collectively to the system supporting such a flawed structure. It was possible to reach an agreement relying on the idea of 'justice for all' rather than 'justice for the FARC', meaning that all parties to the conflict, including the army, which holds a prominent position in Colombian governing circles, agreed to submit themselves to the jurisdiction of a future tribunal. As a result, the peace deal envisages the creation of a holistic justice system aimed at unifying Colombia's scattered transitional justice landscape. Diego Martinez, one of the lawyers representing the FARC during the negotiations with the government, gave the following assessment to the system: "it is based on restorative justice, the idea that more truth leads to less punishment, encouraging a targeted and personalized judicial truth to the victims. And it admits, from the beginning, amnesty when it comes to political crimes".[73]

The emphasis is not so much on retribution but rather on establishing the truth about the past, creating mechanisms for reparations for victims and guarantees of non-repetition. The implementing legislation – *El*

[72] The preamble to peace deal speaks about the rights of victims to truth, justice and reparation. Section 5 of the Peace Deal elaborates on the mechanisms whereby these goals are attained.

[73] V. Abierta, "Understanding the Special Jurisdiction for Peace", Interview with Diego Martinez (http://www.legal-tools.org/doc/c4f66b/).

Sistema law – brings this system to life by approving the creation of its various components: the Truth Commission, the Unit for the Search of Missing Persons, the SJP, and other measures aimed at reparation and non-repetition.[74] The new law makes it clear that the system incorporates both restorative and retributive aspects as it seeks to achieve justice not only through penalties but also through repairing damage caused to victims affected by the conflict.[75] This is both innovative and controversial. Arguably this system is different from the one established by the ICC where victims do participate in the proceedings as parties and have the right to seek reparations, but still do so within the retributive criminal justice paradigm.[76] In other words, at the ICC the victims complement the proceedings, while in Colombia they are the primary driving force.

In practice, such 'dual' focus of the system created by the peace deal entails a number of consequences. For instance, the *El Sistema* law expressly provides opportunities for reparations. It is well known that the FARC acquired significant wealth during conflict, for example, through illegal mining. The law creates explicit incentives for the FARC to declare their assets to the government (to be later used for reparations) by including them in a special inventory covered by the SJP jurisdiction. Offences relating to assets discovered at a later stage and not on the inventory will be subject to ordinary criminal jurisdiction. While reparations take a prominent role within the system, some retributive elements are seriously curtailed through the practice of prioritization of cases, amnesties or commuted sentences for less serious or political crimes and lenient penalties. To this date, the ICC OTP has not criticized the orientation of the system as a whole but rather insisted on the idea that effective punishment and responsibility of those most responsible should be the key elements in Colombia's justice pursuits.

9.3.2. Prioritization

According to the peace deal, the new SJP will have primary jurisdiction over all cases arising out of the conflict.[77] It is logistically impossible to prosecute all those responsible within the limited time frame allotted to

74 *El Sistema* Law, Article 1.

75 *Ibid.*, Article 13.

76 ICC Statute, Article 75.

77 Oficina del Alto Comisionado para la Paz, "ABC: Jurisdicción Especial para la Paz" (ABC: Special Jurisdiction for Peace) (http://www.legal-tools.org/doc/0e0b9b/).

the SJP, namely 10 years with a five-year extension period.[78] Prosecuting everyone involved in the conflict is estimated to require 114 years. The only feasible solution is therefore prioritization of cases and choosing the most representative or 'symbolic cases'. The Office of the Attorney General in Colombia, presently tasked with collecting all the relevant material to pass on to the SJP, is working on grouping potential cases with reference to their gravity and symbolic value. The first level of prioritization will happen on the basis of the types of crimes. There are currently seven themes singled out for further prosecution at the SJP: sexual violence, 'false positives', enforced disappearances, mass murders, displacements, recruitment of children, and environmental crimes.

Initially the ICC OTP opposed the policy of prioritization in Colombia. As explained above, in one of her private letters to the Constitutional Court of Colombia in 2013, Bensouda raised objections to this practice in domestic settings.[79] She referred to the framework established by the "Justice and Law" (2005) mostly aimed at facilitating demobilization of paramilitaries and the LFP (2012).[80] The mechanism created by the LFP targeted primarily paramilitaries, as well as their partners and sponsors, such as politicians and the military promoting supporting paramilitary activities. The OTP stressed early on that while prioritization of cases against those most responsible as a national policy is welcome, measures aimed at shielding individuals from criminal responsibility for grave international crimes is of concern, even if these are low-level perpetrators.[81] As mentioned above, the Constitutional Court of Colombia upheld the practice of prioritization, however, arguing that the Constitution provides for the State's countervailing obligation of peace, which underlies the need to prioritize cases.[82] The ICC adjusted its position later on.[83]

78 *El Sistema* Law, Article 15.

79 "Una 'carta bomba'", in *La Semana*, see *supra* note 36.

80 OTP 2012 Report, para. 201.

81 *Ibid*.

82 Constitutional Court of Colombia, Instrumentos Juridicos de Justicia Transicional-No sustituye elementos estructurales y definitorios de la Constitución Política/Marco Juridico para la Paz-Contenido y alcance, Sentencia C-579/13 (http://www.legal-tools.org/doc/ede533/).

83 Stewart, 2015, see *supra* note 1.

9.3.3. Penalties

The issue of penalties is one of the most contested and discussed in the framework of the Colombian peace process. One of the narratives that emerged in the press around the time of the rejection was overwhelming public concern over the possibility of guerrilla fighters avoiding jail time if they confessed to crimes and demobilized.[84] The interviews conducted in Colombia in March 2017 disproved such a narrow interpretation of the facts, however, pointing rather to several interrelated factors that led to a 'no' vote. The first is the strong cult of personality and influence of the former President Álvaro Uribe, who actively campaigned against signing a peace treaty with guerrillas by appealing to concerns and fears of different groups within the population. Leniency of the future sentences rendered by the SJP was one of the aspects of this campaign. Bad weather conditions on the polling day, coupled with the lack of infrastructure in many parts of the country also effectively prevented many people from travelling to polling stations. Finally, little information and time was allotted to voters to study the deal prior to the referendum.

Pursuant to the *El Sistema* Law, the SJP will have the power to choose between ordinary and alternative penalties when sanctioning those coming before it. With respect to the FARC, the alternative penalty is currently understood as sentencing persons to reside within a designated demobilization zones, or *Zonas Veredales Transitorias de Normalización*, for a period of five to eight years (with restricted liberty), coupled with reparations to victims and other restorative measures. Moreover, those given alternative penalties will be able to participate in political life along with serving the sentence imposed by the SJP.[85] It was unclear until the *El Sistema* law was passed whether this right could be exercised simultaneously with the sanction or whether the convicted person must wait five to eight years prior to joining political life (a position advocated by some NGOs). Confession is the condition for receiving lighter treatment in the form of alternative penalties, and the decision as to the nature of punishment will depend on the time when such confession is made. Those who confess early in the process are likely to benefit from alternative penalties, while those who confess later during trial face five to eight years of jail

[84] "Latin America: Saving Colombia's peace", in *The Economist*, 6 October 2016 (http://www.legal-tools.org/doc/203390/).

[85] *El Sistema* Law, Article 20.

time; those who do not acknowledge their responsibility at all risk fifteen to 20 years of imprisonment.[86] The leniency of sentences provided by the deal was one of the key arguments of the 'no' campaign.

It is important to note that State agents and the army cannot benefit from amnesty because auto-amnesty is prohibited under the law. The deal specifies however that all warring parties receive differentiated but comparable treatment.[87] What this means in practice is that the deal and the implementing law provide for the possibility of commuting sentences of those who cannot be subject to amnesty, which is a comparable solution. Similar treatment is more challenging when it comes to alternative penalties because State agents and the army cannot serve their sentences in the zones specifically designated for demobilized guerrillas. As things stand, they will serve their punishments in prisons. This aspect creates discontent in some of the 'no' voters arguing for tougher treatment of the FARC.

The question is whether lenient sentences for mass atrocities amount to impunity. Drastically curtailed sentences of five to eight years of imprisonment for war crimes and crimes against humanity had already been rendered to perpetrators in Colombia (in particular paramilitaries) pursuant to previous Justice and Peace Law (2005). There is a distant possibility to raise an issue of the incompatibility of excessively lenient punishment of perpetrators of war crimes and crimes against humanity with the State's obligation to fight impunity. This is especially so, if one accepts that the primary purpose of punishment is retribution that is harsh treatment imposed on the person and proportionate to the gravity of his conduct.[88] The ICC held in its case law that the aim of its own sentences is retribution and deterrence.[89] Would this same reasoning be applicable to the assessment of domestic proceedings in the context of complementarity? This question was to some extent settled by the ICC Deputy Chief Prosecutor in 2015 when he clarified that alternative sentences for grave international crimes are compatible with the Rome Statute, but not suspended

86 Peace Deal, Section 5.1.2., paras. 60-62.

87 *Ibid.*, para. 44.

88 "Proportionate Sentences: A Desert Perspective", in A. von Hirsch, A. Ashworth and J. Roberts (eds.), *Principled Sentencing*, 3rd edition, Hart Publishing, Oxford, 2009.

89 See, for example, ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Germain Katanga*, Trial Chamber, Decision on Sentence Pursuant to Article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG, para. 43 (http://www.legal-tools.org/doc/5af172/).

or commuted sentences, which cannot be characterized as 'effective punishment.' In this regard, Seils convincingly argues that transitional justice context in Colombia modifies the traditional policy objectives of punishment, which in the framework of peace negotiations can be seen as a mixture of reformative, retributive, and communicative goals. The last aspect is particularly vital for re-establishing the values undermined by the war and solidifying society's disapproval of the wrongful conduct.[90]

Theoretically speaking, the OTP could have interpreted lenient treatment (alternative penalties) as one of the signs of Colombia's unwillingness to undertake genuine investigations. This, in turn, could have paved the way to formal investigations. This scenario is a far-fetched one, however, because there is no direct reference in the Rome Statute to the length or type of penalties to be imposed on perpetrators of mass atrocities locally. Such a restrictive reading of the principle of complementary could have created further domestic backlash. The Rome Statute does not provide a framework for evaluating domestic sentencing regimes, which allows for a conclusion that there is a degree of flexibility in implementing domestic sentencing regimes. The interviews in Bogota uncovered that, from the Colombian standpoint, the leniency of sentences, while being one of the points of dissatisfaction of people who voted 'no' in the peace deal referendum on 2 October 2016, was not the core concern. Discontent pertained to broader accountability issues and general popular suspicion of the changes brought to Colombia with signing of the deal and establishing the SJP.

9.3.4. Command Responsibility

One of the most recent worries of the ICC with respect to Colombia pertained to the standard of command responsibility enshrined in the peace deal and the subsequent implementation law.[91] The OTP concerns over the definition of command responsibility in the peace deal were not resolved in implementing legislation. The *El Sistema* law contains a chapter on the army including a controversial provision on command responsibility, which uses a narrower definition than the one contained in the Rome Statute of the ICC. According to Article 24, responsibility of the members of

[90] Paul Seils, "Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace", in *ICTJ Briefing*, International Center for Transitional Justice, June 2015 (http://www.legal-tools.org/doc/bf8e9c/).

[91] "Una 'carta bomba'", in *La Semana*, see *supra* note 36.

armed forces is triggered only with respect to the conduct of subordinates over which the commander had effective control and knowledge based on the information available to them before, during or after the event.[92] This construction, based to some extent on Colombian penal law, makes it difficult, if not impossible, to convict a commander based in Bogota for crimes committed in the regions.

Article 25 of the Colombian Criminal Code provides for responsibility for omissions for those who fail to discharge their duty to prevent criminal conduct.[93] This provision resulted in some high-level convictions of the members of the Colombian army, making the generals wary of any possible tightening of the standards on command responsibility in the peace deal. The case of General Uscátegui is a good example that attracted a lot of public attention. He was found responsible for failing to prevent paramilitaries from executing crimes in the municipality of Mapiripán in July 1997. The Supreme Court of Colombia sentenced the general to thirty-seven years of imprisonment. The judges reasoned that, as a local military commander on the ground, the Uscátegui was well informed about the violent capture of the municipality by paramilitaries but failed to take steps to protect the local population.[94] The general recently requested to have his sentenced reviewed by the SJP, arguing that he would defend his innocence until the day he dies.[95]

While there is a clear discrepancy between Article 28 of the Rome Statute and Article 24 of the *El Sistema* law, the real question is whether domestic policy makers have the flexibility in implementing international criminal law standards that are not the definitions of crimes.[96] While there is near universal acceptance in Colombia of the need to incorporate the definitions of international offences as well as broader principles of international criminal justice in the domestic legal system, there is less con-

92 Juan Pappier, "The 'Command Responsibility' Controversy in Colombia", in *EJIL: Talk!*, 15 March 2017.

93 Congress of Colombia, *Colombia: Código Penal*, 24 July 2000, Ley no. 599 (http://www.legal-tools.org/doc/13e6bc/).

94 Colprensa and Olga Rendón, "Conceden libertad al general (r) Uscátegui, condenado por masacre de Mapiripán", in *El Colombiano*, 5 May 2017 (http://www.legal-tools.org/doc/682fa3/).

95 *Ibid*.

96 R. Urueña, "Playing with Fire: International Criminal Law, Transitional Justice, and the Implementation of the Colombian Peace Agreement", in *AJIL Unbound*, 2016, vol. 110.

sensus when it comes to the modes of liabilities, defences and procedural elements.[97]

One of the arguments against direct transposition of the notion of command responsibility from international into domestic law is that the ICC is still defining its own standard as the *Bemba* case, which deals at length with issues of command responsibility, is currently under appeal.[98] The Constitutional Court of Colombia is likely to rule on the issue of command responsibility in the course of its review of the *El Sistema* law. If the current formulation of command responsibility remains intact, it may lead to possible responsibility gaps triggering future involvement of the ICC. Colombia remains under preliminary examination by the ICC, whose Chief Prosecutor has already signalled her concern over the issue of command responsibility.[99] Fatou Bensouda exercised her symbolic power by giving a public interview to a Colombian weekly and alerting the domestic legal communities about the importance of not letting senior leadership go unpunished. This statement is not so much a threat of potential investigations by the ICC (although it is part of the message), but more a restatement of the values the ICC tries to communicate outwards.

9.4. Conclusion

The case of Colombia demonstrates the relationship between the ICC and local actors within the framework of the principle of complementarity. The OTP assumed different roles in Colombia, both legitimizing local actors and pushing for certain outcomes in the movement towards peace. While working on establishing whether there is 'reasonable basis to proceed' under the Rome Statute, the ICC engaged in symbolic interaction with a number of domestic authorities. The involvement of the ICC in Colombia as a part of the dialogical model influenced the justice element of the eventual peace agreement: the OTP tried to steer the discourse to a certain direction and define the contours of national prosecutions. For instance, the ICC held a strong position with regards to suspended and commuted sentences and is currently closely monitoring the standard for

97 Leon, 2016, see *supra* note 10.

98 ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343 (http://www.legal-tools.org/doc/edb0cf/).

99 "El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad", in *La Semana*, 21 January 2017 (http://www.legal-tools.org/doc/9450bc/).

command responsibility pertaining to senior leadership. The engagement of the ICC was not without pitfalls, however, as the change of heart on the issue of prioritization of cases demonstrates. This not very cautious move of the ICC in the form of private letters to the Constitutional Court of Colombia was a sign of a healthy adjustment to the local needs within the principle of complementarity.

While the power of the Court to dominate public discourse with regards to the specific standards is tangible, its influence on the broader legitimacy concern of the voters is limited. The government's decision to proceed along the fast-track route, rather than holding a second plebiscite or giving up on the deal altogether, delivered a strong blow to the legitimacy of the eventual outcome, dividing the country into two camps, creating room for identity politics. The standoff between two ideological camps makes it essential for the success of the deal to move forward with its implementation in an expedited fashion. With presidential and parliamentary elections fast approaching in 2018, the hope is that the deal will gain its legitimacy through its effective implementation, thereby eliminating the possibility for a future government to challenge the hard-won peace arrangement. The role of the ICC in further implementation of the peace deal remains to be seen.

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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

Volumes 1 and 2 are organized in five parts. The present volume covers 'The Practice of Preliminary Examination: Realities and Constraints' and 'Case Studies or Situation Analysis', with chapters by the editors, Andrew T. Cayley, Runar Torgersen, Franklin D. Rosenblatt, Abraham Joseph, Matthias Neuner, Matilde E. Gawronski, Amitis Khojasteh, Marina Aksenova, Christian M. De Vos, Benson Chinedu Olugbuo, Iryna Marchuk, Thomas Obel Hansen, Rachel Kerr, Sharon Weill, Nino Tsereteli and Ali Emrah Bozbayindir, in that order, and with forewords by LIU Daqun and Martin Sørby.

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