Friction in Transitional Justice Processes: The Colombian Judicial System and the ICC
Annika Björkdahl* and Louise Warvsten**

ABSTRACT
With the aim of understanding how the International Criminal Court (ICC) affects peace processes, this article examines the Colombian peace and justice processes through the lens of friction. It investigates frictional encounters between the Colombian judicial system and the ICC, in order to reveal the tensions in this relationship. First, we disaggregate the concept of friction and propose three different types of frictional encounters – conceptual, normative and jurisdictional – in transitional justice processes. Second, we investigate different responses to these frictional encounters, such as compliance, adaptation, co-option and resistance. Finally, we find that responses to frictions generate hybrid judicial outcomes, such as a hybrid, intersubjective understanding of justice, a hybrid sanctioning regime as well as hybrid complementarity. The article concludes that the ICC influenced the Colombian peace process, while the Colombian judicial system complied with the requirements of the ICC thereby demonstrating agency, flexibility and innovation and ensuring its judicial sovereignty.

KEYWORDS: Colombian judicial system, Colombian peace process, friction, International Criminal Court, transitional justice

INTRODUCTION
Colombia has been plagued by a complex and multifaceted violent conflict for nearly six decades. The conflict has stretched over generations, emerging and proliferating in various geographical, ethnical and cultural settings – consequently affecting wide spans of the Colombian population and resulting in millions of victims.¹ The multiple number of actors involved, the main being the Colombian Armed Forces, the Fuerzas Armadas Revolucionarias de Colombia (FARC), the Ejército de Liberación Nacional (ELN) and various paramilitary groups, has undeniably contributed to exacerbation of the intricacy of the conflict. The lengthy conflict between the FARC and the Colombian Government came to an end in November 2016, when the Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace was

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¹ Fernando Travési and Henry Rivera, ‘Political Crime, Amnesties, and Pardons,’ ICTJ, https://www.ictj.org/publication/columbia-political-crime-amnesties (accessed 25 May 2020); Fabio Andrés Díaz Pabón, ‘Transitional justice and the Colombian Peace Process,’ in Truth, Justice and Reconciliation in Colombia, ed. Fabio Andres Diaz Pabón (New York: Routledge, 2018).

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This comprehensive peace agreement is the product of the five-year-long Havana negotiations. It consists of six parts representing different focus areas – rural reform, political participation for FARC members, the ceasefire and decommissioning of weaponry, a solution to the illicit drugs problem, the agreement on victims and the implementation of these measures – reflecting both peacebuilding and transitional justice ambitions. The peace accord is part and parcel of the Colombian transition from conflict, a transition which has come to illustrate the complexity of building peace and doing justice in a globalized world where new and complex legal dilemmas have been brought to the fore as a result of the establishment of the International Criminal Court (ICC) in 2002. States which have ratified the Rome Statute of the International Criminal Court (Rome Statute) have found themselves bound by a new set of legal norms, affecting their judicial sovereignty and their flexibility in regard to how to respond to calls for justice in conflict-affected societies.

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. Increasingly applied in peacebuilding processes, transitional justice approaches have come to offer broader notions of justice than mere retributive ones – a development which might come to be challenged by the novel legal order promoted by the ICC.

The recent Colombian peace process has undeniably been affected by this new judicial reality, and the present article seeks to trace the frictional encounters between the ICC and the Colombian judicial system in the ongoing peace and justice processes in Colombia and also to conceptualize the hybrid outcomes of these encounters that have come to define the postconflict legal justice landscape. This article will focus on judicial aspects that were taken into consideration during the Colombian peace process, striving to expose the dynamics, frictions and tensions between the ICC and the Colombian judicial system and their subsequent outcomes. Through the lens of ‘friction’ we investigate how international norms and legal principles interact with norms and legal frameworks in domestic transitional contexts. Thus, this article addresses the question of how we are to understand the frictional encounters between the Colombian judicial system and the ICC during the Colombian peace process. In doing so, we advance the analytical framework of frictions by presenting three different types of frictional encounters: conceptual, normative and jurisdictional. Such disaggregation contributes to a more distinct and precise use of the concept of friction. Moreover, we advance the notion of an emergent hybrid judicial system to capture the outcomes of these frictional encounters in the Colombian transition towards peace and justice.

The Colombian peace process is an illustrative case, since it is one of the few contemporary peace processes that seeks to address both peace and justice simultaneously and is one that has taken place while the Rome Statute has been in force. The

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2 Hector Olasolo and Joel M.F. Ramirez Mendoza, ‘The Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition,’ *Journal of International Criminal Justice* 15(5) (2017): 1011–1047, 1012.
situation in Colombia is relatively unique and demonstrates a high level of complexity: the peace process is not the result of an international intervention; the state was bound by the Rome Statute during the process; and it is currently under preliminary examination by the Office of the Prosecutor (OTP) at the ICC. In order to empirically map and analyse the different frictional encounters between the international and the domestic we have collected and analysed legislative documents and publications issued by the actors involved, as well as drawing on secondary sources. The analysis of the international–domestic encounters suggests that conceptual friction emerged parallel with the initiation of the peace process, whilst normative friction became most evident once the process was underway, and jurisdictional friction became increasingly tangible once the normative framework had been established. Moreover, we find that an emergent hybrid judicial system is one outcome of the various responses to the frictional encounters in the transitional justice processes.

The article develops as follows: first we discuss the theoretical underpinnings pertaining to peace versus justice, international–domestic encounters as well as hybridity upon which the theoretical framework of friction rests. Subsequently, the theoretical framework is outlined and employed to deepen our analysis of the frictional encounters, responses and outcomes between the ICC and the Colombian judicial system in the Colombian peace process.

THE PERPETUAL DILEMMA OF PEACE VERSUS JUSTICE

The peace versus justice debate has presumed that a choice must be made between peace and justice at the time of peace negotiations, that searching for both peace and justice is too ambitious and that the best becomes the enemy of the good. The counter argument is that peace without justice is an unjust and unsustainable peace. In most peace negotiations, peace is prioritized at the expense of justice. The urgency of reaching an end to violent conflicts and the pragmatism that guides many peace negotiations are common reasons for why peace agreements may fail to address root causes, structural injustices and violations of international humanitarian law committed during the violent conflict. In some cases, doing justice has been regarded as a barrier to reaching a peace accord and building peace. Yet people

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3 We recognize that other courts and sources of international law have affected the Colombian peace process. Addressing these lies outside the scope of this article but will be discussed briefly when merited.
4 Yaacov Bar Siman-Tov, ‘Linking Peace and Justice in Peace-making,’ in Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans, ed. Karin Aggestam and Annika Björkdahl (London and New York: Routledge, 2013).
5 John Paul Lederach and R. Scott Appleby, ‘Strategic Peacebuilding: An Overview,’ in Strategies of Peace: Transforming Conflict in a Violent World, ed. Daniel Philpott and Gerard Powers (Oxford: Oxford University Press, 2010); Pierre Allan and Alexis Keller, What Is a Just Peace? (Oxford: Oxford University Press, 2006); Avishai Margalit, On Compromise and Rotten Compromises (Princeton: Princeton University Press, 2010), 9.
6 Bar Siman-Tov, supra n 4.
7 Peter Wallensteen, Erik Melander and Stina Högblad, ‘Peace Agreements and Durable Peace,’ in Rethinking Peacebuilding: The Quest for Just Peace in the Middle East and the Western Balkans, ed. Karin Aggestam and Annika Björkdahl (London and New York: Routledge, 2013).
in states emerging from violent conflicts will generally have experienced significant human rights abuses or violations of international humanitarian law, and they are likely to call for some form of ‘justice,’ whether judicial or not. Transitional justice is in essence about meeting their demands for justice and accountability for crimes committed during violent conflicts. However, these calls for justice are likely to fuel tensions, exacerbate conflicts and generate renewed violence that have the potential to undermine peace negotiations and peacebuilding processes. Despite tensions between building peace and doing justice in the same postconflict time and space as outlined above, the need to build the rule of law has become the common sense of peacebuilding, giving it an axiomatic power that is nearly impossible to contest.

Globalization has contributed to the fact that domestic and international actors now co-exist in a space that places high demands on their ability to interact, adapt and cooperate. To develop a constructive relationship between international transitional justice approaches and domestic politics and judicial systems in conflict-affected societies is a challenge to domestic and international actors alike. A number of issues come to the fore when analysing the dynamics between international and domestic actors such as the asymmetrical power relations, the challenges of anchoring the international version of peace in national post-war realities and the risk of overestimating the global influence while at the same time romanticizing the local.

As a consequence of the disappointing results of the predominantly internationally led peace processes in the 1990s, the beginning of the 21st century came to witness a local turn in peacebuilding in response to increased demands for local ownership, which has implications for transitional justice processes as well. However, many scholars now question whether the local turn provides a successful way forward for peacebuilding. Cognizant of many of the challenges peacebuilding faces, Peter Wallensteen argues that there is still hope for building a quality peace, and we suggest that such quality peace is a just peace – a hybrid outcome of domestic and international efforts to marry peace and justice.

The concept of hybridity has been used to shed light on the intertwinement and melding of the international and the domestic in both peacebuilding and transitional

8 William A. Schabas, Ramesh Thakur and Edel Hughes, eds., *Atrocities and International Accountability: Beyond Transitional Justice* (Tokyo: United Nations University Press, 2007); Catherine Baker and Jelena Obradovic-Wochnik, ‘Mapping the Nexus of Transitional Justice and Peacebuilding,’ *Journal of Intervention and Statebuilding* 10(3) (2016): 281–284.

9 Roger Mac Ginty, *No War, No Peace: The Rejuvenation of Stalled Peace Processes and Peace Accords* (Basingstoke: Palgrave Macmillan, 2006); Oliver P. Richmond, ‘De-romanticising the Local, De-mystifying the International: Hybridity in Timor Leste and the Solomon Islands,’ *The Pacific Review* 24(1) (2011): 115–136.

10 Timothy Donais, ‘Understanding Domestic Ownership in Security Sector Reform,’ in *Domestic Ownership and Security Sector Reform*, ed. Timothy Donais (Zurich: LIT Verlag, 2008); Gearoid Millar, ‘Disaggregating Hybridity: Why Hybrid Institutions Do Not Produce Predictable Experiences of Peace,’ *Journal of Peace Research* 41(4) (2014): 501–514, 502; Roger Mac Ginty and Oliver Richmond, ‘The Domestic Turn in Peace Building: A Critical Agenda for Peace,’ *Third World Quarterly* 34(35) (2013): 763–764.

11 David Chandler, *Peacebuilding: The Twenty Years’ Crisis*, 1997–2017 (Houndmills: Palgrave Macmillan, 2017); Roger Mac Ginty and Gurcharathen Sanghera, ‘Hybridity in Peacebuilding and Development: An Introduction,’ *Journal of Peacebuilding & Development* 7(2) (2012): 3–8; Isabel Schierenbeck, ‘Beyond the Domestic Turn Divide: Lessons Learnt, Relearnt and Unlearnt,’ *Third World Quarterly* 36(S) (2015): 1023–1032.

12 Peter Wallensteen, *Quality Peace: Peacebuilding, Victory and World Order* (Oxford: Oxford University Press, 2015).
justice processes. Hybridity acknowledges the results that are produced by the interaction of different groups, worldviews, norms and activities. This acknowledgement encompasses both top-down and bottom-up forces, and domestic as well as international actors. The concept of hybridity suggests that these interactions produce fused forms of practices, institutions and norms.

While hybridity has indisputably contributed to shedding light on interactions between the domestic and the international, it has not always succeeded in fully grasping such encounters that have produced unexpected outcomes. In Colombia, one might have expected that a so-called hybrid court would be established as a melding of the international and the domestic. However, the Special Jurisdiction for Peace (SJP), which was given the task of dealing with the criminal justice aspects of the peace process, has been situated within the domestic judicial structure of Colombia. Hence, it cannot be classified as a hybrid court. However, examination of the relationship between the ICC and the Colombian justice system through the lens of friction helps us understand the emergent hybrid legal outcomes of such frictional encounters. Thus, the concept of friction, which draws upon hybridization, can be used to more thoroughly examine encounters between the international and the domestic.

**FRICTION IN INTERNATIONAL–DOMESTIC ENCOUNTERS**

The concept of friction helps to unpack the complex, interwoven entanglements and co-constitutive relationship between the international and the domestic. The reference to international is often seen to encompass universal moral frameworks, cosmopolitan awareness and the ability to move across borders. In contrast, domestic tends to stand for particularities, authenticity, contextuality and a lack of mobility. In this context, it is important to understand that ‘international’ discourses, legal frameworks and practices are in fact not universal, but claim universality. The international is often understood as the international community, encompassing international organizations and institutions, that have the ability to undertake transnational movement with the purpose of promoting universal norms and cosmopolitanism. In contrast, even though the definition of the domestic is not always clearly delineated, it is often perceived to constitute a wide variety of actors and stakeholders, spread out and
situated in a setting that covers the span from civil society to the national level. To think in terms of an international–domestic dichotomy tends to ignore the complexity of intrinsic patterns of interactions, of political, judicial and societal layers and power structures.

Friction is a metaphor with roots in the field of ethnography. We develop friction into a concept to capture the interplay between domestic and international discourses, practices and actors. These, often frictional, encounters, can be understood as unequal, unstable and awkward interconnections that can be both empowering and disempowering. As an analytical tool, friction helps us to move away from neat and clear-cut global/local spaces and perceptions of international versus domestic dynamics, structures and agencies. The concept conveys that frictional encounters can be perceived as contests about power, and consequently about agency, that originate from asymmetrical relationships. Moreover, such interactions lack pre-determined outcomes and the outcomes they give rise to are inherently complex, multi-layered and multidimensional. Thus, frictional processes are not and cannot be the result of intentionality and conscious choice, and therefore cannot be engineered in a certain way to fulfil particular pre-defined outcomes.

As such, friction provides a multifaceted way of understanding confrontation and transformation, and the dynamic processes that these latter entail in the context of peacebuilding and transitional justice. This concept makes it possible to study norms, concepts and discourses, which, when projected from the international to a domestic context, often become subject to reinterpretation and reconstruction, which in turn lead to new hybrid outcomes characterized by both international and domestic elements.

The relationship between the ICC and the Colombian judicial system elucidates multiple points of divergence and tension. It touches upon the wider debate of peace versus justice and reflects different understandings of justice and opposing viewpoints on accountability and impunity. Moreover, the relationship reveals tensions between the domestic ownership of justice and international involvement in transitional justice process, which in turn bring to the fore questions regarding state sovereignty. Such divergences and tensions create preconditions for frictional encounters, emerging from different domestic responses to international and domestic pressures such as compliance, adoption, adaption, co-option, resistance and rejection (Table 1).
Table 1. International–domestic interaction in transitional justice27

| Frictional encounters                                      | Response           | Outcome                                                                 |
|------------------------------------------------------------|--------------------|------------------------------------------------------------------------|
| Contested/conflictual encounters between actors’ judicial norms and practices. | Compliance        | Adherence or submission to international/external norms and practices |
| Adherence or submission to international/external norms and practices. | Adoption           | Adoption at the local level of international/external norms and practices |
| Adaptation and contextualising of international/external norms and practices to domestic characteristics. | Adaptation         | Adaptation and contextualising of international/external norms and practices to domestic characteristics. |
| Strategic adoption of the international/external into the domestic as a means of averting pressure. | Co-option          | Strategic adoption of the international/external into the domestic as a means of averting pressure |
| Dominance of domestic characteristics, limited adoption of international/external norms and practices. | Resistance         | Dominance of domestic characteristics, limited adoption of international/external norms and practices. |
| Exclusion of international/external norms and practices from the domestic context. | Rejection          | Exclusion of international/external norms and practices from the domestic context. |

It has been argued that frictional encounters can produce different feedback loops, in which an encounter can result in a certain response, that may subsequently result in a certain outcome. Through the encounters between globalized rule of law norms, practices and judicial institutions and domestic ones, ‘friction produces new legal forms layered on the outcomes of previous encounters,’28 according to Dunn. The often hybrid outcomes in international–domestic entanglements in transitional justice processes can be understood in what Dunn has labelled ‘emergent hybrid legality.’ Emergent denotes ‘the ever-changing and fluid nature of hybridity, in contrast to the practice of attempting to engineer hybridity.’29 The unpredictability of friction clarifies the type of hybridity we refer to, one that cannot be planned, engineered or instrumentalized because its emergent form of a hybrid judicial order is unpredictable.30 Even though the crimes examined in Dunn’s work differ from the crimes this article is concerned with, namely the international crimes falling under the Rome Statute, we argue that emergent hybrid legality can be used to broaden the understanding of interactions concerning these types of crimes as well.

Striving to develop the understanding of friction, this article introduces three different types of frictions: conceptual, normative and jurisdictional frictions. The frictional encounters examined in this article are to a certain extent intertwined as they include the same actors in the context of the same peace process, yet for analytical

27 Adapted from Björkdahl and Höglund (2013).
28 Dunn, supra n 13 at 8.
29 Dunn, supra n13 at 7.
30 Dunn, supra n 13 at 8; see also Millar, supra n 10.
purposes we will examine them separately. To analyse conceptual frictions helps elucidate international and domestic interactions in the processes of defining important concepts. A focus on normative frictions illustrates the different norms the actors promote as desirable or unacceptable, and the interaction influences the norms that are adopted or rejected in the domestic context. Lastly, jurisdictional frictions shed light on one of the most complicated issues of international law, namely the relationship between state sovereignty and international judicial institutions.

Even though the literature often situates friction within the interaction of the global and the local, frictional encounters can occur both vertically and horizontally. This broader notion of horizontal can thus include encounters occurring both within the global space and within the local space. This article reflects vertical frictions through the international–domestic divide, i.e., the ICC and the Colombian judicial system. In addition, the Colombian peace process has revealed horizontal frictions illustrated by the relationship between the FARC and the Colombian government, and between other actors involved at the domestic level, including the Colombian military. The article advances frictions in both horizontal and vertical encounters. As the article concerns the question of jurisdiction in the relationship between the international court and the domestic judicial system and responses to and outcomes of these vertical frictional encounters, horizontal frictions are given less attention.

Our analysis suggests that different types of frictional encounters are especially prominent at different stages of the peace process, while recognizing that frictional encounters are entangled with other processes, both fluid and multidirectional, and they wax and wane over time (see Figure 1).

FRICTIONAL ENCOUNTERS BETWEEN THE ICC AND THE COLOMBIAN JUDICIAL SYSTEM

The ICC

The ICC began operating in 2002, being the first permanent institution of its kind. According to its authorizing treaty, the Rome Statute, the purpose of the ICC is to end impunity for perpetrators of the most serious crimes of concern to the international community. The Court has jurisdiction over crimes against humanity, war crimes, genocide and crimes of aggression (referred to as Rome Statute crimes in the following).

The ICC differs from its predecessors in many ways, the main one being that it rests upon the notion of complementarity. Thus, it lacks primacy over national courts, and primarily seeks to encourage the pursuit of international crimes by and within domestic legal systems. Only in cases where the Court deems the concerned state to be unwilling or unable to do so genuinely may the court exercise its jurisdiction. If not, the case is deemed inadmissible.
In broad and simplified terms, the operation of the ICC can be described as follows.35 Once a state ratifies the Rome Statute, it becomes subject to the jurisdiction of the Court. In regard to such states, the OTP may decide to open a preliminary examination, during which information about alleged crimes is collected and considered. If the OTP finds that there are grounds for prosecution and that the concerned cases are admissible, the OTP moves forward to the investigation stage. Thereafter the Prosecutor issues arrest warrants for alleged perpetrators, and subsequently proceeds to the trial stage.36 The OTP is an independent organ of the ICC focused on conducting investigations and monitoring situations and cases of concern to the Court.37 As the OTP is a crucial part of the ICC’s structure, its actions and statements are here considered to represent the ICC.38

The ‘Colombian Judicial System’

It is important to note that the term ‘Colombian judicial system’ does not constitute one, single actor but aims to cover actions undertaken by both the executive and legislative branches of government. This includes the Colombian Constitutional Court (CCC), which has had great impact on assessing the legislative frameworks of the peace process. Furthermore, the emergent hybrid judicial mechanisms of transitional justice in Colombia should be understood not only as a product of international–domestic encounters, but also as a product of horizontal frictions emerging from the interactions at the domestic level. Although the FARC and the Colombian Government were the key actors during the negotiation phase, input from Colombian citizens was allowed to a certain extent and external support was drawn upon as well, for example from the US (through the appointed
Special Envoy Bernard Aronson) and from the guarantor countries, Cuba and Norway.\(^ {39}\)

Before the Havana Negotiations were initiated, several failed attempts to end the prolonged conflict had been undertaken in Colombia.\(^ {40}\) These attempts have contributed to give the Colombian judicial system vast experience in drafting and evaluating legislation aimed at addressing past and contemporary atrocities. In recent years, such legislation has come to reflect a more comprehensive adoption of transitional justice measures, clearly reflected in, for example, the Justice and Peace Law (2005) and the Legal Framework for Peace (2012).\(^ {41}\) Likewise, the Peace Agreement of 2016 is also characterized by a commitment to justice as it adopts a number of transitional justice mechanisms.\(^ {42}\)

The Relationship Between the ICC and the Colombian Judicial System

Colombia ratified the Rome Statute in 2002, thus giving the ICC potential jurisdiction over crimes committed post November 2002. However, as a result of a declaration issued by Colombia under art. 124 of the statute, the ICC only gained jurisdiction over war crimes committed after November 2009. In 2004, the OTP decided to launch a preliminary examination in Colombia, which has since come to focus on alleged crimes against humanity (i.e., murder, forcible transfer of population, imprisonment, torture, rape and sexual violence) and war crimes (i.e., intentional attacks against civilians, torture, taking of hostages and using children to participate actively in hostilities). The OTP has collected information about perpetrators and has reported that there is reasonable basis to believe that the crimes have been committed by both state and non-state actors, such as the Colombian military forces, paramilitary groups, new illegal armed groups, as well as the FARC and the ELN.\(^ {43}\)

Its attention now mainly concerns issues of admissibility – especially in light of the genuineness of the national proceedings undertaken in relation to these crimes.\(^ {44}\) As yet, the preliminary examination has neither been closed nor resulted in the launch of an investigation, and the collection of information related to subject-matter jurisdiction continues as the Statue provides no timelines to arrive at a decision and to keep the examination open is the common practice of the OTP.\(^ {45}\)

Since initiating the preliminary examination, the OTP has gathered information about the alleged crimes, supervised legislative developments and helped to keep the

\(^ {39}\) Carlo Nasi, ‘The Peace Process with the FARC-EP,’ in Truth, Justice and Reconciliation in Colombia, ed. Fabio Andres Díaz Pabón (New York: Routledge, 2018); Olasolo and Mendoza, supra n 2 at 1015.

\(^ {40}\) Javier Sebastian Eskauriartza, ‘The Jus Post Bellum as “Integrity” – Transitional Criminal Justice, the ICC and the Colombian Amnesty Law,’ Leiden Journal of International Law 33(1) (2020): 189–205, 193.

\(^ {41}\) Olasolo and Mendoza, supra n 2 at 1013.

\(^ {42}\) Olasolo & Mendoza, supra n 2 at 1012–1013, 1016–1018; Juliana Bustamante-Reyes, ‘Colombia’s Path to Peace,’ New Zealand International Review 42(1) (2017): 14–17, 14.

\(^ {43}\) For more detail, see Office of the Prosecutor, ‘Situation in Colombia,’ Interim Report November 2012, https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf (accessed 14 January 2021).

\(^ {44}\) In the Colombian context, the crimes International Criminal Court, https://www.icc-cpi.int/colombia (accessed 26 May 2020).

\(^ {45}\) Office of the Prosecutor, ‘Report on Preliminary Examination Activities,’ Annual Report, 2018 ed., https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf (accessed 26 May 2020).
Colombian Government informed about the policies and practices that were likely to prompt ICC admissibility. At the time when the peace negotiations were initiated between the FARC and the Colombian Government it was clear that the negotiated outcomes needed to be in compliance with Colombia’s obligations stemming from the Rome Statute. However, the measures to ensure compliance were not fully detailed. Some transitional justice measures negotiated clashed with the ICC’s support of prosecution and the lack of recognition of amnesties, and to implement these measures could be interpreted by the ICC as a Colombian ‘unwillingness’ to prosecute and thus trigger the Court’s admissibility. Highlighting the complexity of the situation, Colombian President Juan Manuel Santos explained ‘We are entering unexplored territory: there are no examples of successful peace negotiations in the era of the Rome Statute.’

Frictional Encounters

The frictional encounters between the Colombian judicial system and the ICC can be unpacked by differentiating between three types of frictions. These types of friction can be identified in relation to the different phases of the peace process and they are outlined below, commencing with an analysis of the conceptual frictions prominent in the initial phase, followed by an analysis of normative frictions and finally an analysis of jurisdictional frictions. The different responses of compliance, adoption, adaption, co-option, resistance and rejection will be employed in the following analysis of the conceptual, normative and jurisdictional frictions.

Conceptual Frictions: Defining Justice

The concept of justice is value-laden, contested and vague. Hence, agreeing upon a definition and delimitation of the concept is a crucial step in a peace process aimed at a just peace, and will have great implications for the measures envisioned and enforced. Different definitions expose different understandings of justice, ranging from retributive, corrective, restorative, reparative and distributive ambitions. The way justice is conceptualized within a judicial system often reflects whether it is victim-centred or focused on alleged perpetrators.

46 Gissel, supra n 36 at 170; René Urueña, ‘Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003–2017,’ American Journal of International Law 111(1) (2017): 104–105.
47 See art. 17 of the Rome Statute; Chandra Lekha Sriram, ‘Conflict Mediation and the ICC: Challenges and Options for Pursuing Peace with Justice at the Regional Level,’ in Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development, ed. Kai Ambos, Judith Large and Marieke Wierda (Berlin: Springer Verlag, 2009); Allan Weiner, ‘Ending Wars, Doing Justice: Colombia, Transitional Justice and the International Criminal Court,’ Stanford Journal of International Law 52(2) (2016): 212–230.
48 Paul Dziatkowiec, Christina Buchhold, Jonathan Harlander and Massimiliano Verri, ‘Peacemaking in the New World Disorder,’ Oslo Forum 2015 Meeting Report, Centre for Humanitarian Dialogue, http://www.hdcentre.org/wp-content/uploads/2016/06/Oslo-Forum-2015-Meeting-Report.pdf (accessed 26 May 2020).
49 Björkdahl and Höglund, supra n 18 at 296–297.
50 Rama Mani, Beyond Retribution: Seeking Justice in the Shadows of War (Cambridge: Polity Press, 2002), 4.
51 Susanne Buckley-Zistel Teresa Koloma Beck, Christian Braun and Friederike Mieth, ‘Transitional Justice Theories: An Introduction,’ in Transitional Justice Theories, ed. Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (New York: Routledge, 2014); Höglund and Orjuela, supra n 18 at 303.
52 Díaz Pabón, supra n 1 at 6.
Entering the negotiations, the FARC stated that they could not accept an agreement that would result in FARC members being prosecuted and imprisoned.\(^5\) Their past experiences of negotiations with the Colombian Government as well as their ideological stance complicated the matter further, as it contributed to mistrust of the Colombian justice system and liberal laws.\(^5\) The Government, on the other hand, clearly stated that its aim for the negotiations was to ensure the protection of victims’ rights.\(^5\)Hovering above the negotiations were the requirements imposed on Colombia by the Rome Statute. The OTP had since initiating its preliminary examination insisted on a continuous dialogue with the Colombian Government regarding the definition of justice. In order to ensure compliance with the Rome Statute, all transitional justice laws established post 2004 were influenced by the consultation with the OTP. These laws, and the lessons learnt from their implementation, were all drawn upon during the negotiation phase.\(^6\) Thus, at the time of the Havana Negotiations Colombia was familiar with the ICC involvement and its views on the concept of justice and adapted its own view of justice incrementally.\(^7\)

Whilst the Government negotiated the notion of justice with the FARC, the OTP informed the Government about acceptable and unacceptable definitions of justice. Certain retributive elements would be required, such as criminal prosecution for Rome Statute crimes, since amnesties and pardons for these types of crimes were incompatible with the Rome Statute.\(^8\) Simultaneously, the OTP opened up space to find a solution, within the boundaries of the OTP mandate and the Rome Statute.\(^9\)

The process of defining justice during the Colombian peace process was not simply a bilateral negotiation between the two parties concerned. Instead, the ambition was to develop an intersubjective understanding of justice shared by the FARC and the Colombian Government as well as by the ICC – thus elucidating both horizontal and vertical conceptual frictions in these encounters.

The ICC’s initial demarcation of the concept of justice was wide enough to allow for meaningful negotiations between the FARC and the Colombian Government, enabling them to develop a shared understanding of the concept within the boundaries set by the ICC. However, even though the domestic actor(s) were granted autonomy in the decontestation of the justice concept, it is clear that the ICC was not in any way excluded in the process. First, as a result of the preliminary examination initiated in 2004, the ICC had contributed to shaping the understanding of justice

\(^5\) Gissel, supra n 36 at 179.
\(^6\) Nelson Camilo Sanchez Leon, ‘Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?’ \(AJIL\) \textit{Unbound} 110 (2016): 172–177, 173.
\(^7\) Angelika Rettberg, ‘Victims of the Colombian Armed Conflict: The Birth of a Political Actor,’ in \textit{Colombia’s Political Economy at the Outset of the 21st Century: From Uribe to Santos and Beyond}, ed. Bruce M. Bagley and Jonathan D. Rosen (London: Lexington Books, 2013); Nasi, supra n 39 at 44.
\(^8\) Gissel, supra n 36 at 179.
\(^9\) Freedeen 1996, cited in Gissel, supra n 36.

Office of the Prosecutor, ‘Transitional Justice in Colombia and the Role of the International Criminal Court: Keynote Speech by James Stewart, Deputy Prosecutor of the ICC,’ 2015, https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf (accessed 26 May 2020); Gissel, supra n 36 at 177; Courtney Hillebrecht, Alexandra Huneeus and Sandra Borda, ‘The Judicialization of Peace,’ \textit{Harvard International Law Journal} 59(2) (2018): 279–330, 283, 297.
that the Colombian Government brought to the negotiations. Second, the ICC clearly delineated the outer boundaries of the justice concept. These vertical frictional encounters between the international and the domestic caused the Colombian judicial system to adapt to the requirements enforced by the ICC and the Rome Statute. Such a response is characterized by the contextualizing of international judicial norms and practices to the domestic contexts. In this case, the Colombian judicial system clearly adapted the definition of justice presented by the ICC to fit its judicial context, whilst simultaneously letting the understanding of justice be influenced by domestic demands and the domestic setting. This in turn contributed to an emergent hybrid, intersubjective understanding of justice.

The outcome of the conceptual frictions is manifested in the Agreement Regarding the Victims of the Conflict: Comprehensive System for Truth, Justice, Reparations and Non-Recurrence (Victims’ Agreement), part five of six in the final Peace Agreement. The Victims’ Agreement rests upon a holistic view of justice, and the mechanisms established through the agreement complement each other and are granted equally important standing. It establishes both judicial and non-judicial transitional justice mechanisms: the Special Jurisdiction for Peace (SJP); the Truth, Coexistence and Non-Recurrence Commission; The Special Unit for the Search for Persons Deemed as Missing in the Context of the Conflict; a system for reparations; and Guarantees of Non-Recurrence. The Victims’ Agreement, as reflected in its name, has a victim-centred approach. The recognition of victims and the acceptance of liability remain as guiding principles throughout the Agreement, thus clearly reflecting the Government’s initial stance.\(^60\) The system established through the Victims’ Agreement, and the interrelated mechanisms it comprises, combines elements of reparation, retribution and restoration.

It has been argued that the understanding of justice reflected in the Victims’ Agreement is ground-breaking, as it successfully draws up a middle way that moves away from the contradiction between retributive and restorative justice.\(^61\) It incorporates retributive elements sufficient to satisfy the ICC and for the Court to support the Agreement’s notion of justice.\(^62\) Briefly after the Victims’ Agreement was presented the Prosecutor of the ICC, Fatou Bensouda, made a statement claiming that ‘any genuine and practical initiative to end the decades-long armed conflict in Colombia, while paying homage to justice as a critical pillar of sustainable peace, is welcome by her Office.’\(^63\)

By creating a system with multiple interdependent mechanisms, the Victims’ Agreement demonstrates a multidimensional and comprehensive conceptualization of justice that acknowledges the multifaceted character of justice, seeking to satisfy both domestic needs and international obligations. Thus, the Victims’ Agreement

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60 Bustamante-Reyes, supra n 42 at 15; Camilla Gamboa Tapia and Fabio Andrés Díaz Pabón, ‘The Transitional Justice Framework Agreed Between the Colombian Government and the FARC-EP,’ in Truth, Justice and Reconciliation in Colombia, ed. Fabio Andrés Díaz Pabón (New York: Routledge, 2018).
61 Díaz Pabón, supra n 1 at 4–6.
62 Gissel, supra n 36 at 182.
63 Office of the Prosecutor, ‘Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia,’ 2015, https://www.icc-cpi.int/Pages/item.aspx?name=otp_stat_24-09-2015 (accessed 26 May 2020).
exposes a novel way of conceptualizing justice, producing an intersubjective and hybrid understanding of it that balances elements of retributive and restorative justice.

Normative Frictions: Shaping the Sentencing

A contentious issue at the nexus of national and international criminal law is the sentences to which alleged perpetrators should be subject. This issue becomes particularly prominent when violent conflicts end by negotiated settlements, rather than by military victory. The ability to grant amnesties and pardons is often regarded as a manifestation of state sovereignty and has long been considered an important leverage in peace negotiations. However, the 1990s saw a shift in the international community’s viewpoint regarding the granting of amnesties and pardons for certain types of atrocious crimes, and the international community came to embrace the emerging anti-impunity norm, subsequently bolstered by the creation of the ICC. Even though the Rome Statute omits explicit provisions on the matter of amnesties and pardons, the subject was thoroughly debated during the drafting of the Statute.

The sentencing regime was a stumbling block in the peace negotiations, and once the conceptualization of justice had been addressed, the normative frictions pertaining to sentencing became prominent. As mentioned above, the FARC entered the Havana Negotiations rejecting imprisonment as a punishment and pushed for a sentencing regime that would not strip them of political agency or limit their ability to participate in Colombian politics. Early on, the Colombian Government declared that the peace process would include a transitional justice approach. Yet, in order to move the negotiations forward and accommodate some of the FARC’s concerns concerning penalties, the Colombian Government did not outline the accountability measures of the transitional justice approach. In parallel, the Colombian Government needed to consider the ICC requirements. Therefore, the transitional justice approach could not be too vague on judicial accountability, because such resistance could trigger ICC admissibility and thus limit the judicial sovereignty of Colombia. This trilemma became particularly prominent in light of the OTP’s vague stance on sentencing requirements. Although the present article does not focus on this matter, it is in this context also important to note that the jurisprudence of the Inter-American Court of Human Rights (IACHR) – which had developed a hard stance in regard to amnesties for ‘grave violations’ of human rights law since the turn of the millennium – weighed in on the matter as well. It was thus not solely the risk of ICC admissibility that gave cause for concern, but the risk of criminal prosecution by the IACHR as well.

64 Eskauriatza, supra n 40 at 192.
65 Jacopo Roberti di Sarsina, *Transitional Justice and a State's Response to Mass Atrocity* (Berlin: Springer, 2019), 127, 148.
66 Roberti di Sarsina, supra n 64 at 127–128; Gissel, supra n 36 at 5–7; Mani, supra 49 at 98.
67 Roberti di Sarsina, supra n 64 at 148.
68 Gissel, supra n 36 at 179.
69 Martha Minow, ‘Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law? Truth Commissions, Amnesties, and Complementarity at the International Criminal Court,’* Harvard International Law Journal* 60(1) (2019): 1–45, 12; Weiner, supra n 46 at 228; Hillebrecht, Huneeus and Borda, supra n 58 at 282, 285–286.
Initially, OTP Prosecutor Bensouda was highly critical towards a sentencing regime that excluded imprisonment as a penalty for war crimes and crimes against humanity (ECCHR 2012: 13). Amnesties and pardons were perceived as ‘shielding of persons,’ and may thus be in conflict with the Rome Statute. However, imprisonment was not part of the alternative sentencing regime advocated by the Colombian judicial system, including Colombia’s Prosecutor Eduardo Montealegre, and demanded by the FARC. Over time, a more relaxed attitude towards the Colombian sentencing regime emerged within the OTP as a result of the feedback loop that emerged from the frictional encounters with the Colombian Government. Whilst maintaining that crimes falling under the Rome Statute would not be subject to amnesties and pardons, states were seen to have a ‘wide discretion’ in regard to sentencing and sanctions regimes. The OPT suggested that sanctions may take many different forms, as long as they are effective and ‘serve appropriate sentencing goals, such as public condemnation of the criminal conduct, recognition of victims’ suffering and deterrence of further criminal activity.’ A legal sub-commission was established within the peace process, given the task of dealing with the above-mentioned different and contradictory demands.

The FARC and the Colombian Government had strong and opposite views on the sentencing regime, creating horizontal frictions in the negotiations. By drawing upon the permissibility of amnesties and pardons in regard to so-called political crimes, stemming from Art. 6.5 of the Geneva Protocol II of 1977 (applicable to the Colombian conflict and holding constitutional rank according to the CCC), the FARC’s exposure was narrowed, thus creating a basis for continued negotiations. The need for creating a solution perceived as legitimate by the Colombian population was acute for the Government, as the Peace Agreement would become subject to a plebiscite post negotiation. It is noteworthy that the sentencing regime would come to affect multiple actors of the conflict, as the newly created SJP, a judicial body given the task of dealing with crimes committed in the context of the armed conflict, would have jurisdiction over FARC members, as well as members of the Colombian Armed Forces and military militia. This matter exacerbated the complexity of the horizontal frictions, adding stakeholders to the negotiations, and reinforced the interest of the parties in finding accountability measures alternative to imprisonment.

The response by the Colombian judicial system to the vertical friction emerging from its encounters with the ICC can be regarded as co-option, i.e., a strategic adoption of the international norm of anti-impunity, within the domestic judicial sentencing regime. This response was a means of averting the ICC’s pressure. The sentencing regime and the framework for the SJP presented in the Victim’s...
Agreement is utterly complex and was the hybrid outcome of co-optation. The SJP has jurisdiction over individuals who, directly or indirectly, participated in the conflict, including but not limited to FARC members and state officials. The legislative framework thus establishes an alternative sentencing regime, through which two categories of crimes are constructed: those for which amnesty, pardon and special treatment can be granted, and those for which they cannot. The foremost category concerns so-called political crimes, i.e., rebellion and sedition. The latter category relates to Rome Statute crimes and other gross human rights violations and grave breaches of international humanitarian law. Individuals accused of committing these latter crimes become subject to an effective restriction of their liberties and rights during a period ranging from five to eight years, given that they comply with the requirements of full disclosure and acceptance of liability. The restriction is coupled with sanctions of a reparative and restorative character, including public reparations in communities that have been affected by the conflict. Individuals who fail to satisfy the above-mentioned requirements do not qualify for the alternative sentencing regime and may instead be subject to imprisonment.

A high level of legislative creativity produced a hybrid sentencing regime coalescing the punishment of imprisonment with amnesties and pardons. The hybrid sentencing regime goes hand in hand with the victim-centred justice approach, combining retributive and restorative elements. By constructing two categories of crimes, political crimes and Rome Statute crimes, and by ensuring that the crimes falling under the Rome Statute were excluded from amnesties or pardons, ICC admissibility was prevented. The Prosecutor at the ICC, Fatou Bensouda, noted ‘with satisfaction, that the final text of the peace agreement excludes amnesties and pardons for crimes against humanity and war crimes under the Rome Statute.’ The ability to grant amnesties and pardons for political crimes was perceived to be well within Colombia’s sovereignty, and those crimes were not of concern to the ICC.

Despite the innovative nature of the SJP and its legislative framework, it has been subject to substantial criticism. A first version of the Peace Agreement was rejected in a plebiscite in September 2016 by a remarkably thin margin, forcing the parties to renegotiate the agreement. A revised final version was later approved by Congress. It has been suggested that one of the main reasons for rejecting the Peace Agreement was that the hybrid sentencing regime was perceived as too lenient, resulting in a risk of impunity for some FARC members. Furthermore, the sentencing regime has been criticized for deviating from earlier jurisprudence, moving away from the practice of relying on imprisonment. The adjudication of the SJP has also

77 Gamboa Tapia and Díaz Pabón, supra n 59 at 75–77; Olasolo and Mendoza, supra n 2 at 1020–1021.
78 Roberti di Sarsina, supra n 64 at 158–159; Nasi, supra n 39 at 45; Olasolo and Mendoza, supra n 2 at 1032–1033.
79 Office of the Prosecutor, ‘Statement of the 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, https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia (accessed 26 May 2020).
80 Gamboa Tapia and Díaz Pabón, supra n 59 at 66–67; Gissel, supra n 36 at 173.
81 Olasolo and Mendoza, supra n 2 at 1015; Gissel, supra n 36 at 177.
82 See further Olasolo and Mendoza, supra n 2 at 1038.
been a source of debate in regard to questions concerning jurisdictional friction, which will be analysed below.

**Jurisdictional Frictions: Complementarity and the Assessment of Genuineness**

The principle of complementarity is one of the most important cornerstones of the Rome Statute, found in Article 17. It seeks to ensure that international crimes are primarily prosecuted by the Member States, and that the ICC instead functions as a ‘complement’ to domestic Courts. This understanding of complementarity reflects a respect for both state sovereignty and domestic ownership while simultaneously striving to end a culture of impunity. However, if a state is considered unwilling or unable to undertake genuine proceedings, the ICC’s complementary jurisdiction enters into force, and in consequence the cases concerned become admissible before the Court.

There is an inherent contradiction in the fact that one part of the ICC’s work is to adjudicate how the Member States comply with their obligations, while simultaneously being dependent on the consent and funding of the said States. If the ICC starts interpreting the principle of complementarity too broadly and invasively expanding its jurisdiction in a way that is unwelcomed by the Member States, the Court jeopardizes its legitimacy.83

When Colombia ratified the Rome Statute in 2002, it opted out of the War Crimes provisions of the Rome Statute until 2009. It waived its judicial sovereignty in regard to certain international crimes and opened the way for jurisdictional tension, which was exacerbated by the ongoing violent conflict within its borders. Jurisdictional frictions between the Colombian judicial system and the ICC became apparent as the OTP decided to launch a preliminary examination in the country. The ICC has battled with the issue of admissibility ever since, continuously assessing the Colombian proceedings in terms of genuineness. Colombia has implemented legislation that signals willingness to comply with the Rome Statute, but insufficient to render the closing of the OTP’s preliminary examination. In the light of this, the most prominent jurisdictional frictions between the ICC and the Colombian judicial system arguably emerged after the signing of the Peace Agreement. The period leading up to the Agreement was characterized by consultation and dialogue between the two parties, and it was not until a concrete framework for the process had been finalized and the implementation phase was initiated that the ICC could begin to assess the genuineness of the proceedings related to the peace process. When the legislative framework for SJP was finalized, the OTP’s initial response was positive, while emphasizing that it would continue to monitor the situation and extend its support during the implementation phase, in order to evaluate whether the proceedings satisfied the requirement that they should be genuine.84

In 2017, the OTP identified four areas related to the legislation of the SJP that caused concern: the definition of command responsibility; the definition of grave

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83 Claire Brighton, ‘Avoiding Unwillingness: Addressing the Political Pitfalls Inherent in the Complementarity Regime of the International Criminal Court,’ *International Law Review* 12 (2012): 629–664, 664.

84 Office of the Prosecutor, supra n 78.
These pinpointed areas seem to jeopardize Colombia’s compliance with the Rome Statute. The criticism has been acknowledged by the CCC, but not acted upon.86 The OTP stressed that the SJP is to interpret the regulations in accordance with international law, in order to ensure that the Colombian proceedings are deemed genuine. In its preliminary report from 2018, the OTP concluded that the admissibility assessment continues, and it will continue its dialogue with Colombian authorities in order to remain updated on prosecutorial activities.87 As of 2020, the SJP has initiated seven cases, concerning for example kidnapping and recruitment of child soldiers.88

The jurisdictional frictions between the ICC and the Colombian judicial system are still present, and will most likely be so until the ICC chooses either to close the preliminary examination or to launch an official investigation. However, this does not mean that the previous frictions have not affected their encounters, giving rise to different responses and hybrid outcomes. The response to the jurisdictional frictions can be characterized as resistance, co-option and eventually strategic adoption. The Colombian judicial system’s initial resistance to the ICC’s language and the international norms it advocates developed into strategic adoption to prevent admissibility before the ICC and to hinder the launch of an investigation, while the final peace agreement can be regarded as adoption of the norm of impunity to the Colombian judicial context.

Colombia’s encounters with and responses to the ICC demonstrate that states are able to maintain a certain extent of jurisdictional sovereignty and avert the launch of an official investigation by the ICC. This analysis finds that the state’s prolonged involvement with the ICC granted them an understanding of how the court exerts pressure and an ability to adapt its legal language. The longer the preliminary examination continued, the less imminent the threat of an investigation became. This in turn enhanced the confidence of the Colombian judicial system and expanded its space for independent decision-making. 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. The OTP’s primary stance in 2012 was that the absence of imprisonment penalties would be regarded as

85 Office of the Prosecutor, ‘Report on Preliminary Examination Activities,’ Annual Report, 2017 ed., https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Colombia_ENG.pdf (accessed 26 May 2020).
86 Office of the Prosecutor, supra n 44.
87 Ibid.
88 Jurisdicción Especial para la Paz, ‘JEP en cifras,’ 2020, https://www.jep.gov.co/Infografias/cifras-mayo-15.pdf (accessed 25 May 2020).
A notable shift occurred in 2015 when the OTP acknowledged that alternative sentencing regimes may be accepted as long as they serve ‘appropriate sentencing goals.’ Once the finalized peace agreement was reached in 2016, Prosecutor Bensouda issued a statement not mentioning the requirements of prison time. The Colombian judicial system was able to seize the opportunity when the ICC’s stance wavered. Thus, normative frictions that produced the hybrid outcome of the alternative sentencing regime empowered the Colombian judicial system to reclaim parts of its jurisdictional sovereignty. Exerting this sovereignty generated frictions in the encounters with the ICC. The ICC’s influence continued due to the ongoing preliminary examination continuing to cause jurisdictional frictions. The Court’s influence is also reflected in the final Peace Agreement which, despite all its innovative features, still strongly draws upon international law for its legitimacy. As an example, the Agreement contains 12 references to the Rome Statute. Overall, the approach that the ICC adopted was cooperative and the Court continuously emphasized and extended its support to the peace process.

The jurisdictional frictions between the ICC and the Colombian judicial system had a significant impact on both actors. The Colombian judicial system’s creative legislative solutions caused the ICC to revisit its stance on how it assesses genuineness, perhaps opening up for less narrow interpretations in the future. Furthermore, the Colombian peace process contributed to developing the understanding of the principle of complementarity, helping illustrate to what extent states are free to adapt criminal justice proceedings to national requirements and visions. How the SJP in the near future adjudicates the cases before it will have great consequences for whether or not the ICC deems that Colombia fulfills its prosecutorial obligations stemming from the Rome Statute. As such, the jurisdictional frictions generated by Colombia’s resistance caused the ICC to revisit its approach to the complementarity principle, thus producing an outcome that can be characterized as hybrid complementarity.

89 European Center for Constitutional and Human Rights, ‘Special Newsletter: When Women Become Targets: Sexual and Gender-based Violence in Colombia’s Conflict: A Matter for the International Criminal Court,’ 2012, https://www.ecchr.eu/fileadmin/Sondernewsletter_Dossiers/SpecialNewsletter_Colombia_ICC_20150427.pdf (accessed 12 July 2020).
90 Office of the Prosecutor, supra n 57.
91 Office of the Prosecutor, supra n 78.
92 This, more flexible, approach, may be attributed to the frictional encounters between the ICC and Uganda with regard to Uganda’s attempts to implement an amnesty law; see Uruena, supra n 45 at 120.
93 See for example Office of the Prosecutor, ‘Report on Preliminary Examination Activities,’ Annual Report, 2013 ed., https://www.icc-cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20Report%20Preliminary%20Examination%20Activities%202013.PDF (accessed 26 May 2020); Office of the Prosecutor, ‘Report on Preliminary Examination Activities,’ Annual Report, 2014 ed., https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf (accessed 26 May 2020); Office of the Prosecutor, ‘Report on Preliminary Examination Activities,’ Annual Report, 2015 ed., https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf (accessed 26 May 2020).
94 Our conceptualization of hybrid complementarity strives to nuance the meaning of complementarity. Likewise, the terms negative and positive complementarity are at times used for the same purpose. The former emphasizes punishment, coercion and threat-based incentives, while the latter mainly focuses on judicial assistance; see e.g., Steven Roach, Critical Theory of International Politics: Complementarity, Justice and Governance (Abingdon: Routledge, 2010). However, we argue that the term hybrid complementarity allows for a less rigid categorization.
CONCLUSION

The peace process between the FARC and the Colombian Government (informally with the Colombian Armed Forces and military militias) is remarkable in many ways. Not only has it successfully pushed for an end to the most prolonged civil conflicts in modern times, but it has also contributed to shedding light on the relationship between sovereign states and their interaction with international judicial organs.

By examining the Colombian peace process, it becomes clear that the ICC has altered the way in which peace and justice can be constructed in contemporary peacebuilding and transitional justice processes. The court is now involved and able to affect decisions that were previously perceived to be reserved for the autonomous decision-making of sovereign states. Thus, it has contributed to influence what measures need to be taken into account during peace negotiations and the subsequent implementation phases. As the Court is a relatively new institution, all interactions with its Member States are revealing – highlighting what is prioritized, in which situations the Court chooses to act and when it adopts a more cautious approach – and contribute to a more detailed understanding of the Court’s role in the international community.

The tension between ICC admissibility and state sovereignty and the primacy of national criminal jurisdiction has caused frictions not only in Colombia. In the wake of the widespread and systematic violence perpetrated by former Libyan Government forces in Benghazi and other Libyan cities in 2011, the UN Security Council referred the situation to the Prosecutor of the ICC under Chapter VII of the Charter of the UN. The ICC issued three warrants of arrest for Colonel Moammar Gaddafi and his son Saif Al-Islam Gaddafi, as well as for Gaddafi’s intelligence chief. After the killing of Moammar Gaddafi in 2011, Libya challenged the admissibility of the cases against his son by invoking Libyan sovereignty, the primacy of national criminal jurisdiction and its own ability to investigate its nationals. The frictions between the ICC and Libyan authorities emerged as they engaged in an intense battle over how justice should be served for Saif Al-Islam Gaddafi. The standstill between the ICC and the Libyan authorities revealed vertical frictions between the ICC and the Libyan state as judges at the ICC, fearing that Libya would give Saif Al-Islam Gaddafi an unfair trial and the death penalty, wanted to see him surrendered to the Court, while the Libyan state insisted on a trial in Libya where he would be tried by Libyans. Oddly enough, the Libyan Government had the support of the ICC’s prosecutor in the matter, demonstrating horizontal frictions within the ICC. Sentenced to death in absentia for crimes against humanity by the Tripoli Criminal Court in 2015, Mr Gaddafi was granted an amnesty and lawfully released. The ICC warrant for Mr Gaddafi’s arrest remained outstanding, as general amnesty laws do not apply to crimes against humanity. The back and forth in the Libyan transitional justice process clearly reflected the political exploitation of these laws. Thus, the ICC’s decision of 2019 confirmed the admissibility of the case against Saif Al-Islam

95 Hilmi M. Zawati, ‘Prosecuting International Core Crimes Under Libya’s Transitional Justice: The Case of Saif Al-Islam Gaddafi and Abdullah Al-Senussi,’ in Justiciability of Human Rights Law in Domestic Jurisdictions, ed. Alice Diver and Jacinta Miller (Cham: Springer, 2016).
96 Angela Walker, ‘The ICC versus Libya: How to End the Cycle of Impunity for Atrocity Crimes by Protecting Due Process,’ UCLA Journal of International Law and Foreign Affairs 18(2) (2014): 303–354.
Gaddafi and called on the Libyan state and the international community to ensure Gaddafi’s surrender to the ICC to face trial. The ICC stresses that granting amnesties for international crimes is incompatible with international human rights law. States have a clear obligation to investigate, prosecute and punish perpetrators. Amnesties for grave crimes deny victims their right to truth and justice, as well as the opportunity to seek reparations. Gaddafi challenged the case against him on the grounds that he had been convicted of similar crimes by the Tripoli Criminal Court in 2015. Nevertheless, the ICC determined that the case against Mr Gaddafi is admissible.97

With regard to the Colombian peace process, the analysis of the frictional encounters between the Colombian judicial system and the ICC demonstrates various types of frictions, responses and hybrid outcomes. First, the horizontal frictions at the domestic level contributed to shaping a complex, comprehensive and intersubjective concept of justice, creating a conceptualization clearly anchored in the context of the conflict. The conceptualization was also shaped by the vertical friction, which arose due to the ICC’s demarcation of the justice concept, which caused the Colombian judicial system to adapt – thus resulting in a hybrid conceptualization. Hence, the outcome of these frictional encounters was an intersubjective, hybrid understanding of justice.

Second, the response by the Colombian judicial system to the vertical normative frictions emerging from its encounters with the ICC and the international norm of anti-impunity can be regarded as co-option. This strategic adoption of the international norm of anti-impunity into the domestic judicial sentencing regime can be understood as a means of averting the ICC’s pressure.98 The outcome of the normative frictional encounters was a hybrid sentencing regime, which reflected the Colombian judicial system’s thorough understanding of the ICC language, its ability to utilize the Court’s vague stance on sentencing and a thorough legislative understanding, separating crimes falling under the Rome Statute from other crimes, which in turn ensured sufficient compliance with the anti-impunity norm proposed by the ICC. Lastly, the jurisdictional frictional encounters – which are still very much present – have affected both actors. On the one hand, the Colombian judicial system, empowered by the outcome of the hybrid sentencing regime, has through constant efforts managed to act in a way that ensured some jurisdictional sovereignty and yet has so far not triggered ICC admissibility. The ICC, on the other hand, has continuously monitored and evaluated to what extent the actions undertaken in Colombia should be considered compliant with the Rome Statute, especially in regard to genuineness. This interaction has challenged the principle of complementarity and produced what may be termed hybrid complementarity.

The lens of friction and the three types of conceptual, normative and jurisdictional frictional encounters have proved useful in order to unpack the tensions between and within international and domestic justice processes, as demonstrated by the analysis of the ICC and Colombia. However, as the brief description of the Libyan case

97 Lawyers for Justice in Libya, ‘Admissibility of the International Criminal Court’s Case Against Saif Al-Islam Gaddafi Confirmed,’ 9 April 2019, https://www.libyanjustice.org/news/admissibility-of-the-international-criminal-courts-case-against-saif-al-islam-gaddafi-confirmed (accessed 1 June 2021).
98 Björkdahl, supra n 23 at 297.
demonstrates, the frictional encounters become blurred in such a setting where the transitional justice process is more or less in chaos, where those representing the state are constantly changing, the parties to the negotiations of justice are unclear or fragmented and where justice is being politicized and exploited for political reasons. In addition, the lens of friction may be less useful when analysing transitional justice processes that took place before the states ratified the Rome Statue or when the international normative context prioritized peace at the expense of justice. The transitional justice process in El Salvador has been hampered by the amnesty law which the El Salvador Legislative Assembly adopted in 1993 but which lacked a broad national consensus. The amnesty law was adopted at a time when the norm against impunity had not yet gained strong international support. In 2016, El Salvador became a member of the ICC and the amnesty law started to be overturned with the ambition that justice and accountability should not be delayed any further.99 Moreover, there are most likely additional responses to frictional encounters than the six outlined here, and there may be additional categories of frictional encounters than the three theorized and mapped in this analysis.

The frictional encounters between the ICC and the Colombian judicial system may perhaps predict a changing role for the ICC in the future, where the Court embraces a different approach in regard to complementarity to a further extent, and adopts a more flexible stance on the norm of anti-impunity and a broader understanding of justice cognizant of victim-centred approaches to transitional justice. Moreover, in these encounters the Colombian judicial system has shown a high level of adaptability and flexibility, finding new and innovative solutions restricting the influence of the ICC and creating emergent hybrid judicial mechanisms in the transitional justice process. The Colombian judicial system has simultaneously been able to push back the ICC and to secure agency. Thus, the vertical conceptual, normative and jurisdictional frictional encounters and their hybrid outcomes have collectively challenged the idea that striving for both peace and justice is too ambitious and that the ICC, the Rome Treaty and the norm of anti-impunity should be perceived as a hindrance to peace processes.

99 Cf. Francesca Lessa, Tricia D. Olsen, Leigh A. Payne, Gabriella Pereira and Andrew G. Reiter, ‘Overcoming Impunity: Pathways to Accountability in Latin America,’ Journal of International Transitional Justice 8(1) (2014): 75–98, 88; Daniel Cerqueira and Leonora Arteaga, ‘Challenging the Amnesty Law in El Salvador: Domestic and International Alternatives to Bring an End to Impunity,’ 2016, http://www.dplf.org/sites/default/files/amnesty_law-final-24june.pdf (accessed 14 May 2021).