

## The Judicialization of Peace

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*As international courts gain in influence, many worry that they will impoverish domestic politics—that they will limit democratic deliberation, undermine domestic institutions, or even thwart crucial political initiatives such as efforts to make peace. Indeed, many states are in the midst of withdrawing, or actively considering withdrawal, from international commitments presided over by international courts. The Article focuses on the currently unfolding Colombian peace process, the first to be negotiated under the watch of not one but two international courts, to show that these concerns misconstrue the way international courts actually work.*

*Throughout four years of peace talks, many predicted that the International Criminal Court and the Inter-American Court of Human Rights would impede peace by demanding prosecution of war criminals. Instead, the 2016 Colombian peace accord opens the way to a far less punitive peace than many of those familiar with the courts and underlying treaties would have deemed possible. The effect of the engagement of the international courts in Colombia has not been to impose rigid conditions from afar, but rather to allow domestic players to reinterpret the content of Colombia's international legal obligations: the terms of Colombia's peace were produced through—not despite—the international courts' ongoing deliberative engagement with the peace process.*

*The Article draws on original empirical data to reveal precisely how the international courts enabled the construction of Colombia's sui generis peace. The Article thus speaks directly to those voicing concern over the increased involvement of international courts in national politics in general, and in peace and reconciliation in particular. It also contributes to our knowledge about how, precisely, international law comes to influence domestic politics, and how, in turn, domestic politics shape international law.*

### INTRODUCTION

How did one of the world's most internationalized peace talks—convened under the shadow of not one but two international courts focused on atrocity crimes—lead to an accord that *prima facie* allows war criminals to avoid prison?<sup>1</sup> In January 2017, Colombia began to implement its historic peace

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1. See, e.g., José Miguel Vivanco, *Letter to President Santos on the New Peace Agreement with the FARC*, HUMAN RIGHTS WATCH (2016), <https://www.hrw.org/news/2016/11/23/letter-president-santos-new-peace-agreement-farc> (expressing concern that war criminals will not undergo punishment). See generally Sandra Borda & Mateo Morales, *Colombia: La Internacionalización de la Paz* [Colombia: The Internationalization of the Peace], in ANUARIO INTERNACIONAL CIDOB 2016–2017 239 (2016) (showing how Colombian peace has been internationalized).

deal with the Revolutionary Armed Forces of Colombia (“FARC”), bringing a 55-year-old armed conflict to a close. It has been, by any measure, a highly judicialized peace process.<sup>2</sup> Not only is Colombia under the jurisdiction of both the International Criminal Court (“ICC”) and the Inter-American Court of Human Rights (“Inter-American Court”), but over the past three decades it has ratified nearly every human rights treaty to emerge from the United Nations and the Organization of American States.<sup>3</sup> If there were one place where international law and courts should have an impact, Colombia would be it. Yet the resulting accord, signed with pomp as international judges looked on and applauded,<sup>4</sup> advances an understanding of transitional justice less punitive than most knowledgeable observers would have deemed allowable.

This Article conducts an empirically informed analysis of the Colombian peace process in order to reveal whether and how the involvement of international courts in the peace negotiation altered the form and the substance of the resulting accord. The analysis reveals that international courts did, indeed, influence the peace, but not in the ways conventional wisdom would suggest. Many predicted that the international courts’ rigid demands for prosecution of atrocity crimes would either impede the peace talks or, alternatively, lead to a peace accord with a greater measure of criminal accountability. Both predictions were wrong. In Colombia, the international courts acted neither as a spoiler of the peace, nor as a *deus ex machina* that imposes justice on a reluctant body politic.

Instead, the international courts became deeply engaged in the domestic debate and, through their engagement, gave the government and FARC a platform on which to forge a new understanding of the terms of peace possible under international law. Colombia’s 2016 Final Accord (“Final Accord”) is, compared to previous Colombian agreements, longer, more procedurally detailed, and more legally intricate, particularly in its treatment of international law and criminal process. But it is also less punitive. The Colombian solution to the peace/justice dilemma is to offer lighter punishment for the most heinous crimes, in exchange for greater involvement by the wrongdoer in legal processes aimed at repairing the harm and restoring social bonds. Indeed, the Final Accord may allow someone who committed international crimes to be tried, sentenced, and punished, but not imprisoned. That possi-

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2. Judicialization refers to the involvement of courts in important political questions, such as the debates over the peace process in Colombia. See generally C. NEAL TATE & TORBJÖRN VALLINDER, *THE GLOBAL EXPANSION OF JUDICIAL POWER* 13 (1995). In this Article, the term will be used to refer to the involvement of *international* courts as well as domestic.

3. For a list of the UN treaties Colombia has ratified, see *Status of Ratification Interactive Dashboard*, U.N. OFF. OF THE HIGH COMM’R, <http://indicators.ohchr.org/> (last visited July 27, 2017). For a list of the OAS treaties Colombia has ratified, see *Multilateral Treaties*, Org. Am. States, [http://www.oas.org/dil/treaties\\_central\\_authorities\\_colombia.htm](http://www.oas.org/dil/treaties_central_authorities_colombia.htm) (last visited July 27, 2017).

4. *La Corte Interamericana de Derechos Humanos está de testigo en un momento histórico en Colombia* [The Inter-American Court of Human Rights is Witness to Historic Moment in Colombia], Caracol Radio (Sept. 26, 2016), [http://caracol.com.co/radio/2016/09/26/nacional/1474922100\\_935377.html](http://caracol.com.co/radio/2016/09/26/nacional/1474922100_935377.html).

bility embodies a new understanding of accountability not yet tested before the international courts. The courts' impact, counterintuitively, has been to enable Colombian actors to specify and reinterpret the content of Colombia's international obligations, and thereby potentially usher in a new transnational regime of transitional justice.

These findings have implications for our understanding of peacemaking beyond Colombia, and for our understanding of how international courts influence politics. Colombia is arguably more enmeshed in the international legal and judicial realm than many states, and thus something of an outlier. But it can also be viewed as the best-case scenario for international courts, helping us discern what international law and courts can achieve, and cannot achieve, under the most favorable conditions. This knowledge matters because international law and courts are playing a growing role in conflict resolution in contexts as varied as Georgia, Mexico, Sri Lanka, and Uganda. Moreover, judicialization is not limited to peacemaking. Many areas of political and social life are increasingly falling under the purview of a sophisticated blend of international and domestic courts and rules. At the same time, there is a growing backlash against these institutions, with many states in the midst of withdrawal, or considering withdrawal, from the ICC and the Inter-American Court. Critics worry that these courts will increasingly interfere with democratic deliberation or otherwise undermine domestic institutions. Understanding how the courts have worked in this case of extremely contentious politics will allow us to achieve a more realistic approach to the question of the courts' influence more broadly.<sup>5</sup>

The Article proceeds in four parts after the Introduction. Part I sets the inquiry in context by reviewing current theories about the role of international courts in peacemaking. Part II provides a brief history of the Colombian conflict and peacemaking efforts, and explains the methods used in this study. Part III draws on court documents, legislative records, press reports, and executive announcements to show the varied but important roles that the international courts and their underlying treaties came to play in the peace-making process. This Part underscores how the international courts signaled their intentions regarding justice in Colombia, how domestic actors used that signaling in their maneuvering with each other and, ultimately, how the Colombian government pushed back against the courts' interpretations of the relevant treaties. Part IV uses a comparative case study and process tracing to document how judicialization made possible a less punitive and more procedural settlement. It juxtaposes Colombian peace accords negotiated over the past four decades to throw into relief the imprint of the international courts on the current accord. Part V concludes by considering the implications of this case study for international law, and for our understanding of legal globalization more generally.

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5. See generally Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

## I. COURTS AND THE PEACE/JUSTICE DILEMMA

A. *Courts as Crusaders*

Since the 1990s, the international community has forged a formidable set of mechanisms to step in and prosecute atrocity crimes when states fail to do so. The idea is that international courts will foster criminal accountability either by directly prosecuting, as in the case of the international criminal courts and hybrid courts; or by creating pressure for states to prosecute, as in the case of the human rights courts (or the ICC when it pressures states to prosecute without yet opening its own international prosecution).<sup>6</sup> The International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda, as well the international-hybrid tribunals in Sierra Leone and Cambodia all opened their doors in the 1990s.<sup>7</sup> In 2002, the Rome Statute entered into force, creating the ICC, a permanent international criminal court which today enjoys the participation of 123 state parties. These institutions were created to back up the new norm that states could no longer choose to forego prosecution of certain atrocities.

Meanwhile, regional human rights courts also became engaged in accountability politics. In 2001, the Inter-American Court handed down its influential ruling in *Barrios Altos v. Peru*, which seemingly “outlawed” the use of amnesties for atrocity crimes.<sup>8</sup> The judgment also further developed the doctrine that states violate the American Convention on Human Rights not only when they directly commit atrocity crimes, but also when they fail to prosecute atrocity crimes. The remedy, of course, is state prosecution. The Inter-American Court has since issued four other judgments in which it declares an amnesty to be in violation of the American Convention on Human Rights, and in a majority of its judgments it has called on states to prosecute fundamental human rights violations.<sup>9</sup>

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6. Many argue that the International Criminal Court (“ICC”) should try to foster domestic prosecution, a practice called positive or proactive complementarity. See, e.g., William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 54 (2008). Others note that the creation of these courts is also a function of states’ geopolitical interests, which have long-enduring effects on the functioning of the courts. See also CHRISTOPHER RUDOLPH, *POWER AND PRINCIPLE: THE POLITICS OF INTERNATIONAL CRIMINAL COURTS* 6 (2017).

7. See generally GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000); MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* (2006); Mirjan Damaška, *What Is The Point of International Criminal Justice*, 83 CHI.-KENT. L. REV. 329 (2008); Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013, 1014–15 (2004); Theodor Meron, *From Nuremberg to The Hague*, 149 MIL. L. REV. 107 (1995).

8. See, e.g., Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203, 1208–09 (2011); Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT’L L. 915 (2009).

9. Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights*, 44 CORNELL INT’L L. J. 493, 502–03 (2011).

Both modes of working have their advocates. The ICTY in particular has been held up as a successful experiment in international criminal justice, having successfully prosecuted 104 suspects before handing over its work to more localized special courts.<sup>10</sup> But there is perhaps even more support for the idea that international courts should foster domestic judicial process. Many scholars support the ICC on the grounds of its principle of complementarity, which means that the ICC only has jurisdiction in cases when domestic courts cannot or will not adequately try suspected perpetrators.<sup>11</sup> The complementarity principle, they argue, not only encourages domestic prosecution, it also encourages domestic actors to incorporate international accountability norms into domestic processes in general, thereby having impact beyond a particular case. For its part, the Inter-American Court has been heralded for creating a strong accountability norm through its jurisprudence, and for fostering domestic prosecution through its supervision of domestic systems.<sup>12</sup> It has also been an innovative force in the development of victim-centered remedial responses to atrocity crimes.<sup>13</sup>

### B. *Courts as Spoilers or Bumpers*

In the realm of peace and political transition, however, the ICC and the Inter-American Court have frequently come under fire, both for not making a difference, and for making a difference in the wrong way. A skeptical line of criticism views the courts as weak and ineffective. The first exhibit might be states' poor record of compliance with the Inter-American Court's orders to prosecute atrocity crimes.<sup>14</sup> The ICC in particular has been attacked for moving too slowly at too great a cost due to the political challenges of

10. *The Cases*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/action/cases/4> (last visited Aug. 8, 2017).

11. Burke-White, *supra* note 6, at 54; Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT'L L. 689, 729–33 (2017); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. of Int'l Crim. Just. 86, 86–88 (2003); Michael A. Newton, *The Quest for Constructive Complementarity in INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* (Carsten Stahn & Mohamed El Zeidy, eds., 2010); Frans Viljoen, *Human Rights in Africa: Normative, Institutional and Functional Complementarity and Distinctiveness*, 18 S. Afr. J. of Int'l Aff. 191, 192–93 (2011). See generally INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Carsten Stahn & Mohamed El Zeidy eds., 2010).

12. Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 2–4 (2013).

13. Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279, 279 (2011); Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNATIONAL L. 351, 363 (2008).

14. See, e.g., COURTNEY HILLEBRECHT, *DOMESTIC POLITICS AND INTERNATIONAL HUMAN RIGHTS TRIBUNALS: THE PROBLEM OF COMPLIANCE* 41–42 (2014) (finding that compliance is à la carte); Darren Hawkins and Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 35, 55–65 (2010) (finding compliance to the Inter-American Court's non-compensatory orders to be lower than its compensatory orders); Huneeus, *supra* note 9, at 494–95 (finding that compliance with orders to investigate and punish is almost null).

prosecuting atrocity crimes from afar.<sup>15</sup> Taken together, these criticisms highlight the paradox that these courts rely on cooperation from national justice systems, meaning that they are ultimately beholden to the same political dynamics that impeded domestic justice in the first place.<sup>16</sup> Sarah Nouwen finds through her analysis of the ICC in Uganda and Sudan, for example, that even the complementarity principle does little to affect domestic processes, either toward or away from international accountability norms.<sup>17</sup>

A second set of skeptics accept that the courts have an impact but worry that it is the wrong one: the courts emphasize criminal accountability at too great a cost. Institutionalizing the accountability norm through international courts impedes states' ability to reach political settlements on their own terms, or to pursue other, at times more urgent or valuable, ends, including peace itself.<sup>18</sup> Indeed, as Mark Kersten has suggested, the establishment of the ICC has made the tension between peace and justice more visible and intractable.<sup>19</sup> Critics argue that the ICC has prolonged and exacerbated ongoing conflicts. Scholars have shown, for example that the growing push for international criminal accountability for perpetrators has removed leaders' exit-through-exile option, leaving them to fight longer and harder in a bid to avoid prosecution.<sup>20</sup> Others argue that the involvement of

15. See, e.g., Kai Ambos, *Slow Wheels of Justice: The ICC's Disappointing Track Record*, DER SPIEGEL ONLINE (Dec. 14, 2011), <http://www.spiegel.de/international/world/slow-wheels-of-justice-the-icc-s-disappointing-track-record-a-803796.html>; David Davenport, *International Criminal Court: 12 Years, \$1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014), <https://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/#50f96c772405>; Jon Silverman, *Ten Years, \$900m, One Verdict: Does the ICC Cost Too Much?*, BBC NEWS (Mar. 14, 2012), <http://www.bbc.com/news/magazine-17351946>.

16. See generally CHRISTOPHER K. LAMONT, INTERNATIONAL CRIMINAL JUSTICE AND THE POLITICS OF COMPLIANCE (2010); VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION (2008).

17. SARAH M.H. NOUWEN, COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN (2013); see also James Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271 (2005) (arguing International Criminal Tribunal for the former Yugoslavia had no detectable effect on peace and reconciliation in Bosnia).

18. Indeed, this argument is increasingly being leveled against not only the international courts, but the anti-impunity movement and transitional justice regime as a whole. See Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069 (2015). See generally DANIEL R. PASTOR & CRISTIAN G. CACACE, NEOPUNITIVISMO Y NEOINQUISICIÓN: UN ANÁLISIS DE POLÍTICAS Y PRÁCTICAS PENALES VIOLATORIAS DE LOS DERECHOS FUNDAMENTALES DEL IMPUTADO [Neo-punitivism and neo-inquisition: an analysis of the penal politics and practices violative of the fundamental rights of the accused] (2008).

19. MARK KERSTEN, JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTIONS ON ENDING WARS AND BUILDING PEACE 4 (2016).

20. See generally Abel Escribà-Folch & Daniel Krčmaric, *Dictators in Exile: Explaining the Destininations of Ex-Rulers*, 79 J. OF POL. 560, 565, 571 (2017). See generally Kasaija Phillip Apulli, *Peace Over Justice: The Acholi Religious Leaders Peace Initiative (ARLPI) vs. The International Criminal Court (ICC) in Northern Uganda*, 11 STUD. ETHNICITY & NATIONALISM 116 (2011); Jack Snyder & Leslie Vinjamuri, *Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice*, 7 ANN. REV. POL. SCI. 345 (2004); Kirsten Ainley, *The Great Escape? The Role of the International Criminal Court in the Colombian Peace Process*, JUST. IN CONFLICT (Oct. 13, 2016), <https://justiceinconflict.org/2016/10/13/the->

the ICC in a peace process makes government negotiators less credible, undermining negotiations. Christine Bell, for example, argues that “[p]eace agreement amnesties could even less clearly be guaranteed by negotiators where the state had acceded to the ICC. Technically speaking, they were no longer worth the paper they were written on.”<sup>21</sup>

The Inter-American Court has also come under fire for demanding criminal accountability at too high a cost. Despite its mandate to adjudicate matters of *state* responsibility, which is a type of civil rather than criminal responsibility, the Inter-American Court has made criminal prosecution of atrocity crimes a central focus of its work.<sup>22</sup> Since 2001, the Court has issued orders striking down amnesty laws in five different Latin American states and has issued orders demanding prosecution of atrocity crimes in a majority of its judgments overall. In one famous case, *Gelman v. Uruguay*, it struck down an amnesty that had been passed by a democratic legislature and approved by two subsequent plebiscites held over a decade apart.<sup>23</sup> Critics contend that the Court’s demand for prosecution and punishment despite democratic decision-making at the domestic level makes it “not sufficiently respectful to democracy.”<sup>24</sup> In particular, Latin American scholars have pushed back on the Court’s emphasis on use of criminal justice tools to resolve complex political and social problems,<sup>25</sup> arguing that it is “neo-

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great-escape-the-role-of-the-international-criminal-court-in-the-colombian-peace-process/; Jackson Diehl, Opinion, *After the dictators fall . . .*, WASH. POST (June 5, 2011), [https://www.washingtonpost.com/opinions/after-the-dictators-fall-2011/06/02/AG57AmJH\\_story.html?tid=a\\_inl&utm\\_term=.302bb623f84d](https://www.washingtonpost.com/opinions/after-the-dictators-fall-2011/06/02/AG57AmJH_story.html?tid=a_inl&utm_term=.302bb623f84d); Phillippe Sands, *The ICC Arrest Warrants Will Make Colonel Gaddafi Dig in His Heels*, THE GUARDIAN (May 4, 2011), <https://www.theguardian.com/commentisfree/2011/may/04/icc-arrest-war-rants-libya-gaddafi>; Rodrigo Uprimny & Nelson Camilo Sánchez, *The ICC and Negotiated Peace: Reflections from Colombia*, OPEN DEMOCRACY (Feb. 11, 2015), <https://www.opendemocracy.net/openglobalrights/rodrigo-uprimny-nelson-camillo-sanchez-25C3%25A1nchez/icc-and-negotiated-peace-reflections-from-col>; Barbara F. Walter, *Why Assad Will Fight to the Death*, POL. VIOLENCE AT A GLANCE (June 18, 2012), <http://politicalviolenceataglance.org/2012/06/18/why-assad-will-fight-to-the-death/>.

21. CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA 249 (2008).

22. Huneeus, *supra* note 12. The Inter-American Court is not a criminal court. It is a human rights court that oversees state compliance to the American Convention on Human Rights. Individuals and states can bring cases to the Court claiming that a state has violated its obligation to uphold rights listed in the American Convention on Human Rights, which includes a long list of mostly civil and political rights. If it finds a violation, the Court orders the state to repair the harm. For a reflection on the role of state responsibility in atrocity crimes, see Laurel Fletcher, *A Wolf in Sheep’s Clothing? Transitional Justice and the Effacement of State Accountability for International Crimes*, 39 FORDHAM INT’L L.J. 447 (2016).

23. *Gelman v. Uruguay*, Merits and Reparation, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 232, 240, 246 (Feb. 24, 2011).

24. Roberto Gargarella, *Democracy and Rights in Gelman v. Uruguay*, 109 AJIL UNBOUND 115, 119 (2016). See also Roberto Gargarella, *Justicia Penal Internacional y Violaciones Masivas de Derechos Humanos* [International Penal Justice and Massive Violations of Human Rights], in *DE LA INJUSTICIA PENAL A LA JUSTICIA SOCIAL* [From Penal Injustice to Social Justice] 105–47 (Siglo del Hombre Editores eds., 2008) [hereinafter Gargarella, *Justicia Penal*]. See also Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 15 INT’L J. CONST. L. 414 (2017); Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT’L L.J. 45 (2015) (arguing the Inter-American Court needs to be more deferential to national actors).

25. See generally Engle, *supra* note 18.

punitivist,”<sup>26</sup> and even “illiberal” in its emphasis on prosecution at all costs (including, the argument goes, at the cost of procedural safeguards).<sup>27</sup> The Inter-American Court has had the opportunity to rule on a peace accord only once, and only years after its implementation.<sup>28</sup> As the Colombian peace process began to unfold, however, some grew concerned that the Inter-American Court’s hard stance on amnesties would stymie negotiation.<sup>29</sup>

### C. A More Nuanced Approach

Recent scholarship suggests, however, that the view of international courts as constraining national policy-making in a top down manner is too simplistic. In the realm of transitional justice, the reality is that international courts sometimes hinder peace, sometimes foster a better peace, and are sometimes indifferent.<sup>30</sup> The Article builds on recent scholarship that re-conceptualizes the way international courts actually work on the ground in order to yield a more realistic understanding of the value and risk they pose.<sup>31</sup> In particular, it joins recent studies that adopt a symbolic-interactive perspective, “shifting attention away from compliance with court orders to the processes of group interaction in which court actions may play various contributing roles.”<sup>32</sup> Mark Kersten, for example, argues that one of the key roles that the ICC plays in peacemaking is that of altering the narratives of

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26. See Ezequiel Malarino, *Judicial Activism, Punitivism and Supranationalisation: Illiberal and Antidemocratic Tendencies of the Inter-American Court of Human Rights*, 12 INT’L CRIM. L. REV. 665 (2012) (arguing that the Inter-American Court over-emphasizes punishment).

27. For arguments that the Inter-American Court overemphasizes penal responses, see *id.*; see also Gargarella, *Justicia Penal*, *supra* note 24, at 105–47; Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT’L L. REV. 195 (2007); Daniel R. Pastor, *La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos* [The Neo-Punitivist Drift of Organizations and Activists as a Cause of the Current Discrediting of Human Rights], 1 NUEVA DOCTRINA PENAL [New Penal Doctrine] 73 (2005).

28. *Massacres of El Mozote and Nearby Places v. El Salvador*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 292 (Oct. 25, 2012).

29. Indeed, former President and Senator Álvaro Uribe submitted a petition against the peace process to the Inter-American Commission of Human Rights, which acts as a first step in litigation before the Inter-American Court, claiming that the terms of the peace were in violation of Inter-American human rights standards. See *Uribe llevó a la CIDH críticas al proceso de paz colombiano* [Uribe brought critiques of the Colombian peace process to the Inter-American Commission on Human Rights], EL UNIVERSAL (Feb. 25, 2016), <http://www.eluniversal.com.co/colombia/uribe-llevo-la-cidh-criticas-al-proceso-de-paz-colombiano-220149>.

30. See, e.g., CHANDRA LEKHA SRIRIAM, *GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY* 5 (2005); KERSTEN, *supra* note 19, at 19. See generally Courtney Hillebrecht, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, 42 INT’L INTERACTIONS 616 (2014).

31. See, e.g., Alyssa K. Prorok, *The (In)compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination*, 71 INT’L ORG. 213–43 (2017) (finding that ICC involvement prolongs the conflict in those places where domestic punishment probability is low). See also KAREN J. ALTER, LAURENCE HELFER & MIKAEL RASK MADSEN, *INTERNATIONAL COURT AUTHORITY* (forthcoming) (presenting a view of international courts as constrained political actors whose authority varies by political contextual factors).

32. Michael McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715, 734 (1992).



the warring parties and shaping the discourse of the conflict, peace, and accountability.<sup>33</sup> Nouwen makes a similar argument, suggesting that a conditional effect of the ICC has been that of shaping the narrative of who among the conflicting parties are the “friends and enemies” of the international community.<sup>34</sup> Wegner adds that local perceptions and attitudes toward the ICC can alter, in turn, if and how the ICC affects peacemaking processes.<sup>35</sup>

What this more recent research shares is a reluctance to make general statements about the effects of international justice mechanisms on peacemaking, cutting back to seek specific effects on specific aspects of the peace processes. This Article takes as its point of departure the recent turn toward a more nuanced mapping of when and how international accountability courts can affect peacemaking processes. In Colombia, the ICC and the Inter-American Court exert influence through “the shadow of the law.”<sup>36</sup> neither international court has an active case, yet both loom large in the domestic debate over peace. Few studies have focused on this “shadow effect” of international courts in the peace context.<sup>37</sup> Yet it may be that “shadow effects” are the most important way courts exert influence. The threat of future litigation as well as the imprint of prior litigation that has already shaped institutional processes and normative understandings mean that courts exert power over domestic decision-making even without issuing a judgment or opening a case.<sup>38</sup> The ICC’s role in the preliminary examination stage, and even before that, may be as significant as its prosecutorial role. In the Inter-American context, the Court’s prior jurisprudence has become an important tool for domestic actors seeking to shape policy and domestic litigation, without their ever having to file an international claim. The Article also maps new terrain by reversing the usual direction of causal

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33. Mark Kersten, *Trials and Tribulations at the Special Tribunal for Lebanon Justice in Conflict*, JUST. IN CONFLICT (Jan. 28, 2014), <https://justiceinconflict.org/2014/01/28/trials-and-tribulations-at-the-special-tribunal-for-lebanon/>.

34. Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 941, 945 (2010).

35. PATRICK S. WEGNER, THE INTERNATIONAL CRIMINAL COURT IN ONGOING INTRASTATE CONFLICTS: NAVIGATING THE PEACE-JUSTICE DIVIDE 308–10 (2015).

36. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (introducing the concept of the “shadow of the law”).

37. Most ICC case studies have focused on active cases, stressing, for example, how the manner in which a case arrives at the ICC shapes the politics of its prosecution of that case. See, e.g., Kersten, *supra* note 19, at 5; WEGNER, *supra* note 35, at 1–13; David Bosco, *Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court*, 22 GLOB. GOVERNANCE: REV. MULTILATERALISM & INT’L ORG. 155 (2016); Nouwen & Werner, *supra* note 34, at 942; Prorok, *supra* note 31, at 222–23. Similarly, most Inter-American Court studies focus on litigation, judgments, or their aftermath. But see René Uruña, *Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003–2017*, 111 AM. J. INT’L L. 104 (2017) (arguing that the impact the ICC may have through a preliminary examination diminishes over time).

38. See generally Karen Alter, Laurence Helfer, & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 L. & CONTEMP. PROBS. 1, 2–3 (2016) (describing the different types of authority that courts can have, even outside the scope of a particular case).

inquiry to ask how the courts and international law itself may be changed by the courts' engagement in a particular context.

## II. HISTORY AND METHOD

Several features of the Colombia peace process make it a significant case for the study of the role of international law in politics.<sup>39</sup> This Part reviews the half-century history of the Colombian conflict, examines the features that distinguish Colombia from other cases, and explains the methods used in the remainder of the Article.

### A. A Brief History of the Colombian Conflict

Until the Peace Treaty was signed in 2016, Colombia's civil conflict was the longest-running war in the Western hemisphere. It had many stages over its five-decade span, evolving from a conflict between two dominant political parties in the late 1940s, into a conflict that was fragmented among many parties, including actors engaged in organized crime and narco-trafficking.

The conflict had its roots in partisan violence between members of what were then Colombia's two main political parties, the Liberals and Conservatives. *La Violencia*, as the fighting was known, began after the 1946 elections and reached its highest point following the assassination of Liberal candidate Jorge Eliecer Gaitán on April 9, 1948. A decade later, in 1958, the two parties forged a power-sharing agreement known as the *Frente Nacional* (National Front), which brought an end to the violence but with unanticipated consequences. The National Front's agreement closed the political system for other actors. In doing so, the National Front set the stage for Colombia's

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39. It has already received much scholarly treatment. Although this Article is not the first to examine the ICC's intervention in Colombia, it is the first to analyze three distinct paths by which the two courts engaged the peace process, and to compare the 2016 peace to prior peace efforts in order to discern the specific imprint of this engagement on the Final Accord. See generally KAI AMBOS, THE COLOMBIAN PEACE PROCESS AND THE PRINCIPLE OF COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT: AN INDUCTIVE, SITUATION-BASED APPROACH (2010); Ainley, *supra* note 20; D. Acosta Arcaraz, R.J. Buchan & R. Uruña, *Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law*, 26 CRIM. L. FORUM 291 (2015); Nicolás Henry Buckley Martín, Pierluigi Antonio Allegretti, & Iñigo Mejuto Hidalgo, *La acción de la Corte Penal Internacional en Colombia: entre legalismo y perspectiva histórica* [The International Criminal Court in Colombia: Between Legalism and Historical Perspective], 50 NÓMADAS: REVISTA CRÍTICA DE CIENCIAS SOCIALES Y JURÍDICAS [Nómadas: Critical J. Soc. & Juridical Sci.] 187 (2017); Eleanor Gordon, *Crimes of the Powerful in Conflict-Affected Environments: False Positives, Transitional Justice and the Prospects for Peace in Colombia*, 6 ST. CRIME J. 132 (2017); Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49 (2006); Jamie Rowen, "We Don't Believe in Transitional Justice: Peace and the Politics of Legal Ideas in Colombia", 42 L. & SOC. INQUIRY 622 (2017); Uruña, *supra* note 37; Allen Weiner, *Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court*, 52 STAN. J. INT'L L. 212 (2016). Further, two online symposia have focused on the peace talks: Alexandra Huneeus & Rene Uruña, *Introduction to Symposium on the Colombian Peace Talks and International Law*, 110 AJIL UNBOUND 161 (2016); *Peace and Justice in Colombia—A JIC Symposium*, JUST. IN CONFLICT (2017), <https://justiceinconflict.org/2016/10/10/peace-and-justice-in-colombia-a-jic-symposium>.

current civil conflict, which began in the mid-1960s when the Revolutionary Armed Forces of Colombia (FARC) first organized as an armed force. The Government of Colombia has been fighting the FARC ever since.

During the 1980s the Colombian conflict grew not only more violent but also more complex. In addition to the FARC, drug traffickers and paramilitary groups entered the fray. Drug trafficking fueled the conflict and major trafficking organizations developed love-hate relationships with the rebel groups, the government, and the paramilitary forces. The paramilitaries, in turn, allied with the state in order to combat the rebel groups and their presumed supporters. The cost of this fighting has been paid in human lives. According to a 2013 report from the National Centre of Historical Memory, after four decades of fighting, the Colombian conflict left over 220,000 Colombians dead and 5.7 million civilians forcibly displaced.<sup>40</sup>

The most recent peace process is one in a long line of attempts by domestic and international actors to bring an end to Colombia's devastating conflict. Nearly 35 years ago, in 1982, as part of the so-called *Acuerdos de la Uribe*, the Colombian government looked to address the armed conflict by providing political, economic and social reforms, and generous amnesty for armed insurgents.<sup>41</sup> The *Acuerdos de la Uribe* failed to bring the conflict to an end, however, and the rest of the 1980s were some of the bloodiest years in the conflict.

The violence of the 1980s led to political reform in the early 1990s. In 1991, Colombia adopted a new constitution, which updated and institutionalized international human rights legal protections.<sup>42</sup> In 1993, the Colombian government also established Law 104, which provided the legal framework for the accord between the Colombian Government and the *Frente Francisco Garnica*, a small faction of the Popular Liberation Army (EPL).<sup>43</sup> These advances, however, did little to address the two main sources of violence: the FARC and the paramilitaries.

In the mid-2000s the Colombian government undertook yet another initiative to quell the violence, this time focusing on the paramilitaries.<sup>44</sup> Be-

40. *Colombian Conflict Has Killed 220,000 in 55 Years, Commission Finds*, THE GUARDIAN (July 25, 2013), <https://www.theguardian.com/world/2013/jul/25/colombia-conflict-death-toll-commission>.

41. *See Acuerdos del cese al fuego entre 1984 y 1986 con las FARC, el M-19, el EPL y la ADO* [Ceasefire Agreements between 1984 and 1986 with the FARC, M-19, EPL, and ADO], VERDAD ABIERTA [Open Truth] (Nov. 18, 2012), <http://www.verdadabierta.com/procesos-de-paz/farc/4292-acuerdos-del-cese-al-fuego-entre-1984-y-1986-con-las-farc-el-m-19-el-epl-y-la-ado>.

42. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

43. *See Acuerdo entre el Gobierno Nacional y el Frente Francisco Garnica de la Coordinadora Guerrillera* [Accord between the National Government and the Francisco Garnica Front of the Guerilla Coordinator], signed June 30, 1994, UN PEACEMAKER, <http://peacemaker.un.org/colombia-acuerdogarnica94>; *Bitácora, con el Frente Francisco Garnica* [Log, with the Francisco Garnica Front], CENTRO DE DOCUMENTACIÓN DE LOS MOVIMIENTOS ARMADOS [Documentation Center of Armed Movements] (July 1, 1995), <http://www.cedema.org/ver.php?id=1820>.

44. *See generally* Human Rights Watch, *BREAKING THE GRIP? OBSTACLES TO JUSTICE FOR PARAMILITARY MAFIAS IN COLOMBIA* (2008), <https://www.hrw.org/reports/2008/colombia1008/colombia1008web.pdf>.

tween 2002 and 2006, then-president Álvaro Uribe held negotiations with paramilitary groups that ended in the demobilization of most of their fronts.<sup>45</sup> The main vehicle for the demobilization of the paramilitaries was Law 975 of 2005, known as the Justice and Peace Law (*Ley de Justicia y Paz*, “JPL”).<sup>46</sup> Unlike previous demobilization efforts in Colombia, which had promised amnesty in exchange for peace, this law allowed perpetrators who confessed their crimes to receive alternative or reduced sentences.<sup>47</sup> The success of the JPL has been mixed. Between 2003 and 2006, 30,000 paramilitaries were demobilized, although many of the demobilized later took up arms again under a different name.<sup>48</sup>

Around the same time as the passage of the Justice and Peace Law, both the Inter-American Court and the ICC stepped up their involvement in Colombia. Colombia accepted the jurisdiction of the Inter-American Court in 1985<sup>49</sup> and the Inter-American Court issued its first judgment against Colombia in 1997.<sup>50</sup> The early 2000s and the JPL, however, spawned a new era of activity related to Colombia at the Inter-American Court. To date, the Court has ruled on 18 cases related to Colombia, over half of which focus on massacres and other atrocity crimes committed by the paramilitary with the acquiescence or active involvement of state actors. Some of the Inter-American Court’s most important cases related to Colombia, such as *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis)*, reviewed the way the Justice and Peace Law was being implemented.<sup>51</sup>

With respect to the ICC, the Government of Colombia ratified the Rome Statute in 2002. In the seven months following Colombia’s ratification, the Office of the Prosecutor (“OTP”) received 141 communications regarding potential violations. Of those, 20 petitions fell far outside the ICC’s jurisdiction, but 94 of the petitions consisted of enough evidence to indicate that the atrocity crimes outlined in the Rome Statute might have taken place. As a result, the OTP informed Colombia on March 2, 2005 that it would be

45. *Id.* at 6.

46. See L. 975, julio 25, 2005, 45.980 DIARIO OFICIAL [D.O.] (Colom.) [hereinafter *Justice and Peace Law*]. See also Gaceta del Congreso [G. Cong.] t. 390.

47. See Laplante & Theidon, *supra* note 39, at 60.

48. See generally Human Rights Watch, PARAMILITARIES HEIRS: THE NEW FACE OF VIOLENCE IN COLOMBIA (2010), <https://www.hrw.org/report/2010/02/03/paramilitaries-heirs/new-face-violence-colombia>.

49. Colombia has belonged to the Organization of American States since it ratified the OAS Charter in 1951. It was one of the early states to deepen its commitment to protecting human rights through the OAS by ratifying the American Convention on Human Rights in 1973. However, it did not accept the jurisdiction of the Inter-American Court until 1985, six years after the Convention came into effect and the first slate of judges took office. *American Convention on Human Rights, Signatories and Ratifications*, OAS, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (last visited Mar. 30, 2018).

50. Caballero-Delgado & Santana v. Colombia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 31 (Jan. 29, 1997).

51. *Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270 (Nov. 20, 2013).

opening a preliminary examination.<sup>52</sup> The preliminary examination covers the crimes that fall within the ICC's jurisdiction and the status of domestic proceedings.<sup>53</sup> Twelve years on, Colombia remains under preliminary examination.

In addition to the increased oversight of the ICC, the 2010s ushered in a new approach to forging peace in Colombia. Even though Juan Manuel Santos won the 2010 presidential election with the promise of continuing Uribe's security policy, as soon as he assumed office he started to initiate a peace process with the FARC.<sup>54</sup> By July 2012, Congress approved the Legal Framework for Peace (Marco Jurídico para la Paz, "MJP"), a law that would facilitate the demobilization of the guerrilla groups in a peace process.<sup>55</sup>

After multiple rounds of negotiations, the Government and the FARC finally arrived at an agreement, which they signed in Havana, Cuba, on August 25, 2016. While the agreement was widely lauded as being able to bring the long-running Colombian conflict to an end, the Colombian public was more skeptical. In a plebiscite on October 2, 2016, the public narrowly rejected the peace deal.<sup>56</sup> The reasons the plebiscite failed are manifold, including, but not limited to, concerns that the agreement did not sufficiently address narco-trafficking, critiques that the deal would increase taxes, allegations that the deal put the government in the position of negotiating and aligning with terrorists, concerns about the overreach of international actors, and the possibility of human rights perpetrators going unpunished.<sup>57</sup>

After a long list of revisions—reportedly numbering around 500—the Colombian Senate approved a revised version of the agreement in a 75-0 vote. Former president Uribe's *Centro Democrático* party abstained in the vot-

52. See OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, SITUATION IN COLOMBIA 2 (2012), <https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>.

53. *Id.* at 2–4.

54. See *Así se llegó al acercamiento con las Farc* [This is how the rapprochement with the Farc took place], *El Tiempo* (Sept. 1, 2012), <http://www.eltiempo.com/archivo/documento/CMS-12186341>.

55. See *Congreso de Colombia aprueba reforma para eventual diálogo con guerrilleros* [Colombian Congress Approves Reform for Eventual Dialogue with Guerrillas], *NOTICIAS24* (June 14, 2012), <http://www.noticias24.com/internacionales/noticia/38963/colombia-aprueba-reforma-para-eventual-proceso-de-paz-con-la-guerrilla/>.

56. See Jorge Humberto Botero, Juan Carlos Henao, María Victoria Llorente, Diego Martínez Castillo & Marta Ruíz, *¿Qué cambios presenta este nuevo acuerdo de paz?* [What Changes Does the New Peace Agreement Present?], *PUBLICACIONES SEMANA S.A.* (Nov. 16, 2016), <http://www.semana.com/nacion/multimedia/nuevo-acuerdo-de-paz-con-las-farc-que-representa/505649>.

57. See María Fernanda González, *La «posverdad» en el plebiscito por la paz en Colombia* [The “post-truth” in the plebiscite for peace in Colombia], 269 *NUEVA SOCIEDAD* [New Society] 114 (2017); Carmen Magallón, *La paz en Colombia: decepción, controversia y esperanza* [Peace in Colombia: disappointment, controversy and hope], 70 *CULTURA DE PAZ* 4 (2016); Luis Alberto Restrepo & Socorro Ramírez, *Colombia: sorpresas y sobresaltos de la paz* [Colombia: Surprises and Fears of Peace], 266 *NUEVA SOCIEDAD* [New Society] 129 (2016); *Por qué ganó el No* [Why ‘No’ Won], *LA SEMANA* (Oct. 3, 2016), <http://www.semana.com/nacion/articulo/por-que-gano-el-no-en-el-plebiscito-por-la-paz-2016/496636>; *¿Por qué ganó el NO en el plebiscito?* [Why did NO Win the Plebiscite?], *EL ESPECTADOR* (Oct. 12, 2016), <http://colombia2020.elespectador.com/opinion/por-que-gano-el-no-en-el-plebiscito>.

ing.<sup>58</sup> The final accord is the product of four years of negotiations.<sup>59</sup> By the time of congressional approval, Colombians had lived for five decades under the shadow of the conflict. The government had negotiated three prior significant peace agreements and both the ICC and the Inter-American Court have maintained formal jurisdiction in Colombia for many years. The hope, of course, is that this most recent agreement, forged in a highly legalized and judicialized world, will be the one that—finally—brings the conflict to an end.

### B. Salient Features of the Colombian Case

The Colombia peace process serves as a significant case study for the study of international courts for several reasons. In particular, Colombia could be considered a best-case scenario for international law. It is the first state to forge peace under the shadow of two active international courts focused on criminal accountability. Further, Colombia has more stable institutions and a stronger domestic judiciary than any other situation before the ICC.<sup>60</sup> It is a highly judicialized society, where political disputes are often resolved using the language and institutions of law.<sup>61</sup> This means that the locus of decision-making about rights happens in the courts, as well as the legislature or executive and, accordingly, legislative and political actors have started to adopt the judiciary's way of thinking. Finally, Colombia's legal system is uniquely open to international law, even by Latin American standards: human rights treaties and jurisprudence are self-executing and often carry constitutional rank.<sup>62</sup> The case thus shows international law at its most influential, making all the more significant the finding that the courts worked in a nuanced manner and adapted their positions in light of arguments made at the domestic level.

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58. See Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera [Final Accord for the Termination of the Conflict and the Construction of a Stable and Lasting Peace], signed Nov. 24, 2016, Alto Comisionado Para La Paz, <http://www.altocomisionadopalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>; Tomás Betín, *Senado vota sí a la referendación del nuevo Acuerdo de Paz con las Farc* [Senate Votes 'Yes' to Ratification of New Peace Agreement with the Farc], EL HERALDO (Nov. 29, 2016), <https://www.elheraldo.co/colombia/senado-vota-si-la-referendacion-del-nuevo-acuerdo-de-paz-con-las-farc-306959>; Brillith Obregón Rollón, *Farc y Gobierno llegan a nuevo acuerdo de paz con ajustes* [FARC and Government reach new Peace Agreement with Revisions], EL HERALDO (Nov. 13, 2016), <https://www.elheraldo.co/colombia/farc-y-gobierno-llegan-nuevo-acuerdo-de-paz-con-ajustes-301681>.

59. Obregón Rollón, *supra* note 58.

60. Most of the ICC's active cases are in African states experiencing mass violence. *Situations Under Review*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Mar. 3, 2018) (listing all the ICC's cases and situations).

61. Torbjörn Vallinder, *When the Courts Go Marching In*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 13, 13 (C. NEAL TATE & TORBJÖRN VALLINDER EDS., 1995) (explaining the concept of judicialization).

62. Rodrigo Uprimny, *El Bloque de Constitucionalidad en Colombia: un análisis jurisprudencial y un ensayo de sistematización doctrinal* [The Constitutionality Block in Colombia: a Jurisprudential Analysis and an Essay on Doctrinal Systematization], DEJUSTICIA (2005), [https://www.dejusticia.org/wp-content/uploads/2017/04/fi\\_name\\_recurso\\_46.pdf](https://www.dejusticia.org/wp-content/uploads/2017/04/fi_name_recurso_46.pdf).

The case is also significant because in Colombia the ICC and the Inter-American Court exert influence through what the aforementioned call “the shadow of the law”: neither has an active case regarding the peace process, yet both loom large in the domestic debate over peace.<sup>63</sup> Few studies have focused on this “shadow effect” of international courts in the peace context. Yet it may be that “shadow effects” are the most important way courts exert influence. The threat of future litigation as well as the imprint of prior litigation that has already shaped institutional processes and normative understandings mean that courts exert power over domestic decision-making even without issuing a judgment.<sup>64</sup> Indeed, the number of situations under preliminary examination by the ICC is equal to the number of cases with active investigations.<sup>65</sup> In the Inter-American context, the Court’s prior jurisprudence has become an important tool for domestic actors seeking to shape government policy and domestic litigation, without their ever having to file an international claim.

### C. *Methods*

This Article leverages a range of data to gain insight on how international judicialization has affected both the process of peacemaking (Part III) as well as the outcomes of these peacemaking processes (Part IV). In Part III, we conducted a content analysis of a wide range of primary source documents, including the Colombian Constitutional Court (“CCC”) rulings regarding the JPL and the MJP; all of the Colombian congressional gazettes for both the JPL and MJP; all statements and interventions coming from the Higher Commissioner for Peace; all of the joint Government/FARC-EP statements coming from the current negotiation roundtable, known as *La Mesa de Conversaciones*; and all FARC statements about the Mesa. For each of these documents, we searched for the terms (in Spanish) “International Criminal Court,” “Inter-American Court of Human Rights,” “Inter-American Commission on Human Rights,” “Inter-American Human Rights System,” “The Constitutional Court of Colombia” and “accountability.”<sup>66</sup> Through

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63. See generally Mnookin & Kornhauser, *supra* note 36 (introducing the concept of the “shadow of the law”). ICC case studies have focused on active cases, stressing, for example, how the manner in which a case arrives at the ICC shapes the politics of its prosecution of that case. See, e.g., WEGNER, *supra* note 35, at 1–13; Bosco, *supra* note 37; KERSTEN, *supra* note 19, at 5; Nouwen & Werner, *supra* note 34, at 942. Similarly, most Inter-American Court studies focus on litigation, judgments, or their aftermath.

64. See Karen J. Alter, Laurence R. Helfer, & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 L. & Contemp. Probs. 1, 36 (2016) (describing the different types of authority that courts can have, even outside the scope of a particular case).

65. *Situations Under Review*, INT’L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Mar. 3, 2018) (listing all the ICC’s cases and situations).

66. As “accountability” does not have a direct translation in Spanish, we searched for “responsabilidad” and related iterations. For the FARC-EP and Mesa de Conversaciones data, we conducted our keyword search through a simple search-and-find within the PDF. For the Congressional and High Commissioner for Peace data, we conducted the search and subsequent content analysis by hand. This data will be made available on one of the author’s webpages.

this analysis, we examined how international judicialization shaped domestic actors' understanding of accountability as an international norm and as a firm legal obligation and how they leveraged that understanding in their domestic political and judicial debates.

In Part IV, we use content analysis of four peace accords in order to discern the effects of international judicialization on peace agreements over time. Specifically, we juxtapose the terms of the current peace with those of three peace accords or peace laws that were passed in the three decades prior, engaging in a structured, over-time comparison.<sup>67</sup> While the prior peace accords were similar in terms of the actors and issues involved, an important difference across time is the substance of international law as well as the growing involvement of international institutions in the Colombian conflict, starting with the Inter-American Commission and Court. We are particularly attentive to the ways in which state actors respond to the different tribunals and look for “smoking guns,” or pieces of evidence that corroborate or challenge our arguments about the role of the tribunals' mechanisms of influence across different actors.<sup>68</sup>

### III. THE WORLD'S MOST JUDICIALIZED PEACE TALKS

Colombia is the first state to resolve an armed conflict while under the jurisdiction of two active international courts concerned with the terms of the peace. This Part reveals how deeply the courts penetrated each aspect of the process. The legal norms these courts protect and the prospect of their eventual judgment on the peace accord have been debated by actors from across the political spectrum, in many different arenas, throughout the peace negotiation.

There are three main paths by which the courts engaged with, and were engaged by, domestic actors. The first path is top-down: international courts sent signals to domestic audiences about their expectations regarding the peace process and the peace accords. The second path, shadow effects, refers to how state and non-state actors bargained “in the shadow of the law,” using treaties and jurisprudence to provide political cover and legitimate their policy preferences, while deploying the threat of litigation to diminish those of their opponents. The third path is bottom-up: domestic actors responded to—and pushed back against—the courts, often curbing or re-channeling the courts' influence over the peace process. Domestic actors used diplomatic channels and public statements to persuade the courts to their view and to test how far they could go before they triggered additional intervention by the courts. Through these three paths, the peace debate became thoroughly judicialized. The language, concepts, and institutions of

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67. The methods for the comparison and selection of peace processes is explained further in Part IV.

68. See generally James Mahoney, *The Logic of Process Tracing Tests in the Social Sciences*, 41 SOC. METHODS & RES. 570 (2012).



international law have been constant referents, shaping how options are framed and discussed, and what is emphasized as well as what is left unsaid.

### A. *The Courts Signal their Positions*

Neither the Inter-American Court nor the ICC have adjudicated a case directly arising from the current Colombian peace process. But that has not stopped either court from engaging in a top-down manner by signaling its position on particular issues. In the case of the ICC, it is important to recall that the ICC is not only a court. It is also a prosecutor, and it has interpreted its mandate to allow the OTP to pressure states to impose criminal accountability for Rome Statute crimes through proactive or positive complementarity. Thus, the ICC has acted not only as a court that casts a shadow through its settled jurisprudence, but also as an actor directly engaged in trying to influence the peace bargaining process. By contrast, the Inter-American Court has acted in a more court-like manner; it cannot simply proffer its opinions on Colombian debates and policies outside an active case. The Inter-American Court did, however, have the opportunity to pronounce itself in a case against El Salvador in 2013 with facts and issues comparable to those unfolding in Colombia.<sup>69</sup> Further, since the peace process began, it has issued 17 judgments and compliance reports on cases having to do with Colombia's internal conflict, providing powerful signals on how it might adjudicate issues arising under the peace accord.

#### 1. *The ICC Prosecutor's Direct Interventions*

The ICC has mainly signaled its intent regarding Colombia via the Prosecutor's direct interventions, site visits, communiqués and reports. Colombia ratified the Rome Statute in 2002 and on March 2, 2005, ICC Chief Prosecutor Luis Moreno Ocampo, informed Colombia that his office would be conducting a preliminary examination of the ongoing conflict.<sup>70</sup> Technically speaking, this refers to a first stage in ICC process, during which the OTP analyzes whether or not the ICC has jurisdiction (a crime listed in the Rome Statute appears to have been committed by a national of a State Party or on the territory of a State Party, after July 1, 2002); whether an investigation would be admissible (a national court is not already dealing with it); and whether or not an investigation would be in the interests of justice and of the victims (there is some good reason not to take on this situation).<sup>71</sup> In Colombia, however, the ICC has transformed the preliminary examination from a threshold decision into a platform for pressuring the state to comply

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69. *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 264 (Aug. 19, 2013).

70. *Colombia Preliminary Examination*, INT'L CRIM. CT., <https://www.icc-cpi.int/colombia> (last visited Mar. 30, 2018).

71. See POLICY PAPER ON PRELIMINARY EXAMINATIONS, Int'l Crim. Ct., Off. of the Prosecutor (2013).

with its obligations to hold actors criminally accountable. Despite its name, the Colombian preliminary examination has lasted over a decade and shows no sign of ending. It has provided a stage for the ICC to exert influence without having an actual open criminal investigation. The OTP acts by issuing reports on the status of the preliminary examinations, by sending comunicués to the government, and by *in situ* visits through which it meets with different actors within the state and in civil society.<sup>72</sup> Meanwhile, so long as Colombia and the ICC maintain a good working relationship, these visits are an opportunity for the Government of Colombia to continue to delay any deeper ICC involvement.

After announcing the preliminary examination in 2005, the OTP's first important intervention was an in-country visit in 2007. Prosecutor Ocampo met with government officials, officials in the Prosecutor's Office and Supreme Court of Justice, and members of Colombian civil society. Of particular interest to Ocampo was the Justice and Peace Law, the 2005 Colombian law that offered paramilitary actors reduced sentences in exchange for arms and truth-telling. During his visit, Ocampo announced that "[w]ith the International Criminal Court, there is a new law under which impunity is no longer an option. Either the national courts must [conduct trials] or we will."<sup>73</sup> Ocampo's call for individual accountability established the basic parameters of the ICC's influence in Colombia, highlighting the demand for individual accountability and seemingly removing amnesty from the government's arsenal of negotiating tools.

Ocampo returned to Colombia in 2008 for more interviews and site visits, including attending an exhumation. This time he focused on what was known as the "parapolitics" scandal, a series of revelations regarding the financial and political ties between political elites, including members of Congress and paramilitary groups. Ocampo also focused on the extradition of 15 paramilitary members to the United States, where they would be tried on drug charges but might otherwise escape accountability for any atrocity crimes.<sup>74</sup> Both cases spoke to the core issues of the government's willingness to prosecute Rome Statute crimes: the former because it brought into question the government's commitment to prosecuting responsible perpetrators

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72. *The Office of the Prosecutor*, Int'l Crim. Ct., <https://www.icc-cpi.int/about/otp> (last visited Feb. 17, 2018). See also Urueña, *supra* note 37 (providing a nuanced account of the preliminary examination).

73. Press Release, Office of the Prosecutor, International Criminal Court, ICC Prosecutor Visits Colombia (Aug. 21, 2008), <https://www.icc-cpi.int/Pages/item.aspx?name=icc%20prosecutor%20visits%20colombia>.

74. Ocampo wrote a letter expressing concern about this issue to Colombia's ambassador in The Hague. Luis Moreno Ocampo, Carta del Fiscal de la CPI, Luis Moreno Ocampo, dirigida al Embajador colombiano acreditado ante la CPI, Francisco José Llereda [Letter from the ICC Prosecutor, Luis Moreno Ocampo to the Colombian Ambassador to the ICC, Francisco José Llereda] (*quoted in Carta enviada por el fiscal Moreno de la CPI*, [Letter sent by Prosecutor Ocampo of the ICC], LA SEMANA Aug. 16, 2008, <https://www.elspectador.com/impreso/politica/articuloimpreso-carta-enviada-el-fiscal-moreno-de-cpi> (last visited Apr. 6, 2018)). See also Corte Penal Internacional ya indaga sobre 'falsos positivos', 'parapolítica' y financiación a Farc, EL TIEMPO, Oct. 10, 2009, <http://www.eltiempo.com/archivo/documento/CMS-6325649> (discussing extradition of paramilitary leaders to the United States).

from across the political landscape, and the latter because it challenged the government's commitment to denying immunity, both *de jure* and *de facto*.<sup>75</sup>

In 2012, just as the peace process with the FARC began to unfold, the OTP issued its first interim report on the situation in Colombia.<sup>76</sup> The extensive report contained both good and bad news for the Colombian government. It commended Colombia for complying with all of the OTP's requests for information with respect to both national proceedings and crimes under the ICC's jurisdiction.<sup>77</sup> At the same time, the report noted that there was sufficient information to suggest that atrocity crimes had taken place. The report also indicated that a wide range of actors, including the FARC and the ELN and the Colombia armed forces had perpetrated these violations.<sup>78</sup> The implications were two-fold. On the one hand, it meant that the government forces must face justice alongside the guerrilla fighters. The ICC's calls for criminal accountability also meant, however, that the guerrillas would have little incentive to negotiate, as doing so would likely mean individual accountability for their leadership.

The report became an important intervention in the peace process. The report's timing thrust the ICC in the limelight, and helped it become a major part of the 2012 negotiations of the MJP.<sup>79</sup> By identifying five areas of particular interest as the preliminary examinations moved ahead, the interim report helped to shape the public debate about the peace process.<sup>80</sup> Those opposed to criminal prosecution began to paint the ICC as a major spoiler to the formulation and implementation of a peace process, while those opposed to the peace process used the ICC to criticize and constrain the Santos initiative, as we discuss below. The OTP thereafter became more active in its engagement in Colombia. In April 2013, the OTP traveled to Bogotá for a five-day visit, which included meetings with officials across all branches of government, as well as members of civil society. The OTP team focused on the five areas outlined in the 2012 report and gathered additional information on the Attorney General's plans for prioritizing cases. The OTP publicly noted that the government facilitated the visit, and cooperated fully with the ICC's requests, suggesting that Colombia was committed to a strategy of cooperation, even as the ICC's involvement moved closer to the core issues of a peace settlement.<sup>81</sup>

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75. See generally AMANDA LYONS & MICHAEL REED-HURTADO, INT'L CTR. FOR TRANSITIONAL JUST., COLOMBIA: IMPACT OF THE ROME STATUTE AND THE INTERNATIONAL CRIMINAL COURT (2010).

76. See generally *id.*

77. *Id.* at 4–5, 7.

78. *Id.* at 2–5.

79. See Urueña, *supra* note 37, at 104.

80. The five areas of interest include: 1) the Legal Framework for Peace; 2) the emergence of new illegal armed groups; 3) proceedings related to forced displacement; 4) proceedings related to sexual crimes; and 5) the false positive cases. INT'L CRIM. CT., OFF. OF THE PROSECUTOR, *supra* note 71.

81. Press Release, Office of the Prosecutor, International Criminal Court, ICC Office of the Prosecutor Concludes Visit to Colombia (Apr. 19, 2013), <https://www.icc-cpi.int/Pages/item.aspx?name=pr900&ln=en>.

Not long after, the OTP experimented with yet a new form of intervention which quickly backfired. In July and August of 2013, ICC chief prosecutor Fatou Bensouda sent two confidential letters to the president of the Colombian Constitutional Court, which was in the midst of reviewing Santos' Framework for Peace Law.<sup>82</sup> In her letters, Bensouda expressed the OTP's position on the very matters that were before the Colombian Constitutional Court (CCC): whether the government could forego punishment after a genuine process, and whether it could prioritize cases. The letters made clear that while some inconsistencies with the judicial process were understandable, any moves that would indicate that the peace process would include amnesties for those most responsible for the worst violations would be reason for the ICC to intervene. The letters were leaked to the media, creating a public uproar and heightening apprehension about the ICC's role in the Colombia peace process.<sup>83</sup> The letters prompted Bensouda and President Santos to meet in New York in September 2013, and that November, in a mission organized by the Colombian Attorney General's Office and the news magazine, *Semana*, the OTP participated in a conference on the theme of "Strengthening the Attorney General's Office on Transitional Justice."<sup>84</sup> In 2014, the OTP conducted another four-day visit to Colombia, meeting with a wide range of stakeholders from the government, international organizations, and civil society.<sup>85</sup>

In early March 2015, the OTP conducted yet another visit to Colombia, meeting with members of the executive, judiciary, civil society, and international organizations.<sup>86</sup> The OTP team also met with members of Congress and the Inspector General of the Nation, notably at their request. During this visit, the vice director issued a statement that revealed that the OTP had changed its position on the questions of prioritization of cases as expressed in the letters to the CCC.<sup>87</sup> Indeed, his statements seemingly shaped the drafting of the final accord (see below). The OTP's public statement on the final accord in September commended the Colombian government for its

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82. Letter from Fatou Bensouda, ICC Prosecutor, to Jorge Iván Palacio Palacio, President of the Colombian Constitutional Court, Ref. 2013/025/FB/JCCD-evdu (July 26, 2013); Letter from Fatou Bensouda, ICC Prosecutor, to Jorge Iván Palacio Palacio, President of the Colombian Constitutional Court, Ref. 2013/028/FB/JCCD-pmdu (Aug. 7, 2013). See also *Una 'Carta Bomba'* [A 'Letter Bomb'], SEMANA (Aug. 17, 2013, 7:00 AM), [www.semana.com/nacion/articulo/una-carta-bomba/354430-3](http://www.semana.com/nacion/articulo/una-carta-bomba/354430-3) (summarizing both letters).

83. Cf. Rodrigo Uprimny, *¿Cartas bombas?* [Letter Bombs?], EL ESPECTADOR (Aug. 24, 2013, 11:00 PM), <http://www.elespectador.com/opinion/cartas-bombas-columna-442193>.

84. *Se desarrolla primer Congreso Internacional de Fortalecimiento de la Fiscalía en Justicia Transicional* [The First International Congress on the Strengthening of the Attorney General's Office on Transitional Justice Begins], FISCALIA GENERAL DE LA REPUBLICA (Nov. 2013), <https://www.fiscalia.gov.ec/se-desarrolla-primer-congreso-internacional-de-fortalecimiento-de-la-fiscalia-en-justicia-transicional/>

85. INT'L CRIM. CT., OFF. OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2014 ¶ 128 (Dec. 2, 2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>.

86. Press Release, Office of the Prosecutor, International Criminal Court, The Office of the Prosecutor Concludes Mission to Colombia (Mar. 2, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1090>.

87. *Id.*

achievement. As Prosecutor Bensouda wrote: “I have supported Colombia’s efforts to bring an end to the decades-long armed conflict in line with its obligations under the Rome Statute since the beginning of the negotiations. I will continue to do so during the implementation phase in the same spirit.”<sup>88</sup>

Indeed, the OTP has been less sanguine in its post Peace Accord statements. In an opinion piece in January of 2017, Fatou Bensouda “noted with some concern” that the final articulation of command control in the Peace Accord omitted a reference to the Rome Statute definition.<sup>89</sup> In October, the ICC submitted a brief to the CCC in which it made several arguments against the two congressional laws that implement the Peace Accord.<sup>90</sup> The preliminary examination, in other words, continues, and the OTP will continue to opine, ever signaling its position on matters of liability.

## 2. *The Inter-American Court’s Signals*

The Inter-American Court has not had the opportunity to adjudicate a case related to the peace process. Indeed, it probably will not do so for many years.<sup>91</sup> There is no direct individual petition to the Inter-American Court, and thus cases must begin at the Inter-American Commission, which first attempts to reach a friendly settlement between the state and the victims. Because of this, the court lags almost ten years behind current events.

Nonetheless, courts have ways of staying relevant. In 2013, the Inter-American Court issued a judgment on El Salvador’s 1987 amnesty decree, as Colombia was in the midst of its amnesty debates.<sup>92</sup> Many viewed this as a test case for the Colombian peace accord, and also, perhaps, for the Inter-American Court.<sup>93</sup> The Inter-American Court has issued a series of cases

88. Statement, Fatou Bensouda, ICC Prosecutor, On the Conclusion of the Peace Negotiations Between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army (Sept. 1, 2016), <https://www.icc-cpi.int/legalAidConsultations?name=160901-otp-stat-colombia>.

89. See Fatou Bensouda, *El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad* [Colombia’s Peace Agreement Demands Respect, but also Responsibility], SEMANA (Jan. 21, 2017, 12:00 AM), <http://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820> (translated by authors).

90. See *Escrito De Amicus Curiae De La Fiscal De La Corte Penal Internacional Sobre La Jurisdicción Especial Para La Paz* [Writ of Amicus Curiae of the Prosecutor of the ICC on the Special Jurisdiction for Peace], RPZ-000000 and RPZ-003 (Oct. 18, 2017), <http://cr00.epimg.net/descargables/2017/10/21/17135b6061c7a5066ea86fe7e37ce26a.pdf?int=masinfo>.

91. See Sierra Porto, *La Corte no es competente para hacer observaciones sobre el proceso de paz: Humberto Sierra* [The Court is Not Able to Comment on the Peace Process: Humberto Sierra], EL COLOMBIANO (Aug. 17, 2015), <http://www.elcolombiano.com/colombia/paz-y-derechos-humanos/cidh-no-se-metiera-en-el-proceso-de-paz-por-ahora-h-sierra-porto-BX2550377> (interview in which President of Court explains that the Court cannot step in until the State Party has tried to resolve an issue on its own).

92. *The Massacres of El Mozote and Nearby Places v. El Salvador*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 264 (Aug. 19, 2013). For a discussion of the Inter-American System’s engagement prior to 2013, and the differences that at first arose with the ICC’s engagement, see Urueña, *supra* note 37, at 111–19.

93. See, e.g., Daniel Salgar Antolínez, *¿Cómo evitar la impunidad? Lecciones de El Salvador para Colombia sobre las amnistías* [How can one avoid impunity? Lessons on Amnesty from El Salvador for Colombia], EL

delineating the scope of the state's duty to prosecute fundamental human rights violations. Starting in 2001, with the *Barrios Altos v. Peru* judgment, the Inter-American Court developed a hardline stance through five judgments that many argued "outlawed" amnesty decrees.<sup>94</sup> Indeed, a group of scholars began to criticize the Inter-American Court's amnesty jurisprudence as "punitivist" and lacking sensitivity to variation in domestic politics underlying amnesty decrees.<sup>95</sup> The Inter-American Court seemingly was listening. Even as the ICC prosecutor was citing the Inter-American Court's jurisprudence as demanding punishment in every situation,<sup>96</sup> the Inter-American Court had the opportunity to adjudicate peace forged in the midst of an internal armed conflict in El Salvador. The President of the Court, Diego Garcia Sayan, joined by four of the six other judges, issued a concurring opinion that seemed custom-built for the Colombian peace initiative:

Thus, in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed.<sup>97</sup>

Garcia Sayan's concurrence is the only international court judgment which the Final Accord cites.

The Inter-American Court has also sent signals through its Colombia jurisprudence in cases that arise from the internal conflict, although not directly related to the current peace process. Since the most recent peace negotiation started in 2012, the Court has entered seven judgments against Colombia that address the internal conflict,<sup>98</sup> and it has issued ten compliance reports that review Colombia's implementation of judgments on issues

ESPECTADOR (July 5, 2016), <http://colombia2020.elespectador.com/justicia/lecciones-de-el-salvador-para-colombia-sobre-las-amnistias>.

94. *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

95. *See Acuerdos del cese al fuego entre 1984 y 1986 con las FARC, el M-19, el EPL y la ADO [Ceasefire Agreements between 1984 and 1986 with the FARC, M-19, EPL, and ADO]*, VERDAD ABIERTA (Nov. 18, 2012), <http://www.verdadabierta.com/procesos-de-paz/farc/4292-acuerdos-del-cese-al-fuego-entre-1984-y-1986-con-las-farc-el-m-19-el-epl-y-la-ado>.

96. *See* Letter from Fatou Bensouda, ICC Prosecutor, to Jorge Iván Palacio Palacio, President of the Colombian Constitutional Court, Ref. 2013/025/FB/JCCD-evdu (July 26, 2013).

97. *Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 38 (Oct. 25, 2012).

98. *Vereda La Esperanza v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 341 (Aug. 31, 2017); *Yarce et al. v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 325 (Nov. 22, 2016); *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 287 (Nov. 14, 2014); *Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270 (Nov. 20, 2013); *Massacre of Santo Domingo v. Colombia*, Preliminary Objections, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 259 (Nov. 30, 2012); *Vélez Restrepo and Family v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 248 (Sept. 3, 2012).

arising from the internal conflict.<sup>99</sup> A 2013 judgment carefully evaluates the work of the Justice and Peace jurisdictions in response to forced displacement and other organized attacks against civilians that took place in an Afro-descendant community in the department of Choco in 1997.<sup>100</sup> While it concedes that the Justice and Peace law itself is not in violation of the Convention, the Court asserts its power to monitor the prosecutions that fall under its jurisdiction until they reach conclusion. In August of 2017, just as the government is trying to implement the Peace Accord and create the new Jurisdiction for the Peace, the Inter-American Court issued a judgment which discusses the relationship of Peace and Justice courts and the regular judiciary, signaling problems that may recur in relation between new peace jurisdiction and regular judiciary.<sup>101</sup>

Through the ten Colombia compliance reports, the Court has also signaled to Colombia the priority that it places on victims' reparations. In one compliance report, for example, it calls for a private hearing with the government of Colombia to review its implementation of orders to provide victims with medical and psychological care in nine separate cases.<sup>102</sup>

It might be argued that these were not "signals," in the sense that the Inter-American Court was not ruling with the Colombian peace accord in sight, but rather only the facts of the case before it. Intended or not, how-

99. Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 10, 2017), [http://www.corteidh.or.cr/docs/supervisiones/escue\\_22\\_11\\_16.pdf](http://www.corteidh.or.cr/docs/supervisiones/escue_22_11_16.pdf); Escué Zapata v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 22, 2016), [http://www.corteidh.or.cr/docs/supervisiones/escue\\_22\\_11\\_16.pdf](http://www.corteidh.or.cr/docs/supervisiones/escue_22_11_16.pdf); Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Oct. 20, 2016), [http://www.corteidh.or.cr/docs/supervisiones/operaciongenesis\\_20\\_10\\_16.pdf](http://www.corteidh.or.cr/docs/supervisiones/operaciongenesis_20_10_16.pdf); 19 Traders v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. June 23, 2016), [http://www.corteidh.or.cr/docs/supervisiones/19comerciantes\\_23\\_06\\_16.pdf](http://www.corteidh.or.cr/docs/supervisiones/19comerciantes_23_06_16.pdf); Rochela Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Aug. 31, 2015), [http://www.corteidh.or.cr/docs/supervisiones/rochela\\_31\\_08\\_15.pdf](http://www.corteidh.or.cr/docs/supervisiones/rochela_31_08_15.pdf); Ituango Massacres v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. May 21, 2013), [http://www.corteidh.or.cr/docs/supervisiones/ituango\\_21\\_05\\_13\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/ituango_21_05_13_ing.pdf); Mampiripán Massacre v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Nov. 23, 2012), [http://www.corteidh.or.cr/docs/supervisiones/mapiripan\\_23\\_11\\_12.pdf](http://www.corteidh.or.cr/docs/supervisiones/mapiripan_23_11_12.pdf); 19 Traders v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. June 26, 2012), [http://www.corteidh.or.cr/docs/supervisiones/comerciantes\\_26\\_06\\_12\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/comerciantes_26_06_12_ing.pdf); Caballero Delgado & Santana v. Colombia, Monitoring Compliance with Judgment, Order of the Court (Inter-Am. Ct. H.R. Feb. 27, 2012), [http://www.corteidh.or.cr/docs/supervisiones/caballero\\_27\\_02\\_12%20ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/caballero_27_02_12%20ing.pdf); Monitoring Compliance with the Measure of Reparation Concerning the Medical and Psychological Attention Ordered in Nine Colombian Cases, Notice of a Private Hearing, Order of the President (Inter-Am. Ct. H.R. Feb. 8, 2012), [http://www.corteidh.or.cr/docs/supervisiones/comerciantes\\_08\\_02\\_12\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/comerciantes_08_02_12_ing.pdf).

100. Afro-descendant Communities Displaced from the Cacarica River Basin, Inter-Am. Ct. H.R. (ser. C) No. 270.

101. Vereda Esperanza, Inter-Am. Ct. H.R. (ser. C) No. 341.

102. Monitoring Compliance with the Measure of Reparation Concerning the Medical and Psychological Attention Ordered in Nine Colombian Cases, Notice of a Private Hearing, Order of the President (Inter-Am. Ct. H.R. Feb. 8, 2012), [http://www.corteidh.or.cr/docs/supervisiones/comerciantes\\_08\\_02\\_12\\_ing.pdf](http://www.corteidh.or.cr/docs/supervisiones/comerciantes_08_02_12_ing.pdf).

ever, these reports were a timely indication of the Court's position that domestic actors then used to advance their own positions in domestic politics.

Finally, it should be emphasized that even though the Inter-American Court is a more constrained actor than the ICC's OTP and has not had the opportunity to directly review the peace process, it has arguably played a constitutive role in the way the discussion has unfolded. The Inter-American Court issued its first judgment against Colombia in 1997, and has since issued 17 more contentious judgments. Almost all of these have examined violations that took place in the context of the internal conflict. In all but the first judgment, the Court demanded that the state conduct a criminal investigation for the crimes, investigating all those responsible and, where criminal liability is found, imposing punishment. Further the Court has developed a victim-centered reparation regime which Colombia has adopted in its own domestic practice. It will be argued below that the Inter-American Court's jurisprudence and the American Convention have been frequently cited to in domestic debates. The Court has also played an important role over the years by shaping the practice and approach Colombians take to reparations, investigation and truth-finding. In this way, the Inter-American Court's hand is not visible in the debates or through active interventions but rather has already shaped the approach. The Inter-American Court's interventions have shaped the way Colombia issues reparations and deals with the violence of the conflict. In this way, it might be said that the effect of the Inter-American Court was always already in place, shaping the way Colombians and their institutions deal with and discuss these questions.

### *B. Domestic Actors Bargain "in the Shadow of the Law"*

The influence of courts is not limited to their direct intervention in particular cases. At times, an even more powerful way in which they work is by providing discursive resources for political actors to frame and advance their political agendas. Such was the case in Colombia. International law and the courts' intentions were used—and usurped—within the domestic political and judicial debate over peace, imbuing those debates within the narrative of law and judicialization. Moreover, the courts identified a set of options, particularly amnesties, as unacceptable, meaning that those options could result in international adjudication. This externally imposed notion of acceptability becomes an important tool in domestic negotiations, as actors deploy the threat of international adjudication to shape and limit the policy options available to their opponents.

This section illustrates how Colombian domestic actors used the courts' authority to advance their own agendas as they debated the terms of peace. Ostensibly, international adjudicative commitments are a way for political elites to bind their hands and make credible commitments about their actions. At the same time, international judicialization and international courts' jurisprudence can provide political cover and legitimation for a di-



verse array of actors' domestic policy preferences as they bargain in the shadow of the international courts.<sup>103</sup> The section begins with political actors, showing how both congressional debates and executive discourse frequently refer to international law and courts as a way of self-legitimation, as well as of constraining their opponents. It then turns to the judicial sphere. Many peace-related laws have come before the CCC. The debates that took place before the Court, as well its judgments, are also rife with citations to international law and courts, showing that overall, these international courts were viewed domestically as important and legitimate authorities.

1. *Domestic Actors in the Political Arena: Invoking International Law to Restrain Political Opponents*

The Colombian Congress understood and leveraged international law and international judicialization in legislative debates, rendering international law an important tool in their arsenal for shaping peace.<sup>104</sup> Content analysis of the Congressional Gazette, the official record-keeping of debates and floor speeches in the Colombian Congress, reveals that international law and adjudication were regularly referenced on the floor of Congress, with 36 references during the 2005 debates over the Justice and Peace Law of 2005 (JPL) and 56 references during the debates over the Marco Jurídico de la Paz (MJP).<sup>105</sup> Congresspersons used the language of law and the constraints imposed by Colombia's international legal and judicial commitments to shape the contours of both the JPL, and the MJP.

The ICC was still in its infancy when Colombia drafted and later passed the JPL in 2005. As the law was debated in congress, legislators noted that international law has been modernized and globalized since previous peace talks, and that Colombia must abide by the new international legal landscape. Despite the general consensus for upholding Colombia's international commitments, however, there was significant and sustained debate about the implications of international law and adjudication for the JPL. Individual members of Congress used Colombia's international legal commitments as a way to define the limits of the JPL and to cast doubt on specific pieces of the JPL.

One such debate pertained to disagreement over which kinds of acts constituted crimes against humanity, and how those definitions related to the different parts of the JPL. In discussing the relationship between different categories of crimes and the JPL, Senator Oswaldo Darío Martínez

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103. See generally Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

104. The data used for this section are the archives of the Colombian Congress. The archives, and particularly, the *Congressional Gazette*, chronicle each and every floor speech and debate comment made during debate in both Houses and thus provide a rich well of nuanced information as to which members of Congress referenced international law and courts in their comments and the tenor of those references.

105. Content analysis is an evaluation of texts for particular key words and concepts.

Betancourt used the ICC as the differentiating factor in determining which alternative penalties might be acceptable.<sup>106</sup> The ICC, and not the legislature or executive, in other words, held ultimate authority to identify which acts constituted crimes against humanity—as well as how those acts falling outside of the ICC's jurisdiction should be punished.

Senator Betancourt was not alone in using the ICC to limit the scope of what Congress could or could not determine with respect to the peace negotiations. In a speech on the Senate floor, Senator Jimmy Chamorro Cruz noted the range of the Rome Statute's requirements for identifying and trying crimes against humanity. He warned his fellow senators that the JPL law would violate at least three articles of the Rome Statute. He argued, "we are making it so [the ICC] can come and judge us, since we are not inclined to do it."<sup>107</sup>

This threat was a way to encourage other legislators to act and to push the executive on the issue of accountability, even if the threat of adjudication was not clearly outlined. Senator Héctor Helí Rojas Jiménez summed up the debate about what counted as crimes against humanity, and Congress's authority and responsibility to decide as such:

[I]f [Congress] is not capable of making a political decision, and pardons the whole world and falls in the hands of the ICC, then do transitional justice, but don't forget that within this transitional justice there needs to be a minimum of justice . . . [there are] things that we are not going to pardon, nor the international community or the international court.<sup>108</sup>

It was not just the ICC that figured in Congressional debates. Members of Congress also referenced the Inter-American Court and the consequence of running afoul of its jurisprudence. Senator Rafael Pardo Rueda noted in his discussion of the ICC and transitional justice processes in Colombia, ". . . the other component, which it is important that you take into account, which we are part of, is the Inter-American System for the Protection of Human Rights."<sup>109</sup> In discussing the Inter-American System, Senator Pardo Rueda asked, "What can these organs do? They can issue decisions that have jurisdiction over Colombian justice."<sup>110</sup> While the threats of international justice are not particularly specific or well developed, the underlying logic is clear: if Congress cannot agree to accountability in some form, Colombia becomes vulnerable to international judicial interference.

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106. Acta De Comisión 10 Del 11 De Abril De 2005, June 27, 2005, GACETA DEL CONGRESO [G. Cong.] t. 408, pp. 14–15.

107. G. Cong., t. 521, p. 31 (translation by authors).

108. *Id.* (translation by authors).

109. *Id.* at 29 (translation by authors).

110. *Id.* at 16 (translation by authors).

The debates over the Framework for Peace Law (MJP, or *Marco Jurídico para la Paz*) in 2012 similarly showcased the ways in which members of Congress were using international courts to limit each other's policy options, particularly in the context of partisan battles between the supporters of president Santos, and the opposition led by former President Uribe. The MJP debates also demonstrated members' growing sophistication in their knowledge of international courts. When the discussion about the MJP took place in Congress, the opposition bloc argued that the government and its majority in Congress were trying to impose a legal framework for impunity. Some argued that the Constitution provided a legal framework for peace and that it was not necessary to create another.<sup>111</sup> The opposition, comprised of a bevy of parties, largely, but not exclusively, aligned with supporters of former President Uribe, also insisted that there the MJP was incompatible with Colombia's commitments with international law.

Members of Congress from across the political spectrum also displayed a growing knowledge of international law and jurisdiction and showcased a willingness to walk right up to the line that would prompt international judicial intervention but never a willingness to cross it. The ammunition in these domestic debates were the disaggregated details of the MJP. For example, during the MJP debates, one key issue was the sentencing and imprisonment of perpetrators. According to the MJP, Congress—following the Executive's initiative—could authorize the suspension of criminal prosecution or the execution of sentences. According to Senators Rivera, Avellaneda and Gómez, the first from the Liberal Party, the second and third from the *Polo Democrático*, and the last from the Conservative Party, this was openly incompatible with the Rome Statute.<sup>112</sup> Along the same lines, critics of the MJP aligned with the position of Human Rights Watch and its director, José Miguel Vivanco. They both suggested that this feature (among others) of the MJP violated Colombia's constitutionality bloc and would leave the country exposed to the risk of an ICC intervention.<sup>113</sup>

Members of Congress, thus, used international adjudication to shape the debate around the peace process and to constrain each other. They were not, however, the only actors to do so. The High Commissioner for Peace, the executive actor charged with leading the peace negotiation, used the threat of international adjudication as a way to remove certain policy options from the table and to legitimate his proposals by noting precedent in international jurisprudence. The baseline argument from the High Commissioner's office was perhaps best summarized by the government's chief negotiator in Havana, Humberto de la Calle, who wrote, "we are in agreement that there

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111. G. Cong., t. 910, p. 10.

112. G. Cong., t. 45, pp. 31–34; G. Cong., t. 11, pp. 48–49.

113. G. Cong., t. 455, p. 13.

can't be peace above impunity."<sup>114</sup> In discussing the design of the MJP with respect to crimes against humanity, de la Calle said there will be no place for amnesties for those crimes that fall under the Rome Statute.<sup>115</sup> Similarly, in an interview with foreign correspondents, de la Calle answered a question about Colombia's international commitments:

Let me reiterate that the Government is fully aware of its commitments to the international community. Colombia participates in international organizations and has signed treaties that regulate these circumstances. . . We will find inspiration in the transitional justice process and. . . we will examine solutions. We will do it in a rigorous manner and in full compliance with our international obligations.<sup>116</sup>

While many of the statements about international law and jurisprudence coming from the Office of the High Commissioner of Peace were broadly in response to questions about and attacks on the MJP, the High Commissioner's Office also referenced Colombia's international legal commitments to shape its negotiating position with the FARC. For instance, when the FARC negotiating team advanced an idea for alternative sentencing and particular restricted movements, de la Calle responded: "We insist that there are interpretations from the FARC lawyer about the characteristics of the restriction of liberty that are unacceptable and below the minimums that the national and international community demand."<sup>117</sup> On the other hand, when the FARC agreed to turn over the names of others whom they killed, de la Calle also framed this in terms of international obligations. Turning over the names, he said, "is a humanitarian gesture, an important gesture that refers to their obligations under international humanitarian law."<sup>118</sup> By

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114. Oficia del Alto Comisionado Para la Paz, *Declaración del Jefe del Equipo Negociador del Gobierno, Humberto de la Calle Lombana*, [Office of the High Commission for Peace, Statement from the Chief of the Government Negotiation Team, Humberto de la Calle Lombana] (Mar. 13, 2015), <http://www.altocomisionadopalapaz.gov.co/procesos-y-conversaciones/pronunciamientos-jefe-de-la-nacion/Paginas/2015/Octubre/Declaracion-del-Jefe-del-Equipo-Negociador-del-Gobierno-Nacional-Humberto-de-la-Calle-Lombana%E2%80%8B8-de-octubre-2015.aspx>.

115. *Declaración del Jefe de la Delegación del Gobierno Nacional Humberto de la Calle*, [Statement from Humberto de la Calle, Head of the National Government's Delegation], Corporación Nuevo Arco Iris (Dec. 15, 2015), <http://www.arcoiris.com.co/wp-content/uploads/2015/12/15-12-15-Declaraci%C3%B3n-del-Jefe-de-la-Delegaci%C3%B3n-del-Gobierno-Nacional-Humberto-de-la-Calle.pdf>.

116. *Rueda de prensa luego de la instalación de la segunda fase del proceso de Conversaciones entre el Gobierno Nacional y las Farc* [Press Briefing following the Inception of the Second Phase of the Conversations between the National Government and the FARC], [http://wsp.presidencia.gov.co/Prensa/2012/Octubre/Paginas/20121018\\_10.aspx](http://wsp.presidencia.gov.co/Prensa/2012/Octubre/Paginas/20121018_10.aspx) p. 5.

117. Oficia del Alto Comisionado Para la Paz, *Declaración del Jefe del Equipo Negociador del Gobierno, Humberto de la Calle Lombana*, [Office of the High Commission for Peace, Statement from the Chief of the Government Negotiation Team, Humberto de la Calle Lombana] (Oct. 8, 2015), <http://www.altocomisionadopalapaz.gov.co/procesos-y-conversaciones/pronunciamientos-jefe-de-la-nacion/Paginas/2015/Octubre/Declaracion-del-Jefe-del-Equipo-Negociador-del-Gobierno-Nacional-Humberto-de-la-Calle-Lombana%E2%80%8B8-de-octubre-2015.aspx>.

118. Oficia del Alto Comisionado Para la Paz, *Declaración del Jefe del Equipo Negociador del Gobierno, Humberto de la Calle Lombana*, [Office of the High Commission for Peace, Statement from the Chief of the

leveraging his mastery of international law—and the consequences of failing to abide by it—de la Calle was using the indirect influence of judicialization to legitimize the government’s position on the peace negotiations.

The shadow of the ICC and the Inter-American Court shaped the politics of the peace agreement, both in Congress and in the executive branch. It is, of course, perhaps of little surprise that the executive branch, and particularly the Office of the High Commissioner for Peace, had a deep knowledge of international human rights and humanitarian law. The same cannot be said for members of the Colombian Congress. Indeed, the fact that politicians from a range of political parties and positions not only demonstrated a working knowledge of international human rights and criminal law, but also illustrated a keen interest in using that knowledge to define the limits of the peace process, shows how significant a shadow the ICC and Inter-American Court cast over peace negotiations. The judicialization of peace, in other words, extended well beyond the signals sent by the ICC and Inter-American Court and into the political deals carved out in Congress and in the executive branch.

## 2. *Domestic Actors in the Judicial Arena*

The executive and legislative branches of government were not the only ones to use the indirect influence of international judicialization to advance their position relative to other domestic actors. Domestic courts have also, perhaps unsurprisingly, been a key conduit for this type of debate. The Colombian Constitutional Court (CCC) in particular has been called upon to review most pieces of legislation passed both regarding the Justice and Peace negotiation and the current peace process.<sup>119</sup> In its review, the CCC has relied heavily on international law generally, and on the international courts in particular.

One of the CCC’s first forays into reviewing peacemaking efforts came about in judgment C-370 of 2006, the second of three JPL rulings that year.<sup>120</sup> The complaint was filed by Gustavo Gallon, a well-known activist

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Government Negotiation Team, Humberto de la Calle Lombana] (Oct. 18, 2015) <http://www.altocomisadoparalapaz.gov.co/procesos-y-conversaciones/pronunciamientos-jefe-de-la-nacion/Paginas/2015/Octubre/Declaracion-del-Jefe-de-la-Delegacion-del-Gobierno-Nacional,-Humberto-de-la-Calle-18-de-octubre-2015.aspx>.

119. The JPL law, passed over a decade ago, had been the focus of five rulings by the Constitutional Tribunal by 2010. The MJP has been challenged twice. The JPL law, passed over a decade ago, has also been reviewed directly by the Inter-American Court in contentious judgments, and by the ICC prosecutor in its interim reports on the Colombia Preliminary Investigation. Its interpretation has also been relevant to at least ten rulings before the Supreme Court of Colombia. See COMPILACIÓN NORMATIVA Y JURISPRUDENCIA DE LA LEY DE JUSTICIA Y PAZ, [Normative Compilation and Jurisprudence of the Law of Justice and Peace], Fiscalía General de la Nación (2010).

120. Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2006, Sentencia C-370/06, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2006/C-370-06.htm>. The first challenge, C.C., abr. 25, 2006, Sentencia C-319/06, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2006/C-319-06.htm>, had argued that the JPL should have been passed under a distinct and more stringent procedure than an ordinary law, which would require a supra-

lawyer and frequent litigator before the Inter-American System, along with other lawyers from the *Comisión Colombiana de Juristas*. They raised 23 different challenges to the JPL law. Many of the challenges broached topics that are relevant to the American Convention and Rome Statute. In particular, the petitioners argued that the JPL was a de facto amnesty or pardon, that it did not vindicate the rights of victims, and that it did not adequately define which perpetrators would be allowed to accede to alternative sentences and under what circumstances. The opinion, which was widely viewed as a definitive statement on the JPL, runs roughly 400 pages. It includes amicus briefs from several of Colombia's main universities, as well as domestic and international NGOs, and several state agencies, including the Minister of Interior in favor of the law, and the *Procurador de la Nación*, in favor of some aspects and arguing for revision of others. The ruling also summarizes the oral arguments of the parties and interveners at oral hearings held before the CCC.

The CCC considered both the Inter-American Court and the ICC in its judgment on the JPL. Under the Colombian Constitution, Colombia's international human rights treaty obligations are treated as part of the "constitutional block."<sup>121</sup> In other words, they are understood to form part of constitutional law, and thus to be directly justiciable by domestic courts. Therefore, when the CCC is asked to review the JPL and MJP laws under the constitution, it also reviews them under the Inter-American Convention on Human Rights and Rome Statute, which form part of Colombia's constitutional obligations. Further, the CCC has ruled that the Inter-American Court's interpretations of the American Convention can be binding on Colombia.<sup>122</sup> In reviewing the JPL, the CCC drew heavily on both courts, and on the Inter-American Court in particular. In C-370, it refers to the Inter-American Court ninety-four times and to the ICC thirty-two times. Before embarking on its own analysis of the case, for example, the CCC lists and describes all of laws that are relevant to the case, including all relevant treaty law (Section 4.3). The list includes the Rome Statute, which the Court refers to as "probably the main international instrument for the protection of human rights and international humanitarian law."<sup>123</sup> It also discusses the Inter-American Court's jurisprudence in depth in order to set the stage for its own analysis. Once the CCC moves on to undertake its own analysis of the JPL, it again draws directly from several of the Inter-American Court's

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majority and abstract review prior to promulgation by the CCC. There is only one mention of the American Convention and the ICC Statute in this ruling.

121. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

122. C.C., oct. 28, 1992, Sentencia C-574/92, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/1992/c-574-92.htm>; see Mónica Orango Olaya, *El Bloque de Constitucionalidad en la Jurisprudencia de la Corte Constitucional Colombiana*, [The Constitutionality Block in the Jurisprudence of the Colombian Constitutional Court], PRECEDENTE 79, 81 (2004).

123. C.C., mayo 18, 2006, Sentencia C-370/06, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2006/C-370-06.htm>.

judgments on questions of right to justice, rights of victims to participate in the judicial process, and reparations.

Seven years later, the CCC confronted many similar questions when called upon to review the Legal Framework for Peace. Like its predecessor, the MPJ judgment, C-579/13 was over 300 pages long, in part because the procedure was designed to be as inclusive and deliberative as a political hearing: the judgment includes sixteen amicus briefs, five invited interventions, including Human Rights Watch and Amnesty International, and the transcripts of twenty-nine interventions in the oral hearings, including arguments made by the President of Colombia, Juan Manuel Santos, the President of Congress, the President of the Supreme Court, and the national ombudsmen, the *Procurador*<sup>124</sup> and the *Fiscal General de la Nación* (General Prosecutor), as well as individual citizens, universities, think-tanks and other NGOs.<sup>125</sup>

International courts again constituted an important part of the CCC's reasoning. This time, however, the citation count is reversed: the ICC is referenced seventy-six times, and the Inter-American Court forty-five times. By 2013, the Colombian preliminary examination was in its seventh year, and the ICC was thus a familiar actor. Further, the ICC had reached conviction in a child soldier case.<sup>126</sup> The CCC cites to this jurisprudence as it tries to interpret what "systematic" means in the definition of crimes against humanity.<sup>127</sup> The CCC also cites to the Policy Paper on Preliminary Examinations and 2012 Interim Report on Colombia.<sup>128</sup> These are not judgments, but rather documents created by the OTP to clarify its policies and priorities. The CCC also refers to two letters the Chief Prosecutor of the ICC submitted to the President of the CCC while the CCC was deliberating on this case. The letters appear in this judgment in the form of amicus briefs. The ICC, then, played a number of roles in the CCC's judgment: as a court that authoritatively interprets the Rome Statute, as an international body that has been monitoring the Colombia case, and as a 'friend of the court.' Further, the ICC is also referred to as a threat: if Colombia does not prosecute certain cases, we are reminded, the ICC has jurisdiction.<sup>129</sup>

The CCC also gives special emphasis to the case law of the Inter-American Court, particularly on questions of victim's rights, right to truth, and the duty to prosecute. There is one case in particular that is frequently mentioned throughout the ruling, raised by many of the amici and declarations

124. An autonomous body charged with investigating state actors and institutions for irregularities.

125. C.C., agosto 28, 2013, Sentencia C-579/13, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm>.

126. Prosecutor v. Dyilo, ICC-01/04-01/06, Judgement pursuant to Art. 74 of the Statute (Apr. 4, 2012), [https://www.icc-cpi.int/CourtRecords/CR2012\\_03942.pdf](https://www.icc-cpi.int/CourtRecords/CR2012_03942.pdf).

127. C.C., agosto 28, 2013, Sentencia C-579/13, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm>.

128. *Id.*; *Situation in Colombia – Interim Report*, INT'L CRIM. CT., OFF. OF THE PROSECUTOR (Nov. 2012).

129. C.C., agosto 28, 2013, Sentencia C-579/13, G.C.C. (Colom.), <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm>.

before the CCC: *Mozote Massacre v. El Salvador* (2011).<sup>130</sup> As discussed above, this is the first case in which the Inter-American Court notes that the obligations of the state to prosecute may be different in the context of peace-making and civil war, as humanitarian law also applies.

Overall, the CCC review of peace-related legislation clearly shows that the international courts are highly visible players in this debate. This is particularly the case given that the hearings before the CCC included the oral arguments of so many different state and non-state actors and amicus briefs presented, all of which also frequently refer to the international courts and to international law more generally. As with the executive and legislative branches, international courts cast a shadow on the proceedings before the domestic judiciary.

### 3. *Other Actors*

As the record of the oral hearings before the CCC make clear, it is not only government actors that relied on the jurisprudence of the international courts to advance their positions. Civil society actors, including think tanks, universities, and activist lawyer groups, also made statements before the CCC and dressed their claims in the language of the international courts and their underlying treaties. Indeed, while our data is focused on government actors, it is important to note that the media and other civil society actors consistently invoked the international courts throughout the years in which peace was being negotiated. International NGOs, and, in particular, Human Rights Watch, similarly relied on the international courts in their public statements and reports on the Colombian peace process—further raising their profile in the domestic debate.<sup>131</sup>

### C. *The Government Pushes Back*

The dynamics described above show that a large set of domestic actors, including the Colombian government, have mastered the nuances of the Rome Statute and the American Convention on Human Rights, as well as the jurisprudence of the Inter-American Court, including concurring judgments. But to know the law is not to slavishly comply with, or even to correctly cite, the law. Domestic actors are not simply recipients of international law. In addition to being constrained by international courts and using international judicialization to try to constrain their domestic opposition, domestic actors are also trying to reign in those very same adjudicative bodies. They do this in two main ways. The first is by proactively re-reading the law to arrive at an interpretation that is colorable even as it is

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130. *Id.* (the *Mozote* case receives 19 distinct mentions); *The Massacres of El Mozote and Nearby Places v. El Salvador*, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 264 (Aug. 19, 2013).

131. See Rowen, *supra* note 39 (analyzing the rhetorical strategies of civil society activists focused on transitional justice).



more favorable to their interests. Second, the Colombian government and other actors involved in debating the peace have directly engaged the international courts, and especially the ICC's Office of the Prosecutor, through letters, closed meetings, invitations to participate in events, and other diplomatic overtures.

1. *Engaging the international courts through legal interpretation*

International law and international courts possess a highly specialized vocabulary and language. Further, the courts have a strategic advantage in that they possess insider knowledge of their own workings, and the extent of their resources and capacity. To engage with international courts effectively, actors must gain knowledge of this language and institutional structure. In its interactions with the ICC's OTP and the Inter-American Court, the Government of Colombia has demonstrated a growing command of the particular language of international criminal law and human rights law, as well as the institutional features and constraints of each court. Through this knowledge, the government has been able to offer its own legally grounded interpretations of that law, at times challenging the Courts.<sup>132</sup>

Perhaps the most salient examples of this lawyerly engagement came from the Office of the High Commissioner for Peace. Throughout the peace process, the High Commissioner for Peace stressed the importance of keeping Colombia's international commitments, and repeatedly asserted that Colombia was doing everything that it needed to do in order to meet its international obligations. Even in pushing back against attacks that raised the question of the compatibility of the MJP with international law, Commissioner Jaramillo framed his answers within the context of international jurisprudence. For example, although the High Commissioner's Office acknowledged Colombia's responsibilities under the Rome Statute and other international instruments, Commissioner Jaramillo and de la Calle have also been clear that the situation in Colombia is exceptional. Jaramillo has argued that Colombia's peace must not be viewed from the perspective of a "normal" justice system, but rather the specific framework of transitional justice following an armed conflict.<sup>133</sup> When referencing the opposition's argument that the MPJ contravened the Constitution, for example, Commissioner Jaramillo argued that the MJP did not contravene the Constitu-

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132. René Uruña, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003–2017*, 111 AM. J. INT'L L. 104, 104 (2017) (noting that "Colombian actors' increased fluency with international criminal law concepts permitted them to play a more active role, pushing back against some of the OTP's strategies of influence").

133. Speech, Sergio Jaramillo, Alto Comisionado Para la Paz, Intervención Del Alto Comisionado Para La Paz, Sergio Jaramillo en la Audiencia Pública Sobre el Marco Jurídico Para la Paz en la Corte Constitucional [Intervention of the High Commission for Peace, Sergio Jaramillo to the Public on the Legal Framework for Peace in the Constitutional Court] 2–3 (July 25, 2013). [http://www.altocomisionadopalapaz.gov.co/desarrollos-legislativos-paz/marco-juridico-para-la-paz/Documentos%20compartidos/discurso\\_gobierno\\_y\\_jefe\\_delegacion.pdf](http://www.altocomisionadopalapaz.gov.co/desarrollos-legislativos-paz/marco-juridico-para-la-paz/Documentos%20compartidos/discurso_gobierno_y_jefe_delegacion.pdf).

tion or international law because neither constitutional nor human rights law took grave humanitarian law violations into account when facing an integrated strategy for transitions from an armed conflict.<sup>134</sup> Even in stressing the extraordinary nature of the Colombian case, the Commissioner embedded his arguments within the context of international law and adjudication.

Another sophisticated strategy was to highlight differences between the Rome Statute and other international legal regimes, and in particular, as argued by René Urueña, presenting the norms of the Inter-American System as a “competing narrative.”<sup>135</sup> The High Commissioner noted, for example, that as of 2012 the Inter-American Court had not ruled in any case that analyzed a transition from an armed conflict, and had only recently, in the case of *El Mozote Massacre v. El Salvador*, considered an amnesty within the context of an armed conflict. The Court’s previous analyses, he remarked, had been with respect to post-dictatorial contexts and thus any consideration of their applicability to the MJP should be taken with that context in mind.<sup>136</sup> The Commissioner thus implicitly drew a distinction between what the Rome Statute and the American Convention demand. Similarly, in response to critiques about the proposed truth commission and alternative mechanisms of justice, the High Commissioner said, “Although the Inter-American Court has recognized the right to truth, as legalized through penal justice and the state’s obligations to prosecute those responsible, the exposition of the truth, as an end in and of itself, can neither depend nor derive exclusively from the penal system.”<sup>137</sup> In other words, the Inter-American Court’s right to truth is distinct from and goes beyond the facts generated by a criminal investigation. By drawing distinctions between human rights law and international criminal law, the government creates a space of legal uncertainty, and greater discretion.

Similarly, the Office’s statements about the primacy of peace have been couched in terms of general international law and human rights law, as opposed to criminal law. Peace, the High Commissioner has noted, is an important principle of the Colombian Constitution. He frequently makes reference to sources of international law that also privilege peace, including the Charter of the UN, the Preamble of the UDHR and the preamble of the OAS Charter, among other documents.<sup>138</sup> In a concise summary of the Office’s approach to peace and international justice, the High Commissioner noted that the work they were doing in Havana, is constructed “based on the state of the art of international doctrine and—much more importantly—based on what the victims of the conflict were saying in different

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134. *Id.* at 5.

135. See Urueña, *supra* note 39, at 113.

136. *Id.*

137. *Id.* at 4.

138. *Id.*

forums and participation spaces.”<sup>139</sup> In effect, the High Commissioner is telling domestic and international audiences alike that the government’s international legal obligations are broader than just criminal accountability, and includes the prioritization of victims’ needs.

The government also used the ICC’s own prosecutorial practice to argue against the ICC’s preferred reading of the Rome Statute. One feature of the MJP that sparked substantial debate was its provisions for the prioritization of cases. The MJP stated that the president could, with Congressional authorization, create mechanisms to prioritize and select the most serious cases, the most responsible perpetrators and therefore avoid a collapse of transitional justice mechanisms.<sup>140</sup> The opposition argued that this was a form of impunity and that international law requires that all violators of Rome Statute crimes be tried. The High Commissioner defended the MJP on the ground that international law has come to accept that we need to prioritize those most responsible for the worst crimes: “The experience of the national and international tribunals that have been established to address international crimes has led the judicial community to accept the necessity of focusing the investigations on a selection [of cases], concentrating on the prosecution of those most responsible for the gravest crimes.”<sup>141</sup> The discussion proceeded to outline how the ICC, ICTY and the Extraordinary Chambers in the Courts of Cambodia have decided to *not* prosecute particular cases because they fell below the limit of what the courts perceived to be the worst perpetrators of the worst crimes.<sup>142</sup> The government responded to these accusations by showing how at the international level, it has been impossible to achieve peace without prioritizing cases.<sup>143</sup> Moreover, in his statements before the Constitutional Court, the High Commissioner goes on to suggest that the MJP policy mirrors ICC practice: “This is precisely the recommendation the ICC prosecutor has insisted upon in the Colombian case” and thus could not be used as an argument to start an intervention from that tribunal if Colombia decided to employ it.<sup>144</sup> Indeed, the ICC would have a hard time reviewing such a decision, since the cases that were not investigated would, by definition, be of a lower gravity.

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139. Press Release, Alto Comisionado para la Paz, Declaración Del Jefe Del Equipo Negociador Del Gobierno Nacional Humberto de la Calle [Declaration of the Chief Negotiator for the National Government Humberto de la Calle] (June 7, 2014), <http://www.altocomisionadoparalapaz.gov.co/procesos-y-convenciones/pronunciamientos-jefe-de-la-nacion/Documentos%20compartidos/2014/20140607-declaracion-del-Jefe-de-la-Delegacion%20del-Gobierno-Nacional.pdf>.

140. G. Cong., t. 27, p. 28.

141. Public Document, Alto Comisionado para la Paz, *Intervención en el proceso de constitucionalidad del Acto Legislativo 1 de 2012 Expediente D-9499* [Intervention in the Process of Constitutionality of Legislative Act 1 of 2012, D-9499] (Mar. 4, 2013), 8.

142. *Id.* at 9.

143. G. Cong., t. 27, pp. 33–34.

144. *Supra* note 125, at 10.

## 2. *Engaging the International Courts through Diplomacy*

The government has sought to shape and constrain the international courts' influence not only by publicly voicing legal counter-arguments, as argued above, but also through diplomatic contacts with court officials, including in-person meetings, private letters, and invitations to participate in high-level peace-related events. The government, in other words, devised a strategy of a judicial diplomacy to further persuade and pressure the courts.

Such a strategy is particularly available vis a vis the ICC. As noted above, the ICC works in Colombia not in its capacity as a court, but rather through the OTP as an international body monitoring domestic prosecutorial policy. That means it is not constrained by the rituals of litigation. Different actors within the Colombian state have seized on this flexibility to engage directly with the ICC. As noted above, President Santos and Prosecutor Bensouda met in New York in September 2013, and that November, in a mission organized by the Colombian Attorney General's Office and the news magazine, *Semana*, the OTP was invited to participate in a conference on the theme of "Strengthening the Attorney General's Office on Transitional Justice." More generally, the executive has made a point of being compliant with ICC demands for information, cooperating with all requests, and meeting with the OTP when it conducts field visits. In 2009, Colombia formally adopted the Rules of Evidence and Procedure of the ICC and also ratified the Agreement on the Privileges and Immunities of the Court.<sup>145</sup> In ratifying these agreements, the Colombian government sent a clear signal to the ICC, as well as to domestic and international audiences, that it was committed to complying with the ICC's demands. These steps toward cooperation form part of the government's strategy to be set apart from the other situations under the ICC's purview. Cooperation with the ICC on procedural matters was a way for the government to deflect deeper ICC involvement.

Other actors in the government were not always on board with the Santos peace and sought to undermine it through their own direct contact with the OTP. When frustrated with Santos' peace deal, for example, the *Procurador* sent the ICC a list of fifteen reasons why it should reject the Peace Accord.<sup>146</sup> Civil society actors also regularly met with the ICC OTP during visits, and used the ICC to advance their agenda by directly getting in touch with the OTP and urging it to act on certain issues.<sup>147</sup>

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145. Letter from Embassy of Colombia to Secretariat of the Assembly of State Parties of the Rome Statute, INT'L CRIM. CT., [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP11-POA-2012-COL-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP11-POA-2012-COL-ENG.pdf) (Aug. 8, 2012).

146. '*Acuerdo con Farc es un pacto de impunidad*': *Procurador a la CPI* [Agreement with FARC is a Pact of Impunity: Attorney General of the ICC], EL TIEMPO, Jan. 19, 2016, <http://www.eltiempo.com/archivo/documento/CMS-16485333>.

147. For example, civil society actors urged the OTP to respond when President Uribe extradited drug lords who were also implicated in human rights violations, prompting the OTP to send a letter to Colombia. See Carta del Fiscal de la CPI, Luis Moreno Ocampo, dirigida al Embajador colombiano acreditado ante la CPI [Letter from Prosecutor of the ICC to the Colombian Ambassador accredited before

By contrast, the Colombian state's relationship with the Inter-American Court is more constrained, hemmed in by the rules of litigation. But that did not stop the Santos government from actively engaging the Court as it forged the peace deal. The Santos government was the first to host the Inter-American Court's extraordinary hearings, and it has done so not once but twice.<sup>148</sup> Further, Santos was able to seat Humberto Serra Porto, a former CCC judge, on the Inter-American Court in 2013. Serra then served as the Court's President in 2014-2015. That meant that when Colombia hosted the Court for a second time in Cartagena in April 2015—at the height of the peace negotiation—the Court was under the leadership of a former CCC judge. Serra opened the Cartagena session by lauding Colombia's "genuine respect for the international legal order and the values and principles that sustain it."<sup>149</sup> The 2015 event was timed to coincide with a conference on transitional justice and the Inter-American System, inaugurated by President Santos himself. On that occasion, Santos delivered a 50-minute speech, before an audience that included the judges and staff of the Inter-American Court, on the importance of balancing the demands for justice with the demand for peace.<sup>150</sup> The following year, the Inter-American Court judges and secretary were invited to witness the signing of the peace treaty in September of 2016.<sup>151</sup> Finally, Santos's diplomacy was not limited to the Court. He also met with the President of the Inter-American Commission, James Cavallaro.<sup>152</sup> In these ways, the Colombian government complemented its

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the ICC], Francisco José Lloreda, *quoted in Carta enviada por el fiscal Moreno de la CPI*, [Letter sent by Prosecutor Ocampo of the ICC], *LA SEMANA* (Aug. 16, 2008), <https://www.elespectador.com/impreso/politica/articuloimpreso-carta-enviada-el-fiscal-moreno-de-cpi>. See also Universidad del Rosario, *Eventos 13 May: Foro: La Justicia Transicional en Colombia y el Papel de la Corte Penal Internacional*, <http://www.urosario.edu.co/Home/Principal/Eventos/La-Justicia-Transicional-en-Colombia-y-el-Rol-de-l/#eventosTab2> (last visited Apr. 9, 2018) (illustrating one example of a meeting between members of civil society and representatives of the ICC).

148. Twice a year, the Inter-American Court holds extraordinary sessions in which it sits not in its San Jose home but rather in the territory of a State party. Press Release, Corte Interamericana de Derechos Humanos, *La Corte Interamericana Celebrará su 47 período Extraordinario de Sesiones en la Ciudad de Medellín, Colombia* [Inter-American Court of Human Rights Will Celebrate its 47th Term of Extraordinary Sessions in Medellín, Colombia] (Mar. 13, 2013), [http://corteidh.or.cr/docs/comunicados/cp\\_04\\_13\\_esp.pdf](http://corteidh.or.cr/docs/comunicados/cp_04_13_esp.pdf) (announcing the Court's visit to Medellín, Colombia).

149. Press Release, Corte Interamericana de Derechos Humanos, *Corte Interamericana Finalizó El 52 Período Extraordinario De Sesiones En Cartagena De Indias, Colombia* [Inter-American Court of Human Rights Ends the 52nd Term of Extraordinary Sessions in Cartagena de las Indias, Colombia] (Apr. 27, 2015), [http://corteidh.or.cr/docs/comunicados/cp\\_14\\_15.pdf](http://corteidh.or.cr/docs/comunicados/cp_14_15.pdf) (translation by authors).

150. Corte Interamericana De Derechos Humanos, INAUGURACIÓN. SEMINARIO INTERNACIONAL JUSTICIA TRANSICIONAL Y CORTE INTERAMERICANA DE DERECHOS HUMANOS, PALABRAS DEL PRESIDENTE DE LA REPÚBLICA DE COLOMBIA, DOCTOR JUAN MANUEL SANTOS CALDERÓN [Opening. International Seminar on Transitional Justice and the Inter-American Court of Human Rights, Remarks from the President of the Republic of Colombia, Juan Manuel Santos Calderón], <https://vimeopro.com/corteidh/justicia-transicional-y-corte-interamericana-de-derechos-humanos/video/126543769> (Apr. 20, 2015).

151. *La Corte Interamericana de Derechos Humanos está de testigo en un momento histórico en Colombia* [The Inter-American Court of Human Rights is Witness to Historic Moment in Colombia], *supra* note 4.

152. The Commission is the other main organ of the Inter-American Human Rights System. It acts as a first instance of sorts, receiving individual petitions before referring them to the Inter-American Court.

legal arguments with a diplomatic strategy of pointed engagement with the Inter-American System.

#### *D. Judicialization as Deliberation*

This Part has demonstrated that the Colombian peace was highly judicialized. Throughout the process, key players in Colombia were keenly aware of the international law, international norms, and judicial politics surrounding the issues of accountability and transitional justice. While the ICC and Inter-American Court clearly signaled their intentions regarding Colombia via public communiqués, site visits, reports, and relevant jurisprudence, domestic actors both appropriated and pushed back against the courts' messaging. Whether in Congress, in the Executive's Office, or in the judiciary, domestic actors leveraged international law and international courts' jurisprudence to restrain their domestic opponents and shape the narrative of peace.<sup>153</sup> Moreover, the government reached out to the international courts through invitations to public events and other diplomatic overtures, even as it pushed back against the courts' interpretation of the law. Thus, the international courts, while constraining the state, were also, in turn, courted, persuaded, and constrained.

These multiple modes of interaction were an important part of the four-year process that resulted in the 2016 peace agreement. They remind us that the impact of international courts does not happen in a top-down directive manner alone. Judicialization, by this telling, took the form of deliberation. The impact of the courts' jurisdiction was to make the ongoing peace debate more infused with references to the guidance and constraints provided by international law, to make more actors at the domestic level aware of the international courts and laws, and, ultimately, to allow the manner in which these international norms were debated and understood to shift.

#### IV. THE OUTCOME: A JUDICIALIZED PEACE ACCORD

This Part turns from examining the judicialization of the peace process to examination of its impact: how did the engagement of international courts alter the terms of the final peace accord? To bring into view the effects of international judicialization, we compare the current peace accord with three other agreements negotiated by the Colombian government over the prior three decades. In other words, we engage in a structured, over-time comparison. The 2016 peace accord follows and builds upon a long succession of ceasefires, talks and peace initiatives through which the Colombian government has attempted to pacify the different irregular armed groups that oc-

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153. Although not focused on the international courts, Jamie Rowen's study shows a similar dynamic whereby different actors deploy transitional justice terms to advance their particular agendas. *See* Rowen, *supra* note 39.

cupy its territory, and in particular the FARC, since the 1960s. The current process, therefore, has deep roots in the past, and in many ways enlists the same cast of institutional players as prior efforts in the push towards disarmament, peaceful political participation, and political reform. A difference across time, however, is the rapid and pronounced judicialization of Colombian politics, through the creation of a powerful new constitutional court in 1991, and through accepting the jurisdiction of two international accountability courts. Comparison of the current peace accord to prior peace accords, therefore, throws into relief some of the changes wrought by judicialization.

Specifically, we ask how judicialization has changed the shape of justice and accountability as inscribed in four of the main agreements the Colombian government has negotiated over the past four decades: the Uribe Pact (*Pactos de la Uribe* 1984, 1986); the Francisco Gárnica Front accord (*Frente Francisco Gárnica* (1992); the Justice and Peace agreements demobilizing the paramilitary (2003-2006); and the 2016 agreement that emerged from the peace process in Havana (2012-2016).<sup>154</sup> Each was chosen because it marked a different moment in the ongoing judicialization of the conflict, thus providing a unique comparison of four peace negotiations against a backdrop of growing judicialization. Further, we trace the evolution of the debates that were most prominent in the negotiation phase and examine the outcome reached in the final accord.

The analysis reveals that the effects of the international courts are not necessarily what those who backed the courts as a way to advance criminal

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154. Further methodological explanation of the selection of cases is due here. Each of the four negotiations chosen follows a development in the Colombian legal system with regards to international law and courts. The *Acuerdos de la Uribe*, and its accompanying Law 35 of 1982, mark one of the Colombian government's first efforts to establish peace with the FARC guerrilla. This accord took place before Colombia had submitted to the jurisdiction of the Inter-American Court, and before said court had developed its jurisprudence on amnesty. However, Colombia had been part of the Inter-American System more generally, and the Commission had published a country report on Colombia in 1982. Nonetheless, the Treaty makes no mention of these international bodies, and sought to address the armed conflict by providing generous amnesties. Ten years later, the Colombian government passed a law providing for a peace accord between the government and Frente Francisco Gárnica, a small faction of the Popular Liberation Army (EPL). This peace accord law took place after Colombia had accepted the jurisdiction of the Inter-American Court, and under a new constitution and the establishment of a new constitutional court. In the early 2000s, the government again began negotiations to quell the armed conflict. This time, it began by negotiating with the paramilitary. President Uribe passed the Justice and Peace law in 2005. Significantly, this was after the ICC had ratified the Rome Statute giving jurisdiction to the ICC. The law passed in the legislature just as the ICC opened its preliminary investigation. The final text is the 2016 Final Accord, negotiated, of course, under the watch of both international courts. Note also that the comparison begins with the first official peace negotiations between the FARC and the Colombian government and ends with the *Acuerdo Final*, the result of the most recent peace negotiations. This analysis was unable to include agreements from the two other peace negotiations with the FARC as both failed before an agreement was reached. These negotiations occurred in the early 1990s and early-mid 2000 and as such cases around those points in time were chosen. Further, the four selected cases begin with the first negotiated peace accord developed through a policy of "diplomacia por la paz," in which the government involved international relationships to address the armed conflict. Of the four chosen agreements, some are peace accords and others are laws providing framework for peace. However, they are comparable because what we seek to understand is how the Colombian government engages with questions of amnesty, across time.

accountability would have hoped, but neither are they what court skeptics most feared. Colombia's peace accord shows signs of judicialization through its unparalleled reliance on international law to define terms and bolster its legitimacy; through construction of a process-heavy and lawyerly post-conflict mechanism; and by leaving resolution of particularly difficult accountability trade-offs to the future, so as to defer court review. Significantly, however, this emphasis on process at the formal level comes coupled with an innovative approach at the substantive level: Colombia's peace negotiation yielded an accord less focused on punishment than the international courts would have required, at least as their position was understood when the negotiations began. Dressed in procedure, rife with reference to pre-existing treaties, and clearly in dialogue with the international courts, Colombia's 2016 peace accord nonetheless hazards a transitional justice regime that is innovative in important ways.

The following sections each highlight a distinct dimension of comparison across the four accords, with special emphasis on the topics that played a prominent role during the peace negotiation: punishment, the prioritization and selection of cases, and command responsibility. The analysis thus reveals how the Final Accord differs from its predecessors due in part to its engagement with international courts and law.

#### A. *A Peace that Speaks International Law*

Christine Bell has noted that international law is playing a growing role in the resolution of intra-state conflict.<sup>155</sup> Comparison of the current Accord to its predecessors indeed reveals a marked increase in direct references to international law, and particularly to the treaties over which the international courts have jurisdiction. The comparison also suggests another significant trend: it is the aspects of international law that are subject to international judicial review that play a greater role. International human rights law and international criminal law pre-exist the two international courts, but really only begin to receive mention in the accords once there is an international court in place to enforce them. Further, while humanitarian law regulates many different aspects of the use of force, it is the war crimes provisions, which are the only ones enforced by the ICC, that receive most frequent mention.

The trend toward greater citation over the four decades is not subtle: the *Acuerdos de la Uribe* (1982) and the Accord with Frente Francisco Gárnica (1990) make no direct mention of international law or organizations. It is only with the JPL that international law makes its appearance in this important domestic instrument. But even here, the mentions are few. The JPL refers to international law only two times. The first is a general framing statement at the beginning of the law stating that it should be realized in a

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155. BELL, *supra* note 21.



manner that conforms “to constitutional norms and the international treaties ratified by Colombia.”<sup>156</sup> The second is a reference to the United Nations Convention against Illicit Traffic in Narcotic Drugs, to which Colombia is a party.<sup>157</sup> International law here, then, is viewed only as a distant interpretive guide, and the international courts receive no direct mention. This is despite the fact that the negotiation of this law took place as Colombia came under ICC review through the preliminary examination, and the Office of the Prosecutor and the government were in direct dialogue about the law.

The 2016 Peace Accord, by contrast, has many more cites to general international law, to specific international treaties to which Colombia is party, and to the Rome Statute and Inter-American Court in particular. The Accord makes mention of the Rome Statute twelve times. Overall these cites refer to the Rome Statute in three different ways. First, as in the Justice and Peace Law, there is a framing paragraph at the beginning that proclaims the entire accord to be subject to international law in general, and to certain treaties, including the Rome Statute, in particular.<sup>158</sup> Second, at eight different points, the Accord cites to the Rome Statute as authority for the list of crimes that cannot be amnestied: it prohibits amnesties for “crimes against humanity, nor other crimes defined by the Rome Statute.”<sup>159</sup> Finally, the Accord specifically commits the government to rely on the Rome Statute in matters of evidentiary practices regarding sexual violence (Art. 67).<sup>160</sup> The ICC itself and its judgments are not mentioned; only the Rome Statute.

The Inter-American Court, by contrast, is directly mentioned two times. First, the general framing statement notes that the agreement is subject not only to international law in general and to particular international treaties of relevance, but also to “the judgments issued by the Inter-American Court.”<sup>161</sup> The second mention is also significant: it quotes at length the concurrent vote of Judge Garcia Sayan in the *Mozote Massacre Case*, which was decided when the Colombian peace process was underway, and which many viewed as written with the Colombian process in mind. The quote speaks of peace as a human right, and of the duty of the state to create peace; indeed, it says that the states’ duty to make peace is “of equal intensity” as its duty to attend to victims’ rights.<sup>162</sup> The Inter-American Court’s concurrent vote is thus used to provide the government greater flexibility in its

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156. L. 975, julio 25, 2005, 45.980 DIARIO OFICIAL [D.O.] art. 2 (Colom.), <http://www.secretariassenado.gov.co/leyes/L0975005.htm> (translation by authors).

157. *Id.* art. 71.

158. L. 975, julio 25, 2005, D.O. 45.980 art. 2 (Colom.), <http://www.secretariassenado.gov.co/leyes/L0975005.htm> (“always and in each moment hewed to the spirit and reach for the norms of the National Constitution, the principles of international law . . . the demands of the Rome Statute”) (translation by authors).

159. L. 975, julio 25, 2005, D.O. 45.980 art. 40 (Colom.) (translation by authors).

160. Acuerdo Final, *supra* note 58, art. 67.

161. *Id.* at 2.

162. *Id.* at 143.

negotiation across rights (for once you have two rights that are in tension but of equal importance, we are back in the realm of balancing and, ultimately, politics). The Accord also makes direct mention of the Inter-American Commission: through the Accord, the state recommits itself to resolving a case that has been mediated by the Commission and has to do with atrocities that took place in the 1980s, indirectly involving the FARC.<sup>163</sup> The American Convention is not mentioned; however, it is implied both in the many mentions of “international human rights treaties to which Colombia is party,” as well as in the mentions of the Inter-American Court, whose primary role is interpreting and applying the American Convention.<sup>164</sup>

International law as such, and humanitarian law and international human rights law as branches thereof, also receive mention throughout the document. Humanitarian law, or the laws of war, receives no less than thirty-one mentions. It is used mostly to make reference to war crimes.<sup>165</sup> This suggests that the parts of the Geneva Conventions that are also part of the Rome Statute become more prominent. International human rights law is referred to twenty-six times. Of these, seventeen are references to “grave violations” of human rights law, which the Inter-American Court has said must be investigated and punished, and likely fall under the purview of the ICC as well as the Inter-American Court.<sup>166</sup>

Overall, the Accord affirms itself through direct mention of international law with more frequency than its predecessors in Colombia, and engages in particular with law over which international courts have jurisdiction. This use of international law mirrors that of the debates leading up to the Accord analyzed in Part III: it is a further example of how domestic actors use the international law and courts to add legitimacy to their claims, reflecting, in turn, the growing relevance of the courts.

### *B. A Less Punitive Peace*

Analysis of the four accords also reveals that there are significant differences in how the government and its negotiating partners resolve the questions of criminal accountability across time. Indeed, the progression of accountability across the four accords has a surprising arc: if the norm of accountability has grown stronger, the imposition of punishment, understood as years spent in prison, is weaker, at least on paper.

In the first two accords, criminal accountability is treated as a dichotomous variable—either the state prosecutes or it does not. If the latter, liability is erased and there is no criminal proceeding. The 1982 law is brief but grants a broad amnesty: any crime connected to the rebellion is covered

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163. *Id.* at 181.

164. *Id.* at 2, 146, 164, 214.

165. *Id.*

166. *Id.*

without exception. Further, amnesty here means that there is no investigation or trial; the law does not differentiate among the different stages of criminal process. The grant of amnesty erases liability, and those who benefit do not really have to do anything to qualify.<sup>167</sup>

The 1993 peace is very different from the 1982 peace, and displays many features of the contemporary transitional justice norms. It is lengthier, and entire sections are devoted to the rights of victims, including provision of assistance in housing, health, education and work. It also differs from the earlier peace in that international crimes (genocide and war crimes) are exempt from amnesty. Shifting international norms have already had an important impact.<sup>168</sup> However, the question of criminal liability is still treated as a yes/no variable. Whereas in 1982, atrocity crimes are amnestied and their perpetrators exempt from criminal liability, in 1993, atrocity crimes are entirely excluded from amnesty, and the accused are simply subject to regular criminal process. Surprisingly, it is the 1993 Accord that is thus the most punitive of the four here examined, as it imposes regular criminal process and punishment on those who commit atrocity crimes, with no possibility of abatement.

In the later accords, criminal accountability is disaggregated into two main component pieces: investigation, trial, and judgment on the one hand; and sentencing and punishment on the other. These component pieces are then leveraged against each other, and against the rights of victims. Under the JPL, there is no amnesty for international crimes. However, there is a possibility of reduced sentences: punishment moves from being a dichotomous variable to one with gradations. Further, the way to accede to a reduced sentence is by cooperating with the investigation and other aspects of the transitional legal scheme. So overall the trend is to trade in a bit of punishment in return for fuller participation in other aspects of the legal process, and for contributions to the reparation of the harm suffered by the victims. Demobilized paramilitaries have to contribute what they know in all cases of which they have knowledge; they must compensate, if they can; and they are urged to make statements of apology and commit to not repeating the harms.

The 2016 Accord introduces yet another twist on criminal accountability. The emphasis on investigation and repair remains and in some ways grows. Here too, the *guerrilleros* who aspire to amnesty must participate in process, share knowledge they have about criminal acts, and apologize for harm suffered by the victims of their crimes.<sup>169</sup> But drawing on restorative justice

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167. L. 35, nov. 1982, D.O. 128. N. 36133 BIS. 20 art. 4 (Colom.) at 1, <http://www.suin-juriscol.gov.co/viewDocument.asp?id=1591525> (last visited Mar. 30, 2018) (a law that implements the Acuerdos de la Uribe).

168. See Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990) (arguing in 1990 that states have a duty under international law to prosecute grave human rights violations).

169. Acuerdo Final, *supra* note 58, art. 27.

theories, the new peace accord introduces an idea that had been mostly absent from international criminal law: punishment is no longer conceptualized only through the lens of moral desert, but is recast as (also) about rehabilitation and the restoration of social bonds.<sup>170</sup> Like the JPL, the peace accord gives those who committed atrocities the opportunity to participate in truth-telling and to cooperate with criminal investigations, and to provide reparation and to participate in community building activities.<sup>171</sup> But in this agreement those who cooperate in this way are able to escape incarceration, understood as time in a prison. Punishment instead entails a still to be defined restriction of liberties, including the liberty of movement and liberty of domicile.<sup>172</sup> Further, the punishment will in no case last over eight years.<sup>173</sup> Ultimately, then, it is possible that someone who commits international crimes will be tried and sentenced but not imprisoned. That is a new understanding of accountability, and one not yet tested before the international courts.

The trend in transitional justice in general has been towards imposing less punitive measures in exchange for greater involvement by the perpetrator in the investigation and in other legal processes aimed at repairing the victim's harm.<sup>174</sup> What distinguishes the 2016 Accord is that the most heinous crimes are also subject to this regime. Indeed, the peace accord overall makes little mention of punishment. While it pronounces accountability (*rendición de cuentas*) to be a main principle of the terms of the peace. Retribution as such is rarely mentioned. In the Accord's own words, "the Integral System for Truth, Justice Reparation and Non-Repetition shall have as its primordial goals the consolidation of peace, and the guarantee of the rights of the victims."<sup>175</sup>

It is important to note that this move away from incarceration is not an escape from the confines of criminal law; rather, the move re-purposes criminal procedure to a different end.<sup>176</sup> The solution to the peace/justice dilemma is quite technical and deeply embedded in criminal procedure: it breaks accountability down into two distinct pieces—investigation and punishment—and enhances one at the expense of the other. Note, further, that this is not pure legalism or sleight of hand. The approach has the potential to offer very real benefits for the victims. By thus disaggregating criminal accountability, the government can choose to offer the accused a

170. *Id.* art. 60.

171. *Id.* § 5.

172. *Id.* art. 60.

173. *Id.*

174. See generally AMNESTY IN THE AGE OF HUMAN RIGHTS ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES (Francesca Lessa & Leigh A. Payne eds., 2012); RENÉE JEFFERY, AMNESTIES, ACCOUNTABILITY, AND HUMAN RIGHTS (2014).

175. Acuerdo Final, *supra* note 58, at 147 (translation by authors).

176. Karen Engle argues against overreliance on criminal law as a form of response to human rights violations. See Engle, *supra* note 18. Here, by contrast, there is a push against "neo-punitivism" even while using the framework and vocabulary of criminal procedure.

reduced sentence in return for cooperation in truth-telling, apology, repair, and other aspects of accountability that may be of great value to victims.

The move away from incarceration is also undeniably a strategy that seems tailored to deflect international court review. Although the Rome Statute provides that the ICC should impose imprisonment as the form of punishment,<sup>177</sup> it is silent on the question of what sort of penalties *states* should impose for international crimes that fall within the statute.<sup>178</sup> Under Article 17, the Court can open its own investigation only if it finds the state unable or unwilling to prosecute, or if the prosecution is undertaken only with “the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.”<sup>179</sup> The statute itself does not differentiate among the different pieces of a criminal prosecution. The ICC has not yet considered whether a reduced or alternative sentence could trigger an investigation.

The Inter-American Court’s jurisprudence, by contrast, has addressed the different aspects of criminal accountability over dozens of cases.<sup>180</sup> Overall, its jurisprudence has been understood to demand criminal prosecution, and arguably punishment, in all cases where there have been violations of fundamental human rights without exception.<sup>181</sup> In its first judgments, it always ordered states to “investigate *and* punish,” seemingly without distinction between the two. In more recent cases, it speaks of the obligation to “investigate and prosecute and punish, as appropriate.”<sup>182</sup> This method of listing different stages of accountability would seem to imply that each is a distinct obligation of the state. In this sense, the Inter-American regime may pose a more difficult hurdle. But it is important to note that the Inter-American Court and Commission have been path breaking in promoting and prioritizing the rights of victims. Indeed, the Peace Accord’s emphasis on the rights of victims, the right to truth, and on holistic reparations is one that Colombia has drawn in part from the extensive and unique jurisprudence of the Inter-American System on this matter.<sup>183</sup> At times, the Court has even cast

177. Rome Statute of the International Criminal Court, art. 77, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

178. *Id.* art. 80.

179. *Id.* art. 17.

180. For a nuanced discussion, see Oscar Parra, *La Jurisprudencia de la Corte Interamericana respecto de la lucha contra la impunidad* [The Jurisprudence of the Inter-American Court regarding the Fight Against Impunity], 13 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 5, 32–33 (2012).

181. This is how Fatou Bensouda interpreted the Inter-American Court’s jurisprudence in her letter to the Constitutional Court. See Bensouda, *supra* note 82.

182. See, e.g., Tenorio Roca et al. v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 314 (June 22, 2016).

183. See Enrique Gil Botero, *El principio de reparación integral en Colombia a la luz del Sistema Interamericano de Derechos*, in PERSPECTIVA IBEROAMERICANA SOBRE LA JUSTICIA PENAL INTERNACIONAL 319 (Héctor Olásolo Alonso & Salvador Cuenca Curbello eds., 2012) (showing how the Inter-American System has helped shaped Colombia’s approach to reparations). It can also be argued that the Court drew, in turn, from Colombia’s *Consejo Superior*, and that the reparations regime is mutually constructed by these two.

criminal prosecution of the wrongdoer as an aspect of the victim's rights, so that criminal prosecution becomes subsumed within victim's rights. This move seemingly allows Colombia to more easily make trade-offs between truth and punishment, while still arguing that it is protecting victims' rights overall—for it is only playing one right of the victim against the other. Finally, the *Mozote Massacre* case seems to open up the possibility that the Court's prior amnesty cases, focused almost entirely not on peace accords but other types of political transitions from authoritarian to democratic government, are not necessarily applicable to the peacemaking scenario.<sup>184</sup>

Overall, the progression of the accords suggests that international courts have made negotiators much more focused on the questions of criminal responsibility. However, the progression has not been toward more punishment. Rather, negotiators have given new meaning to the concept of accountability, while further distancing it from retribution. The Accord repeatedly affirms that those who committed international crimes will not receive amnesty. That means they will undergo criminal investigation and trial, and a sentence will be imposed. However, exactly what the sentence is will be shaped by the defendant's level of cooperation with trial and with reparatory measures. This concession to the politics of peacemaking represents a significant shift in transitional justice practice.

### C. *A More Procedural Peace*

Comparison of the four accords reveals another, related trend: the most recent peace accord is the longest, most procedurally detailed and in many ways legally ambitious deal to emerge from decades of peacemaking in Colombia. This is a trend that has been noted in the evolution of peace accords overall, judicialized or not.<sup>185</sup> Even compared against these trends, however, the 2016 Colombian accord is a standout—the final accord “at nearly three hundred pages long (297)—is the longest peace agreement produced in intrastate conflict.”<sup>186</sup> Perhaps, then, judicialization has led to ever greater process, more lawyers, and more complex understanding of criminal responsibility, even as it de-emphasizes punishment as measured out in years of imprisonment.

One explanation for this procedural complexity is the disaggregation of criminal accountability discussed above. The first two agreements relied on the existing criminal legal system: the question was only whether or not some actors could be exempt from that system. However, once accountability is to be broken down, and punishment is to be played off against truth and other reparatory projects, the regular criminal courts are no longer suffi-

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184. *The Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 264 (Aug. 19, 2013).

185. BELL, *supra* note 21, at 249.

186. *Christine Bell, Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective*, 110 *AJIL UNBOUND* 165, 166 (2016).

cient. The JPL provided for the creation of special prosecutors and special courts devoted to the paramilitary cases. In part this was a way to get more resources to support the regular judicial system as it takes on many new, complicated cases. But it was also a way to allow certain actors within the criminal justice system to specialize in the line of cases governed by the JPL law. Thus, the National Prosecutor created special teams devoted to transitional justice cases, and within the judiciary, certain judges had their courtrooms devoted to trying cases having do with demobilization of the paramilitary under the JPL.<sup>187</sup>

The 2016 Accord takes this differentiation even further. It creates a special jurisdiction for peace that is distinct from the regular judiciary, and whose judges are not part of the regular judiciary.<sup>188</sup> In this way, the nuanced balance the peace accord strikes between the FARC's demands for political participation and reform, on the one hand, and the requirements for accountability dictated by international law and courts, on the other, will ensure the involvement of lawyers, judges, and legal activists for years to come. Tellingly, the Final Accord's section on victims, which encompasses criminal accountability, is the longest one by far. The other four pieces of the agreement, while detailed relative to other agreements, are much thinner. This is not because they were uncontested. Some aspects, such as the drug trade, were as controversial as the question of punishment for atrocity crimes. But the issue of accountability is the only one negotiated in the shadow of two international courts.<sup>189</sup>

#### D. *A Peace That Plays for Time*

Another strategy by which the 2016 Accord resolves the trade-offs between the demand for accountability as defined by the international courts, on the one hand, and the demands of the FARC and military, on the other, is using the ambiguities and loopholes of the relevant treaties to defer important decisions to a later time. Beyond incarceration, two of the issues most debated prior to the Peace Accord were whether the government would have discretion to prioritize cases, and how to define the contours of command responsibility. In the end, the Accord eludes resolution of these issues. Further, the accord's definition of war crimes differs slightly from that of the Rome Statute and the Geneva Conventions, creating a potentially narrower category. Some argue that with these stratagems, the Colombian

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187. For a description of the Justice and Peace Courts, see *Justicia y Paz* [Justice and Peace Law], MINISTERIO DE JUSTICIA Y DEL DERECHO. <http://www.justiciatransicional.gov.co/Normatividad/Justicia-y-Paz> (last visited Mar. 3, 2018). For a description of the division of the National Prosecutor, see <https://www.fiscalia.gov.co/colombia/la-entidad/>.

188. Acuerdo Final, *supra* note 58, art. 9.

189. One might consider the adage that subjection to criminal process is itself a form of punishment. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

government is “playing with fire” and risking an ICC case.<sup>190</sup> This section suggests instead that the stratagems are rather a sign of the government learning to exploit the institutional limits of the courts and make itself more impermeable to court review.

### 1. *Prioritization of cases*

As noted in Part III, at times the government has claimed that it should have the same level of discretion to choose among cases as the ICC and other international criminal courts. The government proposed creating a mechanism to prioritize and select the most serious cases.<sup>191</sup> In its letter to the CCC, the OTP countered that the state could not use the ICC as a model: Unlike the ICC, the state had a duty, as stated in many of the judgments of the Inter-American Court, to prosecute every grave violation, and not only the most serious crimes.<sup>192</sup> Eventually, however, both sides shifted. The OTP, through an important intervention by Deputy Prosecutor James Stewart in 2015, capitulated that even though the state had such a duty, the ICC was constrained in its mandate to review the admissibility of only cases that it could itself investigate.<sup>193</sup> The Final Accord itself punts on this question. It leaves the details of the mechanisms for selection, prioritization and decongestion of cases to be decided later.<sup>194</sup> It thus defers the decision, and the possibility of an adverse judgment on that decision, to a later time.

### 2. *Narrowing the scope of war crimes*

There is one phrase in particular introduced into the final version of the Accord that seems to pose a direct challenge to the ICC. The Final Accord states that “grave” war crimes will not be granted amnesty, and it then defines grave war crimes as “any violation of international humanitarian law committed in a systematic way.”<sup>195</sup> The provision thus introduces two innovations. First, it proclaims that only “grave” war crimes will not receive amnesty. International Criminal Law defines war crimes as “grave breaches of the Geneva Convention.” These are listed in the Geneva Convention. Here, the Accord seems to be claiming only a subset of those will be prosecuted—the *grave* grave breaches, leaving open the possibility that some war crimes will receive amnesty.<sup>196</sup>

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190. Rene Urueña, *Playing with Fire: International Criminal Law, Transitional Justice, and the Implementation of the Colombian Peace Agreement*, 110 AJIL UNBOUND 364, 366 (2016).

191. G. Cong., t. 27, p. 28.

192. See Rome Statute, *supra* note 177, art. 77.

193. James Stewart, Deputy Prosecutor, Int'l Criminal Court, Keynote Address at the Transitional Justice in Colombia and the Role of the International Criminal Court Conference (May 13, 2015), <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf>.

194. Acuerdo Final, *supra* note 58, art. 46.

195. *Id.* art. 40.

196. Urueña, *supra* note 190, at 364–68.



Second, the Accord goes on to explain that by “grave,” it is referring to violations of humanitarian law committed in a systematic way, or as part of a plan or policy. It is true that the Rome Statute itself provides: “The Court shall have jurisdiction in respect of war crimes *in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes*” (emphasis added).<sup>197</sup> But the Accord seems to be saying Colombia will *only* prosecute breaches of the Geneva Conventions that are committed systematically. Note that as an evidentiary matter, it is likely more challenging to prove that a crime was committed “systematically” than that is merely part of a “large-scale commission” of that crime.

In other words, the Accord’s framers, at the last minute, threw in one word, “grave,” seemingly borrowed from the Geneva Conventions, but used in a way that could lead to an overly narrow category of what counts as war crimes. Or, perhaps not. The Constitutional Court announced in March of 2018 that in its still to be issued judgment reviewing the Amnesty Law that implements the Peace Accord, it would strike down as unconstitutional both the use of the adjective “grave” to modify war crimes, as well as the definition of war crimes as violations of humanitarian law that were “committed systematically.”<sup>198</sup>

### 3. *Limiting command responsibility*

The doctrine of command responsibility is one area where the ICC, as well as the ad hoc tribunals, have had several opportunities to develop the law, providing us with interpretations in particular cases. The Final Accord, however, seemed to try to loosen the hold of this precedent. The Accord as signed in September defined “effective control” —the standard needed to prove command responsibility for both FARC and military commanders— as:

The real possibility that the superior had to have exercised appropriate control over his subordinates, in relation with the execution of the criminal conduct, as indicated by Article 28 of the Rome Statute.<sup>199</sup>

But the Final Accord omits the reference to the Rome Statute. In describing the burden of proof for effective control for the FARC, the reference is replaced by “as established in international law,”<sup>200</sup> thus diluting the role of the Rome Statute and the ICC cases. Further, the entire sentence is omitted from the section on military responsibility.<sup>201</sup>

197. Rome Statute, *supra* note 177, art. 8.

198. Colombian Constitutional Court, *Comunicado No. 8*, Mar. 1, 2018 at 3–4.

199. Acuerdo Final, *supra* note 58, arts. 44, 59 (translation by authors).

200. *Id.* art. 59.

201. *Id.* art. 44.

More broadly, while the section on the FARC's command responsibility self-consciously grounds itself in "International Humanitarian Law, International Human Rights Law and International Criminal Law," the section on the military's command responsibility commits to referring only to a treatment that is "special, simultaneous, balanced, equitable, and based on International Humanitarian Law." It thus singles out only humanitarian law. Then, it subjects humanitarian law to domestic law: "Said differentiated treatment will uphold what is established in the operational rules of the public force in relation to International Humanitarian Law."<sup>202</sup>

These changes to article 44 were introduced at the twelfth hour as the government sought to submit the Accord to the Congress. It is possible that this definition could allow some military commanders who would be deemed to have responsibility for war crimes under the ICC's reading of the Rome Statute to escape liability domestically. However, the difference is subtle, and it is too early to know how this will play out. Again, it is a resolution that defers judicial review to a later time.

Each of these three resolutions to contested accountability issues could lead to impunity for crimes covered by the Rome Statute and could thereby trigger an ICC investigation or a challenge before the Inter-American System. Yet, it is also possible that the government will implement them in such a way that they are fully and clearly compliant with the demands of international law. A third alternative is that the government will implement the Accord in a way that seizes on gray areas to push against and stretch international law, making it politically costly for the ICC to open its own investigation, and perhaps even for the Inter-American Court to find Colombia in breach of the American Convention. Another way to understand the Accord's resolutions is that the peace negotiators are playing with time. They are able to move the peace process forward, leaving the thorny details—and potential adverse court judgments—for later.

Interestingly, the OTP seems to be in agreement with this strategy. In writing about the Colombian peace talks, and in particular the question of alternative punishment, James Stewart, Deputy Prosecutor wrote that the OTP could not judge whether the alternative sentences satisfied the Rome Statute "Without knowing the details of the specific sanctions that are being contemplated . . . the Prosecutor will be obliged to take into consideration a series of factors in order to determine if the sanctions are compatible with the interest in bringing persons who have been convicted to justice."<sup>203</sup>

If this strategy ensures that the international courts will remain involved indefinitely, it is also a way to buy time for political change. As referenced above, Bensouda's statement on the peace accord has made it clear that the

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202. A later constitutional amendment furthers this distinction, removing the military from the ambit of contemporary criminal law. See Uruña, *supra* note 187 (translation by authors).

203. Stewart, *supra* note 193, at 14 (translation by authors).

ICC's preliminary examination of the Colombian case will continue.<sup>204</sup> So too, will the Colombian conflict and peace process continue to be of interest to the Inter-American System. But the delay in implementation means that any eventual judicial review would take place under a new political constellation.

Colombia's judicialized peace accord, then, both advances a new, less punitive understanding of transitional justice in international law, and dresses it in a procedural armor that the international courts will find hard to pierce for the time being. The result is a peace that is less punitive, more fluent in international law, more procedurally complex, and more focused on restorative justice.

## V. WILL COLOMBIA'S PEACE CHANGE INTERNATIONAL LAW?

Throughout the peace negotiation, many had wondered whether the international courts would derail any possible peace accord or, alternatively, provide greater criminal accountability. But, the analysis has shown that judicialization was not just a top-down process by which international courts enforce pre-set constraints on peace-making states with blueprints for peace, which states then either follow or discard. Instead, judicialization took the form of a series of dialogues—between the courts and government; among different actors within the state, such as courts, executive agencies, and the prosecutors; and among non-state actors such as NGOs, the media, and the universities—that emphasized the international law and norms of criminal accountability.

Throughout this process, the Colombian government was able to construct, propose and find reception for a less punitive understanding of transitional justice. In other words, the Colombian government neither followed nor discarded a pre-made blueprint for accountability, but instead fashioned its own legally sophisticated solution in consultation with different sets of actors.<sup>205</sup> The Final Accord stays within the bounds of reasonable if untried interpretations of the existing law and norms, but also, at times, seizes on the institutional limits of the international courts to defer their scrutiny. The argument here, however, is not only that that Colombian actors' growing fluency in international law allowed them to push back against ICC influence.<sup>206</sup> It is also that the terms of Colombia's peace were produced *through*—not *despite*—the international courts' ongoing deliberative engagement with the peace process. Without the courts' participation and apparent acquiescence, the Final Accord would not enjoy the same level of international or domestic legitimacy, and it would not show the same level of legal

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204. See *supra* note 88.

205. To use the concept forwarded by Christine Bell, the international courts enabled Colombia to participate in the construction of the *Lex Pacificatoria*. See BELL, *supra* note 21.

206. Urueña, *supra* note 39, at 104.

sophistication.<sup>207</sup> In this sense, it is possible that time's passage does not diminish the impact of an ICC preliminary examination, as argued by Urueña, so much as it changes the kind of impact the court has. Domestic actors now anticipate the ICC and Inter-American Courts' responses, and shape their arguments and actions around them *ex ante*.

The Colombian case also sheds light on the role of international courts in legal globalization more generally. Halliday and Carruthers have argued that legal globalization processes are recursive and can be understood "as sets of cycles that integrate global norm making and national lawmaking."<sup>208</sup> Specifically, they point to cycles of lawmaking and implementation at the national level, and, secondly, norm-making at the international level. But they also point, thirdly, to the cycle of "intersection of the two where national experiences influence global norm making and global norms constrain national lawmaking, in an asymmetric but mutual fashion."<sup>209</sup> The judicialized Colombian peace process described above falls into this third category. Indeed, international courts seem to have been the main site for the intersection: it is primarily through the incidence of the courts that national peace-making processes were put in conversation with international law. Further, as a result of this intersection, the international courts seem to have changed and refined their own understanding of the norms they interpret. Both courts have been depicted by critics as unyielding, as too punitive, and as spoilers of peace and democracy. But their engagement with Colombia seems to have facilitated and hastened a change in the settled norms around transitional justice. Perhaps one significant effect of judicialization more generally, therefore, is to hasten the pace of development of transnational legal orders in response to national processes, and to narrow the gap between the two.<sup>210</sup>

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207. In this sense, our account differs from the trajectory of the Andean Tribunal of Justice (ATJ). Karen Alter and Laurence Helfer argue that the ATJ issues narrow, legalistic rulings in order to ensure its survival in a complex political field. Here, the international courts are playing a more prominent role, even as they at time seem to defer to the state. See generally Karen J. Alter & Laurence Helfer, *TRANSPLANTING INTERNATIONAL COURTS: THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE* (2017).

208. See Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112(4) *AM. J. SOCIOLOGY* 1135, 1138 (2007).

209. *Id.*

210. See *TRANSNATIONAL LEGAL ORDERS* 504–06 (Terrence C. Halliday & Gregory Schaffer eds., 2007) (posing the different institutional forms that transnational legal orders have, and their effects, as a topic that should be further investigated).