CONTEXTUAL COMPLEMENTARITY: ASSESSING UNWILLINGNESS AND "GENUINE" PROSECUTIONS IN COLOMBIA'S SPECIAL JURISDICTION FOR PEACE

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ABSTRACT

The November 2016 peace agreement in Colombia is an historic achievement for the country after a fifty-year conflict. One crucial aspect of this deal is the Special Jurisdiction for Peace–the accountability framework established by the parties to prosecute violations of international criminal law. The situation in Colombia is still under a preliminary examination by the International Criminal Court (ICC). While the ICC is precluded from prosecuting individuals in Colombia for Rome Statute violations if the country is willing to genuinely prosecute them, the ICC makes the determination of whether or not the prosecutions are "genuine." This Note analyzes the ICC's complementarity assessment to determine whether the Special Jurisdiction for Peace will be considered a "genuine" prosecution. It then considers the range of goals and accountability mechanisms that a country emerging from conflict may pursue in its transitional justice process and how those may differ from those of the ICC. This Note concludes that the Office of the Prosecutor of the ICC should consult with Colombian actors, provide clearer guidance on sentencing, and exercise its prosecutorial discretion to provide countries flexibility in pursuit of a transitional justice process that best fits the context of the transition and the goals of the country.

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I. INTRODUCTION

On November 24, 2016, the government of Colombia and the Revolutionary Armed Forces of Colombia (FARC-EP) reached a final peace accord, four years after peace talks between the two parties began in Havana in November 2012.[1] This agreement laid out new details of a transitional justice process in Colombia to address the legacy of violence that has persisted in the country for the past five decades.[2] While a prior version of the agreement was narrowly rejected in a nationwide referendum on October 2, 2016, Colombia's congress approved the revised peace accord on November 30, 2016.[3] One question raised by this agreement is how it will impact the Preliminary Examination being conducted by the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) on the situation of war crimes and crimes against humanity committed in Colombia. Will the ICC deem the situation in Colombia inadmissible before the Court on

1. *See generally Colombia President Hails Farc War Victims Reparation Deal*, BBC NEWS (Dec. 16, 2015), http://www.bbc.com/news/world-latin-america-35103709; *What Is at Stake in the Colombian Peace Process?*, BBC NEWS (Sept. 24, 2015), http://www.bbc.com/news/world-latin-america-19875363; *Acuerdo Final Para La Terminación Del Conflicto Y La Construcción De Una Paz Estable Y Duradera* [*Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace*], COLOM.-FARC-EP (Nov. 24, 2016), http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf (Colom.) [hereinafter *Final Peace Accord*].

2. *See generally* INTER-AM. COMM'N H.R., *Truth, Justice, and Reparation: Fourth Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II, doc. 49/13 (2013), http://www.oas.org/en/iachr/reports/pdfs/Colombia-Truth-Justice-Reparation.pdf.

3. Joshua Partlow & Nick Miroff, *Colombia's Congress Approves Historic Peace Deal with FARC Rebels*, WASH. POST (Nov. 30, 2016), https://www.washingtonpost.com/world/the_americas/colombian-congress-approves-historic-peace-deal/2016/11/30/9b2fda92-b5a7-11e6-939c-91749443c5e5_story.html.

complementarity grounds because of the transitional justice plan proposed in the peace agreement? While more details on how the transitional justice process will be implemented are needed to fully answer this question, by examining the Rome Statute and the policies of the OTP, this Note argues that the OTP should consult with Colombian actors, provide clearer guidance on sentencing, and exercise its prosecutorial discretion to provide the country flexibility in pursuit of a transitional justice process that best fits the context of the transition and the goals of the country.

The principle of complementarity is one of the defining features of the ICC. According to this principle, countries have primary responsibility for prosecuting violations of international criminal law, and the ICC will only exercise jurisdiction over such crimes when a country that has jurisdiction is unwilling or unable to do so.[4] Commenting on this principle, the first Chief Prosecutor of the ICC, Luis Moreno-Ocampo, said that "complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[5]

I argue that there are two important tensions at work in this principle. The first is that while this concept is based at least in part on the notion of state sovereignty and the primacy of state jurisdiction, the ICC makes the ultimate determination of whether a country is "unwilling or unable" to "genuinely" prosecute the case.[6] Therefore, a situation may arise in which a country claims that it will exercise jurisdiction over a case through the primacy of its jurisdiction but the ICC determines that the prosecutions are not "genuine," and the OTP will prosecute the case. As discussed *infra*, the Court may not enjoin the domestic proceedings, but the accused individual may be prosecuted twice for the same crime if the ICC determines that the proceedings were for the purpose of shielding the individual from responsibility or otherwise "inconsistent with an intent to bring the person concerned to justice."[7]

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4. Rome Statute of the International Criminal Court art. 17, *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute]; *see also* OFFICE OF THE PROSECUTOR OF THE ICC, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 3 (2003) [hereinafter INFORMAL EXPERT PAPER].

5. Luis Moreno-Ocampo, Chief Prosecutor of the ICC, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), https://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf.

6. *See* Rome Statute, *supra* note 4, arts. 17, 20.

7. Rome Statute, *supra* note 4, art. 20(3).

Another tension within the principle of complementarity arises when the goals of the concerned country with regard to prosecuting and sentencing individuals are different from the goals of the ICC. The preamble to the Rome Statute makes clear that a primary goal of the ICC is to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[8] The Court does not explicitly state what its sentencing goals are, although Deputy Prosecutor James Stewart has described "appropriate sentencing goals" as "public condemnation of the criminal conduct, recognition of victims' suffering, and deterrence of further criminal conduct" in the context of Colombia.[9] This is almost certainly not an exhaustive and official recitation of the sentencing goals of the ICC, but such goals may conflict with the goals of a country in its transitional justice process.

The International Center for Transitional Justice (ICTJ) defines transitional justice as "the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses."[10] The ICTJ lists criminal prosecutions, truth commissions, reparations programs, and institutional reforms as the primary mechanisms of transitional justice.[11] The goals of transitional justice will vary by situation and by society, but common goals include establishing the truth about what happened and why, acknowledging the suffering of victims, accountability for perpetrators, compensation for past wrongs, preventing future abuses, and promoting social healing and reconciliation.[12] These goals therefore go beyond those articulated by Deputy Prosecutor James Stewart.

Both the tension between sovereignty and the ICC's authority and the tension between the country's goals and the ICC's goals are present in the case of Colombia. The OTP is conducting a preliminary examination into the situation in Colombia and has not yet launched an official investigation.[13] However, the Court has made clear that it will "carefully review and analyse" any transitional justice agreement to ensure that it

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8. Rome Statute, *supra* note 4, pmbl.

9. James Stewart, Deputy Prosecutor of the ICC, Keynote Address at the Universidad del Rosario Conference: Transitional Justice in Colombia and the Role of the International Criminal Court"10 (May 13, 2015), https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.

10. Int'l Ctr. for Transitional Just., *What Is Transitional Justice?* (2017), https://www.ictj.org/about/transitional-justice.

11. *See id.*

12. *See Transitional Justice: Information Handbook*, U.S. Inst. of Peace 1–2 (2008), http://www.usip.org/sites/default/files/ROL/Transitional_justice_final.pdf.

13. The Office of the Prosecutor of the ICC, Report on Preliminary Examination Activities 52 (2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

comports with the Court's requirements for "genuine" prosecutions.[14] Furthermore, the Colombian government has identified specific goals of its transitional justice process that may be in tension with those of the ICC. This Note analyzes the Court's standards for determining whether domestic proceedings are "genuine" as well as the extent to which the concerned country's goals are considered by the ICC in its proceedings in order to determine how the Court can resolve these tensions.

Part II of this Note analyzes the complementarity principle of the ICC by taking a close look at the background and possible interpretations of Articles 17 and 20 of the Rome Statute in order to illustrate what qualifies as a "genuine" prosecution. Part III provides a brief overview of the situation in Colombia and the terms of the transitional justice process. Part IV considers the goals of countries in transitional justice processes and the spectrum of accountability efforts that countries may adopt in pursuit of those goals. Part V presents the tension between Colombia's Special Jurisdiction for Peace and the ICC's principle of complementarity and proposes how the ICC can best resolve this tension.

II. The Complementarity Principle of the ICC

In this section, I will first analyze the background and interpretation of the two most important articles of the Rome Statute with regard to complementarity: Article 17 and Article 20. I will then analyze statements by the OTP with regard to complementarity, which provide further guidance on how the OTP assesses domestic proceedings for complementarity purposes.

A. *Article 17: Background*

The ICC has established the principle of complementarity primarily through Article 17 of the Rome Statute. This article sets forth three situations related to complementarity in which a case will be inadmissible:

> (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the

14. *Id.*

> person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3 . . . .[15]

The first clause, Article 17(1)(a), indicates that a case becomes presumptively inadmissible where it is being investigated or prosecuted by a country that has jurisdiction. However, this presumption is rebutted if the Court can demonstrate that the country is unwilling or unable to *genuinely* carry out the prosecution. The word "genuinely" also appears in Article 17(1)(b) but is not defined within the treaty.

John Holmes, a Canadian diplomat who participated extensively in the drafting of the Rome Statute, discusses the drafting of this article at length and notes that the delegates debated a great deal about its precise language. The International Law Commission (ILC) proposed several phrases to describe the standard for domestic prosecutions which would preclude ICC jurisdiction, including "apparently well-founded," "effectively," "ineffective," "good faith," "diligently," and "sufficient grounds"; however, all of these standards were rejected.[16] Delegations attacked the proposals from both ends of the accountability spectrum, some claiming that it violated state sovereignty or that it could potentially interfere with constitutional protections against double prosecution, while other delegations found the language too broad and not demanding enough of domestic proceedings.[17]

Delegations sought to find a word that expressed a standard that was as objective as possible; however, as Holmes notes, "some subjectivity had to be retained to give the Court latitude on which to base its decision of finding unwillingness."[18] The word the parties agreed upon was "genuinely." While some delegations objected to this term as not providing a clear standard, ultimately the delegations agreed upon it in order to reach consensus.[19] These debates reflect the tension between the desire of the ICC to be a "court of last resort" and its desire to

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15. Rome Statute, *supra* note 4, art. 17(1)(a)-(c). A fourth grounds for inadmissibility is also provided in this article, which is that a case will be inadmissible where "[t]he case is not of sufficient gravity to justify further action by the Court." *Id.* art. 17(1)(d).

16. John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41, 49 (Roy S. Lee ed., 1999).

17. *See id.* at 45–48.

18. *Id.* at 50.

19. *See id.*

ensure that violations of international criminal law do not go unpunished. While the Rome Statute expresses the position that countries have the primary responsibility to prosecute crimes under international law,[20] the Court also must ensure that countries do not shirk these duties through sham investigations or prosecutions. The word "genuinely" is thus the word that the parties decided best struck that balance.[21]

While the word "genuinely" is not defined in the statute, both "unable" and "unwilling" are defined. Article 17(3) states that "[i]n order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings." The notion of inability was not particularly controversial to the drafters of the Rome Statute.[22] There was some debate over original language, which stated that a "partial collapse" of a national judicial system may be sufficient to demonstrate that a country was unable to prosecute; however, ultimately the drafters agreed upon the language "total or substantial collapse."[23]

Unwillingness proved to be a more divisive issue. Article 17(2) lays out the following factors to determine if a country is unwilling to prosecute:

> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice . . . .[24]

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20. *See* Rome Statute, *supra* note 4, pmbl ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . . .").

21. *Id.* at 50 (describing "genuinely" as the "least objectionable word").

22. Sharon Williams, *Article 17*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 606, 610 (Otto Triffterer ed., 2d ed. 2008).

23. *Id.* at 612.

24. Rome Statute, *supra* note 4, art. 17(2).

While some countries saw this provision as too much of an interference with sovereignty, the majority of countries realized that without such a provision, the ICC's power would be undermined by "sham" trials.[25] The drafters made some minor changes to address concerns of various delegations, including replacing the phrase "undue delay" with "unjustified delay," but the core language remained intact.[26]

B. *Article 17: Interpretation*

While the word "genuine" was the "least objectionable word"[27] for the drafters of the Rome Statute, determining what actually constitutes a genuine investigation or prosecution is not entirely clear. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) requires that the terms of a treaty be interpreted in good faith and in accordance with their "ordinary meaning."[28] The ordinary meaning, or dictionary definition (per Merriam-Webster), of genuine is perhaps the most helpful in this context, as it provides one definition of genuine as "free from hypocrisy or pretense."[29] This is in accordance with the treaty's definition of unwillingness, which is concerned with prosecutions that are inconsistent with an attempt to bring the concerned person to justice, i.e., a prosecution that takes place under false pretenses.

In addition to the VCLT's requirement of considering terms' "ordinary meaning," it further states that this ordinary meaning must be considered in light of the object and purpose of the treaty.[30] Applying this to the Rome Statute, this may mean that a genuine prosecution must be in line with the goals of the Rome Statute, as outlined in the treaty's preamble.[31] The primary goal identified in the preamble is to bring an end to impunity for the perpetrators of the most serious crimes of concern to the international community and thus contribute to the prevention of such crimes.[32] One interpretation of the treaty is, therefore, that proceedings are only "genuine" if they have the intended goal of bringing an end to impunity for the crimes within the court's jurisdiction.

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25. WILLIAMS, *supra* note 22, at 388.

26. WILLIAMS, *supra* note 22, at 612.

27. HOLMES, *supra* note 16, at 49.

28. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

29. *Genuine*, MERRIAM-WEBSTER DICTIONARY (2016).

30. Vienna Convention on the Law of Treaties, *supra* note 28, art. 31.

31. *See* ROD JENSEN, *Complementarity, 'Genuinely' and Article 17, in* COMPLEMENTARY VIEWS ON COMPLEMENTARITY 147, 160 (Jann K. Kleffner & Gerben Kor eds., 2004).

32. Rome Statute, *supra* note 4, Preamble.

A group of experts on the ICC wrote an informal paper on complementarity in 2003 that established a set of factors that may be relevant in determining whether a country is unwilling to genuinely prosecute.[33] This list suggests first understanding how the government works in the concerned state, including the relationship between branches of government, the independence of the judiciary, and the role that government actors play in the judicial process. The paper then considers several potential indicia of unwillingness, including whether there is a pattern of trials reaching "preordained outcomes," whether suspected perpetrators and country officials have common objectives, and the existence of special processes with "lenient approaches" established for the perpetrators. The list continues to name many other factors and suggests that the ICC should set high standards and conduct robust investigations into national proceedings when assessing admissibility with regard to Article 17.[34]

It is noteworthy, given the centrality of sentencing to holding individuals accountable for violations of criminal law, that sentencing is not mentioned in Article 17. This is particularly relevant in the context of the Colombian case. The language pertains to genuine investigations and prosecutions, and it is not clear that sentencing is included in this assessment of national proceedings. In the United States, for example, state or federal prosecutors carry out investigations and prosecutions and judges or magistrates determine sentences, illustrating how sentencing can be an entirely separate process from investigating and prosecuting. The governor or the president additionally has the power to grant pardons or to commute the sentences of individuals who have been prosecuted and sentenced. Article 17, therefore, by failing to mention sentencing, does not provide guidance on how the ICC should consider the role of sentencing judges and executives with the power to pardon when conducting its complementarity analysis. The 2003 Informal Expert Paper on the Principle of Complementarity in Practice, published by the OTP, lists pardons and "grossly inadequate sentences issued after the proceeding" as a factor to consider when analyzing admissibility under Article 17,[35] but once again this is not explicitly addressed in the text of the treaty. This consideration may be more relevant, however, when considering admissibility under Article 20.

33. *See* INFORMAL EXPERT PAPER, *supra* note 4, at 28–31.

34. *See id.*

35. *Id.* at 30.

C. *Article 20: Background and Interpretation*

Article 20 of the Rome Statute establishes another limitation on the jurisdiction of the International Criminal Court by establishing the principle of *ne bis in idem*. This principle, which literally means "not twice for the same thing," is similar to the principle of double jeopardy in the United States: a person cannot be tried twice for the same offense.[36] This principle logically follows from Article 17, because if the Court shall not have jurisdiction where another country is conducting an investigation or prosecution, it should not have jurisdiction where such an investigation and prosecution has already occurred. As in Article 17, there are important exceptions to this provision.

The ILC draft of this provision provided for three instances where the Court could find that national proceedings were deficient: (1) where the proceedings were not impartial or independent, (2) where the proceedings were designed to shield the accused, or (3) where the case was not diligently prosecuted.[37] The ILC also proposed creating an exception where a person was convicted but was subsequently pardoned, paroled, or had their sentence commuted.[38] The Portuguese delegation wanted to add exceptions where "the sentence was manifestly disproportionate to the gravity of the crime" or "there was a manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole, or a commutation of sentence."[39] However, these proposals were rejected in the face of arguments that it was inappropriate for the Court to interfere with the country's political decisions regarding sentencing and pardons.[40] There was also concern that resistance to this proposal could result in the entire principle of complementarity in the Rome Statute being overhauled in subsequent negotiations.[41]

The Article, as agreed to by the parties, establishes two situations in which the Court shall have jurisdiction even though national proceedings have already taken place. These exceptions apply where the national proceedings:

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36. *Ne Bis In Idem*, BLACK'S LAW DICTIONARY (10th ed. 2014).
37. HOLMES, *supra* note 16, at 57.
38. *Id.* at 58.
39. WILLIAMS, *supra* note 22, at 434.
40. HOLMES, *supra* note 16, at 60.
41. *Id.*

> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[42]

In this regard, the purpose of Article 20 seems similar to the purpose of Article 17(2): to ensure that proceedings that are taken to shield an individual from prosecution or that lack a true intent to bring them to justice do not preclude action by the ICC.

The lack of discussion regarding sentencing in Article 20 has been controversial among scholars. Holmes states, regarding Article 20:

> Potentially the greatest weakness to the complementarity regime lies in the failure to include in the Statute provisions related to pardons. The lacunae may permit a state to investigate, prosecute, convict and sentence a person, and then pardon or parole the person soon thereafter. Clearly, that possibility exists, especially since the *travaux préparatoires* will indicate that a proposal existed to cover this possibility but was not included in the Rome Conference.[43]

Sharon Williams, a scholar and practitioner in international criminal law, reiterates this concern in her commentary to Article 20, stating that "[c]riminal proceedings that have been conducted in a wholly appropriate manner may turn into a *de facto* sham trial at the stage of enforcement."[44] Only if the proceedings themselves were "genuine" in the sense of Article 17 and were consistent with an attempt to bring the person to justice would the ICC be prevented from taking action. This situation is conceivable where the judiciary is independent of the executive and carries out genuine proceedings, only to have those efforts frustrated by an executive that grants a pardon or commutes the sentence. This is a gap in accountability that the ICC has failed to address.

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42. Rome Statute, *supra* note 4, art. 20(3).
43. HOLMES, *supra* note 16, at 76.
44. WILLIAMS, *supra* note 22, at 434.

D. *OTP Guidance: Statements on Complementarity*

The Office of the Prosecutor of the ICC has attempted to clarify its approach to complementarity through policy papers. In particular, the Policy Paper on Preliminary Examinations, the Policy Paper on the Interests of Justice, and the Policy Paper on Case Selection and Prioritization are particularly helpful in illustrating the OTP's position.

In the Policy Paper on Preliminary Examinations, the OTP lays out its approach to assessing national proceedings to determine the admissibility of a case. First, the OTP notes that it will only consider national proceedings that are actually underway with concrete facts that can be assessed; it will not consider "hypothetical national proceedings that may or may not take place in the future."[45] The next factor the OTP must consider is whether the national proceedings are against the same individuals and for the same crimes for which the Court is contemplating action.[46] This includes ensuring that any national proceedings place an emphasis on prosecuting those most responsible for the most serious crimes.[47] Only after establishing these preliminary facts will the OTP then move to considering the "genuineness" of national proceedings.

The OTP goes on to list factors that may establish an intent to shield a person from criminal responsibility, unjustified delay, lack of independence, or lack of impartiality. These factors include blatant violations of criminal prosecution norms, such as the fabrication of evidence and intimidation of witnesses, but also more subtle concerns such as not allocating sufficient resources to the proceedings as compared with overall capacity.[48] The OTP also considers other factors relating to impartiality and independence, such as any relationships between the accused perpetrators and authorities responsible for investigation and prosecution.[49] In this Policy Paper, the OTP emphasizes the ongoing nature of the complementarity analysis and that revisions may become necessary as the facts on the ground change.[50] Article 20 carries the implication that this analysis could continue after proceedings have terminated.

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45. OFFICE OF THE PROSECUTOR OF THE ICC, POLICY PAPER ON PRELIMINARY EXAMINATIONS 12 (Nov. 2, 2013), https://www.legal-tools.org/uploads/tx_ltpdb/OTP_-_Policy_Paper_Preliminary_Examinations_2013-2.pdf.

46. *Id.*

47. *Id.* at 13.

48. *Id.*

49. *Id.* at 14.

50. *Id.* at 14–15.

The OTP's Policy Paper on the Interests of Justice also plays a role in the complementarity assessment. Article 53(1)(c) of the Rome Statute states that when deciding whether to initiate an investigation, the Prosecutor shall consider whether, "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[51] This concept is reiterated in Article 53(2)(c), which provides that a Prosecutor may conclude that there is not a sufficient basis for a prosecution because "[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime . . . ."[52] These factors can only be considered after all other admissibility requirements, including those laid out in Article 17 and Article 20, have been satisfied.

With regard to the interests of victims, the OTP's policy paper emphasizes that the Court will engage in dialogue with the concerned victim populations when considering or undertaking investigations. The Policy Paper states that while the language of the Rome Statute "implies that the interests of victims will generally weigh in favour of prosecution, the Office will listen to the views of all parties concerned."[53] Nothing in this section provides an example of a situation in which the interests of victims would result in the ICC deciding not to pursue an investigation or prosecution. This paper also addresses "other justice mechanisms," such as "truth seeking, reparations programs, institutional reform, and traditional justice mechanisms."[54] The paper states that the OTP views such mechanisms as valuable, but emphasizes that such efforts must be complementary to criminal prosecutions.[55]

Within this paper on the interests of justice, the OTP notes that other actors have a role to play with regard to peace and security, and the ICC will pursue its own judicial mandate independently.[56] Included in this section is the role of the U.N. Security Council, which has the power to

51. Rome Statute, *supra* note 4, art. 53(1)(c).

52. Rome Statute, *supra* note 4, art. 53(2)(c).

53. OFFICE OF THE PROSECUTOR OF THE ICC, POLICY PAPER ON THE INTERESTS OF JUSTICE 5 (Sept. 2007), https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/140640/ICCOTPInterestsOfJustice.pdf.

54. *Id.* at 8.

55. *Id.* at 7–8.

56. *Id.* at 8.

defer action by the ICC "where it considers it necessary for the maintenance of international peace and security."[57] In this regard, the OTP makes clear that while it may consider "interests of justice," assessing issues of peace and security are better left to other institutions.[58]

Given the limited resources of the ICC, case selection and prioritization are important aspects of its work. To this end, the OTP has written a Policy Paper on Case Selection and Prioritization that lays out the criteria that the OTP will consider when assembling its docket.[59] The first step is to assess the jurisdiction, admissibility, and interests of justice concerns for any case that is considered by the Court.[60] The OTP does not expand on Article 17 in this paper; rather, it reiterates the language of the Rome Statute when discussing the admissibility of a case.[61] The paper articulates three considerations for case selection: gravity of the crime(s) (which may be a higher threshold than that established in Article 17(1)(d)),[62] degree of responsibility of alleged perpetrators,[63] and the charges to be levied (taking into consideration an attempt to choose charges which are a representative sample of types of victimization and focusing on traditionally under-prosecuted crimes).[64]

This policy paper identifies nine factors that the Court will consider when prioritizing cases. These factors are divided into two categories: strategic and operational.[65] Strategic case prioritization criteria include, for example, "whether a person, or member of the same group, has already been subject to investigation or prosecution by the country for another serious crime."[66] This was an addition from the Draft Policy Paper on Case Selection and Prioritization that was released earlier the same year and suggests that the Court has realized the importance of

57. *Id.*

58. *Id.* at 9.

59. OFFICE OF THE PROSECUTOR OF THE ICC, POLICY PAPER ON CASE SELECTION AND PRIORITIZATION (Sept. 15, 2016), https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.

60. *Id.* at 9–12.

61. *Id.* at 11–12.

62. *Id.* at 12–14.

63. *Id.* at 14–15.

64. *Id.* at 15.

65. *Id.* at 16–17.

66. *Id.* at 16.

taking into account domestic proceedings in its case prioritization process.[67]

Taken together, the OTP's policy papers give some insight as to how it will assess domestic prosecution efforts. First, the OTP will only consider actual proceedings that are occurring with regard to individuals against whom the OTP is considering bringing charges. The OTP identifies a number of factors regarding its assessment of genuineness and emphasizes that it will follow the development of proceedings and reassess periodically. The interests of justice do not explicitly pertain to other proceedings happening at the domestic level, as the OTP includes "traditional justice mechanisms" as the type of action that would be complementary to criminal prosecutions. Finally, while the OTP will consider prior investigations and prosecutions by the country in its case prioritization, it does not address whether or not such prosecutions must meet the "genuine" standard of Article 17. In order to understand how these requirements will be applied to domestic proceedings that take an alternative form to traditional criminal prosecutions, it is important to better understand transitional justice mechanisms and the potential goals of states.

III. The Special Jurisdiction for Peace in Colombia

The armed conflict in Colombia has been ongoing for over fifty years (the longest internal armed conflict in the Western Hemisphere) among government forces, paramilitary groups, and armed rebel groups.[68] Colombia has been a party to the Rome Statute since 2002, and the situation in Colombia has been under preliminary examination by the Office of the Prosecutor at the ICC since 2004.[69] The OTP's preliminary examination noted that it has reason to believe that war crimes and crimes against humanity have been committed in Colombia since the Rome Statute's entry into force in 2002.[70]

Peace talks between the Colombian government and the FARC-EP began in Havana in October 2012.[71] These negotiations included

67. Office of the Prosecutor of the ICC, Draft Policy Paper on Case Selection and Prioritization 15–16 (Feb. 20, 2016), https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf.

68. *Id.*

69. *Id.*

70. *Id.* The ICC only has jurisdiction over crimes that have occurred since its entry into force. Rome Statute, *supra* note 4, art. 11.

71. Office of the Prosecutor of the ICC, Report on Preliminary Examination Activities 52 (Nov. 14, 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

participation by victims and civil society organizations.[72] At the behest of the government and the FARC-EP, the United Nations convened a series of forums in which victims could participate and present proposals on truth, justice, reparations, and guarantees of non-repetition.[73] More than 3,000 victims participated in these forums, and sixty victims travelled to Havana to give testimony and recommendations directly to the parties.[74] Additionally, eighteen Colombian women's organizations and ten experts on sexual violence gave testimony to the parties during the negotiations.[75]

The parties announced the creation of an accountability framework and a special body within the government to take steps towards accountability, "The Special Jurisdiction for Peace" (SJP), on September 23, 2015.[76] The details of this plan were articulated further in the Agreement on the Victims of the Armed Conflict, which was announced on December 15, 2015[77] and incorporated into the final peace accord.[78] After the Colombian people voted against the first accord in a nationwide referendum, the Colombian government and the FARC-EP made several changes to the SJP in the final version of the peace accord.[79] The SJP will have jurisdiction over individuals who participated directly or indirectly in the armed conflict between the government and the FARC-EP, but it does not apply to any other

72. Viola Gienger, *Colombia's War Survivors Appeal for U.S. Support, Responsibility,* U.S. INST. OF PEACE, https://www.usip.org/publications/2014/08/colombias-war-survivors-appeal-us-support-responsibility.

73. *Id.*

74. Comunicado Conjunto 64: Acuerdo sobre las Víctimas del Conflicto [Joint Communiqué 64: Agreement on the Victims of the Armed Conflict], GOVERNMENT OF COLOM. AND FARC-EP, (Dec. 15, 2015), http://equipopazgobierno.presidencia.gov.co/prensa/Paginas/acuerdo-sobre-las-victimas-del-conflicto.aspx.

75. *Id.*

76. Comunicado conjunto 60 sobre el Acuerdo de Creación de una Jurisdicción Especial para la Paz [Joint Communiqué 60: Agreement Creating a Special Jurisdiction for Peace], GOVERNMENT OF COLOM. AND FARC-EP (Sept. 23, 2015), http://wp.presidencia.gov.co/Noticias/2015/Septiembre/Paginas/20150923_03-Comunicado-conjunto-N-60-sobre-el-Acuerdo-de-creacion-de-una-Jurisdiccion-Especial-para-la-Paz.aspx. *See also* Adam Isacson and Gimena Sánchez-Garzoli, *English Summary of the September 23 Government-FARC Communiqué on the Transitional Justice Accord*, WASH. OFFICE ON LATIN AMERICA (Sept. 23, 2015), http://colombiapeace.org/2015/09/23/english-summary-of-the-september-23-government-farc-communique-on-the-transitional-justice-accord/.

77. *Colombia President Hails Farc War Victims Reparation Deal*, BBC NEWS (Dec. 16, 2015), http://www.bbc.com/news/world-latin-america-35103709.

78. *Final Peace Accord*, *supra* note 1, at 124-92.

79. *Key Changes to the New Peace Accord*, WASH. OFFICE ON LATIN AMERICA (Nov. 15, 2016), http://colombiapeace.org/2016/11/15/key-changes-to-the-new-peace-accord/.

guerrilla or paramilitary groups.[80] The jurisdiction of the SJP is also limited to crimes committed in the context of, and as a result of, the armed conflict, with a focus on the gravest and most representative crimes.[81]

The government has agreed to grant rebels the broadest possible amnesty for political crimes, such as rebellion; however, the agreement makes clear that the crimes included in the Rome Statute will not be amnestied.[82] The agreement also specifically names hostage-taking, torture, extrajudicial executions, enforced disappearances, rape and other forms of sexual violence, abduction, forced displacement, and recruitment of minors as crimes that cannot be amnestied.[83] Crimes that cannot be amnestied will be the subject of an integral system of truth, justice, reparation, and non-repetition agreed to by the parties.[84]

The SJP creates a Judicial Panel of Acknowledgement of Responsibility, which receives reports from the Attorney General, the criminal justice system, the legislature, and other government officials regarding all investigations concerning conduct committed during the armed conflict, as well as reports from victims' organizations and human rights organizations.[85] Individuals who have been implicated in these reports will be notified and given the opportunity to come before the panel to either (1) voluntarily testify, acknowledge the truth, and accept responsibility, (2) deny the allegations, or (3) argue that their conduct was not related to the conflict.[86] Individuals who acknowledge the truth and accept responsibility will go before a section of the Tribunal for Peace that issues sentences.[87] Individuals who deny the charges will go before a distinct section of the Tribunal for Peace that conducts adversary proceedings and issues decisions (acquittals or convictions) and sentences.[88] While the peace agreement had originally contemplated including foreign judges, the finalized agreement precludes the possibility of including foreign judges.[89] Ten foreign legal experts will be allowed to serve as observers.[90]

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80. *Final Peace Accord*, *supra* note 1, at 148.
81. *Id.* at 157.
82. *Id.* at 148.
83. *Id.* at 151.
84. *Id.* at 145-46.
85. *Id.* at 153.
86. *Id.* at 155.
87. *Id.* at 156.
88. *Id.* at 153-54.
89. *Id.* at 167.
90. *Id.* at 167-69.

The peace agreement sets forth the framework for sentencing individuals for violations of international criminal law under the SJP. Individuals who acknowledge the truth and accept responsibility for the most serious crimes before being brought to trial will receive a "special sentence" of between five and eight years of restrictions on liberty and rights, which will not be served in a prison or jail.[91] The final peace accord clarifies that the zones of "restrictions of liberty" will be no larger than the size of a rural hamlet (*vereda*).[92] Those who receive these "special sentences" must contribute to their reincorporation into society by means of work, training, or study while serving their sentences.[93] Individuals who do not acknowledge the truth and accept responsibility face up to twenty years in prison if they are convicted.[94] Individuals who do not initially acknowledge the truth but later confess at trial before sentencing will receive an "alternative sentence" of five to eight years in prison.[95]

Even though the peace accord was originally rejected in a referendum, the response from victims' organizations and human rights organizations in Colombia has been largely positive. A coalition of four women's human rights organizations in Colombia released a statement celebrating the agreement for its recognition of the gravity of sexual- and gender-based crimes and ensuring that such crimes cannot be amnestied.[96] However, the statement noted concerns regarding the special sentences and the need to ensure that victims' right not to be confronted by their aggressor is protected.[97] The Colombian Commission of Jurists also praised the agreement for its purpose of ending the cycle of impunity and guaranteeing the rights of victims.[98] Members of

91. *Id.* at 165.

92. *Id.* at 186.

93. *Id.* at 175.

94. *Id.*

95. *Id.* at 174-75.

96. Comunicado a la Opinión Pública: La Jurisdicción Especial Para La Paz Debe Ser un Modelo Diferencial de Acceso a La Justicia para las Mujeres y Niñas Víctimas de Violencia Sexual [Public Opinion Communiqué: The Special Jurisdiction for Peace Should be a Distinct Model of Access to Justice for Women and Girl Victims of Sexual Violence], Red Nacional de Mujeres, la Corporación Sisma Mujer, la campaña No Es Hora de Callar, and la Corporación Humanas [translation of title], http://www.iccnow.org/documents/comunicadojurisdiccionespecial paralapaz_(1).pdf.

97. *Id.*

98. Un Acuerdo Admirable y Promisorio para la Paz y la Justicia en Colombia [An Admirable and Promising Agreement for Peace and Justice in Colombia], Comisión Colombiana de Juristas [Colombian Jurists Commission] (Sept. 25, 2015), http://www.coljuristas.org/documentos/comunicados_de_prensa/un_acuerdo_admirable_y_promisorio_para_la_paz_y_la_justicia.pdf.

the Victims' National Roundtable expressed satisfaction with the agreement, particularly its focus on victims and victims' participation.[99]

Abroad, there was more skepticism of the agreement. Human Rights Watch's analysis of the agreement stated that because other international national tribunals (the ICC, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda) imposed prison terms as punishment for violations of international criminal law, Colombia has an obligation under international criminal law to punish such crimes with imprisonment as well.[100] Chief Prosecutor of the ICC Fatou Bensouda issued a statement when peace negotiations concluded in September 2016, stating that the Special Jurisdiction for Peace is expected to ensure that perpetrators of serious crimes are genuinely brought to justice, but noted that genuine accountability includes "effective punishments."[101]

In the OTP's most recent report on Preliminary Examinations, it stated that "at this stage of the preliminary examination, the OTP has not formed a specific or final position regarding the Special Jurisdiction for Peace, which has yet to be established."[102] This report was issued before the final peace accord was passed and identifies the "effectiveness of the restrictions on liberty" as one continuing concern of the OTP in its assessment of the "genuine" nature of these proceedings.[103]

Public perception of the SJP impacts its credibility both domestically and internationally. If the SJP has wide public support in Colombia, it is more likely to restore confidence in public institutions and contribute to reconciliation. Conversely, if the SJP does not have public support, particularly from victim communities, it is more likely to contribute to further division in the country. If the SJP has broad public support internationally, the international community will likely view the ICC's

99. *Mesa Nacional de Víctimas Establece su Plan de Trabajo y Reitera su Compromiso con la Pedagogía de Paz* [National Victim's Roundtable Establishes its Plan of Work and Reaffirms its Compromise with the Teaching of Peace], UNIDAD PARA LAS VÍCTIMAS [Victim's Unit] (March 13, 2016), http://www.unidadvictimas.gov.co/es/participaci%C3%B3n/mesa-nacional-de-v%C3%ADctimas-establece-su-plan-de-trabajo-y-reitera-su-compromiso-con-la.

100. *See generally* HUMAN RIGHTS WATCH, ANALYSIS OF COLOMBIA-FARC AGREEMENT (Dec. 21, 2015).

101. Fatou Bensouda, *Statement on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia—People's Army* (Sept. 1, 2016), https://www.icc-cpi.int//Pages/item.aspx?name=160901-otp-stat-colombia.

102. OFFICE OF THE PROSECUTOR OF THE ICC, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 57 (Nov. 14, 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

103. *Id.*

interfering with Colombia's transitional justice process negatively. This negative reaction could, in turn, undermine the ICC's credibility with the international community.

The SJP in Colombia is not the first alternative approach to holding individuals accountable for violations of international criminal law. In order to understand the balance between accountability and peace that Colombia is confronting, it is useful to consider examples from other countries facing a similar dilemma.

IV. Transitional Justice: Alternative Approaches to Accountability

Criminal prosecutions for human rights violations and breaches of international criminal law constitute one mechanism within the broader framework of transitional justice. As discussed in Part I, *infra*, countries may use tools such as truth commissions, reparations programs, and institutional reforms to pursue their goals, which may include establishing the truth, compensating victims, preventing future abuses, and promoting social healing and reconciliation.[104]

The goals of a society, or of those individuals charged with leading the transitional justice process, will inform the mechanisms that are used. Criminal prosecutions can serve several of the goals listed above, such as establishing the truth, acknowledging victim suffering by giving victims the opportunity to tell their stories, holding perpetrators accountable, and preventing future abuses through deterrence. Ensuring that criminal prosecutions are carried out in an independent and unbiased manner may also contribute to institutional reform and public trust in government institutions.

Sentencing is an important, and sometimes controversial, aspect of criminal prosecutions. Hector Olásolo, a scholar who participated in the drafting of the Rome Statute and served as a Legal Officer at the International Criminal Court, identifies four possible goals of criminal punishment: retribution, general deterrence (i.e., deterrence aimed at the general public), special deterrence (i.e., deterrence aimed at the convicted individual), and rehabilitation.[105] In a statement on transitional justice in Colombia, Deputy Prosecutor of the ICC James Stewart identified "appropriate sentencing goals" as "public condemnation of criminal conduct, recognition of victims' suffering, and deterrence of

104. *See* U.S. Inst. of Peace, Transitional Justice Information Handbook 1–2 (Sept. 2008).

105. Hector Olásolo, *Complementarity Analysis of National Sentencing*, *in* Sentencing and Sanctioning in Supranational Criminal Law 37, 43 (Roelof Haveman & Olaoluwa Olusanya eds., 2006).

further criminal conduct."[106] Noticeably absent from this list is the concept of rehabilitation, which may be of particular importance in a society emerging from conflict.

The fact that domestic jurisdictions have divergent practices on sentencing is illustrative of the fact that there is no global norm on sentencing. Such divergence may be a positive feature so that punishments reflect the values of the affected communities and the context of the particular situation.[107] For example, imprisonment may not be viewed as an effective punishment in a post-conflict situation where the victim population is impoverished and the perpetrators are guaranteed access to food and shelter through imprisonment.[108] Long prison sentences may also be inappropriate where crimes were committed by child soldiers who are themselves victims of a war crime.[109] These examples demonstrate the importance of considering contextual factors when establishing methods of sentencing.

Article 17 of the ICC and subsequent statements by the OTP have established that the Court has a particular view of how domestic prosecutions should be carried out in order to make a case inadmissible before the ICC on complementarity grounds, discussed *supra*. This type of criminal prosecution envisioned by the ICC constitutes only one potential mechanism within a range of accountability options that may be pursued by a country in its transitional justice process. The experiences of South Africa and Rwanda provide two examples of alternative approaches to criminal prosecutions.

A. *South Africa: Truth for Amnesties*

The Truth and Reconciliation Commission for South Africa (TRC) began its work in 1995 to investigate human rights violations perpetrated during the period of Apartheid from 1960 to 1994.[110] While the TRC did not have a mandate to conduct prosecutions, it did have the

106. James Stewart, Deputy Prosecutor of the ICC, *Transitional Justice In Colombia And The Role Of The International Criminal Court* 10 (May 13, 2015), https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.

107. *See* Nancy Combs, *Seeking Inconsistency and Advancing Pluralism in International Criminal Sentencing*, 41 YALE J. INT'L L. 1 (Winter 2016).

108. *Id.* at 27.

109. *Id.* at 28–29.

110. *See* U.S. INST. OF PEACE, TRUTH COMM'N: SOUTH AFRICA (1995), http://www.usip.org/publications/truth-commission-south-africa.

power to grant amnesties through the Amnesty Committee.[111] This was not a blanket amnesty granted to all perpetrators—rather, it was a program to grant amnesties after the Amnesty Committee reviewed an application and determined whether it met certain qualifications.[112] These qualifications included that the act committed was associated with a political objective, occurred during the specified time period, and, perhaps most importantly, the applicant admitted fault and made full disclosure of all relevant facts.[113] The TRC had an additional requirement that, if the applicant committed a gross violation of human rights, a public hearing would be held at which "persons having an interest in the application" had a right to be present and testify.[114]

The report of the TRC lays out several reasons why the country was not pursuing what it termed the "Nuremberg option" of trials for those guilty of gross violations of human rights.[115] First, there was a military stalemate, meaning there was no victor in a position to enforce "victor's justice" as there had been after World War II.[116] Second, they argued that members of the security establishment would not have agreed to a peaceful transition to democracy had they thought they would then face criminal prosecution for their past crimes.[117] The TRC report also claims that the country lacked sufficient resources for such trials and that trials would simply prolong divisions in the society rather than promote reconciliation.[118] Finally, the TRC report notes that establishing the truth was an important goal in the transitional justice process and the amnesty provisions provided an incentive for perpetrators to come forward and tell the truth, whereas it is much more difficult to know if the whole truth is established in criminal proceedings.[119] To this end, the report also notes that the TRC provided a safer environment for victims to tell their stories than a criminal trial, where they would be subject to cross examination.[120]

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111. TRUTH AND RECONCILIATION COMM'N, REPORT OF THE AMNESTY COMMITTEE VOL. 6 § 1, 3 (2003), http://www.justice.gov.za/trc/report/finalreport/vol6_s1.pdf.

112. *Id.*

113. *Id.* at 7–11.

114. *Id.* at 11.

115. TRUTH AND RECONCILIATION COMM'N, REPORT OF THE AMNESTY COMMITTEE VOL. 1, 5 (2003) http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 6.

120. *Id.*

B. *Rwanda: International, National, and Local Justice*

In Rwanda, alternatives to prosecution were supplemental to criminal prosecutions undertaken at both the national and international level. The International Criminal Tribunal for Rwanda (ICTR) was established by the United Nations Security Council to prosecute individuals responsible for genocide and other violations of international criminal law in Rwanda in 1994.[121] Located in Arusha, Tanzania, this court was responsible for prosecuting those "most responsible" for the crimes committed in Rwanda during the relevant time period.[122]

The scale of the Rwandan genocide and the limited scope of the ICTR's mandate meant that many perpetrators of genocide and war crimes would not be prosecuted, creating a large gap in accountability that would need to be filled by other means. The Rwandan government developed specialized legislation to deal with genocide-related cases that relied heavily on plea agreements.[123] The national legislation created categories of perpetrators based on the crimes for which they were accused.[124] Besides individuals accused of the most heinous crimes, all other perpetrators would be entitled to a reduced sentence on the condition that they admitted their guilt, gave a complete confession, and apologized to the victims.[125] These reduced sentences were even lower for those who came forward to confess prior to the initiation of prosecution.[126]

The scale of the Rwandan genocide was so massive that even the combined efforts of the ICTR and domestic Rwandan courts were insufficient to address the number of accused perpetrators. By 1998, the prison population in Rwanda had reached 130,000.[127] In order to deal with this overcrowding while still holding individuals accountable, the Rwandan government set up the *gacaca* system to deal with offenders on a local level, drawing inspiration from a traditional dispute

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121. *The ICTR In Brief*, UNITED NATIONS MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS, http://unictr.unmict.org/en/tribunal.

122. *Id.*

123. Madeline H. Morris, *Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 358 (1997).

124. *Id.*

125. *Id.*

126. *Id.* at 359.

127. HUMAN RIGHTS WATCH, RWANDA: JUSTICE COMPROMISED: THE LEGACY OF RWANDA'S COMMUNITY-BASED *GACACA* COURTS, 13 (2011), https://www.globalpolicy.org/images/pdfs/rwanda0511webwcover.pdf.

resolution mechanism in Rwanda.[128] The *gacaca* system was not available to the worst offenders (planners, leaders, organizers, and instigators of the genocide) but was available to others individuals accused of genocide.[129] Trials in the *gacaca* system were generally initiated by a "civil party" (usually a victim) and took place within the community.[130] Community members were given the opportunity to testify and a panel of five to seven judges (elected members of the community) issued sentences (which could include prison terms up to life in prison) by majority rule.[131]

Three main arguments were given for using the *gacaca* system in Rwanda: (1) to deliver justice in a reasonable time frame to help eliminate prison overcrowding, (2) to hold individuals responsible for their crimes, and (3) to promote reconciliation in local communities by allowing victims to participate and tell their stories within their own communities.[132] There were hopes that this proceeding would promote community building by allowing local communities to establish the truth through victim's stories as a form of restorative justice, similar to the goal of the South African TRC.[133]

The accountability efforts in South Africa and Rwanda demonstrate two examples of how countries emerging from periods of massive human rights violations dealt with the issue of accountability. The post-conflict situations in South Africa and Rwanda were dramatically different. In South Africa, as noted in the report of the TRC, over forty years of institutionalized apartheid was brought to an end through negotiation.[134] By contrast, in Rwanda, the Rwandan Patriotic Front (RPF) secured military victory after as many as 1,000,000 people were killed between April and July 1994.[135] To use the terms of Kathryn Sikkink, South Africa was a "pacted" transition, in which leaders of the prior regime negotiated their exit from power and exerted some

128. *Id.* at 15–17.

129. *Id.* at 18.

130. *Id.* at 21.

131. *Id.* 18–23.

132. *Id.* at 15.

133. Timothy Longman, *Trying Times for Rwanda*, HARV. INT'L REV. (Aug 1, 2010), http://hir.harvard.edu/law-of-the-landtrying-times-for-rwanda/.

134. *See* REPORT OF THE AMNESTY COMMITTEE VOL. 1, *supra* note 115, at 5; *see also Dismantling Apartheid, 1990-1994*, *in* SOUTH AFRICA: A COUNTY STUDY (Rita M. Byrnes, ed., 1996), http://countrystudies.us/south-africa/34.htm.

135. UNITED NATIONS, *Rwanda, A Brief History of the Country*, http://www.un.org/en/preventgenocide/rwanda/education/rwandagenocide.shtml.

control over their position in the transitional society.[136] Rwanda, by contrast, was a "ruptured" transition, in which the outgoing regime was defeated or weak and therefore unable to control their position in the new society, in this case due to a military loss.[137] Prosecutions for human rights violations are much easier following ruptured transitions, whereas amnesty is much more likely as part of the negotiations of a pacted transition.[138]

Colombia is experiencing a pacted transition after over fifty years of conflict between guerrillas, paramilitaries, and the government.[139] The length and complexity of the conflict in Colombia is closer to that of South Africa, with its negotiated transition, than that of Rwanda, where there was a short-lived conflict, primarily between two parties, with one clear military victor. Accountability will thus be challenging in this situation and is further complicated by the fact that Colombia is party to the Rome Statute. The transitional justice processes in South Africa and Rwanda took place before the ICC was established and thus, while they faced pressure from the international community, neither country faced the same legal obligation as Colombia with regard to the duty to prosecute grave violations of international criminal law.

V. Colombia: Reaching a Middle Ground

The overall provisions of the SJP seem to be a middle ground between the South African and Rwandan approaches. Like in the case of South Africa, individuals who come forward to confess their crimes will not face criminal prosecution. They will not, however, be granted complete amnesty. Individuals who acknowledge the truth and accept responsibility will receive a reduced sentence, as was the case in Rwanda, but these sentences will not be served in prison. Rather, these sentences will amount to a restriction on liberty focused on reincorporating the individuals into society. This section analyzes whether proceedings in the SJP will be considered "genuine" under the Rome Statute and suggests ways that the ICC can address the tension between ensuring that prosecutions are genuine and respecting Colombia's goals in its transitional justice process.

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136. Kathryn Sikkink, The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics 32 (2011).

137. *Id* at 33.

138. Kathryn Sikkink and Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 Ann. Rev. L. & Soc'y 269, 276-77 (2013).

139. *See Fourth Report on the Human Rights Situation in Colombia, supra* note 2.

A. *The Special Jurisdiction for Peace and Genuine Prosecutions*

It is not yet clear how the ICC will rule on the admissibility of cases that have been addressed by the SJP based on its complementarity analysis. First, it is not clear whether the sentences articulated in the agreement will be sufficient. In his statement on transitional justice in Colombia, Deputy Prosecutor James Stewart described "appropriate sentencing goals" as "public condemnation of criminal conduct, recognition of victims' suffering, and deterrence of further criminal conduct."[140] The final peace accord describes the sanctions for those who thoroughly acknowledge the truth, in detail and publicly, as having a "restorative" goal.[141]

It is not settled whether the ICC can deem that prosecutions are not "genuine" because of the sentences that are imposed, given that sentencing is not explicitly addressed in the Rome Statute. The OTP seems to believe that it has this power, as Deputy Prosecutor James Stewart said in his statement regarding transitional justice in Colombia that "[w]here a conviction results from the proceedings, the assessment of genuineness also includes the matter of sentence."[142] He argues that suspended sentences or sentences that are "manifestly inadequate" amount to shielding individuals from criminal responsibility for war crimes or crimes against humanity.[143] With regard to reduced sentences, however, Stewart states that where the convicted person fulfills certain conditions—such as an acknowledgment of criminal responsibility, demobilization and disarmament, and guarantees of nonrepetition—a reduced sentence may be appropriate.[144] Stewart also comments on alternative sentences, stating that some factors to be considered when assessing such sentences would include the usual sentencing under national law for the crimes, the proportionality of the sentence in relation to the gravity of the crime, and the type and degree of restrictions on liberty, among others.[145] Alternative sentences, according to Stewart, will be considered in the "context of a

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140. James Stewart, Deputy Prosecutor of the Int'l Criminal Court, Transitional Justice In Colombia And The Role Of The International Criminal Court (May 13, 2015), at 10, *available at* https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.

141. *Final Peace Accord*, *supra* note 1, at 128.

142. James Stewart, Deputy Prosecutor of the Int'l Criminal Court, Transitional Justice In Colombia And The Role Of The International Criminal Court (May 13, 2015), at 10, *available at* https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.

143. *Id.* at 11.

144. *Id.* at 12.

145. *Id.* at 13.

transitional justice process" and whether they serve appropriate sentencing goals.[146]

The informal expert paper on complementarity includes special procedures with "lenient" approaches, pardons, or "grossly inadequate sentences" as potential factors that could indicate unwillingness under Article 17.[147] The guidelines for these sentences would be laid out before any investigations or prosecutions begin, making it more likely that sentences could be considered as part of an Article 17 "unwilling" analysis, rather than a situation in which proceedings were entirely genuine and later frustrated by inadequate sentencing.

Douglass Cassel, one of the lawyers who helped to negotiate the agreement for the SJP, defended its legality in a letter to Colombian President Juan Manuel Santos.[148] He describes the provisions of the SJP as more rigorous than those of the South African TRC because they ensure that justice is not sacrificed in the pursuit of peace.[149] He also states that the interest of victims weighs in favor of supporting the agreement because there will be more victims if peace is not achieved.[150] With regard to the goals of the SJP, he notes that the President of the ICC, Judge Silvia Fernández de Gurmendi, recently issued a statement in which she emphasized the importance of restorative justice for long-term stability in post-conflict societies.[151] Cassel is therefore optimistic, though uncertain, that either the OTP will not pursue action in Colombia or, if they do, that the Court will not allow an investigation to go forward.[152]

There are steps that Colombia can take with regard to sentencing that would increase the chances that the OTP will not interfere with its transitional justice process. For example, it could deny the special sentencing options to the "big fish," i.e., those most responsible for violations of international criminal law. This is similar to the approach that Rwanda took, by not making the *gacaca* system available to the

146. *Id.*

147. INFORMAL EXPERT PAPER, *supra* note 4, at 30.

148. Letter from Douglass Cassel, Notre Dame Law School, to Juan Manuel Santos, President of Colombia (Sept. 25, 2015), http://humanrights.nd.edu/assets/177163/spec_jurisd_peace_legal_ltr_9.25.15.pdf [hereinafter Cassel Letter].

149. *Id.*

150. *Id.*

151. Press Release, Int'l Criminal Court, Justice is Key to Durable Peace (Sept. 21, 2015) https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1152.aspx.

152. Cassel Letter, *supra* note 148.

worst offenders.[153] The OTP makes clear in its Draft Policy Paper on Case Selection and Prioritization that the degree of responsibility of alleged perpetrators is an important consideration in determining who the Court will prosecute.[154] Furthermore, Colombia could ensure greater consultation with victims, particularly with victims of sexual and gender based violence. Chief Prosecutor Fatou Bensouda has made clear that prosecuting such crimes is a priority for her,[155] and a coalition of Colombian women's organizations has already pointed out that the parties have an obligation to protect victims' right not to be confronted by their aggressor.[156] Greater consultation with victims may also demonstrate that these proceedings are in the best interest of victims, and thus intervention by the ICC is not in the interests of justice.[157] These steps would improve the likelihood that the OTP would not pursue an investigation in Colombia, but would still not grant the Colombian government or the FARC-EP legal certainty.

B. *Reconciling "Genuine Prosecutions" with the Goals of the Country*

Perhaps the biggest challenge for the ICC in conducting its complementarity analysis is how to reconcile its requirements and standards for determining what is a "genuine" prosecution with the goals of a country emerging from a period marred by human rights violations. There are two considerations in particular that are in tension. First, the Court should develop predictable and clearly enforceable standards for assessing domestic efforts at accountability to determine if they are "genuine." The Court included this provision for an important reason:

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153. *See* THE LEGACY OF RWANDA'S COMMUNITY-BASED *GACACA* COURTS, *supra* note 127.

154. *See* OFFICE OF THE PROSECUTOR OF THE ICC, DRAFT POLICY PAPER ON CASE SELECTION AND PRIORITIZATION 13 (Feb. 29, 2016), https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf.

155. *See* OFFICE OF THE PROSECUTOR OF THE ICC, POLICY PAPER ON SEXUAL AND GENDER-BASED CRIMES (June 2014), https://www.icc-cpi.int/iccdocs/otp/otp-policy-paper-on-sexual-and-gender-based-crimes–june-2014.pdf.

156. Comunicado a la Opinión Pública: La Jurisdicción Especial Para La Paz Debe Ser un Modelo Diferencial de Acceso a La Justicia para las Mujeres y Niñas Víctimas de Violencia Sexual [Public Opinion Communiqué: The Special Jurisdiction for Peace Should be a Distinct Model of Access to Justice for Women and Girl Victims of Sexual Violence], Red Nacional de Mujeres, la Corporación Sisma Mujer, la campaña No Es Hora de Callar, and la Corporación Humanas [translation], http://www.iccnow.org/documents/comunicadojurisdiccionespecialparalapaz_(1).pdf.

157. *See* OFFICE OF THE PROSECUTOR OF THE ICC, POLICY PAPER ON THE INTERESTS OF JUSTICE 5 (Sept. 2007), https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

"sham trials" or proceedings that are not consistent with a true attempt to bring a person to justice should not preclude action by the ICC. Ensuring that these standards are predictable is not only consistent with principles of the rule of law, but also provides guidance for countries in crafting their transitional justice processes and ensures that these policies do not change drastically with each new Prosecutor.

While clear and predictable standards are desirable, the ICC must also keep in mind contextual considerations of different transitional justice processes. As discussed above, "ruptured" and pacted transitions will result in much different possibilities for accountability on the ground. The OTP made clear in its Policy Paper on the Interests of Justice that assessments of peace and security are better left to other institutions and the Court has a specific mandate that it must follow.[158] While this certainly means that the Court cannot accept blanket amnesties, it does not as clearly address how the Court should approach a situation in which accountability efforts are being pursued in a manner that the transitional society deems to be in its best interest but are not the typical criminal prosecutions envisioned by the ICC (what the South African TRC termed the "Nuremberg option").

The first important way that the Court can address this tension is through consultation with the concerned state. Only by speaking with actors who are involved in the transitional justice process can the Court best understand the goals of the country and the reasoning behind decisions it adopts. This dialogue can provide better guidance to the Court regarding whether actors are simply trying to shield perpetrators from accountability or if they are adjusting their strategy to the complexity of the situation in order to pursue goals such as reconciliation and reintegration of perpetrators into society. This is a judgment that is best made by the OTP in communication with the concerned actors.

Additionally, communication with the concerned country allows the Court to provide assistance and guidance to the state. Beyond the "stick" of threatening to intervene if the country does not "genuinely" prosecute perpetrators, the Court can offer the "carrot" of technical assistance, guidelines, and best practices. The Court does not have an outreach or capacity building mandate, so it is not clear that it has sufficient resources to dedicate to such efforts. The ICC can partner with civil society organizations at the national and international level as

158. Office of the Prosecutor of the ICC, Policy Paper on The Interests of Justice 9 (Sept. 2007), https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf.

well as United Nations agencies to provide some degree of assistance to states, perhaps through providing examples of "best practices" or more clear and practical guidelines to the Court's complementarity analysis.

Second, the Court should adopt a clearer stance on sentencing guidelines. As previously mentioned, it is not entirely clear how much control the ICC actually has over how a country sentences individuals. Deputy Prosecutor James Stewart, in addressing the Colombia agreement, said:

> 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 . . . . They should, however, serve appropriate sentencing goals, such as public condemnation of the criminal conduct, recognition of victims' suffering, and deterrence of further criminal conduct.[159]

This statement seems to reflect that while the Court recognizes that it has not established clear sentencing guidelines, it does have some power over determining what are and are not appropriate sentences. The Court, and the OTP in particular, should clarify its stance towards sentencing and, if it asserts any authority over domestic sentencing procedures, it must provide some basis for that stance based on the Rome Statute. The fact that countries withheld power from the ICC to investigate cases under Article 20 where the sentence was disproportionate to the crime or a pardon was granted demonstrates a reluctance by countries to give the ICC power over national sentencing guidelines. The Court should therefore consider bringing the issue before the Assembly of States Parties before issuing any sentencing guidelines.[160]

Finally, the Court can incorporate considerations for a country's alternative goals into its complementarity analysis. One way the Court can do this is when the OTP is making its case selection and prioritization decision. As noted in the OTP's Policy Paper on Case Selection and Prioritization, the Court's resources are limited, and thus it cannot

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159. James Stewart, Deputy Prosecutor of the ICC, Transitional Justice In Colombia And The Role Of The International Criminal Court 10 (May 13, 2015), https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.

160. *See* Rome Statute, *supra* note 4, art. 112 (establishing the Assembly of States Parties), art. 122 (governing amendments to the Rome Statute and stating that where consensus cannot be reached, the Assembly of States Parties will vote to determine whether such an amendment will be adopted).

prosecute all cases that fall within its jurisdiction.[161] It therefore makes sense that the OTP should, when deciding where to initiate investigations, consider if there are any good faith efforts being taken domestically to hold perpetrators accountable for their crimes. If there are, it may be better to prioritize cases where no domestic efforts at accountability have emerged and thus there is a greater chance for impunity. This should be an important factor the OTP considers when exercising prosecutorial discretion, in order to grant some deference to the country to conduct its transitional justice process without constant concerns about interference by the ICC.

These options allow the Court to maintain high standards with regard to what constitutes a "genuine" prosecution and thus prevent sham trials from shielding perpetrators from accountability for grave violations of international criminal law. At the same time, consultation with concerned countries, a clear stance on sentencing guidelines, and the exercise of prosecutorial discretion will provide guidance and allow flexibility for countries to construct transitional justice processes in accordance with the goals of their societies. This should be particularly emphasized in situations like Colombia, where victims have been given the opportunity to participate in the transitional justice process and the agreed upon mechanisms have domestic support. The limited resources of the Court and preferences for domestic prosecutions over international ones, as demonstrated by the principle of complementarity, support the idea that the Court should work with countries to ensure that domestic prosecutions take place where that is possible.

VI. Conclusion

While the peace agreement between the Colombian government and the FARC-EP is now finalized, there are still important steps that need to be taken towards its implementation. It will take time to set up the tribunals established under the Special Jurisdiction for Peace, and it could be years before the first sentences are handed down. Even when this does happen, it will not be the end of concerns regarding accountability in Colombia, as the government began peace talks with the National Liberation Army (ELN), the second-largest rebel group in

161. Office of the Prosecutor of the ICC, Draft Policy Paper on Case Selection and Prioritization 5 (Feb. 29, 2016), https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf.

Colombia, on February 8, 2017.[162]

The complementarity analysis with regard to sentencing is an important issue outside the Colombian context as well, as this case may serve as a model for other countries seeking to implement alternative forms of prosecution while complying with their international obligations under the Rome Statute. Furthermore, other countries that are not parties to the Rome Statute but that may consider joining the Rome Statute would certainly benefit from a clearer understanding of what a country must do to fulfill its obligations of "genuinely" prosecuting violations of the crimes enumerated in the Rome Statute. By providing greater clarity and guidance to countries, the Court may be able to increase its own legitimacy, expand its jurisdiction, and promote domestic prosecutions to ensure it truly remains a "court of last resort."

162. *Colombia: Peace Talks with the ELN Tebel Group Begin*, BBC NEWS (Feb. 8, 2017), http://www.bbc.com/news/world-latin-america-38902638.