

NOTES

REMODIFYING COLOMBIAN PEACE PROCESS: A CRITICAL PERSPECTIVE AND A DEMAND FOR JUSTICE

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I. INTRODUCTION

Colombia is a beautiful yet extraordinarily complex country. Its complexities arise from different groups of people fighting over its beauty. Some of these groups include the Colombian Government, the citizens of Colombia, and the Revolutionary Armed Forces of Colombia (“the FARC”), a communist-guerrilla group. The FARC and the Government have been in conflict since the mid-20th century.

In 2016, the FARC and the Colombian Government formally came to a peace agreement. This agreement, however, has yet to be implemented into Colombian legislation because of its uncertainty regarding transitional justice for FARC members. The Colombian Congress votes on each provision of the deal to be implemented into legislation by a majority vote. It is 2018, however, and certain members of this Congress have refused to vote on provisions that they feel require modification. Members of Congress believe these provisions need be to clearer and structured regarding retribution for the FARC.

Additionally, because Colombia is a party to the Rome Statute of the International Criminal Court (“the Rome Statute”), the deal has caught the attention of the International Criminal Court (“ICC”). There is skepticism as to whether the deal meets the standards set forth by the Rome Statute, which Colombia is obli-

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gated to meet. If Colombia does not comport with the Rome Statute, the ICC may launch a prosecutorial investigation on agents of the Colombian government, as the deal would be a violation of international law. This Note explores what the future Colombian presidential administration can do to ensure that the deal complies with the Rome Statute and preserves the standards of international human rights.

Part II of this Note will give a background of the FARC, the FARC's impact throughout Colombia., and the Role of the ICC in the Colombian Peace Process. Part III of this Note will discuss the legal status of the peace deal between the FARC and the Colombian Government, as well as whether the ICC should intervene in the peace deal's implementation process. Lastly, Part IV discusses that the future Colombian presidential administration should consider modifying the current peace deal using interest-based facilitative mediation.

II. BACKGROUND

A. *History of FARC and its Role in Colombia*

Colombia's conflict with the FARC began in the mid-20th century. This period in Colombia was known as "La Violencia."¹ In the 1930s and the 1940s, a glaring tension existed between the most powerful political parties in Colombia.² On the left was the Leftist Liberal Party, led by individuals from commercially elite background; while conversely, the Conservative Party on the right, was led by wealthy, agricultural landowners.³ Colombian citizens outside of the elite circles of the Conservative and Liberal parties, rural landowners and poor people outside of Bogotá, were livid that Colombia's political economy primarily served the interests of the wealthy and powerful.⁴ Thus, in response to this inequality in

¹ Thomas R. Cook, *The Financial Arm of the FARC: A Threat Finance Perspective*, 4 J. STRATEGIC SEC. 19, 20 (2011); Alfredo Rangel Suarez, *Parasites and Predators: Guerrillas and the Insurgent Economy of Colombia*, 53 J. INT'L AFF. 580 (2000); see also *Who Are the FARC?*, BBC NEWS (Nov. 24, 2016), <http://www.bbc.com/news/world-latin-america>.

² Cook, *supra* note 1, at 20; Adriaan Alsema, *A 200-year history lesson to understand Colombia's 52-year conflict*, COLOM. REP. (Aug. 29, 2016), <https://colombiareports.com/200-year-history-lesson-understand-colombias-52-year-conflict/>.

³ Cook, *supra* note 1, at 20; Alsema, *supra* note 2.

⁴ *Id.*; see also Suarez, *supra* note 1, at 580; Jorge Eliécer Gaitán, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Jorge-Eliecer-Gaitan> (last visited Mar. 9, 2018).

the distribution of power, Jorge Eliécer Gaítan, the leading populist candidate of the 1950 presidential elections was assassinated by hitmen hired by the Conservative and Liberal parties.⁵ Gaítan's assassination led to a period of civil unrest, known as "La Violencia."⁶

The "La Violencia" conflict was primarily between the insurgents of the Liberal party, who received support from the communist Soviet Union, and syndicates of the Conservative party, who received support from the United States.⁷ The insurgents of the Liberal party were primarily the rural landowners responding to Gaítan's death⁸. Out of these insurgents rose the FARC, whose ethos was fueled by the Communist ideologies of Karl Marx.⁹

The FARC started as a peasant-farmer movement in opposition to the "National Front."¹⁰ The "National Front" was a movement in which the elites of the Conservative and Liberal parties shared the legislative and executive branches of the Colombian Government by way of agreement: every four years, the Conservative party would hold office, followed by four years of the Liberal party in office, and then the Conservative party would return to office, and so on.¹¹ The power of the "National Front" yielded the FARC's impetus to oppose the Colombian Government in any manner possible.¹² In 1965, the Colombian military, with assistance from the United States, attempted to curtail the FARC's uprising by attacking the FARC in the rural land occupied by these individuals.¹³ After this attack, the FARC held a conference in which it adopted a mobile guerrilla agenda and developed its political, ideological, and military foundation, in which it became an official guerrilla movement in 1966.¹⁴

Since its inception, the FARC has been fundamentally opposed to the Colombian Government and its purported imperialist-

⁵ Cook, *supra* note 1, at 20; Alsema, *supra* note 2; *see also* Suarez, *supra* note 1, at 580; Jorge Eliécer Gaítán, *supra* note 4.

⁶ Jorge Eliécer Gaítán, *supra* note 4.

⁷ Cook, *supra* note 1, at 20; *see also* Suarez, *supra* note 1, at 582.

⁸ *See* Cook, *supra* note 1.

⁹ Cook, *supra* note 1, at 20; Alsema, *supra* note 2.

¹⁰ Suarez, *supra* note 1, at 580.

¹¹ Javaria Ahmad, *The Colombian Law of Justice and Peace: One Step Further From Peace and One Step Closer to Impunity?*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 333, 340 (2006); *see generally* DOUG STOKES, *AMERICA'S OTHER WAR: TERRORIZING COLOMBIA* (Zed Books, 1st ed. 2005).

¹² *See* Ahmad, *supra* note 9, at 341.

¹³ Suarez, *supra* note 1, at 588.

¹⁴ Cook, *supra* note 1, at 20.

capitalist agenda.¹⁵ The FARC was not the only Colombian demographic opposed to the Colombian Government however, as rural farmers and peasants were also frustrated with their exclusion from Colombia's economic policy.¹⁶ The FARC, thus, was able to use the farmers' and the peasants' frustration with the Government to its advantage by financially supporting these farmers and peasants in exchange for land.¹⁷

Because the land that the FARC eventually occupied through its alliance with these farmers was heavily rich with coca leaf, the main ingredient in cocaine,¹⁸ the FARC was able to fund itself by providing drug traffickers with access to coca. The FARC exploited these economic benefits for its own financial improvement by imposing high taxes on the large quantities of cocaine it sold to drug traffickers.¹⁹ Although ideologically opposed to the ethos of the drug traffickers, as drug traffickers were using cocaine as a free-market enterprise, the FARC played a critical role in allowing Colombian drug traffickers to profit vastly through the cocaine trade.²⁰

Throughout its development, the FARC amassed over 20,000 guerrilla members to join its movement.²¹ During the 1980s and the 1990s, the FARC broadened its financing means by kidnapping and extorting members of the Colombian Government.²² These kidnappings were in response to the Colombian Government's coca-eradication program, which fumigated the coca crop in an attempt to reduce the FARC's leverage in the global cocaine trade.²³ Because the FARC was a guerilla syndicate that did not obey the

¹⁵ See Suarez, *supra* note 1, at 584.

¹⁶ *Id.* at 580.

¹⁷ *Id.* at 586.

¹⁸ *Id.*

¹⁹ *Id.* at 584.

²⁰ See generally KARL MARX, FRIEDRICH ENGELS, SAMUEL MOORE & DAVID McLELLAN, *THE COMMUNIST MANIFESTO* (Oxford University Press, 6th ed. 1992) (Marx argues that capitalist free-market enterprises profited by exploiting the proletariat (the working class). The FARC believed that the Colombian Government mirrored the capitalist bourgeoisie that Marx discusses in the Manifesto by exploiting its influence in the greater political economy of Colombia. The FARC believed to be representing the interests of the proletariat by opposing the Colombian Government at any cost); see also Cook, *supra* note 1, at 21–22; Suarez, *supra* note 1.

²¹ See Ricardo Vargas, *The Revolutionary Armed Forces of Colombia (FARC) and the Illicit Drug Trade*, TNI (June 7, 1999), <http://www.tni.org/en/publication/the-revolutionary-armed-forces-of-colombia-farc-and-the-illicit-drug-trade/>; see also Cook, *supra* note 1.

²² Cook, *supra* note 1, at 21; see Alsema, *supra* note 2.

²³ Adam Isaacson, *Time to Abandon Coca Fumigation in Colombia*, WOLA (Oct. 13, 2013), <https://www.wola.org/analysis/time-to-abandon-coca-fumigation-in-colombia/>; see also Alsema, *supra* note 2.

Colombian rule of law, the Colombian Government recognized the humanitarian threat the FARC, as well as other guerilla groups,²⁴ posed to the safety of its citizens.²⁵ This forced the Colombian Government to attempt to negotiate peace with the FARC on multiple occasions throughout the 1990s and the 2000s.

B. *History of Peace in Colombia and the Current Peace Deal*

Although there were many attempts to reduce the FARC's presence between the 1990s and early 2000s, it was not until President Alvaro Uribe's election in 2002 that the FARC's presence weakened.²⁶ President Uribe made it known to Colombia, and the global community at large, that his priority as President was to diminish FARC's presence and seek justice for those affected by the FARC. In 2003, thus, President Uribe implemented the Democratic Security Policy ("DSP"), a statute aimed to increase the state presence of the Colombian Government. The DSP focused on reducing the FARC's terrorism, protecting the Colombian citizens from the FARC's violence, and eliminating revenues from the illegal drug trade by curtailing and diminishing coca-rich land transactions.²⁷

Initially, President Uribe's legislative agenda was successful, as it depleted the FARC's presence in Colombia to 8,000 soldiers.²⁸ On the surface, President Uribe's plan represented that Colombia was finally on the correct path to eliminating the FARC's presence and forcing the FARC to engage in peace talks with the Colombian

²⁴ Ahmad, *supra* note 9, at 341 (other violent guerrilla groups that arose around this period include the Army of National Liberation (ELN), the Popular Libertarian Army (EPL) M-19, and the Autodefensas Unidas de Colombia (AUC)).

²⁵ See generally Suarez, *supra* note 1; Alsema, *supra* note 2.

²⁶ Joe Parkin Daniels, 'False Positives': How Colombia's Army Executed Civilians and Called Them Guerrillas, VICE NEWS (June 25, 2015), <https://news.vice.com/article/false-positives-how-colombias-army-executed-civilians-and-called-them-guerrillas>; see also *Extrajudicial Executions*, COLOM. REP., <https://data.colombiareports.com/false-positives/> (last visited Mar. 9, 2018).

²⁷ Daniels, *supra* note 26; see also Jennifer S. Eastday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 ARIZ. J. INT'L COMP. L. 49 (2009) (citing Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49, 61 (2006)).

²⁸ *After Surprising First Round Elections in Colombia, Two Candidates to Vie for Presidency on June 20*, COUNCIL ON HEMISPHERIC AFFAIRS (June 2, 2010), <http://www.coha.org/after-surprising-first-round-elections-in-colombia-two-candidates-to-vie-for-presidency-on-june-20/> [hereinafter *Council on Hemispheric Affairs*]; see also *Colombia: Lessons to be Learned About "Justice and Peace"*, KNOWLEDGE PLATFORM: SECURITY & RULE L. (Apr. 7, 2016), <https://www.kpsrl.org/browse/browse-item/t/colombia-lessons-to-be-learned-about-justice-and-peace>.

Government.²⁹ The reality of President Uribe's agenda, however, sadly demonstrated otherwise.³⁰

As a result of President Uribe's staunch prioritization,³¹ officials of the Colombian armed forces offered bounties to soldiers who killed FARC militants and brought the dead militants back to particular units of where Colombian armed forces were stationed.³² The FARC was mainly present in isolated, rural Colombian territory; thus, soldiers of the Colombian armed forces likely did not confront FARC soldiers as frequently as they anticipated.³³ To avoid any wasted effort in not being able to find or execute FARC soldiers, members of the Colombian armed forces allegedly forced rural civilians to wear FARC uniforms, and they subsequently executed these civilians to "present them as combat kills."³⁴ This was the "false positives" incident of the DSP.³⁵ President Uribe denied the allegations that the Colombian military engaged in these practices.³⁶ The Prosecutor General of Colombia began to investigate these allegations, and the findings "linked the bodies of unidentified rebel finders . . ." ³⁷ to citizens who had been reporting missing in different cities and towns of Colombia.

President Uribe addressed these concerns by establishing the Justice and Peace Law of 2005 ("JPL").³⁸ The JPL aimed to establish truth commissions³⁹ for Colombian military soldiers to present their accounts of what precisely happened regarding the allegations of officials offering bounties.⁴⁰ The legal mechanism of the JPL, moreover, intended to "prosecute and sentence perpetrators of war crimes and crimes against humanity . . ." ⁴¹ committed by members

²⁹ Daniels, *supra* note 26; Council on Hemispheric Affairs, *supra* note 28; Sanne Weber, *Colombia: Lessons to be Learned About "Justice and Peace"*, CONSENTIDO (June 24, 2016), <http://consentido.nl/colombia-lessons-to-be-learned-about-justice-and-peace/>.

³⁰ Daniels, *supra* note 26.

³¹ *Extrajudicial Executions*, *supra* note 26.

³² *Id.*

³³ *Id.*

³⁴ Daniels, *supra* note 26; Alsema, *supra* note 2.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Extrajudicial Executions*, *supra* note 26.

³⁸ See Eastday, *supra* note 26.

³⁹ *Id.* at 13; see also René Urueña, Note and Comment, *Prosecutorial Politics: The ICC's Influence in Colombia Peace Processes*, 111 AM. J. INT'L L. 104, 106 (2017) (citing René Urueña, Diego Acosta Arcarazo & Russell Buchan, *Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law*, 26 CRIM. L.F. 298–318 (2015)).

⁴⁰ IUS Gentium, *Chapter 3 Reactions to the Regulation on Victims of the 2004 CPC: Challenges, Adjustments, and Punitive Counterreforms*, 62 IUS GENTIUM 107, 111 (2017).

⁴¹ See generally IUS Gentium, *supra* note 41, at 150.

of the Colombian military. Although President Uribe's FARC-emphasized agenda greatly delegitimized the FARC's presence throughout Colombia, the "false positives" scandal diverted the attention from the FARC to atrocities committed by the Colombian military.⁴² Furthermore, President Uribe's approach to dealing with the FARC demonstrated minimal willingness to engage in peace talks with FARC officials. This indicates that President Uribe was more concerned with seeking retribution for the FARC's actions, as opposed to establishing a system of peace.⁴³ President Uribe's successor, and current President, Juan Manuel Santos, attempted to reduce the imbalance between peace and justice by implementing a purported system of transitional justice and peace.⁴⁴

President Santos demonstrated a willingness to negotiate with the FARC that Uribe lacked.⁴⁵ Santos sought to establish peace with the FARC through a bilateral peace agreement. The terms of the agreement stipulated that in exchange for certain rights given to them by the Colombian Government, the FARC would cease to exist as a guerrilla movement.⁴⁶ The Santos administration began back-channel negotiations with the FARC in 2010.⁴⁷ These negotiations became official in 2012 in Havana, Cuba.⁴⁸ After four years of official negotiations under the auspices of lawyers, negotiators, and government officials, the Colombian Government struck an agreement with the FARC in June 2016 in Havana.⁴⁹ In September 2016, President Santos and FARC leader Rodrigo Londoño signed the agreement in Cartagena Colombia. This agreement was not final, however, as it had to pass through Colombian legislation in order to become both a law and part of Colombia's constitution.⁵⁰

⁴² *Extrajudicial Executions*, *supra* note 26.

⁴³ See Weber, *supra* note 29.

⁴⁴ Heather Saul, *Why Did Juan Manuel Santos Win the Nobel Peace Prize?*, INDEPENDENT (Oct. 7, 2016), <https://www.independent.co.uk/news/people/juan-manuel-santos-nobel-peace-prize-2016-winner-why-did-he-win-colombian-president-farc-deal-a7349866.html>.

⁴⁵ Saul, *supra* note 44; Juan Forero, *Colombia Explores Peace Talks with FARC*, WASH. POST (Aug. 28, 2012), https://www.washingtonpost.com/world/the_americas/colombia-explores-peace-talks-with-farc/2012/08/28/7a1fcae2-f152-11e1-b74c-84ed55e0300b_story.html?utm_term=.175380b422c0.

⁴⁶ *Colombian President to Sign Peace Deal with Farc Rebels Today*, GUARDIAN (Sept. 26, 2016), <https://www.theguardian.com/world/2016/sep/26/colombian-president-juan-manuel-santos-sign-peace-deal-with-farc-rebels-today> [hereinafter GUARDIAN].

⁴⁷ GUARDIAN, *supra* note 46; Forero, *supra* note 45.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Jon Lee Anderson, *How Colombia's Voters Rejected Peace*, NEW YORKER (Oct. 4, 2016), <https://www.newyorker.com/news/daily-comment/how-colombias-voters-rejected-peace>.

Instead of ratifying the agreement directly through the Colombian legislature, President Santos decided to leave the deal's ratification—and fate—in the hands of the Colombian population.⁵¹

President Santos called for a plebiscite of the peace agreement on October 2, 2016 in which Colombian citizens voted to implement the deal into legislation.⁵² To pass through legislation, the deal would have to garner a majority vote from the Colombian citizens.⁵³ The mechanics of the referendum were simple: Colombian citizens could either vote in favor of the deal by voting “Yes,” or they could vote against the deal by voting “No.”⁵⁴

Although polls throughout Colombia indicated that the “Yes” vote would win, 50.2% of the Colombian population voted “No” and narrowly rejected the deal.⁵⁵ Certain members of the “No” camp cited lack of transparency and justice for the FARC as the primary reason for voting “No.”⁵⁶ Some of these members included former President Uribe, who became a member of the Colombian Senate and grew wary of Santos’ intention of giving the FARC more rights than they deserved.⁵⁷ President Uribe also became the de-facto leader of the “No” camp.⁵⁸

In the initial peace agreement, members of the FARC would receive minimal punishment for the crimes they committed in exchange for benefits that the majority of the Colombian population who voted believed to be grossly disproportionate to the justice the FARC deserved.⁵⁹ The initial deal’s rejection warranted President Santos to invite ex-President Uribe to the negotiating table in order to amend the agreement with the FARC’s Londoño.⁶⁰ Although the agreement was modified, President Uribe, along with other critics of the deal, were skeptical of how much of the original

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*; see also *Colombia Peace Deal: Government and FARC Reach New Agreement*, BBC NEWS (Nov. 23, 2016), <http://www.bbc.com/news/world-latin-america-37965392>.

⁵⁹ Malachi Ryan, *Álvaro Uribe to Present Legislation Which Ends the Special Jurisdiction for Peace*, COLOM. FOCUS (Oct. 2, 2017), <https://www.colombiafocus.com/alvaro-uribe-to-present-legislation-which-ends-the-special-jurisdiction-for-peace> (these benefits included minimal retribution for the FARC regarding the crimes they committed, an ambiguity in the conflict’s transitional justice system’s retributive measures, and allowing the FARC to become a political party. The FARC, as a political party, would be guaranteed a minimum of ten seats in Colombia’s Senate.).

⁶⁰ *Id.*

deal's substance was modified, specifically the method of transitional justice applied to the FARC for its crimes.⁶¹

These critics, President Uribe included, noted that what had actually been modified was the deal's procedural implementation into the Colombian legislature.⁶² President Santos, nevertheless, amended the deal in November 2016, circumvented a second referendum, and had the deal ratified by the Colombian Congress in December 2016, effectively marking the end of a 50-year civil conflict.⁶³

It is now 2018, and the peace deal has yet to be implemented into legislation.⁶⁴ The main component of the deal that remains at issue, both in language and in practice, is the deal's transitional justice mechanism.⁶⁵ This mechanism is the "Jurisdicción Especial para la Paz," or rather, the "Special Jurisdiction for Peace" ("SJP").⁶⁶

This SJP is a truth commission aimed "to adjudicate and sentence [those] responsible for 'grave crimes' committed [by the FARC] during the civil war."⁶⁷ In this tribunal, members of the FARC will have the opportunity to elucidate on their involvement in the conflict.⁶⁸ Those members of the FARC "who acknowledge their unlawful behavior will be subjected to a 'restriction of liberty' ranging from five to eight years, [while] those who do not acknowledge their responsibility will be subject to prison terms of up to twenty years."⁶⁹ This arrangement establishes "differential treatment for [members of the FARC] who acknowledge their responsi-

⁶¹ *Id.*

⁶² *Colombia's Government Formally Ratifies Revised FARC Peace Deal*, GUARDIAN (Dec. 1, 2016), <https://www.theguardian.com/world/2016/dec/01/colombias-government-formally-ratifies-revised-farc-peace-deal>.

⁶³ *Id.*

⁶⁴ Adam Isacson, *Rescuing Colombia's Post-conflict Transitional Justice System*, WOLA (Nov. 29, 2017), <https://www.wola.org/analysis/colombias-post-conflict-justice-framework-remains-vague-becoming-less-fair/>.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Allen S. Weiner, *Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court*, 52 STAN. J. INT'L L. 211, 230–31 (2016).

⁶⁸ Weiner, *supra* note 67 (citing *Comunicado Conjunto # 60 Sobre el Acuerdo de Creación de una Jurisdicción Especial para la Paz* [Joint Communiqué # 60 Regarding the Agreement for the Creation of a Special Jurisdiction for Peace], GOV'T OF COLOM. ¶ 4 (Sept. 23, 2015), http://wp.presidencia.gov.co/Noticias/2015/Septiembre/Paginas/20150923_03-Comunicado-conjunto-N-60-sobre-el-Acuerdo-de-creacion-de-una-Jurisdiccion-Especial-para-la-Paz.aspx (trans. by author).

⁶⁹ Weiner, *supra* note 67, at 230.

bility compared to those who do not.”⁷⁰ Furthermore, the specific type of justice in the SJP, “restricted liberty”, that those members who acknowledge responsibility for their crimes will receive is uncertain. Lastly, the SJP incentivizes FARC members who committed crimes worse than they may acknowledge and escape with a punishment disproportionate to the crimes they committed.⁷¹ The SJP has caught not only the attention of the global community, specifically international human rights activists and other non-governmental human rights organizations, but also the attention of the International Criminal Court (“ICC”).⁷²

C. *Role of the International Criminal Court in the Colombian Peace Process*

The ICC, located in The Hague, operates under the Rome Statute of the International Criminal Court (“the Rome Statute”).⁷³ The ICC, moreover, has jurisdiction over war crimes, crimes against humanity, and genocide.⁷⁴ The ICC has jurisdiction over a perpetrator of these crimes when:

[t]he crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or the crimes were referred to the ICC Prosecutor by the United Nations Security Council pursuant to a resolution adopted under chapter VII of the UN charter.⁷⁵

The ICC’s jurisdiction is contingent on a state’s consent to the jurisdiction through ratification.⁷⁶ Thus, if a state party to the Rome Statute does not consent to the ICC’s jurisdiction, the ICC cannot prosecute a potential defendant in that state. Ironically, this limits the ICC’s power, as its power to adjudicate is conditional

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 227–40.

⁷³ See generally Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) (entered into force July 1, 2002) (the Rome Statute defines crimes against humanity as organized attacks against a protected group of a population including, but not limited to, forcible transfers, rape, and violations of *ius cogens* norms) [hereinafter Rome Statute].

⁷⁴ *Id.*

⁷⁵ Sarah Lesser, *Early Non-Military Intervention to Prevent Atrocity Crimes*, 19 *CARDOZO J. CONFLICT RESOL.* 129, 139 (2017) (citing *How the Court Works*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/how-the-court-works>).

⁷⁶ *Id.* at 140.

on a state's willingness to enter its jurisdiction.⁷⁷ Colombia became a party to the Rome Statute in 2002.⁷⁸

In December 1998, under President Andres Pastrana, Colombia signed the Rome Statute and ratified it through Colombian legislation on August 5, 2002.⁷⁹ Although Colombia removed itself from the ICC's jurisdiction through a declaration under Article 124 of the Rome Statute for 7 years, on December 1, 2009, the ICC regained full jurisdiction over crimes against humanity and war crimes in Colombia.⁸⁰ This effectively signifies is that the ICC can prosecute perpetrators of crimes against humanity and war crimes in Colombia either directly, by bringing the perpetrators to trial and prosecuting them in front of the ICC, or indirectly, by exerting pressure on domestic court systems to prosecute the perpetrators within domestic tribunals.⁸¹

The ICC has been monitoring the Colombian Peace Process well before the Colombian Government's deal with the FARC.⁸² In 2004, former ICC Chief Prosecutor, Luis-Moreno Ocampo, questioned both the legal strength and effectuation of the JPL.⁸³ The JPL's transitional justice mechanism is akin to that of the SJP: it established a truth commission that allowed members to acknowledge their unlawful behavior and receive a method of punishment proportionate to what they acknowledged, but not necessarily for the crimes they actually committed.⁸⁴ Ironically, this left open the possibility of the truth going unrecognized.⁸⁵ Because Colombia is a state party to the Rome Statute of the ICC,

⁷⁷ See *id.* at 140.

⁷⁸ Amanda Lyons & Michael Reed-Hurtado, *Colombia: Impact of the Rome Statute on the International Criminal Court*, INT'L CTR. FOR TRANSITIONAL JUST. (2010), <https://www.ictj.org/sites/default/files/ICTJ-Colombia-Impact-ICC-2010-English.pdf> (citing Michael Reed, Expert Testimony before Inter-American Court of Human Rights, *Case of Manuel Cepeda*, Jan. 26, 2010 (citing an example where the Colombian Supreme Court took eight different positions on a particular question)).

⁷⁹ Marie-Claude Jean-Baptiste, *Cracking the Toughest Nut: Colombia's Endeavor with Amnesty for Political Crimes Under Additional Protocol II to the Geneva Conventions*, 7 NOTRE DAME J. INT'L & COMP. L. 27, 34 (2017).

⁸⁰ Rome Statute, *supra* note 74; see also Jean-Baptiste, *supra* note 79, at 31.

⁸¹ Kai Ambos, *Prosecuting International Crimes at the National and International Level*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 64–65 (Wolfgang Kaleck et al. eds., 2007).

⁸² Urueña, *supra* note 39, at 3.

⁸³ *Id.*

⁸⁴ *Id.* at 14 (citing OLGA LUCIA GAITAN, LA CONSTRUCCIÓN DE SENTENCIAS DE JUSTICIA Y PAZ Y DE LA 'PARAPOLITICA' 47–51 (2014)).

⁸⁵ Weiner, *supra* note 67, at 219.

the JPL fell within the ICC's jurisdiction.⁸⁶ Chief Prosecutor Moreno-Ocampo, therefore, launched a preliminary examination regarding JPL.⁸⁷

In 2010, there were a series of inconsistent JPL rulings by the Colombian judicial system.⁸⁸ The JPL rulings resulted in a lack of convictions for members of the Colombian military who were not adequately punished for crimes they allegedly committed.⁸⁹ This led Chief Prosecutor Moreno-Ocampo to question whether or not the Colombian judicial system was comporting not only within the legal framework mandated by the JPL but with the Rome Statute as well.⁹⁰ Moreno-Ocampo threatened to launch an ICC investigation on Colombian judges and prosecutors if they failed to carry just and consistent proceedings for members who either did not fully acknowledge their unlawful behavior or received amnesty for the crimes they committed.⁹¹ Aside from threatening Colombian judges and prosecutors, however, Moreno-Ocampo did not take further action on Colombia, foregoing any ICC intervention.⁹²

The current ICC Chief Prosecutor, Fatou Bensouda, has been more active in monitoring the Colombian Peace Process, specifically the JPL.⁹³ Additionally, Chief Prosecutor Bensouda has been more transparent in the ICC's willingness to intervene in the Colombian peace process than Moreno-Ocampo was.⁹⁴ Thus, in order to avoid the judicial shortcomings of the JPL, Bensouda has been scrutinizing the process to ensure that the current peace deal between Colombia and the FARC includes a transitional justice system that effectively tries war crimes committed by the Colombian military and the FARC.⁹⁵ Bensouda, along with other members of the international community, is concerned that the SJP will deviate from the criminal justice measures of the Rome Statute if the SJP fails to effectively prosecute perpetrators of international humani-

⁸⁶ Urueña, *supra* note 39, at 3.

⁸⁷ *Id.*

⁸⁸ Lyons & Reed-Hurtado, *supra* note 77, at 3–4.

⁸⁹ Urueña, *supra* note 39, at 3.

⁹⁰ *Id.* at 4.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Urueña, *supra* note 39; see also René Urueña, *Playing with Fire: International Criminal Law, Transitional Justice, and the Implementation of the Colombian Peace Agreement*, 100 AM. J. INT'L L. 364, 364–68 (2017); see also Adriaan Alsema, *ICC Chief Prosecutor to Inspect Colombia's Progress in Military War Crime Probes*, COLOM. REP. (Aug. 14, 2017), <https://colombiareports.com/icc-chief-prosecutor-inspect-colombias-progress-military-war-crime-probes/>.

⁹⁴ Alsema, *supra* note 93.

⁹⁵ *Id.*

tarian law and hence, results in a situation like the JPL.⁹⁶ The next section of this Note examines the deal's international legal status and the ICC's pressure on agents of the Colombian Government.

III. DISCUSSION

The section will consider: 1) whether or not the peace agreement potentially violates the Rome Statute; 2) whether or not the ICC should intervene in the process; and 3) the ICC's role in ensuring justice is effectively carried out for those affected by the FARC.

A. *The Colombian Peace Agreement's International Legal Status*

The Office of the Prosecutor of the ICC may launch an investigation on a country's domestic agents if those agents fail to effectively prosecute the crimes against humanity and war crimes, as well as the direct perpetrators of the crimes themselves.⁹⁷ Because the language of the Colombian peace agreement, specifically the SJP, leaves open the possibility of certain FARC members receiving amnesty for the crimes they committed, the Colombian peace agreement's transitional justice mechanism may not comport with the Rome Statute's obligations.⁹⁸ Thus, if the peace agreement fails to meet these obligations, the peace agreement may likely violate Rome Statute.⁹⁹

The SJP has generated skepticism and debate of whether the deal comports with international law.¹⁰⁰ Consider the following:

“[t]he transitional justice framework described in the [Special Jurisdiction for Peace] indicates on the one hand, that the ‘broadest possible amnesty’ will be granted for crimes related to the conflict but, on the other hand, specifically notes that amnesty will not be granted for genocide, crimes against humanity, and grave war crimes, along with certain other serious offenses. The question of whether prosecutions will be limited to the most responsible perpetrators remains unclear . . . [p]ersons who ac-

⁹⁶ *Id.*; see also Adriaan Alsema, *ICC Chief Prosecutor Meets with President, Counterpart on 1st Day*, COLOM. REP. (Sept. 12, 2017), <https://colombiareports.com/icc-chief-prosecutor-meets-president-counterpart-1st-day-colombia/>.

⁹⁷ Jean-Baptiste, *supra* note 79.

⁹⁸ Weiner, *supra* note 67, at 239.

⁹⁹ *Id.*

¹⁰⁰ Weiner, *supra* note 67.

knowledge their unlawful behavior will be subject to a ‘restriction of liberty’ ranging from five to eight years; those who do not acknowledge their responsibility will be subject to a prison term of up to twenty years.”¹⁰¹

Evidently, the SJP yields differential treatment for members of the FARC who acknowledge their unlawful behavior from those who do not.¹⁰² This differential treatment incentivizes those members of the FARC to acknowledge their unlawful behavior and receive a punishment in the form of “restrict[ed] liberty” from five to eight years when certain FARC members who acknowledge their unlawful behavior may have committed crimes worse than what they will admit in the SJP’s tribunal.¹⁰³ In other words, although the SJP provides *some* accountability for FARC members who committed “war crimes” and “crimes against humanity,” the SJP does not guarantee that FARC members who possibly committed these crimes and will receive retribution proportionate to their acts.¹⁰⁴

Since the peace agreement, and thus, the SJP, has not yet been fully enacted into Colombian legislation, on November 14, 2017, the Constitutional Court of Colombia (“the Constitutional Court”) considered the procedural and substantive implementations of the agreement’s SJP.¹⁰⁵ The Constitutional Court’s decision centered around the definition of the term “command responsibility,” which would make FARC leaders liable for crimes committed by those FARC members lower in the command chain if they: 1) knew about the crimes their subordinates carried out after their orders; or 2) “should have known” about the crimes committed by their subordinates.¹⁰⁶ Although it is extraordinarily difficult to prove what a FARC commander knew when his or her subordinate was ordered to carry out an attack, the “should have known” standard sets the bar lower for the SJP tribunal to hold FARC members guilty of crimes committed by their subordinates.¹⁰⁷ Still, there is no guarantee the magistrates of the SJP’s tribunal will consistently apply the “should have known” standard. This leaves the possibility of FARC members who may have ordered atrocities escaping

¹⁰¹ *Id.* at 232.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Corte Constitucional [C.C.] [Constitutional Court], Noviembre 14, 2017, Sentencia C-674/17, FE De Erratas al Comunicado (No. 55, p. 1–23) (Colom.).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

with impunity for their involvement in Colombia's civil conflict.¹⁰⁸ Should the SJP tribunal fail to consistently apply the “should have known” standard, the judicial agents of the Colombian Government will not comport with Article 28 of the Rome Statute and thus, they may expose themselves to ICC intervention.¹⁰⁹ Additionally, the deal does not clarify whether the victims and the families of those victims will receive the justice they deserve.

The mechanics of the SJP may be too precarious to ensure a balance between peace and justice.¹¹⁰ These mechanics leave too much fate in the most-senior FARC officials to truthfully acknowledge their unlawful behavior, hoping that these officials will present the truth regarding their involvement. Thus, the international community, such as agents of Human Rights Watch and Chief Prosecutor Bensouda, has been skeptical if the SJP will provide justice to those affected by the FARC.¹¹¹ In fact, Chief Prosecutor Bensouda has been scrutinizing the deal's implementation and has made it clear that any amnesty will likely result in ICC intervention.¹¹² This would not be the first instance in which Colombia failed to hold perpetrators of atrocities committed accountable for their actions.¹¹³

The JPL involved truth commissions of its own for those members of the Colombian military who partook in the “false positives” scandal.¹¹⁴ There has been much skepticism as to how judicially effective the Colombian Attorneys General have been in effectuating the JPL, as over 90% of the perpetrators intended to be subject to justice have qualified for amnesty under the JPL's truth commissions.¹¹⁵ In fact, the truth commission's confessions revealed the identities of approximately 13,000 Colombian individuals who played a role in the “false positive” instance.¹¹⁶ The truth commissions' magistrates passed the identities of these individuals to Colombia's criminal prosecutors—however, the prosecutors did not take judicial measures further, as they have allegedly failed to

¹⁰⁸ *Id.*; see Isacson, *supra* note 64; see also Rome Statute, *supra* note 74, at art. 28 (establishing parameters for how the ICC should apply the doctrine of superior responsibility).

¹⁰⁹ Weiner, *supra* note 67, at 239; Rome Statute, *supra* note 74.

¹¹⁰ Weiner, *supra* note 67, at 240.

¹¹¹ Jose Miguel Vivanco, *Colombia: Fix Flaws in Transitional Justice Law*, HUM. RTS. WATCH (Oct. 9, 2017), <https://www.hrw.org/news/2017/10/09/colombia-fix-flaws-transitional-justice-law>.

¹¹² *Id.*

¹¹³ Isacson, *supra* note 64 (citing Human Rights Council Res. 28/2, U.N. A/HRC/28/3Add.3 (June 23, 2015)).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

act.¹¹⁷ Evidently, justice in the context of the SJP may be similar to that of the JPL.

On the other hand, there is optimism that the SJP will carry out its intention of seeking reparations for those affected—directly or indirectly—by the FARC.¹¹⁸ Scholars in the optimism camp believe the SJP's effects include a balancing of peace, reconciliation, and reintegration.¹¹⁹ These scholars believe that amnesty is an inevitable price parties and actors to civil conflicts have to heavily consider, and pay, when they are at the negotiating table.¹²⁰ These conflicts should focus on rebuilding Colombian society as a whole and including the FARC as part of this reconciliation and reintegration.¹²¹

Additionally, the optimism camp asserts that the peace agreement is not a violation of international law.¹²² Since Chief Prosecutor Bensouda has been monitoring the implementation of the peace agreement, the camp believes that the SJP will carry out genuine judicial proceedings.¹²³ Bensouda has made it clear that even if some language in the agreement may be interpreted as amnesty for FARC members, she will monitor the SJP's implementation to curtail this amnesty's practical implementation.¹²⁴ Her scrutiny of the SJP demonstrates a willingness to prevent the SJP from mimicking the JPL.

What is undeniable, however, is the uncertainty of the SJP's retributive measures.¹²⁵ At the moment, the SJP's mechanics may provide unsubstantial redress to the victims who have been directly and indirectly affected by the FARC.¹²⁶ Thus, until any indication

¹¹⁷ *Id.*

¹¹⁸ Jean-Baptiste, *supra* note 79, at 63; see also Claudia Josi, *Accountability in the Colombian Peace Agreement: Are the Proposed Sanctions Contrary to Colombia's International Obligations?*, 46 *SW. L. REV.* 401, 418–21 (2017) (citing Elizabeth B. King, *Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures*, 45 *GEO. WASH. INT'L L. REV.* 85 (2013)); Lily Rueda, *One Step Closer to Peace in Colombia: Implications for Accountability*, *CTR. FOR INT'L CRIM. JUST.* (2016), <https://cicj.org/2016/06/one-step-closer-to-peace-in-colombia-implications-for-the-accountability-for-international-crimes>; *Human Rights Watch Analysis of Colombia-FARC Agreement*, *HUM. RTS. WATCH* (Dec. 21, 2015), <https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement>.

¹¹⁹ Josi, *supra* note 118, at 419.

¹²⁰ *Id.*; Jean-Baptiste, *supra* note 80, at 63.

¹²¹ Josi, *supra* note 118, at 419.

¹²² *Id.* at 420.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Isacson, *supra* note 64.

¹²⁶ *Id.*; Weiner, *supra* note 67, at 240.

of the contrary, the peace agreement may very well be on the path to violating international law.

B. *Should the ICC intervene in the Colombian Peace Process?*

Although the process of implementing the peace agreement and the SJP is not over, as the SJP is still undergoing modifications before it is passed through Colombian legislation, there is skepticism that the SJP will carry out its intended effects.¹²⁷ The peace agreement, as it currently stands, will not begin to prosecute defendants until, practically speaking, 2019.¹²⁸ Furthermore, at this juncture, there are approximately 5,000 imminent FARC defendants waiting to stand trial in front of the SJP.¹²⁹ Thus, this number of defendants waiting to stand trial until 2019 demonstrates inefficiency on behalf of the Colombian legislature and the judiciary.¹³⁰ These defendants could become overwhelmed being in “legal limbo” and would be tempted to return to the formerly occupied FARC territory. Should they return to that territory, however, they would join other guerrilla groups, such as the ELN.¹³¹

Moreover, the current peace agreement does not guarantee the participation of victims in the SJP proceedings.¹³² The deal states that it will “contemplate victims’ participation” in the SJP proceedings.¹³³ This is equivalent to a plaintiff, or the person seeking redress, having his or her participation being contemplated at his or her own proceeding.

The victims who have been directly affected by the FARC should be *guaranteed* participation. These victims are crucial in fully exposing the truth in the SJP, and the chance of their presence not being guaranteed may compromise uncovering the truth, as well as stripping them of their retribution.

¹²⁷ Adam Isacson & Gimena Sánchez-Garzoli, *Colombia’s New Transitional Justice Law Violates the Spirit of the Peace Accords*, WOLA (Mar. 22, 2017), <https://www.wola.org/analysis/colombias-new-transitional-justice-law-violates-spirit-peace-accords/>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*; *Se embolata trámite de la JEP y Gobierno ya evalúa otras salidas*, CARACOL RADIO (Nov. 9, 2017), http://caracol.com.co/radio/2017/11/09/nacional/1510182706_569150.html (stating that members of the Colombian Congress are refusing to vote on the implementation of certain provisions of the peace deal, and this refusal is greatly frustrating the peace deal’s implementation).

¹³¹ Isacson, *supra* note 64.

¹³² *Id.*

¹³³ *Id.*

Lastly, there is no guarantee that the SJP will effectively prosecute FARC members who may be responsible for international crimes.¹³⁴ A provision in the SJP that the magistrates on the panel of the SJP “[will] determine [the] criteria to focus the criminal prosecution exclusively on those [people] who had a decisive participation in the worst and most representative crimes.”¹³⁵ The operative language of this provision, “decisive, worst, and most representative,” leaves the possibility for members who have committed some crimes to escape without being formally prosecuted domestically.¹³⁶ Although these members may receive “restricted liberty” through the SJP, this “restricted liberty” may also preclude these individuals from receiving retribution for crimes they might have committed.¹³⁷

Chief Prosecutor Bensouda has been monitoring the peace agreement closely, but is there any guaranteed form of genuine retribution and judicial redress? The peace agreement’s current state, along with the skepticism among the international community, seems to answer this question in the negative. The ICC and Chief Prosecutor Bensouda will let the peace agreement fully implement itself *if* Colombia investigates the crimes gravely and punishes those responsible. What past practice has showed us, however, is that Colombia’s judicial system has been inefficient in both investigating crimes allegedly to have been committed, and, subsequently, has failed to punish those responsible for those crimes.

On the other hand, there is some belief that Colombia’s SJP transitional justice mechanism comports with the Rome Statute and the Inter-American Human Rights system, and thus, the ICC should not intervene.¹³⁸ “Amnesty” as interpreted in the context of the Colombian peace agreement refers to the possible amnesty being granted for *political* crimes that do not constitute war crimes and crimes against humanity.

Consider the following example: suppose in 2010, well before the public peace negotiations began with the FARC, a group of FARC members attempted to take the lives of certain members of the Colombian government and in this attempt, they unintentionally murdered a number of civilians in their path.¹³⁹ Suppose, addi-

¹³⁴ Vivanco, *supra* note 111.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Josi, *supra* note 118.

¹³⁹ Jean-Baptiste, *supra* note 79, at 63.

tionally, that the FARC members murdered both members of the Colombian Government and innocent civilians.¹⁴⁰ Under the current status of the peace agreement, the FARC would not receive amnesty for the crimes they committed against civilians, but they *would* receive amnesty for the attempt they made on the lives of members of the Colombian Government.¹⁴¹ Additionally, the high-ranking officials who ordered this “attempt” on the lives of the Colombian Government would likely escape prosecution for the innocent civilians murdered in the wake of the FARC’s attack. Because these FARC members likely did not specifically know of the crimes their subordinates committed against these civilians, they may not be prosecuted adequately in the SJP tribunal.¹⁴² Although they may be prosecuted under the “should have known” standard, there is no guarantee an SJP tribunal will apply this standard to these FARC officials.¹⁴³

Under this hypothetical, the lower-ranking FARC subordinates may receive adequate retribution for these crimes. The FARC officials who ordered this attack, however, would likely receive amnesty through the SJP for these political crimes and could receive amnesty under the SJP for the lives of the innocent civilians.¹⁴⁴ Adequate retribution for those affected by the FARC in this context seems precarious. Therefore, in order to ensure this retribution is effective and just, Chief Prosecutor Bensouda should highly consider some form of intervention.

There is some belief, furthermore, that the peace deal is effective in its overall balance of reintegration, retribution, and reparation.¹⁴⁵ The concept of peace with accountability is extraordinarily difficult to grapple with.¹⁴⁶ Striking peace with a guerrilla group is unequivocally a difficult outcome to reach, even more so when trying to find an equilibrium between peace and accountability. Additionally, Article 127 of the Rome Statute allows state parties to withdraw from the Statute without providing any reason for withdrawing.¹⁴⁷ In 2016, for example, South Africa, Burundi, and the Gambia withdrew from the Statute, citing the ICC’s bias towards

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 34.

¹⁴² See Rome Statute, *supra* note 74, at art. 28.

¹⁴³ *Id.*

¹⁴⁴ Isacson, *supra* note 64.

¹⁴⁵ Josi, *supra* note 118.

¹⁴⁶ Isacson, *supra* note 64.

¹⁴⁷ Manisuli Ssenyonjo, *State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia*, 28 CRIM. L.F. 1, 6 (Nov. 9, 2017);

African countries as reasoning behind their withdrawals.¹⁴⁸ Since a party need not provide a reason to withdraw from the Rome Statute, only notice, some scholars believe that the ICC should not exert pressure on Colombia beyond an examination.¹⁴⁹ If the ICC places more pressure on Colombia than its officials deem necessary, Colombia could very well decide to remove itself from the Rome Statute and thus, the ICC's jurisdiction. The ICC, thus, should not intervene in Colombia and allow Colombia's local judicial bodies to push for the FARC's accountability.

2018 is an election year in Colombia. Since the current peace deal's implementation is contingent on Colombian congressional votes, the presidential election is another factor delaying the deal's implementation.¹⁵⁰ Additionally, in late 2017, the Constitutional Court of Colombia declared that the peace deal could not be modified for 12 years. This only applies, however, to provisions that have already been voted on by the Colombian Congress; the provisions of the deal that still need to be voted on may be modified by future members of the Colombian Congress. The future presidential administration of Colombia, thus, should modify the remaining provisions of the peace deal using interest-based facilitative mediation ("IBFM").

IV. PROPOSAL FOR A MODIFICATION OF THE PEACE DEAL THROUGH INTEREST-BASED FACILITATIVE MEDIATION

This section will examine the interests of Colombia, the United States, and the international community, respectively, within the context of IBFM. Additionally, it will explore the framework of the interests for the modified peace deal. Lastly, it will discuss the potential flaws of modifying the current peace deal as well as delaying its implementation.

The Office of the Prosecutor, *Report on Preliminary Examination Activities 2016*, at 39–52, ICC (Nov. 14, 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

¹⁴⁸ See Ssenyonio, *supra* note 146, at 14; see also Fred Makana, *Ugandan President Yoweri Museveni Lashes out at ICC, Wants Africa to Pull Out*, STANDARD DIGITAL (Dec. 13, 2014), <https://www.standardmedia.co.ke/article/2000144601/ugandan-president-yoweri-museveni-lashes-out-at-icc-wants-africa-to-pull-out>; S.C. Res. 1593 (Mar. 31, 2005); see also Duncan Miriri, *Uganda's Museveni Calls On African Nations to Quit the ICC*, REUTERS (Dec. 12, 2014), <http://www.reuters.com/article/us-africa-icc>.

¹⁴⁹ Isacson, *supra* note 64.

¹⁵⁰ JLT, RISK OUTLOOK REPORT 2018: CREDIT, POLITICAL, AND SECURITY RISKS (2018), <https://www.jltspecialty.com/-/media/files/sites/specialty/insights-cps/cps-riskoutlk-jan18>.

By modifying the provisions of the peace deal already in question, the future president of Colombia would protect Colombia's agents from triggering the ICC's jurisdiction. The modification of the remaining provisions through IBFM, moreover, would allow the future presidential administration to thoroughly examine the provisions of the deal that need improvement, specifically the SJP. These are the provisions that are under scrutiny by Chief Prosecutor Bensouda. As such, the future presidential administration would be ensuring that the deal comports with the Rome Statute, giving Chief Prosecutor Bensouda no reason to expand the scope of the ICC's pressure on Colombia. In addition to complying with the Rome Statute, IBFM would allow Colombia achieve an equilibrium between peace for Colombia and justice for those affected by the FARC.

IBFM can be an effective mechanism to resolving conflicts in the international arena.¹⁵¹ Moreover, IBFM lends itself to ensuring the tension between peace and transitional justice is mitigated.¹⁵² IBFM focuses on the *individual* interests of *all* relevant actors, including victims, at the negotiating forum.¹⁵³ IBFM also weighs the intricacies of the components of the accord to be negotiated—this method maximizes the autonomy, sovereignty, and dignity of conflict actors involved, aims closely to achieve transitional justice and retribution.¹⁵⁴ IBFM, moreover, allows healing to be a crucial part of conflict resolution, which demonstrates reparation for those primarily affected by the conflict.¹⁵⁵

IBFM was used in the case of Israel and Palestine. Chief Israeli and Palestinian negotiators noted that their role in disengaging Israelis and Arabs from the West Bank affected the actors religiously, cultural, historically, and psychologically.¹⁵⁶ From this realization, the negotiators deduced that interest-based outcomes in mediation extend far beyond pragmatic ones.¹⁵⁷ IBFM provided a broad scope of the interests the mediator must understand in or-

¹⁵¹ Lars Kirchoff, *Linking Mediation and Transitional Justice: The Use of Interest-Based Mediation in Processes of Transition*, in *BUILDING A FUTURE ON PEACE AND JUSTICE* 237, 243–47 (Ambos et al. eds., 2009).

¹⁵² *Id.* at 244.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 247.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

der to ensure the relevant actors appreciate the other's interests at the negotiating table.¹⁵⁸

By understanding the interests of Colombia, the United States, and the international community, the relevant actors, the mediator can pinpoint the particular interests these should emphasize when diluting the tension between peace and justice in Colombia with a reformed peace agreement.¹⁵⁹ Each country has its respective interests to protect: Colombia wants to ensure that peace is both implemented and maintained; the United States' interests lie with the monitoring of drug-rich territories to ensure global cocaine exportation is reduced; and the international community wants to ensure that the legal framework of the Colombian peace agreement does not compromise transitional justice standards and fundamental human rights.

A. *Interests of Colombia*

Colombia, in this framework, would represent interests of the Colombian population, including the victims, the FARC, and the Colombian Government. Colombia's interests within the framework of interest-based facilitative mediation are peace and justice.¹⁶⁰ The current peace agreement, along with its rejected predecessor, demonstrates that justice is the price Colombia is willing to pay for peace.¹⁶¹ The initial agreement's rejection in October 2016 likely demonstrates that the Colombian people, as well as the international community, are wary of the deal's imbalance between peace and justice.¹⁶² To achieve optimal results during the re-modification of the peace deal, Colombia, thus, must ensure that justice and accountability for those victims affected by the conflict is proportionate to peace.¹⁶³

By understanding the gamut of Colombia's interests as a party to the negotiation, the mediator would incorporate the interests of Colombian citizens, the interests of the FARC, and the interests of

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ *Id.* at 252–53; see also Ed Vulliamy, *Colombia: Is the End in Sight to the World's Longest War?*, *GUARDIAN* (Mar. 15, 2015), <https://www.theguardian.com/world/2015/mar/15/colombia-end-in-sight-longest-running-conflict>.

¹⁶¹ See Anderson, *supra* note 50.

¹⁶² *Id.*

¹⁶³ See Josi, *supra* note 118.

the victims affected by the FARC into the proposed final deal.¹⁶⁴ This could likely incentivize other revolutionary groups in Colombia, such as the ELN, to enter into separate peace negotiations with the Colombian government, as these revolutionary groups would see their interests being accounted for in a post-FARC Colombia. This type of mediation, moreover, could harness a Colombia free of armed revolutionary groups, while also ensuring the standards of transitional justice are honored throughout Colombia.

B. *Interests of the United States*

The United States has been committed to helping Colombia fight the war on drugs since the Reagan Administration. The United States Government has provided Colombia with over \$10 billion in military and anti-drug aid since 2000; the \$10 billion figure represents an aid package between former United States President George W. Bush and former Colombia President Andres Pastrana known as, “El Plan Colombia.”¹⁶⁵ In 2016, President Barack Obama continued the efforts of the “Plan Colombia” through a proposed framework titled “Paz Colombia.”¹⁶⁶ The plan stated that the U.S. government would provide an essential \$450 million to Colombia in order to implement post-conflict provisions in its peace deal, enhance Colombia’s national security and justice, and continue to provide aid to military and anti-drug efforts.¹⁶⁷

President Donald Trump, however, has yet to publicly take a position on whether the United States will provide Colombia with the \$450 million President Obama promised.¹⁶⁸ Although President Trump is not expected to completely back out of the “Paz Colombia,” his administration is expected to significantly reduce

¹⁶⁴ See Kirchoff, *supra* note 152, at 248–51.

¹⁶⁵ Sergio Muñoz Bata, *The U.S. Played a Crucial Role in Colombia’s Historic Peace Deal. Here’s How*, HUFFINGTON POST (Sept. 29, 2016), https://www.huffingtonpost.com/entry/us-colombia-peace-deal_us.

¹⁶⁶ Juan Forero, *Obama to Seek \$450 Million for Colombia Peace Package*, WALL STREET J. (Feb. 4, 2016), <https://www.wsj.com/articles/obama-to-seek-450-million-for-colombia-peace-package>.

¹⁶⁷ *Id.*

¹⁶⁸ *US Congress Set to Honor Funding for Colombian Peace, Military*, TELESUR (May 2, 2017), <https://www.telesurtv.net/english/news/US-Congress-Set-to-Honor-Funding-for-Colombian-Peace-Military>; see also Alex Aaron, *Senators Worry Colombian Peace Deal Failed to Stem Cocaine Trade*, HILL (Sept. 12, 2017), <http://thehill.com/policy/international/350319-senators-worry-colombian-peace-deal-failed-to-stem-cocaine-trade>.

the foreign aid budget as a whole, which would financially constrain the post-conflict implementation of the peace deal.¹⁶⁹

One likely reason the Trump Administration is reluctant to voice its support for the peace deal is Colombia's failure to fully undertake counternarcotic policies, which aim to reduce distribution, production, and exportation of illegal drugs.¹⁷⁰ These policies are effectuated through Colombia's crop eradication program, which reduce coca cultivation through aerial spraying of Colombia's coca-rich territories.¹⁷¹ Although this method of reducing coca production has proven to be statistically effective, this method also damages Colombian ecosystems and contributes to deforestation.¹⁷² Nevertheless, accountability for the reduction of narcotics exportation remains a priority for Colombia, and it is also an essential predicate for the United States to provide the necessary funding for the peace deal.¹⁷³ As such, for the reformed peace agreement to receive the necessary funding from the United States, the future Colombian presidential administration must convince the United States to partake in interest-based facilitative mediation to modify and produce a reformed peace deal, accounting for the United States' interests.

The United States' involvement in the reforming the peace deal would directly contribute to the reduction of cocaine in the United States. The United States would be limiting the main source of cocaine importation to the United States as a component to the mediation and reformation of the peace deal.¹⁷⁴

Chuck Grassley and Dianne Feinstein of the United States Senate, who also co-chair the United States Senate Caucus on International Narcotics Control, recently noted that 90% of the cocaine found in the United States comes from Colombia.¹⁷⁵ In addition to the overwhelming percentage of Colombian-exported cocaine in the United States, cocaine overdoses in the United States increased by 52% between 2015 and 2017. By becoming a party to the interest-based mediation, the United States' interests would align with Colombia's interests, since increasing security in

¹⁶⁹ See Bata, *supra* note 165.

¹⁷⁰ See generally Alexander Rincon Ruiz, Harold Leonardo Correa, Daniel Oswaldo Leon & Stewart Williams, *Coca Cultivation and Crop Eradication in Colombia: The Challenges of Integrating Rural Reality into Effective Anti-Drug Policy*, 33 *INT'L J. DRUG POL'Y*, 56, 56-65 (2016).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Aaron, *supra* note 168.

¹⁷⁵ *Id.*

the unoccupied, formerly FARC-controlled, coca-rich territory formerly would lower the volume of narcotics exiting Colombia and entering the United States.¹⁷⁶ Colombia is the United States' second largest trading partner in South America behind Brazil, and peace within Colombia's borders would greatly enhance the current trading relationship between the United States and Colombia.¹⁷⁷

C. *Interests of the International Community*

The international community, such as agents and representatives of Human Rights Watch and Chief Prosecutor Bensouda, are also wary if the current peace deal will adequately harness justice to those affected by the FARC.¹⁷⁸ The interests of the international community, thus, likely include ensuring a final reformed deal reconciles the tension between peace and justice, as well comporting with the Rome Statute.¹⁷⁹ Instead of focusing on the proportional justice the FARC should receive for the atrocities they have committed, the reformed peace deal's judicial mechanics weigh heavily on what the FARC can do to admit their crimes. Since SJP cases may result in certain FARC members receiving amnesties, the SJP may result in "illusory" sanctions.¹⁸⁰ Accounting for the interests of the international community in the reformed peace deal, thus, would likely diminish that possibility.¹⁸¹

D. *Framework of the Actors' Interests*

Once the mediator is made aware of the relevant actors' interests, a critical task would be to establish which interests of the reformed peace deal are negotiable. The mediator must then curtail discussion about which provisions and topics are *not* negotiable.¹⁸² This task is vital to the mediation, and it is extraordinarily difficult

¹⁷⁶ See Bata, *supra* note 165.

¹⁷⁷ See Reinhard J. Cate, *The Investment Casualties of War: Global Impacts of Armed Conflict on Foreign Direct Investment Inflows* 5 (2016) (unpublished Master's thesis, University of San Francisco) (on file with the University of San Francisco).

¹⁷⁸ See Vivanco, *supra* note 111.

¹⁷⁹ Kirchoff, *supra* note 152.

¹⁸⁰ See Josi, *supra* note 118.

¹⁸¹ See Josi, *supra* note 118; see also Urueña, *supra* note 39.

¹⁸² Kirchoff, *supra* note 152.

due to the competing interests of Colombia, the United States, and the international community.¹⁸³

One possible term that may be negotiable in the reformed peace deal is the duration of the United States providing funding and security to Colombia to ensure security is maintained in formerly controlled FARC territories.¹⁸⁴ A precedent for this would be “Plan Colombia,” in which the United States provided over \$10 billion in funding to Colombia from 2000 to 2015.¹⁸⁵

“Plan Colombia” was supposed to be complemented by President Obama’s proposed “Paz Colombia,” which intended to provide \$450 million in United States foreign aid assistance for 10 years to bolster the “Plan Colombia.”¹⁸⁶ The Trump Administration, as stated, has refused to acknowledge whether or not the United States would carry out the intended “Paz Colombia.” Thus, making the duration of the United States’ funding and involvement in the reformed agreement negotiable could give the United States flexibility in its potential involvement to modification of the peace deal.¹⁸⁷

Another component of the reformed peace agreement that would be negotiable is the FARC’s ability to become a political force in Colombia. The modification of this component of the current peace deal would incentivize the United States’ in becoming a party to these negotiations, as the FARC holds strong views against the United States.¹⁸⁸ The current peace agreement recognizes the transition of the FARC from an armed group to citizens of Colom-

¹⁸³ See generally CHRISTIAN TOMUSCHAT, *INTERNATIONAL LAW: ENSURING THE SURVIVAL OF MANKIND ON THE EVE OF A NEW CENTURY* (2001).

¹⁸⁴ Faten Ghosn & Christina Sciabara, *Are Needs Negotiable? The Role of Participation, Security and Recognition in Keeping the Peace After Civil Wars End* 8 (2009) (unpublished manuscript), <http://www.saramitchell.org/ghosn.pdf>.

¹⁸⁵ Daniel Mejia, *Plan Colombia: An Analysis of Effectiveness and Costs*, BROOKINGS INSTITUTION, <https://www.brookings.edu/wp-content/uploads/2016/07/Mejia-Colombia-final-2.pdf> (last visited Mar. 9, 2018).

¹⁸⁶ See Mejia, *supra* note 186; Daniela Franco, ‘Paz Colombia’: Santos, Obama Announce Next Chapter of U.S. Support, *NBC NEWS* (Feb. 5, 2016), <https://www.nbcnews.com/news/latino/paz-colombia-santos-obama-announce-next-chapter-u-s>.

¹⁸⁷ Kirchoff, *supra* note 152; Joseph Bamat, *US Funding Key to Implementing Colombia’s Peace Deal with FARC*, *FR.* 24 (Dec. 9, 2016), <http://www.france24.com/en/20160912-colombia-peace-deal-united-states-financial-aid>.

¹⁸⁸ Cook, *supra* note 1; Alsema, *supra* note 2; Aila M. Matanock, *The FARC Just Became a Colombian Political Party. Here’s Why Elections Are Critical to a Lasting Peace*, *WASH. POST* (Aug. 30, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/30/the-farc-just-became-a-colombian-political-party-heres-why-elections-are-critical-to-a-lasting-peace>.

bia and with that, the FARC's desire to have political influence.¹⁸⁹ These interests demonstrate that the interests of the FARC are capable of being globally recognized, while the interests of the victims, and those of the international community as well, would go under the radar.¹⁹⁰

Preventing the FARC from becoming a political party would also potentially increase global foreign direct investment in Colombia.¹⁹¹ Colombia would have the opportunity for bilateral trade debts to be forgiven by Great Britain, France, and other G20 countries as a reward for successfully constructing peace.¹⁹² It seems unlikely, however, these trade debts would be forgiven and foreign direct investment in Colombia would increase with former war criminals having political influence.¹⁹³

An interest that would be non-negotiable in the reformed peace agreement would be that the final form of adjudication must comport with the Rome Statute. Opponents of the current peace deal, specifically right-wing Colombians,¹⁹⁴ believe that the SJP, and the idea of transitional justice *in general*, allows for FARC rebels to escape with amnesty. As such, establishing this interest in the reformed peace agreement through mediation is one interest that the mediator must make clear from the start of negotiation.¹⁹⁵ This would likely seal the gap in the current peace deal, where reparations for the victims of human rights violations remain a big question.¹⁹⁶

Another component that the future Colombian Government needs to address is the current deal's effectiveness in monitoring security in a post-conflict Colombia, especially formerly occupied FARC and coca-rich territory.¹⁹⁷ The mediator would unequivocally

¹⁸⁹ *Colombia's FARC Revolutionaries Become a Political Party*, ECONOMIST (Sept. 9, 2017), <https://www.economist.com/news/americas/21728682-repugnant-though-former-guerrillas-are-colombians-should-welcome-change-colombias-farc>.

¹⁹⁰ *Id.*

¹⁹¹ Alan Fleischmann & Ian Solomon, *What It Really Costs for Colombia to Strike a Peace Deal*, FORTUNE (Oct. 6, 2016), <http://fortune.com/2016/10/06/colombia-farc-peace-deal/>.

¹⁹² *Id.*

¹⁹³ See U.S. DEP'T OF STATE, 2014 INVESTMENT CLIMATE STATEMENT (2014), <https://www.state.gov/documents/organization/227143.pdf>.

¹⁹⁴ Jamie Rebecca Rowen, *We Don't Believe in Transitional Justice*, 42 J. L. & SOC. INQUIRY 622, 643 (2017).

¹⁹⁵ See Rowen, *supra* note 194; see Kirchoff, *supra* note 152.

¹⁹⁶ See Vivanco, *supra* note 111.

¹⁹⁷ Nick Miroff, *A Side Effect of Peace in Colombia? A Cocaine Boom in the U.S.*, WASH. POST (May 8, 2017), https://www.washingtonpost.com/world/the_americas/a-side-effect-of-peace-in-colombia-a-cocaine-boom-in-the-us/; see also José R. Cárdenas, *Cocaine is Booming in Colom-*

cally need to establish post-conflict accountability and security measures in a post-conflict Colombia to ensure that these provisions, and more importantly the interests of the United States of the reformed peace agreement are honored.¹⁹⁸ If the mediator does not ensure a mechanism for the interests of the United States, the financial linchpin of the reformed peace agreement, this could compromise the ethos of the proposed interest-based mediation. As such, the reformed peace deal could possibly fail overall.¹⁹⁹ Thus, effectively ensuring a bilateral post-conflict security measure in a post-conflict Colombia would be a non-negotiable interest of the reformed peace deal.

One plausible criticism reforming the current peace deal is that it may very well delay the deal's implementation if the parties return to the negotiating table, which could effectively put the overall peace agreement in jeopardy.²⁰⁰ Although this particular peace deal is far from perfect, the fact Colombia was able to meet and come to peace with the FARC for four years is remarkable in and of itself,²⁰¹ and some view the fact that FARC shifting itself from armed rebel group to citizens makes Colombia a model for future conflicts.²⁰² The Colombian population and Congress believe, however, that the deal's current state is too lenient on the FARC. The deal's initial rejection through the October 2016 referendum supports this, as the "yes" would have had Colombian citizens felt the terms of the deal were fair. The future presidential administration would have the opportunity to codify the democratic sentiment into the reformed peace deal, especially if either German Vargas Lleras or Ivan Duque, both opponents of the deal, were to become president.²⁰³

Another criticism of re-modifying the peace deal through interest-based mediation would be that this could set a dangerous

bia and the President is Tanking, FOREIGN POL'Y (Aug. 11, 2017), <http://foreignpolicy.com/2017/08/11/cocaine-is-booming-in-colombia-and-president-santosis-tanking-pence-drugs-farc/>.

¹⁹⁸ See Kirchoff, *supra* note 152; Tristan Clavel, *US Ambassador: FARC 'Have Not Complied' With Colombia Peace Deal*, INSIGHT CRIME (Sept. 27, 2017), <https://www.insightcrime.org/news/brief/farc-not-complied-peace-agreement-us-ambassador-colombia/>.

¹⁹⁹ See Kirchoff, *supra* note 152.

²⁰⁰ See Josi, *supra* note 118.

²⁰¹ Joshua Partlow & Nick Miroff, *Colombia's Congress Approves Historic Peace Deal with FARC rebels*, WASH. POST (Nov. 30, 2016), https://www.washingtonpost.com/world/the_americas/colombian-congress-approves-historic-peace-deal/2016/11/30/.

²⁰² *Id.*

²⁰³ Helen Murphy, *Colombian Former Rebel Petro Leads Polls Ahead of Presidential Vote*, REUTERS (Feb. 23, 2018), <https://www.reuters.com/article/us-colombia-election-poll/colombian-former-rebel-petro-leads-polls-ahead-of-presidential-vote>.

precedent in countries' willingness to negotiate, as well renegotiate, with terrorists.²⁰⁴ Allowing the FARC to transition from an armed group to a political party, while also providing the opportunity for the FARC to possibly escape with amnesty,²⁰⁵ may encourage other armed groups to disarm in exchange for political influence and peace.

V. CONCLUSION

Although the peace deal may violate the Rome Statute, Chief Prosecutor Bensouda and the ICC should withhold from intervening. Prosecutor Bensouda, however, should keep applying pressure on the Colombian Government to ensure that the remaining provisions of the peace deal both meet the standards set forth by the Rome Statute and protect fundamental rights of FARC-affected victims. The onus, and the spotlight, is unequivocally on the future presidential administration to ensure that these provisions are properly effectuated. The ICC's continued pressure on Colombia's future president to modify the terms of the current peace deal through interest-based mediation could create a new, pragmatic framework of transitional justice and mediation.

Although the facts point to the ICC intervening in the Colombian peace process, Colombia's future president must take the initiative to ensure that the interests of all parties to the modification are accounted for. This would help steer peace, justice, and accountability in the right direction. Because the model of interest-based mediation incorporates the interests of *all* parties, and not just those of the society in transition and the perpetrators, this model of peace deal modification would ensure that Colombia does not sacrifice peace for justice, as it purportedly has with the current peace agreement.

²⁰⁴ See generally Rut Diamint, *Negotiating with Terrorists: Diplomacy Triumphs in Colombia's Peace Process*, CONVERSATION (Sept. 29, 2016), <http://theconversation.com/negotiating-with-terrorists-diplomacy-triumphs-in-colombias-peace-process>; see also Peter R. Neumann, *Negotiating with Terrorists*, FOREIGN AFF. (Feb. 2007), <https://www.foreignaffairs.com/articles/2007-01-01/negotiating-terrorists> (stating that the key objective for any government contemplating negotiations with terrorists is simply not to end violence, but to do so in a way that minimizes the risk of setting dangerous precedents and destabilizing its political system).

²⁰⁵ See Rowen, *supra* note 194.

