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The Colombian Judicial System and the ICC

Elucidating frictional encounters in the Colombian peace process

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Contents

Abstract

The ICC, which was established in 2002, has come to introduce new legal norms affecting the judicial sovereignty of its member states – a fact that has become especially prominent in regard to states attempting to transition from conflict to peace. With the overarching purpose of contributing to a greater understanding of how the ICC affects and relates to peace processes, this thesis examines the recent Colombian peace process through a qualitative case study. By utilizing the analytical framework of friction, it analyses frictional encounters between the Colombian judicial system and the ICC during the peace process, striving to elucidate tensions between the global institution and the national legal context. Aiming to develop the theory of friction, the thesis additionally introduces three different types of friction: conceptual, normative and jurisdictional friction. The thesis concludes that the ICC has indubitably affected the Colombian peace process to a certain extent. However, as the Colombian judicial system has demonstrated a high level of flexibility and innovation, it has been able to secure agency and shield its judicial sovereignty while insofar complying with the requirements of the ICC. This balancing-act might thus come to reflect a middle path for future peace processes. Lastly, the thesis emphasizes how a disaggregation of the concept of friction can contribute to a more nuanced and developed understanding of the interaction occurring between local and global actors.

Key words: *Colombian peace process, International Criminal Court, Colombian judicial system, friction, transitional justice.*

Abbreviations and acronyms

ELN	*Ejército de Liberación Nacional*
FARC	*Fuerzas Armadas Revolucionarias de Colombia*
IACtHR	*Inter-American Court of Human Rights*
ICC	*International Criminal Court*
ICTR	*International Criminal Tribunal for Rwanda*
ICTY	*International Criminal Tribunal for the former Yugoslavia*
Peace Agreement	*Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace*
Rome Statute	*Rome Statute of the International Criminal Court*
SCSL	*Special Court for Sierra Leone*
SJP	*Special Jurisdiction for Peace*
Victims' Agreement	*Agreement Regarding the Victims of the Conflict: Comprehensive System for Truth, Justice, Reparations and Non-Recurrence*

1 Introduction

Colombia has been plagued by a complex and multifaceted civil 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 (Díaz 2009, p. 471; Travesí-Rivera 2016, p. 1). The multiple number of actors involved, the main being the Colombian Armed Forces, Fuerzas Armadas Revolucionarias de Colombia (FARC), Ejército de Liberación Nacional (ELN) and various paramilitary groups, have undeniably contributed to exacerbate the intricacy of the conflict (Olasolo – Mendoza 2017, p. 1012; Díaz 2009, p. 471).

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* (Peace Agreement) was signed. The Peace Agreement, a product of the five-year-long Havana Negotiations, is utterly comprehensive, stretching over 300 pages. It consists of six parts representing different focus areas; rural reform, political participation for FARC-members, ceasefire and decommission of weaponry, a solution to the illicit drugs problem, agreement on victims, and implementation – reflecting a clear transitional justice approach (Government of Colombia – FARC 2016, pp. 1-7; Olasolo – Mendoza 2017, pp. 1016-1018; Bustamante-Reyes 2017, p. 14).

However, new and complex legal dilemmas have been brought to the fore in the field of transitional justice as a result of the establishment of the International Criminal Court (ICC) in 2002. States who 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 alleged perpetrators might be dealt with in post-conflict scenarios. The recent Colombian peace process was indubitably affected by this new reality.

2 Purpose, research question and delimitation

The overarching purpose of this thesis is to contribute to a greater understanding of how the ICC relates to and affects peace processes, more specifically by examining the recent Colombian peace process between the Colombian government and the FARC. As the ICC is a relatively new institution, a thorough understanding of how the court interacts with sovereign states striving to transition from periods of conflict will be crucial in regard to the undertaking of current and future peace processes. How the Rome Statute delimits – directly and indirectly – what measures states may take in the realm of their judicial sovereignty will also bear implications for the field of transitional justice. Increasingly applied in contemporary conflict resolution, transitional justice approaches have come to offer broader notions of justice than mere retributive ones – a development which might come to be challenged by this novel legal order.

The choice of examining the Colombian peace process is predominantly motivated by the fact that it is one of the few successful peace processes during which the Rome Statute has been in force. The thesis will focus on judicial aspects that were taken into consideration during the peace process, striving to expose tensions between the ICC and the Colombian judicial system. Utilizing the analytical framework of friction, the objective is to unpack tensions between the global institution and the national legal context, by elucidating frictional encounters between them and their subsequent responses and outcomes.

Hence, the research question will be:

- *How can we understand the frictional encounters that have arisen between the Colombian judicial system and the International Criminal Court during the Colombian peace process?*

Additionally, the thesis presents three different types of friction – namely *conceptual, normative* and *jurisdictional friction.* This disaggregation has theory-developing ambitions, as it aims to contribute to a more distinguished and precise use of the concept of friction.

In regard to delimitation, the definition of the term 'peace process' will in this thesis rest upon a notion of continuity. The term will thus cover the peace negotiations initiated in 2010 and the signing of the Peace Agreement in 2016, but it will also extend to comprise the current implementary phase of the agreement.

It is also important to note that there are other courts and sources of international law that have contributed to affect and influence the Colombian peace process, such as the Inter-American Court of Human Rights (IACtHR) and the *Geneva Conventions* (Urueña 2017, p. 104; Bustamante-Reyes 2017, p. 16). Nonetheless, addressing these lies outside the purpose of this thesis.

Furthermore, the legal principle of *ne bis in idem*, meaning that one should be prosecuted twice for the same thing, which is often discussed in light of jurisdictional dilemmas will due to the limited scope of this thesis not be examined.

3 Theory

This chapter begins with an introduction of the theoretical underpinnings upon which the theoretical framework for this thesis rests. Subsequently, the theoretical framework utilized in the analysis is presented.

3.1 Theoretical underpinnings

The peace versus justice dilemma has caused much debate within the field of transitional justice (Gissel 2018, p. 10; Buckley-Zistel et. al 2014, p. 4; Ambos et. al 2009, p. V; Langer 2015, p. 168). Should countries striving to transition from conflict prioritize ending violence and reaching peace? Or should focus lay on prosecuting perpetrators (Langer 2015, p. 166)? It is not uncommon that the relationship between the two is portrayed as a dichotomy, framing the two goals as mutually exclusive through opposing narratives (Gissel 2018, p. 11). For instance, it has been argued that the pursuit of justice might risk decreasing the combating actors' incentives when it comes to reaching a conflict settlement, whilst solely focusing on peace might encourage impunity and jeopardize accountability (Weiner 2016, p. 212; Ambos et. al 2009, p. V; Langer 2015, p. 167-168). Hence, the peace versus justice dilemma elucidates a plethora of difficult trade-offs that need to be taken into consideration during peace processes.

Furthermore, the peace versus justice debate has many times contributed to position the field of transitional justice in opposition to the field of peacebuilding. Nonetheless, the two fields are undeniably interconnected, both targeting post-conflict scenarios. As a consequence, they are concerned with ideas that intertwine – both in practice and in discourse (Díaz Pabón 2018, p. 2; Baker – Obradovic-Wochnik 2016, pp. 281-282). On the one hand, addressing past atrocities and human rights violations is often recognised as the main purpose of transitional justice. This can be done by establishing different mechanisms – both judicial and non-judicial – aimed at reconciliation, reparation and remembrance (Díaz Pabón 2018, p. 3; ICTJ).

Peacebuilding, on the other hand, focuses mainly on the establishment and strengthening of institutions (Baker – Obradovic-Wochnik 2016, p. 281). The divide between the two is not always clear-cut, but their contradictory relationship is often illustrated by the claim that the accountability mechanisms established through transitional justice measures might compete with the institution-building elements of peacebuilding (Baker – Obradovic-Wochnik 2016, pp. 281-284; Mani 2002, p. 4). However, even though the fields are frequently portrayed as parallel rather than integrated, they are both concerned with the conceptualization of justice, who it should be for and what it should entail (Baker – Obradovic-Wochnik 2016, p. 288). The field of transitional justice has come to introduce a broad conceptualization, incorporating notions of punitive, corrective, restorative, reparative and distributive justice (Buckley-Zistel et al. 2014, p. 6). This list is however not exhaustive, as Mani illustrates by presenting three parallel dimensions of justice: legal, rectificatory and distributive justice. The first dimension aims to address a faulty rule of law-system, while the second aims to deal with victims of the conflicts and abuses they've been subject to. Lastly, distributive justice addresses structural and systemic injustices (2002, pp. 6-9).

Another aspect that has caused much debate in regard to peace processes is the delimitation of involved actors. By whom should the process be undertaken? Globalization has contributed to the fact that local and global actors now co-exist in a setting that places high demands on their ability to interact, adapt and cooperate. As a consequence of the disappointing results many of the predominantly international peace processes produced, the beginning of the 21st century came to witness an increased demand for local-ownership (Jarstad 2013, p. 383; Donais 2008, p. 3; Millar 2014, p. 502; Mac Ginty – Richmond 2013, pp. 763-764). Nonetheless, this binary perception of the local versus the global often fails to capture the volatile nature of peace processes (Mac Ginty – Sanghera 2012, p. 5). The concept of hybridity has hence gained ground, as it has been used to shed light on the intertwinement and the melding of the global and the local (Millar 2014, p. 502). Hybridity acknowledges the results that are caused by the interaction of different groups, worldviews and activities. This acknowledgement encompasses both

top-down and bottom-up forces, and local and external actors. The concept of hybridity argues that these interactions produce fused forms of practices, institutions and norms (Mac Ginty – Sanghera 2012, pp. 3-5).

While hybridity indisputably has contributed to shed light on interactions between the local and the global, it has not always been able to fully grasp such encounters that have resulted in unexpected outcomes. In a situation like Colombia, one might have expected that a so-called hybrid court would be established as a melding of the global and the local (Dougherty 2004, p. 316; Raub 2009, pp. 2-3). However, the Special Jurisdiction for Peace (SJP), which was granted 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 does not classify as a hybrid court (DPLF 2016, p. 3). In the light of this, it would be questionable to examine the relationship between the ICC and the Colombian justice system through the lens of hybridity.

Instead, the concept of friction, which draws upon hybridization, can be used to more thoroughly examine encounters between the global and the local. The concept will be addressed in the following.

3.2 Theoretical framework: *friction*

The concept of friction introduces a more nuanced way of understanding encounters between the global and the local. The global is often understood as the international community, encompassing international organizations and institutions, bearing the ability of undertaking transnational movement with the purpose of promoting universal norms and cosmopolitanism (Höglund – Orjuela 2013, p. 306; Björkdahl – Höglund 2013, p. 292; Tsing 2005, pp. 5-7). Contrastingly, even though the definition of the local is not always clearly delineated, it is often perceived to constitute a wide variety of actors and stake holders, spread out and situated in a setting that spans from the civil society to the national level (Mac Ginty 2015, p. 841; Kochanski 2020, pp. 26-28).

Friction is a metaphor with roots in the field of ethnography (Tsing 2005, p. 5). It aims to portray interactions and encounters lacking predetermined outcomes, moving away from neat and clear-cut perceptions of dynamics, structures and agencies (Björkdahl-Höglund 2013, pp. 292, 294-295; Millar 2013, p. 190; Jarstad 2013, p. 383). These engagements, which are the root of friction, can be understood as unequal, unstable and awkward interconnections (Tsing 2005, p. 4). The concept conveys that frictional encounters can be perceived as contests over power, and consequently over agency, materializing due to skewed and asymmetrical relationships (Björkdahl-Höglund 2013, pp. 289, 298). It targets local and global discourses, practices and actors, reflecting how encounters within these spheres can be both empowering and disempowering (Björkdahl – Höglund 2013, p. 294). As such, it provides a multifaceted way of understanding confrontation and transformation, and the dynamic processes they entail in the context of peacebuilding (Björkdahl – Höglund 2013, pp. 292, 294; Millar 2013, p. 197; Kappler 2013, p. 351). The concept enables the study of norms, concepts and discourses, which when projected from the global to a local context often become subject to reinterpretation and reconstruction – consequently leading to new and distinctive results characterized by both global and local elements (Millar 2013, p. 197; Shaw 2007, p. 187; Björkdahl – Höglund 2013, p. 2013).

The relationship between the ICC and the Colombian judicial system elucidates multiple points of divergence and tension. Not only does it touch upon the wider debate of peace versus justice, but it also reflects tensions between local ownership and international involvement. As a consequence, tensions stemming from questions regarding state sovereignty are also brought to the fore. Such divergences and tensions create preconditions for frictional encounters.

It has been argued that frictional encounters can produce different feedback loops, in which an encounter can result in a certain response, which subsequently can result in a certain outcome (Björkdahl – Höglund 2013, pp. 296, 297; Jarstad 2013, p. 396). By utilizing the concept of friction, this thesis

will unpack some of the frictional encounters between the ICC and the Colombian judicial system, and the respective responses and outcomes stemming from said encounters. Björkdahl and Höglund have identified six different responses to frictional encounters – compliance, adoption, adaption, co-option, resistance and rejection – which will be drawn upon in the following (2013, p. 297).

Striving to develop the understanding of friction, this thesis introduces three different types of friction: *conceptual*, *normative* and *jurisdictional* friction. The frictional encounters examined in this paper intertwine to a certain extent, mainly due to the fact that they engage with the same actors in the context of the same peace process, but there is nonetheless a purpose of examining them separately as their core concerns differ. The choice of analysing conceptual friction stems from the fact that it can help elucidate how the global and the local interact while striving to define important concepts. Comparatively, normative friction can illustrate what norms the actors regard as desirable or unacceptable, and how the interaction between the two influences what norms are adopted or disregarded. Lastly, jurisdictional friction can 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, it has been illustrated that frictional encounters can occur both horizontally and vertically. This broader notion of the concept can thus include encounters occurring both within the global sphere and within the local sphere (Kappler 2013, pp. 349-351). The actors in focus for this thesis clearly reflect the global-local divide, with the ICC portraying the global and the Colombian judicial system representing the local. Nevertheless, the peace process has revealed friction at the horizontal level as well, clearly illustrated by the relationship between the FARC and the Colombian government. The thesis will rest upon this notion of friction, incorporating both horizontal and vertical encounters. However, the aim of this thesis is to elucidate how we can understand frictional encounters between the Colombian judicial system and the ICC. In light of this, focus will lay on the responses and outcomes of

the vertical frictional encounters, and horizontal friction will only be addressed to a certain extent. Additionally, horizontal friction will not be addressed in the chapter on jurisdictional friction. This is due to the fact that the question of jurisdiction is of main concern to the international court and the domestic judicial system.

4 Method

This methodological chapter commences with an introduction of the research design applied in the thesis. The following subchapter presents the material drawn upon, and briefly addresses aspects concerning validity and reliability.

4.1 Research design

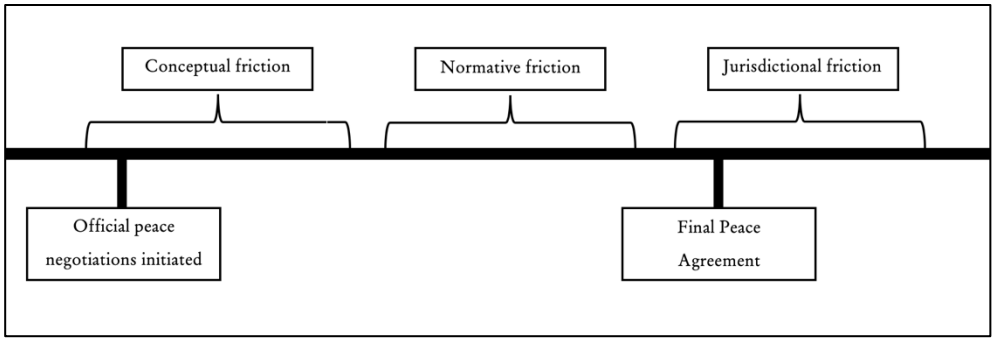
As this thesis focuses solely on the Colombian peace process, it constitutes a qualitative case study. Such studies are suitable when striving to understand how and why certain processes come about. They often consist of 'thick' descriptions which in return allow for an in-depth and detailed understanding of the chosen case (Vromen 2010, pp. 249, 255; George – Bennet 2004, p. 21). Findings of case studies can elucidate new effects of interactions and causal mechanisms and are often utilized when the aim is theory development (George – Bennet 2004, pp. 32-33, 109; Blatter – Haverland 2012, p. 1). In light of the fact that this thesis strives to develop the theoretical concept of friction, as noted in chapter 2, I argue that this methodological choice is well motivated.

Furthermore, there are few cases that would motivate a comparison, hence reducing the appeal of the option of conducting a comparative case study (George – Bennet 2004, pp. 151-152). The 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 under the process; and it is currently under preliminary examination by the Office of the Prosecutor (OTP) at the ICC.

The research design is additionally inspired by process tracing, described by George and Bennet as a method attempting to "trace the links between possible causes and observed outcomes" (2004, p. 6). Due to the limited extent of this paper, it would not be feasible to conduct a comprehensive process tracing of the entire Colombian peace process, illustrated by a

detailed chronological narrative (Ibid 2004, p. 210). However, the frictional encounters examined in the paper all become especially prominent at different stages of the peace process (see Figure 1). Thus, when examining these particular encounters, this methodological technique is drawn upon in order to understand the frictional encounters, their respective responses and the outcomes they cause.

Figure 1. Timeline of frictional encounters.



4.2 Material, validity and reliability

Data has been collected from a mix of legislative documents, publications issued by the involved actors and secondary quantitative sources, such as academic articles. I am well aware of the advantages in regard to reliability that would have followed from a larger representation of primary sources, but due to language barriers, the limited economic means and the limited amount of time provided for this paper, such data collection was not possible.

Single case studies often face criticism due to the fact that they risk lacking in representativeness, determinacy and generalizability, thus having a negative effect on the external validity of the study (Hopkin 2010, p. 300; George – Bennet 2004, pp. 32-33). However, single case studies are often attributed with a high internal validity, bearing the potential of realizing high conceptual validity and capturing causal complexity. They allow for the study of multiple and thorough observations within a chosen case (George – Bennet 2004, p. 19).

5 Analysis of frictional encounters

The first subchapter, 5.1, commences with a presentation of the actors of concern to the thesis, introducing first the global actor and thereafter the local actor(s). Following, the relationship between two is set in context. The second subchapter, 5.2, contains an analysis of the frictional encounters this thesis aims to investigate. The subchapter begins with analysing conceptual friction, followed by normative friction and lastly jurisdictional friction.

5.1 The actors

As noted above, this subchapter will begin by introducing the global and the local actor(s), whose interaction later will be analysed in light of the frictional encounters. Subsequently, the relationship between the two will be contextualized.

5.1.1 The global actor

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 (see Preamble of the Rome Statute). The court has jurisdiction over crimes against humanity, war crimes, genocide and crimes of aggression (see art. 5 of the Rome Statute).

The ICC differs from its predecessors in many ways. Firstly, it rests upon the notion of complementarity. The ICC lacks primacy over national courts, and thus primarily seeks to encourage that international crimes are pursued by and within domestic legal systems. Only in cases where the court deems the concerned state unwilling or unable to do so genuinely, may the court exercise its jurisdiction. If not, the case is deemed inadmissible (see art. 17 of the Rome

Statute). Secondly, the ICC has mandate to prosecute the crimes falling within its jurisdiction regardless of the context in which they are committed. The court is thus not sensitized towards political and contextual realities in a way that previous international courts have been, an aspect that caused concern during the drafting of the Rome Statute. As a solution, the Prosecutor of the ICC was given an option to stay an investigation or prosecution in a case where they deemed such action would not serve the interest of justice (see art. 53 of the Rome Statute; Gissel 2015, pp. 7-8). Additionally, the statute grants discretionary power to the UN Security Council to request that the ICC defer its investigation or prosecution for 12 months (see art. 16 of the Rome Statute).

In broad and simplified terms, the operation of the ICC can be described as following. Once a state ratifies the Rome Statute, they become 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 believes there is ground for prosecution and that the concerned cases are admissible, the OTP then moves forward to the investigation stage. The Prosecutor thereafter issues arrest warrants for alleged perpetrators, and later proceeds to the trial stage (Gissel 2015, pp. 24-25).

Lastly, before the local is introduced in the following subchapter, the role of the OTP needs to be addressed briefly. The OTP is an independent organ of the ICC, focused on conducting investigations and monitoring situations and cases of concern to the court (ICC 2020a). Nonetheless, as the OTP is a crucial part of the ICC's structure, its actions and statements are considered to represent the ICC in its entirety throughout this thesis.

5.1.2 The local actor(s)

It is important to note that the local in this thesis does not constitute one, single actor. The term 'Colombian judicial system' aims to cover actions undertaken by both the executive and legislative branches of government. Furthermore, the Colombian Constitutional Court has had great impact over

assessing the legislative frameworks of the peace process and thus also constitutes an important part of the local (Hillebrecht et. al. 2018, pp. 307-308). Additionally, the local should also be understood as a product of the horizontal friction emerging as a consequence of the interaction between the FARC and the Colombian government in the context of the peace negotiations. The FARC and the Colombian government were unquestionably the key actors during the negotiation phase, but input from Colombian citizens was nevertheless allowed to a certain extent and support was drawn upon from the guarantor countries Cuba and Norway (Nasi 2018, p. 38). Hence, the results stemming from the peace negotiations must be understood in the light of this.

In order to further develop the understanding of the local actor(s) in this thesis, the contextual setting needs to be addressed. Before the Havana Negotiations were initiated, several failed attempts to end the prolonged conflict had been undertaken in the country (Eskauriatza 2020, p. 193). These attempts have contributed to give the Colombian judicial system vast experience in drafting and evaluating legislation aimed at addressing past and contemporary atrocities committed in the country. In recent years, such legislation has come to reflect a more comprehensive adoption of transitional justice measures (Olasolo – Mendoza 2017, p. 1013). Similar to these earlier legislative undertakings, the Peace Agreement of 2016 is also characterized by a transitional justice approach (Government of Colombia – FARC 2016; Olasolo – Mendoza 2017, pp. 1016-108; Bustamante-Reyes 2017, p. 14).

5.1.3 The relationship between the ICC and the Colombian judicial system

Colombia chose to ratify the Rome Statute in 2002, thus giving the ICC potential jurisdiction over crimes committed in the state after November the same year. In 2004, the OTP decided to launch a preliminary examination in Colombia, focused on crimes against humanity and war crimes allegedly committed in the context of the civil conflict. The examination extends its attention to the genuineness of the national proceedings undertaken in relation

to these crimes (ICC 2020b). To this day, the preliminary examination has neither been closed nor resulted in the launch of an official investigation.

The preliminary examination is currently at the so-called phase 3, where focus lies on issues of admissibility, mainly in light of article 17 of the Rome Statute. It has been established that the OTP has reason to believe that crimes against humanity and war crimes have been committed in Colombia, and the collection of information related to subject-matter jurisdiction thus continues (OTP 2018, pp. 8, 36).

Since initiating the preliminary examination, the OTP has, in addition to gathered information about the alleged crimes, supervised legislative developments and helped keep the Colombian government informed about what actions – both in regard to policies and practices – that could prompt ICC admissibility (Gissel 2018, p. 170; Urueña 2017, pp. 104-105). When the peace negotiations were initiated between the FARC and the Colombian government, it was already from the beginning excruciatingly clear that the actions agreed upon needed to be fully compliant with Colombia's obligations stemming from the Rome Statute. How compliance would be ensured was however not fully staked-out. Aspects such as ICC's lack of recognition of amnesties raised complicated questions – especially in regard to what transitional justice measures might be interpreted as an "unwillingness" to prosecute by the ICC and thus trigger the court's admissibility under article 17 of the Rome Statute (Sriram 2009, p. 305; Weiner 2016, p. 228). Highlighting the complexity of the situation, Colombian president Juan Manuel Santos explained "We are entering unexplored terrain: there are no examples of successful peace negotiations in the era of the Rome Statute" (Santos 2015, p. 14).

5.2 Frictional encounters

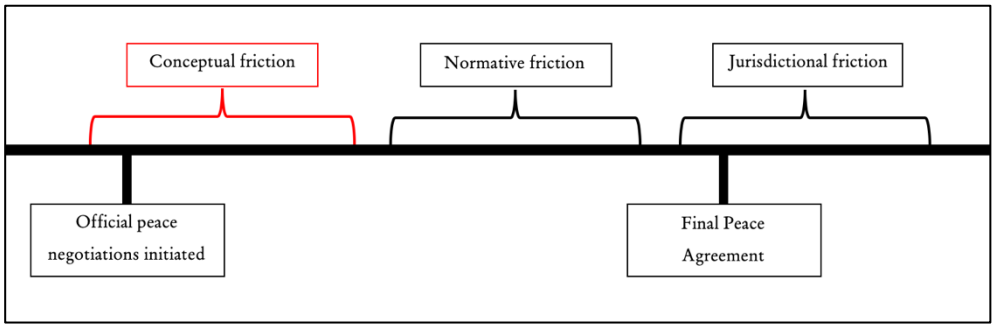
This subchapter addresses the three different types of friction of concern to the thesis. As conceptual friction is the type that became prominent earliest during the peace process, it will be analysed first. Thereafter, normative

friction will be analysed. Finally, an analysis of the jurisdictional friction will be conducted.

5.2.1 Conceptual friction: *defining justice*

The concept of justice is broad, contested and vague (Mani 2002, p. 4). Hence, agreeing upon a definition and delimitation of the concept is a crucial step of a peace process, and will have great implications for what measures will be envisaged and enforced (Buckley-Zistel et al. 2014, p. 6; Höglund – Orjuela 2013, p. 303). Different definitions expose different understandings of what shape justice should take, ranging from retributive, corrective, restorative, reparative and distributive ambitions (Buckley-Zistel et al. 2014, p. 6). How justice is conceptualized within a judicial system, often reflects who the system focuses on – be it victims or alleged perpetrators (Díaz Pabón 2018, p. 6).

Figure 2. Conceptual friction.



Entering the negotiation phase, the FARC argued that they would not accept an agreement that would result in them being imprisoned (Gissel 2018, p. 179). The FARC's Marxist ideological stance additionally complicated the matter, as it contributed to an aversion against liberal law and a mistrust in the Colombian justice system (Leon 2016, p. 173). The government, on the other hand, clearly stated that their aim of the negotiation was to ensure the protection of victims' rights (Rettberg 2013, p. 1; Nasi 2018, p. 44). Hovering above the power play at the local level were the requirements imposed on Colombia by the Rome Statute. The OTP had ever since it initiated its preliminary examination in the country made sure that there was a continuous

dialogue between the OTP and 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 of the OTP. These laws, and the lessons learnt from their implementation, were all drawn upon during the negotiation phase (Gissel 2018, p. 179). Thus, Colombia was at the time of the Havana Negotiations not foreign to ICC involvement in regard to the decontestation of the justice concept.

Whilst the government negotiated the concept with the FARC, the OTP sped up the delimitation process by informing the government about what definitions would be regarded as unacceptable. Criminal prosecution was deemed crucial and certain retributive elements would be required, as amnesties and pardons for Rome Statute crimes would not be tolerated (OTP 2015a, p. 5; Gissel 2018, p. 177; Hillebrecht et. al. 2018, pp. 283, 297). Nevertheless, the OTP simultaneously explained that there was a relatively broad space for finding an acceptable solution, as long as the red lines drawn up by the OTP and the Rome Statute were respected (OTP 2015a, pp. 2, 10). In order to explore what possibilities the negotiating parties had in regard to defining justice, a legal sub-group was established (Nasi 2018, p. 45; Gissel p. 179).

Responses

The process of defining justice during the Colombian peace process was not a bilateral negotiation between the two concerned parts. Instead, the concept needed to be decontested both within the local sphere, that is amongst the FARC and the Colombian government, and in relation to the ICC – thus elucidating both horizontal and vertical friction.

The fact that the ICC's requirements did not entirely suffocate the decontestation process enabled meaningful negotiation at the horizontal level. The ICC's initial demarcation of the concept was wide enough for the FARC and the Colombian government to seek for their own definition within the tolerated boundaries. However, even though the local actor(s) were granted a

certain degree of flexibility during the decontestation of the justice concept, it is clear that the ICC was not in any way cut off from influencing the process. Firstly, the ICC, as a result of the preliminary examination initiated in 2004, had contributed to shape the definition of justice that the Colombian government brought with them entering the negotiation phase. Secondly, the ICC clearly demarcated the outer boundaries of the justice concept. This vertical frictional encounter between the global and the local caused the Colombian judicial system to **adapt** to the requirements enforced by the ICC and the Rome Statute. According to Björkdahl and Höglund, an adaptive response is characterized by the "adaptation and contextualizing of global/external norms and practices to local characteristics" (2013, p. 297). In this case, the Colombian judicial system clearly adapted to the definition of justice presented by the ICC, whilst simultaneously letting the definition be influenced by local demands and the local setting.

Outcomes

The outcome of the responses triggered by the conceptual friction is materialized 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 (Government of Colombia – FARC 2016, pp. 132-203). The Victims' Agreement rest upon a holistic view, and the mechanisms established through it complement each other and are granted equally important standing (Gamboa Tapias – Díaz Pabón 2018, p. 68; Bustamante-Reyes 2017, p. 15). It establishes both judicial and non-judicial 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 (Government of Colombia – FARC 2016, pp. 135-139). The Victims' Agreement, as reflected in its name, has a victims-centred approach. The recognition of victims and the acceptance of liability run as guiding principles throughout the agreement, thus clearly reflecting the governments initial stance (Bustamante-Reyes 2017, p. 15; Gamboa Tapias – Díaz Pabón 2018, p. 68). The system established through the Victims' Agreement, and

the interrelated mechanisms it consists of, combines elements of reparation, retribution and restoration. It thus moves away from the contradiction of retributive versus restorative justice, and instead reflects a definition that contains and combines both restorative and retributive elements (Díaz Pabón 2018, pp. 4-6).

It has been argued that the conceptualization reflected in the Victims' Agreement is ground-breaking, as it successfully draws up a middle way of decontesting the concept (Díaz Pabón 2018, pp. 4-6). Simultaneously, it incorporates enough retributive elements for the ICC to be kept at bay, even expressing their support for the conceptualization (Gissel 2017, p. 182). Briefly after the Victim's 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" (OTP 2015b).

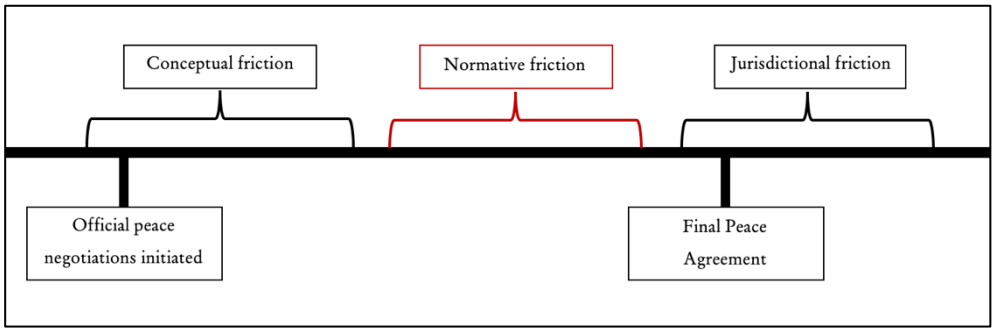
By creating a system with multiple interdependent mechanisms, the Victim's Agreement elucidates how justice can be conceptualized in a more multidimensional and comprehensive way. Moreover, the Victim's Agreement reflects a definition that acknowledges the multifaceted character of justice, seeking to satisfy both domestic needs and international obligations. Concludingly, the Victims' Agreement exposes how justice can be conceptualized in a new-thinking way.

Pursuant to the conceptualization of justice, normative friction in regard to sentencing arose between the ICC and the Colombian judicial system. This type of friction will be addressed in the following subchapter.

5.2.2 Normative friction: *shaping the sentencing*

What sentences alleged perpetrators should be subject to has long been a source of debate in the nexus of national and international criminal law. This dilemma often becomes particularly prominent when civil conflicts end by negotiated settlements, rather than by military victory (Eskauriatza 2020, p. 192). The ability to grant amnesties and pardons has long been considered an important leverage in such negotiations, often seen as a manifestation of state sovereignty (Roberti di Sarsina 2019, pp. 127, 148). However, the 1990's came to witness a shift in the perception of amnesties and pardons regarding certain types of especially atrocious crimes, launching the international community towards embracing an anti-impunity norm. This development was unquestionably driven by prejudice – stemming both from ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), and hybrid courts such as the Special Court for Sierra Leone (SCSL). The emergence of the anti-impunity norm was furthermore bolstered by the creation of the ICC, which clearly reflected a legal consensus on the matter amongst large parts of the international community (Roberti di Sarsina 2019, pp. 127-128; Gissel 2018, pp. 5-7; Mani 2002, p. 98). One should however note that the Rome Statute does not contain any explicit provisions on the matter of amnesties and pardons, even though the subject was thoroughly debated during the drafting of the statute. Nevertheless, it has been argued that there is an underlying suggestion in the Preamble of the Statute claiming that neither impunity nor the waiving of prosecution can comply with the underlying purpose of the ICC (Roberti di Sarsina 2019, p. 148).

Figure 3. Normative friction.



The question of sentencing was particularly problematic during the Colombian peace process. As mentioned in subchapter 5.2.1, the FARC entered the Havana Negotiations clearly explaining that they would not accept imprisonment as a punishment (Gissel 2018, p. 179; Nasi 2018, p. 45). Furthermore, the FARC overtly pushed for a sentencing regime that would not strip them of their ability to participate in Colombia's politics, thus striving to safeguard their political survival (Gissel 2018, p. 179). As the Colombian government early on declared that the peace process would be characterized by a transitional justice approach, one of the main concerns was that such an approach might trigger ICC admissibility. This dilemma became especially prominent in light of the OTP's vague stance on sentencing requirements (Minow 2019, p. 12; Weiner 2016, p. 228).

Prosecutor Bensouda, was in the beginning of the negotiations highly critical towards a sentencing regime that would not include imprisonment as a penalty for war crimes and crimes against humanity (ECCHR 2012, p. 13). Imprisonment was however not a part of the intended alternative sentencing regime, which was heavily advocated by the Colombian judicial system – none the least by Colombia's Prosecutor Eduardo Montealegre – and demanded by the FARC (El Tiempo 2014). Nonetheless, a more relaxed attitude towards an alternative sentencing regime could be interpreted from the OTP's issued statements in 2015. Whilst explicitly maintaining that crimes falling under the Rome Statute could not be subject to amnesties and pardons, the OTP communicated that states have a "wide discretion" in regard to sentencing and how they choose to frame and combine sanctions (OTP 2015a, p. 10). The OPT argued that sanctions can 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" (OTP 2015a, p. 10). The aversion against amnesties and pardons stemmed from the fact that such course of action would be perceived as the "shielding of persons" (OTP 2015a, p. 11) and thus be in straight conflict with article 17 (2) of the Rome Statute (see subchapter 5.2.3).

The legal sub-group that was established in order to define justice, was thus also given the task of dealing with the above-mentioned different and contradictory demands (Nasi 2018, p. 45; Gissel p. 179).

Responses

The horizontal friction that arose on the matter – that is between the FARC and the Colombian government – elucidated the need for a sentencing regime that the FARC would find acceptable whilst still being perceived as legitimate by the Colombian population. By not eliminating the possibility of amnesty and pardons in regard to political crimes, the FARC was incentivised to not walk away from the negotiation table. The need for legitimacy was pursuant to the fact that the Peace Agreement would become subject to a plebiscite post-negotiation. It is noteworthy that the sentencing regime would come to affect both sides of the conflict, as the as the SJP – the ad hoc judicial body given the task of dealing with crimes that were committed in connection to the armed conflict – would have jurisdiction over both FARC-members and members of the Colombian Armed Forces. Hence, there is reason to believe that it lay in the interest of both parties to find alternative solutions to imprisonment.

The Colombian judicial system's response to the vertical friction that emerged can be categorized as **co-option**, described by Björkdahl and Höglund as the "strategic adoption of the global into the local as a means of averting pressure" (2013, p. 297). The co-option is primarily reflected by the fact that the established sentencing regime illustrates how the Colombian

judicial system partially adapted to the anti-impunity norm proposed by ICC, mainly as a mean to mitigate and decrease the courts ability to exert pressure.

Outcomes

The sentencing regime and the framework for the SJP presented in the Victim's Agreement, in other words the outcome of the co-option, is highly interesting and utterly complex (Olasolo – Mendoza 2017, pp. 1015-1016; Bustamante-Reyes 2017, p. 15; Roberti di Sarsina 2019, p. 158). The scope of this research paper does not provide for a detailed account of the SJP and its legislative framework, but the main aspects will be briefly summarized in the following.

The SJP has jurisdiction over individuals who, directly or indirectly, participated in the conflict, including but not limited to FARC-members and state officials (Olasolo – Mendoza 2017, p. 1020; Gamboa Tapias – Díaz Pabón 2018, p. 75). The legislative framework establishes an alternative sentencing system, only available for individuals who comply with the SJP's requirements of full disclosure and acceptance of liability. Through the legislative framework, two categories of crimes are constructed: those for which amnesty, pardon and special treatment can be granted, and those for which such sanctions cannot. The foremost category regards so called political crimes, i.e. rebellion, sedition, military uprising. The latter category concerns crimes amounting to gross human rights violations and grave breaches of international humanitarian law committed occasionally, indirect or directly in relation to the armed conflict – thus including crimes falling under the Rome Statute (Gamboa Tapias – Díaz Pabon, 2018, pp. 75-77; Olasolo – Mendoza 2017, pp. 1020-1021; Roberti di Sarsina 2018, p. 158). Individuals accused of committing this latter type of crime become subject to an effective restriction of their liberties and rights (freedom of movement and residence) during a period ranging from five to eight years. They are thus ensured the ability to remain politically active. The restriction is additionally coupled with sanctions of reparative and restorative character, often amounting to conducting public reparations in communities that have been affected by the conflict. The penalty of imprisonment is excluded for those

individuals that comply with the requirements of full disclosure and acceptance of liability. Individuals who fail to satisfy these requirements do not qualify for the alternative sentencing regime and may instead be sentenced to prison for up to 20 years (Roberti di Sarsina 2018, pp. 158-159; Nasi 2018, p. 45; Olasolo – Mendoza 2017, pp. 1032-1033).

The alternative sentencing regime reflects a high level of legislative creativity. It goes hand in hand with the victims-centred justice approach, elucidating an intertwinement of retributive and restorative elements. Additionally, by creating two categories of crimes and ensuring that the crimes falling under the Rome Statute did not become subject to neither amnesties nor pardons, ICC admissibility could be 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" (OTP 2016a). The ability to grant amnesties and pardons for political crimes was perceived to be well within Colombia's sovereignty, and those crimes were anyway not of concern to the ICC.

Despite the innovative nature of the SJP and its legislative framework, it has been subject to substantial critique. A first version of the Peace Agreement became subject to a plebiscite in September 2016, the underlying purpose being to anchor the perceived legitimacy of the agreement with the Colombian population. Contrary to common expectations, the agreement was rejected by a remarkably thin margin, which led to a renegotiation of the agreement (Gamboa Tapias – Díaz Pabón 2018, pp. 66-67; Gissel 2018, p. 173). A revised final version was later approved by congress (Gissel 2018, p. 174). It has been argued that one of the main reasons as to why the Peace Agreement was rejected during the plebiscite, was due to the fact that the alternative sentencing regime was perceived as too lenient, bordering on granting impunity to FARC members (Olasolo – Mendoza 2017, p. 1015; Gissel 2018, p. 177). Furthermore, the sentencing regime has been criticised as it is regarded to deviate from earlier jurisprudence. Olasolo and Mendoza claim that the crimes committed in the context of the Colombian conflict do

not differ much from crimes that have been dealt with in previous international courts and tribunals, but the alternative sanctions imposed by the SJP move away from the practice of relying on imprisonment for such crimes (2017, p. 1038). The adjudication of the SJP has also been source of debate in regard to questions concerning jurisdictional friction, which will be analysed in the subsequent subchapter.

5.2.3 Jurisdictional friction: *complementarity and the assesment of genuinity*

The principle of complementarity is one of the most important cornerstones of the Rome Statute, clearly reflected in article 17 of the treaty. The principle entails that the ICC should function as a "complement" to domestic courts. Moreover, it illuminates a fundamental tension that the ICC constantly needs to relate to, namely the balancing act of respecting the sovereignty of its member states whilst still striving to end impunity (Brighton 2012, pp. 629-631; Eskauriatza 2020, p. 199). The principle furthermore reflects local ownership, as it aims to promote that international crimes primarily be prosecuted within the context of the members states' national judicial systems (Roberti di Sarsina 2019, pp. 155-156; Roach 2010, p. 12). This primacy is however conditioned, as it requires that the undertaken proceedings are considered "genuine" (Brighton 2012, p. 632).

Article 17 states that a case is inadmissible before the ICC if it is being investigated or prosecuted in the concerned state, unless said state is unwilling or unable to conduct such proceedings genuinely. This entails a two-step test, where the first step is to see to if an investigation or prosecution is taking place at all. If not, the ICC has jurisdiction over the matter. If such proceedings are taking place, the second step is concerned with determining whether or not the state should be considered unwilling or unable to conduct these genuinely. Article 17 (2) clarifies that a state can be considered unwilling if the proceedings aim to shield the person concerned for criminal responsibility, there is an unjustified delay in the proceedings, or the proceedings lack independence and impartiality. Inability is concerned with

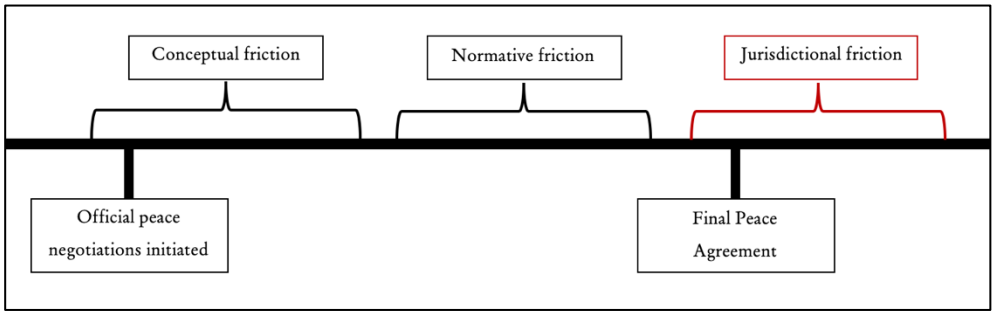
the functioning of the judicial system. Article 17 (3) stipulates that a total or substantial collapse of the judicial system, leading to that the state is unable to obtain the accused or necessary evidence could be perceived as inability. This article draws upon lessons learned from former international tribunals: inability aims to prevent the lack of institutional capacity that the ICTR faced and unwillingness strives to prevent the political aversion that aggravated the work of the ICTY (Brighton 2012, pp. 639-640).

How the principle of complementarity should be interpreted is not always clear-cut. There is an inherent contradiction in the fact that the one part of the ICC's work is to adjudicate how the member states comply with their obligations, whilst simultaneously being dependent on the consent and funding of said states. If the ICC starts interpreting the principle too broadly and invasively, thus expanding its jurisdiction in a way that is not welcomed by the member states, the court risks decreasing its own legitimacy (Brighton 2012, p. 664). With the purpose of trying to pinpoint how the principle should function, two different sub-categories have been developed: negative and positive complementarity. The foremost emphasizes punishment, coercion and threat-based incentives. The latter focuses on judicial assistance, where the ICC supports its member states, helping them develop and reinforce the rule of law (Roach 2010, pp. 12, 91).

When Colombia ratified the Rome Statute in 2002, the state waived part of its judicial sovereignty in regard to certain international crimes and opened up for jurisdictional tension – undeniably exacerbated by the fact that there was an ongoing civil conflict proliferating within its borders. Jurisdictional friction arose between the Colombian judicial system and the ICC at the same time the OTP decided to launch a preliminary examination in the country. The ICC has battled with the issue of admissibility ever since, continuously considering whether or not the proceedings undertaken in the country should be perceived as genuine. Colombia has, on the other hand, managed to keep the ICC at bay by implementing legislation that on the one hand signals a willingness to fulfil its duties stemming from the Rome Statute, whilst still not being persuasive enough to render the closing of the preliminary

examination. It is outside the scope of this thesis to analyse this long-drawn-out interaction, and focus will – according to the research question – lay on the peace process. In the light of this, it is arguable that the most prominent jurisdictional friction arose between the ICC and the Colombian judicial system 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 implementary phase had been initiated that the ICC could begin to assess the genuinity of the proceedings related to the peace process.

Figure 4. Jurisdictional friction.



When the legislative framework for SJP was finalized, the OTP's initial response was predominantly positive. However, it was emphasized that the OTP would continue to monitor the situation and extend its support during the implementary phase, in order to evaluate if the proceedings would come to satisfy the requirement of genuineness (OTP 2016).

In 2017, the OTP identified four areas related to the legislation of the SJP that in their perspective raised cause for concern. These were the definition of command responsibility, the definition of grave war crimes, the determination of active or determinative participation in the crimes, and the implementation of effective restrictions of freedoms and rights. The OTP argued that these aspects might jeopardize Colombia's compliance with the Rome Statute, and consequently might grant the ICC admissibility (OTP 2017, pp. 32-33). These concerns were addressed by the Colombian Constitutional Court, who acknowledged the critique but chose not to act upon it (OTP 2018, p. 42). As such, the OTP stressed that it will be up to the SJP to interpret these

regulations in accordance with international law, in order to ensure compliance with the Rome Statute. The SJP will thus bear a great responsibility in whether or not the Colombian proceedings are to be perceived as genuine. The OTP concluded its preliminary report from 2018 by noting that the admissibility assessment continues, and that it will continue its dialogue with Colombian authorities in order to stay updated on prosecutorial activities. It will furthermore follow individual proceedings (OTP 2018, p. 44). As of 2020, the SJP has initiated seven cases concerning different situations, such as kidnapping and the recruitment of child soldiers (SJP 2020).

Responses

The jurisdictional friction between the ICC and the Colombia is still present – and will most likely be until the ICC chooses either to close the preliminary examination or to launch an official investigation. However, this does not mean that the previous friction has not affected the relationship between the two, causing different outcomes due to their interaction.

The response of the jurisdictional friction during the peace process can be attributed to bear the characteristics of **co-option**, as the Colombian judicial system reflects a highly strategic adoption of the ICC's language and the international norms it advocates. It is clear that this cause of action strives to prevent admissibility before the ICC and to hinder the launch of a tentative investigation.

Outcomes

Colombia has shown that states are still able to shield their jurisdictional sovereignty to a certain extent, while still averting the launch of an investigation of the ICC. One might argue that the state's prolonged involvement with the ICC granted them an understanding of how the court exerts pressure and an ability to adapt to its legal language. The longer the preliminary examination dragged on, the less imminent the threat of a tentative official investigation must have become – thus enhancing the confidence of Colombian judicial systems and expanding its space for

independent decision-making. The Colombian judicial system has insofar been able to counterbalance the ICC's requirements, firmly holding on to its belief in a transitional justice-based approach to the peace process.

The normative pushback in regard to sentencing can illustrate the above-mentioned argument. The OTP's primary stance in 2012 was that the absence of imprisonment penalties would be regarded as "manifestly inadequate" (ECCHR 2012, p. 13). There was however a notable shift in the stance, and in 2015 the OTP elaborated on the fact that alternative sentencing regimes can be accepted, as long as they serve "appropriate sentencing goals" (OTP 2015a, p. 10). When Prosecutor Bensouda issued her statement after the finalized agreement in 2016, there was no mention of any requirements of prison time (OTP 2016). This, indubitably more flexible approach, have by some been attributed to the struggle the ICC faced in Uganda in regard to the state's attempt to implement an amnesty law (Urueña 2017, p. 120). Nonetheless, the Colombian judicial system was able to utilize this window of opportunity that the ICC's wavering stance on the question constituted. Consequently, they were able to successfully promote and decide upon an alternative sentencing regime, whilst not altering the balance of the jurisdictional friction in a way that would cause the ICC to spring to action. The normative friction in regard to sentencing has previously been discussed in subchapter 5.2.3.

However, the ICC's influence over the peace process should not be diminished, and the court was unquestionably able to affect the process – much due to the ongoing preliminary examination, the imminent jurisdictional friction it had caused and the communication channels it had established. 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 legitimacy. As an example, the agreement contains twelve references to the Rome Statute. Furthermore, the approach that the ICC adopted clearly bears the characteristics of positive complementarity, especially as the court continuously emphasized and extended its support to the peace process (OTP 2013, p. 37; OTP 2014, pp. 31-32; OTP 2015c, p.

17). This embrace of positive complementarity might envisage another role for the ICC in the future and offer an alternative modus operandi for a court struggling in regards of both capacity and funding (Minow 2019, p. 3; Roberti di Sarsina 2015, p. 155). By extending its support to member states striving to address accountability, the ICC might be able to streamline and project its universal norms in a way that is not perceived as too intrusive in regard to state sovereignty, thus actually contributing to anchor these norms in local contexts.

To summarize, it is clear that the jurisdictional friction that has arisen between the ICC and the Colombian judicial system has had significant impact on both actors. The Colombian judicial system's creative legislative solutions have caused the ICC to revisit its stance on how it assesses genuineness, perhaps opening up for less narrow interpretations in the future. As the court is a relatively new institution, all interactions with its member states are revealing and contribute to a more detailed understanding of the court's role in the international community and the work it strives to undertake. Such interactions can elucidate what is prioritized, in which situations the court chooses to act and when it adapts a more apprehensive approach. Furthermore, the Colombian peace process has thus contributed to develop 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 fulfils its prosecutorial obligations stemming from the Rome Statute. If the ICC might assess that the proceedings undertaken by the SJP cannot be considered genuine, it will not only bear consequences for Colombia's possibility of achieving a durable peace – but it will indubitably affect to what extent future peace processes will be able to incorporate transitional justice measures as well.

6 Concluding remarks

The peace process between the FARC and the Colombian government is remarkable in many ways. Not only has it successfully pushed for an end in regard to one of the most prolonged civil conflicts in modern times, but it has contributed to shed light on the relationship between sovereign states and their interaction with international judicial organs.

The purpose of this thesis has been to contribute to a greater understanding of how the ICC relates to and affects peace processes. By examining the Colombian peace process, it is clear that the ICC has altered how peace can be constructed, at least to a certain extent. The court is now involved and able to affect decisions that previously were perceived to be reserved to 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 their subsequent implementary phases. The ICC's authorizing treaty, the Rome Statute, is still quite young, thus weak in prejudice and guidelines concerning the interpretation of its provisions. As noted continuously throughout this thesis, any interaction between the ICC and its member states, where the court elaborates on the interpretation of the Rome Statute can thus help shed light on its particular wording.

In regard to the Colombian peace process, the analysis of the frictional encounters has demonstrated how the interaction between the Colombian judicial system and the ICC have taken – and continue to take place. Firstly, the conceptual friction that emerged during the conceptualization of justice led to that the Colombian judicial system adapted to the ICC's demarcation of the concept. More importantly, the Colombian judicial system was able to present a unique interpretation of the concept, which satisfied the demands of the ICC, whilst simultaneously developing a complex and comprehensive definition of the concept – clearly anchored to the context of the conflict. Secondly, the normative friction caused the Colombian judicial system to co-opt to the requirements of the ICC. The alternative sentencing regime reflects

a thorough understanding of the ICC's language, an ability to utilize the ICC's vague stance on sentencing and a legislative creativity well suited to the situation in Colombia. By separating crimes falling under the Rome Statute from other crimes, the Colombian judicial system has illustrated how such a division can ensure and shield states' judicial sovereignty to a significant extent. Lastly, the jurisdictional friction – which is still very much present – has contributed to affect both actors. On the one hand, the Colombian judicial system has through constant efforts managed to act in a way that has insofar not triggered ICC admissibility. The ICC has on the other hand, continuously monitored and evaluated to what extent the actions undertaken in Colombia should be considered compliant with the Rome Statute. As a result, the Colombian judicial system has placed strain on the principle of complementarity, in particular how the term "unwilling" in article 17 of the Rome Statute should be interpreted and understood.

To summarize, the Colombian judicial system has shown a high level of adaptability and flexibility in the peace process. In this particular case, the local actor has been able to find new and innovative solutions, restricting the influence of the global. The Colombian judicial system has thus been able to secure agency, whilst simultaneously pushing back the ICC and challenging the idea that the court could be perceived as a hinder to the peace process.

However, I argue that the role the ICC has played in the Colombian peace process should not be diminished. When the peace process was initiated, the OTP's preliminary examination concerning the situation in the country had been in progress for nearly a decade. Thus, the OTP had been able to meticulously highlight and monitor the development in the country in regard to Rome Statute-crimes. Moreover, the preliminary examination had established communication routines and communication channels between the Colombian judicial system and the ICC. As a result, the ICC's stance on context-specific matters seldom came as news during the peace process, giving the Colombian judicial system opportunity to relate to the court's demands and requirements in advance. This lengthy interaction between the two has thus enabled the ICC to introduce, anchor and legitimize universal

norms advocated by the court – in particular the anti-impunity norm. Nevertheless, it is uncertain to what extent the ICC would have been able to influence and affect a peace process undertaken in a country not subject to a preliminary examination or investigation.

The analysis has furthermore shown that transitional justice should not be deemed incompatible with the work of the ICC. The Colombian peace process has been characterized by an extensive transitional justice approach, which has gained the acceptance and support of the ICC. It has however been established that a certain amount of criminal justice elements must be incorporated, in order to ensure that Rome Statute-crimes are dealt with in a way that the ICC finds adequate. As such, the SJP's work and compliance with the Rome Statute will continue to be of great importance in regard to how the ICC perceives and relates to transitional justice mechanisms.

Concludingly, this thesis has demonstrated that the interaction between the ICC and the Colombian judicial system can be understood as multifaceted and complex. The utilization of the analytical framework of friction has contributed to elucidate a more nuanced and thorough understanding of how the interaction between the ICC and the Colombian judicial system advanced during the peace process. Furthermore, by disaggregating the concept and examining the encounters between the two actors in light of three different types of friction, this thesis has contributed to a more fine-grained understanding of frictional encounters. It has allowed for a precise and distinct perception of friction, illuminating how frictional encounters between the same actors in the same context can result in different responses and varied outcomes. As such, the thesis has illustrated how a disaggregated use of the concept of friction can contribute to a more developed and refined understanding of the interaction between the global and the local.

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