NOTES

JUSTICE IN THE TIME OF PEACE: EVALUATING THE INVOLVEMENT OF INTERNATIONAL COURTS IN COLOMBIA

ASHLEY COLLINS*

ABSTRACT

When the Final Peace Agreement was signed by the Colombian National Government and the Revolutionary Armed Forces of Colombia—People's Army (FARC-EP) in 2016, it marked the end of over fifty years of war. The agreement itself attempted to strike a careful balance between seeking a peaceful end to armed conflict and ensuring justice and accountability for atrocity crimes. Indeed, scholars, diplomats, and actors in the human rights space have long debated these two objectives—whether one should be prioritized over the other and how to sequence them if both are pursued. Courts are particularly relevant in this process, and the Colombian peace agreement creates a complex judicial system to deal with issues of justice and accountability.

However, Colombia's situation is unique because its peace process also falls under the jurisdiction of not one, but two international courts—the International Criminal Court (ICC) and the Inter-American Court of Human Rights (IACtHR). Therefore, to understand Colombia's relationship with the peace versus justice question, it is necessary to examine the interaction of these international courts within the context of the peace process, assess their impact, and reflect on opportunities for improvement. About six years after the peace deal and at a time when peace in Colombia seems fragile, it is worth re-evaluating what international courts—and international involvement in Colombia more broadly—could and should accomplish.

This Note argues that both the ICC and IACtHR have nuanced, but nevertheless substantial, roles to play in the Colombian peace process moving forward. After assessing the impact of the international courts' involvement so far and examining the evolution of both courts' views on the justice and peace question over the years, the Note reflects on the potential ways that international involvement could better support domestic efforts to navigate this tension in the future, in accordance with the international courts' differing mandates

* Ashley Collins holds a J.D. from Georgetown University Law Center (2022) and a B.A. from Harvard University (2017). The author would like to thank Professor Jane Stromseth for her feedback and guidance throughout the writing process.

and areas of expertise. The Note concludes that there is still space for international involvement in Colombia.

I. INTRODUCTION

In November 2016, the Colombian National Government and the Revolutionary Armed Forces of Colombia—People's Army (FARC-EP) signed the "Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace," bringing an end to over fifty years of war.[1] The internal armed conflict killed over 260,000 Colombians and displaced around 7.5 million people.[2] The violence that engulfed the country for over half a century involved a myriad of actors including the military, guerrillas, paramilitaries, and other criminal armed groups.[3] The FARC-EP, originally a Marxist-Leninist guerilla movement, was one of the largest groups involved in the fighting and at various times engaged in bombings, kidnappings, drug trafficking, and extortion, among other activities.[4] The combined violence of the FARC-EP, right-wing paramilitaries, and other criminal organizations

1. *See generally* Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colom., Nov. 24, 2016, https://www.refworld.org/docid/5b68465c4.html [hereinafter Final Peace Agreement].

2. Ted Piccone, *Peace with Justice: The Colombian Experience with Transitional Justice*, BROOKINGS INST. 3 (July 2019), https://www.brookings.edu/research/peace-with-justice-the-colombian-experience-with-transitional-justice/.

3. *See id.* at 2–4.

4. *See id.* at 3.

reflected and exacerbated the underlying challenges of rural poverty, social marginalization, and state absence.[5]

Over the years, the national government attempted to reach a peace agreement with the FARC-EP, but it was not until 2012 that these talks began to meaningfully progress.[6] Following exploratory negotiations in Cuba, the government and the FARC-EP reached a "General Agreement to End the Armed Conflict and Build a Stable and Lasting Peace," which was signed on August 26, 2012.[7] The parties conducted further negotiations, and on September 26, 2016, they formally signed a final version of the agreement.[8] Shortly thereafter, on October 2, the country held a plebiscite in which Colombian voters narrowly rejected the deal, many expressing their concerns about leniency in the deal's provisions on accountability for the FARC-EP's crimes.[9] Finally, on November 24, the parties signed a revised version of the agreement, and it was approved by the Colombian Congress.[10]

The tumultuous trajectory of the Colombian peace agreement was thus a reflection of the tension between seeking a peaceful end to armed conflict and ensuring justice and accountability for atrocity crimes. The deal itself recognizes the need for both elements and adopts a "peace with justice" approach; in its efforts to lay the foundation for sustainable peace, the agreement references principles of international criminal law and international human rights law.[11]

Indeed, these references reflect Colombia's unique situation with regard to international courts—its peace process falls under the jurisdiction of both the International Criminal Court (ICC) and the Inter-American Court of Human Rights (IACtHR).[12] Therefore, to understand Colombia's relationship with the peace versus justice question, it is necessary to examine the interaction of these international courts

5. *See id.* at 1.

6. *See A Timeline of Colombia's 55-year rebel conflict*, AP NEWS (Aug. 29, 2019), https://apnews.com/article/79af91d139ae41a2abd06fdcdf86a7da.

7. *See* Final Peace Agreement, *supra* note 1, at 1.

8. Nicholas Casey, *Colombia Signs Peace Agreement With FARC After 5 Decades of War*, N.Y. TIMES (Sept. 26, 2016), https://www.nytimes.com/2016/09/27/world/americas/colombia-farc-peace-agreement.html.

9. *Colombia referendum: Voters reject Farc peace deal*, BBC NEWS (Oct. 3, 2016), https://www.bbc.com/news/world-latin-america-37537252; *see* Piccone, *supra* note 2, at 3.

10. *See* Final Peace Agreement, *supra* note 1, at 1–2; Piccone, *supra* note 2, at 3.

11. *See* Piccone, *supra* note 2, at 1–2; Final Peace Agreement, *supra* note 1, at 2.

12. Hillebrecht et al., *Colombia's constrained peace process: how courts alter peace-making*, OPENDEMOCRACY (July 26, 2016), https://www.opendemocracy.net/en/openglobalrights-openpage/colombia-s-constrained-peace-pr/.

within the context of the peace process, assess their impact, and reflect on opportunities for improvement.

One of the central propositions of this Note is that about six years after the peace accords, it is worth re-evaluating what international courts—and international involvement in Colombia more broadly—could and should accomplish. This moment in time—when peace in Colombia seems fragile[13]—may provide an opportunity for the courts to reposition themselves. On one hand, the ICC and IACtHR are no longer hampered by domestic actors using them as threats to walk away from negotiations.[14] On the other hand, the courts on their own cannot undo the politicization that has damaged the Colombian process of negotiating justice and peace.[15] However, they can, perhaps, strategically support domestic actors in navigating this balance.

This Note will argue that both the ICC and IACtHR have nuanced, but nevertheless substantial, roles to play in the Colombian peace process moving forward. First, this Note will assess the impact of the international courts' involvement so far, examining their contributions to the politicization of the peace process as well as their more beneficial roles as standard setters. To that end, this Note will also examine the evolution of each court's views on the justice and peace question over the years in order to track their influence on domestic actors and each other. Additionally, this Note will reflect on the potential ways that international involvement could better support domestic efforts to navigate the peace and justice tension in the future. The possibilities for the ICC and IACtHR must, for the most part, be evaluated separately due to the courts' differing mandates and areas of expertise, but both discussions contribute to the overarching argument that there is still space for international involvement in Colombia.

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13. *See Continued violence strains Colombia peace process, Security Council hears*, UN NEWS (Oct. 14, 2020), https://news.un.org/en/story/2020/10/1075402; Democracia Abierta, *Four years later, Colombia's Peace Agreement advances at a snail's pace*, OPENDEMOCRACY (Jan. 6, 2021), https://www.opendemocracy.net/en/democraciaabierta/colombia-peace-agreement-advances-snail-pace/; Juan Arredondo, *The Slow Death of Colombia's Peace Movement*, THE ATLANTIC (Dec. 30, 2019), https://www.theatlantic.com/international/archive/2019/12/colombia-peace-farc/604078/; Julie Turkewitz & Sofía Villamil, *Children Trapped by Colombia's War, Five Years After Peace Deal*, N.Y. TIMES (Mar. 27, 2021), https://www.nytimes.com/2021/03/27/world/americas/colombia-children-war-FARC.html?smid=ig-nytimes&utm_source=curalate_like2buy&utm_medium=curalate_like2buy_3euQ1BMQ__dd7ae40c-ea57-412e-b817-9894254a5085&crl8_id=dd7ae40c-ea57-412e-b817-9894254a5085.

14. *See* Hillebrecht et al., *supra* note 12.

15. *See id.*

II. Impact and Evolution of the International Courts' Involvement

For all of the ICC's and IACtHR's engagement in the Colombian context, the courts' involvement has yielded mixed results. In this section, the Note will examine the impact of the international courts' involvement in Colombia—both at a high level, examining the overall result of significant judicial engagement in a political process, and at a more granular level, tracing how each court has evolved in its views of the justice versus peace question.

A. *International Courts and the Judicialization of the Peace Process*

Of particular importance here is the extent to which the Colombian peace process has been characterized by the involvement of courts in political matters, often termed "judicialization."[16] Indeed, Colombia, as noted above, is unique in that its process has involved not only its domestic courts, but also two international courts. Moreover, these international courts have, in some capacity, been involved in the country for a significant amount of time; when the government and FARC-EP initiated their negotiations in 2012, the ICC and IACtHR had been involved in or exerted some influence over Colombia's handling of its armed conflict for almost a decade.[17] In light of this long-standing engagement, the key inquiry is where the peace process stands today as a result of it.

Scholars and observers of Colombia's peace process have noted that the road to the 2016 agreement was—as is the case with many transitional periods—highly political.[18] However, given the heavy involvement of courts—both domestic and international—in Colombia's process, it is apparent that courts, along with their standards and procedures, have become crucial political tools as well as political actors in

16. Hillebrecht et al., *The Judicialization of Peace*, 59 Har. Int'l L. J. 279, 280 (2018).

17. Colombia signed the Rome Statute on August 5, 2002, but submitted a declaration to exclude war crimes from the ICC's jurisdiction for seven years after that. The Office of the Prosecutor (OTP) opened a preliminary examination in June 2004. The IACtHR was arguably influential in Colombia even before the ICC opened its preliminary examination, as its jurisprudence—specifically, a 2001 case, discussed later in this Note—was referenced by human rights organizations in their opposition to the Alternative Sentencing Bill of 2003. *See* Off. of the Prosecutor, Preliminary Examination: Colombia, Int'l Crim. Ct. (Oct. 28, 2021), https://www.icc-cpi.int/colombia; René Urueña, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003-2017*, 111 Am. J. Int'l L. 104, 107–09 (2017).

18. *See, e.g.*, Hillebrecht et al., *Colombia's constrained peace process*, *supra* note 12.

their own right.[19] In this sense, the judicialization of the Colombian peace process has fed the politicization of it.

On the positive side, the ICC and IACtHR's standards have been influential in determining the positions of domestic actors; they have acted as standard setters that have dictated the outer boundaries of what is permissible in the peace process.[20] At the same time, domestic actors have been able to dilute the impact of these courts by leaving open certain policy questions, which if answered definitively, might trigger international involvement.[21] Therefore, it has not been the case that international courts have overwhelmed Colombia's transitional process, nor were they merely ornamental. The ICC and IACtHR did have mixed results in the lead up to the peace agreement, and it is precisely this nuance that the next section will explore, as it has important implications for the courts' post-peace agreement positioning.

B. *Evolution of the ICC and IACtHR's Views of Justice and Peace*

Given the length of time that the ICC and IACtHR have been involved in Colombia, it is perhaps no surprise that the courts' views of the tension between seeking justice for atrocities and peace processes have evolved. This section will examine these shifts both before the signing of the peace agreement in 2016 and after.

1. Before the Peace Agreement

In the years preceding the peace agreement, the ICC and IACtHR exerted differing degrees of influence over the situation in Colombia, and the courts' involvement in this period revealed shifting positions on the justice versus peace question.

Colombia signed the Rome Statute in 2002, but the ICC Office of the Prosecutor (OTP) did not open its preliminary examination into the conflict until 2004.[22] However, in 2003, the Colombian government introduced the Alternative Sentencing Bill, which would have "prioritize[d] 'peace and reconciliation' over criminal punishment" in the state's negotiations with the paramilitary groups.[23] The proposed legislation would have suspended criminal sentences for five years if members of the group agreed to demobilize.[24] Although the ICC loomed

19. *See id.*
20. *See id.*
21. *See id.*
22. Off. of the Prosecutor, *supra* note 17.
23. *See* Urueña, *supra* note 17, at 108.
24. *See id.*

over these deliberations since Colombia had recently joined the Rome Statute, the OTP stayed mostly silent during the first two years.[25] Instead, the IACtHR and its jurisprudence proved increasingly influential in the Colombian context.[26] This was due in large part to the court's recent decision in the *Barrios Altos* case, which many human rights groups cited as a significant obstacle to the Alternative Sentencing Bill.[27]

Barrios Altos concerned the promulgation and application of amnesty laws in the context of Peru's transition out of a period of armed conflict.[28] The amnesty laws in question were challenged because they prevented a case involving a massacre carried out by a death squad affiliated with the military intelligence service from advancing.[29] The Court explained that "all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations."[30] Moreover, the Court determined that self-amnesty laws such as the ones enacted by Peru were "manifest[ly] incompatib [le]" with the American Convention on Human Rights and as such, "said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible."[31] In light of the IACtHR's rejection of amnesty laws in *Barrios Altos* and concerns that the Court would intervene in Colombia to invalidate the Alternative Sentencing Bill on similar grounds, the government withdrew the legislation from consideration.[32] This marked the first instance in which one of the international courts involved in Colombia had—through its adherence to a particular view of justice and accountability—shifted domestic actors' pursuit of peace.

Following this incident, the negotiations with the paramilitaries proceeded and demobilizations began between 2003 and 2004.[33] In June

25. *See id.*

26. *See id.* at 109.

27. *See id.*

28. *See* Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001) [hereinafter *Barrios Altos*]; *see also Barrios Altos*, CEJIL, (Mar. 27, 2021), https://cejil.org/en/case/barrios-altos-2/.

29. *See* Barrios Altos, Inter-Am. Ct. H.R. (ser. C) No. 75.

30. *Barrios Altos*, *supra* note 28, ¶ 41.

31. *Id.* ¶ 44.

32. *See* Urueña, *supra* note 17, at 109.

33. *Id.* at 109.

of 2004, the OTP opened its preliminary examination.[34] This would have been a strategic opportunity for the OTP to clarify its expectations of justice and accountability with regard to a peace agreement between the government and paramilitaries, but it did not officially communicate with Colombia until the spring of 2005.[35] Consequently, in the initial years of the ICC's involvement in Colombia, the IACtHR and its jurisprudence constituted the most influential model for domestic actors to follow as they navigated the balance between justice and peace.

The ICC's views became clearer in the years that followed. In September of 2007, the OTP published a policy paper on the "interests of justice," in which it noted that "justice is an essential component of a stable peace," but made clear that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions."[36] These statements indicated that the ICC, like the IACtHR, would likely take issue with attempts to enact amnesties, as these would limit the extent to which justice was incorporated into peace processes. However, unlike the IACtHR, the OTP—in an October 2007 statement—signaled that prosecutions of paramilitary leaders, as opposed to perpetrators of every rank within the paramilitary groups, would be enough to fulfill Colombia's international obligations.[37] This contrasted with the Inter-American approach, which at that time required the prosecution of all perpetrators.

Therefore, while the ICC and IACtHR seemed to agree on some level that amnesties were unacceptable, the nuances of their differing approaches on who to prosecute are significant because they represent two different visions of the justice versus peace question. The ICC's position at this point in time seemed to indicate a more flexible approach to prosecution. As Mallinder argued, a "state may not be required to prosecute *every* perpetrator, as this would not be a realistic obligation . . . coupl[ing] selective prosecutions for the 'most responsible' with amnesty for lower-level offenders may be permissible, if these approaches are accompanied by mechanisms to ensure the rights of the victims."[38] In 2007, the ICC did not seem to go this far in its assessment of what would be permissible in Colombia's situation. However,

34. Off. of the Prosecutor, *supra* note 17.

35. *See* Urueña, *supra* note 17, at 110.

36. Off. of the Prosecutor, *Policy Paper on the Interests of Justice*, INT'L. CRIM. CT., 1, 8–9 (Sept. 2007), https://www.icc-cpi.int/sites/default/files/ICCOTPInterestsOfJustice.pdf.

37. *See* Urueña, *supra* note 17, at 112.

38. Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1 INT. J. TRANSIT. JUST. 208, 214 (2007).

Mallinder's argument indicates that more flexible approaches to justice—what she terms a "broader conception of justice"—may provide openings for peace processes to proceed.[39] Thus, the ICC's approach provided a more appealing avenue for the Colombian government than that of the IACtHR, and it "created space for the emergence of new domestic strategies for complying with international legal obligations vis-à-vis the conflict."[40]

Following this era of negotiations with the paramilitaries, the Colombian government set its sights on peace talks with the FARC-EP, and with this reorientation, international courts and their views on justice and peace were again relevant. Between 2010 and 2011, the ICC did not significantly engage with Colombia, although the preliminary examination remained open and the Colombian government participated in secret talks with the guerilla.[41]

Regionally, in 2012, the IACtHR decided the *Masacres de El Mozote* case.[42] There, the IACtHR examined a series of massacres—in which about 1,000 people were killed—committed in 1981 in the context of a military operation during the Salvadoran civil war.[43] An investigation into these events had been opened, but was halted in September of 1993 following the enactment of the Law of General Amnesty for the Consolidation of Peace.[44] The investigation was not reactivated, despite requests to re-open it and exhumations carried out in the years that followed.[45] With regard to the killings themselves, the IACtHR found the State of El Salvador responsible for the massacres and forced displacement of survivors in the aftermath, in violation of several provisions of the American Convention on Human Rights.[46]

With regard to the investigations of the massacres, the IACtHR found certain provisions in the Law of General Amnesty for the Consolidation of Peace "that prevent the investigation and punishment of the grave human rights violations that were perpetrated in this case lack legal effects and, consequently, cannot continue to represent an obstacle to the investigation … and the identification, prosecution and

39. *See id.* at 220.

40. *See* Urueña, *supra* note 17, at 113.

41. *Id.* at 116.

42. Case of the Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012) [hereinafter *Masacres de El Mozote*].

43. *Id.* ¶ 2.

44. *Id.*

45. *Id.*

46. *Id.* ¶¶ 156, 195.

punishment of those responsible."[47] The Court distinguished *Masacres de El Mozote* from its other cases because it concerned an amnesty law relating to acts committed in the context of an internal armed conflict and the subsequent enactment of a peace accord.[48] Moreover, the Court drew on international humanitarian law in explaining that amnesty laws are sometimes justified because they can help lead to a peaceful conclusion of a conflict, but that this norm is not absolute; states still have an obligation to investigate and prosecute war crimes.[49] The Law of General Amnesty was problematic because it moved away from the agreement to end impunity contained in the January 1992 peace accord, as well as the 1992 National Reconciliation Law, which established amnesty—as it was not mentioned in the peace accord itself—but excluded anyone who had taken part in grave acts of violence, according to the Truth Commission's report.[50] Instead, the Law of General Amnesty extended amnesty to people who had been excluded from this benefit under the National Reconciliation Law.[51]

Therefore, although the IACtHR did invalidate the amnesty law in this case, it seemingly opened up the possibility for arguments that certain kinds of amnesties might be permissible. This articulation of a more flexible conceptualization of the justice versus peace question created an opportunity for Colombia in its negotiations with the FARC-EP, the start of which was formally announced in 2012.[52]

At this point, balancing justice and peace became a key focus because in June 2012, the Colombian Congress approved a constitutional amendment, the "Legal Framework for Peace" (LFP), which was to serve as the constitutional framework for the peace negotiations with the FARC-EP.[53] The LFP leaned heavily on the more flexible conceptualization of the relationship between justice and peace, as it allowed the Attorney General to direct prosecutorial efforts towards the principal perpetrators of war crimes and crimes against humanity.[54] Therefore, at this point, it appeared that the IACtHR's views were exerting the most influence over domestic actors in Colombia. At the very least, the flexible approach articulated in *Masacres de El Mozote* seemed to create a valuable space for domestic actors to support their arguments in favor

47. *Id.* ¶ 296.
48. *See id.* ¶ 284.
49. *Id.* ¶¶ 285–86.
50. *Id.* ¶¶ 287–89.
51. *Id.* ¶ 291.
52. *See* Urueña, *supra* note 17, at 116, 119–20.
53. *Id.* at 116.
54. *See id.*

of the LFP. This proved particularly important when, in November of that year, the OTP published an interim report on the Colombian situation, which was critical of the case prioritization strategy at the heart of the LFP.[55] Indeed, it stated that despite its appreciation of Colombia's adoption of the LFP, the OTP "would view with concern any measures that appear designed to shield or hinder the establishment of criminal responsibility of individuals for crimes within the jurisdiction of the Court."[56] The OTP further explained that "failure to examine [information regarding the crimes committed by low-level offenders] could negatively impact a State's efforts to conduct genuine proceedings in respect of those bearing the greatest responsibility for the most serious crimes."[57] Thus, in 2012, it looked like the ICC was moving away from its earlier, more flexible approach to accountability, whereas the IACtHR had moved toward this more pragmatic view.

The following year, as the Colombian Constitutional Court was reviewing the LFP and peace negotiations were underway, the OTP again reiterated—via letters it sent to the president of the Court—its stricter view of what would and would not trigger ICC intervention in Colombia.[58] In short, the OTP continued to take issue with case prioritization, but it was perhaps more adamantly opposed to proposals for the suspension of sentences for those who committed war crimes and crimes against humanity.[59] For its part, the Colombian Constitutional Court pushed back on the OTP's views, accepting case prioritization and the suspension of sentences, albeit for those perpetrators who were not deemed to be "most responsible."[60] Ultimately, the LFP was enacted, but not implemented, due to the FARC-EP's rejection of it.[61] However, the debate over the OTP's stricter view of justice and accountability proved significant because the flexible approach was beginning to take hold in Colombia and elsewhere, as evidenced by the IACtHR's evolving views.

The last major point in the evolution of the ICC and IACtHR's approaches to justice in the period before the peace agreement occurred in 2015. The ICC Deputy Prosecutor, James Stewart, delivered

55. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., SITUATION IN COLOMBIA: INTERIM REPORT ¶ 205 (Nov. 2012), https://www.icc-cpi.int/sites/default/files/2022-09/OTPCOLOMBIAPublicInterimReportNovember2012.pdf.

56. *Id.*

57. *Id.*

58. *See* Urueña, *supra* note 17, at 118.

59. *See* Urueña, *supra* note 17, at 118.

60. *See* Urueña, *supra* note 17, at 118.

61. *See* Urueña, *supra* note 17, at 119.

a speech in Colombia, where he noted, in his discussion of the compatibility of sentences in national proceedings with the Rome Statute, that "in sentencing, States have wide discretion" and that "effective penal sanctions may thus take many different forms."[62] On alternative sentencing, which had also been included in the LFP, Stewart explained that a determination of the appropriateness of such sentences would depend on weighing a variety of factors, including the specific kind of sentences, the gravity of the crimes, and the level of responsibility of the perpetrator.[63] Therefore, the ICC's position on flexible approaches to justice finally seemed to be in line with those of many actors in Colombia, as well as the IACtHR on the regional level.

Thus, the period between 2002 and 2016 proved to be a dynamic one in terms of the international courts' evolving views of justice, in particular against the backdrop of two separate peace processes, first with the paramilitaries and later with the FARC-EP. By the time the Colombian National Government signed the peace agreement with the latter, the international courts involved appeared to be more receptive to the balance that the deal appeared to strike. Many factors likely influenced this result, but it is clear that influence flowed both ways. The international courts shifted the way Colombian institutions thought about certain issues relevant to the proposed peace deals—such as amnesties—but domestic actors appeared just as willing to push back against the international courts on other matters, including case prioritization and alternative sentencing.

2. After the Peace Agreement

As noted above, the Colombian National Government signed the Final Peace Agreement with the FARC-EP in November 2016.[64] The signing of the peace agreement, however, did not mark the end of international courts' involvement in Colombia. Therefore, this section will examine the extent to which the courts' positions on the justice versus peace question evolved further in the period following the peace agreement, including how—if at all—their relationships with domestic actors has changed as a result.

Regionally, the IACtHR heard few cases that were directly relevant to the application of amnesty laws, which had been its primary focus in cases involving transitional justice contexts. In November 2016, the

62. James Stewart, Deputy Prosecutor, Int'l. Crim. Ct., Transitional Justice in Colombia and the Role of the International Criminal Court 10 (May 13, 2015).

63. *Id.* at 13.

64. *See* Final Peace Agreement, *supra* note 1.

same month that the Colombian Congress approved the revised Final Peace Agreement between the government and the FARC-EP, the IACtHR issued its judgment in *Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal*.[65] This case concerned a 1982 massacre in the Chichupac Village as well as extrajudicial executions, tortures, forced disappearances, and sexual violence, among other crimes committed in the neighboring communities against indigenous Maya Achí people throughout the mid-1980s during the internal armed conflict.[66] The Court found that Guatemala had violated several provisions of the American Convention on Human Rights, including its obligation to investigate grave human rights violations.[67] In the process of finding these violations, the Court reiterated its position on amnesty laws, namely that such provisions that "in reality are a pretext for impeding the investigation of grave violations of human rights" are inadmissible.[68] Indeed, in the "Reparations" section of its judgment, the IACtHR stated that Guatemala should "remove all of the obstacles, *de facto* and *de jure*, that maintain impunity in this case and initiate, continue, launch, and/or re-open the investigations that are necessary to identify, judge, and where appropriate, punish those responsible for human rights violations that are the object of the present case."[69] Furthermore, the Court explained that "considering the gravity of the facts, [the state] may not apply amnesty laws nor prescription provisions . . . which are actually a pretext to impede the investigation."[70]

Thus, in *Aldea Chichupac*, the IACtHR generally held onto the view of amnesty laws it had articulated in *Masacres de El Mozote* in 2012. Its opinion in the Guatemala case is grounded in the Court's understanding that states have obligations to investigate and prosecute war crimes. In particular, the Court's focus on the inadmissibility of amnesty laws that block the investigation of "grave violations of human rights" echoes its more flexible approach to justice in *Masacres de El Mozote*, which invalidated an amnesty law on the grounds that it went too far by extending amnesty to individuals who had taken part in "grave acts of violence."[71] While the Court in *Masacres de El Mozote* seemed open to some

65. *See* Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal vs. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 328 (Nov. 30, 2016) [hereinafter *Aldea Chichupac*].

66. *Id.* ¶ 1.

67. *See id.* ¶ 257.

68. *See id.* ¶ 247.

69. *Id.* ¶ 285.

70. *Id.* ¶ 285(a).

71. *Masacres de El Mozote, supra* note 42, ¶¶ 287–89.

amnesties if they contributed to the peaceful conclusion of an armed conflict, it made clear that there was a limit.[72] This concern for "grave violations" was also present in the Guatemala case.[73] Furthermore, the Court's "pretext to impede the investigation" language in *Aldea Chichupac* is arguably consistent with the more flexible approach adopted in *Masacres de El Mozote* because it seems to suggest that there may be legitimate uses or justifications for amnesty laws. The Court here, however, was expressing its concern with amnesties that might be used for illegitimate reasons, but it does not say that amnesty laws are never justified. These cases thus demonstrate that the IACtHR's views on amnesty laws were generally consistent and grounded in a flexible approach to justice.

Another instance where the IACtHR expressed its views on amnesty laws involved considering urgent measures and monitoring compliance with its judgment in *Masacres de El Mozote* in 2019.[74] In 2016, the Constitutional Chamber of the Supreme Court of Justice of El Salvador declared the Law of General Amnesty for the Consolidation of Peace—the focus of the IACtHR case—unconstitutional.[75] However, in 2019, the Salvadoran legislature was considering a bill, the "Special Law of Transitional and Restorative Justice for National Reconciliation," which representatives of the *Masacres de El Mozote* victims alleged would contain provisions contravening the state's international obligations to investigate, judge, and punish.[76] Various international organizations as well as the UN High Commissioner for Human Rights worried that these provisions could be "translated as a *de facto* amnesty," urging the Salvadoran legislature to "refrain from reestablishing amnesties for those responsible for grave violations of human rights."[77] Ultimately, the IACtHR resolved to require El Salvador to immediately suspend the legislative process involving that bill until the full Court could hear and decide on the provisional measures request presented by the victims' representatives.[78]

72. *See id.* ¶¶ 285–86.

73. *See Aldea Chichupac*, *supra* note 65, ¶ 247.

74. *See* Masacres de El Mozote y Lugares Aledaños vs. El Salvador, Urgent Measures and Monitoring of Compliance with Judgment, Resolution of the President of the Court, (Inter-Am. Ct. H.R. May 28, 2019), https://www.corteidh.or.cr/docs/medidas/mozote_se_01.pdf [hereinafter Mozote Compliance].

75. *See id.* ¶ 3, at 4.

76. *See* i*d.* ¶ 17, at 11.

77. *Id.* ¶ 36.

78. *Id.* ¶ 1, at 21.

Here, as in *Aldea Chichupac* and *Masacres de El Mozote*, the IACtHR maintained its reluctance to approve amnesties for those who commit grave human rights violations. This disapproval, however, should not be taken as a reversion to the stricter stance on amnesties articulated in *Barrios Altos*. Thus far, the IACtHR appears consistent in its view that broad amnesties for those who engage in grave violence or grave violations of human rights are not permissible under the American Convention on Human Rights. In cases both before and after 2016, the Court has not commented further on the nuances of permissible amnesties. Therefore, the IACtHR does not appear to have drastically evolved in its flexible approach to accountability in transitional justice contexts in the years that followed the 2016 Colombian peace agreement.[79]

The ICC for its part, remained involved in Colombia to the extent that the preliminary examination remained open until October 2021.[80] Throughout the years that followed the 2016 peace agreement, OTP officials made various statements reiterating the ICC's stance on the importance of justice in conflict resolution processes and the establishment of sustainable peace, in addition to its reports on the progress of the preliminary examination. For the most part, however, these statements do not reveal significant shifts in the positions articulated by the OTP prior to the 2016 agreement.

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79. The IACtHR has heard cases involving the Colombian conflict following the 2016 peace agreement, but they are less relevant to the present discussion of amnesties and peace agreements. For example, in *Vereda La Esperanza vs. Colombia* in 2017, the Court found the Colombian state responsible for the forced disappearance of twelve people and the arbitrary detention of another in 1996, actions which were carried out by a paramilitary group and supported by state forces. The Court discussed a lack of investigation and delays in moving the cases forward, but did not directly address the government's peace agreement with the groups. The Court further noted the use of case prioritization, but did not ultimately find a violation of judicial guarantees as a result of these practices. The following year, the Court heard the case of *Omeara Carrascal y Otros vs. Colombia*, which involved extrajudicial executions and forced disappearances carried out in 1994 by paramilitary groups and supported by state forces. The Court concluded that the state had violated various rights under the Convention and again highlighted significant delays in the investigation and impunity for the crimes. *See* Vereda La Esperanza vs. Colombia, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 341 (Aug. 31, 2017); Omeara Carrascal y Otros vs. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 368 (Nov. 21, 2018).

80. Off. of the Prosecutor, *supra* note 17; Press Release, Int'l Crim. Ct., ICC Prosecutor, Mr Karim A. A. Khan QC, concludes the preliminary examination of the Situation in Colombia with a Cooperation Agreement with the Government charting the next stage in support of domestic efforts to advance transitional justice (Oct. 28, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=pr1623 [hereinafter Press Release].

In 2017, as Colombia was enacting a legal framework for the Special Jurisdiction for Peace (JEP), the OTP did step in. In short, the OTP disputed the definition of command responsibility of military leaders in relation to their subordinates' criminal conduct, which it maintained was contrary to international law.[81] At one point, references to Article 28 of the Rome Statute were inserted to resolve the potential conflict, but these were ultimately dropped.[82] The OTP, for its part, warned Colombia it needed to clarify these questions or risk ICC intervention if military commanders were not prosecuted effectively.[83]

The following year, the OTP reiterated its concerns over the definition of command responsibility, but ultimately noted that whether Colombia's definition of command responsibility conflicts with the Rome Statute and international law will depend on how the magistrates of the JEP interpret it.[84] The OTP thus articulated the outer bounds of what would be permissible with regard to command responsibility in Colombia's transitional justice process. Whether its warnings end up shifting the domestic actors' actions largely remains to be seen.

In 2018, the OTP was also focused on monitoring the Colombian Attorney General's inquiries regarding high-ranking military officials' responsibility for "false positives" killings, which the OTP maintained were relevant to its evaluation of the genuineness of Colombia's transitional justice proceedings.[85] With regard to amnesties, the OTP reiterated that its primary concern was with amnesties relating to crimes under the ICC's jurisdiction—genocide, crimes against humanity, war crimes, among others—but that crimes outside of that universe were not its concern.[86] However, the OTP favorably discussed the Colombian Constitutional Court's finding that amnesties could not be granted to individuals for any war crimes, whether committed systematically or not, noting this position was consistent with the OTP's position.[87] On sentencing, the OTP was largely consistent with its previous statements that states had "wide discretion"[88] on the matter, explaining the suspension of sentences would be "inadequate," but "reduced

81. *See* Urueña, *supra* note 17, at 122.

82. *Id.*

83. *Id.*

84. James Stewart, Deputy Prosecutor, Int'l Crim. Ct., The Role of the ICC in the Transitional Justice Process in Colombia ¶¶ 117–21 (May 30, 2018), https://www.icc-cpi.int/iccdocs/otp/201805SpeechDP.pdf.

85. *Id.* ¶¶ 70–71.

86. *Id.* ¶¶ 123–25.

87. *Id.* ¶¶ 126–30.

88. Stewart, *supra* note 62, at 10.

sentences are conceivable . . . as long as the convicted person must fulfil certain conditions that would justify an attenuated sentence."[89]

In 2020, Stewart delivered another speech on the Colombian situation, in which he discussed the role of the OTP in Colombia and the ways it engages with the work of the Special Jurisdiction for Peace (JEP).[90] On sentencing, Stewart reiterated the OTP's prior position, that "effective penal sanctions may take different forms."[91] More explicitly on the justice and peace question, Stewart explained that "from the perspective of the [OTP], transitional justice measures permit flexibility, to the extent that the fundamental objectives of the Rome Statute are met."[92] He continued, explaining that "the principle of complementarity is susceptible to a flexible and pragmatic application in distinct contexts, including in the context of Colombia, in which people are seeking the normalization of society following a prolonged and bitter armed conflict with the FARC-EP, which has concluded with a peace agreement."[93] This is perhaps the clearest indication that the flexible approach to navigating justice and accountability in the context of peace agreements has taken hold in the ICC.

The most significant development in the ICC's involvement following the peace agreement came in October 2021, when the OTP—under the direction of a new Prosecutor, Karim Khan[94]—announced that it was concluding the preliminary examination of the Colombian situation and had entered into a Cooperation Agreement with the Government of Colombia to lay out the future of the OTP's relationship with the state.[95] The OTP noted that it was satisfied that Colombian authorities were not inactive, unwilling, or unable to genuinely investigate and prosecute crimes under the ICC's jurisdiction and consequently determined that the closure of the preliminary examination was appropriate.[96] However, the accompanying press release notes

89. Stewart, *supra* note 84, ¶¶ 145–46.

90. James Stewart, Deputy Prosecutor, Int'l Crim. Ct., Prácticas contemporáneas sobre justicia transicional: el impacto de los tribunales internacionales con jurisdicción complementaria (Oct. 29, 2020), https://www.icc-cpi.int/sites/default/files/itemsDocuments/20201029-JKS-Speech-COL.PDF.

91. *Id.* at 6.

92. *Id.* at 8.

93. *Id.*

94. Karim Khan began his term as the ICC Prosecutor in June 2021. *See Statement of the ICC Prosecutor, Fatou Bensouda, on the transition process and related discussions with the Prosecutor Elect*, Int'l Crim. Ct. (Mar. 19, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=210319-statement-prosecutor-transition.

95. Press Release, *supra* note 80.

96. *Id.*

that "the closure of the preliminary examination does not detract from the reality that significant work is still required and that the institutions established must continue to be given the space to perform their constitutional responsibilities."[97] Indeed, the Cooperation Agreement, "the first of its kind concluded by the Office and a State Party,"[98] sets out a variety of commitments on both sides to advance the transitional justice process and leaves open the possibility that the OTP could reconsider its decision to close the preliminary examination.[99]

Therefore, the ICC, although no longer actively engaged in a preliminary examination, has indicated that it will remain involved in Colombia. The next section will examine certain provisions of the Cooperation Agreement and their impact on the ICC's involvement moving forward, but it is worth noting here that the fundamental approach to the justice and peace question—flexibility—appears intact in the OTP's recent decision. This is perhaps clearest in the emphasis on giving Colombian institutions "the space to perform their constitutional responsibilities."[100] Although more deferential than even the OTP's previous statements affirming states' "wide discretion" in sentencing matters, the closing of the preliminary examination could still be considered in line with its aforementioned "flexible" position because the continuation of the transitional justice process in Colombia remains the OTP's overarching goal and appears to be the motivation for entering into the Cooperation Agreement rather than closing the preliminary examination without further steps.[101] The main departure from the era of the preliminary examination is that the mechanisms through which transitional justice will be pursued are Colombian institutions established as part of the peace process. Finally, as mentioned, the prospect of a reopened preliminary examination is still present, albeit on paper.

Thus, in the years following the 2016 Colombian peace agreement, both the IACtHR and ICC have reiterated and reinforced their positions that the approach to seeking justice for atrocity crimes within peace processes must be flexible. Barring a dramatic reversion to the stricter stances each institution took at different points in the early

97. *Id.*

98. *Id.*

99. Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia art. 6, Oct. 28, 2021, https://www.icc-cpi.int/itemsDocuments/20211028-OTP-COL-Cooperation-Agreement-ENG.pdf [hereinafter Cooperation Agreement].

100. Press Release, *supra* note 80.

101. *See id.*

years of their involvement in Colombia, the pragmatic approach to navigating peace and justice will likely be how international courts examine developments in the following crucial years of the transitional justice process. The next section will argue that this position is significant because it affords both courts a strategic opportunity to ensure that they have a positive impact on the Colombian situation moving forward.

III. Potential Avenues for International Involvement in Justice and Peace

About six years after the Final Peace Agreement between the government and the FARC-EP, the international courts are still involved in Colombia in some form, and this section argues that this moment provides an opportunity to re-evaluate what they could and should be achieving. Over the last couple of years, observers have expressed concerns that Colombia's peace is beginning to fray. Reports cite continued violence,[102] in particular attacks on human rights defenders and social leaders.[103] This precarious situation has significant ramifications for the younger generations, who either are targeted for recruitment by armed groups or suffer due to state absence, despite the provisions of the peace agreement.[104] Moreover, the pace at which the implementation is proceeding is also a key concern.[105] Of course, the ICC and IACtHR cannot address all threats to the stability and sustainability of peace in Colombia. However, in the coming years, as the parties continue to implement the agreement, these international courts must examine the possible ways in which their involvement could better support domestic efforts to navigate the balance between justice and peace. This Note contends that, due to the courts' differing mandates and areas of expertise—international criminal law and human rights law—the possibilities for the ICC and IACtHR must, for the most part, be evaluated separately. As demonstrated by the above discussion of the courts' interactions in the years leading up to the agreement, however, neither one operates in a vacuum, so while they may be able to achieve different objectives, any efforts to chart the future of the courts should look for points of synergy. That said, there is still space for international involvement in Colombia; the shape it ultimately takes will depend on the extent to which the courts act in accordance with their respective

102. *Continued violence strains Colombia peace process, Security Council hears*, *supra* note 13.

103. Arredondo, *supra* note 13.

104. Turkewitz & Villamil, *supra* note 13.

105. Abierta, *supra* note 13.

strengths and are strategic about the matters in which they become involved.

A. *The ICC's "Hovering" and Proposed Reforms*

There are two primary ways the ICC could better support domestic efforts to navigate the balance between justice and peace. The first approach involves the ICC continuing its engagement with Colombia, supervising the developments in the implementation of the peace agreement, and making clear when those developments risk nonconformance with the Rome Statute. The second involves the ICC undertaking reforms that international nongovernmental organizations as well as the Independent Expert Review established by the Assembly of States Parties to the Rome Statute for the ICC have recommended, in particular those that involve strengthening the Court's relationship with in-country civil society and media organizations.

First, it may be the case that the ICC can best support domestic efforts to ensure peace by "hovering" over the situation in Colombia, although it may look different given the recent closure of the preliminary examination. Just as others have argued that the threat of ICC intervention can prompt domestic actors to include accountability mechanisms in their transitional processes, the continued presence of the OTP may create the space for Colombia's peace process to proceed.

The ICC had much to offer Colombia during the peace negotiations for structural reasons—it includes both the Court itself and the Prosecutor. This combination made the ICC harder to ignore during negotiations because it was able to function "not only as a court that casts a shadow through its settled jurisprudence, but also as an actor directly engaged in trying to influence the peace bargaining process."[106] Indeed, a Human Rights Watch report published prior to the 2016 agreement with the FARC-EP suggests that international courts and tribunals have aided the development of domestic accountability mechanisms because they "facilitat[ed] an environment in which confronting past atrocities became expected and acceptable."[107] The report further notes that even in Colombia and other countries under preliminary examination, "the looming possibility of ICC involvement has been enough to spur national enforcement efforts."[108] In particular,

106. Hillebrecht et al., *supra* note 15, at 295.

107. HUM. RTS. WATCH, SELLING JUSTICE SHORT: WHY ACCOUNTABILITY MATTERS FOR PEACE 93 (July 2009), https://www.hrw.org/sites/default/files/reports/ij0709webwcover_3.pdf.

108. *Id.* at 105.

it cites various instances in which the prospect of ICC involvement had some influence over decisions about domestic accountability for paramilitary groups.[109] Thus, the threat of ICC involvement—either through the OTP's statements on specific issues or the expectation created by the Court's jurisprudence—was influential before the peace agreement.

However, it is less clear that the ICC's hovering will, on its own, continue to have a significant impact on Colombian actors following the peace agreement, and this is especially true following the conclusion of the preliminary examination. As Human Rights Watch explains in its analysis of interviews conducted with Colombian government officials and civil society representatives a few months before the peace agreement was signed, "the length of the preliminary examination appears to have diminished the threat of an investigation. In particular, recent significant progress in prosecuting some international crimes could make it hard for officials to believe that the OTP would open an investigation now."[110] This suggests that even as the peace agreement neared, there was a certain level of comfort with the shadow of the ICC over Colombia. Therefore, even before the OTP closed the preliminary examination, it seemed possible that the further along Colombia got into its implementation process, the less it would feel threatened by the ICC and its presence would become less important. As noted above, the OTP continued to issue reports and make statements on the situation, but significant conflicts between Colombia and the Prosecutor were largely avoided, even though the OTP expressed concern about issues such as command responsibility, alternative sentencing, and "false positives" killings.

However, as suggested in the prior section, the ICC has both influenced and been influenced by Colombia, resulting in the OTP's acceptance of a more flexible approach to balancing justice and peace. In that sense, the OTP was probably more in sync with domestic authorities—in terms of what forms of accountability it considers acceptable—after the peace agreement rather than before. If so, it may be worth expanding our understanding of the nature of the ICC's "hovering" over Colombia. In a post-peace agreement Colombia, perhaps the ICC can be helpful because beyond the threat of opening a case—which is unlikely following the recent closure of the preliminary examination—

109. *Id.* at 107–08.

110. HUM. RTS. WATCH, PRESSURE POINT: THE ICC'S IMPACT ON NATIONAL JUSTICE: LESSONS FROM COLOMBIA, GEORGIA, GUINEA, AND THE UNITED KINGDOM 51 (May 2018), https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf.

it carries the benefit of its expertise in international criminal law, which could be used to support domestic efforts to uphold these standards. For example, the OTP's 2020 preliminary examination report on Colombia notes that it was in the process of developing a "framework of referential parameters" that would "allow the Prosecutor to identify the indicators that in principle would permit it, when appropriate, to conclude whether it should proceed to open an investigation or defer to national accountability processes, as a result of relevant and genuine national actions."[111] The OTP expected to share a draft of this framework with Colombian officials and other interested parties for their observations and comments in the first half of 2021.[112] Thus, the "hovering" of the ICC in Colombia looked different even in 2020 compared to when the OTP first opened its investigation in 2004. The mere fact that the OTP was planning on sharing a draft with interested parties to receive their input seemed to be more collaborative than its previous statements dictating what would and would not trigger its intervention.

Perhaps the best indicator that the ICC's "hovering" over the situation in Colombia will look different moving forward is the closing of the preliminary examination and the enactment of the Cooperation Agreement in October 2021, described above. Article 1 of the Cooperation Agreement sets out the Government's commitment to continue supporting the transitional justice process, and Article 2 affirms the Government will continue informing the OTP of the progress of investigations and prosecutions.[113] Article 3 affirms that the OTP will continue supporting Colombia's efforts. Article 4 covers the exchange of best practices between the Government and the OTP. Article 5 describes the OTP's commitment to engaging in awareness raising and other programs to familiarize Colombian legal professionals with developments in the ICC's work; and Article 6 provides that the OTP may reconsider its assessment of complementarity in the event of a significant change in circumstances.[114] Thus, the Cooperation Agreement sets out important provisions regarding the expectations of the parties involved and makes clear that reopening the preliminary examination is still an option.

However, the OTP's decision to close the preliminary examination and enter into the Cooperation Agreement with the Colombian

111. OFF. OF THE PROSECUTOR, INT'L CRIM. CT., INFORME SOBRE LAS ACTIVIDADES DE EXAMEN PRELIMINAR: COLOMBIA ¶ 154 (Dec. 14, 2020), https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-col-spa.pdf.

112. *Id.*

113. Cooperation Agreement, *supra* note 99, at 4.

114. *Id.*

government was met with criticism from human rights groups.[115] One of the key concerns is that the Cooperation Agreement is not strong enough to ensure the Colombian government will take meaningful steps to advance the stated objectives.[116] The previous ICC Prosecutor began a consultation process to develop a benchmarking framework—which might have set more specific parameters regarding when the ICC would defer to national proceedings or open its own investigation—but these efforts ended under the new Prosecutor.[117] In the absence of such benchmarks, there are doubts about whether the risk of re-opening the preliminary examination, Article 6 of the Agreement, exerts enough pressure to ensure the Colombian government follows through on its commitment to accountability.[118] Thus, the OTP appears to be in a situation of limited leverage,[119] which may ultimately undermine the effectiveness of its "hovering." However, the Agreement is relatively new. The OTP's new approach may still provide an opening for a productive relationship with domestic actors involved in moving the implementation of the peace agreement forward, but this will depend on how actively the OTP plans on engaging with the Colombian government and the extent to which it has the resources to do so.

Second, the ICC could better support domestic efforts through reforms to strengthen the Court's relationship with in-country civil society and media organizations. Some, for example, have maintained that "the OTP's approach in Colombia has not taken full advantage of opportunities to strengthen its leverage with government authorities by way of building strategic alliances with other key partners,"[120] including civil society groups and the media. Indeed, the Independent Expert Review established by the Assembly of States Parties recommended that the OTP strengthen its relationship with such groups because these ties could facilitate communication for fact-finding and promote greater understanding of the ICC's mandate, among other potential benefits.[121] Of course, there are concerns that developing too close of a relationship with civil society

115. *See* Elizabeth Evenson & Juan Pappier, *ICC Starts Next Chapter in Colombia: Will It Lead to Justice?*, HUM. RTS. WATCH (Dec. 16, 2021, 8:47 AM), https://www.hrw.org/news/2021/12/16/icc-starts-next-chapter-colombia.

116. *See id.*

117. *Id.*

118. *Id.*

119. *See id.*

120. HUM. RTS. WATCH, *supra* note 110, at 53.

121. INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM: FINAL REPORT ¶¶ 380–85 (2020), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

organizations could damage the ICC's relationship with government actors, but as indicated by the report, these relationships can be formalized in ways that provide for appropriate levels of engagement.[122] Additionally, the report suggests other kinds of engagement, such as through workshops for civil society organizations and media representatives that cover the Court's legal framework and information collection practices could be another productive means of capacity building.[123]

Although the OTP has developed a strong relationship with civil society groups in Colombia and the Colombian media is highly attentive to human rights issues,[124] the OTP has not necessarily capitalized on these relationships. Another criticism of the recent Cooperation Agreement is that it was concluded with limited input from civil society and victims' groups.[125] Working for greater civil society engagement moving forward and undertaking some of the reforms suggested by the Independent Expert Review could strengthen the OTP's leverage over government actors, as these individuals pay attention to media reporting and have to respond to pressure from civil society groups. Provided the OTP is clear in its public articulations of its stance on various issues —some have noted the OTP's statements tend to be broad and lack specific examples of progress or concerns[126]—stronger relationships with civil society and media organizations could amplify its voice and increase the pressure on government actors to fulfill their obligations under the Cooperation Agreement. Such steps may be particularly important given the potentially more limited leverage that the OTP now has, following the conclusion of the preliminary examination. Moreover, improved engagement with civil society and media organizations can strengthen the legitimacy and standing of these groups in Colombian society more broadly, which could result in expanded civic space and enhanced media freedom. In this moment, when human rights defenders are increasingly under attack for their work to move the peace agreement forward, this strategy could help promote sustainable peace.

In conclusion, the ICC, as some have suggested, "should remain vigilant in monitoring the judicial aspects of the peace agreement, but not overplay its hand."[127] This "vigilance" should involve the ICC

122. *Id.* ¶ 385, at R160.
123. *Id.* ¶ 385, at R158.
124. HUM. RTS. WATCH, *supra* note 110, at 53–55.
125. Evenson & Pappier, *supra* note 115.
126. HUM. RTS. WATCH, *supra* note 110, at 56.
127. Piccone, *supra* note 2, at 22.

continuing to hover over the situation in Colombia. Other contexts have demonstrated that the prospect of international involvement may have a positive impact on peace processes, and while this is diminished in Colombia now that the OTP has closed the preliminary examination, the OTP still has the potential to influence the situation via the framework of the Cooperation Agreement. Therefore, the ICC should not remain passive. International non-governmental organizations and the Independent Expert Review have recommended that the ICC undertake a wide range of reforms not only in Colombia, but also in terms of its operations overall. Given the length of time the ICC has been involved in the Colombian situation, some of the most strategic reforms involve strengthening the relationship and information-sharing practices between the Court, civil society, and media organizations. This sort of outreach could function as a form of capacity building to ensure not only that the Court, its expertise in international criminal law, and the new Cooperation Agreement remain relevant in Colombia, but also that domestic actors are strengthened in the long term. On their own these two approaches might be insufficient—the ICC could achieve more in Colombia, but given its significant resource constraints, it would be smart to work with domestic actors without leaving all of the work to these entities. Therefore, a combination of the approaches seems to be the most viable path forward for this international court.

B. *The IACtHR as a Human Rights Court and a Quasi-Criminal Court*

The IACtHR has a different mandate than the ICC, and this unique positioning as a human rights court provides it with an opportunity to support Colombian actors as they attempt to navigate the balance of justice and peace. As Huneeus explains, despite not being a criminal court capable of finding individual responsibility, through "a creative interpretation of its remedial powers, [the IACtHR] regularly orders states to investigate, try, and punish those responsible for gross human rights violations as a form of equitable relief."[128] Furthermore, the Court "supervises states' implementation of its orders: it holds mandatory hearings and issues compliance reports that aspire to hasten and guide the progress of national criminal processes."[129] Huneeus argues that this form of accountability via human rights bodies constitutes a "quasi-criminal review" or "quasi-criminal jurisdiction."[130] Consequently, while the

128. Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 1 (2013).

129. *Id.*

130. *Id.* at 2.

IACtHR does not carry the "big stick" of ICC prosecution, it can—and does—spur change in other ways.[131] The IACtHR has made two key innovations: first, by ordering effective domestic prosecution as a remedy, and second, by interpreting its mandate to include long-term supervision of national prosecutions, which provide it with the opportunity to make both procedural and substantive demands on the state.[132]

One relevant example of the Court's supervision of national prosecutions is the aforementioned 2019 compliance report related to its judgment in *Masacres de El Mozote*.[133] The report culminated in the IACtHR ordering El Salvador to suspend the legislative process surrounding a bill that many feared would reintroduce amnesties so the full Court could examine the request for provisional measures.[134] The Court's engagement with El Salvador on this case is ongoing.[135]

What it reveals, however, is an opening for the IACtHR, not only in El Salvador, but also with other countries like Colombia that seek to implement accountability measures in the wake of peace agreements. This is primarily due to the "dialogic" nature of the IACtHR's supervision of the accountability measures undertaken by states.[136] The IACtHR's quasi-criminal review is effective in part "because the supervision stage . . . itself is a teaching opportunity. Through supervision, the Court keeps open a dialogue with the state on the obstacles to compliance, and it offers suggestions on how to overcome them, while pressuring state actors to do so."[137] Essentially, the Court's innovative supervisory practices provide an opportunity for domestic capacity-building. The Court used the *Mozote* Compliance report to reiterate its

131. *Id.* at 3.

132. *See id.* at 6–12.

133. Mozote Compliance, *supra* note 74.

134. *Id.* ¶ 1, at 21.

135. In November 2019, the Legislative Assembly of El Salvador began working on a new legislative proposal. According to the victims' representatives, this was done without the participation of the victims and the new proposals contain provisions that, like the previously proposed legislation, maintain impunity. Moreover, in December 2019, the Constitutional Chamber granted an extension, until February 2020, for the legislature to approve the regulations under consideration, after which the Chamber would conduct a follow-up hearing on their constitutionality. The IACtHR reiterated that the national reconciliation legislation that is ultimately approved in El Salvador will have to comply with the Court's jurisprudence on amnesties. Masacres de El Mozote y Lugares Aledaños vs. El Salvador, Request for Provisional Measures and Monitoring of Compliance with Judgment, Resolution of the Court, "Considerando Que," ¶¶ 43–44 (Inter-Am. Ct. H.R. Nov. 19, 2020), https://www.corteidh.or.cr/docs/supervisiones/masacres_mozote_19_11_20.pdf.

136. *See* Huneeus, *supra* note 128, at 12.

137. *Id.* at 21.

stance on amnesties for those who commit grave human rights violations, and its ongoing engagement with El Salvador suggests that this conversation is not finished. Over time, this back-and-forth could have long-term effects on how national prosecutions proceed or even how civil society or victims' groups direct their advocacy efforts on these matters. The same could be true for Colombia's implementation of its peace agreement with the FARC-EP. In the event that a case is taken to the IACtHR that directly implicates the 2016 agreement or steps that the state has taken or failed to take to move proceedings forward, the IACtHR may have the opportunity to engage with domestic actors and "teach" them what it considers an acceptable balancing of justice and peace under the American Convention.

This kind of engagement between an international court and domestic actors is not without criticism. One set of concerns—particularly in relation to the IACtHR—focuses on what some states have viewed as the Court intruding on their criminal proceedings. Colombia, for example, has pushed back on the Court's attempts to exercise quasi-criminal review as a step too far outside the bounds of its powers.[138] Indeed, Latin American governments from across the political spectrum—but especially populist regimes—have accused the IACtHR of overreaching with its expansive interpretations of its mandate.[139] A second, but related, set of concerns is whether courts should even attempt to support domestic actors, including civil society and media organizations, as this Note suggests they might. In response, some scholars have argued for greater, not less, strategic outreach to address these challenges to international human rights courts' legitimacy.[140] As discussed above, the ICC has also been called upon to conduct greater outreach to domestic actors—both for capacity-building purposes and for strengthening its leverage with resistant government actors—so this suggestion could prove valuable in the Inter-American context. If part of the solution to the concerns raised by states regarding the Court's expansive interpretation of its mandate is for the institution to "choose [its] battles carefully" to avoid being the target of such backlash,[141] it makes sense for the IACtHR to lean into its engagement with domestic actors. Such engagement would allow the IACtHR to strategically determine where it can and cannot push states and where civil society actors

138. *Id.* at 12–13.

139. Laurence R. Helfer, *Populism and International Human Rights Law Institutions*, *in* HUMAN RIGHTS IN A TIME OF POPULISM 218, 236-37 (Gerald L. Neuman ed., 2020).

140. *See id.* at 239–41.

141. *Id.* at 237.

should be directing their advocacy efforts. Through dialogues with a variety of domestic actors, the Court can create space to refine its approach to its quasi-criminal review and ensure that its involvement in countries like Colombia is as productive as possible.

Consequently, the IACtHR's quasi-criminal jurisdiction presents significant opportunities for growth on the local level. This in turn contributes to the sustainability of accountability efforts in a way that might be difficult to achieve through a trial in the Hague. In cases involving peace processes, which are long-term undertakings, building this kind of domestic institutional capacity is particularly important.

IV. Conclusion

As demonstrated, both the ICC and IACtHR have a nuanced, but nevertheless substantial role to play in Colombia's peace process moving forward. International courts should not take a backseat, nor should they try to do more than necessary. Colombia's 2016 peace agreement sets up a complex judicial system to deal with issues of justice and accountability, so there is likely a point when the involvement of international courts becomes counter-productive. As some literature has suggested, courts in general cannot undertake all of the work that needs to be done in transitional justice contexts.[142] Likewise, international courts cannot on their own achieve the objectives of justice in Colombia.

At the same time, it is imperative to continue examining what the international community can do in this situation precisely because the stakes are so high. Violence is on the rise, and Colombia is struggling to hold on to a hard-won peace. It would not be just, nor would it be rational, for the international community to turn its back on the Colombian people now. Even in The Hague and in San José, the ICC and IACtHR do have a role in ensuring that justice is done in Colombia. As this Note has demonstrated, they are not merely far off, detached institutions, and they have not exhausted their options for involvement. The moves that international courts do and do not make in the coming months and years will matter to the Colombian people and their peace.

142. *See, e.g.*, Tricia D. Olsen et al., Transitional Justice in Balance 153-54 (2010) (arguing for a holistic approach that involves combining transitional justice mechanisms such as trials, truth commissions, and amnesties, depending on context-specific considerations).