# The local impact of a global court : assessing the impact of the International Criminal Court in situation countries

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## Chapter 4: Transformative Effect: Peace With Punishment

*The goal should be to "achieve peace with maximum justice"*[747] – President Juan Manuel Santos, Colombia

*On the horns of a dilemma, there is no room for dogma* - Barney Afako, Uganda[748]

## I. Introduction

This Chapter seeks to assess whether the existence of the Rome Statute and the ICC are having a transformative effect on political processes such as peace negotiations. As discussed in Chapter 1, the logic of the Rome Statute is that effective investigation and prosecution will contribute to prevention. Yet amnesties were often granted during peace negotiations. Is the Court a facilitator or an obstacle to concluding peace agreements? Is the existence of the Court leading to a reduction in amnesties?

The provisions of the Rome Statute that seek to balance peace and justice have not been used in practice, except to guarantee immunity to peacekeepers. During the Review Conference in 2010, speakers referred to a "paradigm shift, in which there was now a positive relation between peace and justice."[749] Amnesties were considered "no longer an option" and "mediators had to find ways to convince parties to come to the negotiating table against a backdrop of actual or possible indictments."[750]

Experiences in Uganda and Colombia show that the peace versus justice dilemma is not imagined, and countries continue to grapple with this difficult question. In Uganda, the talks broke down, and commentators remain divided over the question whether this was a result of the ICC involvement. In Colombia, for now the Havana talks succeeded, based on a complex formula of peace with punishment and political participation. Amnesties too are not entirely off the table in certain situations, as may be seen in Afghanistan and Libya.

## II. Legal Framework

A. Article 16: Reluctance of the Security Council?

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[747] UN News Center, *Both peace and justice vital to heal wounds of conflict, Colombian leader tells UN*, 24 Sept. 2013.
[748] Afako, Barney. *Undermining the LRA: Role of Uganda's Amnesty Ac*t, Conciliation Resources, August 2012.
[749] Moderator's Summary of Stocktaking of international criminal justice, Peace and Justice, RC/11 at para. 29 (2010).
[750] Ibid. para. 31.

The need to find a balance between peace and justice was anticipated in the Rome Statute, and the Prosecutor and Pre-Trial Chamber, but also the Security Council were given tools in this regard.[751] Article 16 was a result of the "Singapore compromise" intended to balance two radically different views of the International Criminal Court, one in which the Court would be subservient to the Security Council, and another of an independent court which could act on its own, irrespective of the Security Council.[752] In spite of its potentially crucial role in balancing peace and justice, in the first twelve years deferrals have been contemplated, but were never used to suspend an ongoing investigation.

In the Ugandan Peace Talks, Article 16 was contemplated on several occasions but Uganda was not on the Security Council agenda, which raised practical problems in requesting an Article 16 deferral.[753] In 2008, the AU called upon the Security Council to apply an Article 16 deferral in the case of Omar Al-Bashir, President of Sudan. The UK and France supported the request for a deferral, and actively promoted an exchange of surrender of Haroun and Kushayb and free movement for peacekeepers in return for the deferral.[754] However, the final Security Council did not mention a deferral.[755] The United States was most firmly against, abstaining from the Resolution because "the language added to the resolution would send the wrong signal to Sudanese President Al-Bashir and undermine efforts to bring him and others to justice."[756] Another attempt by the AU to obtain a deferral was in the context of the cases against Kenyatta and Ruto.[757] African Members of the SC tabled the matter, and a draft resolution was considered in a session held on 15 November 2013. Seven members of the SC, voted in favor, but the Resolution did not pass, since eight members abstained.

It may be that the issue of requesting deferrals now is too associated with a political push to obtain reprieve for sitting African Heads of State. The Council has seemingly been reluctant to use these powers, perhaps because of the perceived impact on the credibility of the Court.[758]

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[751] Article 16 states: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted by Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

[752] Schabas, William. *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press (2010) pp. 326-327.

[753] Juba Agreement on Implementing and Monitoring Mechanisms, section 37. The parties to the Peace Talks in Uganda included a provision late in the talks to agree that the Government of Uganda would request a Security Council deferral.

[754] Bosco, David. *Rough Justice: The International Criminal Court in a World of Power Politics*. Oxford University Press (2014) p. 145.

[755] UN Doc S/RES/ 1828 (2008). See also Cryer, Robert. *Prosecuting the Leaders: Promises, Politics and Practicalities.* Gottingen Journal of International Law 1 (2009) 45 p. 68.

[756] UN Doc. S/PV.5947, p. 6.

[757] Decision Ext/ Assembly/AU/Dec. 1 (Oct. 2013).

[758] Bosco, David. *Rough Justice: The International Criminal Court in a World of Power Politics*. Oxford University Press (2014) p. 181.

B. Article 53: An Uncompromising Prosecutor

In Rome, South African delegates raised the possibility of amnesties during the Rome Statute negotiations, [759] but it found no consensus and no expression in the Statute.[760] A non-paper drafted by the US delegation in August 1997 also tabled the suggestion that the ICC should recognize amnesties to facilitate transitions to democracy. This eventually led to the inclusion of Article 53 in the Statute.[761] According to Art. 53, the Prosecutor can choose to suspend an investigation or prosecution "in the interests of justice", a decision that is reviewable by the Pre-Trial Chamber.

This has led to extensive discussions on whether the interests of justice can demand that an investigation or prosecution be halted in the "interests of peace." From early on, many scholars believed that the "interests of justice" should be interpreted broadly.[762] Kirsch noted that this phrase was included in the Rome Statute to allow for "creative ambiguity" in possibly recognizing amnesties.[763] The expert group on complementarity in 2003 argued that the "stance of the OTP with respect to alternative forms of justice should probably be framed, conceptually, under Article 53."[764] Robinson argued that Art. 53 juxtapose the gravity of the crime and interests of victims with the interests of justice, therefore indicating that the latter may trump the former.[765] The wording of Article 53, which requires the Prosecutor to take into account the gravity of the crimes and the interests of victims on the one hand, and the interests of justice on the other, supports the view that a balancing test is required. In this respect, some scholars have argued that the "interests of justice" is akin to "public interest" considerations in domestic legal systems, which allows prosecutorial discretion not to prosecute on grounds such as public safety.

Human rights NGOs however argued that the meaning is more narrow, and that the references in Art. 53 to the "gravity of the crime", "the interests of victims" or the "age or infirmity of the alleged perpetrator" and his or her role in the alleged crime

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[759] South Africa's delegation shared its experience but beyond Articles 16 and 53, nothing definitive was included in the Statute. Schabas, William. *Complementarity in Practice: Some Uncomplimentary thoughts.* Criminal Law Forum (2008) p. 22.

[760] There were those who "had misgivings about laying down an iron rule for all time, mandating prosecutions as the only acceptable response in all situations": Robinson, Daryl. *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, European Journal of International Law (June 2003) p. 483.

[761] Scharf, Micheal, *The Amnesty Exception to the Jurisdiction of the International Criminal Court,* Cornell International Law Journal vol. 31 (1999), p. 507.

[762] Hayner, Priscilla. *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict.* Routledge (2018) pp. 100-102.

[763] Ibid., p. 522.

[764] Informal expert paper: The principle of complementarity in practice, ICC-OTP (2003) p.71.

[765] Robinson, Daryl. *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court,* European Journal of International Law (June 2003) p. 488.

refer to considerations linked to a specific case and not to an overall policy objective.[766] HRW and AI pushed for this narrower construction of Art. 53, arguing that a broader interpretation would contradict the object and purpose of the Rome Statute.[767] HRW suggested that any such considerations would fall into the realm of the "political" and would be inappropriate to consider.[768]

Originally the OTP seemed to share the broader interpretation. [769] In announcing the arrest warrants in Uganda in 2005, the Prosecutor said that the ICC would "help bring justice, peace and security for the people of Northern Uganda."[770] During the negotiations headed by Betty Bigombe, the Prosecutor mentioned that the warrants were still reversible under Article 53, creating the impression of a "tap" that could be turned on or off, rather than resembling an unstoppable "train". At a meeting with traditional and religious leaders from Northern Uganda in The Hague, the Prosecutor suggested that Art. 53 could be used to suspend investigations.[771]

However, the policy paper on "the Interests of Justice" issued in 2007, eliminated the space of "creative ambiguity". The paper acknowledges that the interpretation of the "interests of justice" is "the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly), but there is no clear guidance." The paper stressed that "the exercise of the Prosecutor's discretion under Article 53 (1) (c) and 53 (2) (c) is exceptional in its nature and that there is a presumption in favor of investigation and prosecution." Secondly, it argued that the criteria of the "interests of justice" test should be informed by the objects and purposes of the Statute, namely the prevention of serious crimes of concern to the international community through ending impunity. Third, and perhaps most significantly, the paper states: "there is a difference between the concepts of the interests of justice and the interests of peace" and finds that "the latter falls within the mandate of institutions other than the Office of the Prosecutor."[772] The Prosecutor argued that the responsibility for peace remains with the Security Council, and that "the interests of justice provision should not be considered a conflict management tool requiring the Prosecutor assume the role of a mediator in political negotiations."[773]

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[766] Stahn, Carsten. *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*. 3 Journal of International Criminal Justice (2005) p. 718.
[767] Human Rights Watch, *Policy Paper: the Meaning of "the Interests of Justice" in Article 53 of the Rome Statute,* June 2005.
[768] Ibid. p. 7.
[769] Brubacher, Matthew. *The ICC investigation of the Lord's Resistance Army,* in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality*, Zed Books (2010) p. 263.
[770] Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, The Hague 14 Oct. 2005.
[771] IRIN News Kenya, *Uganda: ICC Could Suspend Northern Investigations- Spokesman*, 18 April 2005.
[772] OTP Policy Paper on the Interests of Justice, September 2007 at pp.1-2.
[773] Policy Paper on Preliminary Examinations, 4 Oct. 2010.

The OTP states that it does not conflate the "interests of victims "with the "interests of justice", but argues that the wording of Article 53(1)(c) implies that the interests of victims "will generally weigh in favor of prosecution." The notion that the interests of victims could favor a peace agreement or other mechanisms, such as a truth commission, is dismissed. The paper states that other justice mechanisms are to be considered relevant only as complementary, or in addressing the "impunity gap" (reverting to a Court-centric view as discussed in Chapter 2).

In taking this position, the OTP disregards a rich field of experience in terms of interacting with victims about their wishes, during negotiations and in the aftermath of a peaceful settlement. It raises the question what to do in situations where victims are opposed to an ICC intervention or support a peace agreement that proposes another justice arrangement. In some situations, the "do no harm" principle may mean that the interests of victims weigh against proceeding with prosecutions in cases where victims face additional violence or harm, including through prolonged conflict.[774] This should go beyond a mere "operational assessment" of protection obligations in relation to individual witnesses. In the situation on Afghanistan, the ICC gathered information of the impact of the conflict on women and girls as a step towards the do no harm principle.[775]

During the Juba Peace negotiations in 2007-2009, the Prosecutor maintained this harder line as described in the policy paper.[776] Court officials were sceptical that the talks would yield anything, and viewed it mainly as an attempt by the LRA to regroup and rearm.[777] The Prosecutor took a strong stance that the arrest warrants ought to be enforced in spite of the talks.[778] At the Nuremberg Conference in 2007, speaking in the historic courtroom where the Nazi leadership was tried, the Prosecutor said:

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[774] Carlos Nino describes in his book the end of the military dictatorship in Argentina: "Even though Alfonsin believed that punishment of the worst abuses were essential for the long-term consolidation of democracy, he was also fully aware that a miscalculation could jeopardize democracy …. Therefore, if he threatened democracy through trials and weighty sentences to discourage human rights violations, he might in fact be risking future violations." Nino, Carlos. *Radical Evil on Trial,* Yale University (1996). See also Varaki, Maria. *Revising the "Interests of Justice" Policy Paper*, JICL, Vol. 15 Issue 3, pp. 455-470.

[775] OTP Report on Preliminary Examination Activities 2016, para. 227.

[776] Seils, Paul. *The Impact of the ICC on Peace Negotiations*, Expert paper Workshop 7- The Impact of the International Criminal Court, Conference on Building a Future on Peace and Justice, Nuremberg 25-27 June 2007: "The arguments that are presented against the pursuit of justice may often present very stark moral and political dilemmas and no doubt this will continue for a log time to come: the first impact of the Rome Statute however is to change the parameters, and to a large extent the usefulness, of such discussions. This is for the simple reason that it states what the law is now. The time for rhetorical discussions and genuine philosophical debate may not be over, but it will often be beside the point if not conducted with a clear understanding of the implications of the new legal realities. The Rome Statute provides the legal framework in which the discussion about the pursuit for peace must be circumscribed."

[777] Brubacher, Matthew. *The ICC investigation of the Lord's Resistance Army*, in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality*, Zed Books (2010) p. 263.

[778] Interview with Michael Otim, 6 Feb. 2014.

> Arrest warrants are decisions taken by the judges in accordance with the law, they must be implemented … *If* States Parties do not actively support the Court, in this area as in others, then they are actively undermining it … It is the lack of enforcement of the Court's decisions which is the real threat to enduring Peace.[779]

Human Rights Watch shared this view: "Experience indicates that justice, rather than being an obstacle, is a precondition for meaningful peace."[780]. Likewise, the UN Secretary General said in 2009 that "Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives,"[781] and "the debate is no longer between peace and justice, but between peace and what kind of justice."[782] At the Review Conference in Kampala in 2010, the Chief Prosecutor stated: "Let me conclude on peace and justice … The Prosecutor and Judges cannot and will not take political considerations into account. This was a conscious decision, to force political actors to adjust to the new legal limits. We cannot both claim that we will "never again" let atrocities happen and continue to appease the criminals, conducting "business as usual.[783]

At the Review Conference, speakers at the Review Conference argued that peace and justice are fundamentally complementary, and that any conflict between them is virtually imagined.[784] Only one speaker took a much more cautious line, arguing that arrest warrants had hindered the successful conclusion of a peace agreement in Uganda, and that "The Ugandan people and the international community would have to live with the consequences of that decision."[785]

In 2012, when peace talks were just commencing in Colombia, the Prosecutor maintained this hard line when she said: "The international community has put in place some clear divisions of responsibility. The UN Security Council is in charge of

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[779] Address by Luis Moreno- Ocampo, Prosecutor of the International Criminal Court, 25 June 2007, International Conference "Building a future on Peace and Justice", Nuremberg. Own emphasis.
[780] Human Rights Watch Policy Paper: *The Meaning of "The Interests of Justice" in Article 53 of the Rome Statute,* June 2005.
[781] UN Secretary-General Report to the Security Council, *The rule of law and transitional justice in conflict and post-conflict societies,* 23 August 2004, UN Doc. S/2004/616.
[782] "Honouring Geneva Conventions, Secretary-General says debate is no longer between peace and justice but between peace and what kind of justice," SG/ SM/12494, Sept. 26,2009. http://www.un.org/News/Press/docs/2009/sgsm12494.doc.htm
[783] Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Review Conference General Debate. Statement, Kampala, 31 May 2010.
[784] The Prosecutor called for 4 pledges at the Review Conference, including public and diplomatic support to executing arrest warrants; severance of non-essential contacts with persons who are the object of an ICC arrest warrants; cutting off the supply networks of those persons; and providing concrete support for arrest operations.
[785] See remarks by Barney Afako, Moderator's Summary of Stocktaking of international criminal justice, Peace and Justice, RC/11 (2010) at para. 2.

peace and security. The ICC is doing justice."[786] In a press release in April 2013, the OTP again insisted on the role of the Rome Statute's legal framework in "underpinning durable solutions that provide for both peace and justice …"[787] She reiterated in the New York Times: "The debate about peace versus justice or peace over justice is a patently false choice. Peace and justice are two sides of the same coin. The road to peace should be seen as running via justice, and thus peace and justice can be pursued simultaneously."[788] Later on, during the peace negotiations in Colombia, the Prosecutor stated: "To preserve its impartiality, the Office cannot participate in peace initiatives, but it makes clear that any proposed solutions in peace talks have to be compatible with the Rome Statute. It will inform the political actors of its actions in advance, so they can factor the Court into their activities.[789]

The Prosecutor's position is controversial and comes close to *fiat justitia ruat caelum* (do justice lest the heavens fall).[790] The following sections will examine the desirability of this approach and impact of the position of the OTP on negotiations in Uganda and Colombia.

## III. Peace Negotiations in the Shadow of the ICC

### A. Uganda: Did the ICC Intervention Increase Awareness of Accountability?

Uganda had a bloodstained history, but criminal justice was not used to deal with political violence. After the overthrow of Idi Amin Dada in Uganda, many of his security officials were detained, but released and never tried.[791] In 1987, when Yoweri Museveni came to power he offered amnesty to all opposing forces who surrendered, excluding "heinous crimes" such as genocide, murder, kidnapping and

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[786] Bensouda, Fatou, Seminar Institute for Security Studies (ISS): Setting the record straight: the ICC's new Prosecutor responds to African concerns: Reconciling the independent role of the ICC Prosecutor with conflict resolution initiatives, Key note address Pretoria 10 Oct. 2102.
[787] Press Release, ICC Office of the Prosecutor concludes visit to Colombia, 19 April 2013.
[788] Bensouda, Fatou. New York Times Op Ed., *International Justice and Diplomacy*, 19 March 2013.
[789] Bensouda, Fatou, *Seminar Institute for Security Studies (ISS): Setting the record straight: the ICC's new Prosecutor responds to African concerns: Reconciling the independent role of the ICC Prosecutor with conflict resolution initiatives,* Key note address Pretoria 10 Oct. 2102.
[790] Priscilla Hayner argues that this approach should be revised on 3 grounds: (1) holding off on prosecutions may lead to better justice later, after a conclusion of a peace agreement; (2) the concept of "justice" should be understood more broadly than criminal prosecutions of a few perpetrators; and (3) ending war may be inherently in the interests of justice and in the interest of preventing further atrocities, irrespective of new justice initiatives included in a peace deal. Hayner, Priscilla. *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict.* Routledge (2018) pp. 105-106.
[791] See Barney Afako, Reconciliation and Justice: *Mato Oput and the Amnesty Act, Conciliation Resources* (2002) at http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php.

rape.[792] In the words of Barney Afako: "Ugandans have had to grapple with the meaning of justice in this context."[793]

Some scholars have suggested that the ICC was instrumental in shaping the accountability debate in Uganda.[794] But as in many societies facing prolonged conflict, discussions on striking a balance between accountability and reconciliation in resolving the LRA conflict predated ICC intervention.[795] With advent of the ICC, criminal accountability became a more a central consideration to these debates.

B. Did the ICC focus increased (humanitarian) attention on the conflict?

Some would argue that one of the most significant impact of the ICC in Northern Uganda was to bring renewed international attention, and with it, new resources, to those victimized by the conflict.[796] New actors did come forward to offer various forms of assistance. Some actors did get involved due to the ICC's presence,[797] but with others the connection was less direct. Several new US-based organizations, such as Invisible Children, were formed after the ICC investigation.[798] The Enough Project is focused on Africa including Northern Uganda.[799] Both organizations

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[792] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 18.

[793] Afako, Barney. *Reconciliation and Justice: Mato Oput and the Amnesty Act, Conciliation Resources* (2002) at http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php p. 65.

[794] This is argued by Sarah Nouwen and Mark Kersten.

[795] Prior to the involvement of the ICC, there had been a lively debate in Uganda on traditional ceremonies amongst both conflict resolution specialists and also anthropologists. See Barney Afako, *Reconciliation and Justice: Mato Oput and the Amnesty Act*, Conciliation Resources (2002) at http://www.c-r.org/our-work/accord/northern-uganda/reconciliation-justice.php. Sverker Finnstrom, *Living With Bad Surroundings: War and Existential Uncertainty in Acholiland in Northern Uganda.* Uppsala: Acta Universitatis Upsaliensis, Uppsala Studies in Cultural Anthropology no. 35, (2003), pp. 297-299. The conversation alternated between a focus on the need for a truth commission; traditional justice; and amnesties or reintegration of former combatants. These mechanisms provide for various *degrees* of accountability, albeit not criminal accountability.

[796] Allen, Tim. *War in Northern Uganda: An Assessment of the International Criminal Court's Intervention*, Special Report. London, UK: Crisis States Research Centre, (2005) 100 pp.

[797] See for instance Erin Baines, Eric Stover and Marieke Wierda. MacArthur Foundation, *War-Affected Children and Youth in Northern Uganda: An Assessment Report*, 1 May 2006. This report resulted in the establishment of a new fund in Northern Uganda, pursuant to ICC involvement.

[798] Invisible Children was founded in 2004, according to its website, when its founders encountered a boy named Jacob and promised him "we would do whatever we could to stop Joseph Kony and the LRA." Invisible Children "focuses exclusively on the LRA conflict through an integrated four-part model that addresses the problem in its entirety: immediate needs and long-term effects." www.invisiblechilden.com.

[799] The Enough Project was founded in 2006 by a small group of concerned policy makers, including Gayle Smith and John Prendergast. It is a project that "fights to end genocide and crimes against humanity, focused on areas where some of the world's worst atrocities occur. We get the facts on the ground use rigorous analysts to determine the most sustainable solutions, influence political leaders to adopt our proposals, and mobilize the American public to demand change." www.enoughproject.org

engaged in advocacy that sometime depicted the conflict in simplistic terms and presented the LRA as an isolated criminal "problem" that has to be resolved (not unlike the ICC's original narrative of the conflict). As Branch wrote, the ICC "reduced the deep internal political crisis of the Acholi to a simple division between the criminal LRA and innocent civilians."[800]

The increased focus of the international community on the conflict was also a result of other developments independent from the ICC's intervention, such as the publication of the report "*The Hidden War, The Forgotten People*",[801] or the visit of UN OCHA Chief Jan Egeland,[802]or the activism of the Canadian Ambassador to the UN, Alan Rock, who successfully lobbied to have the LRA conflict included in the Security Council agenda.[803] The additional spotlight on the LRA by the ICC and others did put more pressure on the Government of Uganda to seek solutions to the conflict.

C. Influence of the ICC on conduct of state actors

Some have credited the ICC for improved conduct on part of the Ugandan People's Defense Forces, in respect of its human rights record.[804] The former ICC Prosecutor himself claimed impact in this area: "one of the most interesting achievements of the Rome Statute's provisions is that armies around the world are adjusting their regulations to avoid the possibility of committing acts failing under ICC jurisdiction."[805] There is indeed some evidence of improvements of conduct within the UDPF. For instance, a Human Rights Desk was opened, and new rules were established for cordon and search operations in the context of the conflict in Karamajong.[806] A few cases of courts martial were pursued for rape committed in the Central African Republic.[807] The former Prosecutor said that the Ugandan troops left DRC immediately after its ratification of the Rome Statute, but evidence suggests

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[800]Branch, Adam. *Uganda's Civil War and the Politics of ICC Intervention.* 21 Ethics and International Affairs 179 (2007) 191.

[801] Liu Institute for Global Studies, *The Hidden War, the Forgotten People: War in Acholiland and its Ramifications for Peace and Security in Uganda*, 20 Oct. 2003.

[802] In November 2003, UN OCHA Chief Jan Egeland visited Northern Uganda for the first time and famously referred to the crisis in Northern Uganda as the world's "worst, forgotten crisis". Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda*, Working Paper No. 22, 12 Oct. 2012. Egeland, Jan. *A Billion Lives.* Simon & Shuster (March 2008) p. 201. See also http://reliefweb.int/report/uganda/war-northern-uganda-worlds-worst-forgotten-crisis-un. See http://www.irinnews.org/report/58646/uganda-interview-with-jan-egeland-un-under-secretary-general-for-humanitarian-affairs.

[803]See Letter dated 5 January 2006 from the Permanent Representative of Canada to the United Nations addressed to the President of the Security Council, 9 January 2006, UN Doc. S/2006/13.

[804] Justice and Reconciliation Project, *The Dog That Barks But Doesn't Bite: Victims' Perspectives on the International Criminal Court in Uganda*, Policy Brief No. 6 (February 2013) p. 5.

[805] Ocampo, Luis Moreno. *The International Criminal Court: Seeking Global Justice.* 40 Case Western Res. J. International Law (2007-2008) p. 217.

[806] Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda*, Working Paper No. 22 (Oct. 2012) pp,14-15.

[807]Ibid.

that this departure was pursuant to the Luanda Agreement between the Governments of Uganda and DRC.[808]

Other factors, such as pressure from the Uganda Human Rights Commission, also played a role in curbing the behavior of the UDPF. The ICRC conducted different trainings for the UPDF in recent years.[809] Improving the image of the UDPF is also a political priority for Museveni, in the aftermath of numerous corruption scandals.[810]

This is not to say all is now well with the UDPF, which has in recent years been implicated in killings of political opponents and demonstrators.[811] The UPDF remains the military branch of the NRA, and "is not so much pro-regime as it is integrated into the regime itself, each dependent on the other's well-being."[812] Museveni continues to deny that the UDPF was involved in abuses in DRC.[813] A UN Group of Experts in October 2012 accused Uganda of supporting the M23. The leader of the M23, Bosco Ntaganda, was already under arrest warrant by the ICC at the time.[814]

D. The ICC's Role in Empowering Victims in Peace Negotiations

A remarkable impact of the ICC is the enhanced role of victims in peace negotiations, in terms of enabling their voices to be heard. In Uganda, the original Agreement on Accountability and Reconciliation was informed by the many studies of victims' perspectives, which had taken place before June 2007. Once that Agreement was in place, both parties undertook further official consultations among affected communities on which mechanisms of accountability should be put in place, before concluding the Annexure to the Agreement. While it is not clear what role the results of these consultations played in formulating the annexure, certainly the process was an important measure, which in particular contributed to increasing the trust between communities in the North and the Government of Uganda.[815]

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[808] Ocampo, Luis Moreno. *The Office of the Chief Prosecutor: The Challenges of the Inaugural Years,* Gruber Distinguished Lecture in Global Justice, 2013.
[809] Interview with Joan Kagezi, 10 Feb. 2014.
[810] Interview with Mike Otim, 12 Feb. 2014. Years ago, the Judgment of the International Court of Justice condemning UPDF for its operations in Eastern Congo, including finding it responsible for killing, torture and inhumane treatment of Congolese civilians; training of child soldiers; and also looting, plundering and exploitation of Congolese natural resources. International Court of Justice, *Case Concerning Armed Activities on the Territory of Congo, DRC vs. Uganda*, Judgement 19 Dec. 2005 No. 2005/26.
[811] Human Rights Watch, No Justice for April 2011 Killings, 2013.
[812] Freeland, Valerie. *Rebranding the State: Uganda's Strategic Use of the International Criminal Court. Development and Change,* Institute of Social Studies, The Hague (2015) p. 307.
[813] Freeland, Valerie. *Rebranding the State: Uganda's Strategic Use of the International Criminal Court.* Development and Change, Institute of Social Studies, The Hague (2015) p. 299.
[814] Al-Jazeera International, *UN Accuses Rwanda of Leading DR Congo rebels,* 17 Oct. 2012.
[815] The fact that the Minister of Internal Affairs, Rugunda, who had headed the Government delegation at Juba participated personally was particularly important. See Michael Otim and Marieke

This is mirrored in Colombia, where perhaps the single biggest triumph of the peace process as the empowerment of victim organizations. The Ministry of Justice and the Congress both organized victims' consultations. [816] In the Havana peace talks, the United Nations helped to organize groups of victims to attend the talks and represent their experiences and views. Different groups of up to sixty victims travelled to Havana to participate in the process.[817] Directly hearing victims as part of the process is a significant step forward in the practice of conducting peace negotiations. Commentators suggest that the debate around international law and legal trainings on the Rome Statute have served to strengthen victim organizations, who then rallied around the Justice and Peace Law which they viewed as an instrument of impunity. [818] Victim groups and lawyers have seized on the language of victims rights,[819] and the definition of crimes against humanity to analyze their situation and to send communications to the ICC.[820] In the opinion of knowledgeable commentators, the ICC strengthened the position of the victims in Colombia.[821]

E. The ICC as an Incentive to Negotiate?

The argument is sometimes made that the ICC incentivized negotiations in Northern Uganda by luring the LRA to the negotiating table. But the evidence on this remains inconclusive, as it is very difficult to demonstrate causality.

When the ICC opened its investigation in 2004, peace negotiations in Northern Uganda were at a virtual standstill. Betty Bigombe, the chief negotiator, declared that she would resign if the ICC were to issue arrest warrants against the LRA leadership.[822] The talks in 2004 initially led to a cease-fire, but broke down when the senior commander involved in the negotiations, Sam Kilo, himself defected in early 2005.[823] By the time the ICC unsealed its arrest warrants against senior LRA leaders in October 2005, Bigombe's further attempts had wilted. By October 2005, the LRA had mostly moved to Garamba National Park in Eastern Congo, and was less

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Wierda, *Justice at Juba: International Obligations and Local Demands in Northern Uganda, in Courting Conflict? Justice, Peace and the ICC in Africa*, Royal African Society, March 2008.

[816] Interview with Member of Congress, Bogota, 14 May 2014.

[817] See BBC, Colombia's victims join FARC peace talks in Cuba, 17 August 2014, http://www.bbc.com/news/world-latin-america-28822683

[818] See remarks of Mr. Reinaldo Villalba of the Jose Alvaer Restrepo Lawyer's Collective in the Report of the expert conference, In *the Shadow of the ICC: Colombia and International Criminal Justice*, Convened by the Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London, 26-27 May 2011 p. 36.

[819] See remarks of Ms. Catalina Diaz, Ibid. p. 37.

[820] See remarks of Mr. Reinaldo Villalba of the Jose Alvaer Restrepo Lawyer's Collective, Ibid. p. 36.

[821] Interview with Member of Congress, Bogota, 14 May 2014.

[822] See ICTJ and UC Berkeley's Human Rights Center, Forgotten Voices (2005) p. 18.

[823] Hovil, Lucy and Joanna Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, Refugee Law Project Working Paper No. 17, July 2005 p. 3.

likely to carry out retaliatory actions.[824] While there were allegations that the ICC arrest warrants contributed to several LRA attacks on foreigners in the weeks after they were unsealed, these rumours were never substantiated.[825] Although the initiating of an investigation and the unsealing of arrest warrants provoked much debate and controversy, initially there was no direct negative impact.

In August 2006, the Government of Uganda and the LRA announced a new ceasefire and the initiation of new peace talks to be mediated by Riekh Machar, the Vice-President of South Sudan. Agenda item number 3 of the talks was devoted to "accountability and reconciliation." The peace talks quickly became the most serious attempt to resolve the conflict to date.[826] However, fearing possible arrest, senior military leaders of the LRA could not come to Juba to negotiate in person. [827] Instead, they were represented by a delegation composed of mainly diaspora Acholi, who often brought their own political agendas. A number of meetings between the LRA, the Ugandan government delegation and the mediator were arranged in remote locations near Marimba, to build some trust, but this limited contact was clearly insufficient. As remarked by Barney Afako: "it is not a crime to talk."

The talks raised questions whether countries could support the talks and whether senior negotiators could have contact with subjects of ICC arrest warrants.[828] But these did not hinder the talks. These are all questions on how ICC should co-exist with on-going negotiations.[829] However, the Prosecutor argued that the ICC arrest warrants brought the LRA to the negotiating table: "The loss of their safe haven led the LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006."[830] This assertion was adopted by scholars such as Schabas, who wrote "it is widely acknowledged that the threat of prosecution by the International Criminal Court helped to bring the Lord's Resistance Army to the

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[824] Brubacher, Matthew. *The ICC investigation of the Lord's Resistance Army*, in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality,* Zed Books (2010) p. 274.
[825] The author was in Uganda in October 2005 when these attacks took place and notified officials of the ICC that there was a perception that these attacks were linked to the ICC. For instance, Finnstrom alleged this in his book at p. 200. The ICC itself subsequently investigated this but was unable to detect such a link.
[826] Grono, Nick and Adam O'Brien, *Justice in Conflict? The ICC and Peace Processes, In Courting Conflict: Justice, Peace and the ICC in Africa*, Ed. Nicholas Waddell and Phil Clark, Royal African Society, 2008 p. 16.
[827] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p.37.
[828] United Nations Guidance for Effective Mediation, Sept. 2012.
[829] Tim Allen observed in the context of Juba: "The Juba process made clear that the representatives of states that are signatories of the Rome Statute, conciliation organizations, NGOs and UN agencies have not resolved the question of how to adequately support negotiations within the ICC framework. The Juba talks were the first attempt to do so. They failed. But the ICC framework is not going to go away. Hopefully some lessons have been learned." Tim Allen, Frederick Laker, Holly Porter, and Mareike Schomerus, *Postscript: A Kind of Peace and an Exported War,* in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality,* Zed Books (2010) p. 288
[830] Chief Prosecutor's Address to the Assembly of State Parties, 23 November 2006.

negotiating table", citing the Ugandan Ministry for Security, Amana Mbabazi, and Jan Egeland.[831]

In fact, there is no evidence that the LRA had reason to believe that they would be arrested in Sudan, and that this is what prompted their move to Garamba. In fact, the only serious (but failed) attempt to arrest the LRA was in fact by MONUSCO in Garamba, in January 2006. Barney Afako, legal advisor to the mediator of the Juba talks remembers talking to Vincent Otti in late 2005, after the arrest warrants were issued. Afako urged Otti to consider negotiations, but Otti said the LRA preferred to wait for the presidential elections, to see if Kizza Besigje, their preferred candidate, would win. According to Afako, the LRA leaders were "not panicked by the arrest warrants."[832]

A more likely factor in driving the LRA to the negotiating table was the changed situation in Sudan after the Comprehensive Peace Agreement between North and South Sudan.[833] After the CPA was concluded, the LRA was in a difficult position in South Sudan, as they suddenly found themselves in enemy territory and cut off from their supplies. Whether the Sudanese government in Khartoum continued to support them is a disputed matter.[834] The LRA was militarily weakened and the opportunity to negotiate gave it a new "lease on life."[835]The factors that drove the LRA to the negotiating table included the constant military pressure on the LRA exerted by the UPDF and fatigue of fighting; practical difficulties in continuing the war in Uganda from Garamba; defections resulting from the Amnesty Act;[836] and a general reassessment of strategic options (including creating space to rearm and go

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[831] Schabas, William, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals*, Oxford University Press (2012) at p. 194.
[832] Interview with Barney Afako, Barcelona, March 2014.
[833] While the ICC has sometimes taken credit for creating a rift between Khartoum and the LRA through concluding an Agreement with the Government of Sudan to arrest the LRA in October 2005, it is clear that the distancing by the Government of Sudan of the LRA began already with the Nairobi Agreement between Sudan and Uganda in 1999, and was a gradual process. Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda,* Working Paper No. 22 (12 Oct. 2012) at p. 17. See also Ledio Cakaj, *The Lord's Resistance Army of Today*, Enough (November 2010) on the loss of the support of the Sudanese Armed Forces for the LRA.
[834] Louise Mallinder writes that: "It seems unlikely that a government willing to engage in such horrendous acts of violence against its own population will change its policies solely on the basis of international arrest warrants issued against nationals of another state." Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 36. But witnesses say that the SPLA gave them three alternatives: (1) conduct peace talks, facilitated by South Sudan; (2) leave South Sudan voluntarily; or (3) risk military action against them by the SPLA. Interview with Michael Otim, 12 February 2014.
[835] Interview with Michael Otim, 12 February 2014.
[836] Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda,* Working Paper No. 22 (12 Oct. 2012).

back to war if need be). [837] While the ICC arrest warrants may have contributed to some further isolation of the LRA, the effect is more accurately described as that "the ICC reinforced an already existing tendency" and ought not to be exaggerated.[838]

As soon as the talks got underway, a vigorous debate began on what should be the consequence of the pending arrest warrants. On 11 May, 2007, the OHCHR issued a statement in the margins of the Juba Peace Talks to remind the parties "discussions concerning those persons should be focusing on the terms and circumstances of their surrender so they can go and address the charges against them before the ICC." The mediator issued a response under the title "ignoring complementarity", arguing that under the Rome Statute Uganda was entitled to explore its own approaches to accountability for the LRA. Human Rights Watch argued that the average sentence of the ICTY for comparable crimes was 17 years, and that Juba should specify similar proportional sentencing.[839] As a practical matter, insisting on sentences of this nature would have made any agreement impossible.

F. The ICC as an Obstacle to Negotiations?

In a curious way the Juba process was simultaneously a failure and a success.[840] Juba was a success because it brought relative calm to Northern Uganda, as the conflict moved elsewhere, and it continues to provide the legal framework according to which the Government is implementing transitional justice to this day. But it can also be considered a failure, because the LRA did not sign the Final Peace Agreement, nor did it demobilize. In fact it has continued to wage attacks outside of Uganda.[841] But the assumption that the ICC led to a breakdown of the Juba Peace Talks is difficult to prove in terms of causality.

The ICC took the view that the talks eventually broke down on grounds other than the arrest warrants.[842] Advocates of the ICC always refer to the fact that all prior

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[837] Grono, Nick and Adam O'Brien, *Justice in Conflict? The ICC and Peace Processes,* In *Courting Conflict: Justice, Peace and the ICC in Africa*, Ed. Nicholas Waddell and Phil Clark, Royal African Society (2008) at p. 16.

[838] Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda*, Working Paper No. 22 (12 Oct. 2012) p. 18.

[839] Human Rights Watch, *The June 29 Agreement on Accountability and Reconciliation and the Need for Adequate Penalties for the Most Serious Crimes*, July 2007,

[840] Michael Otim and Marieke Wierda, *Uganda: Impact of the Rome Statute and the International Criminal Court,* ICTJ Briefing for the Rome Statute Review Conference, May 2010.

[841] In recent years there is some evidence that eventually the LRA may seek to return to Uganda: Cakaj, Ledio. *The Lord's Resistance Army of Today,* Enough (November 2010) p. 20.

[842] In the words of the Prosecutor herself: "The role of the ICC has never precluded or put an end to such processes. Rather, I would say, it has proved a spur to action … As the example of Joseph Kony shows, there can be obvious perverse side effects from deferring judicial proceedings in the name of peace and security. Succumbing to pressure to restrain justice may send out a message to perpetrators that arrest warrants can be stayed if only they commit more crimes or threaten regional peace and security… Bensouda, Fatou, *Setting the record straight: the ICC's new Prosecutor responds to*

attempts to negotiate peace with Joseph Kony over the years also failed.[843] However, a Catholic priest who served for decades in the conflict-affected area, Father Carlos Rodriguez, said: "nobody can convince a rebel leader to come to the negotiating table and at the same time tell him that when the war ends he will be brought to trial."[844] Joseph Kony himself, in a rare interview with German journalist Mareike Schomerus, said the following:

> I read in the paper like this. LRA leadership, Joseph Kony is wanted by the International Criminal Case. That one, as I see, I am not bad and I am not guilty. I did not. I have not done what Museveni is accusing me of … And that accusation was sent by Museveni to [The Hague]. […] we know very well that Museveni is the one who did that to block us or to spoil or name… […].[845]

Later in the same interview, Kony says rather ominously: "So if they want peace, they will take that case from us. But if they do not want peace, then they will continue with it."[846]

As with any peace talks, personalities also played a very important role. The statements of President Museveni were inconsistent, veering between willingness to grant amnesty to the LRA or guaranteeing that he would not hand over the LRA to expressing scepticism about the talks and continuing to promote a military solution.[847] Vincent Otti in particular showed significant interest in the talks, and seemed to be considering returning to Uganda, but was later killed.[848]

Close observers say that it is not accurate that at the last minute, Joseph Kony chose not to sign due to the existence of the ICC arrest warrants.[849] Mike Otim, a prominent civil society activist and first-hand observer of the talks who met with Kony, Otti and other LRA leaders in Garamba nine times during the peace process,

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*African concerns: Reconciling the independent role of the ICC Prosecutor with conflict resolution initiatives*, Key note address Seminar Institute for Security Studies (ISS), Pretoria (10 Oct. 2102).

[843] Interview with ICC outreach officer, 6 February 2014.

[844] Lanz, David. *The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace versus Justice*, The Fletcher School of Law and Diplomacy (May 2007) p. 1. See also Barney Afako's remarks at the Review Conference: Moderator's Summary of Stocktaking of international criminal justice, Peace and Justice, RC/11 (2011) at para. 2.

[845] Schomerus, Mareike. "*A terrorist is not a person like me": an interview with Joseph Kony*, in Tim Allen and Koen Vlassenroot, *The Lord's Resistance Army: Myth and Reality,* Zed Books (2010) p. 127.

[846] Ibid. p. 128.

[847] McGreal, Chris. *Museveni Refuses to Hand Over Rebel Leaders to a War Crimes Court,* The Guardian, 13 March 2008. Refugee Law Project, *Ambiguous Impacts: The Effects of the International Criminal Court Investigations in Northern Uganda,* Working Paper No. 22 (12 Oct. 2012) p. 18.

[848] The author has worked closely with and co-authored several reports with Michael Otim, a prominent civil society leaders who met the LRA leadership up to 9 times over the course of the Juba Peace Process.

[849] For further analysis on this issue, see Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016), pp. 105-108.

describes how in the early meetings, senior LRA leaders engaged with the talks. During Otim's first meeting with the LRA leadership in Garamba in August 2006, most of the LRA had assembled and the senior leadership was present. By the time of the second meeting, in October 2006, it took Kony three days to show up and seemed "less interested'. Other commanders such as Okot Odhiambo were not present and said to be "on mission." In September 2006, legal experts including Barney Afako had travelled to Garamba to explain in more detail the implications of the ICC warrants, and to explain that full amnesty would not be available.[850] Otim observed how Kony engaged less and less with the talks. For instance, when Riekh Machar travelled to Garamba in November 2008, Kony did not show up at all.[851] Kony had a history of reaching out if he was under military pressure, and disappearing when his position is stronger. After failed talks in 1994, he went years without any contact with intermediaries. Since the breakdown of the Juba Peace talks, traditional and religious leaders say they have not heard from Joseph Kony.[852]

Otim also described how external actors increasingly drove the talks and donors, some of whom were invested significantly both financially and politically, including in particular the US. The US also continued to support a military solution through a tripartite agreement with DRC, Rwanda and Tanzania to hunt down the LRA and to rid the region of "negative forces." Local civil society, religious and traditional leaders were cajoled to act as an interface with the LRA and were afraid to sound sceptical, because they were afraid of being labelled as LRA collaborators.

In aggregate, it is most likely that a variety of factors put strain on the talks and caused their disintegration. The two-and-a-half years of negotiation were fraught and suffered numerous challenges and setbacks. Cessations of Hostility Agreements were breached, and deadlines to assemble not respected. The talks also got mired in financial controversies. A rift developed between members of the delegation representing the LRA, and the military leadership in the bush.[853] The head of the delegation changed from Martin Ojul to David Matsanga to James Obita. These differences caused significant tensions within the LRA and led to the murder of Vincent Otti in early October 2007, which in itself was a significant setback.

What is more clear is that ICC's warrants were a complicating factor, considering that one of the key demands of the LRA, the lifting of arrest warrants, could not be met. Until the second failed singing ceremony in November 2008, there were intensive efforts to clarify with the LRA leadership what was being proposed in Agreement No. 3, particularly regarding the relationship between the proposed Special Division and traditional justice.[854] In final meetings between Joseph Kony and religious and traditional leaders in November 2008, it was clear to observers

[850] See http://www.wikileaks.org/plusd/cables/06KHARTOUM2701_a.html.
[851] Interview with Mike Otim 12 February 2014.
[852] Interview with religious leader, Gulu, 8 Feb. 2014.
[853] Interview with religious leader, Gulu, 9 Feb. 2014.
[854] Report of the Workshop on Accountability and Reconciliation in Uganda held in the Fairway Hotel on 6-7 May 2008.

that the LRA senior leadership did not trust the process, and that they were not inclined to surrender.[855]

What was in Kony's mind during those final weeks is impossible to fathom, although mistrust he felt was unlikely solely due to insistence on criminal accountability. It is more likely that he was ultimately unwilling to take the leap of faith to entrust his security to the Government of Uganda due to a fear of being double-crossed or killed.[856] In May 2008, Kony expressed anxiety that the government delegation might be accompanied by snipers, tasked to kill him. During the final meeting with religious and traditional leaders, Otim says it was clear that Kony was aware that new military operations were being prepared against them. [857] Kony said that he wanted peace but that the circumstances were "very tricky."[858] He said he could hide in Garamba without being found for 100 years if he had to. He thanked the religious and traditional leaders for their work and said he would call them when the time was right.

## III. Impact of the Rome Statute on the Content of Peace Agreements

A. Uganda: The Rome Statute's Impact on the Juba Peace Agreement

Initially there was a large gap in the negotiations between the Government of Uganda, which wanted simply to give the LRA a "soft landing" to reintegrate them back into Ugandan society, and the LRA, which held out vain hopes that they would be welcomed back to Uganda as "freedom fighters". The delegation increasingly articulated political demands entailing the recognition of the root causes of the conflict, and the need for all sides to accept their responsibility through various mechanisms. In the course of the negotiations, the LRA vehemently and repeatedly demanded that the arrest warrants be withdrawn. The Government of Uganda on the other hand publicly stated on several occasions that it would approach the ICC or the Security Council to have the arrest warrants halted if and when the LRA signed the final agreement.

The discussions on what incentives or benefits offered to the LRA leadership were not held in public, and are not reflected in the text of the Agreement.[859] A number of

[855] Interview with Mike Otim, 12 February 2014.
[856] Cakaj, Ledio. *The Lord's Resistance Army of Today*, Enough (November 2010). This report states: "Kony apparently fears being killed or poisoned by the Ugandan government if he decides to come out peacefully …. One of Kony's wives captured in July 2010 said that Kony thinks the ICC indictments are the biggest stumbling block to peace although he apparently also fears he will hang if he agrees to go to The Hague. Even though Kony was briefed on the ICC indictments during the two years of negotiations as part of the Juba Talks, he appears not to understand some of the basic functions of the ICC (p.11)" The same report alleges that Ongwen claimed that the Juba Talks offered insufficient incentives to the LRA (p. 13)
[857] Interview with Mike Otim, 12 February 2014.
[858] Ibid.
[859] Ibid.

informal, off-the-record discussions took place with the LRA leadership during the course of the negotiations, to explain to them the nature and consequences of the ICC arrest warrants and to present options for a way forward, while clarifying that neither the war-affected population nor the international community would accept impunity. As the talks approached the negotiations on Agenda Item 3, on "accountability and reconciliation", a daylong workshop was held at Juba on 1 June 2007,[860] to discuss current trends in transitional justice around the world,[861] and the consequences of the Rome Statute.[862]

The provisions of the Agreement on Accountability and Reconciliation that emerged are clearly influenced by the Rome Statute as well as other international human rights conventions. The agreement seeks to balance two essential notions: justice and the "restoration of broken relationships".[863] The Annexure set out the mechanisms that will form part of an "overarching justice framework", and the ways in which they relate to each other.[864] Multiple mechanisms were deemed necessary, including formal justice, traditional justice, truth seeking, reparations, and the Amnesty and Ugandan Human Rights Commissions. A cornerstone of the Agreement is found in Art. 4.1, which states:

> Formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict. Provided that, state actors shall be subjected to existing criminal justice processes and not to special justice processes under this agreement.

The Annexure further specifies "a Special Division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict." The establishment of this mechanism opened the door to challenging the admissibility of the ICC proceedings.[865] In particular, the Agreement also referred to a "regime of alternative penalties," that was not specified further.[866]

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[860] The workshop prepared the ground for the eventual written agreement and addressed a number of topics including (1) traditional justice in Acholi and other northern areas; (2) international standards and practices relating to transitional justice; and (3) the Ugandan constitution, the Ugandan legal system and national institutions such as the Amnesty Commission and the Ugandan Human Rights Commission. All of these topics would eventually be reflected in the Agreement itself.

[861] The discussion also concluded that the most relevant provisions of the Rome Statute for current purposes were Articles 17-19, which set out the complementarity framework, rather than Articles 53 or 16, both of which had been a part of the discussions prior to Juba. Participants discussed the fact that criminal proceedings were most likely to meet the complementarity threshold, including the need for an investigation for the same conduct charged in the ICC arrest warrants.

[862] Participants considered the Colombian Justice and Peace Law (2005) on how to combine various transitional justice approaches and on its practice of reduced sentences.

[863] The Agreement on Accountability and Reconciliation defines reconciliation as the "process of restoring broken relationships and re-establishing harmony." (hereafter: Agreement) (see Definitions).

[864] Agreement, s. 5.2.

[865] The Agreement refers to various due process rights of the accused, also protected by Uganda's constitution, including the right to a "fair, speedy and public hearing before an independent and

The impact of the Rome Statute can also be seen in the definition of victims specified in the Agreement[867] The Agreement on Implementation and Monitoring Mechanisms contained several additional provisions relating to the ICC. The Government also undertook to "give the ICC a comprehensive report on the Juba Peace Process, the Agreements between the Parties, and the progress on the implementation of the Agreement on Accountability and Reconciliation."[868]

The Agreement was generally considered to meet international law standards by the United Nations (both the OHCHR[869] and the Office of Legal Affairs).[870] But international NGOs and the ICC OTP remained sceptical. On 20 February, 2008, Amnesty International stated that "it is not acceptable for the Ugandan government and the LRA to make a deal that circumvents international law,"[871] and that Uganda would still need to hand senior LRA leaders over to the ICC. Similarly, the International Federation for Human Rights (FIDH) said: "Uganda is . . . under an absolute obligation to co-operate with the ICC and to hand over the LRA leaders."[872] These statements neglected both Article of the Rome Statute, which allows for challenges to admissibility even after arrest warrants are brought.[873]

The "transformative effect" of the ICC can most clearly be seen in the fact that the Juba Agreement is unique in giving a central place to individual responsibility for the crimes that were committed in the conflict, in contrast to other peace

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impartial court or tribunal established by law",[865] the right to legal representation (Agreement s. 3.7-3.8.) and the right to finality of the proceedings and protection from double jeopardy (Agreement s. 3.9-3.10).

[866] Agreement, s. 4.7.

[867] The Agreement gives a definition of victims which constituted an elaborated version of the definition of victims found in Rule 85 of the Rules of Procedure and Evidence of the Rome Statute : victims are "persons who have individually or collectively suffered harm; including physical or psychological injury, emotional suffering or economic loss, as a consequence of crimes and human rights violations committed during the conflict." Agreement, s. 6.1.

[868] Agreement on Implementation and Monitoring Mechanisms, section 38. For discussion of the impact of the ICC on the Juba Peace process, see Kersten, Mark, *Justice in Conflict: the Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press (2016) pp.98-100.

[869] The author had some discussions with OHCHR in the aftermath of the Agreement in which they confirmed that they basically considered it acceptable.

[870] The continued participation of the UN Envoy, Joaqim Chissano, is an indication that the UN found the Agreement to meet its standards.

[871] See http://www.amnesty.org.uk/news_details.asp?NewsID=17665. The OHCHR did in fact have an extensive indirect engagement with the talks and prepared a number of other position papers on detailed proposals for the Juba Agreement.

[872] See http://www.fidh.org/spip.php?article5256.

[873] Art. 95 of the Rome Statute states: "Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19."

agreements in the region.[874] But the wording of the Agreement remains ambiguous on key aspects, most notably on the issue of punishment. Options discussed in secret included house arrests or the possibility of a presidential pardon.[875]

B. The Rome Statute's Impact of the Rome Statute on the Justice and Peace Law in Colombia

In 2003, immediately after he took office, President Uribe introduced an agreement with the majority of Colombia's right-wing paramilitaries, the AUC (*Autodefensas Unidas de Colombia*), agreeing to a cessation of hostilities and gradual demobilization plan.[876] Due to the ratification by Colombia of the ICC, offering the paramilitaries a complete amnesty was no longer deemed possible. A prominent paramilitary leader, one of the Castano brothers, retired the day before the ICC entered into force.[877] His brother later said in an interview that he had quit in order to protect himself from ICC liability.[878]

The impact of the ICC on the Justice and Peace process was clear. In March 2005, the Office of the Prosecutor sent a public letter to the Colombian Government to say that the OTP is "monitoring" the situation, and that the proposed Justice and Peace Law should comply with the requirements of peace, justice and reparations. [879] The letter sent by the Prosecutor was debated in Colombia's Congress.[880] The Justice and Peace Law was passed on 22 July 2005 but was immediately challenged by human rights organizations and victim organizations.[881] The revised Justice and Peace Law offered reduced sentences of 5-8 years to Colombia's paramilitaries, under certain conditions.

The ICC was specifically mentioned during parliamentary debates on the Justice and Peace Law.[882] Secret recordings between the government and the AUC were leaked to the press in which the High Commissioner for Peace is heard to say: "The government has proposed a draft law that will block the action of the International

[874] See for instance the 1999 Lome Agreement in Sierra Leone, which provided for a Truth and Reconciliation Commission, and the 2003 Comprehensive Peace Agreement in Liberia, which contained a similar provision.
[875] Interview with Mike Otim, 14 February 2014.
[876] Some say that President Uribe was inspired by a visit to Northern Ireland in proposing the law.
[877] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 19.
[878] Revista Semana. *Habla Vicente Castano*, June 5, 2005.
[879] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 21.
[880] Interview with Member of Congress, Bogota, 14 May 2014.
[881] Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice in Colombia.* PRIO Policy Brief 6, (2007).
[882] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 19.

Criminal Court."[883] Others too have said that in their contacts with paramilitary leaders, the desire to escape ICC indictment and trial was one of motivating factors for paramilitaries to agree to the Justice and Peace law (other factors being the desire to avoid extradition to the United States the reduced sentences proposed).[884]

Under his "Democratic Security Policy", President Uribe inclined towards lenience for the paramilitaries. He first introduced a bill on alternative sentencing entitled *Ley de Alternatividad Penal*. The law proposed legal pardons for all armed actors who accepted to demobilize, based on the reasoning that punishment could be an obstacle to reconciliation.[885] Paramilitaries would also continue to have access to their considerable wealth.[886] The law was opposed by Members of Parliament, NGOs, victim organizations and external actors,[887] who perceived it as an attempt by the paramilitaries and their sponsors to escape any form of punishment, thus promoting impunity while disregarding the rights of victims.[888] On the other hand, the position of human rights organizations and victim organizations was marked by "the maximalist right-based approach … according to which victims' rights should be protected without any constraint- the political need of achieving peace notwithstanding."[889]

Criticism of this law prompted the Government to draft a new law in April 2004 on "Justice, Truth and Reconciliation." Eventually this law became known as the "Justice and Peace Law" (Law 975).[890] "

The law was intended to "white-wash" the paramilitaries, particularly since they were allowed to retain most of their assets which they could access after serving short prison terms. For these reasons, the Justice and Peace Law was criticized as a

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[883] Reed-Hurtado, Michael and Amanda Lyons, *Colombia: Impact of the Rome Statute and the International Criminal Court*, May 2010, paper presented to the Rome Statute Review Conference in June 2010, Kampala, citing Semana, *Revelaciones Explosivas*, Sept. 24, 2004.
[884] See remarks of Professor Eduardo Pizarro in the Report of the expert conference, "*In the Shadow of the ICC: Colombia and International Criminal Justice*", Convened by the Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London (26-27 May 2011) p. 28.
[885] Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice Discourse in Colombia*. PRIO Policy Brief 6 (2007).
[886] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 20.
[887]Ibid.
[888]Ibid. See also victim comments at the Consultations conducted by the Ministry of Justice in Bogota on 8-9 November, at which the High Commissioner for Peace, Sergio Jaramillo, commented that the Justice and Peace law was intended to think of offenders whereas a new law would take into account offenders as well as victims.
[889]Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice Discourse in Colombia*. PRIO Policy Brief 6 (2007).
[890] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 20.

"more subtle and disguised form of impunity."[891] In 2005, Uribe's administration explained its formula for the paramilitary negotiations: "As much justice as possible, as much impunity as necessary[892]." An original reference in Art. 71, that defined membership in an illegal armed group as the political crime of "sedition" in the Justice and Peace Law and which would have prohibited extradition or transfer to the ICC, was deleted.[893] The law recognized the need to find a balance between peace and justice by more explicitly recognizing victims' rights, and by imposing reduced sentences of 5-8 years under certain preconditions.[894]

A challenge to the law posed by victim groups yielded Constitutional Court Decision C-370 of 2006, which revised the Justice and Peace Law in significant ways. In its decision, the Court recognized that the need to achieve a lasting and stable peace would involve "certain restrictions in terms of the objective value of justice and the correlative rights of the victims to justice" but that "peace does not justify everything."[895] It also held that the Justice and Peace law had to respect victims' rights to truth, justice and reparations.[896]

Commentators agree that the Rome Statute contributed to a legal context in which accountability standards were critically re-examined,[897] and the law was "firmed up" to include minimum prison sentences. However, some of the ruling's practical

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[891]Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice Discourse in Colombia*. PRIO Policy Brief 6 (2007).

[892] Reed-Hurtado, Michael and Amanda Lyons, *Colombia: Impact of the Rome Statute and the International Criminal Court*, May 2010, paper presented to the Rome Statute Review Conference in June 2010, Kampala, citing El Tiempo, *El as bajo da manga de los Uribistas*, 13 Feb. 2005.

[893] Reed-Hurtado, Michael and Amanda Lyons, *Colombia: Impact of the Rome Statute and the International Criminal Court*, May 2010, paper presented to the Rome Statute Review Conference in June 2010, Kampala, FN 24.

[894]Saffon, Maria Paula and Rodrigo Uprimny. *Uses and Abuses of Transitional Justice Discourse in Colombia*. PRIO Policy Brief 6 (2007).

[895] Constitucional Claim Decision C-370 de 2006, s. 5.4. The Court therefore decided that the alternative sentence should only be available if (1) the offender does not repeat any criminal offense; (2) the offender declares "freely and voluntarily" the facts related to all crimes committed as a member of the illegal armed group, without any "omission or concealment of crimes;" (3) the victims rights to participate in various stages of the investigation, prosecution and punishment of the victims is guaranteed; (4) the sentence is served in a regular prison, subsequent to sentencing by a judge, rather than in a "zone of concentration"; (5) the offender contributes to reparations for the victim through contributing their assets, whether obtained legally or illegally. If all these conditions were met, the Court stated that the ordinary applicable punishment for crimes could be reduced to a sentence of 5-8 years. The Court also ruled that membership in an illegal armed group could not be considered the political crime of sedition.

[896] The decision that membership of a paramilitary group could not be considered "sedition" also meant that the government's promise of amnesty to some 18,000 paramilitaries not included in the JPL could not be realized. They therefore continued in a state of "legal limbo." Subsequently, the government attempted to apply the "principle of opportunity" to this class of paramilitaries, but this too was ruled unconstitutional by the Constitutional Court in Decision 936/2010, which held that this application violates the principle of legality. Finally the Government passed Law 1424, which suspends arrest warrants and enforcement of sanctions of those paramilitaries: this was held constitutional in Decision 771/2011.

[897] Interview with Member of Congress, Bogota, 14 May 2014.

effects were repealed by Government regulations, which held *inter alia* that the Court's decision was not retroactive,.[898] However, revisions to Law 975 caused backlash, much of it entirely unrelated to the ICC. Senior paramilitaries perceived prison terms as a breach of the pact that they had made with the Government, and started to reveal their links with senior politicians. Some commentators therefore link the "hardening" of the JPL, in which the ICC was a factor, to the perceived breach of the pact between paramilitaries and the Government.[899] However, the JPL law was probably a necessary precursor for the Legal Framework for Peace described below and the Havana peace process. Many argue that it set a new standard for justice, one that also should apply to the FARC.[900]

C. The Rome Statute's Impact on the Peace Process with the FARC

In 2012, President Santos said that the "stars have aligned" to allow for negotiations to end Colombia's longstanding conflict with the FARC.[901] The first of these "stars" was the altered position of the Santos government itself, which recognized the conflict with the FARC as an internal conflict that needs to be resolved through negotiations, thus treating the FARC as a political actor rather than a criminal organization. The second "star" was a "softening of the ground" among victims through the passage of the Victims Law (1446) to meet some of the basic needs of victims. Thirdly, the regional context has changed to favor a peace negotiation, with the death of Hugo Chavez in Venezuela, and decreasing regional support for the FARC. The fourth star was the legal context, as laid out in the Legal Framework for Peace. The fifth was the peace process in Havana, which sought to end the conflict and to commence peace-building and national reconstruction, in a situation where Colombia was experiencing considerable economic growth.[902]

A controversial factor in the peace process is that there was no ceasefire, and violence continues to be perpetrated periodically by both sides. The Havana talks were "talks within the conflict," something which the Central Democratic Party had said would not work.[903] In general, the population in Colombia opposed impunity for the FARC. The Vice-Presidential candidate in the 2014 election stressed that any peace agreement that is seen to guarantee impunity would not be sustainable.[904] In

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[898] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011) p. 25.
[899] Chehtman, Alejandro, *The Impact of the ICC in Colombia: Positive Complementarity on Trial.* Domac/17 (Oct. 2011).
[900] Interview with Carlos Holmes Trojillo, Vice-Presidential Candidate, Bogota, 17 May 2014.
[901] Speech given by the High Commissioner for Peace, Sergio Jaramillo, at Externado University on 9 May 2013, published in El Tiempo.
[902] Ibid.
[903] Interview with Carlos Holmes Trojillo, Vice-Presidential Candidate, Bogota, 17 May 2014.
[904] Ivan Carlos Zuluaga, President Santos' political opponent, said he would only continue the peace process under three conditions: (1) negotiations must be preceded by a ceasefire; (2) there can be no impunity for the crimes of the FARC; and (3) political participation in by the FARC in Colombian politics is not acceptable. Carlos Holmes Trojillo explained that there were many previous attempts

the words of Alejandro Ordonez, the Inspector General in Bogota: "We are not saying that all the rigor of the criminal code must be applied. There can be substantial reductions. But there can be no absolute impunity, nor can there be symbolic punishment."[905]

The Havana talks applied the principle that "nothing is agreed until everything is agreed."[906] Part of the challenge for the Government was to convince the FARC that the arrangement proposed on justice would provide legal certainty, and that it would not subsequently be overturned by the Constitutional Court of Colombia, the Inter-American Court for Human Rights, or the International Criminal Court. The debate on accountability and international standards reversed dramatically from where it was on Law 975. Leftists, liberals and human rights activists now argued for lenience, whereas the conservatives, including those close to former President Uribe, argued that there can be no impunity and that international standards must apply.[907]

D. The Rome Statute's Impact on the Legal Framework for Peace

In order to prevent subsequent comprehensive judicial review by the Constitutional Court, and to promote legal certainty in the results of the Havana peace talks, the Government proposed a constitutional amendment to Articles 66 and 67 of the Colombian Constitution in the form of Legislative Act No. 1 of June 2012, which is known as the "Legal Framework for Peace." The Legal Framework for Peace went through several versions and was also elaborated in the Congress before its passage.[908] An early version was very basic and just referred to case selection and prioritization.[909] Members of Congress explicitly referred to Rome Statute obligations in the debates,[910] and the influence of the Rome Statute can be seen in the text, in particular in relation to explicit references to war crimes, crimes against humanity and genocide.[911] On the other hand, the Legal Framework for Peace seems to diverge from international law when it seems to suggest that crimes against humanity and genocide committed systematically may not be considered political crimes.

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to negotiate peace with the FARC but all failed. Interview with Carlos Holmes Trojillo, Bogota, 17 May 2014.

[905] Interview with Alejandro Ordonez, Inspector-General for Colombia, Bogota, 15 May 2014.

[906] The talks in Havana cover six agenda items: land and rural development (concluded May 2013); political participation of the FARC (concluded November 2013); illicit drug trafficking (concluded May 2014); victims of the conflict; demobilization and transitional justice; and implementation, verification and legalization of accords.

[907] Interview with Alejandro Ordonez, Inspector General of Colombia, 15 May 2014; Interview with Carlos Holmes Trojillo, Vice Presidential Candidate, 17 May 2014.

[908] Interview with Legal Advisor of the Constitutional Court, Bogota, 15 May 2014.

[909] Ibid.

[910] Ibid.

[911] Interview with Legal Advisor of the Constitutional Court, Bogota, 15 May 2014.

The Legal Framework for Peace, a short document, grants the National Congress powers to pass a statutory law allowing for the establishment of transitional justice mechanisms, which will "guarantee, to the greatest extent possible, the rights of victims to truth, justice and reparation." The law may "authorize special and differentiated treatment for the different illegal armed groups that have been a part to the internal armed conflict and also for State agents with regard to their participation in the conflict."[912] The idea behind the framework is to be comprehensive, but at the same time, in the words of Sergio Jaramillo, "those who insist … on thinking that the violations of 50 years of war can be investigated on a case by case basis are frankly lying to themselves."[913]

The Legal Framework for Peace stated that "both prioritization and selection criteria are inherent to transitional justice instruments." This is significant because although prioritization was accepted by the Attorney General's directive 001, selection remains controversial in Colombia, because it implies that some cases will not be prosecuted. The Legal Framework provided that the Congress would be able to establish selection criteria to "focus criminal investigation efforts on those most responsible for all crimes that acquire the connotation of crimes against humanity, genocide, or war crimes." The Legal Framework states that the Congress will also look at the "conditions for the suspension of the criminal sentence; establish the cases in which extra-judicial sanctions, alternative sentencing mechanisms or special modalities for the execution and fulfillment of the conviction may be applied; and authorize a conditional waiver of criminal prosecution of all non-selected cases." In Colombia, some human rights groups opposed Legal Framework for Peace, calling it a "backdoor amnesty."

Finally, the LFP provides through Art. 67 that a statutory law will recognize which crimes can be considered as "political offences", the commission of which would not prohibit future political participation. Colombia's Criminal Code typifies the offences of rebellion, sedition, and mob violence as political crimes, which leaves open the question of which crimes may be considered "connected" to those crimes.[914] The logic behind the framework for peace highlights the fact that the duty to prosecute still exists in the context of a political transition, but the scope is not the same, due to the concept of transitional justice.[915]

The High Commissioner for Peace said that the Framework recognizes that justice is comprised of more than just criminal justice. A special penal procedure is not

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[912] Own emphasis. Translation provided by the Colombian Ministry of Justice.
[913] Speech given by the High Commissioner for Peace, Sergio Jaramillo, at Externado University on 9 May 2013, published in El Tiempo.
[914] Maldonado, Silvia. *Political Participation: An Implied Condition for Enduring Peace in Colombia,* International Law / Rev. Colomb. Derecho Int. Bogota (Colombia) No. 23 pp. 267-318 (July-December 2013) p. 308.
[915] Remarks by Ruth Stella Correa Palacio, Minister of Justice and Law, International conference Concerning International Humanitarian Law and International Criminal law in Domestic Law, and Organized Crime, Pintificia Universidad Javeriana, 20-21 June 2013,.

enough: instead comprehensive justice is required, including truth-seeking, which will promote an understanding of the root causes, will uncover the fate of those kidnapped and disappeared; will lead to an "acknowledgement," and will prevent a repetition of the crimes.[916] The LFP was ultimately rejected by the FARC,[917] neither was it accepted by Uribe's Democratic Center.

The Legal Framework for Peace came under fierce criticism by human rights groups. HRW argued that the LFP violates the right of victims to "a judicial remedy for violations of fundamental rights."[918] It argued that victims of cases that would not be pursued through the courts would be denied their right to access to a court of law, and that the fact that even those "most responsible" may be eligible for suspended sentences amounts to a "parody of justice."[919] HRW also argued that to include "state agents" such as military personnel constituted an "unnecessary and illogical concession to the perpetrators of atrocities."[920] Other commentators too have argued that principles of proportionality and necessity should have been included in the Legal Framework for Peace.[921]

E. The Rome Statute's Impact on the Havana Agreement

The FARC's position at the beginning of the talks was that of "not one day in jail."[922] The FARC referred to the Colombian justice system as the "justice of our enemies" and added, "Even our enemies say it is bad."[923] Instead, the FARC have said that they are the main victims of the war.[924] During the talks, the FARC indicated that they might be willing to submit to a tribunal, even an international tribunal established by USAN (UNASUL in Spanish) or another form of hybrid tribunal.[925]

On 23 September 2015, the Colombian government announced that it signed an Agreement Regarding the Victims of the Conflict with the FARC.[926] The agreement contained certain principles, including the fulfillment of victims rights; accountability for individual who participated in crimes; non-repetition of violence;

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[916] Speech given by the High Commissioner for Peace, Sergio Jaramillo, at Externado University on 9 May 2013, published at El Tiempo.
[917] Interview with Member of Congress, Bogota, 14 May 2014.
[918] Human Rights Watch, *Colombia: Amend "Legal Framework for Peace" Bill,* 31 May 2012.
[919] Ibid.
[920]Ibid.
[921] Isa, Felipe Gomez. *Justice, truth and reparation in the Colombian peace process*, Norwegian Peacebuilding Resource Centre, Report (April 2013) p. 2.
[922] Murphy, Helen and Luis Jaime Acosta, *Colombia's FARC may face alternative justice, not impunity,* Reuters, Bogota 5 Sept. 2013. See also Olle Ohlsen Pettersoon, *We will not go to prison: FARC Secretariat,* Colombia Reports, 27 Mar. 2013.
[923] It is possible the FARC was referring to the critical statements by politicians about the justice system made in the context of the Justice and Peace law and the para-politics scandals.
[924] Isa, Felipe Gomez. *Justice, Truth and Reparation in the Colombian peace process*, Norwegian Peacebuilding Resource Centre, Report (April 2013) p. 3.
[925] Interview with Member of Congress, Bogota, 14 May 2014.
[926] See English Summary of the September 23 Government-FARC Communiqué on the Transitional Justice Accord.

promoting the rejection by society of armed conflict; adoption of territorial, group-based and gender-based approaches according to how these were affected by the conflict; the guarantee of legal certainty for individuals who participated in the armed conflict as long as there is compliance with the agreement and especially the Special Jurisdiction of Peace; strengthening coexistence and cohesion within the Colombian society; and achieving legitimacy through respect for national and international obligations."[927]

Under the Agreement, FARC had to "lay aside their weapons" and they would be transformed to a political movement, for whom 10 seats are reserved in Congress until 2026. They will be allowed to exercise their political rights, even if subject to an alternative penalty. In a twist, a public referendum held on 2 October 2016 rejected the peace agreement by 50.2 percent. While the reasons for the rejection of the agreement were complex, in part they were based on opposition to impunity for the FARC.[928]

After the referendum, the government summoned the main political forces for further consultations, which resulted in a (amended) Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace on 24 November.[929] This version of the Agreement was then put to congressional approval (the Democratic Center walked out of the parliament before it was voted on). As part of the agreement, on 15 December the Colombian government announced in a 75-point plan outlining a Comprehensive System of Truth, Justice, Reparations and Guarantees of Non-Repetition. On 13 December, the Constitutional Court declared that legislation to implement the peace agreement could be approved by a "fast track" procedure of the Parliament. This resulted in the quick approval of several laws, including Law 1820 (2016) on amnesty, pardon and special treatment, and Legislative Act 01, establishing a truth commission, Special Unit for Finding Missing Persons, the Special Jurisdiction for Peace, and measures on reparations for victims.[930]

Central to the Agreement is the creation, parallel to the domestic legal system, of a "Special Jurisdiction for Peace" (SJP), with the aim "to do away with impunity, obtain truth, contribute to victims' reparations, and to judge and impose sanctions on those responsible for serious crimes committed during the armed conflict, particularly the most serious and representative ones." The jurisdiction of the SJP will be to "investigate and prosecute those most responsible for the most serious conflict-related crimes, including cases against members of the FARC-EP, members of the

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[927] Olasolo, Hector and Joel M. F. Ramirez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-repetition*, JICL Vol. 15, Issue 5, 1 Dec. 2017, pp. 1017-1018. Agreement at 128-9.
[928] Olasolo, Hector and Joel M. F. Ramirez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-repetition*, JICL Vol. 15, Issue 5, 1 Dec. 2017 p. 1015.
[929] Ibid. pp. 1011-1047. An English translation of the Final Peace Agreement can be found at http://www.altocomisionadoparalapaz.gov.co/Prensa/Paginas/2017/Mayo/El-Acuerdo-de-paz-en-ingles.aspx.
[930] Ibid., p 1016.

armed forces and those who, directly or indirectly, participated in the armed conflict."[931] It thus reinforces the concept of individual criminal responsibility from the Rome Statute, as well as victims' rights. The Agreement and Legislative Act 01 prohibit the extradition of those falling under the SJP. Some of those previously accused under the Justice and Peace Law may fall under the SJP.

The Special Jurisdiction was originally intended to be an "internationalized" jurisdiction and was proposed to have a minority of foreign magistrates: these were later eliminated when the agreement had to be amended after the peace deal was rejected in a public referendum in October 2016. Instead, foreigners can participate as *amicus curiae*. A Selection Committee, comprised of representatives of national and international institutions and organizations, was mandated with selecting both the national magistrates and the foreign *amicus curiae*. Also, the Constitutional Court has jurisdiction over protection requests (*accion de tutela*) in case of any possible violation of fundamental rights.[932]

The subject matter of the SJP encompasses crimes that fall under Law 1820 (see below) as well as crimes amounting to gross human rights violations and grave breaches of international humanitarian law, committed on account of or in direct or indirect relation to the armed conflict prior to 20 Nov. 2016.[933] It is not yet completely clear whether the Special Jurisdiction includes crimes committed outside the conflict (such as the false positives) or crimes committed by civilians, such as wealthy landowners who sponsored paramilitaries.

The SJP will have three Chambers, including the Chamber for the Acceptance of Truth and Responsibility and Establishment of the Facts; the Chamber for Amnesty and Pardon; and the Chamber for Definition of Legal Situations. The Tribunal for Peace has different sections, including a first instance section for cases where there is acceptance of fact and responsibility; a first instance section where there is not, an appeals section and a review section. There are also Investigation and Prosecution units and an Executive Secretariat. The Investigation and Prosecutions Unit is anticipated to work closely with the AG's office and has 10 years to file all its requests. It can apply case selection and prioritization. The SJP is expected to last 15 years but can be extended.[934]

The Tribunal for Peace only has jurisdiction over gross human rights violations and grave breaches of IHL. It will share its judgements with the truth commission. The Tribunal decides on legal qualification, and on whether the crimes are covered by Law 1820. It can also decide on the sanction.

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[931] ICC OTP Report on Preliminary Examination Activities, 2016 at para. 253.
[932] Olasolo, Hector and Joel M. F. Ramirez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-repetition*, JICL Vol. 15, Issue 5, 1 Dec. 2017 p. 1026-7. Agreement, at 160.
[933] Ibid. pp. 1024-1025. Agreement at 147, 151. Law No. 1820 Arts 32, 30, 45.
[934] Ibid. p. 1027, 1031.

The Special Jurisdiction for Peace can receive information from a wide variety of sources, including the AG's office, the Prosecutor-General's office, but also from other jurisdictions and from victims and human rights organizations. Based on this information it provides the opportunity to individuals to disclose "facts" and "accept responsibility." This disclosure is then verified, and the Chamber decides whether amnesty, pardon or special treatment can apply. In that case it may send the case to the Chamber on Amnesty and Pardon (in the case of the FARC) or the Chamber for the Definition of Legal Situations (in the case of those eligible for pardons or state actors eligible for special treatment). If the person accepts responsibility, the Chamber may send the proceedings with a sanctions proposal to the First Instance Section of the Tribunal for Peace. If disclosure is incomplete, this Section can refer it to the Investigation and Prosecution Unit.[935] The Chamber on Definitions of Legal Situations can establish criteria for the selection and prioritization of cases.[936] The machinery created by the Havana Agreement is highly complex and it remains to be seen how it will operate in practice.

The real issue of contention in relation to the Rome Statute lies in the provisions on alternative penalties. The Agreement establishes a regime of alternative penalties *other than* imprisonment, to be imposed by the Special Jurisdiction. It may include "work, tasks, and activities" aimed at the "satisfaction of victims rights" by "compliance with reparative and restorative functions", for 5-8 years. These can include tasks on rural reform political participation, or related to solutions for illegal drugs, and can be directed at specific damaged caused to minors, women, etc. Tasks can also relate environmental protection and building of infrastructure, waste disposal or demining.[937] The punishment may include restrictions prohibiting movement outside of a defined geographical area for 5-8 years.[938] At the same time, those subject to penalties may still engage in political activities. The element of alternative penalties remained unchanged, even after the referendum, although amendments were made to further specify what was meant by these components of restrictions and reparations. Also, victim representatives must be consulted in the implementation of a sanctions regime. In deciding on a specific sanction, the Tribunal for Peace considers the degree of disclosure, the gravity of the crimes, the existence of aggravating or mitigating circumstances, and the undertaking made by the individual concerned to provide reparations or his/ her participation in demining.[939]

If the facts are contested, the case goes to the Trial Section, which will conduct an adversarial trial. The Trial Section can impose imprisonment of 5-8 years for those who disclose their crimes, and accept responsibility prior to judgement.[940] These persons will go to regular prisons for 5-8 years, where they will "contribute to their

[935] Ibid. p. 1028-1029. Agreement at 156.
[936] Ibid. p. 1031.
[937] Ibid. p. 1033. Agreement at 172, 173.
[938]Ibid. pp. 1033. Agreement at 172.
[939] Ibid. p. 1034. Agreement at 171-172.
[940] Ibid. p. 1035, Agreement at 162,174.

re-socialization through work, training or study." If an accused never accepts responsibility they may be liable to the ordinary penalty provided in the Colombian Penal Code, but for a sentence between 15-20 which can be further reduced through the accused's re-socialization through work, study or training.[941] The Trial Chamber can order the Colombian state and organizations including FARC to provide for symbolic reparations.[942] The Appeals Chamber is competent to decide on appeals by individuals against any decision of the three Chambers of the SJP, as well as by victims who allege violations of their fundamental rights.[943] The Review Chamber may review any order to appear before the SJP or settle conflicts of jurisdiction between the Chambers. It may also review decisions and is the instance of last jurisdiction (although *tutela* requests may now go to the Constitutional Court.)[944]

Law 1820, passed on 30 December 2016, contains provisions on amnesty, pardon and special treatment. It applies to demobilized FARC, including those already convicted or subject to legal proceedings, or listed as FARC members as part of the demobilization process, or those convicted for political offences whose membership of the FARC can be inferred. These may be eligible for amnesty. It also applies to other individuals convicted for political crimes such as illegal protests. Such individuals may be eligible for pardon. Finally, it applies to state officials who have been convicted, prosecuted or identified as responsible for crimes committed in relation to the armed conflict.[945] These individuals may be eligible for special treatment. Law 1820 applies to political offences, but not to ordinary crimes. Neither does it apply to "gross human rights violations or grave breaches of international humanitarian law amounting to genocide, crimes against humanity, serious war crimes, kidnapping or other severe deprivations of physical liberty, torture, extrajudicial executions, enforced disappearances of persons, rape and other forms of sexual violence, abduction of minors, forcible displacement and the recruitment of children."[946] Law 1820 requires beneficiaries to participate in the truth commission or investigations of the Special Unit for Finding Missing Persons and provide disclosure of their crimes.

The 75-point plan also provides for an array of other transitional justice measures such as a Commission for the identification of the Truth, Coexistence and Non-Repetition; a Commission for Missing Persons; A Special Unit for the Investigation and Dismantling of Criminal Organizations; various non-repetition guarantees;[947] and various measures for victims reparations, mostly of a collective nature.

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[941] Ibid. p. 1035, Agreement, at 162.
[942] Ibid. p. 1035-36, Agreement at 162.
[943] Ibid. p. 1036. Agreement at 160.
[944] Ibid. p. 1036-7, Agreement at 163-164.
[945] Ibid. pp. 1019-1020.
[946] Ibid. p. 1021. Agreement at 145,
[947] Some of these are to prevent what happened to the Patriotic Union, a political party founded by FARC, after a ceasefire in 1985. Thousands were subsequently murdered by paramilitary groups.

Human Rights Watch has condemned the agreement as "agreeing to impunity"; saying that it left many questions unanswered including what is meant by restriction of liberties and rights, and the duration of the restriction.[948] It also criticized the fact that references to superior responsibility were struck out.

In contrast, in general the international community welcomed the Agreement, deciding to reward President Santos with the Noble Peace Prize. So far the ICC has reacted cautiously positively to the Havana Agreement. The ICC did issue a press release welcoming the agreement, but this was before the details on restricted liberties became known. In its 2016 report it stated that it "has not formed a specific or final position regarding the Special Jurisdiction for Peace."[949] In September 2017, Fatou Bensouda visited Colombia for the first time and commented positively on the "commitment, invaluable experience, and high standards" of the Colombian courts.[950] The views of the ICC on the fact that the Colombian agreement endorsed alternative, rather than reduced, sentences remain largely unknown, except that the Prosecutor continues to insist on "genuine" sanctions.

However, references to Art. 28, dealing with the responsibility of commanders and other superiors, of the Rome Statute were eliminated from the final revised peace agreement signed on November 24, and Legislative Act 01 contains a more restrictive definition of superior responsibility in relation to state officials than the Rome Statute.[951] This would make it harder to try commanders as the absence of superior responsibility may require their actual knowledge or "effective control" over subordinates who committed crimes. This prompted the ICC Prosecutor to give a statement on 26 January 2017 to say that she will try military commanders if the Colombian courts fail to do so. [952] The OTP is also looking at the definition of "grave" war crimes, and whether nonsystematic war crimes fall under the Amnesty law; the determination of "active or determinative" participation in the crimes, and the sentences involving "effective restrictions of freedoms and rights."[953] It has also filed an *amicus curiae* brief with the Constitutional Court on certain aspects of Legislative Act 01 and the Amnesty Law.

In the interim, the Colombian authorities are moving towards implementation with the establishment of the Special Jurisdiction for Peace, and the enactment of legislation on the implementation of the Havana agreement. The Constitutional Court is due to review the Constitutional amendment on the Comprehensive System of Truth, Justice, Reparations and Guarantees of Non-Repetition. The current

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[948] Human Rights Watch, *Analysis of the Colombia-FARC Agreement*, 21 December 2015.
[949] ICC OTP Report on Preliminary Examination Activities, 2016 at para. 257.
[950] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of her visit to Colombia, 10-13 September 2017.
[951] Olasolo, Hector and Joel M. F. Ramirez Mendoza, *The Colombian Integrated System of Truth, Justice, Reparation and Non-repetition*, JICL Vol. 15, Issue 5, 1 Dec. 2017 p. 1026.
[952] Alsema, Adriaan. *Prosecutor warns ICC will try military commanders if Colombia transitional justice fails.* Colombia reports, 26 Jan. 2017: colombiareports.com.
[953] OTP Report on Preliminary Examinations, 2017.

challenge is to have all necessary legislation approved by the Congress, and to have the Special Jurisdiction for Peace up and running as soon as possible. In the elections in May 2018, the continuation of the peace agreement is at stake. Right-wing parties, including the Democratic Center headed by Ivan Duque, have opposed the peace agreement. Ivan Duque stated in his campaign,"A true peace is built through the triumph of the rule of law not through the relativization of justice."[954] It is likely that Ivan Duque will win the Presidential election in Colombia and the impact on the peace process remains to be seen.

F. Spectator or Player? Impact of the OTP's Actions on Peace Negotiations

While the transformative effect of the Rome Statute on both the process and the content of the peace negotiations are undeniable, much of this effect is indirect, due to an acceptance of the norms of the Rome Statute, and not necessarily due to the direct actions of the OTP. In Uganda, the strong positions of the OTP were sometimes perceived as undermining the talks.[955] In Colombia, the OTP also risked being cast into the position of a spoiler. This became most apparent during the saga of "the letters."

The Colombian Commission of Jurists put the Legal Framework for Peace to a Constitutional challenge, arguing that the selection criteria violate Colombia's international obligation to investigate and prosecute and punish international crimes, not just when they are "systematic". The Colombian Constitutional Court held a public hearing about the Legal Framework for Peace on 25 July 2013.[956] However, in an attempt to influence the process, the OTP sent 2 letters, which were subsequently described as "bombs" in the Colombian media. Both letters were confidential and addressed to the President of the Colombian Constitutional Court but they appeared on the website of a major Colombian newspaper, the *Semana.*[957] Both were sent shortly before the deadline of the final decision on 17 August.

The first was dated 26 July 2013, in the week that the Court was supposed to make its decision. In the letter the Prosecutor stated that a sentence that is manifestly inadequate, considering the seriousness of the crime and the participation of the accused, could be interpreted as an attempt to shield a person from criminal responsibility under the "most reasonable" interpretation of the Rome Statute.[958]

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[954] Associated Press, *Critics of Peace Deal Dominate Colombia Election*, Bogota, 11 March 2018.
[955] Interview with Michael Otim, 6 Feb. 2014.
[956] Interview with Legal Advisor of the Constitutional Court, Bogota, 15 May 2014. The International Criminal Court was not invited, as it is an external organization. The Colombian Constitutional Court does not seek the views of international organizations in its public hearings because this would create legal complexity as to the legal status of those opinions.
[957] See Semana website, 17 August 2013: http://www.semana.com/nacion/articulo/una-carta-bomba/354430-3.
[958] The Prosecutor referred to the fact that the *travaux preparatoires* of the Rome Statute refer to proportionality in relation to sentencing, as does a reference in the Expert Group on Complementarity's report in 2003, which refers to "grossly inadequate sentences". She also refers

She also stated that the object and purpose of the Rome Statute, described as "ending impunity of the most serious crimes" and seeing to it that these "do not go unpunished", would be contravened by suspension of penalties, as these would effectively prevent punishment. The Prosecutor argues that a range of other measures could justify a reduction of sentence, provided that the original sentence was proportional. Finally, the letter argues that a suspension of sentence would amount to the equivalent of a pardon, which is prohibited for *jus cogens* crimes.

In the second letter dated 7 August 2013, Prosecutor Bensouda addresses the Legal Framework's approach to prioritization and selection of cases. She noted that the "mandate of the International Criminal Court differs significantly from domestic judicial systems" and that its prosecutorial policy, which is to focus on those bearing the greatest responsibility for the most serious crimes, is a product of the "global nature of the ICC, its statutory and logistical restraints." She also emphasized that she continued to encourage national authorities to pursue national investigations for offenders of lesser responsibility so as to avoid an "impunity gap", in accordance with positive complementarity. She recited the preamble of the Statute that the most serious crimes "must not go unpunished."

The Prosecutor's first letter appears to have impacted directly on the decision of the Constitutional Court. On 28 August, the Constitutional Court of Colombia upheld the Legal Framework for Peace in a 7-2 decision, in which it established parameters for the statutory law that should be passed after the Agreement. Originally, a press release mentioned 8 parameters.[959] However, the full version of the judgment appeared which included an additional parameter, not included in the earlier press release: "The mechanism of total suspension of execution of sentence, may not

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to other International human rights treaties such as the Genocide Convention, Torture Convention and the Inter-American Court of Human Rights. Although these treaties are silent on the matter of punishment, she cites the *Barrios Altos* case and several other decisions to say that penalties should not reflect impunity but should be proportional to the crimes. However, the *Barrios Altos* case dealt with a self-amnesty, which can be distinguished legally from a democratically ratified amnesty.

[959] The parameters included (1) respect by the State of a duty to investigate in ways that respect the rights of the society and victims, according to transparent selection and prioritization criteria that can be challenged, and if a case is not selected for prosecution to guarantee the right to compensation, truth, and search for and identification of the missing; (2) the armed conflict must end and demobilized groups and individuals must hand in their weapons and cannot commit further offences; (3) international human rights and IHL offences as well as Rome Statute crimes committed in a systematic manner ought to be investigated and those bearing maximum responsibility should be charged; (4) the following crimes ought to be prioritized: extrajudicial executions, torture, forced disappearance, sexual violence against women; forced displacement and illegal recruitment of children, if these constitute genocide, war crimes or crimes against humanity committed in a systematic manner; (5) Statutory provisions should be respectful of international treaty obligations that are part of the "Constitutional block"; (6) the Statutory law shall determine the selection criteria and prioritization; (7) in order to benefit from selection and prioritization, the armed group must contribute in a real and effective way to finding the truth, reparations of victims, release of hostages and the release of all minors and (8) should ensure the truth and disclosure of all the facts constituting serious violations of human rights and international humanitarian law, through judicial and other mechanisms such as the truth commission.

operate for those convicted as most responsible for crimes against humanity, genocide and war crimes committed in a systematic manner."[960]

The sentence of the Constitutional Court in Decision 579 added signification new dimensions to the Court's reasoning. The Court said it is justifiable to focus criminal proceedings on those bearing the most responsibility, as was done at Nuremberg, Tokyo, and the ad hoc Tribunals, and the Cambodia Tribunal.[961] The Decision also states that international crimes are by nature "systematic" but that the reference to "systematic" in relation to war crimes was justified as it reflected the requirement for a "policy" element in Article 8 of the Rome Statute.[962]

The letter of the ICC prosecutor provoked considerable antagonism in Colombia, as many saw it as an attempt to interfere with national sovereignty and the independence of the Constitutional Court.[963] As one commentator put it: "we need a language of persuasion, not of threats."[964] The FARC too reacted negatively to what they called "imperialist not democratic justice."[965] Others however welcomed the letter, because it lent weight to the arguments of human rights organizations and others that the Legal Framework for Peace should be carefully reviewed for its compliance with international standards.[966]

The position of the OTP was eventually softened in a speech given by the Deputy Prosecutor delivered in Bogota in May 2015.[967] During this speech the Deputy Prosecutor said that "in sentencing, States have wide discretion" and that "effective penal sanctions may take many forms" but that they "should serve appropriate goals, such as public condemnation of the criminal conduct, recognition of victims' suffering, and deterrence of criminal conduct." However, the Deputy Prosecutor maintained: "suspending sentences for those most responsible for war crimes and crimes against humanity would amount to shielding the persons concerned from criminal responsibility."

## G. Conclusion: Peace with Punishment

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[960] Constitutional Court Dec. C-579/13 para. 8.4.9.
[961] Constitutional Court Dec. C-579 para. 8.2.3 – unofficial translation The Decision gives a definition of "those most responsible" as persons who have "a key role in the criminal organization in the commission of each offense, who directed, exercised control or funded the commission of crimes against humanity, genocide and war crimes committed in a systematic manner.". The Decision suggests that more minor perpetrators could go before the truth commission.
[962] Constitutional Court Dec. C-579. Interview with Legal Advisor of the Constitutional Court, Bogota, 15 May 2014.
[963] Interview with Director of Dejusticia, Bogota, 16 May 2014.
[964] Interview with Member of Congress, Bogota, 14 May 2014.
[965] Ibid.
[966] Interviews in Bogota, May 2014.
[967] James Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court,* 13 May 2015, https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf.

In both Uganda and Colombia, the Rome Statute led to recognition that criminal accountability should be recognized as part of the peace agreement. At the same time, it also sparked debates on the extent of the duty to prosecute, and what number of prosecutions might satisfy this duty.[968] Current practice in international criminal law uses case selection and prioritization to focus on persons bearing the greatest responsibility for the most serious crimes.[969] As stated by former chief international prosecutor in East Timor, Siri Frigaard: "It is unrealistic to expect that all crimes committed during a specific conflict will be tried in a court, or to expect that every perpetrator will be held criminally responsible for the offences they have committed."[970]Comprehensive prosecutions were attempted in the 20 years since the conflict in the Former Yugoslavia, including at the ICTY and in domestic courts, but the total numbers remain small. ICTY tried about 200 individuals over 17 years. The Bosnian War Crimes Chamber—a domestic court with international assistance— is generally considered quite successful but convicted around 110 individuals since its creation in 2004, in around 80 trials.[971] Bosnia drafted a War Crimes Strategy under which it will take 15 years to complete trials: it has completed just over 400 so far in total.[972]

The Colombian Legal Framework for Peace suggests both prioritization and selection as appropriate strategies. Directive 001 (2012) of the Colombian Attorney General lays out in much more detail both the policy and legal justifications for a prosecutorial strategy based on case prioritization.[973] However,

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[968] United Nations Report of the Secretary-General to the Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004 (S/2004/616) para. 46. See also the Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations, and Guarantees of Non-Repetition, Pablo de Greiff, presented at the 27th General Session of the Human Rights Council, 27 August 2014, A_HRC_27_56_ENG.pdf.

[969] For an extensive discussion on the topic see Bergsmo, Morten (ed), *Criteria for Selecting and Prioritizing Core International Crimes Cases, Forum of International Criminal and Humanitarian Law,* Torkal Opshal Academic Publisher (2010). See also the Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparations, and Guarantees of Non-Repetition, Pablo de Greiff, presented at the 27th General Session of the Human Rights Council, 27 August 2014, A_HRC_27_56_ENG.pdf.

[970] Frigaard, Siri. *Introductory Remarks* in Bergsmo, Morten (ed), *Criteria for Selecting and Prioritizing Core International Crimes Cases,* Forum of International Criminal and Humanitarian Law, Torkal Opshal Academic Publisher (2010) p. 2.

[971]Nidzara Ahmetasevic, *Sarajevo's model under threat*, International Justice Tribune, 15 February 2012. In 2010, prosecutors were involved in 365 cases against some 1165 individuals. According to National War Crimes Strategy, prosecutions in Bosnia were expected to last another 15 years and involve potentially 10,000 cases.

[972]Report of the Special Rapporteur on the promotion of truth, justice , reparation and guarantees of non-recurrence, Pablo de Greiff, to the General Assembly 67th Session, 13 Sept. 2012 at A/67/368.

[973] Directive 001 (2012) of the Colombian Attorney General. The policy reasons for allowing prioritization of such cases are that this allows justice to be delivered to larger numbers of victims; that prosecutions of high-level actors dismantles criminal structures, thereby contributing to non-repetition of the crimes; that it recognizes the links between various sectors of the society (such as politicians and military or paramilitary groups), thereby contributing to historical truth; and it can protect the rights of secondary offenders who may otherwise languish in jail for lengthy periods of time while awaiting their trial. The Directive also highlights the legal reasons for allowing a more

as discussed above, the Prosecutor does not accept this approach, and maintains that the national duty to prosecute remains much broader than that of the ICC. At the same time, in a survey in relation to the Special Court for Sierra Leone,[974] which only prosecuted 9 individuals, respondents overwhelmingly said they felt the SCSL had prosecuted those bearing the greatest responsibility.[975] All of this implies that there ought to be a limit on the number of prosecutions that states can be expected to pursue as part of a peace process.[976]

## IV. Alternative Penalties or Amnesties?

### A. Punishment Through Alternative Penalties

The examples of Uganda and Colombia suggest that States are increasingly experimenting with alternative penalties in peace agreements as an alternative to amnesties. The Rome Statute is silent on the question of punishment, apart from its Preamble, which states that crimes ought not to go "unpunished." As mentioned, during the Havana talks, FARC advocated for "not one day in jail," [977] elaborating, "no peace process in the world has ended with leaders of the insurgency behind bars."[978] This raised the difficult question of what level punishment is required for Rome Statute crimes, to avoid mere " "symbolic punishment."[979] The debate in the Havana peace talks therefore focused on whether prison terms are necessary at all, and eventually settled on the concept of restricted movement as an alternative. The OTP seemed to leave the door open to alternative sentences under certain conditions.[980]

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narrow focus. It argues that international humanitarian and human rights law do not recognize an absolute right to investigate or prosecute in each individual case. The Directive argues that there is no clear duty to prosecute crimes against humanity or crimes in internal armed conflict, as these are based on customary international law and not treaty law. The Directive also observes that prioritization is practiced by all the international criminal tribunals as well as in some domestic legal systems.

[974] Periello, Tom and Marieke Wierda. *The Special Court for Sierra Leone Under Scrutiny,* International Center for Transitional Justice, March 2006.

[975]Special Court for Sierra Leone and No Peace Without Justice, *Making Justice Count: Assessing the Impact and Legacy of the Special Court for Sierra Leone and Liberia,* September 2012.

[976] It is not realistic to presume that national legal systems will be able to conduct hundreds, if not thousands of prosecutions when international systems are clearly unable to do so. It is even questionable whether Colombia would be required to prosecute the 200 or so FARC members against who *in absentia* cases were concluded.

[977] Murphy, Helen and Luis Jaime Acosta, *Colombia's FARC may face alternative justice, not impunity,* Reuters, Bogota 5 Sept. 2013. See also Olle Ohlsen Petterson, *We will not go to prison: FARC Secretariat*, Colombia Reports, 27 Mar. 2013.

[978] Ivan Marquez, F*ARC guerillas will neither go to prison nor surrender weapons: Rebel negotiator, Rebecca Florey*, Colombia Reports, 23 Feb. 2015.

[979] Interview with Dr. Alejandro Ordonez, Inspector General, Bogota, 15 May 2014.

[980] James Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court,* 13 May 2015, https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf. The Deputy Prosecutor said in his speech in Bogota that the following would help to determine whether a alternative sentence were consistent with a genuine intent to bring the convicted person to justice:

As argued by some authors, the criminal trial itself remains an important aspect of the expressive nature of international criminal law.[981] The case that this expressive function must be fulfilled through long prison sentences is less convincing. [982] The treaties providing for international crimes do not give much guidance on the matter of sentencing. The Convention on the Prevention of Genocide says that penalties ought to be "effective" whereas the Torture Against Convention speaks about "appropriate" penalties that take into account the "grave nature" of the crimes.[983] Both international human rights law and domestic constitutions provide for a prohibition of retroactive penalties (*nulla poena sine lege*) and for the principle of proportionality of punishment in relation to the gravity of the crime and the circumstances of the offender. But this does not necessarily mean that this punishment needs to constitute imprisonment as such. The question then becomes which other forms of punishment would still allow for adequate expression of condemnation for breach of social norms. This may differ widely per society.

The policy objectives behind punishment in international criminal law remain an underdeveloped area.[984] The ICTY and ICTR consistently emphasized the goals of retribution and general deterrence in their sentencing judgments.[985] Judgments have also mentioned specific deterrence, rehabilitation, the protection of society, stigmatization, and reconciliation as goals of punishment, although retribution and general deterrence remain dominant.[986] Nonetheless, sentences imposed by the ICTY over the years were inconsistent, although the scope of crimes and the level of the accused have emerged as important predictors.[987] However, as argued in Chapter 1, neither deterrence nor retribution give adequate justification for sentencing at the international level.[988]

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the usual national practice sentencing for Rome Statute rimes; the proportionality of the sentence in relation to the gravity of the crime and the degree of responsibility of the offender; the type and degree of responsibility of the offender; the type and degree of restrictions on liberty; any mitigating circumstances; and the reasoning that the sentencing judge gave for passing the particular sentence.

[981] Seils, Paul. *Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace.* ICTJ briefing, June 2015. See also Meijers, Tim and Marlies Glasius. *Trials as Messages of Justice: What should be Expected of International Criminal Courts*. Ethics and International Affairs, 30 No. 4 (2016) pp. 429-447 at 435.

[982] This case is made by Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007)

[983] Cryer, Robert, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge (2013) p. 494.

[984] Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007.)

[985] Cryer, Robert, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 2nd ed., Cambridge (2013) p. 497.

[986]Ibid, p. 498-499.

[987] Hola, Barbara, Alette Smeuler, and Catrien Bijleveld, *Is the ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice*, Leiden Journal of International Law 22 (2009), pp. 79-97.

[988] See Sloane, Robert. *The Expressive Capacity of International Punishment: The Limits of the National*

Imprisonment as a form of punishment should also be seen in historic perspective. A UNODC Handbook on Alternatives to Imprisonment notes that " "[i]n many countries, the use of imprisonment as a form of punishment is relatively recent."[989] The practices of States in punishing their citizens vary, ranging from wide use of incarceration in the United States to a strong focus on rehabilitation in The Netherlands. In Colombia, low-level drug traffickers and paramilitaries suffer the bad conditions or ordinary jails, whereas higher-level offenders usually enjoy considerable luxuries and freedoms even within the confine of prison (a famous example being Pablo Escobar's detention in La Catadral). Both lower-level and higher-level offenders use prison to make connections to continue their illegal activities after their release.[990] In the context of Colombia, restricted movement may therefore constitute a valid alternative to imprisonment.[991]

In Northern Uganda, people considered a prison cell in The Hague under the ICC as a luxury, not a punishment: "Even if Kony is taken to The Hague, that will not be a punishment. The prisons there are air-conditioned! Rather he should be in the community. He should see the suffering he has caused.[992] Surveys taken in Northern Uganda suggest that the views of victims vary in relation to punishment. In Uganda in 2005, prior to the Juba Peace Talks, in a survey administered by Berkeley University and ICTJ, most respondents (66%) said they favored "hard options" in dealing with LRA i.e. trials, punishment or imprisonment. Only 22 percent preferred "soft options" including forgiveness, reconciliation, and reintegration. In a second survey administered by Berkeley University and ICTJ in

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*Law Analogy and the Potential of International Criminal Law,* 43 Stan. J. Int'l L. 39 (2007) for a critique of retribution as a justification for punishment by an international tribunal. See for instance p. 79: "It is far from clear how punishment by an international tribunal, which derives its authority from either treaty or a Security Council resolution (at bottom, a function of state consent to the U.N.Charter, itself a multilateral treaty), can be a legitimate proxy for the penal interests of the literal victims who suffer extraordinary crimes of violence. This disjuncture may well be a major reason that international tribunals often suffer from a perceived lack of legitimacy in relation to affected local communities or states." Also at p. 81: "Retribution therefore emerges as a problematic justification for ICL punishment in large part because it presupposes both a coherent community and a relatively stable sociopolitical or legal order characterized by shared values. The circumstances that enable widespread violations of international humanitarian law and human rights atrocities generally involve the breakdown of precisely that order."

[989] UNODC, Handbook of basic principles and promising practices on Alternatives to Punishment, New York (2007) p. 3.

[990] The Criminal Code of Colombia makes reference to many concepts other than retribution. Colombia Penal Code Law 599/2000. Article one states that penal law has its basis in human dignity. Article 3 says that punishment shall be governed by the principles of necessity, proportionality, and reasonability. Article 4 refers to the goals of punishment as general deterrence, retribution, specific deterrence, social reinsertion, and respect for rights of the accused.

[991] Colombiapeace.org "*Prison of Deprivation of Liberty for Human Rights Violations*", 2015.

[992] Cited in Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, African Arguments (2006) at p. 135.

2007, during the Juba peace talks, 54% of respondents said they now preferred the "soft options" whereas 41 percent preferred hard options for the LRA.[993]

Victim representatives in Colombia also voiced differing views on the issue of punishment. As observed by President Santos in his receipt of the Nobel Peace Prize in November 2016: "Victims want justice, but most of all they want to know the truth, and they – in a spirit of generosity – desire that no new victims should suffer as they did."

In an event hosted by the Ministry of Justice, a number of victim representatives remarked that historically in Colombia, perpetrators have often received more benefits than the victims.[994] One group expressed the view that those who commit crimes should not become "pampered parties, in luxurious jails." [995] Another group expressed a view that penalties "should not be so harsh as to prevent demobilization and not so flexible as to condone impunity." Some expressed the view that perpetrators should contribute to reconstruction and could thereby become eligible for a reduction of sentences.[996] *De Justicia*, a widely respected Colombian NGO, argued that:

> From the philosophical perspective, specifically with respect to reflections about the purposes of the punishment, it becomes necessary to have a minimum of retribution as a recognition of the suffering of the victims, and as an affirmation of the values that were negated by the serious human rights violations.[997]

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[993] Human Rights Center: *Forgotten Voices: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda*, July 2005, Human Rights Center, UC at Berkeley, and the ICTJ. Out of those who heard about the ICC during that time, 76% said that pursuing trials at that time would endanger the Juba talks. A final survey was conducted in 2010. Views had changed again, quite drastically. Security is much improved in Northern Uganda by now, but a peace agreement with the LRA looks less likely than ever before. When asked what should happen to the LRA, respondents said that they should be persuaded to come out of the bush (24%) or pardoned / amnestied (23%), put on trial (16%), or captured (13%). Interestingly, 87% of respondents said it should not be possible to prosecute former combatants who have received amnesty. The main measures for accountability identified by respondents included the ICC (29%), Ugandan Courts (28%), Amnesty Commission (25%), and traditional measures (8%) But respondents this time said that it was more important to pursue accountability for the government (64%) than for the LRA leadership (19%), or all the LRA (5%).

[994] Consultations of victim representatives organized by the Ministry of Justice on 8-9 November 2014 in Bogota (attended by the author). Some stressed the importance of proportionality between the crime and the punishment, referred to the importance of international treaties, and voiced the view that 8 years is insufficient. In general, representatives expressed concern at the fact that state actors such as the military may be accorded lenience.

[995] Remarks by Claudia Medina at the Consultations on Transitional Justice: A View from the Regions, hosted by the Ministry of Justice, 7-9 November, Bogota.

[996] Reports of the Working Groups on Consultations on Transitional Justice: A View from the Regions, hosted by the Ministry of Justice, 7-9 November, Bogota.

[997] Monograph, www.dejusticia.com, 2013.

B. Amnesia about Amnesties?

While the experiences of Uganda and Colombia indicate that in future agreements, alternative penalties may become more prominent, amnesties are not completely off the table, even in countries where the ICC has jurisdiction. State practice on amnesties remains inconsistent, and indicates that states continue to resort to amnesties to end armed conflicts or even in their aftermath. A comprehensive study by Mallinder of over 500 situations has highlighted that amnesties including for international crimes remain a reality in today's world.[998] Another study on 119 transitions in 86 countries concludes that amnesties neither increase or decrease the likelihood of non recurrence of conflict in civil wars.[999] In the words of Freeman: "amnesties are as prevalent today as at any time in modern history … we are no more at the end of amnesties than we are at the "end of history."[1000]

National courts have upheld amnesty laws in recent years in Uganda (later reversed), Spain and Brazil.[1001] In the *Massacres of El Mozote and Nearby Places versus El-Salvador*,[1002] the Inter-American Court for Human Rights drew a distinction between self-amnesties granted at the end of dictatorships, and amnesties used to end civil wars. In a separate opinion, Judge Diego Garcia Sargan states that when negotiating the end to an armed conflict "States must weigh the effect of criminal justice both on the rights of the victim and on the need to end the conflict." [1003] A set of Guidelines proposed by a group of prominent international lawyers similarly argues in favor of keeping the door open to conditional amnesties.[1004] Louise Arbour, former ICTY Prosecutor, commented: "there must be incentives ... Without compromising the core integrity of justice, this could include very lenient treatment in exchange for disclosing facts, expressing remorse and

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[998] Mallinder, Louise, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*, Oxford and Portland: Hart Publishing 1st ed. (2008) p. 404.
[999] Payne, Leigh, Andy Reiter, Chris Mahony, and Laura Bernal –Bermudez, Conflict *Prevention and Guarantees of Non-Recurrence,* 12 April 2017.
[1000] Freeman, Mark. *Necessary Evils: Amnesties and the Search for Justice,* Cambridge University Press (2009) p. 4.
[1001] See *Kwoyelo* case below. Supremo Tribunal Federal, ADPF 153- arguicao de descumprimento de preceito fundamental (2010) Brazil; Tribunal Supremo, Setencia Absolutoria, Sentencia No: 101/2012 (Feb. 27,2012), Spain.
[1002] Inter-American Court of Human Rights, *Case of the Massacres of El Mozote and Nearby Places v. El-Salvador*, Judgement of October 25, 2012 (Merits, reparations and costs) paras 287-300.
[1003] Inter-American Court of Human Rights, *Case of the Massacres of El Mozote and Nearby Places v. El-Salvador*, Judgement of October 25, 2012 (Merits, reparations and costs), concurring opinion of Judge Diego Garcia-Sayan, at para. 26-27.
[1004] The Belfast Guidelines on Amnesty and Accountability, General Principles (2013). The Belfast Principles argue that various international obligations, including the obligation to prevent international crimes and the obligation to hold perpetrators accountable should be balanced in the form of amnesties that attach conditionalities, such as participation in truth-seeking or reparations. See also the Nuremberg Declaration on Peace and Justice, UN Doc. A/62/885 (19 June 2008), which states that "amnesties, other than those for bearing the greatest responsibility for genocide, crimes against humanity and war crimes, may be permissible in a specific context and may even be required for the release, demobilization and reintegration of conflict-related prisoners and detainees."

making some form of restitution."[1005] In all the countries examined as part of this thesis, amnesties continued to be considered, as will briefly be considered below.

### *1. Uganda's Amnesty Act 2000*

Effectively, the judgment in Kwoyelo before the Constitutional Court, has limited legal validity of Uganda's amnesty law. Already before that, changes were afoot. In May 2012, the Ugandan Minister of Internal Affairs, Hilary Onek, passed Statutory Instrument 34/2012, with the effect of lapsing Part II of the Amnesty Act 2000. This act was prompted by advocacy from JLOS, RLP, ICJ and the UCICC in the aftermath of Kwoyelo's acquittal, that the amnesty is in breach of international law standards.[1006] The JLOS Secretariat drafted a memo in which it argued that the Amnesty Act contravenes international obligations.[1007] Nonetheless, in May 2013 the Parliament voted to reinstate Part II of the Amnesty Act.[1008]

The lapsing of the amnesty caused a wave of concern from local groups. As of 2012, up to 26,288 rebels from 29 rebel groups had utilized the amnesty law: of these, an estimated 12,971 belonged to the LRA.[1009] A 2006 report refers to the amnesty as the most important "pull factor" in encouraging people to leave the LRA.[1010] A communiqué of 23 May 2012, on behalf of traditional and religious leaders, civil society and other organizations called on the government to reinstate it immediately. The communiqué argued that the amnesty was appropriate considering the LRA is largely composed of abducted children; the conflict is unresolved and continues to affect DRC, CAR and South Sudan, and Uganda has a moral obligation to contribute it resolving it; and that the Amnesty Act is an important tool for reconciliation.[1011] Twenty-two civil society groups from LRA-affected areas in Congo, Central African Republic, South Sudan and Uganda issued a similar communiqué on 12 June.[1012] The amnesty represents one of the few forms of government assistance available to ex-combatants.[1013] Generally, it also seems that reintegration of ex-combatants in Northern Uganda is relatively successful, with

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[1005] Louise Arbour, *Are Freedom, Peace and Justice incompatible agendas?* Inaugural lecture on Human Rights and Human Dignity (17 Feb. 2014) Oxford University.
[1006] Human Rights Watch, *Justice for Serious Crimes Before National Courts: Uganda's International Crimes Division,* 2012.
[1007] Interview with former JLOS advisor, Kampala, 12 February 2014.
[1008] Daily Monitor, *Lawmakers Agree to Extend Amnesty Act*, 16 May 2013.
[1009] Agger, Kasper. *The End of Amnesty in Uganda: Implications for LRA Defections,* Enough Project August 2012.
[1010] Mallinder, Louise. *Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast, March 2009 at p. 32 citing Conciliation Resources and Quaker Peace and Social Witness, *Coming Home: Understanding why commanders of the Lord's resistance Army choose to return to a civilian life* (May 2006), p.10.
[1011] Communiqué of traditional and religious leaders, civil society and other organisations, 23 May 2012, Fairway, Kampala. See also Note Accompanying Fairway Communiqué.
[1012]Agger, Kasper. *The End of Amnesty in Uganda: Implications for LRA Defections,* Enough Project August 2012.
[1013] Interview with Michael Otim, 12 February 2014.

up to two-thirds of returnees who went through the amnesty process feeling safe during the day, although fewer feel safe at night.[1014] As noted by Adam Branch, "the ICC irresponsibly frames the Amnesty Act not as the product of mobilization by the Acholi trying to find peace and duly promulgated by the Ugandan parliament, but as a gift from the Ugandan executive, to be withdrawn by President Museveni at his convenience."[1015]

### *2. Afghanistan's National Amnesty, General Reconciliation and National Unity Act 2007*

In 2002, shortly after he took power, President Karzai declared, "peace is a necessity and justice a luxury that Afghanistan cannot afford."[1016] Likewise, the international community has supported a "peace first, justice later" approach in Afghanistan since 2001.[1017]The Afghan Independent Human Rights Commission and human rights groups argued that accountability was important in order to increase stability. A seminal moment was the release of the Human Rights Watch "Bloodstained Hands" and Afghan Justice Projects "Casting Shadows" reports, followed by a Human Rights Watch press release in December 2006, which called for the investigation of several individuals by name, including parliamentarians Abdul Rabb al Rasul Sayyaf, Mohammed Qasim Fahim and Burhanuddin Rabbani, Minister of Energy Ismail Khan, Army Chief of Staff Abdul Rashid Dostum, as well as current Vice President Karim Khalili.[1018] (It is worth noting that since 2006, three of these six, Dostum, Khalili and Fahim, were at one point Vice Presidents and four were on the Presidential or Vice-Presidential list of candidates for the 2014 elections, while one (Rabbani) was assassinated and one (Hekmatyar) was invited back to Afghanistan in a controversial clemency agreement in 2017.[1019] This is the extent of impunity in Afghanistan.

The HRW press release sparked a debate in the National Assembly on the necessity for an amnesty law. In their discussions in the National Assembly, representatives referred to existence of the ICC, and to the hanging of Saddam Hussein in December

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[1014] Mallinder, Louise*. Uganda at a Crossroads: Narrowing the Amnesty?* Working Paper no.1 from Beyond Legalism: Amnesties, Transition and Conflict Transformation, Institute of Criminology and Criminal Justice, Queen's University Belfast (March 2009) p. 33.

[1015]Branch, Adam. *Uganda's Civil War and the Politics of ICC Intervention* 21 Ethics and International Affairs 179 (2007) p. 184.

[1016] Rubin, Barnett, *Transitional Justice and human rights in Afghanistan*, International Affairs 79, 2 (2003) p. 574.

[1017] Ahmad Nader Nadery, *Peace or Justice? Transitional Justice in Afghanistan,* The International Journal of Transitional Justice Vol. 1 (2007) p. 173-179.

[1018] Human Rights Watch, *Afghanistan: Justice for War Criminals Essential for Peace: Karzai Must Hold Officials Accountable for War Crimes,* 13 Dec. 2006. See also Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013 at p. 29.

[1019] Quni, Shereena, Al-Jazeera, *UN lifts sanctions against Gulbuddin Hekmatyar, 4* February 2017. The deal gave Hekmatyar amnesty for past crimes and gave him full political rights. The amnesty was accompanied by a lifting of a UN travel ban, arms embargo and asset freeze.

2006 as reasons for why an amnesty might be necessary.[1020] In February 2007, the National Assembly of Afghanistan passed a law on "National Reconciliation, General Amnesty and National Stability." The law, though poorly drafted, grants a blanket amnesty that is so broad to include Rome Statute crimes, both those committed in the past and those to be committed in future.[1021] The law also provides that it "shall not affect the claims of individuals against individuals based up on *Haqullabd* (rights of people) and criminal offences in respect of individual crimes".[1022] This provision distinguishes between the "rights of God" or collective rights, enforced by the government in its mandate to provide for public order, and the "rights of man" or individual rights, directly enforceable against other individuals. It follows the reasoning that under Islamic law, the "rights of man" cannot be bargained away through an amnesty.[1023] Theoretically therefore, victims of Rome Statute crimes can still go to court in Afghanistan, and demand prosecutions of perpetrators, provided they themselves provide the evidence. While this may provide a loophole, the practical reality and political power-balance is that victims are unlikely to go to court to take on warlords on their own accord without support from the state.

The passage of the amnesty law remains controversial in Afghanistan. [1024] Apart from criticism from the general public, the religious leaders *ulema* in Afghanistan disapproved of the law as un-Islamic. The law was not gazetted until 2009, and to this date Karzai has refused to sign it, casting doubt on its legal status. The law contains no mechanism for its enforcement and in this sense remains inoperable i.e. nobody has utilized it. On the other hand, neither has any prosecution been initiated after its passage. Even if its legal status is doubtful, the amnesty largely extinguished the quest for justice in Afghanistan.

Moreover, amnesty continued to be viewed as a cornerstone of the strategy for reconciliation with the Taliban. The Afghan Penal Code provides for general amnesty (Art. 170) and special amnesty (171), the latter of which incorporates the 2007 National Reconciliation, General Amnesty and National Stability Law.[1025] In 2005, President Karzai had established the Independent Peace and Reconciliation

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[1020] Unofficial notes of National Assembly debate on file with the author.
[1021] Article 3 (1) of the National Reconciliation, General Amnesty and National Stability Law, Afghanistan states: "All political factions and hostile parties who were involved in a way or another in hostilities before establishing of the Interim Administration shall be included in the reconciliation and general amnesty program for the purpose of reconciliation among different segments of society, strengthening of peace and stability and starting of new life in the contemporary political history of Afghanistan, and enjoy all their legal rights and shall not be legally and judicially prosecuted."
[1022] Article 3 (3) of the National Reconciliation, General Amnesty and National Stability Law, Afghanistan.
[1023] Interview with Abdel-Hakim Mujahid, High Peace Council, Kabul, 18 March 2014.
[1024] Afghan Independent Human Rights Commission and International Center for Transitional Justice, *Discussion paper on the Legality of Amnesties*, 21 Feb. 2010.
[1025] Qaane, Ehsan. Nuremberg Academy Afghanistan Complementarity Study (2016), on file with author. See also https://www.nurembergacademy.org/projects/detail/resource-center-on-complementarity-monitoring-13/

Commission to oversee the reintegration of low-level former fighters.[1026] Also in December 2012, the Afghan Cabinet adopted an Action Plan on Peace, Justice and Reconciliation in Afghanistan.

In 2010 President Karzai convened a Peace Jirga to ratify the Afghanistan Peace and Reconciliation Program (APRP). [1027] He also established High Peace Council. Its members include many former *mujahidin* leaders and a few former Taliban and Hezb-i-Islami members. The HPC mandate is (a) to conduct high-level "reconciliation" with the Taliban, in the form of negotiations, and (b) to promote reintegration of low-ranking Taliban who want to be part of the peace process at the local level, through the APRP.[1028] Amnesty is a part of the APRP.

In spite of various levels of contact and negotiations with the Taliban in recent years, none have constituted a breakthrough. Analysts agree that the Taliban in Afghanistan no longer operates under a unified command structure, which complicates attempts at negotiations.[1029] However, the HPC has focused on the release of senior Taliban commanders, such as Mullah Baradar and Mullah Mansour Dadullah, brother of the infamous Mullah Dadullah.[1030] It also works on delisting Taliban from the Security Council imposed travel ban.[1031]

On the local level, the HPC sponsored provincial peace committees, maintains a Secretariat, and facilitated reintegration of rank-and-file Taliban through the Afghanistan Peace and Reintegration Program. The program seeks to reintegrate combatants by simultaneously seeking to engage in social outreach, confidence building and negotiation, demobilization, and consolidation of peace and community recovery.[1032] The program has been criticized for being under-conceptualized but continues its operations. The number of Taliban reintegrated in 2014 was around 10, 000.[1033] It is not clear that Rome Statute obligations were specifically discussed

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[1026] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013 p. 44. See also Mohammed Masoom Stanekzai, *Thwarting Afghanistan's Insurgency: A Pragmatic Approach toward Peace and Reconciliation*, USIP Special Report, September 2008.

[1027] For more information on the APRP see http://www.af.undp.org/content/afghanistan/en/home/operations/projects/crisis_prevention_and_recovery/aprp/

[1028] Interview with High Peace Council Staff member, Kabul, 15 March 2014.

[1029] Stanekzai, Mohammed Masoom. *Thwarting Afghanistan's Insurgency: A Pragmatic Approach toward Peace and Reconciliation,* USIP Special Report, September 2008.

[1030] The Hindu, Mullah Baradar to be released, 11 Sept. 2013, tp://www.thehindu.com/news/international/south-asia/mullah-baradar-to-be-released/article5113418.ece.

[1031] Interview with High Peace Council Staff member, Kabul, 15 March 2014.

[1032] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013 p. 45.

[1033] Interview with UK Embassy official, Kabul, 19 March 2014. Those ready to reintegrate are met by the provincial governor, to go through a reintegration ceremony, and given a lump reintegration sum of about $200 and a *chapan* (an Afghan silk robe often worn by Karzai). The burden of proof for insurgents wishing to benefit from the process is low: they have to hand in a weapon and pledge

in the context of formulating the APRP.[1034] According to an unpublished policy paper by the Joint Secretariat, the amnesty is for political rather than serious crimes,[1035] but so far those taking part have *de facto* been granted amnesty. The European Union does not fund the program because of the amnesty clause.[1036]

According to former Taliban leader Abdel-Hakim Mujahid, insurgents were not aware of the amnesty passed by the National Assembly; neither do they consider it a "benefit", since they do not acknowledge the legitimacy of the Afghan government (or the HPC). They regard it as a "puppet" of the "invaders."[1037] Nonetheless, the broader public remains supportive of the Governments reconciliation efforts, particularly in the provinces bordering Pakistan.[1038] On the other hand, women and minorities remain fearful of the implications of a reintegrated Taliban, and many Afghans feel that these ought to be protected in any peace arrangement.[1039]

In February 2018, President Ashraf Ghani once again invited the Taliban to unconditional peace talks, offering them political recognition,[1040] against the background of a troop surge by the US under the Trump administration, and a general escalation of violence by the Taliban. However, his offer did not address the presence of American troops, the withdrawal of which has always been a key Taliban demand. Thus far the Taliban has not responded to the call for negotiations and violence has intensified in recent years.

### *3. Libya: Amnesty for Revolutionary Acts?*

In Libya, in May 2012 the National Transitional Council passed Law 38, entitled 'special measures for the transitional period', which stated in Article 4 that that

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their commitment to the insurgency. When they report they are kept for some days in order to conduct background checks and biometric tests. Sometimes groups of combatants reintegrate at the same time: if it includes a more senior commander, the HPC may contribute to his upkeep. None were reintegrated into the Afghan National Army for now and there are unconfirmed reports that some rejoined the insurgency. Interview with High Peace Council Staff member, Kabul, 15 March 2014.
www.af.undp.org/content/afghanistan/en/home/operations/projects/crisis_prevention_and_recovery/aprp.html.

[1034] Afghanistan Analysts Network, Patricia Gossman and Sari Kuovo, *Tell Us How This Ends: Transitional Justice and Prospects for Peace in Afghanistan*, February 2013 p. 46. The program's Rule of Law, Governance and Human Rights Pillar promises to be "compliant with the laws and Constitution of Afghanistan and Afghanistan's international treaty obligations."

[1035] Interview with UNAMA Deputy Head of Human Rights, Kabul, 18 March 2014.

[1036] Interview with EU official, Kabul, 16 March 2014. Canada also does not fund the program but cited its opposition to terrorism as a more prevailing reason than the ICC: Interview with UK Embassy official, Kabul, 18 March 2014.

[1037] Interview with Abdel-Hakim Mujahid, High Peace Council, Kabul, 18 March 2014.

[1038] The Asia Foundation. *Afghanistan in 2013: A Survey of the Afghan People.* 63% if surveyed Afghans thought that reconciliation could help to stabilize the country.

[1039] Afghan People's Dialogue on Peace*, Laying the Foundations for an Inclusive Peace Process,* December 2011.

[1040] Deutsche Welle, *Afghan President Ashraf Ghani offers Taliban peace Talks and Political Recognition,* 28 Feb. 2018.

"there shall be no penalty for military, security, or civil actions dictated by the February 17 revolution performed by revolutionaries with the goal of promoting or protecting the revolution." This language seemingly granted a broad amnesty to Revolutionaries, although it left open the question of whether offences such as torture could be said to "promote the revolution." There is no evidence that ICC obligations were considered as part of the discussion, mirroring a belief held in by many Libya that the ICC's jurisdiction ended with the Revolution.[1041] The law was condemned by international human rights groups. HRW wrote a letter to the OTP about it.[1042] But its practical effect was delimited by the passage of a subsequent law introduced by the Justice Minister and entitled 'Criminalization of Torture, Enforced Disappearances, and Discrimination'. This law, which entered into force in April 2013, makes it clear that those crimes are punishable, no matter who has committed them.[1043]

Also in July 2015, in the aftermath of the verdict against former senior regime officials of the Qadhafi government, the Parliament in Tubruq issued another amnesty law granting amnesty for crimes committed since the 2011 Revolution, but exempting war crimes, terrorism, murder, kidnapping, torture, smuggling or corruption.[1044] In December 2015, the United Nations brokered the "Libyan Political Agreement" which was supposed to end the conflict between separate entities following the General National Congress in Tripoli and the House of Representatives in Tubruq. On the issue of accountability, the agreement stipulates that the parties commit to the principles of "prosecuting and punishing perpetrators of murder, torture and other crimes under the international law, including all forms of mistreatment against those detained, whoever they are."

## V. Conclusion: More Attention to Justice But No Universal Formula

The Rome Statute anticipated tensions between peace and justice, but the tools it provided to resolve these tensions, Articles 16 and 53, remain unused, particularly due to a rigid interpretation by the Prosecutor of the latter. So far there is no clear evidence to suggest that an ICC intervention either incentivizes or risks peace negotiations. In Uganda, peace negotiations in the shadow of the ICC did not

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[1041] The National Transitional Council also passed Law 35 on Granting Amnesties for some Crimes, mainly applicable to the former regime but excluding certain crimes such as torture and rape. Theoretically this law could apply to international crimes but it is so badly drafted that it is unlikely to apply at all.

[1042] Human Rights Watch, *Libya: Letter to the ICC Prosecutor on Libyan Amnesty Laws,* 25 May 2012.

[1043] An early version of the law provided that "punishment shall be increased by one third to whomsoever abuses his position as being one of the revolutionary fighters and carries out acts in contradiction with Article (4) of Law 38 such as arresting of individuals, entry and searching of houses, detention of individuals previously required for the success and protection of the revolution." While this provision was deleted but the revolutionaries continue to insist that it is wrong to "criminalize" them when they liberated the nation.

[1044] Panapress, Libya: *Parliament passes general amnesty bill,* 28 July 2015.

succeed, although conflict did not return to Northern Uganda. In Colombia, there is a good chance that negotiations will succeed in bringing a transition to peace in the shadow of the ICC.

The Rome Statute did have a "transformative effect" on the peace negotiations of various sorts, as laid out in this Chapter. The existence of the Rome Statute, as well as the shadow of the Court, had a definitive effect on the process of negotiations. It raised the profile of accountability issues, and drew more international humanitarian attention to the conflict. In some respects it impacted on state actors in Uganda and Colombia. Victims were heard and empowered as part of the process, due to the shadow of the ICC. Negotiators chose to include individual criminal accountability in the peace package, adopting a "peace with punishment" model, but leaving space to improvise on penalties. Crucially, victims' rights were also considered as part of these agreements. One observer states, "A process that does not even attempt to include a debate on transitional justice will most likely be considered incomplete and flawed, with negative consequences for the effectiveness and durability of a resulting peace agreement."[1045] However, this transformative effect was largely due to the normative influence of the Rome Statute, rather than due to the actions or statements of the Prosecutor, which were not always well received.

It may be early to speak about a "paradigm shift" in the way that countries balance peace and justice. In some situations, amnesties remain on the table. In Afghanistan and Libya, amnesties were passed, even though these countries were under ICC jurisdiction. These amnesties invited relatively little international commentary, even by ICC-supporting states, thus reflecting a possible double standard. It is not clear what accounts for this double standard, although in both Afghanistan and Libya, Western countries themselves were involved in the military intervention, which weakened calls for accountability for their allies.

The peace versus justice debate raises fundamental questions about the legitimacy of the Court and "who decides." This creates dilemmas for the ICC, since this raises questions about its "democratic deficit" as a supranational institution.[1046] The question of the "national interest" is akin to that of local ownership, and poses a legitimacy challenge for the ICC. In the words of Dugard: "international opinion, often driven by NGO's and western activists who are strangers to repression, fails to

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[1045] Kastner, Philipp. *Armed Conflicts and Referrals to the ICC: From Measuring Impact to Emerging Legal Obligations,* 12 JICL (2014), pp.471-490 at p. 485.

[1046] Morris, Madeline, *The Democratic Dilemma of the International Criminal Court*, Buffalo Criminal Law Review, Vol. 5 (2002) p. 596: "A supra-national judicial authority has been created, but there has been virtually no examination of its democratic legitimacy." In the words of Rabkin: "The international community is likely to be paying much less attention to the consequences of prosecutions in a particular country than the people who live in that country. A domestic prosecutor must live with the people affected by his decisions, while the international prosecutor can move on to new assignments, without ever returning to that country. Jeremy Rabkin, *Global Criminal Justice: An idea Whose Time Has Passed,* 38 Cornell International Law Journal 753 (2005) p. 767.

pay sufficient attention to the circumstances of the society which chooses amnesty above prosecutions; and to the argument that wounds are best healed at home, by national courts and truth commissions, rather than by foreign courts and international tribunals."[1047] Louise Arbour has said that peace and justice "requires compromise- both sides have to give. Many justice advocates, however, wary of losing ground, are unwilling to support that approach."[1048]

In fact, an end to conflict may be more likely to prevent further atrocities. In the words of Carlos Nino, "Though it is true that many people approach the issue of human rights violations with a strong retributive impulse, almost all who think momentarily about the issue are not prepared to defend a policy of punishing those abuses once it becomes clear that such a policy would probably provoke, by a causal chain, similar or even worse abuses …[1049] Similar arguments have been made by other Latin American scholars.[1050] In the human rights movement, it seems that "impunity" became increasingly identified with retribution and interpreted as the absence of proportionate punishment. A broader interpretation of "impunity" should take into account not just punishment of perpetrators but also remedies for victims.[1051] In the words of the High Commissioner for Peace in Colombia:

> The concept of impunity is much abused. Impunity is necessarily measured according to the degree to which the rights of the victims are satisfied. We think that the mistake has been to concentrate simply on the perpetrators. The victims should be the centre of attention."[1052]

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[1047] John Dugard. *Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?* 12 Leiden Journal of International Law 1001-1015 (1999) p. 1006.

[1048] Arbour, Louise. *Doctrines Derailed? Internationalism's Uncertain Future*, International Crisis Group's Global Briefing, 28 Oct. 2013.

[1049] Nino, Carlos. *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina.* 100 Yale Law Journal (1991) p. 2619.

[1050] Well-known Chilean lawyer and human rights activist Jose Zalaquett argued that according to Max Weber, when confronted with the dilemma of a trying to negotiate a peaceful transition, politicians should be governed by the ethics of responsibility, rather than the ethics of conviction. Jose Zalaquett, Balancing *Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations,* Hastings Law Journal, Vol. 43 (1992) p. 1430-31.

[1051] UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005.102/Add. 1, 8 Feb. 2005, Principle 1: "Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations."

[1052] Speech given by the High Commissioner for Peace, Sergio Jaramillo, at Externado University on 9 May 2013, published at El Tiempo.

In the words of another Colombian, Uprimny: "Each society will have its own approach. A universal formula does not exist."[1053] The ICC should not seek to impose such a universal formula. If this is what is meant by transformative effect, that should not be the objective.

Finally, the Colombian peace process also transformed the ICC, causing it to depart from some of its earlier, more rigid stances on the balance between peace and justice. The speech given by the Deputy Prosecutor showed far more deference to the Colombian process than had previously been the case when he said: "The issue for the Prosecutor of the ICC, but most importantly for State Parties, is how to meet the requirements of the Statute while achieving lasting peace and security." That indeed remains the challenge.

[1053] Interview with Director of Dejusticia, Bogota, 16 May 2014.