MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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THE PRINCIPLE OF POSITIVE COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW AND ITS CONVERGENCE WITH DOMESTIC TRANSITIONAL SYSTEMS: THE CASE OF COLOMBIA

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Abstract:

International Criminal Law and Transitional Justice have been tied by the utmost responsibility of addressing major atrocities committed by humankind, despite their confronted aims for that particular task. Within the modern framework of the International Criminal Court, embodied in the Rome Statute, a new cross-cutting scenario poses the idea of reconciling these different paradigms of justice. The opened preliminary examination in Colombia suggests this emerging interplay between the Court and domestic transitional systems under the auspices of the principle of complementarity. Similarly, a positive approach of this foundational tenet of the Statute's system, appears as a feasible mechanism for not only normative harmonization but also comprehensiveness and the progressive development of a more integral concept of justice. Consequently, by opening the door to different and diverse perspectives thereof, fighting and preventing impunity of international core crimes whilst allowing the pursuit and achievement of those other components of Transitional Justice, becomes a possible pathway.

This study is aimed firstly to provide an analysis of the referred incipient scenario with the particular example of Colombia before the ICC's jurisdiction With this exploration, the proposal of a novel approach for potential situations under examination by this international institution and involving tension between these two different models of justice is edified on the basis of positive complementarity. In this sense, by the use of a descriptive, analytic and comparative dogmatic legal method to study international and national law and caselaw, it is intended a clarification of the normative standards for a domestic system, rooted in transitional instruments, to be legally admissible according to the operation of the principle of complementarity. Thus, through asserting the lawful compliance of the current Colombian transitional court: the Special Jurisdiction for Peace, it is proposed the prospect of Transitional Justice and International Criminal Law validly coexisting under the Rome Statute. A situation that is further developed by seeking to demonstrate the virtues of complementarity's positive approach for enabling the realization of both paradigms' purposes at the same time. As such, by means of a following analysis and elaboration of this notion a wider and more comprehensive concept of integral justice through the lens of modern International Criminal Law is raised.

Keywords: International Criminal Law, Transitional Justice, International Criminal Court, Positive Complementarity, Rome Statute, Colombia, Special Jurisdiction for Peace, Preliminary Examination

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List of Abbreviations

FARC-EP - Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo

HR – Human Rights

ICC – International Criminal Court

ICL – International Criminal Law

ICTR – International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the Former Yugoslavia

IHL – International Humanitarian Law

ILHR – International Law of Human Rights

ILC – International Law Commission

LRA - Lord's Resistance Army

SJP – Special Jurisdiction for Peace

OTP – Office of The Prosecutor

PTC – Pre-Trial Chamber

TRC - Truth and Reconciliation Commission

UN – United Nations

WCD - War Crimes Division

1. Introduction

1.1. Positive Complementarity, the Pathway Between Transitional Justice and the Rome Statute

Transitional Justice,[1] briefly understood as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes",[2] has been commonly used throughout the last decades as an instrument to stop and overcome critical contexts of instability and violence in armed conflicts and repressive ruling. In this vein, transitional tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) (1993) and Rwanda (ICTR) (1994),[3] have been established to address crimes committed in particular armed conflicts which are of international interest due to their gravity and seriousness. Thereafter, the International Criminal Court (ICC) emerged as a permanent institution with the Rome Statute adopted in 1998, to prosecute those responsible for international crimes.[4] Nevertheless, despite its permanent nature, this last court is primarily intended to complement national or domestic systems (Article 1, Rome Statute) and therefore, it can be alleged that there has been a shift of paradigm in regard to how crimes of international concern should be approached and prosecuted.

Bearing this in mind, in scenarios of armed conflict and massive atrocities, questions relating to transitional justice and its applicability within domestic systems have arisen, inasmuch as the ICC was specifically created to assume responsibility for those international crimes generally committed in these particular contexts, and previously handled as mentioned, by international ad hoc tribunals. In this sense, given the complementary role of the ICC concerning the investigation and prosecution of these types of serious crimes, cooperation with domestic jurisdictions to address them, specially by means of its investigating body the Office of the Prosecutor (OTP), has become a matter of study. A question even more appealing and complex in cases where the success of transitional processes is also at stake.

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[1] For an analysis and discussion of transitional justice: Ruti G. Teitel, Transitional Justice (2000); Nagy, Rosemary, Transitional Justice: Nomos Li, edited by Melissa S. Williams, and Jon Elster, New York University Press, (2012); Guillermo O'donnell & Philippe C. Schmitter, Transitions From Authoritarian Rule: Tentative Conclusions About Uncertain Democracies (1998); Neil J. Kritz Ed., Transitional Justice: How Emerging Democracies Reckon With Former Regimes (1997).

[2] Teitel Ruti G., *'Transitional Justice Genealogy Symposium: Human Rights in Transition'* (New York Law School, 2003). p. 1.

[3] Established by the Security Council Resolutions 827/1993 (ICTY), and 955/1994 (ICTR).

[4] Rome Statute of the International Criminal Court (1998). Article 5-8bis.

Since there is a supplementary role to be followed by the ICC and it is now its competence to deal with international crimes, usually and primarily handled throughout history by temporary ad hoc jurisdictions, the question of how its relationship with national transitional systems should be conducted seems to appear inevitable. In this context, the principle of "positive complementarity", generally conceived as the "encouragement and strengthening of States capacity to exercise criminal jurisdiction over the perpetrators of crimes that fall under the jurisdiction of the ICC as well as to cooperate with the ICC, in the context of the Court's own investigative and judicial activities",[5] rises as an option for this recently emerged interaction between international criminal law (ICL) and domestic jurisdictions. A scenario where coordination and cooperation seem as the most proper way to respond effectively to the challenges posed with this new paradigm.

As such, according to this major principle of the Rome Statute it must be followed "that the Court, and particularly the OTP and Chief Prosecutor, should work to engage national jurisdictions in prosecutions, using various methods to encourage states to prosecute cases domestically whenever possible".[6] Thus, this notion can be regarded as a desirable instrument to articulate jurisdictions at the international and national level, and arguably in situations of tension between justice and peace, where particular states are in need of adopting and implementing tailored mechanisms of transitional justice to overcome exceptional and critical situations of violence and mass atrocities. In this view, determining the legal criteria for a domestic system of this nature to properly meet the standards of ICL under the Statute and through the lens of complementarity, will be a necessary analysis to assess the feasibility and suitability of such particular interplay of jurisdictions.

With this in mind, the examination of Colombia under the ICC emerges as a recent and representative example of interrelation between ICL and domestic transitional justice. In 2016, in a context of a protracted, complex and multifaceted armed conflict of more than six decades, a peace agreement between the Colombian government and the armed group FARC-EP (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*) was reached.[7] Herein, a transitional system was created with a singular tribunal aimed concretely to respond to justice

[5] Emilie Hunter, 'The International Criminal Court and Positive Complementarity: The Impact of the ICC's Admissibility Law and Practice on Domestic Jurisdictions.' (European University Institute 2014).https://cadmus.eui.eu/bitstream/handle/1814/34398/2014_Hunter.pdf?sequence=1 P. 24.
[6] Katharine A Marshall, 'Prevention and Complementarity in the International Criminal Court: A Positive Approach' (2010) Vol. 17, no.2 Human Rights Brief 6. P. 22.
[7] Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace 2016.

and peace demands, the Special Jurisdiction for Peace in Colombia (in Spanish: *Jurisdicción Especial para la Paz*). A transitional court in charge of judging crimes of national and international concern, occurred during the armed conflict with this specific rebel group.

In 2004, a preliminary examination was also opened by the ICC's Prosecutor regarding the potential commission of crimes under the jurisdiction of the Court in the country during the recent period of the armed conflict.[8] Examination that was later closed in 2021 and was concluded with a cooperation agreement as a result of the reviewing process in Colombia.[9] This decision to terminate the assessment of the local institutions and endorse them, was strongly based on the referred concept of positive complementarity, a notion edified on the idea of assisting and cooperating with states. In this case, the resolution was taken on the grounds of "the demonstrated ability and willingness of Colombia to date to genuinely administer justice related to crimes under the jurisdiction of the International Criminal Court".[10]

Since a domestic transitional system now will take on the responsibility of investigating and prosecuting those potential criminal conducts under the terms agreed with the OTP, it seems reasonable to suggest that this situation could properly fit into the positive idea of complementarity. Nonetheless, this notion's applicability and interaction in a scenario of normative and principles' harmonisation between different legal systems, such as a transitional system and ICL is still an ongoing discussion, particularly in Colombia where the decision to close the examination has been debated.[11] Moreover, with this novel arrangement of cooperation it can be suggested that this represents a new testing context of conjoined work for international and domestic criminal law, which could later serve as a model for future scenarios before the ICC. As such, this scenario seems as a great opportunity to implement from its essence the so-called principle of complementarity with a positive approach, which incidentally, has been and happens to be the intended policy[12] to intervene by the current

[8] The Office of the Prosecutor (OTP), 'Situation in Colombia - Interim Report' (2012).
[9] The Office of the Prosecutor (OTP) and The Government of Colombia, 'Cooperation Agreement Between the Office of the Prosecutor of the International Criminal Court and the Government of Colombia'.
[10] ibid. Preamble.
[11] See: Juan Pappier and Liz Evenson, *'ICC Starts Next Chapter in Colombia, But Will It Lead to Justice?'* (European Journal of International Law, December 15, 2021): https://www.ejiltalk.org/icc-starts-next-chapter-in-colombia-but-will-it-lead-to-justice/; Andrés Morales, *'The rocky road to peace II: additional challenges at the Special Jurisdiction for Peace in Colombia'*(European Journal of International Law, May 12, 2022): https://www.ejiltalk.org/the-rocky-road-to-peace-ii-additional-challenges-at-the-special-jurisdiction-for-peace-in-colombia/; and International Federation for Human Rights, *'Colombia: ICC Prosecutor's baffling choice to close preliminary examination must be reversed'* (27 April 2022): https://www.fidh.org/en/region/americas/colombia/colombia-international-criminal-court-no-investigate-grave-crimes
[12] Prosecutorial Strategy of 2006, 2009 - 2012, Strategic Plan 2012-2015, 2016-2018, 2019-2021.

Prosecutor of the International Criminal Court, Mr. Karim A. A. Khan, particularly in Latin America.[13]

Under this context, with the existence of a new permanent court, it becomes necessary to consider and study the possibility of articulating the international framework with transitional processes currently emerging from local legal systems, as in the examination of Colombia:

> As the ICC is a relatively new institution, an analysis of how it interacts with sovereign states striving to transition from periods of conflict will break new empirical ground crucial to current and future peace and transitional justice processes. The way in which the Rome Statute, directly and indirectly, delimits the measures states may take in the realm of their judicial sovereignty will also have implications for research on and practices of transitional justice.[14]

Thus, having a preliminary examination concluded, a transitional system already in course, and a commitment to work jointly coming from different legal orders, Colombia seems as an appropriate scenario to examine positive complementarity. In this respect, the emergence of an incipient paradigm of interaction and convergence between ICL and transitional justice settled at the domestic level aimed to the ultimate realization of justice, is a matter to be examined from this particular context.

Following this, the thesis will firstly focus on the surrounding context of Colombia's preliminary examination opened before the ICC. For this purpose, an explanation on how the ICC intervenes in crimes of its interest will be presented. Subsequently, the third chapter will address the case of transitional justice and ICL as differentiated paradigms of justice confronted with the difficult task of deciding between peaceful transitions or criminal justice. Thereafter, to understand how the ICC's framework currently works and interacts with domestic systems, the notion of complementarity and its positive aspect will be examined in the fourth chapter. Lastly, in the fifth chapter, the concrete scenario of the domestic transitional system of Colombia and its edification, functioning and compliance with modern ICL standards under the Rome Statute, will be examined in great extent. Moreover, for the purposes of examining the potential convergence of the latter and domestic transitional justice under positive complementarity, some considerations will be given to the suitability of the Colombian transitional system as an alternative form of justice able to be aligned with the purposes of the Statute, and indented to the actual realization and development of a broader and more comprehensive concept of justice.

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[13] Santiago Vargas Niño, 'No Todos Los Caminos Conducen a La Haya: El Principio de Complementariedad En América Latina' [2021] *Agenda Estado de Derecho*.

[14] Annika Björkdahl and Louise Warvsten, 'Friction in Transitional Justice Processes: The Colombian Judicial System and the ICC' (2022) 15 International Journal of Transitional Justice. P. 637.

2. The ICC's Role and the Preliminary Examination in Colombia

2.1. General Conditions for the Exercise of Jurisdiction

In order to have better understanding of Colombia and its preliminary examination opened in June of 2004 by the OTP due to 114 communications received under Article 15 of the Rome Statute,[15] it seems necessary to first touch upon the ICC and its role and functioning in these procedural scenarios. In this regard, the Court, as the first permanent, international and criminal one, was edified to aim worldwide jurisdiction to investigate and prosecute individuals for those crimes of greatest concern to the international community. Thus, it is observed that this international tribunal, created by the Rome Statute in 1998, was specifically settled "to try and punish for the most serious violations of human rights in cases when national justice systems fail at the task."[16] Crimes that due to their gravity are of utmost relevance for the global society, and therefore, must be prosecuted in order to prevent any further threat to international peace and democracy.

The landmark that the Statute represented at the time of its creation is without question a great step forward for the development of ICL, and a clear change of paradigm in the history of it:

> Adopted on 17 July 1998 by the Rome Diplomatic Conference was a major breakthrough in the effective enforcement of international criminal law. It marks the culmination of a process started at Nuremberg and Tokyo and further developed through the establishment of the ad hoc Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). The Statute crystallizes the whole body of law that has gradually merged over the past fifty years in the international community in this particularly problematic area.[17]

In this manner, the ICC, which emerged from this international instrument originally envisaged by the General Assembly,[18] fulfils a fundamental mandate against impunity around the globe by dealing with crimes of international concern, and by intervening whenever there is a blatant case of inaction in their prosecution and punishment. This intervention will be focused on crimes of extreme gravity, namely: war crimes, genocide or crimes against humanity,

[15] The Office of the Prosecutor (OTP), 'Situation in Colombia - Interim Report' (n 8).
[16] William A Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017). Preface viii.
[17] Antonio Cassese, Paola Gaeta and John Jones, *The Rome Statute of the International Criminal Court: A Commentary*, vol I (Oxford University Press, 2002). P. 3.
[18] According to General Assembly resolutions A/RES/51/207 and A/RES/52/160, adopted in 1996 and 1997 respectively.

commonly denoted as “the most serious crimes of concern to the international community as a whole.”[19]

Historically, states “have long held the primary, if not the sole, responsibility to try individuals accused of violating criminal laws.”[20] Nevertheless, this paramount faculty that emerges from their sovereignty, can be easily turned into frightening impunity in crimes of international interest. Therefore, action at the international level must be taken when failure in preventing, investigating and punishing of heinous events results from the neglect or incapacity of states to deal with them:

> International criminal law now recognises that certain crimes rise above the national interests of states, such that all members of the international community have an interest in their prevention and, where they have been committed, their investigation, trial and punishment, and in ending impunity for the commission of such crimes. These crimes are elevated to the international level either due to their close connection with international peace and security or their ability to shock the conscience of mankind.[21]

Thus, it is visible that there is a pivotal task to be accomplished by the ICC in the sense that the enforcement of ICL was entrusted to this tribunal, and for that matter, special jurisdiction to intervene was provided when necessary, according to the rules in its Ssatute. Having said the latter, this criminal jurisdiction, which can be shortly outlined as a “competence to deal with a criminal cause or matter under the Statute”,[22] is amply regulated by the articles thereof. These dispositions establish the guidelines for determining the competence in regard to the abovementioned crimes, and therefore, inform when it is acceptable for the Court to proceed and properly exercise its jurisdiction, in accordance with the so-called requirements of *ratione materiae, ratione temporis, ratione personae* and *ratione loci*.

Within this context, it can be noted first of all that article 5 of the Rome Statute contains the category of the referred core crimes.[23] Criminal conducts that have been commonly understood as the *ratione materiae* or subject-matter jurisdiction. Nonetheless, it must be noted that despite the relevance given to these crimes by the international community: “This does not mean that there is already a duty under national law to prosecute and punish in all circumstances people

[19] Rome Statute of the International Criminal Court 1998. Article 5.
[20] Sarah Williams, *Hybrid and Internationalised Criminal Tribunals: Selected Jurisdictional Issues* (Hart Publishing 2012). P 1.
[21] ibid. p. 2.
[22] ICC-Appeals Chamber, Prosecutor v. Thomas Lubanga Dyilo, Decision on Defence Challenge to Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006 (ICC-01/04–01/06–772, 14 December 2006).
[23] This fourth crime was defined and further developed with the Kampala amendments to the Rome Statute of the international criminal court in 2010 (art. 8 bis, art. 15 bis), but due to its particularity and differences it won't be examined in detail for the purposes of this work.

who have committed the acts in question. The fact that, in many States, such prosecutions have rarely occurred when the acts in question have been committed by State agents is the *raison d'etre* of the Statute"[24] Similarly, even though there are many more transnational crimes at the international level that can possibly escape the sphere of domestic justice:

> In the case of genocide, crimes against humanity, war crimes and aggression, it is not so much because they are territorially inaccessible or are committed over several territories as that they are left unpunished by the very State where the crime was committed. The explanation for this is political, not technical: the State of territorial jurisdiction is usually unwilling to prosecute because it is itself complicit in the criminal behaviour.[25]

Concerning the *ratione temporis* or temporal jurisdiction, there is a notable limitation for this international court according to the Rome Statute, since it was strictly established that the crimes to be judged will be those "committed after the entry into force of this Statute."[26] This provision is duly compliant with the dispositions of the Vienna Convention on the Law of Treaties, [27] under which "the jurisdiction according to the ICC-Statute does not take effect retroactively but can only be invoked prospectively after its entry into force."[28] Accordingly, the concrete date to be taken into account is 1st July of 2002, when this international instrument took force, and consequently, transgressions committed before this dateline are not prosecutable.

At the same time, it must be stressed that based on article 11(2) jurisdiction will be only exercised over a state from the moment it ratifies this international instrument. However, the Statute provides an exception to the rule, and that is the case noted in article 12(3), which states that an *ad hoc* declaration by the state in question is possible in order to recognize the Court's jurisdiction over certain crimes, even though the latter is not party to the ICC. In this perspective, this disposition "requires such a State to lodge a declaration with the Registrar by which it accepts the exercise of jurisdiction by the Court 'with respect to the crime in question'."[29]

In regard to the personal jurisdiction or *ratione personae*, it must be noted a novelty in ICL, where unlike other traditional fields of international law, criminal responsibility is only

[24] Iain Cameron, 'Jurisdiction and Admissibility Issues under the ICC Statute', *The Permanent International Criminal Court : Legal and Policy Issues* (Dominic McGoldrick, Eric Donnelly, and Peter Rowe, Bloomsbury Publishing Plc 2004). P. 67.
[25] Schabas, *An Introduction to the International Criminal Court* (n 16). P. 75.
[26] Rome Statute of the International Criminal Court. Article 11 Paragraph 1.
[27] Vienna Convention on the Law of Treaties 1969. Art. 28.
[28] Markus Wagner, 'The ICC and Its Jurisdiction – Myths, Misperceptions and Realities' (2003) 7 Max Planck Yearbook of United Nations Law. p. 491.
[29] William A Schabas, *An Introduction to the International Criminal Court* (5th edn, Cambridge University Press 2017) P. 69.

assigned to individuals. Thus, individuals and no organizations, no matter their public or private status, are subject to the Court's jurisdiction: "While almost all the offences set out in the Statute require a considerable level of organisation to be committed, and so the typical perpetrator will normally be a state official, the whole purpose of the Statute is to create and confirm individual responsibility for these acts."[30] In line with this, normativity stipulates that the Court can exercise its powers over nationals of a state party, independently of where the crime took place. As such, according to article 12(2)(b), the ICC is able to prosecute individuals from countries who have ratified the Statute and also individuals from non-party states that have done an *ad hoc* declaration. Additionally, an exception for individual prosecution is that contained in article 26 that has to do with an age limitation, only people over 18 are subject to its jurisdiction and therefore criminally liable.

When it comes to the territorial jurisdiction or *ratione loci*, it is referred specifically to that location or territorial country where the crime has taken place. The main criterion to be considered here is whether the alleged crime happened in a state party's territory, and therefore, if it is possible to be judged by the Court regardless of the nationality of the perpetrator. This condition is explicitly stated in article 12(2)(a), and has been closely aligned with the principle of sovereignty, since it is conceived as an "international mechanism for the protection of universal values through the use of sovereign tools of governance."[31] Furthermore, just as in the previous criteria, the exception of non-state parties with *ad hoc* declarations accepting jurisdiction also applies for this situation.

Lastly, it also worthwhile mentioning the conferment of jurisdiction to the Court's by the Security Council pursuant to article 13(b) and in accordance with Chapter VII of the United Nations' (UN) Charter. In this sense, in all prior cases there is an additional exception coming from the fact that a direct referral coming from this UN's organ will automatically enable the ICC's jurisdiction even when the described rules and requirements are not properly met in regular conditions.

Overall, it must be pointed out that all the above-mentioned factors must be followed in accordance with the ways indicated in articles 13-15 of the Statute. In other words, these normative guidelines to determine when the ICC will be able to try a certain crime must be articulated with the triggering mechanisms, or in other words, by one of those conditions of

[30] Cameron (n 24). P. 70.
[31] Michail Vagias, *The Territorial Jurisdiction of the International Criminal Court* (Cambridge University Press 2014). P. 3.

jurisdictional exercising. These are: by means of a state party referral (art. 13(a), art. 14), referral by the Security Council acting under Chapter VII of the Charter of the United Nations (art. 13(b)), or by *proprio motu* investigation initiated by the Prosecutor (art. 13 (c), art. 15). Accordingly, these mechanisms will be fundamental for the preliminary phase since: "All cases coming before the Court are first reviewed by the Prosecutor to determine whether there is a 'reasonable basis' to continue the investigation (Article 53). This means looking at both jurisdiction and admissibility: either lack of jurisdiction or inadmissibility can lead to the case not being brought or being abandoned."[32]

In addition to the jurisdictional scenarios foreseen in the Rome Statute, an additional triggering mechanism has emerged in practice, and that is the self-referral situation.[33] First exercised by Uganda in 2003,[34] and commonly regarded as "voluntary referrals by states which have territorial jurisdiction as a first step in triggering the jurisdiction of the Court",[35] this last mechanism has been nonetheless considered as "a creative interpretation of Article 14 of the Rome Statute",[36] from which international crimes can also be investigated and prosecuted by the ICC.

In this vein, all these trigger mechanisms are being currently used by the ICC, which so far has exercised jurisdiction in: the Central African Republic, Venezuela, and Ukraine, by referral of another state party; the Democratic Republic of the Congo, Uganda, the Central African Republic, Mali, and State of Palestine, by self-referral; Libya and Sudan, by the United Nations Security Council's referral; and Kenya, Georgia, Burundi, Côte d'Ivoire, Bangladesh/Myanmar, Afghanistan and the Republic of the Philippines, by the Prosecutor's *proprio motu*.[37]

[32] Cameron (n 24). P. 82.
[33] See for example: Ahmed Samir Hassanein, *'Self-referral of Situations to the International Criminal Court: Complementarity in Practice – Complementarity in Crisis'* (International Criminal Law Review, 2017)
[34] This case is particularly relevant for the present study, not only because it was the first referral made by the same implicated state, but also because it represents a clear scenario of complementarity where cooperation between the ICC system and the national government was pretended. Therefore, it will be further analysed in more detail in the second chapter.
[35] The Office of the Prosecutor (OTP),
'Report on the Activities Performed during the First Three Years (June 2003 – June 2006)' (2006). P. 7.
[36] William A Schabas, '‹Complementarity in Practice': Some Uncomplimentary Thoughts' (2008) 19 Criminal Law Forum. P. 12.
[37] As to May 2022, this information has been extracted from the ICC's website: https://www.icc-cpi.int/situations-under-investigations

2.2. The Preliminary Examination in Colombia

Having described the manner in which the ICC can proceed towards the prosecution of crimes within its jurisdiction, it must now be outlined the concrete situation of Colombia in regard to the particular preliminary examination that was opened in 2004 by the OTP. Accordingly, it must be noted that when it comes to the opening of an investigation, it "is preceded by a pre-procedural stage of the triggering procedure, or 'investigation of the situation phase.'"[38] Therein can be found the preliminary examinations, which are exercised whenever it is believed an ICC crime was committed according to the explained rules. In this sense, a situation triggered by any of the ways referred will require a pre-investigation phase where the OTP will "collect all relevant information necessary to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. If the Office is satisfied that all the criteria established by the Statute for this purpose are fulfilled, it has a legal duty to open an investigation into the situation."[39]

Only if the Prosecutor decides to proceed *proprio motu*, authorization by the Pre-Trial Chamber (PTC) of the ICC will be necessary in case of resolving to continue with the next phase and formally open a situation for investigations.[40] Moreover, this procedure of fundamental relevance for the existence of a trial, as it will be explained afterwards, plays a decisive role in the proper attainment of the notion of positive complementarity. The latter because as posed by the OTP, a preliminary examination "is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes".[41] Additional important factors to keep in mind when performing exploratory assessments geared to the intervention in alleged crimes of interest are those stipulated in article 53(1) (a) - (c) of the Statute. According to these provisions, in order to conduct the examination "the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of justice. The standard of proof for proceeding with an investigation into a situation under the Statute is 'reasonable basis'."[42]

With this context, a preliminary examination conducted by the OTP in Colombia was opened as a consequence of several communications received in 2004 under article 15. Thereafter, in order to continue with this procedure, jurisdiction was aimed to be established according to the

[38] Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC* (Duncker & Humblot GmbH 2011). P. 56.
[39] The Office of the Prosecutor (OTP), 'Policy Paper on Preliminary Examinations' (2013) Para. 2.
[40] Rome Statute of the International Criminal Court. Article 15 Paragraph 3.
[41] The Office of the Prosecutor (OTP), 'Policy Paper on Preliminary Examinations' (n 39). Para. 100.
[42] ibid. Para. 5.

mentioned rules where initially the Prosecutor found that temporal jurisdiction was met, insofar as the alleged crimes were presumed to be committed after Colombia's ratification of the Statute on the 5th of August 2002.[43] Nevertheless, here it's important to note that "the Statute allows states parties to the Statute to opt out of the ICC's jurisdiction over war crimes for a period of seven years after becoming a party, as well as its jurisdiction over any new crimes that may be added to the Statute in the future".[44] Thus, following this possibility, in the case of war crimes the ICC had only jurisdiction from the 1st of November 2009 onwards since a declaration[45] pursuant to article 124 was made by the Colombian government at that time.[46]

In regard to the subject-matter, the crimes according to the information gathered and received included: "murder, rape and other forms of sexual violence, forcible transfer of population, severe deprivation of physical liberty, torture, and enforced disappearance. [...] attacks against human rights defenders, public officials, trade unionists, teachers as well as members of indigenous and Afro-Colombian communities."[47] Most of these acts, investigated as crimes against humanity and war crimes,[48] were allegedly committed by state and non-state actors: guerrilla groups, including FARC-EP, ELN (Ejército de Liberación Nacional) and several and different paramilitary groups.

Then, admissibility on this matter was examined by reviewing if national authorities had already initiated proceedings from these events. The OTP determined in its interim report of 2012, that actions were being taken by the government in order to prosecute FARC-EP and ELN guerrillas, paramilitary leaders, state officials, and politicians with presumed links to these groups. Furthermore, it was noted that under the Justice and Peace Law (*Ley de Justicia y Paz*), a transitional justice mechanism was designed for paramilitary members to disarm and confess crimes in exchange for reduced sentences, and therefore, many paramilitaries were already

[43] By means of the national Law 742 of 2002, the statute was internally adopted in Colombia.
[44] Jennifer Elsea, 'International Criminal Court: Overview and Selected Legal Issues', *International Criminal Court: Policy, Status and Overview* (Harry P Milton, Nova Science Publishers 2008). P. 89.
[45] Accordingly the Colombian government declared in respect to the Rome Statute's jurisdiction the following: '5. 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 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.'
[46] Such determination was taken due to the alleged intentions of the Colombian Government to engage in peace dialogues with the existent non-state organised groups at that time, and therefore, be able to reach agreements aimed to the application of transitional penalties and reintegration policies for their armed members. See Jan Schneider, & Francisco Taborda Ocampo, *'Alcance de la declaración colombiana según el artículo 124 del Estatuto de Roma',* (Revista de Derecho, 2011), pp. 297-329.
[47] The Office of the Prosecutor (OTP), 'Situation in Colombia - Interim Report' (n 8). Para. 4.
[48] ibid. Paras. 5-10.

being processed and convicted. Similarly, it was pointed out the existence of the Legal Framework for Peace (*Marco Legal para la Paz*) approved by the Colombian Congress on 19th of June 2012, which was conceived to be a transitional justice strategy for prioritization and selection of cases of members with the greatest responsibility for war crimes and crimes against humanity.[49] Nonetheless, with the interim report it was also concluded that the examination of the country's situation was going to continue on the following critical matters:

> i) follow-up on the Legal Framework for Peace and other relevant legislative developments, as well as jurisdictional aspects relating to the emergence of 'new illegal armed groups;' (ii) proceedings relating to the promotion and expansion of paramilitary groups; (iii) proceedings relating to forced displacement; (iv) proceedings relating to sexual crimes; and, (v) false positive cases.[50]

From that point onwards, preliminary examinations with reports were annually performed. In its report of 2013 the OTP indicated that Colombia indeed took steps involving: prioritisation of prosecutions of those most responsible of ICC crimes under the Justice and Peace Law, including crimes of sexual violence and forced displacement,[51] a "Military Justice Reform" was being conducted in relation to the false positive cases, and the implementations of a Legal Framework for Peace, conjoined with the on-going peace talks with the FARC guerrilla in the Havana, were being monitored at the same time. By 2014, the Prosecutor determined that some progress was achieved in the false positive cases, but limited improvement was reached regarding sexual crimes.[52]

The next year, the initiated peace process with the FARC-EP was highlighted in the report, despite the Office also concluded that there was still a lack of substantial progress in the investigations and prosecutions of false positive cases, sexual crimes and forced displacement. Additionally, it was stressed that particular attention was going to be given to the Special Jurisdiction for Peace in Colombia (SJP), initially envisaged to judge international crimes.[53] In 2016, following the arrangement of 26th of September, the *Final Agreement for Ending the Conflict and Building a Stable and Long - Lasting Peace* between the FARC-EP and the Colombian Government, the OTP focused on the same three critical topics (false positive cases, sexual crimes, forced displacement), and gave particular emphasis to the SJP and its

[49] ibid. Paras. 11-20.
[50] ibid. Para. 22.
[51] The Office of the Prosecutor (OTP), 'Report on Preliminary Examination Activities' (2013). Paras. 131, 134, 151.
[52] The Office of the Prosecutor (OTP), 'Report on Preliminary Examination Activities' (2014). Para. 130.
[53] The Office of the Prosecutor (OTP), 'Report on Preliminary Examination Activities' (2015). Paras. 148, 149, 164-167.

accountability system for those most responsible of crimes of its interest.[54] Thereafter, in 2017, apart from the ordinary cases already under examination, it was noted the development of a set of legal and constitutional norms designed to allow and edify the transitional justice system by means of the Legislative Act 1 of 2017, and the Law 1820 of 2016 or "Amnesty Law".[55]

Subsequently, 2018 represented an important year insofar as operations of the SJP officially began. The Prosecutor's report then recognized additional normativity issued to implement the transitional system, such as the Statutory Law for the Administration of Justice, and the Rules of Procedure of the SJP.[56] The next year, the report acknowledged and confirmed the domestic actions and proceedings that were being conducted with the intervention of the SJP with respect to the OTP's attention to cases of: (i) promotion and expansion of paramilitary groups; (ii) forced displacement; (iii) relating to sexual crimes; and (iv) false positive cases.[57] Lastly, the Prosecutor in its 2020 report determined:

> The Office has continued to assess the progress of domestic proceedings related to the commission of crimes that form the potential cases that would form the focus of its preliminary examination. The information assessed since November 2019 indicates that the Colombian authorities, in overall, have taken meaningful steps to address conduct amounting to ICC crimes, as outlined in the 2012 Interim Report.[58]

Based on this, the OTP came to the conclusion that actions were being taken, and the examination with the Colombian authorities would continue in order to particularly determine whether it should finally "proceed to open an investigation or defer to national accountability processes as a consequence of relevant and genuine domestic proceedings."[59]

2.2.1. The Cooperation Agreement Between the Office of the Prosecutor and the Government of Colombia: The Preliminary Examination is Closed.

On the 28th of October 2021, based on the performed examinations, ICC Prosecutor Karim A. A. Khan concluded that there was no reasonable basis to assume that the crimes under analysis required the opening of a formal investigation, or in other words, that these were admissible pursuant to article 53(1). As a result, a Cooperation Agreement with the Colombian government was signed to elaborate and endorse this determination.

[54] The Office of the Prosecutor (OTP), 'Report on Preliminary Examination Activities' (2016). Paras. 241-257.
[55] The Office of the Prosecutor (OTP), 'Report on Preliminary Examination Activities' (2017). Paras. 143-148.
[56] The Office of the Prosecutor (OTP), 'Report on Preliminary Examination Activities' (2018). Paras. 153-159.
[57] The Office of the Prosecutor (OTP), 'Report on Preliminary Examination Activities' (2019). Paras. 95-128.
[58] The Office of the Prosecutor (OTP), 'Report on Preliminary Examination Activities' (2020). Para. 152.
[59] ibid. Para. 154.

The agreement was concluded by means and as a consequence of the efforts coming from different national jurisdictions: the ordinary justice system, the Justice and Peace Law mechanisms, and the Special Jurisdiction for Peace. Although the agreement terminates the preliminary examination, it also represents a commitment by Colombia to continue supporting, protecting, and promoting the current system of transitional justice.[60] Similarly, the agreement implies the settlement of a relationship of communication, support and cooperation, which would be grasped as the manifestation of positive complementarity.[61] In words of the OTP: "The signature of this Agreement – the first of its kind concluded by the Office and a State Party – breaks new ground by entering into a series of mutual undertakings to ensure that domestic transitional justice processes in Colombia remain on track."[62]

In this regard, it can be found that the agreement more than ending a phase, entails the beginning of a process of conjoined work towards the achievement of justice. In the same vein, this arrangement also establishes the possibility of retaking operations in case of non-compliance following "the possibility for the Office of the Prosecutor to close the preliminary examination, subject to possible later reconsideration".[63] Situation pursuant to the article 7, which contemplates the option of reviewing the assessment in scenarios of new changes that could eventually affect or undermine the national proceedings underway.

Likewise, the SJP has recognized the great relevance of its role concerning the effective fulfilment of the state's international obligations and the accomplishment of justice to prevent impunity. About this relationship with the OTP, it was acknowledged that this will certainly become a new paradigm with a more effective supervision to determine whether to reopen the examination or not. It also asserted that both institutions will complement each other in different manners: on the one hand, the SJP will maintain permanent communication with the OTP and, on the other hand, the latter will conduct its complementary mandate in the event that the Colombian state fails to comply with its international duties under the Rome Statute.[64]

[60] The Office of the Prosecutor (OTP) and The Government of Colombia (n 9). Art. 1.
[61] ibid. Art. 2-5.
[62] The Office of the Prosecutor (OTP), 'ICC Prosecutor, Mr Karim A. A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the next Stage in Support of Domestic Efforts to Advance Transitional Justice' (2021)
[63] The Office of the Prosecutor (OTP) and The Government of Colombia (n 9). Preamble.
[64] Jurisdicción Especial Para La Paz (Special Jurisdiction for Peace in Colombia). "Nuevo Paradigma de La Relación Entre La JEP y La CPI: 'Ejemplar Complementariedad Positiva y En Acción'", Comunicado de Prensa Sobre La Decisión Del Fiscal de La Corte Penal Internacional Sobre El Examen Preliminar En Colombia.' *(Press Communication 118)* (28 October 2021).

From this point of view, it can be observed the emergence of an incipient paradigm where international criminal law and transitional justice at the domestic stage, are starting to interact within a framework of complementarity and cooperation. Regarding this particular case, Professor Kai Ambos commented:

> The Cooperation Agreement also demonstrates that the new Prosecutor wants not only to resolve pending tasks, but also to enter into a more positive cooperative relationship with those States that are fundamentally willing and able to conduct national criminal prosecutions and work with his Office to this end. This breathes new life into the concept known as "positive complementarity", and the Prosecutor rightly highlights the uniqueness of the Colombia Agreement, which may well have a trailblazing effect. The JEP (SJP) even speaks of Colombia as an "invaluable laboratory" of transitional justice from which "important lessons" are emerging that can later be "replicated" elsewhere.[65]

2.3. Research Question and Delimitations

The primary objective of this work is to study and analyse the existence of a new paradigm of relationship between modern ICL, particularly the ICC, and transitional justice systems embodied at the domestic level. Consequently, the initial purpose will be to concretely elaborate on an examination of the legal criteria that must be met under the Rome Statute and a context of complementarity, by such domestic system also addressing international crimes to properly converge with those obligations emerging from international standards. As such, the investigation aims to provide an overview of this new facet of prosecution of crimes of international concern, where the creation of an international permanent court designed to judge them leads to the inevitable interaction and overlapping with systems of transitional justice. Systems generally utilised by states to respond to the same tragedies, and which also look to overcome instable periods of conflict or tyranny at the same time.

In this context, the direct implications and influence of the Rome Statute over the scope of domestic transitional systems in terms of compliance with their international obligations, will be the starting point for an analysis to determine their potential compatibility. To address this particular purpose, the case of the preliminary examination of Colombia opened before the ICC will serve as the guiding pathway. As a result, and emerging from this last scenario, it would be discussed and proposed the notion of positive complementarity as a suitable mechanism to properly address the existing tensions between the differed paradigms of transitional justice and the ICC.

[65] Kai Ambos, '"The Return of "Positive Complementarity"' [2021] *EJIL: Talk!*

Following the latter premises, the coming exploration of the notions of transitional justice and ICL will be necessary to outline and discuss the existing discord under scenarios where their scopes largely overlap. Thereafter, the principle of complementarity will be thoroughly examined since it will play a fundamental role to explain in the first place, how the ICC interacts with domestic legal systems. Moreover, the principle's positive side will be in focus since it will represent the most convenient framework and pathway for cooperation between systems aiming for a successful mechanism of convergence. On the other hand, a look into the Colombian transitional system will be crucial to understand the devised system of transitional justice at stake, and therefore, have the necessary and sufficient insights to assess its composition and operation from an ICL perspective. This whole process will then lead to the proposal of the potential articulation and convergence between transitional justice and ICL as a new scenario under the Rome Statute, where the notion of positive complementarity can serve as a bridge for legal admissibility and a more integral justice, in difficult situations before the Court and currently immersed in contexts of social and political transition.

To this end, all the process and researching of the present work will be aimed and centred to properly and satisfactorily respond to the following questions: is the Colombian transitional system, particularly the SJP as the criminal justice device, compliant with the modern and current ICL standards embodied in the Rome Statute? Is it feasible to conciliate the confronted paradigms of justice of modern ICL and domestic transitional justice under the auspices of the ICC's framework? What is the most convenient way to harmonize differed systems like that, and emerging from the local level, taking into consideration the principle of complementarity as the ICC's tool for interaction with them? And, is particularly the positive complementarity approach a suitable mechanism to successfully respond to the tension posed by transitional justice, match and even coordinate for the improvement of both paradigms in the interest of more integral concept of justice?

Lastly, it must be stressed that since this preliminary examination in Colombia emerges as a novel juncture within the scope of ICL and the Rome Statute itself, there will be certain limitations when it comes to this benchmarking framework. Therefore, similar case law in the context of positive complementarity relating to other preliminary investigations before the ICC will be examined as possible, taking into consideration the special characteristics of the situation under study. On the other hand, due to the complexity of transitional systems, which generally involve the edification and implementation of varied matters and policies involving other social, political, cultural or economic interests, it must be clearly underlined that this

analysis will be exclusively focused on those aspects specifically relating to the ICC's criminal jurisdiction and always under a legal perspective. In this vein, the Colombian transitional system, specific case and subject of this investigation, will be only assessed from its criminal jurisdiction aspect, excluding all not related additional components of it.

Lastly, this investigation will just cover and discuss strictly legal questions relating to the normative discussion, applicability and interaction of the premises herein described and referred, leaving therefore, practical, sociological and empirical aspects aside. Consequently, further analyses implying the study and consideration of the efficacy or real and factual impacts in the edification and implementation of settings such as the current domestic transitional system under study, will be far beyond the scope of this thesis.

2.4. Material and Method

For the purposes of this work, it will be thoroughly reviewed the Colombian transitional legal framework of the SJP, implying national law and case law directly entailing its design, edification and implementation. In this regard, relevant domestic law concerning this legal regime, its statute, further normative developments, and important and pertinent decisions coming from the national Constitutional Court in Colombia, will be primarily taken into consideration for this research. On the other hand, to delve into the particularity of this relationship settled between the ICC and this transitional system, international instruments essentially comprising treaties as primary source and resolutions as a complementary one, will also be the basis for this study. The Rome Statute, particularly considering the order of the applicable law set in its article 21, other international tribunals' statutes, international customary law and related international normativity closely tied to the ICC core crimes, will be in this sense, the main legal sustain for the discussion. In the same way, doctrine and academic resources, especially in the case of transitional justice, will be of great relevance to properly grasp, interpret and endorse the resulting ideas and findings for the research questions here posed.

In the context of international law, the assessment conducted by the present investigation will opt for a legal dogmatic and descriptive approach,[66] with an analytic, interpretative and comparative perspective, since a legal evaluation and reasoning to determine the proposed

[66] Eliav Lieblich, 'How to Do Research in International Law? A Basic Guide for Beginners' (2021) Volume 62 Harvard International Law Journal Online.

premises will be needed in that sense. Consequently, as referred in the above paragraph, this method will concretely imply studying that normative material aiming to clarify the meaning and significance of the rule of law from the content.[67] Thus, the legal examination will pretend to explore the possible answers and understandings provided from the ICL sphere for a particular domestic legal system founded in transitional justice and national law to be admissible in harmony with its rules and principles. Once again, given the pioneering occurrence of the scenario in question under the ICC's jurisdiction, a comparative and interpretative view of the current legal and normative tools at disposal, will be needed to achieve tenable responses to the legal questions posited.

[67] Petrov Alexander V. and Zyryanov Alexey V., 'Formal-Dogmatic Approach in Legal Science in Present Conditions' [2018] Journal of Siberian Federal University. Humanities & Social Sciences 968

3. Transitional Justice and International Criminal Law

3.1. Transitional Justice, the Conflicting Model of Colombia Under ICL

Having explained the scenario of the preliminary examination opened by the OTP in Colombia, where crimes falling under the jurisdiction of the Rome Statute, and therefore of international criminal law, were presumably committed during the armed confrontation, the main purpose of this chapter will be to outline and connect this context with the notion of transitional justice. Thus, it is recognized that great part of the core crimes according to the Statute are committed in situations of domestic repressive regimes and non-international armed conflicts.[68] Situations where the use of mechanisms of transitional justice, and even restorative justice, can play a determinative role in truly and effectively overcoming these problematic settings of massive and serious transgressions of human rights.

The foremost model of transitional justice in Colombia, the SJP, has been built and devised in this same context of transitional processes and mechanisms. As such, after having a first overview of the notion of transitional justice and a reasonable contextualization of it, to properly unravel this discussion, an appropriate examination of the overlapping context implying dealing with international core crimes from different perspectives of justice (ICL and transitional justice), will be necessary. Moreover, given the conveniences and virtues that can be brought by this concept to sensitive and critical scenarios, as in the Colombian one, an analysis of this paradigm of exceptional justice for exceptional cases will be promptly examined.

3.2. Transitional Justice

The notion of transitional justice refers to a different conception of justice in periods of political change to confront the consequences of former times. Historically, "The emergence of transitional justice roughly coincided with the end of the Cold War and the euphoria of the presumed triumph of free market ideologies and political liberation around the globe. In Africa, Asia and Latin America, one-party regimes and opaque dictatorships – most supported by either the West or the East – gave way to new experiments in democratic rule. Most were

[68] According to the Geneva Academy of International Humanitarian Law and Human Rights, there are around 110 of armed conflicts in the world, most of them non-international armed conflicts. See: https://geneva-academy.ch/galleries/today-s-armed-conflicts

emerging from long nights of tyranny and despotism."[69] In this context, the concept has been used within an evolving, heterogeneous, young and extremely broad field, which has made its theorization problematic and complex.[70] Thus, the term can be seen as a very common and wide conception that encompasses all of those series of practices, tools and mechanisms used in exceptional times of social and political transformation. Accordingly, this notion can be also understood as those processes through which, radical transformations of a social and political order are performed, either for the transit from a dictatorial regime to a democratic one, or for the finalization of a non-international armed conflict and the achievement of peace.[71]

In a very extensive and early view David Crocker proposes eight goals to be considered as part of these transitional practices and processes, namely: truth, a public platform for victims, accountability and punishment, the rule of law, compensation to victims, institutional reform, long-term development, reconciliation and public deliberation.[72] Following this, transitions could be identified more specifically in practice as:

> The full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[73]

In the same vein, another more comprehensive and detailed conception of transitional justice coming from Pablo De Greiff is the following:

> The set of measures that can be implemented to redress the legacies of massive human rights abuses, where "redressing the legacies" means, primarily, giving force to human rights norms that were systematically violated. A non-exhaustive list of these measures includes criminal prosecutions, truth- telling, reparations, and institutional reform. Far from being elements of a random list, these measures are a part of transitional justice in virtue of sharing two mediate goals (providing recognition to victims and fostering civic trust) and two final goals (contributing to reconciliation and to democratization).[74]

However, trying to take a more limited approach, according to these latter definitions with a descriptive conceptualization of the primary components of this notion, some elements can be identified with those international standards implying the obligation to respect the rights of

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[69] Makau Mutua, 'What Is the Future of Transitional Justice?' (2015) Vol. 9 International Journal of Transitional Justice. P. 1.
[70] Susanne Buckley-Zistel and others (eds), *Transitional Justice Theories* (1st edn, Routledge 2013).
[71] Rodrigo Uprimny Yepes and others, *¿Justicia transicional sin transición?* (1st edn, Centro de Estudios de Derecho, Justicia y Sociedad 2006). P. 13.
[72] David A Crocker, 'Reckoning with Past Wrongs: A Normative Framework' (1999) 13 Ethics & International Affairs.
[73] Report of the Secretary-General S/2004/616 - The rule of law and transitional justice in conflict and post-conflict societies.
[74] Pablo De Greiff, 'Theorizing Transitional Justice' in Melissa S Williams, Jon Elster and Rosemary Nagy (eds), *Transitional Justice*, vol 34 (New York University Press 2012). P. 40.

victims of serious violations of HR or IHL. Specific matters of special concern for the present work, given the normative context and framework of international criminal law under which it is being used.

Following this normative guidance, it is observed the legal development that transitional justice has had in the international sphere. The updated set of principles for the protection and promotion of human rights through action to combat impunity adopted by the UN[75] establishes the duty of states to take effective action to combat impunity by ensuring the rights to know, to justice, to reparation and guarantees of non-recurrence of violations.[76] Similarly, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the UN General Assembly in 2005[77] provide an encompassing conception of these obligations to be fulfilled by states in these critical scenarios. Accordingly, the rights to respect and ensure respect for, in the same vein, are access to justice, reparation, and relevant information.

These criteria also resonate with the early standards set by Inter-American Court of Human Rights in its famous case of *Velásquez Rodríguez v. Honduras* in 1988. Therein, it was found that states bear the responsibility of taking reasonable steps to prevent human rights violations, and in doing it they must conduct serious investigations, impose suitable sanctions and guarantee reparations for victims as well.[78] In this perspective, in particular cases of massive human rights abuses, transitional justice appears as an appealing option to address these scenarios where impunity is lurking. A serious risk that states must combat and prevent, and that the global community has already realized of when recognizing their obligations to "exposing violations of human rights and IHL that constitute crimes, holding their perpetrators, including their accomplices, accountable, obtaining justice and an effective remedy for their victims, as well as preserving historical records of such violations and restoring the dignity of victims through acknowledgement and commemoration of their suffering".[79]

[75] The 2005 updated version of the Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/Sub.2/1997/20/Rev.1) proposed by Louis Joinet in 1997.
[76] Commission on Human Rights, 'Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher - E/CN.4/2005/102/Add.1' (2005).
[77] UN General Assembly. Resolution 60/147, 2005.
[78] Caso Velásquez Rodríguez vs. Honduras. Sentencia Fondo, Reparaciones y Costas. 1988.
[79] E/CN.4/RES/2004/72 - Impunity 2004.

Lastly, and according to the normative and theoretical development of all these elements pursuant to international obligations, within the concept of transitional justice a number of pillars to explain and build upon its content have been elaborated. These have been found to include: truth, justice, reparation, or guarantees of non-recurrence. More recently, a fifth pillar has also been added by the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, as an additional crosscutting one, memorialization processes: "a vital tool for enabling societies to emerge from the cycle of hatred and conflict and begin taking definite steps towards building a culture of peace."[80]

3.2.1. Objectives of Transitional Justice

Since its appearance and until these days, there has roughly been a general and common understanding of the purposes searched in these sorts of contexts by transitional justice, where "the discourse is directed at preserving a minimalist rule of law identified chiefly with maintaining peace."[81] Unlike international criminal law, this notion can include a series of diverse measures not necessarily serving solely the needs of criminal justice. Needs that given the gravity of the contexts of mass atrocities and serious violations of human rights, are limited and fall short to respond to many other different claims of society in terms of justice, particularly of the victims,[82] and therefore should be considered by the alternative elements of the concept. Following this idea, it can be found that the objectives of transitional justice have a broader and more comprehensive focus particularly for times of utter abnormality:

> Above all, it aims to ensure that victims' rights are treated seriously and that effective efforts to restore trust between the state and its citizens take place to assist the development of a rights-respecting society.
>
> The pursuit of truth, justice, reparations, and institutional reform all seek the same goals in transitional contexts: acknowledging that the normal response to violations is both unavailable and insufficient and that measures built around these ideas can provide a meaningful way to guarantee victims' rights and restore trust in state institutions as protectors of those rights.[83]

As observed, the primary goal is to recognize that recursive responses must be devised to cope with the challenging adversity posed by massive abuses and transgressions of human rights that ordinary mechanisms at hand cannot commonly address. Here, the element of justice plays a pivotal role since it is ultimately its realization the primary end, despite its abstract

[80] A/HRC/45/45 - Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice 2020.
[81] Ruti G. (n 2). P.69.
[82] A/HRC/36/50/Add.1 - Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice. Para. 25.
[83] Paul Seils, 'Squaring Colombia's Circle The Objectives of Punishment and the Pursuit of Peace'. P. 3.

conceptualization.[84] De Greiff identifies in this connection intermediate and final aims within transitional processes. In his view, the former one is composed by the promotion of recognition for victims and civic trust, and the latter by the strengthening of democratic rule of law. All these elements are according to his reasoning conceptually interrelated and are deeply tied to the notion of justice.[85]

To this end, it is arguable so that the objectives of transitional justice are exceptional and largely differ from those of ordinary rule of law. As scenarios of protracted uncertainty and instability pose the appalling threat of massive atrocities and serious human rights violations, devised measures coming from different fields of knowledge are necessary to overcome and prevent social and institutional downfall. In this vein, drawing upon mechanisms of transitional justice has become not only a convenient pathway to address these tragic situations within societies but also a very suitable one to prevent them, since: "numerous indicators demonstrate that it can contribute to sustainable peace and security by helping to break cycles of violence and atrocities, delivering a sense of justice to victims and prompting examinations of deficiencies in State institutions that may have enabled, if not promoted, those cycles."[86]

In this regard, the goals of transitional justice can also be prospective in the sense that they are aimed to impede potential upcoming atrocities. Correctly guaranteeing the handling of the past can be as important and effective at the same time as to prevent its repetition in the future, otherwise the hazard of coming back to the past is always lurking: "lingering perceptions of injustice, failure to recognize crimes committed and continued discrimination against communities are risk factors for further violence and atrocities."[87]

3.3. The Tension Between International Criminal Law and Transitional Justice

Having approached and explained transitional justice, now it must be further developed its involvement with the other notion at stake for the context of this work: international criminal

[84] Pablo De Greiff, 'Algunas Reflexiones Acerca Del Desarrollo de La Justicia Transicional' [2011] Anuario de Derechos Humanos.
[85] ibid. PP. 28-30.
[86] A/HRC/37/65 - Joint study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence. Para. 11.
[87] ibid. Para. 13.

law. Thus, at this point it becomes necessary to address the issue from the existing overlapping that these two forms of perceiving justice seem to be engaged in.

Here, it must be first stressed that criminal law has been traditionally identified as "that body of law that attaches broadly punitive consequences to certain violations of norms that are considered of higher social interest, and whose breach affects public order or fundamental matters of morality."[88] Accordingly, criminal justice will be primarily aimed to punishment or retribution with respect to those conducts that are transgressive of law and social values within society.

Referring more specifically to the supranational stage, ICL can be deemed as that area of public international law coming from the global community and order, directly tied to domestic criminal law and procedures. This branch of international law emerged and consolidated as a field of study in the end of the past century, especially with international institutions such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and more recently, the International Criminal Court (ICC).[89] Unlike domestic criminal law, its prosecution is particularly "focused on crimes that are deemed to be international in nature".[90] In other words, those crimes, that Schabas identifies as *mala in se* or transgressions to fundamental human values that can be deemed as naturally or inherently evil,[91] and of which there is general recognition in the Rome Statute as 'the most serious crimes of concern to the international Statute as a whole'.

The Rome Statute provides in its preamble a clear picture of what the primary purpose of contemporary ICL is by stating that it is the states' duty: "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"[92] Consequently, the focus within the paradigm of international criminal justice will be punitive from its essence. Following this, from a criminal law perspective, punishment can comprise various objectives when exercised: "incapacitation, deterrence (specific and general), reform, retribution, restitution, and communication. The last of these may include approaches that apply ideas of positive deterrence and persuasion."[93]

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[88] Frédéric Mégret, 'The Subjects of International Criminal Law' in Philipp Kastner (ed), *International Criminal Law in Context* (1st edn, Routledge 2017). P. 29.
[89] Philipp Kastner (ed), *International Criminal Law in Context* (1st edn, Routledge 2017). P. 1.
[90] William A Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press 2012).
[91] ibid. PP. 34-35.
[92] Rome Statute of the International Criminal Court. Preamble.
[93] Seils (n 83). P. 8.

With this in mind, it is clear that there is a discord with regard to the aims strived for within international criminal justice on the one hand, and transitional justice, on the other. In the latter case, a set of diverse elements coming from different areas are proposed to address the atrocities occurred as part of scenarios of massive or large-scale abuses. In the second one, most of these same atrocities simultaneously falling under international jurisdiction are similarly aimed to be handled mainly by prosecuting, judging and condemning those who commit them.

Following this context, it must be also noted that coming back to transitional justice, it is found that its role is devised to supply the flaws or absolute absence of ordinary criminal justice, generally due to incapacity or unwillingness of jurisdictional institutions in a state: "Indeed one possible definition of transitional justice suggests precisely the kind of justice that is both possible and necessary when the efficacy of the system has been critically challenged by massive breach."[94] Nonetheless, the dilemma lies more concretely on the difficult task of finding an actual balance when aiming for political and social transition, between effective individual punishment of those responsible of relevant crimes in question and preventing impunity or lack of accountability at all.[95]

3.4. Transition or Punishment

The question of transition or punishment poses a complex and profound debate that will not be theoretically and philosophically addressed here in depth, given the extended nature of the discussion that escapes the scope of the investigation. As such, the main purposes here will be to merely point out and illustrate the existent tension between the pursuit of a successful transition (more concretely of peace in cases of armed confrontation) and the pursuit of justice (understood traditionally as criminal justice). Thus, the clash of purposes in contexts of social transition is notable since the scopes of competence largely overlap, and there is an existence of different ends: "The pursuit of peace often requires a negotiated resolution of armed conflict. The prospect of criminal prosecution may cause offenders to fight to the bitter end if they believe a negotiated 'peace' means they will be exposed to severe criminal sanctions. The

[94] ibid. P. 9.
[95] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press 2004).

pursuit of justice often requires that the victims of heinous war crimes are heard and the guilty are punished."[96]

History in the past century with the progressive development of ICL and the recent emergence of transitional justice as a field, has shown in different scenarios the prevalence of one or the other aspect in this dispute. As such, there can be found extreme cases where the straightforward response for justice was primarily represented in the political and moral demands to punish those responsible, as in the Nuremberg and Tokyo trials, whereas in other countries like Spain or Chile, particularly coming out from dictatorial regimes, no penalties or criminal accountability was addressed at all for the sake of the transition.

In the first situation, bringing war criminals after the second world war to trial was a breakthrough in terms of criminal justice. The great achievements in this sense were manifested in individual criminal responsibility, the rejection of official capacity as an exclusion of responsibility, criminal justice as the one and only viable political and moral response to atrocities, and the trespassing of national borders and ruling of the global community when repudiating and prosecuting these crimes.[97] A clear embracement of justice understood as the lack of global impunity in respect to these massive abuses.

Nevertheless, regardless of the compelling purposes of this perspective, it is undeniable that an impossibility to obtain the prosecution and punishment of all individuals involved in these large-scale acts of criminality is most likely a reality, even in modern times where the rule of law and the efficacy of domestic jurisdictions is still a major concern.[98] Far from expecting criminal prosecutions to be all-encompassing in contexts of severe institutional and social instability, it must be also considered the fact that the very nature of the crimes handled does not allow a feasible and exhaustive satisfaction of justice in these terms:

> No country where atrocities have taken place has come even close to prosecuting each and every perpetrator, let alone punished them in proportion to the harm they caused –not even those "most responsible." Indeed, for various reasons including scarcity of resources, capacity, and will, only a tiny fraction of those that bear responsibility for perpetrating outrageous acts are ever even investigated.[99]

[96] Robert H Mnookin, 'Rethinking the Tension between Peace and Justice: The International Criminal Prosecutor as Diplomat' in Martha Minow, C Cora True-Frost and Alex Whiting (eds), *The First Global Prosecutor* (University of Michigan Press 2015). P. 70.
[97] Kai Ambos, Francisco Cortés Rodas and John Zuluaga, *Justicia transicional y Derecho Penal Internacional* (Editora Géminis Ltda 2018) P. 64.
[98] World Justice Project, '2021 Insights - Highlights and Data Trends from the WJP Rule of Law Index' (2021).
[99] Pablo De Greiff, 'Transitional Justice, Security, and Development' (International Center for Transitional Justice 2010).

It can therefore be argued that opting for a punitive stand solely based on criminal justice in these sorts of circumstances can result not just in a factual impossibility but also in the failure to fulfil the principle against impunity itself. Similarly, it has been regarded as questionable the effective realization of justice in terms of social values and morality by just limiting to procure this sole end. Expecting that the mere punishment of criminals responsible of the most grave and heinous acts committed against humanity is sufficient to compensate all the repercussions these tragedies imply, seems at least largely debatable.[100] Lastly, another relevant aspect that must be considered is the fact that the international criminal trials often happen in a context of animosity between winner and defeated, where no negotiations are needed due to the coercive impositions of one party over the other. Conversely, in circumstances of continued and protracted armed confrontation without a winner, seeking a deal can result indispensable for reaching a point of non-violence, since within a context of war no armed actor would be willing to participate in a peace agreement that will not report any benefit to its faction at all.[101]

As such, in the scenarios where criminal persecution is completely sacrificed in the interest of an arrangement or the transition itself, the moral and ethical claims are less debatable in the sense that the existence of impunity is not a subject under discussion. In this sense, cases such as Spain and Chile can be referred as notable examples of this transitional models. The first country with a sort of amnesic national policy (Ley 46/1977 de 15 de octubre, Spain) based on pardons for those responsible of international crimes without any intention of truth. The second with a general amnesty (Decreto 2191/1978 de 19 de abril, Chile) to all perpetrators, participants or abettors with respect to any type of crimes committed during the dictatorship experienced by the country in the seventies. Although in this case truth commissions were established later and judgements followed, the model's purpose to avoid criminal justice is clear at least in its beginning.[102]

These types of approaches are highly problematic and non-acceptable in modern times, given the existing prohibitions in international law in terms of impunity for international crimes. This, because generally the primary end is to hide the crimes of the past by deterring or even forbidding any attempt of investigation. Situation resulting in the helplessness of the victims and the perpetuation of impunity, preventing these people and their relatives from identifying the perpetrators, knowing the truth and receiving due reparation. In this manner, these kinds of

[100] Martti Koskenniemi, *The Politics of International Law* (1st edn, Bloomsbury Publishing Plc 2011). P. 172.
[101] Uprimny Yepes and others (n 71). P. 20.
[102] ibid. PP. 22-25.

amnesties, which usually operate as auto-amnesties favouring the same authorities that have issued them, blatantly obstruct prosecution and access to justice.[103] Therefore today, the Rome Statute is a clear example of the proscription of excessive benefits, that can result more detrimental than advantageous in a social transition. Similarly, various supranational and regional courts have supported this firm position against impunity, as in the case of the ICTY,[104] the Statute of the Special Court for Sierra Leone,[105] the Inter-American Court of Human Rights,[106] and the European Court of Human Rights.[107]

Either way, the different paths exposed herein do not resolve the existing tension between criminal justice and transition. They can only serve as instances to reflect on the problematic and controversial outputs that both ways can represent when making the harsh choice of sacrificing a social value for another. In fact, this is precisely why transitional contexts can be deemed as tragic dilemmas where not a single and unique formula can be determined. Therefore, according to legal universal requirements and the past experiences from other transitional processes, each society should confront its own contextual problems in terms of justice, truth and reparation.[108]

3.5. A Point of Convergence

As suggested above, finding a more tailored solution for each specific scenario might be the most adequate choice sometimes. In this sense, due to the exposed flaws and risks of the radical postures, it must be searched a possible solution framed outside these examined settings of constant tension.

The case of South Africa can illustrate the choice of a different orientation in terms of the principles and values that were chosen and prioritized. Thus, this experience of transition to a different social and political state in the country, served as a ground-breaking model that opted for a separate way by giving prevalence to another aspect of utmost importance for transitional justice: truth. In this sense, major efforts to accomplish the clarification of the crimes and the

[103] Kai Ambos, Francisco Cortés Rodas and John Zuluaga, *Justicia transicional y Derecho Penal Internacional* (Editora Géminis Ltda 2018) P. 121.
[104] International Criminal Tribunal for the former Yugoslavia (ICTY), 'Prosecutor v. Furundzija - Judgement, IT-95-17/1-T'. Para. 155.
[105] Statute of the Special Court for Sierra Leone, 2002. Art. 10.
[106] Corte Interamericana de Derechos Humanos, 'Caso Barrios Altos Vs. Perú - Sentencia Serie C 75'. Para. 41.
[107] European Court of Human Rights, 'Abdülsamet Yaman v Turkey - 32446/96' Para. 55; European Court of Human Rights, 'Marguš v. Croatia - 445/10'.
[108] Uprimny Yepes and others (n 71). P. 21.

facts surrounding them, were deployed by means of a Truth and Reconciliation Commission (TRC) and institutional reforms aimed to dismantle the Apartheid regime. As such, the main objectives of recognizing and publicly declaring the truth to confront the harsh experiences of the past, were in this case specifically intended to overcome it and rebuild the society.[109]

In this connection, the overhaul process of transformation to a new state of different political and social structure, was chosen by the prevalence of other tenets different from solely justice or peace in a transitional scenario. As such, regardless of the judicial benefits provided under the aim of ceasing violence between the confronted parties, an approach based on the disclosure of truth and the requirement of political motivations for the crimes in question, was edified within this transitional system:

> Rather than provide a blanket amnesty, the new ANC government opted for a provisional amnesty that was linked to a broader truth and reconciliation process. The enactment of the amnesty provision was thus incorporated into the establishment of the Truth and Reconciliation Commission (TRC). One of the TRC's functions was thus to implement the constitutional obligation to grant amnesty.
>
> The Amnesty Committee of the TRC provided a very controversial, but constitutionally mandated, function of reviewing applications for amnesty made by perpetrators of illegal acts (including human rights violations) that occurred during the period of 1960 to 1994. Individuals, but not groups or organizations, could apply for amnesty from civil claims and criminal charges. To be eligible, applicants had to show that the acts for which they requested amnesty were politically motivated, and they had to provide full disclosure about the events.[110]

To this end, the election of an alternative option more comprehensive and responsible with regard to the components of transitional justice and the rights of the victims, seemed like a more plausible model in terms of international standards at the time. In contexts where massive violations have occurred and violence needs to be stopped, appealing to a less radical decision within the middle to address both sides, could result in a more suitable remedy to these exceptional scenarios. Martha Minow recognizes the valuable role that the TRC played in South Africa's transition as a landmark for this paradigm of justice:

> The TRC represents a pioneering effort to address human rights violations in an environment where law itself had become associated with unfairness and oppression, so much so that a setting other than a court was essential for finding facts and making a separation from the past. It sought acknowledgment by the general public of past wrongs. The TRC investigated the general causes of and specific participants in violations of human dignity by the Apartheid regime and also the violations committed by those who fought against it. The commission's public hearings and

[109] Ambos, Cortés Rodas and Zuluaga (n 97). P. 66.
[110] Hugo Van der Merwe and Guy Lamb, 'Transitional Justice and DDR: The Case of South Africa' [2009] Research Unit International Center for Transitional Justice. P. 17.

> broadcasts offered occasions for victims to tell their stories and for offenders to acknowledge what they had done. No apologies were required, although some were given.[111]

In this view, opting for a more specific case focus comprising an essential social value for reconciliation such as truth, inevitably represented a breakthrough in terms of transitional justice and human rights standards. Thus, it can be suggested that with a more comprehensive model other aspects around the needs of the victims, the society, and the global community in general, are taken into account rather than simply focusing on retribution for criminal offenders.

The Sierra Leone Special Court and its TRC, are another good example of more comprehensive and recursive approaches at disposal. Apart from a retribution for those bearing the greatest responsibility of serious international crimes,[112] an alternative mechanism entailing truth telling, public hearings, victim-offender mediation, etc., was enacted despite the later tensions and lack of coordination between both bodies.[113] A more integral response rather than only criminal prosecutions in any case.

As such, there are many other elements like truth, reparation, democracy or accountability, that depending on the concrete social context must be addressed or prioritized. This will rely upon the specific case situation and the interests of the society as Crocker suggests:

> In some contexts, social harmony -if it respects personal freedom and democratic deliberation- should have priority. In other contexts, society may pursue other equally important values, for example, justice, which might require a society to indict, try, sentence, and punish individuals who violated human rights. If social harmony is judged to have priority over other values, that judgment should emerge not from a cultural, theological, or philosophical theory but from the deliberation and democratic determination of citizens.[114]

As seen transitional justice offers many different aspects to be addressed if aiming a healthy and successful overcoming of the violent past. Despite the inherent tension between punishing and reaching peace, a third way implying a more integral approach can be taken to ease this situation and prevent abiding by radical and inconvenient postures. By the same token, following an alternative and less rigid view also provides the possibility of incorporating concrete and more tailored mechanisms for each context. As in the case of South Africa, not only truth was a major achievement but also political and institutional reform to dismantle the

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[111] Martha Minow, 'Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court' (2019) 60 Harvard International Law Journal. P. 26.
[112] Statute of the Special Court for Sierra Leone. Art. 1.1.
[113] Lyn S Graybill, *Religion, Tradition, and Restorative Justice in Sierra Leone* (University of Notre Dame Press 2017). PP. 45-48.
[114] David A Crocker, 'Retribution and Reconciliation' in William Galston (ed), *Philosophical Dimensions of Public Policy* (1st edn, Routledge 2002). P. 219.

structural system of Apartheid in the country, was a necessity prioritized over punishment. Thus, political justice had to prevail instead of criminal justice in this scenario given its own circumstances, and in order to allow participation of everyone in the process of reorganization and reconstruction of the new social structure.[115]

With this in mind, it can be posed that ICL with a primarily retributive posture of justice within transitional contexts, would have to rethink considering more objectives to avoid completely overlooking these other social interests at stake. Therefore, considering the idea of a less rigid focus not solely based on impunity but actually comprehensive of different and more diverse approaches of justice that can respond to the particular demands of each society, does not appear as an unreasonable position at all. Even more when there is currently scope for action and interpretation inside ICL, and particularly in the Rome Statute:

> The fact that transitional justice measures rest upon binding obligations does not mean that there is no latitude concerning how to satisfy those obligations, concretely. Thus, to illustrate, the obligation to investigate, prosecute, and bring to justice perpetrators of certain violations –the principle "that the most serious crimes of concern to the international community as a whole must not go unpunished" in the words of the preamble of the Rome Statute of the International Criminal Court— leaves open many important questions including the precise scope of those liable to prosecutions (those "most responsible") or, what constitutes an adequate punishment for those found guilty of the relevant crimes in a particular jurisdiction.[116]

This idea can be resonated with former Deputy Prosecutor of the ICC James Stewart's view concerning the role of the Court in the transitional process in Colombia. He implied that the duty of the Prosecutor in these sorts of contexts will be to assess the measures of transitional justice under the Rome Statute, always recognising the broad scope they offer to ensure accountability. Accordingly, this assessment has to be holistic, meaning that criminal justice may be considered in a wider framework with more relevant transitional justice mechanisms.[117] As a result, it seems fair to state that when fighting impunity, the possibility of integrating elements that can significantly ease and reduce the conflict between different social values in transitional scenarios should be contemplated, if ICL is also allowing it. The Rome Statute itself seems creatively unclear and ambiguous with respect to the possibility of conferring amnesties in this sense.[118]

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[115] Ambos, Cortés Rodas and Zuluaga (n 97). P. 69.
[116] Pablo De Greiff (n 99). P. 3.
[117] Mr. James Stewart Deputy Prosecutor of the International Criminal Court, 'The Role of the ICC in the Transitional Justice Process in Colombia' (2018).
[118] Michael P Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) Vol. 32 Cornell International Law Journal.

As exposed, both paradigms pose different perspectives regarding the objectives that must be pursued and achieved to realize justice. Nevertheless, transitional justice comprises a multiplicity of criteria that should not be disregarded under critical scenarios of massive atrocities such as armed conflicts or repressive regimes, where numerous and diverse interests apart from criminal justice are also at stake. Consequently, instruments such as amnesties to cease violence and facilitate negotiations for peace; redress and restorative measures for restoring victims' dignity; truth commissions to unveil abuses, perpetrators and allow reconciliation; and institutional reforms and vetting to restore democracy and public trust to prevent recurrence; can be as essential and necessary as criminal prosecutions to the ultimate realization of justice: "These mechanisms do encompass the fundamentals of a criminal justice system: prevention, deterrence, punishment, and rehabilitation. Indeed, some experts believe that these mechanisms do not just constitute "a second-best approach" when prosecution is impracticable, but that in many situations they may be better suited to achieving the aims of justice."[119]

[119] ibid. P. 512.

4. Complementarity under International Criminal Law

4.1. The History of Complementarity and the Relationship Between International Criminal Tribunals and Domestic Courts/other Transitional Justice Mechanisms.

4.1.1. Contextualizing Complementarity

The notion of complementarity can be briefly understood as a "functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction",[120] or in the particular context of the Rome Statue as the "manifestation of the relationship between national justice systems and the first permanent International Criminal Court (ICC)".[121] However, in order to properly address and understand this principle within ICL, it is convenient to first contextualise its adoption and development in the field by the time when the ICC was not yet consolidated as the nowadays tribunal in charge of addressing crimes of international concern.

It is considered that the first international criminal court of modern times emerged from Article 227 of the Treaty of Versailles.[122] The notion of complementarity can be traced back to this early period of the history of ICL, during the First World War, where preliminary usages of the concept can be identified with articles 228 to 230, referring to the handing over of the presumed war criminals and recognized the right of Allies to bring them before military tribunals.[123] However, allegations from Germany came in the sense that no citizen should stand trial before foreign tribunals.[124] As a result, an agreement was reached allowing domestic trials therein, with the explicit Allies' reservation for keeping their right to prosecute in case of unsatisfactory results. According to Professor Mohamed El Zeidy: "The notion of complementarity can be recognized in the Treaty's commitment to try and punish offenders if Germany failed to do so."[125]

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[120] Xavier Philippe, 'The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?' (2006) International Review of the Red Cross 375. P. 380.
[121] Mohamed M El Zeidy, 'The Genesis of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011) P. 72.
[122] Howard Levie, 'The History and Status of the International Criminal Court', *International Law Across the Spectrum of Conflict*, vol Volume 75 (Michael N Schmitt, International Law Studies 2000). P. 248.
[123] Treaty of Versailles 1919. Article 228.
[124] Marlies Glasius, *The International Criminal Court A Global Civil Society Achievement*, vol Vol. 39 (Taylor & Francis Group 2005). P. 7.
[125] Mohamed El Zeidy, 'The Principle of Complementarity in the International Criminal Court's Statute', *The Principle of Complementarity in International Criminal Law: Origin, Development and Practice* (Brill | Nijhoff 2008) P. 16.

As such, trials in Leipzig were held as an early practice of complementarity and although these procedures were not considered as satisfactory by the international community, El Zeidy points out that these circumstances, however, fostered the debate towards an international criminal jurisdiction.[126] As a result, irrespective of the trials' failure discussions on the establishment of a supranational criminal court were encouraged, which subsequently went further with the League of Nations Convention of 1937 (Convention for the Prevention and Punishment of Terrorism). This was a first formal attempt to create an international criminal jurisdiction with a complementary relation between national and international systems. However, this Convention was not ratified by enough states and did not enter into force in the end.

At a later time, the London International Assembly created by the League of Nations Union in 1941 and in charge of finding suitable and effective punishment for those war crimes responsible,[127] recommended the Allies the creation of an international criminal court with the central idea of cases not being brought to it whenever any country within the organization would have jurisdiction over them, and would be entitled and willing to exercise such faculties.[128] The main purpose was to guarantee national sovereignty and to complement it by the action of the international tribunal in exceptional situations. Meanwhile, in 1943 with the creation of the UN War Crimes Commission to investigate war crimes committed by the Axis powers, intentions of setting an inter-allied court were pretended in a similar direction to try major war criminals. However, it failed to achieve their purposes due to time constraints and differences between the allied countries.[129] Instead, the Nuremberg International Military Tribunal was rapidly set up, where unlike in the Versailles Treaty, primacy of international law over national law was the approach taken.[130]

Subsequent attempts to reach an international criminal tribunal came in the 1950s with a committee on international criminal jurisdiction created by the UN General Assembly.[131] This Committee presented to the assembly in 1954 a report of the final and revised draft for the establishment of the statute of an international criminal court.[132] This was another opportunity for achieving complementarity, but this time, with a principle of voluntary submission,[133]

[126] El Zeidy (n 121). P. 91.
[127] El Zeidy (n 125). P. 60.
[128] El Zeidy (n 121). P. 102.
[129] ibid. P. 107.
[130] El Zeidy (n 125). P. 75.
[131] Resolution 489(V) of 12 December 1950.
[132] Report of the 1953 Committee on International Criminal Jurisdiction - A/2645, 1954.
[133] Article 26 of the revised draft statute for an international criminal court of 1953 provided this voluntary mechanism for states.

according to which, states were able to waive their jurisdiction in favour of the court.[134] Unfortunately, once again the project did not come to force due to its postponement.[135] This, due to the current times after the Second World War immersed in a deep geopolitical reorganisation context, tainted by the continued rivalry between the powers, which significantly slowed the process and prevented the realisation of the criminal court. [136]

It was only until the 1990s, when the international criminal tribunals for former Yugoslavia (ICTY) and Ruanda (ICTR) statutes expressly showed a first sign of complementarity and regulated the interaction between ICL and domestic jurisdictions.[137] Nonetheless, once again as in Nuremberg, national primacy was not at the centre of the system since the first-hand jurisdiction was given to these tribunals.[138] Accordingly, there was established a relationship of concurrent jurisdictions.[139] However, pursuant to these provisions, there were situations where the tribunals had prevalence and could try persons regardless of the existence of domestic prosecutions.[140] On the other hand, it must also be stressed the lack of authorization from the concerned states, since both were established under Chapter VII of the UN Charter: "justified by the 'compelling international humanitarian interests involved', and by the Security Council's determination that both situations constituted a threat to international peace and security".[141]

All in all, this situation served as a first experience before the entry into force of the Rome Statute and the ICC:

> The two ad hoc Tribunals clearly had an important impact on the process toward the establishment of a permanent ICC. (...) Even in terms of the relationship between national and international jurisdiction the significance of the two regimes should not be underestimated. The exceptions to the Tribunals' primacy gave useful guidance as to how a complementary regime could be structured.[142]

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[134] El Zeidy (n 125). P. 100.
[135] Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Brill | Nijhoff 2008) P. 39.
[136] Cassese, Gaeta and Jones (n 17). P. 10.
[137] Stigen (n 135). P. 41.
[138] William A Schabas, 'The Rise and Fall of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011) P. 151.
[139] Article 9 of the ICTY and 8 of the ICTR statutes, explicitly determine this principle as the mechanism of interaction with national courts.
[140] The criteria contained in ICTY articles 9(1), 9(2); and ICTR articles 8(1) and 8(2) of their respective statutes refer to situations where the tribunals had prevalence and could try persons regardless of the existence of domestic prosecutions. Additionally, according to rule 9 (iv) of the ICTY's and Rule 9 (i) and (ii) of the ICTR's Rules of Procedure and Evidence, the tribunals could also interfere in trials that were already being prosecuted by the state if there were relevant factual or legal questions that could have had considerable impact in the prosecutions before both Tribunals.
[141] El Zeidy (n 125). P. 138.
[142] Stigen (n 135). P. 44.

Meanwhile, another UN institution was also taking part in the process of creation of an international criminal court:[143] the International Law Commission (ILC).[144] By the time the ICTY and ICTR were established, this commission, having worked before on a draft code of offences against the peace and security of mankind,[145] was conceiving a model to conciliate domestic jurisdictions with ICL.[146] As a result, a draft statute for the ICC was published in 1994 which explicitly recognized the complementary trait of the devised court,[147] and determined the possibility of acting in cases of "unwillingness" or "unavailability" coming from states.[148] In the aftermath of this initiative, the 1994 draft was constantly reviewed and discussed within the subsequently creation of an ad hoc Committee,[149] until reaching the current text of Article 17 of the Rome Statute.[150] In this concrete disposition is found the heart of complementarity nowadays.

4.2. The ICC and Domestic Legal Systems: The Rome Statute and the Principle of Positive Complementarity

4.2.1. Outlining the notion of Complementarity

Complementarity simply understood as "the state of working usefully together",[151] in legal parlance today often strictly refers to the relationship of the ICC with national criminal courts. Nevertheless, it must be stressed the primary role of the latter in the ICC system. In this perspective, states have an indispensable function within ICL: "At the heart of that new system is the idea that, first and foremost, the courts at the national level should deal with cases of serious crimes. The ICC only deals with cases under very limited circumstances."[152] Thus, compliant with this idea, the Statute stipulates in its preamble that the Court shall be complementary to national criminal jurisdictions, meaning that there should be prevalence in

[143] El Zeidy (n 121). PP. 114-115.
[144] This commission was particularly established for the promotion of the progressive development of international law and its codification, according to article 1 of the UN General Assembly's resolution 174 (II) of 1947.
[145] Stigen (n 135). PP. 40-41.
[146] The Commission was previously requested by the UN General Assembly to study the possibility of an international court according to Resolution 260 (III) B of 1948.
[147] International Law Commission Draft Statute 1994. Preamble.
[148] ibid. Article 35.
[149] See: Report of the Ad hoc Committee on the Establishment of an International Criminal Court (1995). This committee was established in 1994 by Resolution 49/53 of the UN General Assembly.
[150] El Zeidy (n 121). P. 130.
[151] Cambridge Dictionary. Available at: https://dictionary.cambridge.org/es/diccionario/ingles/complementarity
[152] Paul Seils, 'Handbook on Complementarity An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes' [2016] International Center for Transitional Justice. P. 3.

first place for states: "The tenth preambular paragraph describes one of the main features of the Court, namely that domestic criminal investigations and prosecutions have priority over the ICC provided that such domestic proceedings are genuine."[153]

Bearing in mind this necessary involvement of states' sovereignty with this principle, an initial definition thereof could be framed as a "paradigm of a relationship of tension between national systems and the Court".[154] This paradigm, according to the OTP's Informal expert paper of 2003 can be understood under the Statute in a practical manner as a "mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes. Where States fail to genuinely carry out proceedings, the Prosecutor must be ready to move decisively with ICC proceedings."[155]

Another perception of the principle's object is presented by Professor Mauro Politi in the same way:

> A division of labour between national jurisdictions and the ICC, under which the Court should essentially concentrate on those who have the major responsibility for the crimes involved. Moreover, the purpose of complementarity is to ensure that states abide by their duty to prosecute international crimes in an effective and substantive way. But, in the end, the fundamental objective remains the prevention of impunity, to avoid that crimes of the magnitude indicated in the Rome Statute would go unpunished.[156]

Here, it is relevant to note that states do not only maintain their sovereignty in criminal matters, but also hold responsibility thereof, and must therefore comply with their international obligations. Thus, from this premise it can be inferred that "the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States."[157] International duty that is basically embedded in the primary obligation of states to investigate and prosecute those crimes that, for the current context, are outlined by the Court's Statute:

> The concept of complementarity, as perceived in international criminal law, provides national courts with priority to exercise jurisdiction with respect to the core crimes defined under the Rome Statute establishing the ICC. The preference given to domestic adjudication is driven from the fact

[153] Mark Klamberg (ed), *Commentary on the Law of the International Criminal Court* (Torkel Opsahl Academic EPublisher 2017). P. 45.
[154] Schabas, 'The Rise and Fall of Complementarity' (n 138). P. 155.
[155] The Office of the Prosecutor (OTP), 'Informal Expert Paper: The Principle of Complementarity in Practice' (2003). P. 3.
[156] Mauro Politi, 'Reflections on Complementarity at the Rome Conference and Beyond' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011) P. 145.
[157] The Office of the Prosecutor (OTP), 'Paper on Some Policy Issues before the Office of the Prosecutor' (2003). P. 5.

> that under current international law, states are duty bound to investigate and prosecute many of the enumerated acts defined under the Rome Statute.[158]

From this perspective, the ICC's role becomes pivotal when states fail to fulfil their obligations in terms of ICL enforcement. Professor El Zeidy properly stresses this idea: "The complementarity principle is intended to preserve the ICC's power over irresponsible States that refuse to prosecute those who commit heinous international crimes. It balances that supranational power against the sovereign right of States to prosecute their own nationals without external interference."[159]

Lastly, another relevant aspect to be taken into account for complementarity is efficiency, in the sense that the ICC's system is constructed in order to supply the necessities and difficulties that the Court by itself could not possibly overcome when trying specific cases: "These included operating languages, distance from victims and crime scenes, witness protection, victim attendance and participation, and lengths of trials."[160] Situations that are easier to be resolved at the domestic level due to facilities and proximity to address the cases, because as similarly points out the referred OTP's Informal expert paper: "States will generally have the best access to evidence and witnesses and the resources."[161]

4.2.2. Complementarity in the Rome Statute

To analyse and describe the complementarity system's procedures established in the Rome Statute distinction must be made from the beginning between the notions of jurisdiction and admissibility. In this regard, when it comes to the former it can be found that various conditions, which were already approached in the first chapter must be met for it to operate and work properly.[162]

On the other hand, admissibility which briefly refers to the actual exercise of jurisdiction, is the next step within complementarity, and it is edified in the Statute in the way that it determines when the Court will or not intervene in accordance with articles 17-20:

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[158] El Zeidy (n 121). P. 73.
[159] El Zeidy (n 125). P. 158.
[160] Seils (n 152). P. 8.
[161] The Office of the Prosecutor (OTP), 'Informal Expert Paper: The Principle of Complementarity in Practice' (n 155). P. 3.
[162] Article 5 of the Rome Statute defines the category of the crimes; article 11 establishes the ratione temporis, crimes committed after 1 July 2002; article 26 indicates the age of the prosecuted, over 18 years; article 12 request that either the territorial state or the national state of the suspect must have consented the jurisdiction; no request to defer from the Security Council must have been made according to article 16; and lastly the case must have been brought in one of the ways noted in articles 13-15.

> Complementarity is the principle reconciling the States' persisting duty to exercise jurisdiction over international crimes with the establishment of a permanent international criminal court having competence over the same crimes; admissibility is the criterion which enables the determination, in respect of a given case, whether it is for a national jurisdiction or for the Court to proceed. Accordingly, admissibility can be regarded as the tool allowing the implementation of the principle of complementarity in respect of a specific scenario.[163]

The scenarios envisaged in these provisions, and more specifically in article 17(1), are strictly constructed for the referred conditions of "inability" or "unwillingness", coming from a state in the context of the investigation or prosecution of a crime of international interest. More specifically, these contemplated scenarios are: "(a) a domestic investigation or prosecution is in progress; (b) a domestic investigation has been completed with a decision not to prosecute; (c) a prosecution has been completed; or (d) the case is 'not of sufficient gravity'."[164] In this connection, an extensive interpretation implies that a situation will be admissible if there has not been any action or national proceeding, as noted by the ICC's Appeals Chamber:

> Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability.[165]

As such, once the previous queries are properly addressed, the evaluation can proceed to considerations of willingness or ability.[166] Nonetheless, an additional aspect to the admissibility test contained in article 17(1)(d), has to be considered according to the Pre-Trial Chamber, the 'gravity threshold'.[167]

In this respect, the two first elements would constitute in principle the exercising of the complementarity principle within the international criminal system of the Rome Statute, insofar as they explain how and under what terms the interaction between domestic criminal jurisdictions and the international court should operate. However, according to Jo Stigen, a third element must be also met when referring to complementarity: the prosecutorial discretion

[163] ICC-Pre-trial Chamber II, Prosecutor v. Kony et al., Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04–01/05–377, 10 March 2009. Para 34.
[164] Benjamin Perrin, 'Making Sense Of Complementarity: The Relationship Between The International Criminal Court And National Jurisdictions' (2006) Vol. 18 Sri Lanka Journal of International Law. P. 304.
[165] ICC-Appeals Chamber, Prosecutor v. Germain Katanga, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04-01/07 OA 8, 25 September 2009. Para. 78
[166] Willingness and ability aspects must be further evaluated according to the following dispositions of article 17 (2) and (3) of the Statute.
[167] ICC-Pre-trial Chamber I, Prosecutor v. Thomas Lubanga Dyilo, Decision on the Prosecutor's Application for a Warrant of Arrest, ICC-01/04–01/06, 10 February 2006. Para. 29.

test contained in article 53 of the Rome Statute.[168] This test, which is performed during the initial phase of the process, will come after the analyses of jurisdiction and admissibility of the case, and subsequently, will result in the formal opening of an investigation and prosecution:

> The Prosecutor must first find there is a 'reasonable basis' to proceed, involving the three criteria of jurisdiction, admissibility and prosecutorial discretion. In proprio motu situations, the Prosecutor needs an authorization from the Pre-trial Chamber applying the same standard. Later, upon an investigation and regardless of the trigger mechanism, the Prosecutor may only proceed with a prosecution if he or she finds that there is a 'sufficient basis', involving a new assessment of the same three criteria.[169]

4.3. Mechanisms to Limit the Caseload at the ICC: Prosecutorial Discretion

4.3.1. The Notion of Prosecutorial Discretion

Having established the content and procedures of the principle of complementarity under the Rome Statute, it must be now discussed an additional aspect, relevant for this current work: the discretion of the Prosecutor. This, because such faculty of the OTP is manifested as the first mechanism of complementarity exercised during preliminary examinations, as it was in the case of Colombia. In this view, in having to determine whether a case should be investigated and tried before the ICC according to the reviewed criteria, the Prosecutor plays an essential role inasmuch as he/she directly decides (with some limitations and exceptions) on this matter: "As the single organ that initiates prosecutions before the Court, the OTP is able to direct the Court's attention and draw its focus to situations, people, and places. The OTP guides the Court. The Prosecutor is therefore the 'gatekeeper of the ICC'."[170]

First, it must be noted that the independence of the Prosecutor in this context is an essential value, which is explicitly stipulated within the text body of article 42(1). As an independent organ of the ICC, the Prosecutor has the discretion to select those cases that will be prosecuted. In this regard, prosecutorial discretion, a notion essential in this thesis when discussing the closing of the preliminary examination in Colombia, can be generally outlined according to article 15 as those "powers to independently initiate investigations into any given situation

[168] Stigen (n 135). P. 4.
[169] Jo Stigen, 'The Admissibility Procedures' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011) P. 504.
[170] Cale Davis, 'Political Considerations in Prosecutorial Discretion at the International Criminal Court' (2015) 15 International Criminal Law Review. P. 171.

within the jurisdiction of the Statute".[171] These, are specifically "intended to bring a degree of independence and pragmatism to the world's first permanent international criminal court."[172] Here it is important to note again that this mechanism plays an essential role as part of the statue's complementarity regime, by also limiting the caseload of the Court once the jurisdiction and admissibility tests have been performed:

> Prosecutorial discretion evolves from the need to exercise selection in the institution of criminal proceedings rather than automatically doing so thereby preventing the system from being overburdened by frivolous cases. In the absence of prosecutorial discretion the international criminal justice system or indeed any criminal justice system 'would grind to a halt'[173]

In this sense, by means of this faculty and according to additional criteria to be considered by the OTP in the Statute that will be subsequently explained, the list of cases can become extensively limited and reduced. Thus, pursuant to this system, only relevant cases for the Statute implying responsible individuals of international crimes exceeding a certain gravity threshold should be addressed: "The need to restrict the number of cases contributed to the creation of a general policy among international criminal courts to focus on those most responsible for committing the most serious crimes."[174] A desirable situation in terms of efficiency and complement with domestic jurisdictions.

It is important to note that here the Prosecutor's role represents a crucial tool for the system as well, inasmuch as it further develops the functions of the Court by respecting and fostering simultaneously the states' sovereignty for trying those matters, subject to their criminal jurisdiction. In this regard, when it comes to this supranational system and the Prosecutor's determination to act, it can be observed that:

> The complementarity regime serves as a mechanism to encourage and facilitate the compliance of States with their primary responsibility to investigate and prosecute core crimes. Where States fail to genuinely carry out proceedings, the Prosecutor must be ready to move decisively with ICC proceedings. Such proceedings will provide independent and impartial justice, demonstrate the determination of the international community to repress international crimes, and demonstrate the real prospect of ICC action, thus encouraging prosecution by States in the future.[175]

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[171] David Baxter Bakibinga, 'Prosecutorial Discretion and Independence of the ICC Prosecutor: Concerns and Challenges' [2018] Revista Acadêmica Escola Superior do Ministério Público do Ceará. P. 178.
[172] Matthew R Brubacher, 'Prosecutorial Discretion within the International Criminal Court' (2004) Vol. 2 Journal of International Criminal Justice. P. 71.
[173] Bakibinga (n 171).
[174] Matthew Brubacher, 'The Development of Prosecutorial Discretion in International Criminal Courts' in Edel Hughes, William Schabas and Ramesh Thakur (eds), *Atrocities and international accountability: beyond transitional justice* (United Nations University Press 2007). P. 144.
[175] The Office of the Prosecutor (OTP), 'Informal Expert Paper: The Principle of Complementarity in Practice' (n 155). P. 3.

As a result, this discretion to initiate an investigation and prosecution, proves to be not just an incentive in terms of efficiency and capacity for the ICC, but it is also an expression of the guiding principles at the head of OTP entailing partnership and vigilance,[176] ultimately aimed to "encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes."[177] Thus, as rightly noted by Stigen: "Only after the discretional test has been applied will the Court's complementary role vis-a-vis national jurisdictions have crystallised."[178] Nevertheless, the discretion of the OTP in selecting cases is not limitless and certain rules and constraints to its use must be taken into consideration.

4.3.2. Selecting the Cases

The first stage of the investigation begins with the preliminary examination or pre-investigative phase, where according to article 53 paragraph 1, a sort of evaluation should be carried out in order to determine if there is a "reasonable basis" to commence a formal investigation. In this connection, the Prosecutor will receive information with which a decision will be finally taken, depending on an analysis made from the consideration of the crimes listed in article 5, the admissibility criteria of article 17, and the gravity of the crimes and the interests of the victims and justice.[179] This information can be received from states, the UN, intergovernmental or non-governmental organisations, or other reliable sources deemed as appropriate by the OTP.[180]

On this basis, in the preliminary assessment or pre-investigative phase the legal criteria will be those envisaged in article 53 (1): "They can be roughly grouped in jurisdictional, admissibility, and "interests of justice" considerations. Article 53 (1)'s criteria are taken into account during pre-investigations when selecting situations. A positive decision with respect to all three legal criteria marks the end of pre-investigations and brings the OTP into the realm of full investigations."[181] Consequently, this preliminary phase is crucial as it will determine the existence of a future investigation and further prosecution, and additionally it will also represent the first interaction with national systems as a scenario to encourage them to enact their own jurisdictions.

[176] ibid. PP. 3-4.
[177] The Office of the Prosecutor (OTP), 'Paper on Some Policy Issues before the Office of the Prosecutor' (n 157). P. 5.
[178] Stigen (n 135). P. 4.
[179] Rome Statute of the International Criminal Court. Article 53 paragraph 1 (a)-(c).
[180] ibid. Article 15(2).
[181] Ignaz Stegmiller (n 38). P. 240.

Having fulfilled this requirement, the next stage will come with the formal opening of an investigation and the conducting of proceedings directed to "cover all facts and evidence relevant to an assessment of whether there is criminal responsibility."[182] In this context, pursuant to article 53(2) the Prosecutor will proceed with the analysis of a "sufficient basis" in order to determine if the investigation must continue. If it is established after this phase that there is not enough reason for that purpose, the Prosecutor must inform to conclude the investigation, the PTC and the concerned state making a referral under article 14, or the Security Council under article 13 case.[183] Here, there is also the possibility for reconsideration of this decision upon request of the referred chamber,[184] or by the Prosecutor him/herself as well.[185]

After the investigation comes the prosecution phase before the PTC. At this final part of the investigative stage, according to article 61 of the Statute the role of the Prosecutor will basically consist of "conducting further investigations and preparing the case for the confirmation of the charges."[186] As such, the coming phase after the investigation will be aimed to maintain the charges with which the OTP will later seek the actual trial, by means of the presentation of the evidence found to establish substantial grounds to believe in the crimes charged.[187]

4.3.3. Limitations to the Prosecutorial Discretion

This concrete topic has special relevance when it comes to the real discretion that the Prosecutor has in terms of case selection, and therefore it is worthwhile to examine it as well. In this regard, at first glance authorization by the PTC must be granted to the Prosecutor to act towards a formal investigation in accordance with articles 15 paragraph 4, 54 paragraph 2(b), and article 57 paragraph 3(d). Conversely, the situation was quite different with the statutes of the ad hoc Tribunals, more specifically in ICTR's article 17 and ICTY's article 19, where the prosecutors were: "vested with powers to initiate investigations at their discretion on the basis of information received by them."[188] In other words, this prosecutorial discretion only had the limits regarding the *loci, temporis* and *materiae* jurisdiction factors of the tribunals, but no

[182] Rome Statute of the International Criminal Court. Article 54 paragraph 1 (a)
[183] ibid. Article 53 paragraph 2.
[184] ibid. Article 53 paragraph 3
[185] ibid. Article 53 paragraph 4.
[186] Bakibinga (n 171). P. 181.
[187] Rome Statute of the International Criminal Court. Article 61 paragraph 5.
[188] Bakibinga (n 171). P. 182.

authorization was required for opening and conducting a formal investigation as in the case of the ICC.

Similarly, oversight and control will be exercised by the PTC in case of an open investigation that has been decided to be closed due to the Prosecutor's decision. In this connection, the PTC can review this determination and request reconsideration in terms of article 53 paragraph 3(a) and (b). This possibility will certainly limit the Prosecutor's discretion of closing a case, whenever that choice is taken on the grounds of paragraph 1 or 2 and upon request of the referral state or the Security Council, and by its own initiative, on the scenarios of paragraph 1(c) or 2 (c) of the same article.[189]

In light of this, the Prosecutor's powers do have a limit that is mainly established by the PTC supervision, in order to guarantee the purposes of justice and the legal course of the process. Having the ability to prosecute delicate cases such as heads of states or high government officials, which undoubtedly concern the sovereignty of an entire nation, and even matter in some events to the international community, seems to deserve limitations to balance those discretionary powers. In this connection, and therefore, the role of the PTC is essential and desirable since it "exercises control over the investigating authority of the prosecutor in order to protect state sovereignty and safeguard the rights of the individual persons involved."[190]

Another important limitation for the prosecutorial discretion has to do with the legal obligation to prosecute: "Whenever the Prosecutor finds a reasonable basis to proceed, he is therefore under an obligation to start a formal investigation."[191] This situation is clear with international crimes coming from different international instruments such as the Statute itself, and conventions or treaties.[192] In this regard, there will be not much room for discretion where according to the legal impositions, there has been found "a reasonable basis to proceed" against serious violations of instruments that establish the duty for states to investigate and prosecute these crimes of relevance for the international community:

> Where treaty law has created a clear duty for states to investigate and prosecute, the objective of the Rome Statute to end impunity for the worst crimes would be perverted if, given an admissible

[189] These are: 1(c) the gravity of the crime and the interests of victims and justice, and 2(c) interests of justice and victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.
[190] Bakibinga (n 171). P. 185.
[191] Ignaz Stegmiller (n 38). P. 251.
[192] Article 15 (3), and 53 of the Rome Statute refer specifically to this obligation.

> case, grave breaches of the 1949 Geneva Convention or genocide were not investigated and prosecuted by the Prosecutor.[193]

International obligations in relation to those crimes of special concern to the Rome Statute and ICL, thus also play an important role in this context, and where it has been established a duty to act against them, not much capacity for discretion should be left for the Prosecutor.

4.4. Positive Complementarity

4.4.1. The Concept of Positive Complementarity

It must now be analysed the further development of complementarity after the entry into force of the Statute. In this regard, it is particularly significant that the notion has been understood to include a positive dimension as well. In the early years of existence of the ICC, this concept was already being germinated with the OTP's Informal expert paper of 2003, where according to the guiding principle of *partnership*, it was stated that:

> The relationship with States that are genuinely investigating and prosecuting can and should be a positive, constructive one. The Prosecutor can, acting within the mandate provided by the Statute, encourage the State concerned to initiate national proceedings, help develop cooperative anti-impunity strategies, and possibly provide advice and certain forms of assistance to facilitate national efforts. There may also be situations where the Office of the Prosecutor (OTP) and the State concerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn State is unable to carry out effective proceedings against persons most responsible.[194]

A trait of complementarity that was slightly recognized by former and first Chief Prosecutor Luis Moreno-Ocampo, when stating that: "the Statute provides for a sophisticated approach to generate national proceedings with elements of dialogue ('who's doing what'), cooperation ('we can help you if you need') and independent decisions to intervene ('we shall do it if you don't')."[195] A more recent approach to the idea of positive complementarity came in 2010 from another ICC organ, the ICC's Bureau of the Assembly of States Parties, that proposed the following definition of positive complementarity: "activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building,

[193] Philipp Kastner, *International Criminal Justice in Bello? : The ICC Between Law and Politics in Darfur and Northern Uganda* (Brill | Nijhoff 2011) P. 132.
[194] The Office of the Prosecutor (OTP), 'Informal Expert Paper: The Principle of Complementarity in Practice' (n 155). PP. 3-4.
[195] Luis Moreno-Ocampo, 'A Positive Approach to Complementarity: The Impact of the Office of the Prosecutor' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011) P. 22.

financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis."[196]

Following this, it is perceived that the principle of complementarity goes a step further from passively waiting to act, and instead, pursues a joint work against international crimes by actively encouraging and providing assistance in terms of investigation and prosecution for the national proceedings: "Where traditional complementarity was meant to protect state sovereignty and was built on the idea that states would carry out national prosecutions as a result of the threat of international intervention by the ICC, positive complementarity envisions a more cooperative relationship between national jurisdictions and the Court."[197] This concept has been outlined to support the idea of real cooperation and joined efforts between legal systems at the domestic and international level, particularly at the preliminary examination stage where a dialogue between the state and the OTP can be conducted in the way of mutual collaboration.

Within this context, cooperation finds foundation in articles 80 and 93(10), which explicitly sets the forms of collaboration with states, and given the proactivity needed for such task coming from the Court, the OTP, as an independent organ, plays a fundamental role in this setting by taking part and directly supporting domestic criminal law. Consequently, it can be found that in order to provide this support, "the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation."[198] Similarly, and embodying this cooperation policy of the OTP, the possibility of arranging agreements with states, as in the examination of Colombia, also emerges an expression of positive complementarity under article 54(3) (c) and (d).

One of the most fruitful tools within this context of international cooperation is the use of preliminary examinations. This is because the tracking of states' activity to verify if genuine proceedings have been or will be initiated to prosecute the ICC's crimes, has proven to be "the most promising, or at a minimum the first opportunity, for the OTP to serve as a catalyst for the initiation of national proceedings."[199] As such, this is the situation where positive complementarity is supposed to be discussed more actively, and therefore, the reason why the

[196] ICC Assembly of States Parties, 'Report of the Bureau on Stocktaking: Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap' (2010). P. 16.
[197] Marshall (n 6). P. 22.
[198] The Office of the Prosecutor (OTP), 'Report on Prosecutorial Strategy' (2006). P. 5.
[199] Moreno-Ocampo (n 195). P. 25.

OTP has chosen to opt for this approach in its Policy Paper on Preliminary Examinations: "Where potential cases falling within the jurisdiction of the Court have been identified, the Office will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes."[200]

4.4.2. Complementarity without its positive side: The failure of the Ugandan Case

Having briefly discussed the notion of complementarity and its content in general, it is now suitable to examine and analyse a telling example of its applicability since the entry into force of the Rome Statute. As such, one of the most noteworthy cases is that related to the self-referral of the government of Uganda. This situation was one of the first under the Court's operations, where a transitional solution to the armed conflict was also intended simultaneously.

The conflict in Uganda has been one of the most notorious confrontations in Africa because of the atrocities committed against civilians of the Acholi ethnic group in Northern Uganda, conjoined with vast allegations of child recruitment by the Lord's Resistance Army (LRA), an armed rebel group commanded by Joseph Kony.[201] The war between the LRA and the government of Uganda that resulted in the displacement of almost 2 million people[202] and the death of about 100,000 people,[203] caused a serious humanitarian crisis in Africa. This conflict started with the rebellion of the Uganda People's Democratic Army (which members later would join the LRA) against the National Resistance Army/Movement, when its leader Yoweri Museveni took power in 1986,[204] and was aimed to be finished at some point with an Amnesty Act in 2000 which at the time "offered amnesty to all Ugandans who had been engaged in acts of rebellion against the government since 1986."[205]

The recurrent involvement and confrontations with the government of Sudan, also played a significant role in this confrontation: "The origins of the conflict lie in the struggle between the National Resistance Army of the current Ugandan President, Yoweri Museveni, and the then-

[200] The Office of the Prosecutor (OTP), 'Policy Paper on Preliminary Examinations' (n 39). Para. 101.
[201] UN Secretary-General, 'Report of the Secretary-General Pursuant to Resolutions 1653/2006 and 1663/2006' (2006). P. 4.
[202] ibid. P. 1.
[203] UN Security Council, '"Security Council Presidential Statement Demands Release of Women, Children by Lord's Resistance Army, Expeditious Conclusion of Peace Process"' (2006) UN Doc. SC/8869.
[204] Marieke Wierda and Michael Otim, 'Courts, Conflict and Complementarity in Uganda' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011) PP. 1157-1161.
[205] Kastner (n 193). P. 22.

government of Uganda. The consequences of this struggle are to an important extent responsible for the decades-long tensions in the transborder region of northern Uganda and southern Sudan."[206] This situation evolved into a complex war carried out in south Sudan and northern Uganda, where the LRA became the most important rebel group, allegedly supported by the Sudanese government in retaliation for Uganda's collaboration with another rebel group active in the former country: the Sudanese People's Liberation Army.[207]

The ICC's intentions to intervene arrived with the perpetration of a massacre by the LRA at the Barlonyo internal displaced people camp in Lira in 2004, when the Prosecutor expressed his interest to open an investigation, which later became a reality with Uganda's self-referral of the situation in January of the same year by President Museveni on the grounds of alleged inability of the state to prosecute the crimes.[208] In this sense, it was argued that "the Government of Uganda has been unable to arrest (…) persons who may bear the greatest responsibility".[209] Nonetheless, in the beginning the Court's role was low-key since dialogues for peace were being held at the same time. But once the process failed warrants against Joseph Kony and other heads of the organisation were issued in 2005.[210]

Thereafter, the Juba negotiations in South Sudan followed in 2006 with the cessation of hostilities agreement between the LRA and the government of Uganda.[211] Nonetheless, by that time there was reluctance on the part of the LRA's members to sign a final agreement due to the existence of the above-mentioned warrants. An annexure to the agreements was drafted in 2008, envisaging a system of accountability before domestic judicial proceedings.[212] This system was conceived as "a comprehensive and integrated approach including formal justice, traditional justice, truth-seeking, reparations and the Amnesty and Ugandan Human Rights Commissions."[213] Furthermore, there were also contemplated the use of alternative penalties to incentivize the illegal group to disarm, a War Crimes Division (WCD) in the High Court of Uganda to deal with the cases, and traditional justice was set as the central pillar of the whole framework. Unfortunately, these agreements never saw the light of day since they were never

[206] ibid. P. 18.
[207] ibid. 19.
[208] ICC. Situation in Uganda. Available at: https://www.icc-cpi.int/uganda
[209] Situation in Uganda. ICC Pre-Trial Chamber II, Warrant of Arrest for Joseph Kony (ICC-02/04-53, issued on 8 July 2005 as Amended on 27 September 2005). Para. 37.
[210] Wierda and Otim (n 204). PP. 1162-1163.
[211] See: International Crisis Group, 'Peace in Northern Uganda?' (13 September 2006), available at: https://www.crisisgroup.org/africa/horn-africa/uganda/peace-northern-uganda
[212] Kastner (n 193). P. 25
[213] Wierda and Otim (n 204). P. 1166.

signed by the LRA and Kony, and consequently, the situation ended with the reactivation of hostilities.[214]

In spite of this, the planned WCD was enacted by Uganda's Government the same year, and therefore, a transitional justice system was in any case created with the aim to deal with the crimes. Nevertheless, this transitional regime posed some questionable matters given its simultaneous applicability with the existent Amnesty Act of 2000, and therefore, aspects such as the benefits for the LRA members, the system of prioritisation, or the prosecution of state actors, were not clear.[215] On the other hand, while this peace process was being held, in 2008 the PTC of the ICC decided to examine if the referred case was still admissible.[216] Accordingly, a year later the Chamber determined that the context remained the same from the moment when the warrants were issued in 2005 since no action had been taken yet by national authorities in Uganda towards this specific case, and consequently, it decided that was still admissible under article 17 of the Statute.[217]

Having observed this, it can be inferred that in this case an interaction between the ICC and the domestic system was established in terms of complementarity. With Uganda's referral there was a first opportunity to exercise the Court's prerogatives and issue warrants against suspects to ensure international criminal responsibility. The situation was later reaffirmed by the PTC's decision to maintain admissibility over the case, meaning that there should be kept jurisdiction to supplement the state's inability to prosecute. Nevertheless, it must be noted that complementarity is thought in the first place with preference for domestic jurisdictions, and having the warrants against LRA's leaders issued at the time inevitably became a stress point not only for national trials, but also for the possibility of reaching a settled outcome from the peace talks in course. In this regard, tension between both systems emerged from this relation of complementarity since:

> Domestically, the government could be perceived as having created an obstacle to a successful conclusion of the most promising talks in the twenty-year old history of the conflict by having outsourced the LRA issue to an international institution. But, having referred the situation to the Court, the Ugandan government could neither withdraw its referral nor make the Court withdraw its arrest warrants.[218]

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[214] ibid. P. 1167.
[215] ibid. PP. 1168-1169.
[216] ICC-Pre-trial Chamber II, Prosecutor v. Kony et al., Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04–01/05–377, 10 March 2009.
[217] ibid. Para. 52.
[218] Sarah Nouwen, 'Complementarity in Uganda: Domestic Diversity or International Imposition?' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011) P. 1122.

Although a transitional system of accountability was indeed envisaged within the Annexure to the final agreements, due to Uganda's appealing to the Court, a transitional settlement to put an end to the conflict was not possible anymore. While it must be recognized that the most promising peace agreements in the country were conducted just after the ICC's intervention, it is also true that this situation simultaneously tarnished the ambience for a peaceful solution to thrive: "At the same time of stimulating peace negotiations, the ICC involvement has subsequently also delayed the peace process. In short, the ICC has helped to set off promising peace negotiations to solve the conflict in northern Uganda, but it has since been a major obstacle to conclude these negotiations."[219]

Philipp Kastner identified at least five negative effects of this interaction in this sense.[220] First, the problematic nature of negotiations when criminal prosecutions have been already initiated. Second, the "one-sided" targeting of the LRA leadership by the ICC, which consequently denied them political status or the possibility of becoming a political force and did not adequately recognize the complexities and dynamics of the Ugandan conflict. Third, the indictments of the Court generated confusion with the amnesty normative program envisaged by the time, casting doubt on the applicable legal regime for the members of the LRA, although its enforceability was thereafter recognized by the Prosecutor. Fourth, the ICC's involvement during the issuance process itself of the Ugandan Amnesty Act, where the alleged lack of support and disapproval from the institution was perceived as a negative stand against peace for the country. Lastly, the probability of retaliative measures coming from the LRA against the civilian population as a consequence of the Court's intervention. This, in view of the former violence experienced by civilians whenever cooperation with the Ugandan government was suspected. Furthermore, the fact that the excuse given by first LRS's leader Joseph Kony for not signing the peace agreements with the government was the existence of the ICC's warrants against him and his other four commanders,[221] is without doubt something that should not be overlooked either.

As such, regardless of the local efforts to stop violence and achieve an arrangement for peace by means of a transitional system founded on domestic and traditional mechanisms, the absence of consideration and cooperation with national authorities by the ICC placed them into a difficult position to reach their own objectives. This misunderstanding and gap in coordination

[219] Kastner (n 193). P. 81.
[220] ibid. PP. 81-85.
[221] Yusuf Kiranda, ''Juba Peace Talks Collapse, A Golden Opportunity for Peace Is Slipping through Our Hands'' (12 June 2008).

between jurisdictions inevitably led to a significant deterioration within Ugandan people's aspirations for transition to peace: “Lacking clear guidance about whether those domestic efforts should bar international action, the ICC prosecutors proceeded with their own efforts. The ICC’s consideration of action put Uganda’s reconciliation efforts in jeopardy”[222]

The case of Uganda proves to be a representative example of the exercising of the principle of complementarity under the Rome Statute without doubt. The opening of criminal procedures and issuance of warrants against the leaders of the LRA by the ICC, however, showed at first glance a visible discord with the simultaneous use of transitional mechanisms at the local level. Thus, despite the first effective action of this international court right after its enter into force and the potential positive effects that it had in terms of enforcement at the time, its impact on the domestic transitional process and therefore, the national aspirations for peace, cannot be completely disregarded. An outcome that was not entirely satisfactory for Uganda and its population. The lack of coordination and harmony between both working systems at the international and domestic stage in the prosecution of international crimes committed by the LRA, certainly represented a regrettable failure for a first chance to positive complementarity.

[222] Minow (n 111). PP. 7-8.

5. Complementarity in Colombia: Transitional Justice in the Context of International Criminal Law

5.1. Transitional Justice in Colombia

5.1.1. The Transitional System in the Peace Agreements

The attention must be now turned towards the transitional system conceived at the domestic level and produced as a result of the *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*. Within this settlement, aimed to put an urgent end to the confrontation between the parties and to unravel and properly respond to the dynamics of the Colombian armed conflict, various and different topics were covered: 1. A comprehensive rural reform, 2. Political participation for FARC-EP members, 3. The end of the conflict, 4. A solution to the illicit drugs problem, 5. An agreement regarding the victims of the conflict, and 6. The implementation, verification and public endorsement.[223] All of them, were adopted in terms of the agreement itself as an: "aim to contribute to the changes required to lay the foundations for a stable and long-lasting peace."[224] For the purposes of this study only the fifth chapter specifically comprising the Comprehensive System of Truth, Justice, Reparation and Non-Repetition with a transitional court for the victims of the conflict in it, will be examined.

5.1.2. The Comprehensive System of Truth, Justice, Reparation and Non-Repetition

The transitional framework (in Spanish: *Sistema Integral de Verdad, Justicia, Reparación y No Repetición*) was conceived as the primary mechanism to satisfy the rights of the victims within the implementation of a process of transitional justice in Colombia. In the wording used in the peace agreements, this comprehensive system is based on:

> The recognition of the victims as citizens with rights; the acknowledgement that the full truth about what has happened must be uncovered; the acknowledgment of responsibility by all those who took part, directly or indirectly, in the conflict and were involved in one way or another in serious human rights violations and serious infringements of international humanitarian law; the realisation of victims' rights to the truth, justice, reparations and non-recurrence, based on the premise of non-negotiation on impunity, additionally taking into account the basic principles of the Special Jurisdiction for Peace, one of which is that "damage caused shall be repaired and made good whenever possible".[225]

In this regard, the system in question is essentially designed as a set of mechanisms and measures that by means of interconnected relations aims to recognize: i) victims as citizens

[223] Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace.
[224] ibid. P. 7.
[225] ibid. P. 135.

with rights; ii) the duty of the existence of complete truth about what happened; iii) the responsibility of those who participated directly or indirectly within the armed conflict and got involved in serious violations of human rights and infringements of IHL; and particularly, vi) the satisfaction of the victims' rights to truth, justice, reparation and non-repetition.[226]

The system is composed of various elements to achieve the referred purposes, namely: the Truth Commission, Coexistence and Non-Repetition Commission; the Unit for the Search for Persons Presumed Disappeared in the Context and by Reason of the Armed Conflict; and the transitional court, the Special Jurisdiction for Peace. Here it is essential to note that this transitional framework must be always conceived as a whole as it requires of coordinated work between the three institutions that shape it, and which otherwise, individually understood could not fully guarantee the rights of the victims. In this sense, each of these mechanisms cannot be understood separately and none of them prevails over the other.[227] This interconnection and the comprehensiveness of them are recognised by the peace agreement itself,[228] and endorsed by the Constitutional Court of Colombia.[229]

Briefly described, the Truth Commission (in Spanish: *Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición*) is a component of the system embodied specifically to "listen to the victims, witnesses and those responsible for the armed conflict in every sector, region and social condition in the country, in order to gain a broad and comprehensive narrative of the events and contexts that explain half a century of war."[230] The Unit for the Search for Persons Presumed Disappeared (in Spanish: *Unidad de Búsqueda de Personas dadas por Desaparecidas en el contexto y en razón del conflicto armado*), on the other hand, is a national extrajudicial and humanitarian entity in charge of directing, coordinating and contributing to humanitarian action, aimed to searching for people considered disappeared within the context and as a consequence of the Colombian armed conflict.[231] Lastly, the SJP, the transitional court to deal with crimes, and the primary subject of interest for the present work.

[226] Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 'La Comisión de la Verdad y el Sistema Integral de Verdad, Justicia, Reparación y No Repetición: conceptos clave para su mandato' (2019) P. 6.
[227] Rocío Quintero, 'Colombia: Jurisdicción Especial para la Paz, análisis a un año y medio de su entrada en funcionamiento' (International Commission of Jurists 2019) P. 29.
[228] Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace. P. 139.
[229] Sentencia C-080/18 2018. Corte Constitucional Colombia.
[230] Commission for the Clarification of Truth, Coexistence, and Non-Repetition, '21 Key Points to Learn about the Truth Commission' (Communications office for the Truth Commission 2018) P. 7.
[231] Unidad de Búsqueda de Personas dadas por Desaparecidas en el contexto y en razón and del conflicto armado, 'Preguntas Frecuentes' P. 1.

5.2. The Special Jurisdiction for Peace (SJP): the Transitional Justice Court in Colombia

5.2.1. The SJP: the Transitional Court for Justice and Peace in Colombia

Under the context of the Rome Statute's complementarity and given the particular jurisdiction provided to the SJP that is directly and inevitably involved with the same area, it becomes indispensable to understand the structure, competence and current functioning of the domestic institution. In this regard, the SJP is devised as a national entity that in terms of the peace agreements has:

> A number of judicial panels for justice, including a Judicial Panel for Amnesty and Pardon and a Tribunal for Peace, to administer justice and investigate, clarify, prosecute and punish serious human rights violations and serious infringements of international humanitarian law. The Special Jurisdiction for Peace (…) deals exclusively and temporarily with conduct relating directly and indirectly to the armed conflict, does not mean substitution of ordinary jurisdiction.[232]

Thus, from the beginning it is quite clear that the SJP constitutes a special institution with a specific mandate that was established to work simultaneously and outside of national ordinary jurisdiction. As it can be noticed from this paragraph, the primary purpose of the establishment of the SJP was to deal with "serious human rights violations and serious infringements of international humanitarian law", committed under the context of the Colombian armed conflict.

The creation of such distinctive jurisdiction required a constitutional and temporary amendment in Colombia, a legislative act (Legislative Act 01 of 2017) that outlined in general terms the implementation and functioning of the Comprehensive System of Truth, Justice, Reparation and Non-Repetition, and therefore the SJP as well. In this law is determined the nature of the transitional court with a temporary, autonomous, exclusive and primary acting over all other different jurisdictions, in regard to those acts committed before the 1st December 2016, and as a consequence of, with the occasion of, or with direct or indirect relation to the armed conflict, over those who participated therein, and specially over those acts considered as serious infringements of IHL and serious violations of HR.[233]

Similarly, according to the SJP's statute, there can be found the same specific objectives of transitional jurisdictions, which are: satisfying the rights of the victims; offering the truth to

[232] Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace. P. 138.

[233] Acto Legislativo 01 de 2017 - Por medio del cual se crea un título de disposiciones transitorias de la Constitución para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones. Art. 5.

the Colombian society; contributing to the achievement of a stable and lasting peace; and adopting decisions that provide legal certainty to those who participated directly or indirectly in the internal armed conflict, especially in those crimes committed within its framework and that entail serious infringements of IHL and serious violations of HR.[234] All of them, pursued under certain cross principles particularly tailored, namely: the centrality of victims; the criminal prosecution of the most responsible; a set of mechanisms comprising conditional benefits, truth telling, a special procedure to verify non-compliance with sanctions; and the coexistence of two models of justice, restorative and retributive.[235]

As a result, once defined the *ratione materiae* (serious infringements of IHL and serious violations of human rights committed as a consequence of, with the occasion of, or with direct or indirect relation to the armed conflict)*, ratione temporis* (acts committed before 1 December 2016)*, ratione personae* (those who directly or indirectly participated in the armed conflict)[236] and *ratione loci* (Colombian state's territory) of the SJP, the operations of this court finally begun in March 2018.[237]

5.2.2. The SJP Structure

At the first stage, the SJP is basically composed of three main chambers, namely: the Chamber for the Recognition of Truth, Responsibility and Determination of Facts and Conducts (in Spanish: *Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas*, henceforth "Chamber for the Recognition"); the Chamber of Amnesty and Pardon (in Spanish: *Sala de amnistía e indulto*); and the Chamber for Determination of Legal Situations (in Spanish: *Sala de definición de situaciones jurídicas*). At the second stage, the closing chambers are named the Tribunal for Peace (in Spanish: *Tribunal para la Paz*), comprising four of them: Section of First Instance with Truth and Responsibility Recognition, Section of First Instance Without Truth and Responsibility Recognition, Section for Judgments Review, and the Appeals Section.[238]

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[234] Ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz 2019.
[235] Jaime Bernal Cuellar & others, *Reflexiones Jurídicas Sobre La Jurisdicción Especial Para La Paz* (1st edn, Universidad Externado de Colombia 2022). PP. 39-59.
[236] Additionally, concerning the *ratione personae* it must be stressed that according to the system's normative only members of the former armed group FARC-EP, the Colombian armed forces, and third parties involved and voluntarily submitted before the tribunal, can be subject to this jurisdiction.
[237] Ámbito Jurídico, 'Histórico primer día de la Jurisdicción Especial para la Paz' (15 March 2018)
[238] Acto Legislativo 01 de 2017 - Por medio del cual se crea un título de disposiciones transitorias de la Constitución para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones. Art. 7.

The Tribunal for Peace is in charge mainly of trying those cases referred by the first stage chambers and of the establishment of "proper sanctions".[239] Therefore, it contemplates two different procedures depending on whether the appearing individuals accept their responsibility or not. Concerning the first stage chambers, a more detailed description is necessary since therein lays the central jurisdiction for the identification and qualification of crimes to be judged by the SJP. Thus, on the one hand, these panels will engage in determining conducts that could lead to the prosecution of those with greatest responsibility before the Tribunal for Peace. On the other hand, they will determine the legal situation of those demobilized from the armed group and members of the armed forces, who have applied to the jurisdiction for the application of legal benefits comprising amnesty, pardon or the application of measures for criminal prosecution renunciation.[240]

In this context, it is found that the Chamber for the Recognition serves at the first stage as the front door within the SJP. Its primary role is to determine from the outset, the jurisdiction of the SJP over the facts and conducts presented to its knowledge. Therefore, this is the first opportunity where the recognition of responsibility in crimes implying violations of human rights or infringements of IHL, can be expressed by individuals involved in their commitment. This situation will necessarily entail a thorough evaluation by the Chamber, that depending on the determination of responsibility recognition or not that appearing individuals decide to undertake, the referral of the case to the Tribunal for Peace chambers will continue.[241]

In contrast, the Chamber of Amnesty and Pardon, as its name states, is entrusted with the role of providing the legal benefits implying amnesties and pardons as a result of a thorough juridical analysis of the crimes committed by individuals, and who will not be prosecuted therefore. This, provided that this examination has concluded that the conducts can be subject to the referred benefits. In the event that the crimes in question cannot be given amnesties, the case will be referred to the Chamber for the Recognition.[242]

[239] According to the final peace agreements, there are different sanctions to be applied depending on the truth and responsibility recognized during the proceedings. In this sense, for those who do not sufficiently and timely fulfil these obligations, there will be "ordinary sanctions" with effective deprivation of liberty from 15 to 20 years, or "alternative sanctions" with the same deprivation from 5 to 8 years. "Proper sanctions", on the other hand, will comprise restorative activities with liberty restrictions from 5 to 8 years, for those who duly cooperate with the transitional system.
[240] Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia (n 226). P. 8.
[241] Ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz. Art. 79.
[242] ibid. Art. 81.

These decisions legally benefiting individuals before this court are decided on the basis of the National Amnesty Law 1820 of 2016, the issued normativity aimed to distinguish those crimes to be prosecuted and judged by the SJP, from those that will receive a lenient treatment. Similarly, it is worth noting that despite the indistinct use of the notions of *amnesties* and *pardons*, the pretended mechanism by this transitional system resonates in a more strict sense with the former ones, which are commonly understood as:

> legal measures that have the effect of:
>
> (a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or
>
> (b) Retroactively nullifying legal liability previously established.
>
> Amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law.[243]

Thus, this mechanism is tied to a formal and legal procedure generally coming from the legislative organ of a state, whereas the pardon can be simply described as an "official act that exempts a convicted criminal or criminals from serving his, her or their sentence(s), in whole or in part, without expunging the underlying conviction."[244] Coming in contrast, from an act of the head of a state or the government, conceived as the executive branch.

Finally, the Chamber for Determination of Legal Situations is in charge of defining the legal condition of those individuals that will not be subject to referral from the Chamber for the Recognition (due to their not decisive participation in serious crimes), nor can they be subject to amnesties. In this sense, this chamber will decide on cases submitted to the SJP where individuals are members of the armed forces, or third parties involved and voluntarily appearing before the tribunal.[245]

5.3. The SJP's *Ratione Materiae* – Serious Violations of Human Rights, Serious Infringements of IHL, and the Obligation to Investigate, Prosecute and Sanction

As previously stated by the referred normativity, the SJP has the primary mandate in terms of criminal law to judge *serious violations of human rights* and *serious infringements of*

[243] Office of the United Nations High Commissioner for Human Rights, 'Rule of Law - Tools for Post-Conflict States - Amnesties' (Brill | Nijhoff 2009) HR/PUB/09/1. P. 5.
[244] ibid. P. 5.
[245] Ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz. Art. 84.

international humanitarian law. Thus, the utmost goal with the system is to establish the responsibility of those who participated directly or indirectly in the commission of atrocities and ultimately, to satisfy the essential right of the victims to justice by investigating, prosecuting and sanctioning crimes of major concern. This is what is commonly understood as a procedural obligation for states, which "in human rights law, (…) in the most general terms, can be determined as the obligation to investigate, prosecute and, if appropriate, punish criminal attacks on human rights.[246]

At the regional level such obligation to prosecute can be found within the Inter-American System, of which the Colombian state is part.[247] According to the American Convention on Human Rights, states have the duty to "respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms".[248] This situation has been further interpreted by the Inter-American Court of Human Rights, as the obligation of the states party to organize their entire governmental apart, and in general, all the structures through which the exercise of public power is manifested, thereby it can be able to legally ensure the free and full joy of human rights. As a result, states must prevent, investigate and sanction every violation of rights recognized by the Convention.[249]

At the national level, the Constitutional Court of Colombia has done a legal review and control of the transitional system by thoroughly examining the compatibility of this framework with the domestic order. In this context, legal assessments were performed by studying the legal and constitutional harmony of the legislative act that creates the SJP (Legislative Act 01 of 2017), its statute law (Law 1957 of 2019), and the Amnesty law (Law 1820 of 2016), which widely regulate its scope of jurisdiction. Yet with various amendments and further interpretations, this normativity was legally and constitutionally admissible.[250] Within this setting, it was also posed and restated the central idea of the duty of states to investigate, prosecute and sanction serious violations of human rights and serious infringements of IHL.[251]

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[246] Kresimir Kamber, *Prosecuting Human Rights Offences : Rethinking the Sword Function of Human Rights Law* (1st edn, BRILL 2017). P. 2.
[247] The Charter of the Organization of American States was signed at Bogotá on 30th April 1948, which entered into force in Colombia the 13th of December 1951.
[248] American Convention on Human Rights - 'Pact of San Jose' 1969. Art. 1.
[249] Caso Velásquez Rodríguez vs. Honduras. Sentencia Fondo, Reparaciones y Costas. Para. 166.
[250] Sentence C-674/17 reviewed the prior process of the Legislative act 01 of 2017, Sentence C-080/18 also reviewed the prior process of Law 1957 of 2019, and Sentence C-007/18 controlled the content of Law 1820 of 2016 after its issuance.
[251] Sentencia C-007/18 2018.

As such, with the criminal justice apparatus embodied by the SJP, the Colombian state intended to comply with its obligations in respect to crimes of serious and international concern. Widely developed at the international level, this duty has been similarly acknowledged in different branches of public international law such as ILHR,[252] IHL,[253] and ICL.[254] Furthermore, well-known texts of international relevance in the context of the rights of victims to justice also comprise this paramount commitment.[255]

With this in mind, and the textual mandate for the SJP to deal with serious HR violations and serious infringements of IHL it must be now outlined the content of the criminal transgressions to be judged. Serious infringements of IHL commonly known as war crimes,[256] are conceived as:

> Any violations described as "grave breaches" of the 1949 Geneva Conventions and Additional Protocol I, and other serious violations of IHL recognized as war crimes in the Rome Statute or in customary law. In substantive terms, the extensive lists of war crimes provided by the 1949 Geneva Conventions, Additional Protocol I and the Rome Statute essentially comprise violations of the core protection afforded either to persons and objects in the power of the enemy or to persons and objects protected against attack in the conduct of hostilities.[257]

The specific connotation of "serious" violations is used when it endangers protected persons or objects and breaches important values.[258] This category has been also analysed by the ICTY in its famous decision *Prosecutor v. Dusko Tadic*, where such acts were referred as a "breach of a rule protecting important values, and the breach must involve grave consequences for the victim."[259] The SJP on its side, has incorporated this notion understanding that the conducts

[252] Just to name some international instruments that establish the obligation to respect and guarantee human rights by access to justice, in general terms: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, European Convention on Human Rights, the African Charter on Human and Peoples' Rights, etc.
[253] In relationship with the prosecution of war crimes: First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146; Additional Protocol II, Article 6; and IHL Customary Law, rule 158.
[254] From the beginning the Rome Statute is very clear about this obligation in its Preamble, and further develops its content with the following articles.
[255] Such as: the Updated Set of principles for the protection and promotion of human rights through action to combat impunity; the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**;** the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.
[256] The International Committee of the Red Cross (ICRC), 'Customary International Humanitarian Law' (2005). Rule 156.
[257] Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (International Committee of the Red Cross 2022). P. 289.
[258] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1 (Cambridge university press 2009). PP. 569-570.
[259] International Criminal Tribunal for the former Yugoslavia (ICTY), 'Prosecutor v. Dusko Tadic Aka "Dule", Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1'.

must affect fundamental interests for individual victims, communities or societies, producing harm or endangering with social repercussion their fundamental rights.[260]

With regard to the concept of serious human rights violations, the spectrum of potential crimes is more comprehensive and less clear. Therefore, it is necessary to outline and make direct reference to national legislation regulating these matters, that is: the Legislative Act 01 of 2017, the statute law 1957 of 2019 and the Amnesty Law 1820 of 2016. In this sense, according to these legal instruments, it can be discerned those additional crimes apart from serious infringements of IHL, that can be prosecuted and judged by the SJP.

Overall, the full list of conducts pursuant to article 23 of the referred Amnesty law and article 42 of the law statute are: crimes against humanity, genocide, war crimes, hostage taking or any other serious deprivation of liberty, torture, extrajudicial killings, forced disappearance, sexual assault by penetration and other forms of sexual violence, child abduction, forced displacement, and child recruitment, in accordance with the Rome Statute.[261] In light of this, it can be inferred that with this explicit reference to the Statute, dealing with serious human rights violations, will necessarily entail to delimit the scope of jurisdiction to not all sorts of transgressions, but only to those specified inside the SJP and ICC frameworks. Thus, based on this the *ratione materiae* in Colombia's transitional jurisdiction with regard to the prosecution of criminal conducts will follow the notion of complementarity by focusing on the core crimes of international concern for the ICC.

The SJP's statute is, however, aimed to cover a wide array of international human rights instruments with the mentioned list of crimes, where the states' duty to investigate, prosecute and sanction must be followed as well.[262] This situation is fully consistent with the idea that this obligation not only comprises the prosecution and sanction of those responsible of international crimes, but also of serious violations of human rights like torture, extrajudicial killings, or forced disappearances, even when they are not committed as part of a systematic or generalized attack, or within the context of an armed conflict.[263] Certainly, a comprehensive and coherent system against impunity and much more protective with the rights of the victims,

[260] Sentencia TP-SA- AM-168, Sección de Apelación (SA) del Tribunal para la Paz - Colombia, 2020. PP. 43-44.
[261] There is also a specific list of crimes that are subject to the legal benefits of amnesties. These are contained in articles 15, 16 and 23 of the Amnesty law 1820 of 2016.
[262] Namely: the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention for the Protection of All Persons from Enforced Disappearance, all of them ratified by Colombia.
[263] Rodrigo Uprimny, Luz María Sánchez Duque and Nelson Camilo Sánchez León, *Justicia para la paz: crímenes atroces, derecho a la justicia y paz negociada* (Primera edición, Dejusticia 2014). P. 40-41.

which from the legal point of view has done a large effort to follow the Rome Statute and ICL standards, even with a furthered and more progressive legislation than in other transitional contexts such as South Africa or East Europe.[264]

Lastly, to summarise the scope of jurisdiction of this transitional court, it must be noted that it is also expressly stated in its statute that the applicable law for its judgements is national criminal law, ICL, IHL, and ILHR.[265] Situation that completely resonates with all the above explained in terms of crimes implying serious violations of HR and serious infringements of IHL, to be investigated, prosecuted and sanctioned by the SJP.

5.4. The SJP and the Rome Statute

5.4.1. Transitional Justice: The System to Comply with the Rome Statute in Colombia

The interconnection between the ICC and this domestic transitional system has been of special interest in Colombia since the opening of the preliminary examination. In this context, the existence of an armed conflict of protracted duration, the presence of different illegal armed groups around the territory, and abuses and transgressions committed by the national armed forces in a context of intense violence, are factors that explain why Colombia has been subjected to monitoring by different supranational instances of human rights during the last thirty years.[266] This was precisely the type of violations that historically lead to the creation of the international criminal jurisdiction of the ICC.

The Rome Statute, as explained, in its article 5 enumerates the core crimes of global concern. In Colombia, and particularly with the presence of a non-international armed conflict, the conditions were such that the potential perpetration of these crimes was plausible. In this view, having a direct reference to the Statute, and the clear mandate to apply international criminal law in its decisions, the SJP was mandated with the duty of legally determining the existence of all those conducts contained in article 6: genocide; article 7: crimes against humanity; and article 8: war crimes. That legal evaluation must be based on the domestic criminal code

[264] Ambos, Cortés Rodas and Zuluaga (n 97). PP. 135 - 142.
[265] Ley Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz, Art. 23; Acto Legislativo 01 de 2017 - Por medio del cual se crea un título de disposiciones transitorias de la Constitución para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones. Art. 5.
[266] Uprimny, Sánchez Duque and Sánchez León (n 263). P. 22.

(National Law 599 of 2000), norms of ILHR, IHL and ICL, as stated by article 5 of the legislative act 01 of 2017. The highest chamber, the Tribunal for Peace within this transitional court, has also endorsed this position by stating that the SJP, being not only a sanctioning judicial authority but also one providing no punitive special treatments, when providing an amnesty in a case is mandated to follow a standard comprising an harmonic interpretation of IHL, ICL, ILHR, and the national criminal code in order to authorize or deny such measure.[267]

This close relationship of the transitional system with ICL is founded on the fact that the Colombian state acquired the obligation to exercise jurisdiction over concerned international crimes, when it signed the Rome Statute and subsequently ratified it by means of the national Law 742 of 2002, duly and legally assessed by the Colombian Constitutional Court with the sentence C-578 of the same year. Furthermore, the country's behaviour has been continually and consistently supportive of this international court with the adoption of the Agreement on the Privileges and Immunities, and the Rules of Procedure and Evidence of the ICC by means of national laws 1180 of 2007, and 1268 of 2008, respectively. This situation evidently reflects the commitment and positive posture of the state towards the current international system of criminal law.

In this perspective, it seems reasonable to infer that in the incorporation of the Rome Statute, the Colombian state has not overlooked its binding legal force, and quite on the contrary, has been proactive in regard to its implementation and enforcement:

> The Colombian case study offers some insight into the way national authorities 'domesticate' ICL, (…) Colombia's legal system has been praised for incorporating ICL standards, as if diffusion was an end in and of itself. (…) Internationalists who promote ICL, sponsor the direct application of the Rome Statute in national jurisdictions and advocate for the sprouting of ICC-like chambers in various national jurisdictions applaud Colombia's efforts.[268]

Neither has been the case for the current situation of the Peace Agreements and the SJP model, which as examined, they have been largely contemplated and edified under the auspices of the existent international legal order, particularly in terms of ICL:

> Given the special features of the negotiations and the strong influence of international law, it is fair to say that for the first time in Colombia international standards have been taken into account in the most comprehensive way possible, not only regarding the criminal prosecution of the most

[267] Sentencia TP-SA-AM-203, Sección de Apelación (SA) del Tribunal para la Paz - Colombia, 2020. Para. 41.
[268] Michael Reed-Hurtado, 'International Criminal Law's Incongruity in Colombia: Why Core Crime Prosecution in National Jurisdictions Should Be Included in Analyses of Transnational Criminal Law' (2015) Vol. 6 Transnational Legal Theory. P. 175.

serious and representative crimes and the most responsible perpetrators, but also regarding the amnesty model which fully complies with international law.[269]

5.4.2. The Endorsement of the ICC's Prosecutor to the Transitional Domestic System

On the side of the ICC, the Office of the Prosecutor has been the entity in constant interaction with the Colombian state. As showed in the first chapter, since the preliminary examination opened in 2004 and where the OTP came to the conclusion in 2012 through its interim report that in Colombia there was a "reasonable basis to believe that crimes against humanity and war crimes have been committed within the context of the situation.",[270] a protracted relationship for regular assessments was sealed for the following years. A relation that later evolved and entered into a new phase with the closing of the preliminary examination in 2021, as a result of the satisfactory activities deployed by the Colombian authorities in the view of Prosecutor.[271]

The reasons behind this decision were first given in the referred cooperation agreement of 2021. This instrument, which officially concluded the preliminary examination, was mainly inspired by the principle of complementarity to encourage genuine domestic judicial proceedings. Arrangement devised for the forthcoming process of cooperative relationship between Colombia and the OTP for supporting these proceedings, and resulting from the proved ability and willingness of Colombia to genuinely prosecute the concerning crimes. Furthermore, it was considered by the Prosecutor that there should be a limit on the duration and scope of these examinations, and consequently, it was time and already possible to come to a conclusion given the developments in the domestic procedures.[272]

In this context, the posture of the ICC through the OTP has been a monitoring and supportive relationship with the Colombian institutions in order to encourage proceedings in light of complementarity, rather than being restrictive and intrusive. Even at a very early stage did the former ICC Prosecutor, Fatou Bensouda, express her endorsement of the premature version of the transitional system in Colombia by stating that: "with satisfaction, that the final text of the peace agreement excludes amnesties and pardons for crimes against humanity and war crimes

[269] Kai Ambos and Stefan Peters (eds), *Transitional Justice in Colombia: The Special Jurisdiction for Peace* (Nomos Verlagsgesellschaft mbH & Co KG 2022) PP. 79-80.
[270] The Office of the Prosecutor (OTP), 'Situation in Colombia - Interim Report' (n 8). Para. 152.
[271] The Office of the Prosecutor (OTP), 'Report on Preliminary Examination Activities' (n 58). Paras. 152-154.
[272] The Office of the Prosecutor (OTP), 'Situation in Colombia - Benchmarking Consultation' (2021).

under the Rome Statute."[273] This happened before the adoption and effective implementation of the system, which evidently cannot suggest a reasonable and convincing argument. However, it was a first glance to the sustained and continued encouragement that the OTP has been giving to the Colombian authorities, and the SJP in particular.

In the same vein, former Deputy Prosecutor James Stewart, expressly supported in 2018 the Colombian authorities' efforts by endorsing on behalf of the institution "the peace process and the implementation of sound transitional justice measures in Colombia."[274] Nonetheless, he also recognized that the SJP is holding a pivotal mandate in terms of ensuring prosecution of the most serious crimes in a genuine way that complies with the Rome Statute. Moreover, he concludes that: "The approach Colombia has taken to ensure accountability is innovative, complex and ambitious, and it must be sustained."[275] This was a more recent pronunciation regarding the SJP, however, still very early since that same year the activities of the SJP were just beginning.

With this in mind, it seems fair to suggest that the OTP has largely taken a positive stance towards the Colombian national institutions, mainly represented by the SJP. This is the case despite the concerns raised by the OTP in its 2012 Interim report, and the subsequent heated debate,[276] which focused primarily on additional crosscutting matters regarding alternative sentences, case prioritization, and command responsibility.

As a result, the SJP, as part of the process of inter-institutional interaction with the ICC, has not been external at all to the Rome Statute's regulations in terms of ICL compliance. Moreover, it was precisely the Statute's crimes adoption and regulation as the basis of this domestic transitional model, what in principle may have determined the OTP's decision not to intervene: "By constructing two categories of crimes, political crimes and Rome Statue crimes, and by ensuring that the crimes falling under the Rome Statute were excluded from amnesties or pardons, ICC admissibility was prevented."[277]

[273] The Office of the Prosecutor (OTP), 'Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Peace Negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army' (2016)
[274] Mr. James Stewart Deputy Prosecutor of the International Criminal Court, 'The Role of the ICC in the Transitional Justice Process in Colombia' (2018) P. 21.
[275] ibid. P. 21.
[276] See: René Urueña, 'Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003–2017' (2017) Vol. 111 American Journal of International Law.
[277] Björkdahl and Warvsten (n 14). P. 651.

Having said all this, the arguments put forward by the current ICC Prosecutor Mr. Karim A. A. Khan, when closing the preliminary investigation in 2021 in Colombia were allegedly based on admissibility considerations. This is expressed in the OTP's recent response to the organizations FIDH and CAJAR requests[278] before the Pre Trial Chamber to review the decision to close the examination.[279] Therein, it is explained that pursuant to the Cooperation agreement, the OTP's determination was that: "as a result of the recent progress that had been made before the competent domestic jurisdictions, the Colombian national authorities could not be assessed to be inactive, or otherwise unwilling or unable to genuinely investigate and prosecute crimes under the Rome Statute."[280] A conclusion reached pursuant to the issues of admissibility already referred in art. 17 of the Statute and the principle of complementarity.[281]

5.4.3. Complementarity in Colombia

An assessment coming from art. 53(1)(a)-(c) of the Statute which is the legal framework for a preliminary examination,[282] must determine "whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been, or is being, committed."[283] (Rule 49 of the Rules of Procedure and Evidence of the International Criminal Court). This determination, as presented before, was reached in 2012 with the OTP Interim report of Colombia.

Thereafter, the following step, that is, the evaluation of the potential cases according to article 53(1)(b) and in terms of admissibility of article 17, will require an assessment of complementarity (subparagraphs 1 (a)-(c)) and gravity (subparagraph 1 (d)).[284] In this connection, the complementarity assessment will firstly imply determining according to subparagraph 1 of art. 17: "whether genuine investigations and prosecutions have been or are being conducted in the State concerned in respect of the case(s) identified by the Office."[285] Subsequently, and recalling Mr. James Stewart's intervention in 2018, when referring to the

[278] On the 27th April 2021, the International Federation for Human Rights (FIDH) and the Colectivo de Abogados José Alvear Restrepo (CAJAR), submitted a request to the ICC for the review of the decision of the Prosecutor to close the preliminary examination in respect to potential crimes falling under the jurisdiction of the Court and committed in Colombia. See: https://www.fidh.org/en/region/americas/colombia/colombia-international-criminal-court-no-investigate-grave-crimes
[279] Request under regulation 46(3) of regulations of the Court - Prosecution response to FIDH and CAJAR requests ICC-RoC46(3)-01/22-3 and ICC-RoC46(3)-01/22-1-Red. Pre-Trial Chamber, 6 June 2022.
[280] ibid. Para. 1.
[281] ibid. Paras. 9-13.
[282] The Office of the Prosecutor (OTP), 'Policy Paper on Preliminary Examinations' (n 39). Para. 5.
[283] ibid. Para. 36.
[284] ibid. Para. 42.
[285] ibid. Para. 46.

criteria of genuineness extracted from art. 17(2), these will render a case inadmissible before the ICC when:

> Under the Rome Statute, genuine national proceedings occur where the proceedings:
>
> - are not undertaken merely to shield persons concerned from criminal responsibility;
> - do not suffer from an unjustified delay that is inconsistent with an intent to bring the persons to justice; and
> - are conducted independently and impartially in a way that is consistent with the intent to bring the persons to justice.[286]

Lastly, in regard to the gravity assessment, generally speaking the aspects to be studied are: the scale, nature, manner of commission of the crimes, and their impact, pursuant to regulation 29(2) of the Regulations of the Office of the Prosecutor.[287]

In this context, art. 17 of the Statute containing the admissibility test of the cases under consideration appears as the primary point of reference, particularly in domestic cases of transitional justice, because as explained by Professor Kai Ambos: "The provision tries to strike an adequate balance between the states' sovereign exercise of (criminal) jurisdiction and the international community's interest in preventing impunity for international core crimes by according prevalence to the State Parties if they are willing and able to investigate and prosecute the international core crimes."[288]

Consequently, according to Ambos in terms of art. 17 in the case of transitional systems using exemption measures like amnesties, these determinations have to be asserted based on 3 concrete criteria: the requirement of existing investigations, reached decisions "not to prosecute", and such decisions not resulting from unwillingness or inability.[289] In this view, it must be noted that in these settings, the conditions must be carefully taken into account, since: "if one recognizes the right to a peaceful transition it would be contradictory to argue that the unwillingness to jeopardize this transition demonstrates unwillingness in the sense of art. 17."[290] Ambos also identifies that there are different scenarios (blanket self-amnesty; conditional amnesty with a TRC; conditional amnesty without a TRC; measures not amounting to full exemptions; and expost exemptions, in particular pardons)[291] depending on the approach taken to these domestic legal benefits. Being the situation of Colombia, a model tentatively

[286] Mr. James Stewart Deputy Prosecutor of the International Criminal Court (n 117). Para. 76.
[287] The Office of the Prosecutor (OTP), 'Policy Paper on Preliminary Examinations' (n 39). Para. 61.
[288] Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice* (Springer Berlin Heidelberg 2009) Para. 37.
[289] ibid. Para. 39.
[290] ibid. Para. 43.
[291] ibid. Paras. 44-49.

resembling to a scenario of conditional amnesties with a Truth and Reconciliation Commissions.

Thus, following the referred criteria, in the specific context of Colombia by replacing the role of the TRC in terms of investigation and prosecution by the SJP, an actual judicial organ, it can be asserted that art. 17 (1) is being accomplished. Concerning the capacity to decide not to prosecute or to provide amnesties, which is also the case of the SJP's attributions (National Amnesty Law 1820 of 2016), the second requirement is fulfilled too, according to what Ambos suggests for such faculties: "be it that the crimes committed by the person concerned are too serious, be it that his/her performance before the Commission and in front of the victims is not considered satisfactory or that for any other reasonable and independent assessment he/she does not deserve the exemption measure"[292] (Amnesty Law and Statute Law 1957 of 2019). Lastly, concerning the unwillingness or inability, the circumstances must be contextually examined in each individual case under other conditions according to Ambos,[293] but in general it will be a factual assessment substantially determined by the dispositions contained in art. 17 (2) and (3) and pursuant to certain indicia or factors evaluated by the OTP.[294] Factual analysis that largely escapes the scope of this investigation.

Here it is important to observe the notion of conditional amnesties as a mechanism that "does not automatically exempt from punishment for acts committed during a certain period of time but makes the benefit of an amnesty conditional on certain acts or concessions by the benefited person(s)". These acts, following Professor Ambos, will be tied to core justice elements such as the rights of the victims (Truth, responsibility acknowledgment, no repetition), aiming to contribute to reconciliation and to establish some *form of accountability*, not necessarily criminal but by the use of alternative mechanisms.[295] This is particularly the case within the Final Peace Agreements, regulating a system of ordinary, alternative and proper sanctions, all of them, serving a duty to undertake reparations for victims with guarantees of non-recurrence.[296]

[292] ibid. Para 46.
[293] In the same text, Ambos suggests a proportionality test (para. 19 et seq.), the criteria for conditional amnesties (para. 28) and for an effective TRC (para. 16).
[294] The Office of the Prosecutor (OTP), 'Informal Expert Paper: The Principle of Complementarity in Practice' (n 155). P. 28.
[295] Ambos (n 288). Para. 30.
[296] Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace. P. 182.

Similarly, based on all the aforementioned in the context of amnesties under the ICC's scope, the analysis of Professor Carsten Stahn results illustrative when it comes to a decision of the Prosecutor not to initiate an investigation or prosecution:

> Article 17(1)(a) and (b) requires an investigation, but it does not expressly state that it must be a 'criminal investigation'. The Prosecutor might therefore find that a conditional amnesty with a combined truth and reconciliation procedure satisfies the requirement of an investigation by a state under Article 17(1)(a), which would exclude the possibility of concomitant ICC proceedings[297]

Furthermore, with regard to the operation of amnesties or pardons for instance, Professor Stahn puts forward some guidelines that can be applied by the ICC when addressing these sorts of scenarios. First, the Court has judicial autonomy to decide whether they are permissible under the Statute. Second, no criminal exemptions can be granted to crimes under the jurisdiction of the Court. Third, prosecution can be limited to the most serious crimes and most responsible perpetrators. Lastly, these mechanisms should only be permitted in exceptional cases where there are conditions accompanied by other alternative forms of justice.[298]

In this vein, such a point of view would be fully consistent with the purposes of the transitional system in Colombia. Given that this framework is aimed to be comprehensive and emphasize in cross cutting and alternative measures like truth, reparations, and no repetition, it can be assumed that much more than just retributive justice, it is rather intended with additional elements, a focus extended to more restorative aspects. A different approach from retribution and deterrence objectives of the ICC,[299] which does not relies exclusively on punitive measures. Situation that under the Rome Statute can be admissible as stated by former Deputy Prosecutor Stewart: "Effective penal sanctions may take different forms, as long as they serve appropriate sentencing objectives of retribution, rehabilitation, restoration and deterrence."[300]

A similar view when it comes to the use of more comprehensive sanctions like those devised in the Peace Agreements of Colombia, which encompass different ends from the traditional conception of criminal retribution, is shared by Paul Seils, former Head of Situational Analysis in the OTP: "Alternative measures that include financial penalties, asset seizure, temporary exclusion from political office, and community service orders may all go some way to meeting

[297] Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court' (2005) Vol. 3 Journal of International Criminal Justice. P. 697.
[298] Stahn (n 297).
[299] International Criminal Court, 'Prosecutor v. Germain Katanga, Trial Chamber, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484-TENG'. Paras. 37-38.
[300] Mr. James Stewart Deputy Prosecutor of the International Criminal Court (n 117).

the goals of punishment."[301] This idea is even more appealing if it is taken into account the fact that the Statute allows flexibility in terms of domestic sentencing regimes, since no specific dispositions regulate this matter.

Furthermore, adopting a system based strictly upon retributive punishments would undoubtedly undermine Colombia's values and aspirations for peace, where due to the inherent and exceptional nature of processes of transitional justice the use of different alternatives to traditional justice are intended. Thus, denying the possibility of alternative sanctions would not just be problematic from the perspective of the Colombian transitional system, but also from the purposes of complementarity that was precisely designed for the contrary:

> The *travaux préparatoires* and Article 80 of the Rome Statute stipulate that the ICC's penalties regime was not meant to be a standard setting for national jurisdictions, and that under the Statute states have deference in determining the sanctions for international crimes. The principle of complementarity was designed to respect the principles and values at the core of national criminal justice systems and, thus, their penalty regimes — including those systems that are less punitive than the ICC Statute.[302]

In this regard, despite the existing tensions between the jurisdictions of the ICC and the Colombian transitional system, and the notable influence and pressure exercised by the former over the latter, the result was apparently satisfactory in terms of implementing a transitional justice model compliant with ICL standards. A hybrid and an exceptional scheme detached from the traditional paradigm of criminal law, in which the Rome Statute is well founded:

> The Colombian judicial system has so far been able to counterbalance the ICC's requirements, firmly holding on to the broad, victim-centred transitional justice approach that combines reparative justice with aspects of retributive justice for crimes under the jurisdiction of the ICC.
>
> The outcome of the jurisdictional frictions produced a hybrid complementarity illustrated by Colombia's assertion of jurisdictional sovereignty in shaping the understanding of justice and constructing an alternative sentencing regime, which created a feedback loop nudging the ICC to change its position.[303]

Similarly, Professor Ambos, when providing conclusions after an analysis of this transitional normative framework, recognizes that it is a sophisticated and novel system in terms of the prohibition of blanket amnesties according to ICL standards, and despite some minor inconsistencies with international law.[304] Instead, conditional amnesties expressly excluding

[301] Paul Seils, 'Squaring Colombia's Circle The Objectives of Punishment and the Pursuit of Peace', (International Center for Transitional Justice, 2016). P. 1.
[302] Beatriz E. Mayans-Hermida and Barbora Holá, 'Balancing "the International" and "the Domestic"' (2021) Vol. 18 Journal of International Criminal Justice. P. 5.
[303] Björkdahl and Warvsten (n 14). P. 653.
[304] Kai Ambos, 'Transitional Justice in Colombia: The Amnesty Law 1820 of 2016 and the International Legal Framework' in Jorge Luis Fabra Zamora, Andres Molina Ochoa and Nancy C Doubleday (eds), *The Colombian Peace Agreement: A Multidisciplinary Assessment* (1st edn, Routledge 2021).

genocide, war crimes and crimes against humanity, were used to suffice demands of truth, accountability recognition and regret, in order to effectively contribute to reconciliation. Moreover, Ambos suggest that this legal framework went even further by adopting a wider focus not limited only to the general core crimes, but similarly included other alike serious conducts such as enforced disappearances or sexual offenses.[305]

Accordingly, pursuant to the latter discussed scenario, and with the available evidence and facts at the time to evaluate as far as possible the situation of Colombia, ICC Prosecutor Karim A. A. Khan determined that it was not admissible for investigation, by stating: "Following a thorough assessment, the Prosecutor is satisfied that complementarity is working today in Colombia."[306] In this sense, after the conducted evaluation the OTP justified such decision, and explained that had to came to the conclusion that: "on the basis of facts as they existed, the national authorities did not appear inactive or otherwise unwilling or unable genuinely to carry out proceedings relevant to the admissibility assessment."[307]

The Prosecutor hence, opted for an approach founded on complementarity prioritizing national proceedings, which in this case, were being mainly carried out and represented by the SJP's activities initiated in 2018 towards those potential cases of special concern and under examination by the Office.[308] This resolution could also be related to the notion of what Professor Kevin Jon Heller has referred to as 'radical complementarity'. The general idea of rendering a case inadmissible before the ICC as long as genuine efforts to bring suspects to justice are being undertaken, regardless of the conducts investigated or the prosecutorial strategies pursued by the state.[309] A situation that, as viewed, has been explicitly referred to be the case by the OTP in the Colombian context.

5.4.4. The Positive Side of Complementarity with the Cooperation Agreement

From the previous approach, it is clear the relevance and role that complementarity has played in assessing the compatibility of a domestic transitional system in respect to those obligations emanated from the Rome Statute. In this sense, admitting the possibility under the Statute of

[305] Ambos, Cortés Rodas and Zuluaga (n 97). P. 150.
[306] The Office of the Prosecutor (OTP), 'ICC Prosecutor, Mr Karim A. A. Khan QC, Concludes the Preliminary Examination of the Situation in Colombia with a Cooperation Agreement with the Government Charting the next Stage in Support of Domestic Efforts to Advance Transitional Justice' (2021)
[307] Request under regulation 46(3) of regulations of the Court - Prosecution response to FIDH and CAJAR requests ICC-RoC46(3)-01/22-3 and ICC-RoC46(3)-01/22-1-Red. Para. 11.
[308] According to the OTP annual reports these cases were: the promotion and expansion of paramilitary groups; forced displacement; sexual crimes; and false positive cases.
[309] See: Kevin Jon Heller, 'Radical Complementarity' (2016) Vol. 14 Journal of International Criminal Justice.

alternative models comprising different national values and ideals of what justice can constitute in certain circumstances, is seemingly not unreasonable at all. However, regarding positive complementarity, this position can be taken even further when referring to the states' obligation to exercise its criminal jurisdiction over international crimes, and the OTP's duty to encourage this prosecutorial activity.

In this sense, in the context of preliminary examinations where the principle is used for national authorities and the ICC to function together, the former bear the primary duty to prevent and punish crimes, whereas the latter intervenes as an exception.[310] Nevertheless, the OTP might engage in a series of different actions at this stage to encourage genuine national proceedings.[311] Furthermore, a process of continued interrelation preserves a guarantee of reconsideration. Thus, if the OTP based on new appearing elements finds that the termination of the assessment must be revoked, it is allowed to proceed in that manner. Certainly, a favourable decision can result after an examination implying its closure, nonetheless: "This does not preclude the Office from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence."[312]

This situation is clearly evidenced in the agreement on cooperation signed by the ICC Prosecutor Khan's Office and the Colombian government. Apart from the varied array of acts envisaged to continue the relationship of cooperation, there is also a clause permitting the reopening of the examination, provided that no progress and success of that agreed is resulting, but instead quite the contrary. In this regard, as previously highlighted and according to the agreement the OTP "may reconsider its assessment of complementarity in light of any significant change in circumstances".[313]

All in all, these cooperation agreements are an expression of the positive side of complementarity. Therefore, common beneficial efforts as a result of these arrangements is expected. In this perspective, more than just simply confirm the compliance of national proceedings with the Rome Statute, seeking their realization and success by cooperation is

[310] The Office of the Prosecutor (OTP), 'Policy Paper on Preliminary Examinations' (n 39). Para. 100.
[311] According to paragraph 102 of the Policy Paper on Preliminary Examinations, the Office can: "report on its monitoring activities, send in-country missions, request information on proceedings, hold consultations with national authorities as well as with intergovernmental and non-governmental organisations, participate in awareness-raising activities on the ICC, exchange lessons learned and best practices to support domestic investigative and prosecutorial strategies, and assist relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures."
[312] The Office of the Prosecutor (OTP), 'Policy Paper on Preliminary Examinations' (n 39). Para. 91.
[313] The Office of the Prosecutor (OTP) and The Government of Colombia (n 9). Art. 6.

intended far beyond. As part of a healthy relationship with the Court, it is found that cooperation is supported by Parts IX and X of the Statute, from where it is inferred that these instruments are aimed to respect and guarantee the effective implementation and correct functioning of domestic judicial procedures:

> The existence of cooperation agreements increases legal certainty both for States Parties and for the Court. Without prejudice to Rome Statute provisions, they acknowledge where States Parties retain specific decision-making power, and establish clear procedures about how that power is exercised in relation to their obligations to the Court, including clear channels for communication on specific issues.
>
> They provide a vehicle for States to share knowledge, expertise, and good practices, thus contributing to capacity-building efforts and related initiatives both at the ICC and at the national level. As a result, an increased mutual understanding of the ICC's operational needs and the States' own internal organization and legal regime is achieved.
>
> Finally, the conclusion of cooperation agreements is a concrete demonstration of the States Parties' commitment to the Court and its mandate, and encourages other States Parties to make similar commitments, strengthening the legal and logistical network supporting successful investigations and prosecutions, and related Court activities.[314]

Consequently, the case of Colombia does not seem to be the exception. As previously illustrated there has been a relation of permanent and tuned interplay between with the OTP, leading to the closing of the preliminary examination on the one hand, and to the progressive shaping and development of the national transitional system of justice on the other. Thus, this prominent activity coming from the ICC represented by the OTP, the subsequent structuring influence in the building process since the beginning of the peace talks, and thereafter, the resulting SJP with its legal framework, could be categorized as an example of a whole process of positive complementarity in the Rome Statute: "In addition to legal communications in the form of statements and reports, the ICC provided limited support, mostly in terms of expertise and outreach, for peace negotiations between the government and FARC guerrilla forces. This type of activity falls under the umbrella of 'positive complementarity'."[315]

Moreover, important to note is that this novel approach of cooperation between the ICC and a transitional justice framework at the domestic level by means of a relation founded in positive complementarity, seems to be serving and contributing not only at the local stage but also at the international one. By engaging in this unexplored and new setting, domestic justice benefits from receiving support and endorsement when trying to respect and comply with international criminal standards, whilst these latter continue further developing and taking more shape to

[314] International Criminal Court, 'Cooperation Agreements'. P. 5.
[315] Marina Aksenova, 'The ICC Involvement in Colombia: Walking the Fine Line Between Peace and Justice', in Morten Bergsmo and Carsten Stahn (eds), Quality Control in Preliminary Examination: Volume 1, (Torkel Opsahl Academic EPublisher, Brussels, 2018). P. 264.

better conciliate with local models of justice. This appears to be the case with the current system in Colombia: "The dialogical engagement of the ICC in Colombia proved generally beneficial for the advancement of the international criminal justice principles and shaping the transitional justice landscape in Colombia."[316]

5.5. Positive Complementarity Post-Colombia?

5.5.1. Transitional Justice Under the Rome Statute: A New Paradigm of Justice Before the ICC

The way in which the ICC dealt with Colombia is interesting because it proposed a completely new way to approach complementarity under the Rome Statute. Having studied the suitability of this domestic legal system at least in normative terms with the concerned international framework, it should now be discussed more generally what the current relationship is between transitional justice and the Rome Statute in this context. To this end, finding a point of convergence that can potentially align with ICL standards, whilst allowing the correct functioning of a tailored transitional system at the national stage to properly address local necessities, seems like a challenging task given the existent dichotomy of their own objectives. Nevertheless, as seen with the examination of Colombia, under the principle of complementarity an option for successful conciliation starts to shed some light in terms of how the interaction between two different settings, generally approaching and regulating the same serious and massive atrocities of concern for the international community, can be duly carried out.

5.5.2. Complementarity and Pluralism: Alternative Forms of Justice

Alternative ways to try to achieve justice within a society can vary broadly according to its inherent cultural and historical traits. Accordingly, different perspectives of it can be illustrated, for example with cases of customary local procedures like *Shalish* in Bangladesh, *Gacaca* in Rwanda, *Nahe Biti Boot* in East Timor, *Mato Oput* in Uganda, amongst others.[317] These indigenous and traditional mechanisms significantly differ from western conception of justice emphasising criminal retribution, and instead tend to focus more on different issues such as

[316] ibid. P. 267.
[317] Gregory S Gordon, 'Complementarity and Alternative Forms of Justice: A New Test for ICC Admissibility' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011) PP. 753-765.

reconciliation and social healing, by combining additional aspects like truth-telling, amnesties, reparations and apologies.[318]

If it is taken into account the fact that these ideals of justice are just some of the models utilized by a few of national and local communities all over the world and priority is pretended for states parties under the Statute and the principle of complementarity, it must be considered the possibility of domestic proceedings attached or at least relating to these sorts of alternative mechanisms. Transitional justice properly captures this alternativity and embraces many other possible ways to address serious crimes such as truth commissions, reparations, vetting, amnesties, etc. In this regard, posing the idea of a transitional system comprising alternative responses to these offenses as a way to satisfy justice demands and the realization of complementarity, would seem reasonable if certain criteria are met as in the case of Colombia.

Regarding the operation of amnesties or pardons, some guidelines have already been explained previously with the situation of Colombia, which can be applied by the ICC when addressing these sorts of scenarios. Concerning more specifically the use of alternative mechanisms with restorative traits, and commonly used as non-judicial processes in transitional contexts, there should be asked the question whether these tools are altogether intended to serve the purposes of the transition, and whether the whole set of measures comply with a certain degree of judicialization under the principle of complementarity.[319] However, having the possibility of making use of them can actually open the way to provide a much more complete and integral response:

> Criminal process, whether domestic or international, is at best a partial response to mass violations of human rights. The ICC has limited resources and accordingly pursues only those most responsible. The Rome Statute also acknowledges that interests of justice, political considerations, and concerns about security, as well as individual criminal liability, matter in responses to gross violations of human rights. Precisely these shortfalls from an absolute duty to prosecute open space for other responses, including alternative justice mechanisms.[320]

Following this idea and as previously suggested, these mechanisms combined in the words of art. 17 of the Statute could be acceptable as it is not explicitly required proceedings of criminal type. Nevertheless, according to Gregory Gordon the provision does establish the existence of a formal investigation as a minimum requirement,[321] as it is the case with the SJP in Colombia. On the other hand, the adopted tools should constitute a holistic approach to the transitional

[318] ibid. P. 753.
[319] Gordon (n 316).
[320] Minow (n 111). PP. 40-41.
[321] Gordon (n 316). P. 786.

process itself. As such, a comprehensive framework aimed to respond to the inherent demands of the transition, and in particular those of the victims, should also be valued according to "its capacity to bring short and long-term peace and domestic stability to the region for which it is proposed."[322] Gordon also suggests that the contextual circumstances surrounding the creation of the system must be considered to assess all the set of justice mechanisms under complementarity.[323] However, in light of the Rome Statute such analysis and factual examination escapes the discussion of this work.

Additionally, adopting alternative mechanisms based on different approaches of justice such as restorative justice can similarly aim for objectives strived for with ordinary punitive proceedings in the ICC. Restorative justice for example, pursues accountability and prevention although this is done from a different perspective. In this regard, by exposing those responsible in public processes to rebuild the trust and the rule of law, similar outcomes are sought as in the Rome Statute: "Interpreting the complementarity requirement to advance deference to domestic action should include acknowledgement of and respect for domestic restorative justice initiatives if they—just like domestic prosecutions that fulfil the ICC's complementarity requirement— are genuine and meaningful efforts to pursue individual accountability, justice, and prevention of future harms."[324] As such, the ultimate goal to achieve should be to properly respond to mass atrocities and prevent them by making use of all tools at hand.

Another relevant aspect to take into account is the discussion of how complementarity in the Rome Statute should be adopted and implemented into domestic legal systems.[325] In this regard, there has been debate whether the legal frameworks of State Parties should be harmonized with this international one by mirroring it, or instead, whether it is enough that they exercise criminal jurisdiction according to their internal order and standards. In this context, in the former scenario for admissibility to happen under complementarity it is required "implementation of the substantive and procedural elements of the Rome Statute, reform of institutions and training of the criminal justice sector",[326] whereas the latter one proposes that states would only have to "exercise jurisdiction according to whatever laws they have in place

[322] ibid. P.792.
[323] ibid. PP.784-785
[324] Minow (n 111). P. 39.
[325] Frédéric Mégret, 'Too Much of a Good Thing?: Implementation and the Uses of Complementarity' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011)
[326] Hunter (n 5). P. 9.

at the time, without the need for updated or revised legislation but through 'equivalent' legal standards."[327]

In this context, the question in terms of operation of the complementarity principle is essential insofar as either way opted will ultimately determine its actual realization. By adopting a stringent view of implementation, it becomes more difficult for domestic legal systems to meet the necessary conditions under the Statute and be able to properly exercise their own jurisdiction. Thus, since the threshold for complementarity to work increases, the inevitable consequence is much less room for states to make use of or diversify their current local mechanisms of justice, if the ICC's standards are not correctly mirrored. This situation would undoubtably pose a threat to the possibility of appealing to alternative forms of justice under the Statute.

Following this idea, Professor Mégret indicates that such a position would imply a series of overreaches coming from the ICC when aiming to the adoption and enforcement of its legal framework. These could be regarded as an imposition of specific features of the Court: rendering discretionary traits in mandatory, requesting the implementation of not related issues to complementarity, amongst others.[328] As such, Mégret promptly raises a general concern in this regard: "the push to 'mirror' the Rome Statute domestically is part of a universalizing drive that overstates the homogenizing requirements of the struggle against impunity beyond and even in contradiction with complementarity."[329] This vision of mirroring the Statute would consequently undermine the first and foremost purpose of complementarity principle by precisely impeding its applicability in terms of prioritizing domestic legal systems currently trying to fight and prevent impunity. An inadmissible situation in terms of radical complementarity, where preference should be given regardless of the conduct investigated and the domestic prosecutorial strategy "as long as a state is making a genuine effort to bring a suspect to justice".[330]

In this sense, a more pluralistic view of criminal systems under this context could avoid this problem by capturing a larger spectrum of local jurisdictions engaged and compromised with the realization of justice. This perspective allows for a less problematic enaction of complementarity, by including alternative models of justice at the domestic level, and prevents

[327] ibid. P. 14.
[328] Mégret (n 325). PP. 368-375.
[329] ibid. P. 363.
[330] Heller (n 308). P. 640.

from imposing a selective, universalistic and centralized vision of criminal justice, particularly coming from western societies. Professor Minow rightly poses this idea: "If only Western-style prosecutions in criminal courts, generating prison sentences, deprive the ICC of jurisdiction, the principle of complementarity is susceptible to a postcolonial critique that the Rome Statute elevates the Global North's adversarial legal traditions over others."[331] Accordingly, there can be framed proposals to regard complementarity as means of global governance and cooperation of various actors operating towards the common goal of ending impunity.[332]

Following all these premises, it could be implied the case of Colombia proves to be an example of the potential functionality of the principle of complementarity in terms of inclusion and applicability of alternative forms of justice. Therefore, formally opening complementarity to this possibility would be a major achievement not only in terms of inclusiveness and respect for priority of domestic mechanisms under this principle, but also for the purposes of resolving the existing tensions of transitional justice and the ICC by allowing their integration and joint operation.

5.5.3. The Prosecutor as a Diplomat Representative for International Peace, Security and Human Rights in Transitional Contexts

In contexts of instability and social transitions, the Prosecutor possesses the major responsibility of involving the Court in sensitive and delicate matters having to do with the social and political governance of nations, regions and the whole globe. Thus, prosecutorial discretion must be carefully exercised, at risk of causing serious and irreversible damage in sensitive political settings. From this point of view, it has been suggested that the Prosecutor could be approached as a diplomat representing the Court and State Parties to the Rome Statute.

As a representative of this international institution, its discretionary faculty has to consider political and social aspects to address the tensions between peace and justice. Robert H. Mnookin outlines this position when referring to former Prosecutor Bensouda's role in these particular settings: "The prosecutor is a political actor embedded in international politics, a diplomat representing the interests of both the ICC and the party states and their citizens. (…)

[331] Minow (n 111). P. 17.
[332] Christoph Burchard, 'Complementarity as Global Governance' in Carsten Stahn and Mohamed M El Zeidy (eds), *The International Criminal Court and Complementarity* (1st edn, Cambridge University Press 2011)

She cannot ignore the tension between the pursuit of peace and the pursuit of justice but instead must diplomatically manage this tension."[333]

Following this view, the Prosecutor bears the utmost burden of diplomatically intervening to properly manage this discord. Where the use of traditional and ordinary criminal proceedings does not appear as the most suitable solution to achieve peace, and conversely, the employment of domestic, situational and more tailored mechanisms seems like the most appropriate way to prevent the prolongation of hostilities, the Prosecutor must proceed cautiously when considering an intervention. This discussion becomes particularly visible in the concrete case where granting amnesties is used for peace purposes and to discontinue the persistence of atrocities and massive violations:

> The mandate of the ICC as a 'security court', that is, to intervene in and deescalate an ongoing conflict, might warrant different if not contrary decisions to that of a pure criminal court. The mandate of the 'security court' is much more diplomatic and, thus, flexible. As is argued by some in the well-known 'peace v. justice' debate while it might not be in the 'interests of (criminal) justice' and therefore problematic from the 'criminal court' perspective, the granting of amnesties for necessity reasons might be in the 'interests of peace'.[334]

The discretionary power of the Prosecutor is consequently a key aspect to consider when determining the scope of involvement that the ICC can have with states, and particularly, in local transitional processes. Therefore, as previously explained, the position taken by the head of this prosecutorial entity is of utmost importance insofar as it will not only determine the interaction of this international institution with governments and the conditions, but it will also have repercussions on relevant interests at stake at the domestic level. Examples of this situation in the past are the different ICTY prosecutors' political and diplomatic approaches used when it came to the relationship and cooperation with the concerned states, to be able to address peace tensions and the prosecution of the atrocities occurred in the Balkans.[335] In this regard, given the convenient absence of express provisions in the Rome Statute pertaining to the role and limitations of the Prosecutor in the interests of peace, there can be a wide scope of discretion in terms of initiating and pursuing criminal proceedings in these scenarios.

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[333] Mnookin (n 96). PP. 70-71.
[334] Florian Jessberger and Julia Geneuss, 'The Many Faces of the International Criminal Court' (2012) 10 Journal of International Criminal Justice. P. 1094.
[335] See: Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford University Press 2004).

Complementarity on the other hand, can also serve the Prosecutor's determination not to intervene in order to prevent risking or hampering peace negotiations. As such, it is also possible for the OTP to manage tensions with the help of this principle as a policy:

> Creating a robust exception on the basis of complementarity creates incentives for states to more precisely tailor justice mechanisms to local needs. By proactively using complementarity, the prosecutor may encourage war- torn countries to take greater ownership of the peace process and pursue justice wherever possible. The purpose of complementarity was to preclude the prosecutor from meddling with domestic investigations and prosecutions.[336]

However, as already indicated certain aspects must be taken into account when allowing space for peace under these premises. Mnookin proposes some guidelines for the Prosecutor to consider when addressing difficult cases of tension in transitional contexts: never acknowledging the validity of unconditional blanket amnesty programs; not being party to a bargain where a particular leader escapes all punishment by laying down his arms or giving up power; using timing, including the delay of investigation or prosecution, to take into account considerations of peace; and proactively use complementarity to encourage the development of institutions of accountability.[337]

From this perspective, it can be concluded that the role of the Prosecutor of the ICC requires of a careful exercise reflected on its diplomatic capacity of adequately addressing the tension between peace and justice under complementarity. On the one hand, criminal prosecutions may result in the punishment and deterrence of heinous crimes during and after war. On the other hand, the same proceedings can undermine and aggravate the ongoing situations of intense violence.[338] In this connection, it will be the Prosecutor's duty to cautiously and concretely analyse these conditions in order to reach the determination of intervening or encouraging alternative domestic proceedings if that is the case: “Where wisdom suggests that the costs in terms of peace and reconciliation outweigh the benefits of immediate investigation and prosecution, the prosecutor has ample room to legitimately decline to pursue a crime. Through proactive complementarity and wise timing, the prosecutor can more productively engage with transitional states”.[339]

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[336] Mnookin (n 96). PP. 83-84.
[337] ibid. PP. 84-88.
[338] Mnookin points out the particular case of Libya, where arrest warrants against Gaddafi were issued by the Court without any particular effect on the course and intensity of the civil war, and even with the presence of some voices opting for a negotiated deal. Similarly, as examined in the present text the case of Uganda can be taken as an example of the implications that such measures can have on these critical scenarios of violence and massive atrocities.
[339] Mnookin (n 96). P. 90.

5.5.4. Positive Complementarity: Concluding Remarks

According to the discussion above, positive complementarity can be posed as a suitable mechanism to adequately capture and develop the use of alternative means anchored in the elements and principles of transitional justice. As such, under the context of alternative forms of justice allowed in the Statute, transitional systems adopted by states can be approached by the ICC not only by admission but also through encouragement and support.

This notion could not only alleviate the existent tensions between ICL and transitional justice, but it can simultaneously support and foster additional relevant aspects apart from criminal prosecutions, which are commonly encompassed and addressed by the latter. Truth, reparation or reconciliation, are just some of those alternative issues that could result directly implicated and benefited by the current proceedings of the Rome Statute that comprise them.[340] A more restorative approach that would not only dictate the rights to participation and reparation for victims, but also contribute to the reconstruction process of truth with their direct involvement, despite the possible limitations recognized in terms of practices of restorative justice under this system.[341]

The reading of the ICC as an open and more comprehensive system to achieve justice by means of alternative mechanisms can enable the inclusion of additional perspectives or components, and the overcoming of limitations in this context. From this view, this legal framework would seize under positive complementarity a relationship of mutual contribution in the ultimate goal of seeking the realization of justice, and preventing where possible, the commission of further crimes by realizing other important principles and values in scenarios of atrocities and massive violations. An appealing and ambitious view that poses the idea of the Court as an institution that far beyond its primary propose of criminal justice, can also serve as a developer paradigm for justice:

> The ICC uses the idea of 'positive complementarity' to help rebuilt and strengthen the domestic justice system by proactively providing technical assistance and support and encourage states to carry out their primary responsibility of investigating and prosecuting crimes and come to terms with their violent past. Having said that, however, at the same time it again becomes apparent that the ICC is much more than just a criminal court, but under the principle of positive complementarity the 'watchdog court' ICC in particular the Office of the Prosecutor turns into some kind of development aid institution.[342]

[340] The Statute references by means of different dispositions victim participation and reparations, particularly under article 68(3) and 75.
[341] Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice' (2017) Restorative Justice
[342] Jessberger and Geneuss (n 334). P. 1090.

Therefore, by opening the door to alternatives forms of justice, the ICC can widen the spectrum of cases that may fall under the principle of complementarity and its enaction, by encouraging and granting priority to domestic proceedings. Moreover, forging this jurisdictional relationship between both systems can result in convergence and cooperation in the persecution of justice. Transitional justice, then can find room for its implementation and purposes according to ICL standards, prioritizing in this manner, local and contextual needs out of the scope of traditional criminal justice. While ICL can ensure the fight against and prevention of impunity, it can also profit from the benefits of transitional justice in specific scenarios where a consideration of different elements to stop and prevent mass atrocities to finally achieve peace, is needed.

6. CONCLUSIONS

The preliminary examination regarding Colombia before the ICC offers a fruitful and ground-breaking example of complementarity under modern ICL, particularly under the Rome Statute. Since 2004 there has been a protracted review of the situation in the country by the OTP, where the initial examination thereof resulted in the determination of a reasonable basis to believe in the commission of serious crimes of international concern during the Colombian armed conflict. Nevertheless, in 2021 the Prosecutor concluded that Colombian authorities were indeed active and satisfactorily responding to the investigation and prosecution of these conducts. This decision was based on the idea of positive complementarity, as the chosen policy to endorse and encourage local proceedings rooted on a large and comprehensive system of transitional justice, agreed by the Colombian government and former armed group guerrilla FARC-EP.

In this context, a new paradigm of interplay between ICL and transitional justice was enacted before the ICC. A special case that directly confronted the visions of two different perspectives of justice. On the first side, criminal prosecution and retribution to fight and prevent impunity of those responsible of international crimes, and on the other side, a more comprehensive spectrum of values and exceptional measures aimed to widely fulfil all conditions to stop and prevent the same heinous acts. Two alternatives that clash insofar as they propose differed ways to address the same tragic events. A relevant grey area of jurisdiction before the Court, even more if it is taken into consideration the fact that this is not a unique situation given the worldwide rising and current existence of non-international armed conflicts.

Due to the evident overlapping of the two paradigms in their remit, and the risk for the prolongation of mass atrocities in the case of a strict adherence to a criminal justice based model, a new understanding of complementarity becomes not just convenient but also necessary to find some clarity and guidance when determining the specific roles and coordination in potential and similar coming cases to the ICC. Transitional justice has become a question of international relevance thanks to its wide application during the past century in different contexts from social instability to peace or democracy. As such, the Rome Statute should recognize its significance, and therefore, consider finding a proper manner to approach and work with this model that has been already globally applied in different settings such as

South Africa, Sierra Leone, Guatemala, Chile, Argentina, Spain, etc. (although some of them with clear and several caveats in terms of international standards nowadays).

Nevertheless, the ICC now has a means to address difficult cases where the success of a transitional process and the punishment of international crimes are in profound tension. Since complementarity for interaction with national systems can allow the Court to exercise its powers over States party, it is fair to reflect on the feasibility of them adopting transitional measures to address their own situations whilst an eye on the same matters is kept by the Court. As seen, there is a series of legal criteria that determine this interplay, comprising rules on jurisdiction, admissibility and discretion. The last aspect, discretion, implies a wide margin of action for the OTP for the purposes of enacting the operation of this international criminal system.

As noted, the Rome Statute has to some extent foreseen these controversial situations of potential tension, but it has at the same time omitted a very concrete regulation thereof. This so-called "creative ambiguity" has opened the door for interpretation, allowing flexible considerations in terms of legal domestic compliance with the supranational framework standards. Under these circumstances, transitional justice as an alternative way to respond to local demands for justice, peace and social transformation, appears a viable option also at disposal for complying with the international obligations of investigating and prosecuting the crimes of the Statute.

Moreover, complementarity turns out to be even more appealing when proposing a step further in considering cooperation of the different systems under the auspices of its positive side. This refers to a strategy focused more on the possibility of prioritizing domestic proceedings by support and encouragement of local institutions and national efforts aimed to address international crimes. As such, this perspective that has been devised and advanced by the OTP as a policy to approach potential situations under the Court's jurisdiction, can create a relationship between international and national levels in terms of joint work for strengthening states' capacity to prosecute, rather than merely legal compliance with the Statute.

The Colombian transitional system, established on the grounds of a special legal framework of different institutions, policies and measures, and tailored to address a wide range of diverse areas of concern for the sake of the social and political transition, is a great example of an alternative approach to justice. Emerged from the Peace Agreements reached with the FARC-

EP, the SJP contains a judicial apart in charge of fulfilling international duties against impunity under the Rome Statute, but simultaneously a focus to respond to local demands for justice.

The SJP has been explicitly designed to meet ICL standards, and more concretely those stipulated under complementarity pertaining to jurisdiction over core crimes and admissibility of article 17. As a result, by means of its subject matter jurisdiction and demonstrated genuine willingness to prevent impunity for international crimes (including conditional amnesties), has been able to this date to meet the necessary criteria for satisfactorily passing the complementarity test in a pioneering way. As noted by Professor Ambos, the devised scheme for the use of conditional amnesties, subjected to their prohibition in cases comprising these grave types of criminal offenses, goes even further to ICL's requirements by including same serious conducts committed in these scenarios, such as enforced disappearances and sexual crimes.[343] Therefore, the SJP today works under the approval and endorsement of the ICC, most notably coming from the decision taken by the Prosecutor Khan.

On this basis, it seems fair to suggest that with the Colombian preliminary examination before the ICC, a new paradigm of interaction between transitional justice and ICL has been settled by means of the realization of complementarity as the necessary mechanism to give priority to domestic proceedings. Local mechanisms fully rooted in alternative and transitional instruments devised for criminal prosecution. Thus, adopting a stringent and restrictive view towards alternative forms of justice like this, would not only close the door to a wide range of potential difficult situations before the ICC, and therefore, impede the ultimate goal of prioritizing and encouraging those domestic prosecution under complementarity, but it could also represent an unjust and authoritative imposition of western conception of justice. Completely outlawing local mechanisms would not be consistent with the due respect to national sovereignty that is pretended under the Statute, nor would it be convenient for addressing particular needs of each country. Moreover, this situation could even represent a threat their national interests for peace, democracy or reconciliation, by completely overlooking all of them in the sole interest of criminal justice realization. Most likely a vicious cycle scenario, given the facility for conflicted and violent settings to germinate and propitiate atrocities.

On the other hand, an approach aimed to pluralism and integration of alternative forms of justice and based on social and political considerations of international peace and security, is

[343] Ambos, Cortés Rodas and Zuluaga (n 97).

more likely to prevent serious tensions between transitions and criminal justice. Nonetheless, careful attention must be paid to ensure minimum standards that can guarantee a reasonable degree of investigation and prosecution, in order to avoid the risk of falling into the exact contrary Rome Statute's main purpose: impunity. As such, a mid-pathway further can be taken by adopting complementarity from its positive approach and resolving to this ground-breaking model of convergence and cooperation of systems

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