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The possibilities of foreign participation in the Colombian transitional process: an analysis of the domestic situation, the MAPP and the prospects for the ICC

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Acknowledgement

This has been the hardest moment of my life. I changed continents right after losing my grandmother and, as I was on the other side of the world, I also lost my grandfather. I miss my family and friends dearly and I turned my world upside down. I took my M.A. while working two jobs, as a cleaner during the day and as a translator on my weekends. I obviously wish a lot of it had been different, I wish I had more focus, I wish I had more discipline and I wish I had adapted quicker, however, if things had not gone the way they did, I would not be where I am today.

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Executive Summary

This thesis is dedicated to the evaluation of how two international institutions, the International Criminal Court (ICC) and the Mission of Support to the Peace Process in Colombia (MAPP), are contemplated in the domestic transitional process in Colombia. Firstly, it will briefly present the conflict's background as well as what led to the current peace agreements, setting the basis for the comprehension of the internal parameters in which the country's Special Jurisdiction for Peace (SJP) operates and its main legislation and institutions. Then, there will be an introduction to the mandate of the MAPP, which was created by the Organization of American States (OAS) specifically to work around the Colombian transition. After understanding its initial mandate and its main alterations over time, I will then analyse the proactive and reactive tendencies it displays on its last published report based on the description of its activities and wording of the document, as opposed to what was initially planned for the institution. Finally, I will analyse the participation of an international institution, the ICC, on the conflict, by presenting its possibilities and controversies. The Court has also been directing its focus towards Colombia and, therefore, I will analyse the Office of the Prosecutor's (OTP) Reports on Preliminary activities on the country. My conclusion will point out how these institutions are fitting in the Colombian's national proceedings and to which degree they have fulfilled or extrapolated their initial intentions towards this transitional process.

1. Introduction and background

I have never personally been to Colombia. The country's history is complex and its societal vicissitudes are tangled in a series of different elements which are not necessarily rooted on the long lasting conflict or on the current transitional moment. Therefore, it is important to clarify the present thesis will be mostly technical and driven by my own interest and passion towards the possibilities involving the peace process in the country. In sum, the arguments and hypothesis will circle the end of the conflict and the national and international institutions regarding this particular topic.

In Colombia, violence is treated in an extremely particular way, they call it: *La Violencia*. It is almost as a living creature or monster, referred to always in the singular and beginning in capital letters, an "omnipresent mythical entity"[1] who would be the root, motive and consequence the actual circumstances of the Colombian transitional process. With time, La Violencia became part of the country's routine, and aggression seemed to be utilized rationally as a political and economic tool.[2]

The roots of the tensions in the country go back to the XIX century, however, this work will start considering it from the landmark for the armed conflict: the "Bogotazo" of April 9, 1948[3]. During a Pan American Conference being held in the capital city of Bogotá, the leader of the Colombian liberal party, Jorge Eliécer Gatán, was murdered and a series of protests and riots arose by the population. The police answered with extreme violence and the whole city was partially destroyed with the conflicts. This event led to a civil war between conservatives, who counted with the help of the repressive police and started the period called La Violencia and

[1]Echavarría Y.,Saúl. 2013. *Pécaut, Daniel. La experiencia de laviolencia: Los desafíos del relato y la memoria*. Medellín, La Carreta Editores E.E., 2013. Co-herencia 10 (19): pp.305-306

[2] *Ibdem*, p. 306.

[3] De la Rosa González, D. (2012). *Del 'Bogotazo' al Día Nacional de la Memoria y Solidaridad con las Víctimas: Los nuevos sentidos del 9 de abril en Colombia*. Aletheia, 3 (5). En Memoria Académica. La Violencia http://www.memoria.fahce.unlp.edu.ar/art_revistas/pr.5444/pr.5444.pdf

liberals, who started to organize in guerrillas and mobilize the neglected rural area of the country[4].

In order to fix the situation, leaders from both parties asked for the armed forces to help and imposed a military dictatorship in the country that was supposed to last four years[5]. This process was the first time in which amnesty was conceded to the participants of the armed conflict, however, the violence did not come to an end with that measure, and the government continued to kill, in silence, members of the guerrillas.[6] This started to generate a particular concern of the Colombian society, which does not fully trust amnesties and other legal remedies as a real solution to its conflicts.

The second planned solution to the tensions was the "*Frente Nacional*", which consisted on a rotating mandate of the government of Colombia between liberals and conservatives in a 4 years basis. The FARC (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*) were created during this period, in 1965, to organize the population of the rural area of the country to fight the government. Other movements that started during the 16 years of duration of the government division are the *Ejército de Liberación Popular* (ELP) and the *Ejército de Liberación Nacional* (ELN), which also took part in spreading the conflict to other areas of the country[7].

During the 1960's, Latin America was mostly under the influence of the US, and the increasing polarization of the Cold War period was deeply reflected into the political structure of the region[8]. In other words, communist related groups were marginalized and repelled by the

[4] *Ibdem*, La llama encendida.
[5]Castañeda, Natalia Chaparro. *Amnístia y Indulto en Colombia:1965-2012.* Universidad Nacional de Colombia. Bogotá, Colombia. 2013: p.55.
[6]*Ibdem*, p. 56
[7]Weyl, Esther S. *Justiça de transição na Colômbia: uma análise do acordo de vítimas e justiça*. Universidade Federal de Brasília. 2016: p.8
[8] Rosero, Luis Fernando Trejos. *Colombia y los Estados Unidos en los inicios de la Guerra Fría (1950-1966) "Raíces históricas del conflicto armado colombiano"*. Revista digital de Historia y Arqueología desde el Caribe colombiano. 2011.

authorities, while the US, after the Cuban Revolution, started to work on obtaining massive influence in Latin America in a manner not to lose influence in the region[9]. At the same time, the communist based guerrilla groups were more and more isolated from public life and took refuge in rural areas[10].

The third elections of the Frente Nacional happened in 1970 and gave origin to a series of critics when Gustavo Rojas Pinilla, former president during the military period, was elected under accusations of fraud. In response to that, the *Movimiento 19 de Abril* (M-19) was created and started a new chapter of the violence in Colombia, since it was based within the urban area, especially in the capital. The actions of the group and their extensive use of anti-regime propaganda took the conflict to the country's upper class, which was not generally affected by it.[11]

In the opposite side, the increasing hate against communists gave rise to extreme right paramilitary groups that had their most famous representative in the 1990's with the *Autodefesas Unidas de Colômbia* (AUC), which was responsible for making Colombia the country with the highest number of murders in the world.[12]

The instability in the 1970's made the guerrillas turn to kidnapping as a political tactic to gather resources and political power. Another group which used the same strategy were the drug dealers (narcotraficantes), which gathered force during the period and gained extreme influence

http://www.redalyc.org/html/855/85522637004/.

[9] Neto, Octavio Amorim, and Andrés Malamud. *What determines foreign policy in Latin America? Systemic versus domestic factors in Argentina, Brazil, and Mexico, 1946–2008.* Latin American Politics and Society 57, no. 4 (2015): 1-22.

[10]Pecault, Daniel. *De laviolencia banalizada al terror: el caso colombiano.* Em: Controversia no. 171. (diciembre 1997). Bogotá : CINEP, 1997.

[11]Weyl, Esther S. *Justiça de transição na Colômbia: uma análise do acordo de vítimas e justiça*. Universidade Federal de Brasília. 2016: p.8

[12]Pecault, Daniel. *De laviolencia banalizada al terror: el caso colombiano.* Em: Controversia no. 171. Bogotá: CINEP, 1997.

to the point of dominating entire areas of the country, including power over the police and political representatives with the rise of cartels such as *Medellín* and *Cali*[13].

The political and civilian tension was increasing while the armed groups gained force, influence and started to develop new tactics, such as the FARC's recruitment of minors to enter the lucrative business of drug dealing[14]. In response to this growth, the government became more violent and repressive, which directly affected not only the groups themselves, but also the general population that, from that moment, could not show any kind of acceptance to the ideals of the guerrillas nor disagreement to the government's policies[15].

Another cycle of amnesties happened in the 1980's, when the government of Belisation Betancur tried to dialogue with the guerrillas and promote a democratic opening, even though some sectors of the society claimed there should not be dialogues with terrorists:

> The government of Betancur […] represented the radical chance in the repressive ways other governments dealt with violence. […] The process of negotiation was crushed by many actors through actions such as the retaking of the Justice Palace, the aniquilation of the 'Unión Patriótica' and the domestic circumstances of the organizations which were protagonists of the conflict.[16]

These amnesties in particular were aimed only at political crimes and, while some participants of the conflict surrendered, the peace lasted for a short period of time. In 1985, the M-19 took the Justice Palace, and the government attempts to regain the place resulted on hundreds of deaths.[17]

[13]Ibdem.
[14]Castañeda, Natalia Chaparro. *Amnístia y Indulto en Colombia:1965-2012.* Universidad Nacional de Colombia. Bogotá, Colombia. 2013
[15]Weyl, Esther S. Justiça de transição na Colômbia: uma análise do acordo de vítimas e justiça. Universidade Federal de Brasília. 2016: p.9
[16]Castañeda, Natalia Chaparro. *Amnístia y Indulto en Colombia:1965-2012.* Universidad Nacional de Colombia. Bogotá, Colombia. 2013: p.61.
[17] *Ibdem.*

In the 1990's the M-19 surrendered and became a political party (*Alianza Democratica M-19*), which lead to a Constituent National Assembly. However, in 1991, the year of its promulgation, a new wave of violence broke the current dialogues with the other guerrillas like the FARC and the ELN[18]. It was only in 2002, with the election of Álvaro Uribe, that there was a proposition to dismantle the AUC, in an initiative launched called Justice and Peace Law (*Ley de Justícia y Paz*)[19].

On the same note, a broader way of understanding the internal transitional process is by analysing the elements of the *Jurisdiccion Especial para a Paz* (Special Jurisdiction for Peace, hereinafter SLP), which is an element of the *Sistema Integral de Verdad, Justicia, Reparación Y no Repetición* (Integral System of Truth, Justice, Reparation and non-Repetition) established after the peace agreement between the government and the FARC-EP, which will be explained on the next chapter. The function of the JEP, as described in its official website, is to "administrate the transitional justice and identify the crimes committed in the marks of the armed conflict" (author's translation)[20]

The present thesis will analyse the ways in which the ideals and strategies displayed in the SJP are treated in two international mechanisms which intend to further the country's transitional process: the Organization of American State's (hereinafter OAS) Mission of Support to the Peace Process in Colombia (*Misión de Apoyo al Proceso de Paz en Colombia*, hereby MAPP), and the International Criminal Court (hereinafter ICC). In order to do that, I will first introduce the SJP, pointing out its goals and mapping its main institutions and derivative legislation. Then, my focus will shift to the MAPP, explaining its development in mandate since it started operating in the country, as well as its relationship with domestic institutions and its degree of

[18] *Ibdem*, p.65.
[19] El Congreso de Colombia. *Ley 975 de 2005*. 25 June 2005, a. 1
https://www.cejil.org/sites/default/files/ley_975_de_2005_0.pdf
[20] JEP. *Jurisdiccion especial para la Paz*. Paragraph 1.
https://www.jep.gov.co/Paginas/JEP/Jurisdiccion-Especial-para-la-Paz.aspx

autonomy or reactivity towards the SJP. The third chapter will be directed to the ICC, an organization which has been analysing and producing reports on the Colombian situation but is still to start its operations in relation to the post-conflict. The novelty presented by the ICC in the Colombian conflict would be the focus on criminal prosecution, which is a sensitive topic towards the field of transitional justice, in general, and the Colombian Justice and Peace Law, in particular. My conclusion is going to point out in what degree such institutions are potentially fitting the original speech intended towards the transitional process and if they are doing so in an autonomous manner or depending on government initiatives.

2. Domestic advancements

The Colombian government has already tried to ease the conflict in many ways over the time, however, the present chapter will have its focus on more contemporary solutions, mapping the norms and institutions that are still in operation under the national umbrella of the transitional justice process.

2.1 Legislation and agreements

The United Nations defines transitional justice as:

> […] the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law.[21]

The complexity of transitional processes and particularly of the Colombian one comes from the fact there are many tensions inherent to this process, such as the necessity of demobilization

[21] Guidance note of the Secretary General.*United Nations Approach to Transitional Justice*. 2010: p.2. https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf

versus the finality of reconciliation[22]. It focuses on the victims of the conflict and it requires for the people to, at the same time, face a traumatic past and move towards reparation. There are many mechanisms which might be used to promote transitional justice, such as truth commissions, fact-finding commissions, domestic and international courts[23].

In 2005, the law n.975/2005, the Justice and Peace Law was signed by president Uribe and, since then, it has been considered the normative landmark to the process of disarmament, demobilizing and collective and individual reinsertion of the armed groups in the margins of the law, it is also supposed to be a legal instrument for the victims to get access to truth, justice and reparation. It outlines the following objectives: "ease the peace process and reincorporate individually or collectively the members of armed groups, granting to victims their rights to truth, justice and reparation" (author's translation).[24] This Law encapsulates not only political crimes but also the crimes of kidnapping and murder, under the condition that the accused would surrender and collaborate with the government with information about the conflict.[25] Shortly after its creation, the scope of the law was extended to members of the guerrillas[26].

The issues raised with this law were related to the victims of the conflict, who were not even mentioned in the text of the norm. There was a general feeling of both unfairness to the mainly affected people and impunity to the perpetrators. Over the time, it has suffered many criticisms by NGOs and other organizations that protect the right of victims, since it is accused to focus

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[22] Barón, Mariana Delgado. *Uma justicia transicional sin transición: verdade, justicia, reparación y reconciliación em medio del conflcito*. 2011: p.54.

[23] International Centre for Transitional Justice. *What is Transitional Justice?* 2018. (Website) https://www.ictj.org/about/transitional-justice

[24] El Congreso de Colombia. *Ley 975 de 2005*. 25 June 2005. Article 1 https://www.cejil.org/sites/default/files/ley_975_de_2005_0.pdf

[25] Weyl, Esther S. *Justiça de transição na Colômbia: uma análise do acordo de vítimas e justiça*. Universidade Federal de Brasília. 2016: p.10

[26] *Ibdem*, p.10

on the perpetrators and their process of getting back to the society and Colombia's political life[27].

> One of the aspects to be highlighted within the Justice and Peace process has to do with the use of a discourse and with the adoption of mechanisms of transitional justice in a complex context that has been described by some as post-conflict within the conflict, or halfway transition, and where it is very easy to fall into an "eternal transition" in which the "limited" processes of truth, justice and reparation linked to the debates about forgiveness, the doses of forgetfulness and memory and the same reconciliation of society, they imply a coming and going towards the "bloody past" (…) and where the issue of reparation of the victims has not been resolved and therefore contributes to continue marginalizing and victimizing broad sectors of this universe (author's translation)[28].

In order to end this feeling of unfairness surrounding the lack of reparations and attention towards victims' rights and, at the same time, tackle the threat and the risks of an "eternal transition", in 2016, the negotiations between the government of Juan Manuel Santos and the FARC culminated in the Final Agreement for Ending Conflict and Building a Stable and Long-Lasting Peace (*Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*)[29]. It regulated on topics such as the access to land and agrarian reform, envisioning rural development[30], the strengthening of democracy and political participation[31], the agreements to cease all hostilities and disarmament[32], the illicit drug traffic[33], the victims'

[27]Barón , Mariana Delgado. *Una justicia transicional sintransición: verdad, justicia, reparación y reconciliaciónen médio del conflito*. Revista Análisis Internacional: Colômbia, 2011: pp 2-3.
[28]*Ibdem*, p. 55
[29] Gobierno Nacional y las Fuerzas Armadas Revolucionarias de Colombia - Ejército del Pueblo (FARC-EP). *Acuerdo Final para la Terminación del Conflicto y la Construcción de Una Paz Estable y Duradera*. 2016. http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf
[30] *Ibdem*, pp. 10-34
[31] *Ibdem*, pp. 35-56
[32] *Ibdem*, pp. 57-97
[33] *Ibdem*, pp. 98-123

rights to truth, justice, reparation and non-repetition[34] and, finally, the ways to implement and verify such practices.[35]

The way in which the government decided to generate a broad sense of participation and drive the population towards the overcoming of the general suspiciousness over the transitional process was through putting the agreement into public vote. A national plebiscite rejected the proposal in October 2016 and, while the "no" vote was preferred by 50,2 percent of the voters, and around 60 percent of the population abstained from voting[36].

Still in 2016, however, a new agreement with the same name was proposed in December between the parts without taking its fate to the public but, still, taking into consideration the victory of the 'no' vote[37]. This was how the Law 1820 of 2016 gave origin to the Special Jurisdiction for Peace (SJP), with the competency over grave crimes committed "in the context and by reason of the conflict.[38]"

The way the SJP tackles the issues found in the previous agreement and in the Justice and Peace Law is by discriminating the ways the transitional justice would treat those who recognize or not recognize their involvement on the conflict[39]. It speaks about 'special treatment', which by its turn would be conditioned to the fulfilment of peace agreements and reincorporation in society[40]. The focus would be the satisfaction of the victims' rights, which, on the text, are directly connected to "truth, reparation and non-repetition" (author's translation)[41].

[34] *Ibdem*, pp. 124-192
[35] *Ibdem*, pp. 193-218
[36] Javier Lafuente. Colombia dice 'no' al acuerdo de paz con las FARC. El Pais, 2016. https://elpais.com/internacional/2016/10/02/colombia/1475420001_242063.html
[37] Congresso de Colombia. *Ley 1820 de 2016.* Bogota, 2016. Article 1. http://es.presidencia.gov.co/normativa/normativa/LEY%201820%20DEL%2030%20DE%20DICIEMBRE%20DE%202016.pdf
[38] Oficina del Alto Comisionado para la Paz. *ABC: Special Jurisdiction for Peace.* 2016, p.1.
[39] *Ibdem*, p.1
[40] *Ibdem*, p.2
[41] *Ibdem*.

It also differentiates between early and late recognition of responsibility and it sets the penalties are to be "graded taking into consideration the level of determinant participation in the most serious and representative conducts" (author's translation)[42]. In case the involved parties recognize their responsibility in early stages of the processes, the maximum penalties would be 8 years of restraint of liberty. As for prison sentences, they vary from maximum of 8 years in case of late recognition to the maximum of 20 years in case the accused fails to recognize involvement[43].

The norm created to set these rules was the Law 1820 of 2016[44], which also makes it clear the scope of the SJP and its special treatment is broader enough to englobe those who had direct or indirect participation in the conflict[45]. Since this was the norm which culminated from the whole process of the denial on the referendum, government and FARC-EP agreements and constant revisions of laws such as the Justice and Peace Law, it is safe to consider it represents nowadays the ultimate representation of the internal concepts for the transitional justice.

With that in mind, I will now go forward to presenting the applicable principles found in the Law 1820 of 2016 which direct its application in domestic institutions. The main directive to the law is the right to peace and integrity, which depends deeply on non-repetition guarantees[46], and contribution to satisfaction of victims' rights[47]. Another important aspect for the transitional process is the prevalence of amnesties, indults and sanctions based on the SJP above any other jurisdiction or other special proceeding which might be connected directly or indirectly to the internal conflict[48], bearing in consideration the recognition of participation in

[42] *Ibdem*.
[43] *Ibdem*.
[44] Congresso de Colombia. *Ley 1820 de 2016*. Bogota, 2016
[45] *Ibdem*, a. 3
[46] *Ibdem*, a. 5-6
[47] *Ibdem*, a. 14
[48] *Ibdem*, a. 7

the conflict, the end of hostilities is also to benefit from the broadest understanding of amnesty possible[49].

An interesting point is to be made on the proposal of "special, symmetrical, simultaneous, balanced and equative legal treatment" (author's translation), which sets that agents of the State cannot receive amnesty or indult, but will be exposed to a unique kind of special treatment[50]. In sum, this means the applicable law for agents of the State is the one set on the "Chamber for the Definition of Juridical Situations of the Special Jurisdiction for Peace" (*Sala de Definición de Situaciones Jurídicas de la Jurisdicción Especial para la Paz*, author's translation), which will consider mechanisms such as "the renounce to criminal prosecution for those who have been condemned, sued or charged of conducts which are punishable because, on the occasion of, or in direct or indirect connection with the armed conflict*"* (author's translation).[51]

At the same time, the law explicitly says it is not opposing the State's duty to "investigate, enlighten, pursue and sanction"[52] issues related to the conflict. Finally, the law should follow the principles of favourability[53], due process[54] and legal safety in a sense that what is stablished by the norm cannot be changed unless it is revised directly by the Tribunal for Peace[55].

The principle which, according to the norm, guides the processes of amnesties and indults is the Integrality, which also includes the special treatment granted to agents of the State[56]. Following an integral and cohesive process would guarantee that the decisions taken under the transitional process would grant juridical safety and contribute for the ending of the conflict and subsequent maintenance of peace[57].

[49] *Ibdem*, a. 8
[50] *Ibdem*, a. 9
[51] *Ibdem*, a. 45
[52] *Ibdem*, a. 10
[53] *Ibdem*, a. 11
[54] *Ibdem*, a. 12
[55] *Ibdem*, a. 13
[56] *Ibdem*, a. 6
[57] *Ibdem*.

The exceptions to the possibility of either amnesty or renunciation of criminal prosecution (either in normal crimes or in those committed by agents of the State)[58] are the following:

> In no case shall amnesty or pardon be the only crimes that correspond to the following conducts: a) Crimes against humanity, genocide, serious war crimes, taking hostages or other serious forms of deprivation of liberty, torture, extrajudicial executions, forced disappearance, violent carnal access and other forms of sexual violence, abduction of minors, forced displacements, in addition to the recruitment of minors, in accordance with the provisions of the Rome Statute. […] b) Common crimes that have no relation to the rebellion, just as those which have not been committed in context and reason rebellion during the armed conflict or which motivation was aimed for the obtainance of personal benefit, or a third party's (author's translation).[59]

In other words, the wrongful acts must be of direct connection to the conflict and in respect of norms of international humanitarian law in order to be considered for amnesty or, in the case of agents of the State, special treatment.

Another important aspect of the SJP which helps to understand its particularities is the process of coordination with ethnical and indigenous jurisdictions. It asks for a transitional process with an ethnic and racial approach and, for such, the domestic mechanisms should follow the principles of "integrity, complementarity and reciprocity" (author's translation) towards those types of jurisdictions which are currently operating in the country.[60] It is also pluralistic, reflecting respect to the right of self-determination and autonomy and accepting the traditional authorities from the different indigenous peoples and their own juridical practices.[61]

This is portrayed in many ways domestically, mostly because the mechanisms for transitional justice and the case instances must reflect on the disproportional degrees of impact which

[58] *Ibdem*, a. 46
[59] *Ibdem*, a. 23
[60] Jurisdicción Especial para la Paz: *Reglamento General, Acuerdo 001 del 9 de marzo de 2018 proferido por la Sala Plena*. Bogotá, 2018. Chapter 15, a. 94. https://www.jep.gov.co/Marco%20Normativo/Sala%20Plena%20Acuerdo%20001%20de%202018%20Reglamento%20general%20JEP.pdf
[61] *Ibdem*, a. 94 (d),(e).

affected different ethnicities by guaranteeing their effective participation.[62] Some ways of assuring participation are disposed in the agreement which gave origin to the Rules of Proceeding of the SJP, such as the availability of interpreter and translators, special treatment for victims of sexual abuse which belong to ethnic minorities and specialized legal assistance.[63] The domestic mechanisms directed to the transitional process should also notify and accompany ethnical authorities on the investigations on a way in which, at the same time that the system provides them with support with their requests and needs related to the post-conflict, it should also work alongside the communities to get information and respect their rules in order to act and investigate[64].

2.2 Institutions for the Special Jurisdiction for Peace

Taking the Law 1820 of 2016 as a basis, the institutions which surround the SJP are composed of one Tribunal for Peace, of three Chambers: the Chamber for the Recognition of Truth, Responsibility and Determination of Doings and Conducts; the Chamber of Amnesty and Indult; and the Chamber of Definition of Juridical Situations, of a Unity for Investigation and Accusation, the Executive Secretariat, the Judicial Secretariat, a Group of Information Analysis and the Presidency (author's translation)[65]. The functions and aims of these bodies, such as the different commissions which make part of the SJP will be explained below, in a manner to make it easier to compare what these domestic institutions propose and how the MAPP and the ICC fit in such terms.

[62] *Ibdem*, a. 94 (i).
[63] *Ibdem*, a. 95
[64] *Ibdem*, a. 96
[65] JEP. *Jurisdiccion especial para la Paz*. https://www.jep.gov.co/Paginas/JEP/Jurisdiccion-Especial-para-la-Paz.aspx

Before analysing the Tribunal for Peace, it is necessary to first focus on the Chamber for the Recognition of Truth, Responsibility and Determination of Doings and Conducts, which will ultimately filter the information on the grave cases and investigations related to the conflicts and assign them to the SJP[66]. It is important to take note that the cases or recognitions of responsibility which are selected as part of the scope of the SJP can be analysed individually or collectively, even though each individual within the group may "accept responsibility or express their disagreement with the individualization of guilt" (author's translation)[67].

Ultimately, this Chamber will present to the Tribunal those grave cases by also contrasting the information received by domestic courts, independent victim's organizations and further investigations with the recognition of participation by the accused, specially of those who had "determinant participation" on the conflict[68]. This is not the case, however, when there is no recognition of participation, since in such situations it is the job of the Unity of Investigation and Accusation to initiate the proceedings before the Tribunal, however even then this Chamber has to send the relevant case to the Unity.[69] On the same note, there is also collaboration with the Chamber of Amnesty and Indult by assigning cases which seem to be in need of such proceedings or, otherwise, send cases which are not going to be part of any resolutions to the Chamber of Definition of Juridical Situations.[70]

In sum, this Chamber seeks to identify and assign the gravest and more representative cases, either those which have been investigated or sentences by ordinary justice or indicated by

[66] Red Internacional de Solidaridad con las Prisioneras y los Prisioneros Politicos Colombianos; INSPP Brigada Juridica Eduardo Umaña Mendoza Bjeum; Asociación Nacional de Ayuda Solidaria Andas: *Jurisdicción Especial para la Paz Amnistía e Indulto: Cartilla Para Prisioneras y Prisioneros Políticos.* Latino Impresores. Bogotá, 2016: p. 27.
http://comitedesolidaridad.com/sites/default/files/315612122-Cartilla-Jurisdiccion-Especial-para-la-Paz-para-Prisioneras-y-Prisioneros-Politicos.pdf

[67] *Ibdem*, p. 25

[68] *Ibdem*, pp. 25-26

[69] *Ibdem*, p.26

[70] *Ibdem*, p.25

victims' or human rights' organizations, which will both have the same juridical strength in the eyes of the SJP.[71] This step already seems like a way to readdress the previous criticisms found on the plebiscite rejected agreement and previous norms such as the Justice and Peace Law, since it is clearly focusing on the victims and most vulnerable groups affected by the conflict. The next institution is the Tribunal for Peace, which is composed by 20 magisters and counts with four independent foreign judges, who work on the basis of *amicus curiae* and, even though they are considered to be third parties in the processes, are authorized to integrate the SJP as consultants in order to "add more juridical elements to the resolution of cases" (author's translation)[72]. The magisters will be divided in four sections: The Section of First Instance to Cases of Recognition of Truth and Responsibility (*Sección de Primera Instancia en los casos de Reconocimiento de Verdad y Responsabilidad*, author's translation); The Section of First Instance to Cases of Non-Recognition of Truth and Responsibility (*Sección de Primera Instancia en los casos de Ausencia de Reconocimiento de Verdad y Responsabilidad*, author's translation); The Section of Revision of Sentences (*Sección de Revisión de Sentencias*, author's translation) and The Appeals Section (*Sección de Apelaciones*, author's translation)[73]. Once the Tribunal ends its activities, it will also count with the Section of Stability and Efficacy (*Sección de Estabilidad y Eficacia*, author's translation), which will access and monitor the efficiency of the sentences under the SJP or, in another hand, deal with "new" cases which may arise and still fit within the description set by the Law 1820 of 2016[74]. Finally, it is composed

[71] *Ibdem*, p.25

[72] Jurisdicción Especial para la Paz: *Reglamento General, Acuerdo 001 del 9 de marzo de 2018 proferido por la Sala Plena*. Bogotá, 2018. Chapter 8, a. 48. https://www.jep.gov.co/Marco%20Normativo/Sala%20Plena%20Acuerdo%20001%20de%202018%20Reglamento%20general%20JEP.pdf

[73] Jurisdiccion Especial para la Paz. *Tribunal Especial para la Paz: Inicio*. Paragraph 1. https://www.jep.gov.co/Paginas/JEP/Tribunal-Especial-para-la-Paz.aspx *Ibdem*, paragraph 1.

[74] Red Internacional de Solidaridad con las Prisioneras y los Prisioneros Politicos Colombianos; INSPP Brigada Juridica Eduardo Umaña Mendoza Bjeum; Asociación Nacional de Ayuda Solidaria Andas: *Jurisdicción Especial para la Paz Amnistía e Indulto: Cartilla Para Prisioneras y Prisioneros Políticos.* Latino Impresores. Bogotá, 2016: p. 33

by an Executive Secretariat (*Secretaría Ejecutiva, author's translation*), which deals with administrative issues and manage the SJP's resources.[75]

The Section of First Instance to Cases of Recognition of Truth and Responsibility takes the information provided by the Chamber for the Recognition of Truth, Responsibility and Determination of Doings and Conducts and matches it with the conduct which has been recognized by the accused and the sanctions imposed by the Tribunal. It is also responsible for the application of the recommended sanction and its fiscalization with the assistance of other monitoring mechanisms which are component of the SJP[76]. On the other hand, there is the Section of First Instance to Cases of Non-Recognition of Truth and Responsibility, which compares the accusations and investigations with the testimony of the accused who does not recognize participation in the conflict. It is also responsible for the sentencing process and imposing of sanctions or alternative measures for each case[77].

The Section of Revision of Sentences works under a very different scope. It basically analyses the sentences which had been previously issued by ordinary courts and assesses their strength and if they were in fact fulfilled. Always taking into consideration violations which were committed in the context or by reason of the Colombian conflict, if it identifies a mistake by the domestic courts or that the gravity of the sentence does not match the severity of the crime, it will, in an exceptional manner, review it.[78] This Chamber can also analyse sentences by the

[75] Jurisdiccion Especial para la Paz. *Secretaria Ejecutiva*.
[76] Red Internacional de Solidaridad con las Prisioneras y los Prisioneros Politicos Colombianos; INSPP Brigada Juridica Eduardo Umaña Mendoza Bjeum; Asociación Nacional de Ayuda Solidaria Andas: *Jurisdicción Especial para la Paz Amnistía e Indulto: Cartilla Para Prisioneras y Prisioneros Políticos.* Latino Impresores. Bogotá, 2016: p. 31
[77] *Ibdem*, p.32
[78] *Ibdem*.

SJP itself, in a manner to resolve disputes, for example between Chambers or instances, or by request of any other Chamber.[79]

The Appeal's Section is a second instance decision for the previous Sections, in case there is an appeal by the accused or by victims who feel their violated fundamental rights have not been addressed in a case.[80] This shows yet another example of instance in which the SJP, as idealized in the national agreement, tries to prioritize the victims' rights and opinions in order to make the process move towards a long lasting peace.

The Chamber of Amnesty and Indult takes into consideration the recommendations of the Chamber of Recognition of Truth and Responsibility and decides the order the granting of amnesties or induct to people either being prosecuted or already condemned in cases in which such measures are deemed necessary[81]. In 2017, the Colombian government signed Decree 277 of February 17th, 2017 (*Decreto 277 del 17 Febrero de 2017*, author's translation), as an Amnesty Law previously predicated by the Law 1820 of 2016[82]. More than regulating amnesties, it extends its scope to "indults and other special legal mechanisms of extinction of responsibilities and criminal sanctions" (author's translation)[83] and promises the broadest amnesty possible for those who are applicable to benefit from it.[84] The applicable principles count with the right to peace[85] and the right to permanence, in a sense that those measures should prevail above any other jurisdiction, as it is included in the SJP.[86] It also reinforces that agents of the State will not be granted amnesties or indults, but a different kind of special

[79] *Ibdem*.
[80] *Ibdem*.
[81] *Ibdem* p.41.
[82] Presidencia de la República de Colombia. *Decreto 277 del 17 Febrero de 2017*. Bogotá, 2017. http://es.presidencia.gov.co/normativa/normativa/DECRETO%20277%20DEL%2017%20FEBRERO%20DE%202017.pdf
[83] *Ibdem*, a. 2.
[84] *Ibdem*,a. 8.
[85] *Ibdem*,a. 5.
[86] *Ibdem*,a. 7.

treatment,[87] and that this Decree, such as the norm which originates it, will not stay in the way of the State's duty to investigate, prosecute and sanction violations under the scope of the SJP.[88]

According to the Law 1820 of 2016, amnesties, indult and special treatment can only be granted after the laying of arms.[89] Other conditions were put by the country's Constitutional Court in April 2018, when it reinforced those measures cannot be granted in cases of genocide, crimes against humanity, genocide, war crimes and torture[90]. It is important to say the Court also invited independent organizations to intervene in the constitutionality process of the Law 1820, by giving their opinions on how the Court should see the norm[91]. Amongst those actors there were many domestic and regional organizations, but it also included: International Amnesty, the International Centre for Transitional Justice and even the International Criminal Court.[92] Once more in the process, the civil society had a chance to participate and be heard by key domestic instances, which also approximates the victim's demands from the decision making around the transition.

The Chamber of Definition of Juridical Situations, by its turn, takes part in defining the procedure in instances in which there are no grounds for exclusion of criminal sanctions. In other words, this Chamber is invoked when there is no amnesty or indult available due to the nature or degree of the violation or if they were not included on the main documents surrounding the SJP[93].

[87] *Ibdem*,a. 9
[88] *Ibdem*,a. 10
[89] Congresso de Colombia. *Ley 1820 de 2016*. Bogota, 2016: a. 18.
[90] Corte Constitucional de Colombia. *Sentencia C-025/18, Revisión de constitucionalidad del Decreto ley 277 del 17 de febrero de 2017 "Por el cual se establece el procedimiento para la efectiva implementación de la Ley 1820 del 30 de diciembre de 2016 'por medio de la cual se dictan disposiciones sobre amnistía, indulto y tratamientos penales especiales y otras disposiciones'".* 2018, paragraph 60.
[91] *Ibdem*, antecedentes, paragraph 4.
[92] *Ibdem*.
[93] Red Internacional de Solidaridad con las Prisioneras y los Prisioneros Politicos Colombianos; INSPP Brigada Juridica Eduardo Umaña Mendoza Bjeum; Asociación Nacional de Ayuda Solidaria Andas: *Jurisdicción Especial*

Finally, the Unity of Investigation and Accusation acts in cases where there is no recognition neither of truth nor responsibility, referring such cases to the Tribunal for Peace with the focus on guaranteeing victim's rights and their protection, especially in situations referring to sexual violence[94]. In case there is no need for actual prosecution, it can also refer cases to other chambers, such as the Chamber for the Definition of Juridical Situations and the Chamber of Amnesty and Indult[95]. It also analyses the violations taking into consideration its perpetrators and the potential sanctions which may be applied (with subsequent monitoring of those).[96]

Apart from those juridical institutions, the SJP counts with groups and commissions which are meant to analyse, monitor, coordinate and inform on the transitional situation and its different stakeholders. The first one worth mentioning is the Information Analysis Group (*Grupo de Anáalisis de la Información*, author's translation), which gathers, systematizes and analyses information on cases and reports produced on the scope of the SJP, not only by its Chambers, groups and sections but also coordinating with other domestic mechanisms, with the intention to preserve it and search for the truth regarding the conflict.[97] The centralization of information and data proposed by this Group would be follow by its scrutinization in a way to identify main actors of the conflict and violations, patterns and suggest possible remedies for satisfy the victims[98]. Its finality is to produce reports based on this whole process while taking into consideration environmental and social perspectives, such as those from indigenous and other vulnerable communities and from different victim's groups.[99]

para la Paz Amnistía e Indulto: Cartilla Para Prisioneras y Prisioneros Políticos. Latino Impresores. Bogotá, 2016: p. 45

[94] *Ibdem*, p.47

[95] *Ibdem*

[96] Jurisdicción Especial para la Paz: *Reglamento General, Acuerdo 001 del 9 de marzo de 2018 proferido por la Sala Plena*. Bogotá, 2018. Chapter 13: a. 86

[97] Jurisdicción Especial para la Paz: *Reglamento General, Acuerdo 001 del 9 de marzo de 2018 proferido por la Sala Plena*. Bogotá, 2018. Chapter 10: a. 71

[98] *Ibdem*.

[99] *Ibdem*.

In the case of ethnical minorities and indigenous groups, the institutions which compose the SJP may stablish that sanctions, for example, are to be executed on Centres of Cultural Harmonization (*Centros de Armonización Cultural*, author's translation), providing them with material support and taking care of the logistics necessary to rehabilitate those who participated in the conflict on the eyes of their people[100]. Not only that, but different communities can also employ their own harmonization mechanisms to those who had their sanctions enforced outside their territory, provided that all those processes have the monitoring of the SJP[101].

Additionally, the SJP counts on commissions and committees in order to guarantee that different approaches will be taken into consideration during the transition. These institutions will also work on the understanding of the dynamics of the conflict based on their different focus, stablishing consistent methodologies and working alongside each other[102]. In sum, each one of these mechanisms must apply their main focus on different types of analysis of the impact of the conflict, for example elaborating reports and guides on the light of previous investigation and case-law.[103] Ultimately, they are able to propose courses of action to the government and the multiple Chambers which compose the SJP.[104] These mechanisms are listed on the Rules of Proceeding as: the Territorial and Environmental Commission (*Comisión Territorial y Ambiental*)[105], the Ethnical Commission (*Comisión Etnica*)[106] and the Gender Commission (*Comisión de Género*)[107]. The Committee for Inter-institutional Coordination (*Comité de Coordinación Interinstitucional*) is supposed to provide the logistics of the coordination of the institutions which compose the SJP with other governmental mechanisms,

[100] *Ibdem*, chapter 15, a. 96
[101] *Ibdem*.
[102] *Ibdem*, chapter 16.
[103] *Ibdem*.
[104] *Ibdem*.
[105] *Ibdem*, a. 101-102.
[106] *Ibdem*, a. 103-104.
[107] *Ibdem*, a. 104(2)-105

such as the Commission for the Truth, Coexistence and Non-Repetition (*Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición*, author's translation) and monitor their activities[108].

3. The Organization of American States' Mission of Support to the Peace Process in Colombia

The present chapter will seek to analyse the way in which the Mission of Support to the Peace Process in Colombia (*Misión de Apoyo al Proceso de Paz en Colombia*, also known as MAPP), instituted by the Organization of American States (hereinafter, OAS) tends to show reactivity or proactivity towards the government's efforts to develop the transitional justice in Colombia. The purpose of this analysis is to understand how this purpose and scope fits within the SJP and how the actions of the institution are intertwined with the original intents of the Colombian government during its establishment and reinforcement.

In the first place, I will briefly explain the context of establishment of the Mission and its importance as a multilateral organization in the country. Second, I will mention the changes in the organization's mandate, from its foundational text to the additional protocols which followed it. Third, I will map the circumstances of the last report published by the organization which show proactive or reactive action, in a way to see whether the Mission has been strictly following its mandate or if its changes in response to new social or governmental needs. Last, the conclusion will point out if the MAPP tends to action a responsive manner toward what is done in practice by the Colombian government and domestic mechanisms or if it has its own agenda.

[108] *Ibdem*, chapter 19.

3.1 The Mission's mandate

Even before the enforcement of the Justice and Peace Law of 2005, the Colombian president Alvaro Uribe was already trying to turn to international participation in the upcoming transitional process of the country. The first attempt was to have the United Nations intervene, and the president's idea was for the organization to train Colombian soldiers into their own peacekeeping parameters, in order for them to best deal with displaced people and the de-militarization of armed groups.[109] The president's requests were declined, since UN representatives said the organization could not train local "blue jackets" to act within their own territory.[110]

The OAS was the one which came to represent an international participation in the conflict. On February 4th, 2004, there was the signature of the Agreement between the Government of the Colombian Republic and the OAS for the monitoring of the peace process in Colombia (*Convenio entre el gobierno de la Republica de Colombia y la Secretaria General de la Organiyación de los Estados Americanos para el Acompanamiento al Proceso de Paz en Colombia*, hereinafter, the *Convenio*)[111], which gave origin to the MAPP and is a landmark for multilateral participation in the country. Before that, the OAS would only treat the Colombian conflict tangentially, issuing declarations with a political background.[112] The

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[109] El Tiempo. "*Dejen de criticar y criticar*", October, 2002
http://www.eltiempo.com/archivo/documento/MAM-1313830

[110] El Tiempo. "*Onu descarta cascos azules a la colombiana*", October, 2002
http://www.eltiempo.com/archivo/documento/MAM-1311527

[111] Organization of American States. *Convenio entre el gobierno de la republica de colombia y la secretaria general de la organización de los estados americanos para el acompanamiento al proceso de proceso de paz en colombia.* 2004.
http://apw.cancilleria.gov.co/Tratados/adjuntosTratados/4615E_OEA%20-%20CONV%20PROCE%20PAZ%20-%202004.PDF

[112] [6]Rafael Duarte Villa and Manuela Trindade Viana. *Internacionalização pelo envolvimento de atores externos no conflito colombiano: atuação da OEA na desmobilização de grupos paramilitares na Colômbia.* 2012, vol.55, n.2 p.12
<http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0011-25820120002000005&lng=en&nrm=iso>. ISSN0011-5258. http://dx.doi.org/10.1590/S0011-52582012000200005. P. 12

Mission represents until this day a way to provide continuity in the international debate on the country's conflict and transition. More importantly, the presence of the OAS on Colombian territory drives away the possibility of a unilateral government solution to the transition of the country, which could potentially isolate it from the regional and international standards of protection of human rights. In sum, the MAPP not only provides legitimacy to the process but also represents a new alternative for victims and local communities to have their voices heard by the government and the international community.

In 2016, the Law 1820[113] was enacted and, alongside the Justice and Peace Law of 2005[114], they have been considered normative landmarks to the process of demobilization followed by collective and individual reinsertion of the armed groups and other participants in the conflict to the society, and as a legal instrument for the victims to get access to truth, justice and reparation.

The present thesis will not focus on the impact these norms and the SJP had in other organizations other than the MAPP and, further on, the ICC, since they represent the largest regional institution meant for Colombia and the main international organization focused on transitional justice. However, it is worth stressing that the early stages of the transitional process suffered criticism, especially from NGOs, which saw the norms as potential breaches in which those responsible for the conflict may gain amnesties without nothing in return to society, what would be prejudicial for the victims and have little impact on the truth finding and its preservation.[115]

[113] Congresso de Colombia. *Ley 1820 de 2016*. Bogota, 2016

[114] El Congreso de Colombia. Ley 975 de 2005. 25 June 2005

[115] International Amnesty in Colombia. *La Ley de Justicia y Paz garantizará la impunidad para los autores de abusos contra los derechos humanos*. April, 2005. https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/la-ley-de-justicia-y-paz-garantizara-la-impunidad-para-los-autores-de-abusos-contra-los-derechos-hum/

Taking that into consideration, the OAS made the MAPP's initial mandate, detailed in the *Convenio*, to monitor the transitional process, from the cease-fire and demobilization until the reinsertion of the participants in the conflict within the society.[116] "The general objective of this *Convenio* is to support the government in the objectives of its peace policy, through facilitating the cooperation the government requires from the OAS and through the reception of help sent by other State-Parties of the OAS and other States" (author's translation)[117].

The organization may provide the mentioned support to the peace process in different ways: not only through the monitoring of policies and laying of arms[118], but also on the incentives to local initiatives towards peace, facilitating cooperation and mutual confidence between different sides of the conflict.[119]

Still regarding local initiatives, the MAPP has also the freedom to formulate and conduct social projects in different communities which would be aimed to cultivate a "…culture of democracy, peace and peaceful conflict resolution" (author's translation) [120]. Therefore, the Mission means to monitor the reconciliation between the government and de-mobilizing armed groups and/or between the Colombian society and the reinserted participants within society.[121]

It is important to mention that even though the *Convenio* expresses the Mission has the right to formulate and recommend projects to the government's policies for the transition or to other parts of the conflict, it explicitally says it cannot participate or advise directly on them "unless

[116] Organization of American States. *Convenio entre el gobierno de la republica de colombia y la secretaria general de la organización de los estados americanos para el acompanamiento al proceso de proceso de paz en colombia*. 2004: a. 1.3
[117] *Ibdem*, a. 1.1
[118] *Ibdem*, a. 2.1(c)
[119] *Ibdem*, a. 2.1(d)
[120] *Ibdem*.
[121] *Ibdem*, a. 2.2(b)

express solicitation by the parts in common accord is made for a specific and punctual opinion" (author's translation)[122]

In spite of being tied to the government's policies and to some of the armed groups' actions through its monitoring goal, the MAPP follows the principle of autonomy, in the sense it must respect Colombian sovereignty[123] and the chain of command within public authorities, without sacrificing its flexibility to adapt to changes on the process of transition.[124] Neutrality is another principle the Mission compromises to follow in its original mandate, proposing not to discriminate against any parts of the conflict when applying its mandate.[125]

Even though its initial purposes were purely reactive to domestic policies, one of my hypotheses is the institution is constantly broadening its scope, responding also to social dynamics and to what the government has been doing beyond (or in spite of) what was initially planned by the SJP legislation. Needless to say, the original mandate of the Mission says nothing about indigenous rights or any type of racial, ethnic or gendered perspective when analysing, monitoring or reporting the transitional period, which might have meant it would only base its analysis on the mainstream positions of both the government, the armed groups and the impact on the victims.

The first main adaptation the Mission had to undertake was regarding the establishment of the Justice and Peace Law in 2005, which happened a year after the *Convenio* took place. This can be seen even in the most recent Report published by the MAPP, which will be analysed further on, in which a section is focused on the current application of that Law.[126] Apart from this first movement, the mandate of the Mission has been extended and adapted several times,

[122] *Ibdem*, a. 2.2(c)
[123] *Ibdem*, a. 2.3(a)
[124] *Ibdem*, a. 2.3(c)
[125] *Ibdem*, a. 2.3(b)
[126] OAS. *Vigésimo tercer informe del secretario general al consejo permanente sobre lamisión de apoyo al proceso de paz encolombia de laorganización de los estados americanos (MAPP/OEA)*. 2017, p.32 https://www.mapp-oea.org/publicaciones-2/informes-semestrales/

in a sense that there are currently seven additional protocols to the *Convenio*. By analysing the changes in this first document in comparison to its seven additional protocols, the first remarkable alteration was in the duration of the Mission, which was supposed to last for three years and has been prorogued in every additional protocol, the last one extending it to 31 December 2021.[127]

The fifth additional protocol in particular is the one which adds alterations to the organization's mandate and functions, as stated in Article 2 of the *Convenio*.[128] The protocol formally adds to the Mission's mandate a perspective of flexibility in the monitoring of the peace process, considering gender, ethnicity and age, and it adds more detail to the functions it is supposed to undertake.[129] However, there is a prevalence of prescriptive verbs such as "verify", "accompany", "monitor", "support" and "facilitate", which seem to keep the key operations undertaken by the MAPP very reactive towards government's actions, the only proactive function being to "propose" recommendations both to the government and the armed groups in order to ease the transition.[130] Despite the alterations brought by the protocol, the three core principles of the MAPP remained the same, with little change in the text: autonomy, neutrality and flexibility.[131]

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[127] OAS. *Séptimo protocolo adicional al convenio entre el gobierno de la república de colombia y la secretaría general de la organización de los estados americanos para el acompañamiento al proceso de paz en colombia, firmado en bogotá el 23 de enero de 2004.*December, 2017.Article 1.
http://apw.cancilleria.gov.co/Tratados/adjuntosTratados/6B1E1_OEA_B-SEPTIMOPROTOCOLOADICIONALACOMPA%C3%91AMIENTOPROCESODEPAZ2017-TEXTO.PDF

[128] Organization of American States. *Convenio entre el gobierno de la republica de colombia y la secretaria general de la organización de los estados americanos para el acompanamiento al proceso de proceso de paz en colombia.* 2004. Article 2

[129]OAS.*Quinto protocolo adicional al convenio entre el gobierno de la república de colombia y la secretaría general de la organización de los estados americanos para el acompañamiento al proceso de paz en colombia, firmado en bogotá el 23 de enero de 2004.*December, 2017. Article 2.1
http://apw.cancilleria.gov.co/Tratados/adjuntosTratados/08926_OEA_B-QUINTOPROTOCOLOADIACOMPA%C3%91AMIENTOPROCESOPAZ2014.PDF

[130] *Ibdem*.

[131] *Ibdem*, paragraph 2.3

The most important textual change seems to be on the definition of the organization's flexibility, which went from "The dynamic of the peace process, its time and priorities must be addressed with a flexible structure which has the capability to adapt to the changing realities of the process without prejudice to its verticality or authority of command" (author's translation),[132] in the original *Convenio*, to "The dynamics of the peace process, including the actual negotiations with the guerrillas like the FARC and the ELN and a possible peace agreement with them, should be addressed with a flexible structure and operation, which is able to adapt to the changing nature of those processes" (author's translation)[133] in the fifth additional protocol.

It also includes a whole section on the demobilization and laying of arms, pointing out a new aspect of the Mission, to monitor the reintegration of both the participants in the conflict and, mainly, people who had been displaced by it, focusing on reconciliatory aspect of the people's return to their communities.[134] The laying of arms and the process of cease-fire will only be monitored by the request of the Colombian government in cases in which it has a constitutionally approved agreement with the localized armed groups.[135] A government's request is also a pre-condition to cases in which the MAPP may or may not give advice on the subject of demobilization[136]

Within the context explicitly portrayed by the SJP as the principle of non-repetition[137], the MAPP now works on the prevention of further recruitment, especially regarding children, to

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[132] OAS. *Convenio entre el gobierno de la republica de colombia y la secretaria general de la organización de los estados americanos para el acompanamiento al proceso de proceso de paz en colombia*. 2004: a. 2.3

[133] OAS.*Quinto protocolo adicional al convenio entre el gobierno de la república de colombia y la secretaría general de la organización de los estados americanos para el acompañamiento al proceso de paz en colombia, firmado en bogotá el 23 de enero de 2004.*December, 2017: a. 2.3(c).

[134] *Ibdem*, a. 2.1

[135] *Ibdem*, a. 2.1.1.2

[136] *Ibdem*, a. 2.1

[137] Gobierno Nacional y las Fuerzas Armadas Revolucionarias de Colombia - Ejército del Pueblo (FARC-EP). *Acuerdo Final para la Terminación del Conflicto y la Construcción de Una Paz Estable y Duradera*. 2016: pp. 57-59

participation in the armed conflict.[138] It also works on risk prevention, by formulating projects and giving recommendations on the prevention of ascension of new armed groups, as well as monitoring the situation in the processes related to identification of new forms of violence and the ways in which the conflict still affects communities (either by the constant threat of gun violence and field mines or by psychological implications of violence).[139]

In terms of transitional justice, from its Fifth Protocol on, the MAPP became in charge of accompanying and supporting technically the different tools and processes adopted by the government at the same time it should identify proceedings on the margins of the law applied by armed groups or specific communities.[140] This would also include monitoring the ease of access to the judicial system and reintegration of former members of armed groups[141].

Apart from mentioning primarily the government's "peace policy" as it did on the Convenio[142], at its Fifth Protocol the Mission sets itself to monitor victim participation in the transition, in ways such as accompanying their claims for integral reparation[143] and restitution of lands.[144] It also extends itself to the realm of official efforts to find a historical truth, supporting the government and the civil society in their efforts to find a common narrative for the conflict.[145]

The same rule applies to efforts for peace and reconciliation: only the government and the civil society receive support and are monitored by the MAPP, and only to those the organization can

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[138] OAS.*Quinto protocolo adicional al convenio entre el gobierno de la república de colombia y la secretaría general de la organización de los estados americanos para el acompañamiento al proceso de paz en colombia, firmado en bogotá el 23 de enero de 2004.*December, 2017: a. 2.1.1.3
[139] *Ibdem*, a. 2.1.2
[140] *Ibdem*, a. 2.1.3.1; 2.1.3.2
[141] *Ibdem*.
[142] OAS. *Convenio entre el gobierno de la republica de colombia y la secretaria general de la organización de los estados americanos para el acompanamiento al proceso de proceso de paz en colombia*. 2004. Article 1.1
[143] OAS.*Quinto protocolo adicional al convenio entre el gobierno de la república de colombia y la secretaría general de la organización de los estados americanos para el acompañamiento al proceso de paz en colombia, firmado en bogotá el 23 de enero de 2004.*December, 2017: a. 2.1.3.3
[144] *Ibdem*, a. 2.1.3.4
[145] *Ibdem*, a. 2.1.3.5

suggest initiatives towards reconciliation and peaceful conflict resolution.[146] On the same note, this protocol stresses the overall goal of the OAS of strengthening peace and democracy in the American continent, as a way to justify its function to monitor elections and any other projects or efforts towards those goals, if the government so requests.[147] This also applies for the organization's ability to accompany the implementation of the agreements between the parts of the conflict and the possible development of new ones.[148]

In conclusion, the highlights of the additional protocols are the new perspectives formally considering gender, ethnicity and age, summed with a broader notion of how flexible the Mission's mandate should be. It is important to stress, before going following to the next section, that the MAPP is not under the obligation to act without prejudice to the process "verticality or authority of command", which in practice means it has the potential to show more autonomy and proactivity towards the government.[149] Based on the changes brought by the Fifth Protocol, it is easy to notice the organization now has many more breaches for more proactive actions, such as formulating proposals and advising directly in judicial and political actions towards peace.

Furthermore, by checking the website of the MAPP, it seems to be much more active and incisive than it initially intended to be

> Our contributions are centered on the creation of bridges between communities and institutions; on the delivery of comparative analysis and concrete recommendations to the Colombian State for the decision-making in local, regional and nacional levels, and as a permanent presence in all territories, which many times dissuades violent acts[150]

[146] *Ibdem*, a. 2.1.4.1
[147] *Ibdem*, a. 2.1.4.2-2.1.4.4
[148] *Ibdem*, a. 2.1.5
[149] *Ibdem*, a. 2.3(c)
[150] OAS. *Misión de Apoyo al Proceso de Paz en Colombia: Acerca de la MAPP/OEA*. Paragraph 5. https://www.mapp-oea.org/mappoea/acerca-de-la-mappoea/

It also mentions the Mission is gradually contributing to the country's lasting peace by generating an ideal environment for the construction of this process[151]. Even the official description of the MAPP on its social media broadens the its scope, by presenting it as an organization that creates "...bridges between the communities, the institutions and the international community, contributing to the generation of environments fit for the construction of a stable and lasting peace in Colombia." (author's translation).[152]

As an effort to analyse these changes in practice and to understand how much more the MAPP extends beyond its mandates, by taking into consideration actions which might indicate reactive or proactive tendencies of the organization. What seems striking at first is the evolution of the literal wording found in the *Convenio* in comparison with the Fifth Protocol and the organization's social networks: it seemed to have gone from a prevalence of words such as "observe", "monitor", "accompany" and "recognizing" to an abundance of terms like "formulating", "proposing", "creating" and "generating". In order to check which aspect of its function the Mission is following and consider if it is extrapolating its mandate in any sense, I analysed its last available Report[153] and compared it with the base of its current mandate.

3.2 Analysing MAPP's reporting: reactive and proactive tendencies

I then analysed the last report of the MAPP, published in 2017,[154] in order to map in which ways the Mission is following this reactive pre-defined path and in which ways, if any, the OAS is actually showing proactivity towards the transitional process apart from its function of making recommendations. I will briefly mention the situations in which the Mission shows

[151] *Ibdem*, paragraph 6

[152] Mision de Apoyo al Proceso de Paz en Colombia. About us. https://www.facebook.com/pg/MAPPOEA/about/?ref=page_internal

[153] OAS. *Vigésimo tercer informe del secretario general al consejo permanente sobre lamisión de apoyo al proceso de paz encolombia de laorganización de los estados americanos (MAPP/OEA)*. 2017 https://www.mapp-oea.org/publicaciones-2/informes-semestrales/

[154] *Ibdem.*

both inclinations, however, this will represent a superficial mapping of the report, in which the specific points will be referenced for further clarification. In order to do that, I first selected reactive situations in which the Mission "observed" or "monitored" the process of societal adaptation to the government policies regarding the redistribution of the land and the demobilization of armed groups, such as the FARC, then selected the moments in the report in which the OAS expresses "recognition" of the government's work or intentions towards the transition.

The "observational" function of the Mission seems to be focused primarily on the armed groups' followings of the peace agreements, such as members of FARC, who are being reinserted into Colombian community, and armed groups which are not completely inserted within the negotiations, such as the *Ejercito de Liberacion Nacional* (ELN) which are gradually advancing through non-controlled areas.[155] On the same note, the MAPP points out there is a slow shift in the control of some territories which are receiving less governmental help, with further advancements of new armed groups which are not on the peace negotiations, such as the Clan del Golfo.[156] The Mission also observed elections of the *Organismos de Accion Comunal*,[157] the proceedings following the JEP and, gradually, its relation with the *Jurisdiccion Especial Indigena* (Indigenous Special Jurisdiction, author's translation).[158] Another context in which the Mission monitors and observes the transitional process refers to the imprisonment of armed group members, including their conditions of the detainment and if there are any suspicion of extrajudicial detentions.[159]

[155] *Ibdem*, p. 2
[156] *Ibdem*, p. 5; p. 36
[157] *Ibdem*, p. 18
[158] *Ibdem*, pp. 26-27; pp. 37-38
[159] *Ibdem*, pp. 30-32

In the report, the Mission constantly restates its "recognition" to government's work in managing its resources[160] and its initiatives, such as the implementation of the *Acuerdo de Paz* (Peace Agreement), which aims for the replacement of coca plantations, as a mean to achieve rural development and assistance.[161]On the same note, the MAPP recognizes the institutional advancements of government initiatives such as the *Zonas Veredales Transitorias de Normalizacion* (Transitory Rural Zones for Normalization, author's translation) and the *Puntos Transitorios de Normalizacion* (Transitory Points for Normalization),[162] and of victims-focused organs such as the *Unidad para la Atencion y Reparacion Integral a las Victimas* (Unity for Attention and Integral Reparation to Victims, author's translation).[163]

As for the analysis of the proactive functions the Mission has been undertaking, I decided not to focus on the "recommendations" made to the government,[164] but on the actions exposed in the body of the report, such as the times it "requests the government" for actions or when it "expresses" either the will of the population or of some particular community or group. The reason why this cut was made was due to the fact that the function of making recommendations is already stated in the MAPP's mandate, while I am looking for further proactive measures undertaken as a way to represent the Mission's own agenda. It is worth stressing, however, that neither the recommendations nor the requests made by the Mission are binding towards the government or any institution dealing with the transitional process.

Surprisingly, there are many instances in which the Mission seems to distance itself from its reactive functions linked to the government and explicitly expresses the society's wishes. What calls for more attention in the report is the MAPP's care towards listening to local

[160] *Ibdem*, p. 26
[161] *Ibdem*, p. 3
[162] *Ibdem*, p. 3
[163] *Ibdem*, p. 18
[164] *Ibdem*, pp. 38-45

communities' needs and frustrations. This is the case of some indigenous communities, which show that the government's disregard of their existence during communication with the armed guerrillas is having serious impacts on their forms of self-government, which end up weakening and de-legitimizing whole communities.[165] In the case of ethnic communities, the Mission not only directly criticizes the government by saying it lacks an ethnic-focused perspective on its policies, but it also upholds the view of ethnic minorities towards the cultivation of coca, which is constantly stigmatized due to the public forces' ways of dealing with illegal plantations.[166] In another direct criticism of the government, the Mission displays in its reports the bad state of prison conditions to people who have recently been detained, stating that this kind of public treatment is contrary to non-repetition principles which should be respected especially during a transitional justice process.[167]

On a similar basis, the report also tries to show the general societal perception of the actual circumstance and the impacts of the recently implemented public policies on their life. First, territories where the public forces have not been established 'adequately' but have a strong presence are being gradually occupied by other forces, such as new armed groups or bandits[168] and the general perception is of generalized escalation of violence in such areas. On the same note, the perception is still of insecurity in areas in which there has been the dismantling of illicit cultures of drugs or illegal mining, and the government has not pursued follow up measures to secure the area's development.[169] The general interest of the population in such cases is the same, more economical opportunities to compensate what is being lost with the transition, followed by educational policies and further measures towards development.[170]

[165] *Ibdem*, p. 10
[166] *Ibdem*, p. 14
[167] *Ibdem*, p. 32
[168] *Ibdem*, p. 4
[169] *Ibdem*, pp. 6-7; 11
[170] *Ibdem*, p. 10

Finally, the Mission also expresses a phenomena of lack of trust in some communities since, in spite of recognizing the government's advancements and planning on the transitional process, it sees that there is still a gap between theory and practice, which has caused a latent growth of distrust in the society towards government's actions towards development and security guarantees focused on the ascension of new armed groups.[171]

As said before, there is a whole section in the report in which the "recommendations" to the furthering of the transitional process are stated, however, throughout the report the MAPP also places a number of indirect 'requests' to the government which show proactivity beyond its original purpose. Based on the previously cited expressions of the interests of the population, the MAPP requests the government for more communication with different societal figures, from various sectors of society, without losing the major focus on the victims' interests.[172] The Mission's requests to the government throughout the text are generally focused on measures to guarantee equal participation of all parties affected by the conflict.[173] It also asks for more transparency and agility in the steps towards the transition, since it identifies a lack of care in the implementation of projects, as evidenced by the difference between government's planning and actual societal perception.[174]

There is no question on the importance of the MAPP for the development and strengthening of the Inter-American System of protection for human rights, since it represents a landmark initiative for the OAS and a world novelty on multilateral involvement in a process of transitional justice. The Mission's mandate was thought to give truth to its name, settling it as a support mechanism to accompany, monitor and facilitate the process in conjunction with the Colombian government. As the transition became more complex and was extended, however,

[171] *Ibdem*, p. 13; 34
[172] *Ibdem*, p. 17; 28
[173] *Ibdem*, p. 14
[174] *Ibdem*, p. 36

so was the Mission. It is no undertaking for the present essay to question either the organization's autonomy or its reach within the OAS and other organs such as the Inter-American Commission on Human Rights, though it is clear that the Mission is showing a high degree of flexibility and, in a certain way, proactivity towards the transition.

As seen in the last section, instead of becoming restricted to purely reactive and observational characteristics, the MAPP has actually been conveying the will and general impressions of the population, openly criticizing some of the government's attitudes and policies, which seems to go beyond its purpose of making raw recommendations. For example, by following the changes made in the last additional protocol, the Mission is not only taking into consideration a more ethnic- and gendered-focused analysis of the situation, but it is also making moves in order to criticize the government when it does not do the same while communicating with local communities or implementing its policies.

In conclusion, the Mission is still bound in parts to its original purpose, however it has been showing a lot of flexibility to adapt especially since the additional protocol n.5 to the *Convenio*. This adaptation is not being made in a tangential or artificial way, in the sense it is still following the rules of its mandate, but with creativity enough to take proactive measures by the interaction with victims, the population in general and with specific communities. Rather than the prevalence of prescriptive verbs such as 'monitoring' and 'observing', the Mission's report displays attitudes such as the 'expression' of the populations' will and 'requests' to the government, in a clear way to show the MAPP is not a mere spectator of the Colombian transitional process, but an actor growing in importance and with its own agenda.

4. Interference by the International Criminal Court

Since June, 2004, the Colombian internal conflict and transitional process is under preliminary examination under the ICC's Office of the Prosecutor (OTP), as a way to assure to have the

main responsible for the conflict duly investigated and prosecuted under international standards of international criminal law, democracy and human rights protection.[175] Even though the ICC is analysing the Colombian situation since 2004, its first Report on Preliminary activities which involved the country was published in 2013[176] and, today, the Colombian case is still on admissibility phase.[177]

The Court brings a Universalist proposal to the conception of justice and the possibilities of achieving peace through criminal prosecution, however there are many critics on the way of operations of the Court, and some of this critics will be presented here in a way to access the potential impact of the institution on the country. Finally, I will map the reports and texts published by the Rapporteur on the country and analyse how the Court could adapt and bring a new and potentially enriching element to the peace process.

4.1 International courts on transitional processes and its critics

Transitional justice is implemented in societies that are overcoming a conflict, an authoritarian regime, such as the military dictatorships in Latin America in the 1950's to the 1970's, for example, or, such as the case of South Africa, in societies that are going through big changes in legislation and collective mentality[178]. It is almost a consensus that, in order to achieve peace, transitional justice processes must find a way to reconciliate two sides of the conflicts and integrate them both into the political and economic life of the country.

[175] International Criminal Court: Office of the Prosecutor, *Report on Preliminary Examination Activities*, 2013: pp. 27-37
https://www.icc-cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF
[176] *Ibdem*
[177] International Criminal Court. *Preliminary Examination: Colombia*. Website.
https://www.icc-cpi.int/colombia
[178] Arthur, Paige. *How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice*. Human Rights Quarterly, vol. 31, no. 2, 2009, pp. 321–367. I - Introduction.
JSTOR, www.jstor.org/stable/20486755.

An important factor within transitional justice processes is the focus on the victims and recognition of the unique aspects of each situation. The United Nations describe this aspect as follows:

> Transitional justice consists of both judicial and non-judicial processes and mechanisms, including prosecution initiatives, truth-seeking, reparations programmes, institutional reform or an appropriate combination thereof. Whatever combination is chosen must be in conformity with international legal standards and obligations. Transitional justice should further seek to take account of the root causes of conflicts and the related violations of all rights, including civil, political, economic, social and cultural rights. By striving to address the spectrum of violations in an integrated and interdependent manner, transitional justice can contribute to achieving the broader objectives of prevention of further conflict, peacebuilding and reconciliation.[179].

It is also important to stress that even though UN has a specific definition on what transitional justice is and the elements that are a part of it, the organization understands the political specificities of different countries have to be taken into consideration before defining the implementation of transitional policies[180]. Hence, even when there is external interference of an organism such as the UN, national stakeholders must be consulted and their opinions taken into consideration in order to choose which elements of transitional justice will be prioritized over others[181]. In this sense, some societies may prioritize criminal prosecution and victims' satisfaction, while others may prefer to focus on reconciliation if it represents a quicker path to peace.

[179]Guidance note of the Secretary General.*United Nations Approach to Transitional Justice*. 2010: p. 3.
[180] *Ibdem*, p. 2, Summary, Guiding principles 2;3;9
[181] *Ibdem*, p. 9, Components of Transitional Justice, paragraph 5

The issues about focusing the whole process of a transitional justice in an international court are explored by Damaska.[182] Basically, he explains these processes are expected to have a pedagogical effect on the international community, since they're expected to make sure the circumstances that gave origin to the conflict never happen again.[183] In cases where there is a strong element of criminal prosecution of the perpetrators, then courts are expected to fight impunity and make an example, especially considering leaders and high hierarchy officials, out of people who are key elements on the conflict.[184] The author also points out that victim satisfaction is also a strong factor of transitional mechanisms, since they are expected to hear from both victims and the perpetrators to collect evidence and clarify the different views of the conflict.[185] Finally, he says transitional processes are expected to have a historical significance in a way not only to clarify the origins and development of the conflicts, but also to shape collective memory in a way that there is acknowledgment of the violations and the political contexts that lead to them.[186]

Damaska explains why such multiplicity of tasks should not be concentrated into one mechanism such as a criminal court but, instead, spread through other transitional justice organisms such as truth commissions and reparation programs[187]. According to him, those elements explained formerly may clash with each other when conducted by the same organism and, therefore, make the process seem unfair[188].

The author says that in order to guarantee non-repetition through their pedagogical effect on the community, international criminal courts try to make sure the protagonists of the conflict

[182] M. Damaska, *What is the Point of International Criminal Justice?*, 83 Chi.-Kent L. Rev. 329 (2008)
[183] *Ibdem*, p. 343
[184] *Ibdem*, pp. 334-335.
[185] *Ibdem*, p. 336
[186] *Ibdem*, p. 332
[187] *Ibdem*, pp. 337-338
[188] *Ibdem*, p. 342

would be tried, however, more often than ever, they are not even the direct perpetrators themselves, they are just more fitted to represent the ideology they stood for and to make a stand that there is no impunity even for high ranking people in the conflicts.[189] Sometimes the willingness to follow this pedagogical path even ends up clashing with the matters of guaranteeing victims' satisfaction, because they usually want the direct violators to be punished and not higher-ranking people who did not act directly.[190] Another contradiction about using an ordinary system of utilizing courts and criminal prosecution to promote victim satisfaction is that that may affect the promptness of the trial as long as every person involved wants to be listened and taken into consideration.[191] The author also points out that in order to fulfil a historical writing goal, the courts not only have to collect every witnessing and processing information, but it is not the point of tribunals to take into consideration all of the backstory of the conflicts and the political factors involved in it.[192] The focus of the courts in a transitional process should be in preventing human rights violations and guaranteeing fair trials to the involved, which would then contribute for a greater impact on non-repetition guarantees.[193]

> Instead, they should aim their denunciatory judgments at strengthening a sense of accountability for international crime by exposure and stigmatization of these extreme forms of inhumanity. This exposure is apt to contribute to the recognition of basic humanity. To the extent that international criminal courts are successful in this endeavor, humanitarian norms would increasingly be respected-the low probability of their violations being visited with criminal punishment notwithstanding. But as the interdisciplinary literature on norm acceptance through persuasion suggests, there exists a necessary condition for their success in performing this socio-pedagogical role: they should be perceived by their constituencies as a legitimate authority.[194]

[189] *Ibdem*, pp. 332-333
[190] *Ibdem*, pp. 333-334
[191] *Ibdem*
[192] *Ibdem*, p. 338
[193] *Ibdem*, p. 345
[194] *Ibdem*

The pedagogical and historical tasks expected from the International Trials are also challenged by Marti Koskenniemi, who says that a fair trial might have less historiographical or pedagogically effects than what he calls a show trial.[195] The point is that if the defendant has his guarantees respected, then he will try to challenge the "truth" presented by the Prosecutor, either by challenging the reliability of witness, for example, or reframing issues the court may consider fundamental for the case. An unfair trial can be much better for this specific function especially to cases in which there is a multiplicity of competing narratives of the event and the defendant rejects his role of violator of human rights.[196]

The notion of justice on punitive bases seeks criminal prosecution of human rights violators in order to bring peace to the affected societies. The prosecution of perpetrators within retributive justice can be a tempting concept at first, however it may affect the "fairness" of a process such as the Colombian one. Since this is clearly not the only way of seeing justice existing in the international system, it would be very problematic to consider it as "universal", even when conducted by an international court such as the ICC. With the monopoly of the definition of unjust, this notion of international retributive justice also fails to criminalize some actions that are not part of its scope.[197]

Cultural, economic and social peculiarities of different people are not analysed in the foreground of the Court if it will consider the crimes established in the Rome Statute,[198] therefore conjunctures such as extreme poverty, for example, are not factored in when the ICC initiates its individual case investigations.

[195]Martti Koskenniemi. *Between Impunity and Show Trials*. In: FROWEIN, J.A.; WOLFRUM, R. Max Planck Yearbook of United Nations Law. Netherlands, 2002, v.06, pp. 1-53.
[196] *Ibdem*, p. 34.
[197]Nouwen, Sarah M. H.*Justifying justice*. In: Crawford, James; Koskenniemi, Martti. The Cambridge Companion to International Law. Cambridge: Cambridge University, 2012, pp. 327-351.
[198] United Nations Treaty Collection. *Chapter XVIII Penal Matters: Rome Statute of the International Criminal Court*, 1998: a 5-9.

The expression of justice as punishment as being the standard one in international organizations precedes the establishment of the Rome Statute. In 1997 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities drafted a document summarizing the origins of the "fight against impunity", ongoing since the 1970s.[199] The document's introduction points out problems with amnesty laws, considering the use of this transitional justice mechanism as a tactic to attribute impunity to human rights violators, especially when referring to "self-amnesty" in dictatorial periods in Latin America.[200] The Sub-Commission makes recommendations to the UN itself on a number of proceedings to combat global poverty, called the Joint Principles (following the 2005 review, Orentlincher).[201] These principles are directed to the rights of victims and summarized in: the right to know; to justice; right to reparation/ guarantees of non-recurrence.[202]

The present thesis does not seek to question the importance of maintaining a strong memory in societies that have gone through great wars or dictatorships, nor of clarifying the fate of the victims of a given regime, but rather to problematize the idea that criminal prosecution is a precept for the attainment of peace. According to the document, true forgiveness can only come after a regular trial.

> This implies that any victim can assert his rights and receive a fair and effective remedy, including seeing that his oppressor stands trial and obtaining reparations. There can be no just and lasting reconciliation without an effective response to the need for justice; as a factor in reconciliation, forgiveness, a private act, implies that the victim must know the perpetrator of

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[199] Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities. *Final report on the Question of the impunity of'perpetrators of human rights violations (civil and political)*. Forty-ninth session, item 9 of the provisional agenda. 1997.
https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/129/12/PDF/G9712912.pdf?OpenElement
[200] *Ibdem*, pp. 3-4
[201] Economic and Social Council, Commission on Human Rights. *Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*. Sixty-first session, item 17 of the provisional agenda. 2005.
https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/111/03/PDF/G0511103.pdf?OpenElement
[202] *Ibdem*.

> the violations and that the latter has been able to show repentance. If forgiveness is to be granted, it must first have been sought.[203]

Justice as punishment cannot be considered an end in itself, that is, it cannot operate selectively only to satisfy civil society. In this sense, the person being investigated should not represent all the evil of a reality, that is, one or some individuals are taken as the whole idealism of a regime. This mechanism of appeasement of social yearnings for justice, through the "demonization" of an individual, gave rise to courts intended only for this representative function, the already cited show trials. Koskenniemi points out that, by drawing a parallel between justice as punishment and the process of demonizing the individual under investigation,

> Sometimes a tragedy may be so great, a series of events of such political or even metaphysical significance, that punishing an individual does not come close to measuring up to it. Internally all the criminal prosecutions concerned with crimes against humanity committed during or after World War II, some observers have doubted the ability of the criminal law to deal with the events precisely in view of their enormous moral, historical, or political significance.[204]

These show trials, according to the author, are more focused on clarifying the truth of the facts than actually on the punishment of the individual and are therefore considered necessary by the international community. In terms of transitional justice, critics of international criminal tribunals are answered by stating that they are irreplaceable instruments for memory and truth. In public acknowledgment of individual guilt, the theory of justice as punishment states that only after trial proceedings the victims will have conditions to recover from their trauma and

[203]The United Nations. *The administration of Justice and the Human Rights Detainees***.** 1997.
[204]Martti Koskenniemi. *Between Impunity and Show Trials*. In: FROWEIN, J.A.; WOLFRUM, R. Max Planck Yearbook of United Nations Law. Netherlands, 2002, v.06, pp. 1-53.

truly restore their dignity. In this sense, Koskenniemi affirms that such vision confers a purely didactic character to these institutions.[205]

It is interesting to note another point raised by the author about the relationship between Show Trials, transitional justice and the punitive conception of justice as an equivalent to Peace: "(...) no uniform jurisprudence has emerged on the use of criminal trials of former political leaders in transitional situations"[206]. Several hypotheses can be drawn from this observation, since these courts took place in extremely localized, selective and strategic societies, whereas amnesties, on the contrary, are widely used in diverse realities.[207]

A Show Trial serves to punish what is considered "morally wrong" in relation to International Human Rights Law. Some authors, such as Hunter, claim that ignorance of what is legal or moral "is no excuse" for a serious crime against the international community[208]. Koskenniemi states that, in relation to the symbolic purposes of giving a moral lesson to society, such tribunals operate better "especially if they are supplemented with other measures such as compensations, disqualifications, administrative measures, truth commissions, opening of archives etc".[209] In addition to the rather narrow conception of international community, international tribunals have no relation to a specific community moral:

> And here is the problem with the analogy between international courts and transitional justice. The reasons that make "show trials"–that is to say, trials of only few political leaders – acceptable, even beneficial, at the national level, while others are granted amnesty, are not present when criminal justice is conducted at the international plane. When trials are conducted by a foreign prosecutors, and before foreign, no moral community is being affirmed beyond the

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[205] *Ibdem*
[206] Ibdem, p.10
[207] Mallinder, Louise. *Amnesty, Human Rights and Political Transitions***.**Hart: Oxford, 2008.
[208] Hunter, Emily. *From Nuremberg to the Haugue: Establishing the Legitimacy of International Legality.* UNSWLJ Student Series. No. 14-08, 2014, parapraph 10: A 'Crystallized Conscience' and Morality http://classic.austlii.edu.au/au/journals/UNSWLawJlStuS/2014/8.html
[209] Martti Koskenniemi. *Between Impunity and Show Trials*.In : FROWEIN, J.A.; WOLFRUM, R. Max Planck Yearbook of United Nations Law. Netherlands, 2002, v.06, p.11

> elusive and self-congratulatory "international community." Every failure to prosecute is a scandal, every judgement too little to restore the dignity of the victims, and no symbolism persuasive enough to justify the drawing of the thick line between the past and the future. [210]

As a contra point, Damaskas says the prosecution of selective individuals and leaders, despite having an element of attributing to them guilt for violations that they did not commit, has a pedagogical effect that is important even for the reconciliation of the parts of the conflict. What the author means is there is an identity crisis under the ICC, which currently juggles with the already cited multiplicity of tasks it brought to itself and, one of the elements of this crisis, is the Court's capability on fair labelling those who committed crimes in first hand and those who ordered their commission.[211] In other words, what the author says is that by prosecuting only high hierarchy persons, the blame and the resentment does not fall into a group of people (for example, all former members of a guerrilla or a paramilitary group, in case of Colombia), but stays concentrated into individuals.[212]

On the same note, George P. Fletcher identifies a general transformation on the collective thought about guilt, which has been more connected to the idea of blameworthiness and the feeling people have once they are faced with guilt.[213]

> Along with this change there has been a shift from guilt as a fixed quantity, the same for everyone, to the concept of guilt as a matter of degree. The striking assumption of modernity is that some people are more guilty than others. Their relative degrees of guilt depend on two factors: first, how much they contribute or how close they come to causing physical harm, and second, their internal knowledge of the action and its risks. The principal who controls the

[210]Ibdem, p.11
[211] *Ibdem*, pp. *337-338*
[212]M. Damaska, *What is the Point of International Criminal Justice?,* 83 Chi.-Kent L. Rev. 329 (2008).
[213]George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt* 111 Yale law Journal 1499; pp. 1564-1565.
https://www.yalelawjournal.org/article/the-storrs-lectures-liberals-and-romantics-at-war-the-problem-of-collective-guilt

> actions leading to harm is more guilty than the accessory who merely aids in execution of the plan. Those who take risks intentionally are worse than those who do so inadvertently. These assumptions about relative guilt are built into the modern way of thinking about crime and punishment.[214]

Justice as punishment embodies the interpretation of the past as unacceptable. Often the truth pointed out by the prosecutor, however, is not equivalent to the historical truth. For criminal law, the guilt does not lay to a nation or its context, but a single person who must be judged for the crimes committed by the whole. It is important to stress that individual action is often conditioned by its social context and the economic and political structures that exert influence over each person. Koskenniemi further states that individualization is not neutral in its effects, for words such as "Hitlerism" or "Stalinism" are fraught with moral impact. For him, the focus on the political leader serves as an alibi for a people to exempt themselves from responsibility for their actions.[215]

Nouwen shows there is a myriad of ways to see the relationship between justice and peace and, through her field study in Uganda and Darfur, she presents some alternative conceptions of justice found in different peoples.[216] Not all of them will be presented in this work; however, the proposal here is to map some alternative conceptions to try to understand how far the idea of justice as punishment may be disagreeing with reality.

According to Nouwen, in some societies' justice is seen as an "ongoing" process and not just a set of events such as criminal prosecutions. The transitional process would aim at ceasing the tensions or conflicts that cause human rights violations as a matter of gradual integration of the different parts in order to achieve peace. In other words, justice is not considered an end in

[214] *Ibdem*

[215] MarttiKoskenniemi. *Between Impunity and Show Trials* .In : FROWEIN, J.A.; WOLFRUM, R. Max Planck Yearbook of United Nations Law. Netherlands, 2002, v.06, p.14

[216] Nouwen, Sarah M. H. *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*. Cambridge: Cambridge University, 2014.

itself and neither is equivalent to peace. For such societies, the mere application of a sentence does not prevent new crimes from occurring, since there is no end in the conflict or situation that catalyses them. In fact, criminal prosecution is often viewed as opposing the peace at certain junctures, since it makes any discussion between the parties impracticable (as in the example of the LRA in Uganda).[217]

> To the extent that the idea 'no peace without criminal justice'underpins international criminal law, it does so as a principled idea (an idea about right and wrong which cannot be easily resolved with reference to evidence) rather than as a causal idea (an idea about cause and effect, supported by evidence). When international arrest warrants in fact make the conclusion of a peace agreement more difficult and therefore in effect lead to a continuation of the conflict and crimes, the pursuit of one type of justice (the enforcement of international criminal law) may thus prevent the realization of another type (the end of a conflict and the crimes committed in the context of that conflict).[218]

The real controversy is where lies the relation between peace and justice. For the conception of the ICC, peace is seen as a consequence of the application of punishment, but for the notion of justice as a "ongoing" process, only with the establishment of a peaceful environment can a more just and egalitarian reality be achieved.

Another conception of justice identified by Nouwen operates in terms of redistribution. Conflicts that lead to violations of human rights often originate from the poor distribution of wealth, political representation and opportunity, that is, injustice is considered as structural in formations of conflicting societies. [219] Through this logic, when we think of a process of transition, the compensation for victims becomes much more relevant than the criminal prosecution of those who gave rise to their situation.

[217] *Ibdem.*
[218] *Ibdem*, p. 14
[219] *Ibdem.*

> The remedying of distributional injustices can thus be experienced as a genuine improvement in the lives of those who have suffered from such injustices, and therefore as justice (…) International criminal justice, by contrast, describes complex political struggles in terms of the criminal guilt of a few individuals and dismisses structural distributional issues as irrelevant or reduces these to 'context'.[220]

Another notion quite different from that employed by the mainstream of criminal persecution is that of justice as the restoration of relationships.[221] In this specific case, the very concept of fairness becomes problematized and the punishment becomes another mechanism of segregation between victim and violator[222]. The author still reveals conceptions of justice as equality or accountability (and may even be through criminal punishment) and states that in a CFI intervention at least communities should be consulted so that prevalent and shared ideas of justice and peace were properly understood.[223] "In assertions that international criminal law does justice (instead of strives for it) or that it represents justice (rather than imperfectly mirrors an ideal) sows the seeds of intolerance, no matter how liberal the origins of international criminal law."[224]

The recognition of the existence and legitimacy of alternative conceptions of justice and peace are fundamental to make transitional processes more effective. It is not possible to turn a blind eye to a large part of the world and keep relying in static conceptions which, in practice, might have caused more harm than good in many of the situations referred to the ICC - as when it

[220] *Ibdem*, pp. 16-17
[221] *Ibdem*, pp. 10-13
[222] *Ibdem*.
[223] *Ibdem*, p.17
[224] Ibdem, p. 22

interrupted ongoing negotiations between the parties of the conflict as illustrated by the case of the Central African Republic.[225]

All this criticism of the modus operandi of international criminal law can be connected to the experience that began to be drawn after the 1955 Bandung Conference, symbolically seen as the birthplace of the Third World Approach to International Law, TWAIL. The Nigerian professor Obiora Chinedu Okafor defines this social and political movement in his text The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections:

> TWAIL is a (not so new) tradition of 'critical internationalism' with intellectual roots stretching back to the Afro-Asian anticolonial struggles of the 1940s–1960s, and even further back to the Latin American decolonization movements. In its renaissance, contemporary TWAIL scholarship has engaged strongly with other critical schools of international legal scholarship. TWAIL scholars deploy a wide range of 'analytic techniques/sensibilities' in providing alternative approaches that 'assail the creation and perpetuation of international law' that subordinates the third world in the global order.[226]

The TWAIL perspective values the equality of Third World peoples and this involves seeing different perceptions of justice and peace as valid. This strand tries to expose the ways in which the third world resists the interference of organisms presented as universal, often accompanied by Westernized impositions. Okafor[227], however, asserts that the influence of TWAIL is more implicit than explicit, that is, the parameters of this perspective appear as a background in criticism of the universal character and the respective effectiveness of international institutions.

[225]Nouwen, Sarah M. H. *Justifying justice*. In: CRAWFORD, James; KOSKENNIEMI, Martti. The Cambridge Companion to International Law. Cambridge: Cambridge University, 2012, pp. 327-351.

[226]Okafor, ObioraChinedu. *The International Criminal Court as a 'Transitional Justice' Mechanism in Africa: Some Critical Reflections.* In: International Journal of Transitional Justice. Oxford: Oxford University Press. 2015, pp. 91-92

[227]Ibdem, p. 92

This reality is well illustrated by the case of the African Union (AU), which has expressed support for the ICC since the enforcement of the Rome Statute. Relations between the two institutions, however, began to wear off with the 2005 submission of the Sudan case to the ICC by the Security Council and in 2009, with the issuance of a warrant for the arrest of President Omar Al Bashir of Sudan[228]. Since then, the AU has taken a more hostile stance as Bashir was considered crucial to the peace process in his country, a figure who could negotiate with the LRA extremists on his own terms, which seemed like a progress to the situation even if not strictly following international law standards[229]. This is not to say the AU or the Court were correct or not during the process, but to illustrate the complexity of the interactions and reasons between both institutions. Ultimately, the ICC action in Sudan has caused a major setback in peace-making (either considering its actions in isolation or as a catalyser for the refusal to act by political leaders), thereby nullifying the ongoing peace agreements[230].

> Therefore, rallying behind Al Bashir, who was re-elected as the President of Sudan in April 2010, could be construed not only as a face-saving exercise but also as one that seeks to prevent the ICC from having such a remit in the administration of international justice on the continent. Nevertheless, the AU made the point that Sudan finds itself at a critical juncture of its peace-making process in Darfur, and Al Bashir is the key interlocutor with the armed militia and political parties. This argument clearly cannot be wished away or ignored.[231]

Since then, several African governments have come to question the 'international' character of the ICC. Moreover, some of AU's criticisms point to the fact that a number of non-signatory

[228]Tladi, Dire.The African Union and the International Criminal Court: the battle for the soul of international law. South African Yearbook of International Law, v. 34, 2009, p. 59
[229]Murithi, Tim. *The African Union and the International Criminal Court: An Embattled Relationship?.* Cape Town: The institute for Justice and Reconciliation, 2013, page 3, The AU's rationale for criticising the ICC, p.3. https://www.africaportal.org/documents/9525/IJR_Policy_Brief_No_8_Tim_Miruthi.pdf
[230]*Ibdem*, p.3
[231]*Ibdem*.

states of the ICC are actively acting on African territory, often exacerbating regional tensions, and neither the ICC nor the UN would have jurisdiction to criminalize such nations. The analysis from a TWAIL perspective makes it possible to recognize that in this context, the most powerful nations or their zones of influence are in no way affected by the court[232].

The response of former ICC Prosecutor Luiz Moreno Ocampo was that he did not "play politics," however, the position of the AU is that he is extremely emphatic in his action in Africa, not making a point of entering other continents.[233] About the former prosecutor, it is also important to say even though he seemed like the perfect choice for the first Prosecutor of the Court, “this image the public formed of Ocampo was deceptive, according to tens of thousands of previously unknown documents, including internal documents from the ICC, contracts, diplomatic dispatches, bank records and emails”.[234]

Without dwelling too much into the depth of accusations on Ocampo, he seems to be involved with the protection of a Libyan oil billionaire associated with the country’s civil war and the Gadhafi regime, in order to avoid his prosecution by the ICC.[235] The former Prosecutor has also shared classified information of the Court during the same period with French authorities, provided that France was one of the countries bombarding Libya, and such details of the Court’s investigations ended up on the media – alerting Gadhafi and his family of the possible outcomes by the ICC.[236]

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[232] *Ibdem*.
[233] Murithi, Tim. *Ensuring Peace and Reconciliation while holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan.* International Justice, Reconciliation and Peace in Africa: The ICC and Beyond, Senegal, 2014, pp. 15-16.
https://www.codesria.org/IMG/pdf/14_tim_murithi.pdf
[234] Becker, Sven; Blasberg, Marian; and Pieper, Dietmar. A Former ICC Chief's Dubious Links, Spiegel Online, 2017.
http://www.spiegel.de/international/world/ocampo-affair-the-former-icc-chief-s-dubious-libyan-ties-a-1171195.html
[235] *Ibdem*.
[236] *Ibdem*.

This has raised questions on Ocampo's partiality in investigating cases for the ICC and his conduct while representing the organization.[237] These disputes have created obstacles to the functioning of the ICC in that region and, at the time, the suspicion as to Ocampo was based on the "... discrepancy in Ocampo's behaviour and attitude towards African and non-African war crime situations ... In fact it was key in fuelling allegations that the ICC Prosecutor was implementing a thinly veiled pro-Western agenda, despite his emphatic denials ".[238]

Despite statements by prosecutors stating that ICC decisions are not politicized, in an extraordinary session the AU has already stated that: "Reiterates AU's concern on the politicization and misuse of indictments against African leaders by ICC as well as the unprecedented indictments of and proceedings ... ".[239] The lack of respect for African nations' sovereignty is constantly problematized by the organization as well as the lack of reciprocity in the process of cooperation between the two bodies.

> The moral integrity of the ICC has therefore been called into question by a number of commentators and observers in Africa, with the accusation being that cases are not being pursued on the basis of the universal demands of justice, but according to the political expediency of pursuing cases that will not cause the Court and its main financial supporters any concerns. Against this charge the ICC system and the Office of the Prosecutor have failed to make a strong case, which ultimately can only be reinforced by actions to demonstrate that this Court is for all and not for the select and marginalised few. This is the perception that the ICC has to address across the African continent.[240]

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[237] *Ibdem*

[238] Murithi, Tim. *The African Union and the International Criminal Court: An Embattled Relationship?*.Cape Town: The institute for Justice and Reconciliation, 2013: p. 5 .http://www.ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%2 0Miruthi.pdf

[239] African Union. *Extraordinary Session of the Assembly of the African Union*. Ethiopia, 2013: p.1 http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf

[240] Tim Murithi. The African Union and the International Criminal Court: An Embattled Relationship?.Cape Town: The institute for Justice and Reconciliation, 2013: p. 3

Effective and lasting peace, according to the AU, is not an exogenous conception that has been shown to be politicized in its implementation, but it is achieved upon consideration and respect to the sovereignty of the legitimate African leaders.[241] The AU justice seems on its own eyes to have much more to do with an analysis of local situations, key actors and the demands made by the sides of the conflict than effectively with the punishment of perpetrators. Sometimes societies have to re-evaluate their history and the conditions that led to the development of tensions in the first place. However, some realities do not ask for this backwardness, but instead prefer to forget and forgive to rebuild from a base without violence[242]. Balakrishnan Rajagopal, an exponent of TWAIL, tries to construct a vision of International Law based on social movements and their nuances, which would represent precisely this other side of justice.[243]

This way of rewriting international law, according to Rajagopal, is one of the most effective ways of combating exclusion and discrimination in the international system. The author considers that this resistance to the mainstream of the field is enriched to the extent that it adds a narrative and a context and placement of the law, because justice could not act in a vacuum.[244] Consequently, he concludes that international institutions, despite having a deep theoretical foundation, cannot act in a political, historical and social void.[245]

> The call for a theory of resistance that addresses a need to understand social movement action should not be misunderstood as a call for a rejection of international legal order. Rather, international law and institutions provide important arenas for transformative politics. For international lawyers, the ability to engage with social movement literature and to develop the sensibility as concerned activists who are motivates by the best cosmopolitan ideals of the discipline awaits.[246]

[241] African Union. *Extraordinary Session of the Assembly of the African Union*. Ethiopia, 2013
[242] Nouwen, Sarah M. H. *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*. Cambridge: Cambridge University, 2014, pp.9-10.
[243] Rajagopal, Balakrishnan. International Law from Below: Development, Social Movements and Third World Resistance. Cambridge: Cambridge University Press, 2003, p.171.
[244] *Ibdem*, pp. 43-45
[245] *Ibdem*.
[246] *Ibdem*, p. 23

However, this is not a fixed formula for the greater democratization of international law. Activists, lawyers and judges are likely to encounter ethical and cultural issues very different from their own during this awareness-raising process. Rajagopal solves this question by proposing the creation of a resistance theory in order to better understand social processes. This issue will not be addressed in this thesis; however, it is important to note that for the author, this is the only way to break the "Westernized, elitist, macho and imperial"[247] stigma of international law and transform it in a fundamental way.

4.2 ICC's Jurisdiction over the Colombian case

Colombia signed the Rome Statute in December 1998 and deposited its instrument of ratification in August 2002, once again promptly reacting to its entry into functioning.[248] At the time of ratification, the country made a declaration in pursuant to article 124 choosing not to accept the Court's jurisdiction in relation to Article 8 (war crimes)[249], which means the ICC can only rule over this type of crime if it is considered ongoing or if was committed from November 1, 2009.[250]

The situation in the country had been under preliminary examination since 2004, it was initiated *propria motu* by the Prosecutor[251] and, at the time of the last Report on Preliminary Activities,

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[247] *Ibdem*, p. 25

[248] United Nations Treaty Collection. *Chapter XVIII Penal Matters: Rome Statute of the International Criminal Court*, 1998. https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en

[249] United Nationa Treaty Collection. *Declarations and Reservations: Colombia*. https://treaties.un.org/Pages/Declarations.aspx?index=Colombia&chapter=18&treaty=377

[250] More information about the process of "opting out" of article 8 and its impacts on the Colombian transitional process can be found in: Schneider, Jan, & Taborda Ocampo, Francisco. (2011). *Alcance de la declaración colombiana según el artículo 124 del Estatuto de Roma*. Revista de Derecho, (36), 297-329. Retrieved July 10, 2018, from http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0121-86972011000200013&lng=en&tlng=es

[251] OTP, *Report on Preliminary Examination Activities Report 2016*, 14 November 2016, supra note 7. https://www.icc-cpi.int/pages/item.aspx?name=161114-otp-rep-PE

181 communications had been received by the OTP pursuant to article 15.[252] Based on the latest reports issued by the OTP, with special focus on the Interim Report of 2012[253], the information available leads to believe there is reasonable basis to attest the commission of crimes against humanity (article 7) "including murder under article 7(1)(a); forcible transfer of population under article 7(1)(d); imprisonment or other severe deprivation of physical liberty under article 7(1)(e); torture under article 7(1)(f); rape and other forms of sexual violence under article 7(1)(g)…"[254] and war crimes (article 8), which also would include murder (article 8(2)(c)(i)) and rape and other forms of sexual violence (8(2)(e)(vi)), apart from "attacks against civilians under article 8(2)(e)(i); torture and cruel treatment under article 8(2)(c)(i); outrages upon personal dignity under article 8(2)(c))(ii); taking of hostages under article 8(2)(c)(iii) […] and conscripting, enlisting and using children to participate actively in hostilities under article 8(2)(e)(vii)…[255]"

> During the reporting period, the Office received from the Colombian authorities approximately 80 judgments rendered by Colombian courts against members of the armed forces, FARC-EP and ELN armed groups, and members of paramilitary armed groups. These judgments include convictions against perpetrators of false positives killings and against paramilitary and rebel commanders for forced displacement and sexual and gender based crimes. (…) All material received has been thoroughly reviewed by the Office, including for the purpose of assessing its relevance for the preliminary examination and to inform the ongoing admissibility analysis. [256]

[252] International Criminal Court: Office of the Prosecutor. *Report on Preliminary Examination Activities*. 2016, p. 52.
https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf
[253] International Criminal Court: Office of the Prosecutor. *Situation in Colombia: Inteirim Report*. 2012
[254] International Criminal Court: Office of the Prosecutor. *Report on Preliminary Examination Activities*. 2016, p. 53.
[255] *Ibdem*
[256] *Ibdem*, paragraph 240.

What seems pressing in this case is the length of the preliminary examinations of the Colombian case, which last for over 13 years, especially when compared with cases like the one in Libya, which lasted one week.[257] This gives the aspect of a hidden and unclear agenda by the Court, which may contribute to allegations of bias towards the institution.[258] The OTP itself is not following its own "golden hour" principle "which recognizes that the sooner one can be present at the crime scene, the higher the chances are that better quality evidence and leads will be discovered and secured".[259]

This issue speaks, in the first place, with the already mentioned apparent focus of the ICC in African States and the implications this stereotype has for the institution, such as State attempts to withdraw from the institution.[260] However, a possible explanation for the long duration of the examinations in the case of Colombia could be explained by the principle of complementarity, since the ICC seems to be expecting the national policies to consolidate and the trials to be conducted internally before it can interfere[261]

> Over the years, the OTP has not only monitored developments in Colombia but engaged in a dialogue with various stakeholders, in particular regarding judicial proceedings against those who appear to be most responsible for alleged crimes. It remains unknown whether developments in Colombia would have been different – either positively, in the sense that effective national proceedings would have been stimulated faster, or negatively, disrupting peace talks – if the ICC had started investigations in Colombia at some point in the past 12

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[257] Anni Pues; *Towards the 'Golden Hour'?: A Critical Exploration of the Length of Preliminary Examinations*, Journal of International Criminal Justice, Volume 15, Issue 3, 1 July 2017: p. 436. https://doi.org/10.1093/jicj/mqx024

[258] *Ibdem*.

[259] International Criminal Court: Office of the Prosecutor. *Strategic Plan 2016 -2018*, 6 July 2015, p. 12, paragraph 24. https://www.icc-cpi.int/iccdocs/otp/en-otp_strategic_plan_2016-2018.pdf

[260] Declaratory Statement by the Republic of South Africa on the Decision toWithdraw from the Rome Statute of the International Criminal Court, UN Doc. C/N/786.20, 19 October 2016, at 1^2. This notification has meanwhile been withdrawn: South Africa: Withdrawal of Notification of Withdrawal, UN Doc. C/N/121.2017.TREATIES-XVIII.10, 7 March 2017.

[261] Anni Pues; *Towards the 'Golden Hour'?: A Critical Exploration of the Length of Preliminary Examinations*, Journal of International Criminal Justice, Volume 15, Issue 3, 1 July 2017, p. 441.

> years. Analyzing the success of the strategy in the complex situation in Colombia is thus a challenge in itself that others are better placed to undertake.[262]

On the same note are the declarations the government of Colombia made upon the signature of the Rome Statute, which stress the complementary role of the Court at the same time in which it reinforces that none of the Statute's would alter domestic jurisdiction within Colombian territory.[263]

Those statements also point out that the potential intervention of the ICC could not interfere on the State's right to grant amnesties or pardons which would be in conformity with the Constitution.[264] Apart from that, the declaration also mentions that the country's right to grant those is also related to the fulfillment of obligations in international humanitarian law, specially "especially those set forth in article 3 common to the four Geneva Conventions and in Protocols I and II Additional".[265] The declaration also expresses concerns on the guarantees for the rights for a fair trial and to the right of defense,[266] at the same time it requests that every cooperation should be carried out in Spanish or accompanied by a translation in that language.[267] Finally, as the statute was signed by Colombia inside the first seven years of it coming into force, it provided the option for the countryto make amendments,[268] such as:

> Availing itself of the option provided in article 124 of the Statute and subject to the conditions established therein, the Government of Colombia declares that it does not accept the jurisdiction

[262] *Ibdem*, pp. 441-442
[263] The United Nations Treaty Collection, *Rome Statute of the International Criminal Court*, Rome, 17, July, 1998, Declarations and Reservations, "Colombia" (4) https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&lang=en
[264] *Ibdem, (1)*
[265] *Ibdem.*
[266] *Ibdem*, (2)
[267] *Ibdem*, (6)
[268] The United Nations Treaty Collection, *Rome Statute of the International Criminal Court*, Rome, 17, July, 1998, a.123

> of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by Colombian nationals or on Colombian territory[269].

With those declarations in mind, it is also possible to identify many issues between the ICC and the Colombian government, in a sense that until 2016 the court had no final position established regarding the SJP[270] and, already in 2017, it found inconsistencies between the way it is laid and the Rome Statute.[271]

The way in which the ICC's report builds the narrative in order to explain those inconsistencies begins on a critic to the slow process of Colombian national justice specifically on the trials of both the FARC-EP's and ELN's leaderships, which remain at the investigation stage.[272] It also shows that the information gathered by the Attorney General's Office ("AGO") on cases involving both participants and leaderships of the armed groups is limited and, more than that, the steps it takes for the investigation it conducts are not clear for the institution.[273] Another issue is, even though some information was given to the OTP on crimes committed by members of the armed groups (which include forced abortions and rape of minors),[274] "during the reporting period, no specific information on on-going or completed investigations or prosecutions against State agents was made available to the Office".[275] On a more technical level,

> The OTP's review of the legislation adopted by the Colombian Congress found that four aspects of the SJP legislative framework may raise issues of consistency or compatibility with

[269] The United Nations Treaty Collection, *Rome Statute of the International Criminal Court*, Rome, 17, July, 1998, Declarations and Reservations, "Colombia" (5)
[270] International Criminal Court: Office of the Prosecutor, *Report on Preliminary Examination Activities*, 14, November, 2016. Paragraph 257.
https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf
[271] International Criminal Court: Office of the Prosecutor, *Report on Preliminary Examination Activities*, 14, November, 2017. Paragraph 144.
[272] *Ibdem*, paragraph 140,
[273] *Ibdem*.
[274] *Ibdem*, paragraphs 140-141
[275] *Ibdem*, paragraph 142

> customary international law and the Rome Statute, namely: the definition of command responsibility, the definition of "grave" war crimes, the determination of "active or determinative" participation in the crimes, and the implementation of sentences involving "effective restrictions of freedoms and rights".[276]

On its next paragraphs, the report on preliminary investigations explains those four issues in more depth, still according to the last Report on Preliminary Investigations published by the OTP.

For the first incompatibility, the Office points out that the Colombian definition of command responsibility does not come from customary international law, which is an issue because the superior party's duty towards the prevention, investigation or criminalization of their subordinate's crimes is then linked exclusively to their *de jure* authority, which might excuse non formally recognized superiors from liability.[277] The reason why this may be problematic is when considering cases in which the authority of one person towards another does not arise from any formal means, but from a greater material ability which cannot always correspond with a degree of command.[278] "This would significantly undermine application of the principle of responsible command and could bring into question whether those proceedings were vitiated by an inability or unwillingness to carry them out genuinely".[279]

The second issue pointed out by the OTP is possibly the most obvious one, since it connects to Colombia's lack of acceptance of the ICC's jurisdiction towards war crimes.[280] Even though the report recognizes the importance of the country's Amnesty law within the transitional process and as a key component on the SJP, it still stresses that, in respect to war crimes, the granting of pardon or amnesty are to be considered problematic specially if these crimes were

[276] *Ibdem*, paragraph 144
[277] *Ibdem*, paragraph 145
[278] *Ibdem*
[279] *Ibdem*
[280] United Nationa Treaty Collection. *Declarations and Reservations: Colombia*.

committed systematically and, in such cases, they would still fall within the Court's jurisdiction.[281] The exclusion of liability in systematically committed war crimes calls for an intervention of the court in all cases of the matter, since it could consider it as a "result of the domestic inaction or otherwise unwillingness or inability of the State concerned to carry out proceedings genuinely - and may also violate rules of customary international law".[282]

The third inconsistency is the discrepancy in the set of definitions of an active or passive role in crimes committed during the internal conflict. The determination of the SJP was made in order to assure the system would investigate serious collaboration in grave crimes and, with an ambiguity in the concepts of "active or determinative" participation, there is a strong risk of granting special treatment while prosecuting individuals responsible for such serious collaboration, even if they are indirect or arise from culpable omission.[283]

The last issue identified by the OTP is in accessing the effectiveness of sentences which involve "effective restrictions on freedoms and rights". In this sense, the Office reiterates the way to measure such success must "depend on the nature and the scope of the measures that in combination would form a sanction and whether, in the particular circumstances of a case, they adequately serve sentencing objectives and provide redress for the victims".[284] It also stresses the indispensability of a rigorous verification system which would monitor such restrictions and if external factors, such as activities involving political affairs, would not impact on the purpose and effectiveness of the sentence.[285]

5. Conclusion

[281] International Criminal Court: Office of the Prosecutor, *Report on Preliminary Examination Activities*, 14, November, 2017. Paragraph 146.
[282] *Ibdem*, paragraph 147
[283] *Ibdem*.
[284] *Ibdem*.
[285] *Ibdem*.

Taking into consideration the complexity of the roots and developments of the Colombian conflict, the domestic solutions proposed over the time tended to mirror the entanglements of the situation. Finally, after the uncertainty surrounding the Law of Justice and Peace of 2005, an option involving all parts of the conflict was proposed and accepted, giving origin to the Special Jurisdiction for Peace.

The system of the SJP then got composed of legislation and agreements plus multiple juridical instances in order to investigate and prosecute those responsible for the violations of the past and, until this day, it has the proposition to englobe different views of the post-conflict, giving special focus on its victims. Even though the whole process is a novelty in terms of transitional justice, the Colombian government felt the need to work alongside international participation, to give it legitimacy and strength.

By analysing the MAPP and the ICC side by side on their advancements since 2004, when the Colombian government signed the Convenio with the OAS and when the ICC initiated its investigation in the country, it is possible to see a massive institutional behavioural difference. Of course, these organizations have different natures and propose to act differently in order to advance the transitional process, however the localized and specific assistance proposed by the Mission seems to be achieving much more of an impact over the years than the Court.

The MAPP is not only a regional institution, but it was constructed specifically to tackle issues within the transitional process in Colombia, by monitoring and supporting domestic actions towards peace and non-repetition. The degree of adaptability the Mission has shown throughout the development of the SJP is what makes it the most remarkable – it started to include perspectives of gender, ethnicity and age; consider more actors and third parties as key in the transition and monitor the reintegration of the main armed group integrants into society, mainly by getting close to diverse Colombian communities and understanding their dynamics.

At the same time, the Mission showed more and more proactivity in its reports, which is perceivable in their language and greatest focus, which shifted from a purely verification and monitoring aspect to a proactive and engaging attitude. This seems to be the way the MAPP evolved on its work towards non-repetition guarantees and victims participation and satisfaction.

As for the ICC, I first attempted to show how much of a complex concept the Court had to juggle with in order to make a difference in transitional processes, mainly by presenting the tensions between the multiplicity of tasks proposed by the Court. It all accumulates into the criticism the ICC receives towards its previous actions, either by representatives of the TWAIL perspective or by the African Union itself.

Rationally it is not possible nor reasonable to expect from the ICC the same level of adaptability shown by the MAPP, since the latter is made specific for the Colombian scenario and has the possibility to be constantly revised and edited. The ICC seems to be following a stricter set of rules, has a broader scope in terms of worldwide reach and is, after all, a Court rather than a multi-layered dynamic project.

There would be no issue with the ICC intervention in the investigating and prosecuting the main responsible for the grave crimes committed during the Colombian conflict, however after 13 years of preliminary investigations, there is very little on the table for the institution to contribute to the transitional process. The only way for the Court at this point would be to point out potential failures in the domestic processes and/or in command structures, however it is worth remembering that it is not following its own definition on pursuing to investigate and prosecute as soon as possible in order not to lose the "golden hour" of the transition.

The furthest the OTP has gotten to this point was, on its last report on preliminary activities, to point out inconsistencies between the SJP and international law, which is already quite important on the demonstration on the limitations of the domestic process. It shows how limited

the Colombian definition of "superior" is when it considers solely *de jure* situations, how slow the local prosecutions have been conducted and how unclear the investigation and conduct of national courts have been. Even though this is already some progress while considering all the years in which the ICC has worked on the Colombian case, it seems of very little practical help so far, as the Court still has not made its move beyond the admissibility stage.

The Colombian transitional process is one of the freshest and newest which can be found on the international system today. By a quick analysis of the domestic system followed by the mapping of two of the main international organizations working in its case, it is possible to see how many possibilities are being explored on this context and how many opportunities may be lost due to passivity. Looking at all three jurisdictions, all of them display issues such as non-compliance towards international law, in the case of the SJP, passivity in the case of the MAPP and an almost state of inaction in the case of the Court.

After developing this thesis, however, it is possible to perceive they almost seem to have the potential to complement themselves, especially if the ICC passes beyond the admissibility phase and pushes the Colombian government to take further steps towards international standards of transitional justice. Having a broad and incisive domestic system represented by the SJP, an international court maintaining the compliance with international law standards on investigation and prosecution of participants in the conflicts represented by the ICC and a monitoring mechanism which also has the potential to propose new projects after empirical experience with the local communities sounds like an ideal scenario. Only time will tell if these three sides will take the necessary steps towards transforming the Colombian transitional justice into a standard model to be followed internationally.

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