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Beyond Justice, Beyond Peace?
Colombia, the Interests of Justice, and the Limits of International Criminal Law

Abstract

This paper explores the role of Article 53 of the Rome Statute and its 'interest of justice' standard in Colombia. After first providing some background to the ICC's involvement in Colombia in the context of the so – called Justice and Peace Law and the more recent Legal Framework for Peace, we critically explore the reasons why the principle of complementarity is the focus of contemporary debates on the ICC in that country. We suggest that this discussion often ends in stalemate, with little space to move forward. In light of this, in this article we propose an alternative way to advance the discussion; namely, Article 53. We then consider whether, in order to protect transitional justice mechanisms adopted by states in order to end conflicts and move towards national reconciliation, the OTP has the power under Article 53(1)(c) to stop a prosecution on the basis that it is not in the interests of justice. Much here depends upon whether justice is interpreted broadly or narrowly. We advocate a narrow reading of the concept of justice, meaning that the OTP cannot use Article 53(1)(c) to prevent ICC intervention on the basis that it risks disrupting a transitional justice mechanism. As a legal institution, the OTP must not involve itself with such politically sensitive issues.

Keywords:

Complementarity; Interests of Justice; Article 53; Colombia; Victims

I. Introduction

Atrocious acts of violence have been committed in Colombia for decades. At least since the early 1950's, in a period that came to be known as *La Violencia*, political violence has been a constant feature of that country's history.[1] It is, in fact, one of the defining

[1] *La Violencia* refers to a period of time that began in 1948 with the murder of liberal populist and charismatic leader Jorge Eliecer Gaitán and ended in 1953 with the coup by General Rojas Pinilla. The murder sparked riots and killings, first in Bogota and then throughout the country, along political lines; conservative governmental and para-governmental forces against members of the liberal party. Contemporary guerrillas would emerge, in part, from the remains of those original liberal armies. The five years of *La Violencia* left around 250 000 deaths, in a country whose total population at the time was around nine million. For a useful introduction to *La Violencia* in English see Marco Palacios, *Between Legitimacy and Violence: A History of Colombia 1875 – 2002* (Durham: Duke University Press, 2006),

features of the country's political process – an approach that has become standard in most studies on Colombia and its history.[2] For the last three decades, though, such extreme violence has come to be understood (from the perspective of international humanitarian law) as a non-international armed conflict.[3] Despite efforts of some analysts (mainly inspired by former President Uribe)[4] to frame the issue as a police matter, as civil unrest, or a struggle against terrorism,[5] it seems clear that the armed confrontation between governmental forces (the police and the military), right-wing paramilitary armies, and a left – leaning guerrilla, has long passed the threshold established by international law to this effect.[6]

Peace negotiations are part of the logic of war in Colombia. Since 1982, at least five peace processes have been undertaken: one in 1982 – 1984, with the guerrilla (the FARC, the ELN, and other smaller groups), which failed. A second negotiation, in 1989 – 1990, with a then-important guerrilla group (the M-19), which resulted in its demobilization and a new Constitution in 1991 (the FARC did not participate). A third effort, in the late 1990's, with the FARC, that failed again. In 2005, a negotiation with the paramilitaries led to the demobilization of the AUC. And, finally, since 2011, current President Santos is negotiating with the FARC in Havana, Cuba. Thus, being aware that a definitive military victory is unlikely, each side of the conflict tries to gain, though violence, a better bargaining position -- fully aware that sooner or later a new negotiation process will start.

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chapter 4. Also useful is David Bushnell, *The Making of Modern Colombia: A Nation in Spite of Itself* (Berkeley: University of California Press, 1993), 201-222.

[2] The standard approach remains inspired by the ground-breaking German Guzman, Orlando Fals and Eduardo Umaña, *La Violencia en Colombia. Vol. 1 and 2.* (Bogota: Alfaguara, 2010).

[3] A non-international armed conflict is defined as 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'; ICTY, The Prosecutor v Dusko Tadic, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para 70.

[4] Álvaro Uribe served as President of Colombia between 2002 and 2010.

[5] For an enumeration of the arguments put forward by former President Uribe to deny that the Colombian confrontation is an internal armed conflict see Libardo Botero (ed.), *La Estratagema Terrorista: Las Razones del Presidente Uribe para no Aceptar la Existencia de un Conflicto Armado Interno en Colombia* (Bogota: Fundación Centro de Pensamiento Primero, 2008).

[6] See generally Antonhy Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge: Cambridge University Press, 2010), 117-157. Here Cullen describes the threshold set by the ICTY in Tadic in order for internal violence to be classified as a non-international armed conflict and thus subject to international humanitarian law.

It is in this context of extreme violence, and of an ongoing peace negotiation, that Colombia approached the negotiation and adoption of the Rome Statute that created the International Criminal Court (ICC). Since its very first moment, Colombia's engagement with the ICC has been read by all actors of the conflict through the prism of the various peace negotiations undertaken by the government with the guerrilla, on one side, and the paramilitaries, on the other. Colombia was one of the first countries to ratify the Rome Statute once it entered into force on 1 July 2002.[7] Colombia signed the Statute on 10 December 1998, which was then ratified via Law No. 742 from 2002.[8] It deposited the instrument of ratification on 5 August 2002 and, in accordance with Article 126, the Statute entered into force for Colombia on 1 November 2002. Importantly, Colombia made use of Article 124, which allows ratifying countries to refuse to accept the jurisdiction of the International Criminal Court (ICC) with respect to war crimes committed by its nationals or on its territory for a seven year period. Despite the academic discussion and critiques that the inclusion of Article 124 elicited, and the fact that this Article played a central role 'in securing support for the final draft of the Statute',[9] Colombia and France were the only two countries to make use of it. France, however, withdrew its Article 124 declaration on 13 August 2008.[10] Whereas Colombia's official motivation for making use of Article 124 was that it would help

[7] The Statute entered into force on 1 July 2002 after the necessary ratification by 60 countries had taken place.

[8] Law 742 of 2002 entailed that the Colombian government had Congress approval to ratify the treaty. According to Colombian Constitutional Court Decision C578 of 2002, the Statute became part of the Colombian legal system. A further Constitutional reform was needed, though, as life imprisonment (which is considered in the Statute) was not allowed by the Colombian constitutional framework at the time.

[9] Louise Arbour and Morten Bergsmo, "Conspicuous Absence of Jurisdictional Overreach," International *Law FORUM du Droit International* 1 (1999): 13-19, p 15.

[10] Shana Tabak, "Article 124, War Crimes and the Development of the Rome Statute," *Georgetown Journal of International Law* 40 (2008-2009): 1069-1099, p 1070. The Review Conference of the Rome Statute which took place in Kampala in 2010 adopted a resolution by which it decided to retain article 124 in its current form and agreed to again review its provisions during the fourteenth session of the Assembly of States Parties, in 2015. See Resolution RC/Res.4.

persuade illegal armed groups to continue negotiations with the government,[11] some authors have provided different explanations such as Colombia's willingness to preserve its important relationship with the US,[12] its desire to prosecute its own criminals as a matter of national pride and, finally, the possible connections between the paramilitaries and the government.[13] *A posteriori* analysis has, in any case, shown the ineffectiveness of Article 124 in achieving its official goal in Colombia, and the ICC may now investigate war crimes since the seven year period came to an end on 31 October 2009.[14] The ICC is therefore competent to investigate crimes against humanity and the crime of genocide since 1 November 2002,[15] as well as war crimes since 1 November 2009, committed by Colombian nationals or foreigners on Colombian territory.[16] However, to date, the Office of the Prosecutor (OTP) has not decided to use his/her powers under Article 15 of the Statute to initiate an investigation *proprio motu.* Nevertheless, the OTP has been engaged in preliminary analysis of several situations, including Colombia (since June 2004), which suggests the possibility of a future investigation. For this reason, a detailed assessment of whether the ICC is able to invoke its jurisdiction in relation to Colombia seems both timely and necessary.

It should be noted however that this article will not only be of benefit to those interested in a possible ICC engagement in Colombia. This article will also be of broader concern to those interested by the relationship between transitional justice mechanisms adopted by states in good faith in order to promote national reconciliation and the Rome Statute.

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[11] Rafael A. Prieto Sanjuán, "La Inocuidad de la Cláusula Opt-out o Exclusión de Competencia por Crímenes de Guerra," in *Corte Penal Internacional. Salvaguardas y Revisión del Estatuto de Roma*, ed. Rafael A. Prieto Sanjuán (Bogota: Editorial Ibañez, 2009) 17-39, p 22.
[12] Indeed, both countries have signed an immunity agreement by which Colombia agrees not to surrender US personnel to the ICC. See on this: Christian G. Sommer, "Los Acuerdos Bilaterales de Inmunidad y el Art. 98 del Estatuto de la Corte Penal Internacional," in *ibid.*, 163-189.
[13] Tabak, *above* n 10, 1090-91.
[14] Prieto Sanjuán, *above* n 11, 28-31.
[15] Art 11 of the Statute.
[16] Art 12 of the Statute.

II. Complementarity as the Focus of Contemporary Debates on the ICC in Colombia: Two visions of Transitional Justice

Given the context described above, possible involvement of the ICC has become a central debate for scholars, judges and practitioners in Colombia and elsewhere. The key focus has been the debate on two models of transitional justice that have been tried in the country: a 'minimalist' and a 'maximalist' model,[17] which we now turn to explore.

The maximalist model is represented by the so – called Ley de Justicia y Paz (Justice and Peace Law, hereinafter LJP). The LJP was designed in order to give a legal basis to the negotiation process with the paramilitaries, which occurred between 2004 and 2010. The conceptual framework of LJP is 'maximalist', in the sense that it requires that *all* perpetrators of war crimes and crimes against humanity are prosecuted and sentenced. To be sure, if all perpetrators are to be prosecuted, there is little incentive for demobilization, as the government has little to offer perpetrators other than the promise of a life outside prison – absent that promise, the perpetrators may prefer to remain in arms. The incentive for negotiation is, then, the notion of 'sentencing alternativity', which basically entails replacing the 'main sentence' required by the law for the crime (say, 40 years for homicide) for an 'alternative sentence' (a maximum of eight years under Article 29 LJP), in exchange for demobilisation and contributions to truth and reparation. All this was to be done in a new specialized unit within the criminal justice system (the "Justice and Peace Jurisdiction"), which integrated the language of victims' rights to the truth, to justice, and to reparations as one of its main axes[18].

[17] Diego López-Medina, "Estándares Internacionales para la Investigación y Acusación de Delitos Complejos en el Marco de la Justicia Transicional: Su Aplicación al Caso Colombiano," *International Law* 16 (2010): 45–80.

[18] The Peace and Justice Law does not apply to all demobilized members of armed groups, but only to those that were included in a list that government submitted to the Colombian Attorney General – those in the list are called "beneficiaries". The first step of the process consist in a free version that each beneficiary must render before the newly created Justice and Peace Prosecutor's Unit, in which the demobilized member has to confess all the relevant information they possess regarding the crimes they committed, which will allow the prosecutors to corroborate the facts. After this, both the prosecutor and the victims, who are allow to listen in, may request clarification, present evidence or report any relevant facts regarding the crimes. Free versions are not open to the public, only to the persons that had been

This view was supported by the Constitutional Court, which held that it did not contradict international human rights obligations agreed by Colombia.[19] Moreover, the Inter-America Court of Human Rights (IACtHR) was also an important variable in support of this model. The IAtHR has constantly stressed the obligation of states to ensure the victim's right to the truth, to a judicial process and to full reparation of the wrongdoing, and has rejected blanket amnesties in transitional justice enacted in Peru[20], Uruguay[21], Brazil[22], Chile[23], and El Salvador[24], which gave perpetrators of atrocities low sentences[25]. This was the environment in Colombia when the Alternative Sentencing Bill was withdrawn in 2003, particularly after the IACtHR decision of Barrios Altos of 2001, where the Court had all but declared that Peru's amnesties laws were in violation of the Inter-American Convention of Human Rights – criminal prosecution, some prison time, truth, and reparation to the victims were required.
The Supreme Court, in turn, also gave content to the same approach: it held that under the LJP, each demobilized paramilitary had to be prosecuted and sentenced for *all* his crimes, and not just a few of them. Even though the Supreme Court did accept that this could be achieved through several partial charges that could result in several partial sentences (thus sparking a difficult procedural debate in domestic criminal law),[26] it

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recognized as victims by the Attorney General office. After the free versions the prosecutor initiates the investigation to verify the truthfulness of the information submitted by the beneficiary, and to clarify the facts of the crimes. During the ongoing investigation, the beneficiary is put under pretrial detention and his assets are seized in order to provide reparation to the victims. Once the investigation is finished, the Prosecutor presses charges before the Peace and Justice Judge, and if the accused accepts the charges, the judge will give a sentence, applying the alternative punishment that consists in a period of 5 to 8 years in jail. If the charges are not accepted, the case is sent to the ordinary criminal system, where no alternative punishment is available for the accused.

[19] Corte Consttitucional, Sentencia C-370 de 2006

[20] Corte IDH, *Caso Barrios Altos vs. Perú*, "Fondo", Sentencia del 14 de marzo de 2001, Serie C. núm. 75, par. 41-44.

[21] Corte IDH. Caso Gelman Vs. Uruguay. Fondo y Reparaciones. Sentencia de 24 de febrero de 2011 Serie C No.221, par. 195 a 229.

[22] Corte IDH. Caso Gomes Lund y otros ("Guerrilha do Araguaia") Vs. Brasil. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2010. Serie C No. 219, par.147- 182.

[23] Corte IDH. Caso Almonacid Arellano y otros Vs. Chile. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 26 de septiembre de 2006. Serie C No. 154, par. 129.

[24] Corte IDH. Caso Masacres de El Mozote y lugares aledaños Vs. El Salvador. Fondo, Reparaciones y Costas. Sentencia de 25 de octubre de 2012 Serie C No. 252

[25] Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', *German Law Journal* 12, no. 5 (2011): 1203–1230.

[26] This is the problem of "imputaciones parciales", which led the Supreme Court to overthrow the first final decision in the context of LJP. See, Corte Suprema de Justicia, Sala de Casación Penal, Auto del 31 de julio de 2009, Rad. 31539, M.P.: Augusto J. Ibáñez.

also expressly rejected the idea that a transitional justice process would empower the OTP to try only some demobilized individuals:[27] *all* individuals had to be tried for *all* of their crimes. Victims' organizations, human rights activists and some scholars were quick to realize that JPL looked like a legal framework to guarantee human rights (particularly in contrast with the Alternative Sentencing Bill of 2003), but actually did something completely different. In the words of human rights activist and scholar, Rodrigo Uprimny, JPL "was widely recognized as generous in the protection of victim's rights, but its application would inexorably lead to the lack of protection of those rights"[28].

LJP's system received a fatal blow in in May 2008, when the Colombian government unexpectedly extradited to the United States fourteen senior paramilitaries, on drug charges[29]. The individuals were part of the LJP process, and could have fallen under the jurisdiction of the ICC. While their extradition in effect shielded them from ICC jurisdiction (the US in not a party), the reasons seem to have been local politics: as part of JLP, the paramilitaries had started confessing crimes committed in association with politicians (mainly member of Congress) that supported the Uribe government. These politicians started being tried by the Supreme Court in 2006, and the government was fast losing valuable political support – in the middle of a reelection campaign. The extraditions were a deathly blow the whole JPL machinery. While the Justice and Peace Unit continued prosecuting mid and lower level ranks, the extraditions made clear that prosecutions of higher ranks of the paramilitary would face serious resistance.

Ultimately, the LJP system led to very weak results: eight years after its adoption, of almost 4000 demobilized individuals only 14 sentences have been passed, of which only one is final. In Colombia, the maximinalist model of the LJP proved a

[27] Corte Suprema de Justicia, Sala de Casación Penal, Auto del 11 de marzo de 2010, Rad. 32852, M.P.: Jorge Luis Quintero.
[28] Uprimny and Saffon, 'Usos Y Abusos de La Justicia Transicional En Colombia'.
[29] BBC Mundo, ""Extradición masiva de paramilitares" (published on 13 May 2008). Available at: http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7398000/7398251.stm; El Espectador, "Extradición masiva de paramilitares" (published on 13 May 2008). Available at: http://www.semana.com/on-line/articulo/extradicion-masiva-paramilitares/92677-3.

failure in terms of actual prosecution or perpetrators: asking for the perfect world in terms of prosecution meant failing to do the bare minimum in terms of justice.

Of course, one could argue that LJP has been successful if measured against other thresholds: for example, according to a poll made by the Colombian Centre of Historical Memory, 45% the general population in Colombia, and 42% of the victims, think that LJP has been helpful to do "some" justice with regard to the crimes of the paramilitary[30]. The point, however, is that the LJP represents a model of transitional justice that relies almost exclusively on the judiciary to achieve any results: vindication of victims' rights, reparations, and even truth. Therefore, under LJP's own structure, a failure to adopt definitive judicial decisions implies a failure of the model as a whole, as the latter features few outcomes of significance different from judicial decisions.

This experience led to a second model, the 'minimalist' one. This model is represented in the constitutional amendment referred to as the 'Legal Framework for Peace' (Marco Jurídico para la Paz – hereinafter LFP), which was approved by Congress in June 2012 in the middle of intense controversy. The LFP is designed as a middle of the road initiative between those who argue that peace with the FARC will require full amnesties for war crimes and crimes against humanity (which is, for all practical purposes, impossible if one considers the case-law of the Inter-American Court of Human Rights),[31] and those who argue that *any* pardon would be in breach of the Colombian constitution and international law – hence, bringing us back to the 'maximalist' model. The Constitutional amendment, then, allows the Colombian Attorney to focus on the 'main perpetrators' of crimes, and give the benefits of suspended sentencing or non-prosecution to all others. In contrast with the idea of

[30] Centro de Memoria Histórica – Colombia. Encuesta Nacional: ¿Qué Piensan los Colombianos Después de Siete Años de Justicia y Paz? (Centro de Memoria Histórica, 2010).
[31] See, for example, IACtHR, *La Cantuta v. Peru*, Decision of 29 November 2006 (Merits, Reparations and Costs).

'sentencing alternativity', which had dominated the peace process with the paramilitaries under the LJP, and by which all perpetrators were to be prosecuted and sentences could be commuted, the LFP proposed a process of selection, whereby only some perpetrators are prosecuted, but those who are will actually serve their full sentence.[32]

The local political context of this model was the exact opposite to JPL and the peace process with the paramilitaries. According to a recent poll, while the general idea of a peace process with the FARC is accepted by 77% of Colombians, the idea of some FARC members not being punished for their crimes distinctively lacks public support: 68% reject the idea of some FARC members not going to jail as a result of the peace process, and 78% reject the idea that FARC leaders avoid prison time[33]. In October 2012, the Colombia Attorney General issued a guideline establishing a general framework for the prioritization of cases, in the very same direction. The Directive acknowledges that its content was inspired by international criminal tribunals, and that it had been modeled in accordance with international human rights law, international humanitarian law and international criminal law since all these regimes allow for the prioritization of cases in the exercise of criminal jurisdiction. As part of the prioritization office, the Colombian Attorney General created the National Unit of Context and Analysis, which is in charge of prosecuting structural organized crimes, exposing patterns of violence and more complex forms of liability, such as superior responsibility.

LFP was also considered to be compatible withthe Constitution by the Colombian Constitutional Court in late August 2013.[34] For the Court, the minimalist model was not in contradiction with the international obligations of the Colombian state; however, for the Colombian Court, the possibility of selection does not include crimes against humanity, genocide, war crimes: all these crimes must be 'prosecuted and judged', and must be 'attributed to the main perpetrators'. This decision was taken in the middle of a

[32] For a detailed overview of the transitional justice arrangement implemented in Colombia see generally Isabella Bueno and Andrea Dias Rozas, "Which Approach to Justice in Colombia?" 13 *International Criminal Law Review* 211.

[33] Semana. Paz Paradojica. http://m.semana.com/nacion/articulo/paz-paradojica/264804-3

[34] See Colombian Constitutional Court, Decision C-579 of 2013.

local controversy stirred by a letter sent by the OTP to the President of the Colombian Constitutional Court in late July 2013, precisely at the moment when the Colombian Court was convening to discuss LFP,[35] According to at least one commentator, the letter was an answer to a previous request of information addressed to the OTP by the Colombian Court.[36] The question that both the Colombian Constitutional Court and the ICC's Office of the Prosecutor (OTP) had to tackle was twofold: first, is selecting for prosecution the persons bearing the greatest responsibility for the crimes committed, but failing to prosecute lower ranks, evidence of a state unwilling to prosecute the latter? And second, if the most responsible perpetrators are indeed prosecuted, can their prison sentences be suspended? The Colombian government's answer to both questions was, of course, yes. The Colombian public opinion, human rights activists and scholars have different opinions. Sworn enemies of the FARC and, paradoxically, human rights activists who accept the maximalist standards if the Inter-American System of Human Rights, would answer no to both. Therefore, depending on the answer to each of these questions, the OTP would be lending legitimacy to the Colombian government's framework of transitional justice with the FARC, or would be undermining it.

In its answer, the OTP emphasizes that Colombia would be in breach of its international legal obligations if it gave suspended sentences to the 'main perpetrators' of crimes subject to the jurisdiction of the ICC. In that sense, for all the controversy that surrounded it,[37] the OTP's letter featured no strong opinion regarding the most pressing issue facing the Colombian Court (whether selecting the 'main perpetrators' was unconstitutional), but rather expressed the idea that, should a main perpetrator be selected, he or she cannot have his or her sentence suspended. That answer was much in line with the OTP's interim report on Colombia, published in November 2012. While the OTP's approach to the issue of prosecuting only most responsible perpetrators seems unclear, the government and Colombian General Attorney seem to count on the OTP's support to this policy. This seemed to be confirmed by the declaration of President Santos, after a meeting with Prosecutor Bensouda on September 2013[38].

[35] See letter from Fatou Bensouda to Jorge Iván Palacio; July 26, 2013. Ref. 2013/0/FB/JCCD-evdu. Available at: http://www.ips.org/blog/cvieira/documento-fiscalia-cpi-sobre-cero-carcel-por-crimenes-de-su-competencia/

[36] See Rodrigo Uprimny, La Fiscal de la CPI y la sentencia sobre el marco jurídico para la paz (MJP). Available at : http://www.dejusticia.org/index.php?modo=interna&tema=justicia_transicional&publicacion=1572

[37] See Revista Semana. "Una 'carta bomba'". August 17, 2013

[38] International Criminal Court OTP (2013) "Report on Preliminary Examination activities", November 2013. Available at: http://www.icc-

Soon after, the OTP published its Report on Preliminary Examination Activities, in November 2013[39]. Regarding the Legal Framework for Peace the OTP recognized that the nine parameters set forth by the Constitutional Court for the application of the LFP appear to show a commitment to ensure the compatibility of the transitional process with Colombian's international obligations.[40]. More recently, in December 2014, the OTP published its report for that year, where it noted that the Colombian authorities took steps to prioritize investigations and prosecutions of those most responsible for conduct relevant to the preliminary examination[41]. However, the OTP was clear in warning the Colombian goverment that any negotiations with the FARC that could result in a sentence that is grossly or manifestly inadequate, in light of the gravity of the crimes and the form of participation of the accused, would vitiate the genuineness of a national proceeding, even if all previous stages of the proceeding had been deemed genuine[42]

For the LFP to be applied to a particular demobilization by the FARC, further action by the Colombian Congress is needed; specifically, further legislation will need to be adopted by Congress in order to articulate the legal detail of how the LFP will operate and to set up the necessary institutions through which it will function. At the time of writing, though, the peace negotiations at Havana carry on, and the precise architecture of a LFP-based deal remains unclear. Nevertheless, it is safe to assume that a key dimension of the discussion will be the principle of complementarity. As we have seen, The principle of complementarity is contained in Article 17 of the Rome Statute and provides that the ICC can only engage its jurisdiction where the concerned State is 'unwilling or unable' to genuinely carry out an investigation or prosecution into the

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cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF, par. 147-148.

[38] Ibid., par. 150.

par. 150.

[39] Ibid.

[40] Ibid., par. 133.

[41] International Criminal Court OTP (2014) "Report on Preliminary Examination activities", December 2014. Available at http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf

[42] Ibid, par. 114

alleged commission of an international crime. Thus, unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the ICC does not possess primacy; the ICC's jurisdiction is complementary to that of national jurisdictions.

Au fond, the question in Colombia is whether the LJP of the LFP constitute an example of 'positive complementarity',[43] thus *blocking* the ICC's involvement in the country on the basis that Colombia is able and willing to prosecute those suspected of committing international crimes, or rather an example of legislation providing impunity to perpetrators, thus *justifying* ICC intervention in Colombia (and with the ICC assuming responsibility for the prosecution of international crimes) because the government has proven unwilling to prosecute those suspected of committing international crimes.[44]

In deciding whether to initiate an investigation, the Prosecutor must consider whether a) there is a reasonable basis to believe that a crime has been committed, b) that the case is admissible under Article 17, and c) taking into account the gravity of the crime there are nevertheless substantial reasons to believe that an investigation would not serve the interests of justice. Let us examine each of these requirements in turn.

First, there seems little doubt that there is at least a 'reasonable basis' to believe that international crimes within the meaning accorded to them by the Rome Statute have been committed in Colombia. A far more difficult question is whether the case is admissible under Article 17. Article 17 has two separate tenets. First, Article 17(1)(d) provides that the ICC will only have jurisdiction where the case is of 'sufficient

[43] The doctrine of 'positive complementarity' was coined by the ICC Prosecutor Luis Moreno –Ocampo. See ICC Press Release, 'Review Conference: ICC President and Prosecutor Participate in Panels on Complimentarity and Co-Operation', 3 June 2010.

[44] See generally Kai Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-Based Approach* (Berlin: Springer, 2010); Jennifer Easterday, "Deciding the Fate of Complementarity: A Colombian Case Study," *Arizona Journal of International Law* 26 (2009): 49-111.

gravity'. This is clearly a response to concerns over resources; namely, that given the unfortunate frequency of international crimes and the failure of national authorities to investigate and prosecute them, the ICC could quickly become overburdened by 'less serious cases'.[45] If this were to happen, the effectiveness of the ICC would be severely diminished, with perhaps the entire system coming to a standstill. Both the OTP and the ICC have provided guidance on the gravity criterion. In its most recent, detailed consideration of the gravity criterion the Appeals Chamber of the ICC has opted for a qualitative approach.[46] Indeed, this approach corresponds to Regulation 29(2) of the Regulations of the Office, adopted in 2009, which enumerates a non-exhaustive list of factors that can be used to guide the OTP's application of the gravity threshold. This Regulation explains that factors to be considered include the scale, nature, manner of commission of the crimes, and their impact.

With this in mind, given the number of international crimes that have allegedly been committed in Colombia, and their egregious nature, one could say with a fair degree of certainty that Colombia is a situation of sufficient gravity to warrant the attention and thus resources of the Court.[47]

The second tenet of Article 17(1) is known as the principle of complementarity. This principle provides that the ICC only possesses jurisdiction where the state in question has proven unable or unwilling to effectively prosecute those suspected of committing international crimes. This discussion often ends in deadlock in the Colombian case, with little space to move forward. Ultimately, the legal debate turns

[45] Susana S*áCouto and* Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2007) 23 *American University Law Review* 807, 818.
[46] *Prosecutor v Lubanga*, Case No. ICC-01/04-169-PUB-Exp, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58' (13 July 2006).
[47] Heller has recently conceded that of all the situations under preliminary examination by the OTP, Colombia is arguably the most serious; K J Heller, 'Could the ICC Investigate Israel's Attack on the *Mavi Marmara*' (14 May 2013) *Opinio Juris*, available at http://opiniojuris.org/2013/05/14/could-the-icc-investigate-the-mavi-marmara-incident/.

into a problem of pragmatism. Early on, when the debate focused on the paramilitaries and the LJP, most human rights activists in Colombia and elsewhere strongly defended the position that the law was nothing but a complex legal façade designed for the specific purpose of preventing the ICC's involvement.[48] However, officials from the Uribe government and other analysts argued that the LJP was, ultimately, as good as it got: in order to enter into some sort of peace agreement with illegal armed groups (mainly the paramilitaries, but also potentially the guerrilla), certain concessions had to be made, albeit without entirely sacrificing justice for the victims of the armed conflict.[49]

The debate on the LFP, and the negotiation with the FARC, has followed similar lines, yet represented by different actors. In this case, civil society seems to be divided: some organisations (for example, the think-tank De Justicia)[50] have adopted a pragmatic position that the constitutional amendment is, again, as good as it gets: a selection of cases must be undertaken in order to implement a transitional justice process. Against this view, an awkward coincidence of points of view has emerged, joining non-governmental organizations (NGOs) such as Human Rights Watch and a conservative segment of Colombian society (spear-headed by ex-President Uribe),[51] all of whom argue that the LFP is merely an excuse for impunity, and will trigger intervention by the ICC on the basis of war crimes whose perpetrators are not selected for prosecution by the General Attorney, or on the basis of main perpetrators whose sentence is suspended

[48] See Comisión Colombiana de Juristas, *El Espejismo de la Justicia y la Paz: Balance sobre la Aplicación de la Ley 975 de 2005* (Bogota: Comisión Colombiana de Juristas, 2008).
[49] For a good summary of the diverging approaches see Fundación Social, *Trámite de la Ley de Justicia y Paz: Elementos para el Control Ciudadano al Ejercicio del Poder Político* (Bogota: Fundación Social, 2006) 182-187.
[50] See their positions at: www.dejusticia.org
[51] This is an awkward coincidence as the Uribe government famously had strong differences of opinion with human rights NGOs during his administration. The fact that they are now on the same side, as critics of LFP, makes their agreement seem awkward.

– the latter being an unlikely possibility after the 2013 decision by the Colombian Constitutional Court.

Each of these positions is designed and deployed mainly for domestic political purposes since the ominous shadow of the ICC's involvement looms large in the Colombian political debate.[52] Arguing that either of these architectures for transitional justice is a façade for impunity is less a legal statement on the law itself, but rather a platform for civil society organisation, opposition parties and victims to press the government to move in a certain direction.[53] Why is it, then, that such a dichotomical mindset has taken over the debate? The answer to that question lies not in the principle of complementarity as a legal construct, but in Colombian politics. Possible involvement of the ICC in the country would impose extremely heavy political costs to the administration. For domestic voters, it would imply a symbolic step back to the times when Colombia was internationally perceived as a failed-state - going back to the dark years when the FARC controlled vast areas of the country and the elected government was unable to undertake basic law enforcement functions.[54] In a global context where Colombia is applying to the Organisation for Economic Co-Operation and Development (OECD), and tries to repack itself as a respectable player in international politics and a rising economy,[55] a formal ICC investigation would be

[52] Ocampo often referred to the 'shadow of the Court' as an important factor in spurring member states to reform their domestic judicial system in order to prevent the politically embarrassing situation of the ICC intervening and assuming responsibility for prosecutions; Luis Moreno Ocampo, "The International Criminal Court – Some Reflections," *Yearbook of International Humanitarian Law* 12 (2009): 3-12, p 11.
[53] For example, in May 2012 Human Rights Watch tried to dissuade leaders of the Colombian Congress from adopting the constitutional amendment labelled as the 'Legal Framework for Peace' by arguing that it could 'expose Colombia to an investigation by [the ICC]'. See Human Rights Watch, Carta Sobre Marco Jurídico para la Paz (1 May 2012), < http://www.caracol.com.co/noticias/actualidad/human-rights-watch-critica-la-impunidad-que-generaria-el-marco-juridico-para-la-paz/20120502/nota/1680477.aspx>, last accessed 27 April 2013.
[54] See Eduardo Pizarro Leongómez, *Las Farc (1949-2011): De Guerrilla Campesina a Máquina de Guerra* (Bogotá: Grupo Editorial Norma, 2011).
[55] See Tim Padgett and John Ottis, 'Colombia Rising', *Time*, 23 April 2012.

extremely costly and would be perceived as confirmation that the administration is unable to provide law and order - a political defeat that would be punished by voters.

The threat of ICC involvement also weighs heavily on the domestic judiciary. Much of the discussion surrounding the first ill – fated convictions resulting from the LJP process was, precisely, whether such decisions could trigger (or in fact prevented) a formal investigation by the OTP.[56]

By the time of writing, then, the ICC works as both leverage and a threat in Colombia. Both sides of the debate are keenly aware of this state of affairs, and tailor their interpretation of the principle of complementarity accordingly. There are, however, specific limits to this strategy, as each party becomes prisoner of their own rhetoric. Those who argue that either transitional justice architecture (LJP or LFP) is a façade for impunity have much more to gain by invoking the possibility of ICC involvement than with an actual formal investigation by the OTP. It is, ultimately, the possibility of an ICC involvement that provides leverage to press the government to provide better guarantees to victims or to deal with perpetrators more severely. Once the OTP files formal charges, this space of pressure and activism will disappear, as the government will have nothing left to lose. Those who defend the LJP or LFP as the best deal available, being of course unable to cast off the shadow of the ICC, in fact use this argument strategically so as to also justify the importance of the law they propose. In this sense, the LJP and the LFP are used as evidence to demonstrate that the government is taking purposive action in relation to the perpetrators of war crimes, which in turn prevents the need for ICC involvement.[57]

[56] See Diego López-Medina, "Estándares Internacionales para la Investigación y Acusación de Delitos Complejos en el Marco de la Justicia Transicional: Su Aplicación al Caso Colombiano" *International Law: Revista Colombiana de Derecho Internacional* 16 (2010): 45-80.

[57] Such dynamics have been explored earlier in other contexts, where international criminal tribunals have also played a key role in modelling local actor's behaviours. With regards to the ICTY, see William W Burke-White, "Domestic Influence of International Criminal Tribunals: The International Criminal

Importantly, there has been no formal decision from the OTP determining whether or not the Colombian government can be regarded as unwilling to prosecute within the meaning of Article 17(1). This being said, the OTP has officially visited Colombia on several occasions. During these visits the OTP has been keen to underscore the complementary role of the ICC, pointing out that the ICC will only get involved if the LJP process proves to be a mere façade for impunity.

More recently, in November 2012 the OTP adopted an interim report,[58] which examines whether the ICC possesses jurisdiction in relation to international crimes committed during the Colombian conflict. But despite considerable analysis of the issues at hand, all in all the OTP reaches no conclusion as to whether Colombia can be regarded as unwilling to prosecute and thus whether an investigation should be opened in relation to Colombia; preliminary examination of the situation continues.[59] It would not be unthinkable for the OTP to consider that the LFP, regardless of whether or not it has been adopted in good faith in order to encourage national reconciliation in Colombia, results in the shielding of some individuals from justice within the meaning of Article 17(2)(a) and thus constitutes an unwillingness to prosecute. If that would happen, the battleground for those arguing against ICC intervention in Colombia would move from Article 17 to Article 53 of the Rome State and in particular its interests of justice standard that we analyze below.

Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia-Herzegovina," *Columbia Journal of Transnational Law* 46 (2008): 279-350. For the case of Côte d'Ivoire, see Michael McGovern, "Proleptic Justice: the Threat of Investigation as a Deterrent to Human Rights Abuses in Côte d'Ivoire," in *Mirrors of Justice: Law and Power in the post-Cold War Era*, eds. Kamari Maxine Clarke and Mark Goodale (Cambridge: Cambridge University Press, 2010), 67-86.

[58] Office of the Prosecutor, Situation in Colombia Interim Report, November 2012, available at http://www.fidh.org/IMG/pdf/otp_-_colombia_-_public_interim_report_-_november_2012.pdf. For a critical discussion of this report see K Ambos, 'ICC OTP Report on the Situation in Colombia – A Critical Analysis', 1 February 2013, EJIL: *Talk!*, available at http://www.ejiltalk.org/icc-otp-report-on-the-situation-in-colombia-a-critical-analysis/.

[59] 'This interim report reaches no conclusion on whether an investigation should be opened: preliminary examination of the situation continues'; ibid at 2.

This analysis is important for two reasons. First, it allows us to unpack the central issue of whether domestic peace-building arrangements in a situation like Colombia should be in fact relevant to the understanding of justice under international criminal law. The notion of 'interests of justice' focuses on the underlying tension between justice and peace, which is the major issue in Colombia (and indeed all post conflict societies that are seeking to deploy transitional justice mechanisms). In short, should transitional justice arrangements be permissible under the legal framework established by the Rome Statute? Second, the 'interest of justice' standard sheds light on the OTP's discretion and on its corresponding need for accountability. In relation to the application of Article 17 the OTP presents itself as a purely technical institution that simply applies rules (complementarity) to facts (the Colombian conflict). This position cannot be maintained in the context of Article 53, which by very definition requires the OTP to exercise its discretion. Consequently, the 'interests of justice' standard places the spotlight on the OTP's decision and raises important questions relating to how the OTP understands its role in peace–building. Should the OTP concern itself with matters pertaining to domestic politics, or should it understand its role as completely separate from the domestic process?

III. **Interpreting Article 53**

In an important but often overlooked (certainly in academic literature) provision of the Rome Statute, under Article 53 of the Rome Statute the OTP has the responsibility to decide whether 'to initiate an investigation' and, upon investigation, to decide that 'there is not a sufficient basis for prosecution because"'[60] In making these decisions, the

[60] The decision of the prosecutor under Article 53 is subject to review by the Pre-Trial Chamber of the ICC; Article 53(3) of the Rome Statute.

Rome Statute explains that a factor that has to be considered by the OTP is 'the interests of justice'. Put concisely, the effect of Article 53 is that 'the prosecutor has the discretion (subject to Pre-Trial Chamber review) to determine not to initiate an investigation or not to proceed to trial based on "the interests of justice."'[61]

This provision is of particular importance for those that argue that the LJP and the LFP represent *bona fide* attempts by Colombia to implement a transitional justice mechanism in order to end the armed conflict and move towards national reconciliation. This is because, as the Informal Expert Paper on Article 53 notes, '[t]he stance of the OTP with respect to alternative forms of justice should probably be framed, conceptually, under Article 53(1)(c) and 2(c) i.e., the prosecutorial discretion not to proceed where it is not in the 'interests of justice' to do so'.[62] The question then is whether the interests of justice standard contained in Article 53(1)(c) permits the OTP to determine whether or not to initiate a prosecution on the basis that the state under consideration has deployed a transitional justice mechanism, and that to insist on prosecution would adversely affect the transitional justice mechanism's ability to foster peace and reconciliation.

It is therefore necessary to accurately interpret the phrase 'in the interests of justice'. In a nutshell, in applying the 'interests of justice standard', what are the limits of the OTP's discretion? Given that the Rome Statute does not precisely define which factors can be taken into account by the OTP under Article 53(1)(c), two options present themselves: an expansive and a restrictive reading of Article 53.

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[61] Human Rights Watch, 'The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute (2005), available at http://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute.

[62] Office of the Prosecutor Informal Expert Paper, "The Principle of Complementarity in Practice" (2003) 22. It is important to note that this sentence reveals that the Informal Expert Paper regards national measures aimed at achieving transnational justice i.e. measures that are *not intended* to shield perpetrators from criminal responsibility but nevertheless have this effect, as indicating an unwillingness to prosecute under Article 17(1) and thus falling within the jurisdiction of the ICC.

An expansive reading of Article 53 would enable the OTP to consider wider political factors in determining whether to initiate a formal investigation. In the context of the current discussion, an expansive reading would allow the OTP to make normative judgements about whether or not the deployment of a transitional justice mechanism is acceptable from the perspective of the interests of justice. For example, it would permit the OTP to assess whether a transitional justice mechanism has been or is likely to be effective in securing demobilization of armed groups. Equally, it would allow the OTP to venture further into the domestic political arena and evaluate whether in the prevailing circumstances it should be permissible to allow those suspected of committing international crimes to benefit from transitional justice arrangements, even if such arrangements are considered necessary (or even the last resort) by domestic (perhaps even democratically elected) political actors to enable society to move towards peace and national reconciliation.[63] An expansive reading of Article 53(1)(c) would therefore confer to the OTP much latitude in deciding what the concept of justice means and, more importantly, how justice is to be achieved.[64]

In contrast, a restrictive reading would heavily circumscribe the factors that the OTP can consider when engaging Article 53. In essence, the only factors that would be relevant to the OTP's understanding of the notion of 'interests of justice' would be those that relate specifically to the facts of the case in question. This would include, inter alia, the severity of the offence committed, the particular characteristics of the defendant and the specific interests of the victim. If, for example, the severity of the case meant that justice demanded prosecution, the OTP could initiate a prosecution, even if a transitional justice mechanism had been adopted by the state. But the point is

[63] Max Pensky, "Amnesty on trial: Impunity, Accountability, and the Norms of International Law" *Ethics and Global Politics* 1 (2008): 1-40.
[64] See generally Thomas H. Clark, "The Prosecutor of the International Criminal Court, Amnesties and the 'Interests of Justice': Striking a Delicate Balance," *Washington University Global Studies and Law Review* 4 (2005): 389-414.

that the restrictive interpretation would mean that when engaging Article 53 the OTP could not weigh in the balance wider political factors such as whether the national authority's decision to deploy a transitional justice mechanism is normatively desirable in the circumstances. In short, a restrictive reading of Article 53 would preclude the OTP from entering in the political arena, reserving this domain for the relevant national actors.

Which approach represents the correct interpretation of Article 53? In answering this question, the first point to note is that that Article 53 is not an exception to the principle of complementarity, and therefore does not override Article 17 of the Statute. Article 53 only becomes relevant in cases where the principle of complementarity has been satisfied; that is, when states have proven to be unwilling or unable to prosecute. If the principle of complementarity has not been satisfied, the OTP has no competence to apply Article 53, as the Court as a whole would have no jurisdiction. In that sense, Article 53 is a second step that comes after the test of complementarity has determined jurisdiction. When deciding whether to initiate an investigation, the OTP must first consider whether (1) the crime is within the jurisdiction of court; *then* whether (2) the test of complementarity has been satisfied; and, *finally*, whether (3) the 'interest of justice' is not served by an investigation.

At the outset, we should note that the term justice is ascribed a broad meaning by Article 53, requiring the OTP to 'take into account all the circumstances…' According to Article 31 of the Vienna Convention on the Law of Treaties 1969 (VCLT), terms within treaties must be accorded their 'ordinary meaning'.[65] Conferring the phrase 'taking into account all the circumstances' its literal and ordinary meaning would seemingly confer to the OTP broad discretion (or in the word of Olasolo,

[65] The Vienna Convention is regarded as being reflective of customary international law; Jeffrey Dunoff, Steven Ratner and David Wippman, *International Law: Norms, Actors and Process: A Problem Orientated Approach* (New York: Aspen Publishers, 2006) at 43-44.

'unlimited political discretion')[66] to consider any factor that he or she considers relevant, including securing domestic peace. For this reason, this expansive reading has received substantial academic support.[67] For example, Washburn and Punyasena suggest that Article 53 'empower[s] the prosecutor quite widely to hold back on a prosecution for reasons of non-interference in a peace settlement, interference in an investigation, as well as social provisions in the article'.[68] According to Ohlin, 'it is difficult to think of a factor that would not be relevant'.[69] Gropengieber and Meinbner agree, suggesting that the interests of justice phrase includes more than 'just criminalization of an offence, because the circumstances of the offence, the perpetrator and the victim can be outweighed by other factors not related to wrongfulness or guilt'.[70] For them, the 'interests of justice' means the realisation of 'a peaceful society'.[71] Goldstone and Fritz argue that 'few would aver that [justice] is demanding in the sense that it is always retributive'.[72]

We argue, however, for a restrictive interpretation of Article 53.[73] We suggest that the factors that can be taken into account when interpreting this provision should exclude wider political factors such as whether the imposition of transitional justice mechanisms are normatively desirable. Four points support this restrictive approach.

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[66] Hector Olasolo, "The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?" *International Criminal Law Review* 3 (2003): 87-150, at p 141.
[67] Eric Blumenson, "The Challenge of a Global Standard of Justice: Peace, Pluralism and Punishment at the International Criminal Court," *Columbia Journal of Transnational Law* 44 (2006): 801-874; Phillip Kastner, "The ICC in Darfur – Savior or Spoiler?" *ILSA Journal of International and Comparative Law* 14 (2007-2008), at p 145.
[68] John Washburn and Wasana Punyasena, *Interest of Justice Proposals* (AMICC May 2005).
[69] Jens Ohlin, "Peace, Security and Prosecutorial Discretion," in *The Emerging Practice of the International Criminal Court*, eds. Carsten Stahn and Göran Sluitter (Leiden: Martinus Nijhoff, 2009) 185-208, at p 188.
[70] Helmut Gropengieber and Jrg Meinbner "Amnesties and the Rome Statute," in *Essays on the Rome Statute of the International Criminal Court, volume II*, eds. Flavia Lattanzi and William A. Schabas (Fagnano Alto: Il Sirente, 2003), 172-197 at p 193.
[71] *Ibid*.
[72] Richard Goldstone and Nicole Fritz, "The ICC Prosecutor's Unprecedented Powers," *Leiden Journal of International Law* 13 (2000): 655-667, at p 662.
[73] This fits with the OTP's determination that '[a] decision not to proceed on the basis of the interests of justice should be understood as a course of last resort'; Office of the Prosecutor, 'Policy Paper on the Interests of Justice', September 2007, p 9.

First, although the phraseology of Article 53 requires '*all* the circumstances to be taken into account' (emphasis added) and provides a list of factors preceded by the word including, the nature of the factors specified in Article 53 limit or qualify the term 'all the circumstances'. As Stahn has argued

> These criteria make it clear that the notion of 'the interests of justice' is linked to justice in a specific case ('*Einzelfallgerechtigkeit*') rather than general policy considerations. It is therefore doubtful whether Article 53 offers a vast space to weigh general interests of national reconciliation or objectives of peacemaking versus interests of individual accountability.[74]

In this sense, when the provision is read holistically it becomes apparent that the framers of Article 53 never intended to confer to the OTP the power to deliberate upon matters that do not specifically relate to the commission of the crime in question. Similarly, for Dukic, 'the structure of the sentence does not seem to elevate 'the interests of justice' criterion above the other considerations but rather subsumes more traditional issues that could be raised in this matter', such as for example the interests of the victims or the gravity of the crime committed.[75] To this end, '[i]t is therefore doubtful whether Article 53 offers a vast space to weigh general interests of national reconciliation or objectives of peacemaking versus interests of individual accountability'.[76] Article 53 in fact reads that when deciding whether to discontinue a prosecution, the OTP can take into account all the circumstances that relate to the commission of the specific offence under consideration but not wider political factors

[74] Carsten Stahn, "Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court," *JICJ* 3 (2005): 695-720, at p 718.
[75] Drazan Dukic, "Transitional Justice and the International Criminal Court – in 'the Interests of Justice'?" *International Review of the Red Cross* 89 (2007): 691-718, at p 697.
[76] See Stahn *above* n 65, at 718.

such as the restoration of domestic peace and stability and the attainment of national reconciliation.

Secondly, although the Vienna Convention requires terms within treaties to be given their ordinary meaning, this applies only in so far as the meaning ascribed to the term does not conflict with the objects and purpose of the treaty.[77] Now: the objects and purposes of the Statute are clearly set out in its Preamble, which explains that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured'. Thus, the ICC is 'premised on an aversion to impunity and accountability for the commission of international crimes'.[78] Consequently,

> [i]f the phrase 'in the interests of justice' is construed in light of the object and purpose of the Rome Statute, a construction that permits consideration of a domestic amnesty, domestic truth commission or peace process and results in permanently not initiating an investigation or proceeding from investigation to trial would be in principle at odds with the object and purpose of the Rome Statute, as set forth in its preamble.[79]

In the words of Dugard, 'justice, in the form of prosecution, must take priority over peace and national reconciliation' and therefore Article 53 cannot be interpreted so as to permit the OTP to enter into a debate that requires consideration of wider political factors relating to peace and reconciliation.[80] This approach is also taken by the OTP, for whom:

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[77] Article 31 provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".
[78] Stahn, *above* n 65, at 703.
[79] *Ibid*.
[80] John Dugard, "Possible Conflicts of Jurisdiction with Truth Commissions," in *The Rome Statute: Of the International Criminal Court: A Commentary*, eds. Antonio Cassese, Paolo Gaeta and John R.W.D. Jones (Oxford: Oxford University Press, 2002) at 702-703.

> The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security.[81]

Thirdly, Article 32 of the Vienna Convention provides that if after the application of Article 31 the meaning of a treaty terms is still ambiguous or obscure it is possible to take recourse to the *travaux préparatoires* of the treaty. As the Human Rights Watch report into the meaning of Article 53(1)(c) makes clear, there is insufficient evidence in the preparatory works of Article 53(1)(c) to suggest that the framers of Article 53 had formed a consensus as to the exact scope of the term justice.[82] However, an isolated remark by the Kenyan delegation is nevertheless informative. In the context of Article 53, the Kenyan delegation explained that the OTP must be 'free from political manipulation, pursuing only the interests of justice, with due regard to the rights of the accused and the interests of the victims'.[83] This lends further weight to the argument that Article 53 was never intended to allow the OTP to consider wider political objectives when interpreting and applying Article 53. Instead, the OTP's discretion should be limited to factors that specifically relate to the perpetrator and victim in the case under consideration.

Fourthly, and perhaps most importantly, Article 16 of the Rome Statute permits the UN Security Council to defer an ICC investigation or prosecution for a period of

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[81] 'Policy Paper on the Interests of Justice', n 64, p.8.
[82] Human Rights Watch explained that "neither the language of the Rome Statute nor actual language in the travaux préparatoires reflect any agreement that the phrase "the interests of justice" permits the prosecutor to consider the existence of a national amnesty or truth commission process, or ongoing peace negotiations as factors to be evaluated"; Human Rights Watch, *above* n 38 p. 4.
[83] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: summary records of the plenary meetings and of the meetings of the Committee of the Whole (U.N. Diplomatic Conference), 379, A/CONF.183/13 (Vol. II) (1998), available at http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf at p 97.

twelve months, with the possibility of annual renewal.[84] The one limitation is that this deferral must be issued under Chapter VII of the UN Charter; that is, the Security Council must determine that the situation constitutes a breach of the peace, a breach of international peace and security or a threat to international peace and security.

Article 16 reminds us that the Security Council and the OTP possess very different competences and that these must not be confused.[85] Indeed, this is recognised by the OTP in its Policy Paper, explaining quite clearly that 'there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the OTP'.[86] Importantly, the OTP acknowledges that the ICC must 'work constructively with and *respect* the mandates of those engaged in other areas... [and] pursue its own judicial mandate independently'.[87] Thus, all in all, justice should not be interpreted 'so broadly as to embrace all issues related to peace and security.'[88]

All in all, the effect of Article 16 is clear: when it is contended that a prosecution by the ICC is likely to disrupt a transitional justice arrangement, potentially leading to the continuation or recurrence of violence, it is not for the OTP to gauge and determine whether this is a real possibility, and if it concludes that it is, to discontinue a prosecution. This would require the OTP to step out of the legal arena and into a political one (and indeed a highly sensitive political area). As explained, it is the role of the Security Council, in line with its global competence in maintaining peace and

[84] On the relationship between the Security Council and the ICC see generally Rosa Aloisi, "A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court" *The International Criminal Law Review* 13 (2013): 147-168.
[85] Thomas Clark, *above* n 55, at p 396, footnote 40.
[86] Policy Paper on the Interests of Justice, *above* n 64, p. 1.
[87] *Ibid*., at 8 (emphasis added).
[88] *Ibid.*, at 8.

security,[89] to suspend (perhaps identifiably) prosecutions which are likely to disrupt transitional justice arrangements and thus threaten peace and security.

It should be reminded that there is a logical order to the requirements put forward in the Statute: 'interest of justice' is a third step, that comes after deciding whether the crime falls under the jurisdiction of the ICC, and after the test of complementarity. In the Colombian case, this means that the narrow interpretation of 'interest of justice' we propose would be deployed only if the OTP has decided that the transitional justice model chosen by Colombia proves that such state is unwilling or unable to prosecute at least the main perpetrators, as identified under the Legal Framework for Peace.

If it has decided that the alleged conducts are indeed subject to the jurisdiction of Court, and (most importantly) that the transitional justice process implies that Colombia is either unwilling or unable to prosecute, then the OTP will be able to consider whether it is in the 'interest of justice' not to initiate the investigation. This latter analysis needs to be centred on the elements related to the crime and its circumstances (for example, considering the truth and reparation for victims of the Colombian conflict), and not on wider political considerations.

Our proposal of a narrow interpretation is not an argument to prevent (or justify) the OTP's intervention in that country. Surely, a narrow interpretation may imply more ICC intervention, if compared with a wider interpretation. Our point, however, is not focused on predicting such possibilities. Rather, our approach suggests that Article 53 is

[89] It should be noted that the Security Council's competence under Chapter VII of the UN Charter actually relates to *international* peace and security, which at least historically meant that a military conflict between two or more states. If this were the case, then Article 16 could not be engaged in order to immunise a transitional justice mechanism *within* a state. However, since the end of the Cold War the Security Council has effectively ignored that the requirement the threat to peace and security is international in the sense that it involves a conflict between two or more states. To put the same point differently, the Security Council is now prepared to engage Chapter VII in relation to matters that affect peace and security *within* member states; see generally R Buchan, *International Law and the Construction of the Liberal Peace* (Hart Publishing, Oxford, 2013) Chapter 4.

a relevant variable to consider – one that is less radical than it appears at first sight. Indeed, this does not give the OTP competence to factor in one and all of the issues involved in transitional justice and become, as it were, a centralized global authority on the normative merits of transitional justice processes in the world. To be blunt, as a legal institution this would require the OTP to deal with issues and answer questions that it does not have the resources or perhaps even aptitude for.

V. Interest of Justice and its Relation to other Transitional Justice Institutions

According to our interpretation outlined above, when deciding whether it is in the interests of justice to initiate an investigation or to proceed with a prosecution under Article 53 of the Rome Statute the OTP can only take into account the severity of the crime(s) that has been committed, the particular characteristics of the defendant(s) under consideration and any factors of special concern relating to the victim(s). In this context it is interesting that in 2011 the Colombian government adopted the Victims Law (Law 1448 of 2011) so as to provide victims of the armed conflict with reparations. In essence, the Victims Law creates a legislative, regulatory and administrative framework to facilitate the reparation of those Colombians who have suffered harm as result of the internal armed conflict since 1 January 1985. Similarly, the LFP calls for the establishment of a Reconciliation Commission, and other non – judicial mechanisms of compensation and transitional justice.

This raises the crucial question as to whether such mechanisms result in the victims being adequately compensated and thus rendering prosecution of offenders unnecessary. That is, in the terms of Article 53, whether such reparations would make a prosecution no longer available “in the interests of justice”.

We submit that this balance should be undertaken by the Colombian polity and not by the OTP. As argued above, a restrictive interpretation of Article 53 requires the OTP to exclude wider political factors, which would include whether victims have been adequately compensated. In this sense, and at least in terms of the role of the OTP, pecuniary compensation for victims of crime and prosecution of offenders are mutually exclusive. Allowing the OTP to consider wider aspects of domestic politics would require the OTP to make a political judgement that it is not in a position to perform.[90] In the Colombian case, it would require the OTP to assess whether the Victims Law, or any other subsequent transitional justice framework, can indeed be instrumental for achieving enduring peace in the country. This will be quite difficult for the OTP to do.

However, it is important to note that we are not arguing that a consideration of wider aspects of domestic politics would imply a failure to prosecute by the OTP, or a delay on justice for the victims. The OTP may decide against pursuing an investigation under Article 53 and still fulfil its mandate. As we have already noted, the characteristics of the defendant and/or the circumstances of the victim maybe be such that prosecution is not in the interests of justice. Moreover, criminal prosecution is not the only available venue to achieve justice for victims. Certainly, we are not arguing that all perpetrators need to be prosecuted at all times and in all places – we disagree, in that sense, with the maximalist view of the LJP that has led to unworkable requirement and, as we have seen, very poor results. A reasonable margin of flexibility in the form of prosecutorial discretion is of course needed. However, we suggest that by grounding its decision on wider political considerations concerned with peace, the OTP would place itself in the middle of a political debate that would undermine its neutrality and, perhaps more importantly, could end in a stalemate such as the one observed with the

[90] Dukic, *above* n 66.

interpretation of the principle of complementarity. The OTP must not understand its own mandate as an instrument to achieve political goals – desirable as they might be, as is the case of peace and reconciliation. We suggest that the interpretation of Article 53 should be decisively anti– instrumentalist, in the sense that it must abandon, as a matter of principle, the expectation that its actions can be instrumental to achieve peace in a given domestic situation, such as Colombia. To be sure, the government as well as NGOs active in Colombia will have an opinion on whether to open an international criminal investigation is in fact conducive to peace and reconciliation in Colombia. That is their job.

It is the Colombian political community, with its advantages and its shortcomings, that decides whether there is a link of instrumentality between criminal prosecution (or lack thereof) and peace. The OTP must not understand its mandate in those terms.

VI. **Conclusion**

As noted, the OTP has Colombia under preliminary examination. The objective of this article has been to explores the role of Article 53 of the Rome Statute and its 'interest of justice' standard in Colombia. Put simply, whereas Article 17 requires the OTP to address the politically controversial issue of whether the government of the state in question has proven unwilling to effectively prosecute those suspected of committing international crimes, Article 53 allows us to ask whether the insistence of prosecution is necessary in order to attain justice. In this context, we argue that justice should be defined principally on the basis of whether a prosecution is demanded by the factual circumstances of the specific case in question. For example, are the characteristics of

the defendant such that a prosecution is not in the interests of justice? Does the conduct or situation of the victim indicate that prosecution is unnecessary? To be clear, we contend that the concept of the 'interests of justice' should not take into account more general issues relating to peace and national reconciliation. The ICC, and therefore the OTP, are legal institutions that should concern themselves with questions of law (have international crimes been committed and, if so, have perpetrators been adequately prosecuted?), not questions of high politics (should prosecution of international crimes be dispensed with because of the wider benefits this yields for society generally?). But a point of clarification is required: we are not arguing that a state that is a member of the Rome Statute is prohibited from adopting transitional justice mechanisms. As events from around the world indicate, transitional justice mechanisms can actually be very effective in ending or at least ameliorating armed conflicts. The point we are making is that as legal institutions the ICC and the OTP should not be required to assess highly politically sensitive questions such as whether by investigating and prosecuting individuals (and thereby disputing transitional justice mechanisms) peace and security will be adversely affected. Article 16 of the Rome Statute makes it quite clear that if a prosecution by the ICC is likely to have an adverse impact on peace and security, it is for the Security Council to invoke Chapter VII of the UN Charter in order to immunise transitional justice arrangements (regardless of the problems surrounding the Security Council as a political organ, such as membership issues etc). All in all, the Rome Statute is premised upon a separation of powers, and confers competences and establishes safeguards in order to ensure that this is maintained.