homes, affecting virtually all regions and every social group. The conflict has

Critics alleged (among other things) that its alternative sanctions did not reflect accepted standards of appropriate punishment for grave violations and perpetrators.[3]

This article examines one specific aspect of the Colombian peace agreement related to holding individuals accountable for war crimes, crimes against humanity, and serious human rights violations committed during the armed conflict. It seeks to answer the question of whether the proposed sanctions are
international law, or if they provide an acceptable form of justice for a peaceful transition under international law. As a consequence, it will discuss the question of how the International Criminal Court should react to this agreement, and if an intervention by the ICC prosecutor is still appropriate.

This article is not intended to analyze other critical components of the international obligation to investigate, prosecute, and sanction, such as rule of law requirements, jurisdictional aspects, and questions regarding the competence of the applicable courts for crimes committed by state actors, the selection, independence and impartiality of the judges, or other procedural aspects that might determine the existence of a fair and adequate trial. Also, it will not discuss the question of the applicable definition of the concept of command responsibility, which in some preliminary versions of the Colombian implementing legislation deviates from the internationally established definition as stated in Article 28 of the Rome Stat

II. INDIVIDUAL CRIMINAL ACCOUNTABILITY FOR INTERNATIONAL CRIMES IN INTERNATIONAL LAW

International law requires the investigation, prosecution, and sanction of those responsible for international crimes, such as war crimes, crimes against humanity, and serious human rights violations.

As the first international legal regime, international humanitarian law (IHL) or the law of armed conflict (LOAC) has established individual criminal re

Geneva Conventions require states to investigate, prosecute, and sanction grave breaches of those conventions.[4] The Grave Breaches System does not, however, provide for a legal forum to adjudicate those individuals responsible, but establishes the obligation of states party to the Convention to criminalize those crimes in their domestic legislation and adjudicate those crimes in their own courts (or extradite the accused for adjudication in another state party).[5]

Also, since the adoption of the Universal Declaration of Human Rights in 1948, international human rights law (IHRL) has recognized the right to a remedy.[6] What remedy is required for which type of human right violation, however, is still being debated by the human rights community. All major universal and regional human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (ECHR), as well as the American Convention on Human Rights (ACHR), have further expanded this right to a remedy and developed the right to access to justice for the victims of human rights violations. In the case of serious human rights violations, this right to a remedy correlates with a clear obligation of states to investigate, prosecute and sanction the human rights violation.[7]

4. Geneva Convention art. 50, 51, 130, 147, Aug. 12, 1949 (ratified by Colombia on Aug. 11, 1961).

5. Geneva Conventions art. 49, 50, 129, 146, Aug. 12, 1949.

6.

discretion when it comes to defining the concrete sanctions. Some international treaties, as well as jurisprudence of international courts and treaty bodies, require states to provide sanctions proportional to the gravity of the crime committed. For example, the Convention against Torture

appropriate penalties

[11] Similarly, the Orentlicher Principles mention under Principle 1 (general obligations of states to take effective action to combat impunity) the following:

> Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and *duly* punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.[12]

Also, the Inter-American Court has repeatedly stated that sanctions have to be *proportional* to the gravity of the crime.[13] However, neither human

war crimes, crimes against humanity, or the most serious human rights violations is. Even the Rome Statute only defines the applicable penalties in ICC proceedings,[14] but it does not prescribe the specific type or length of sentences that States should impose for crimes defined in the Rome Statute. Quite the contrary, Article 80 of the Rome Statute defers to national laws in the case of criminal proceedings in domestic

11. *See, e.g.*, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) art. 4, Dec. 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51(1984), entered into force June 26, 1987 (emphasis added) (ratified by Colombia on Dec. 8, 1987).

12.

appropriate Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity Principle 1, E/CN.4/2005/102/Add.1, Feb. 8, 2005, para. 8, (emphasis added).

13. Vargas Areco v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 108 (Sept. 26, 2006); *id.* (García-Ramírez, J., separate opinion, ¶ 16). *See also* The Rochela Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 163, ¶ 196 (May 11, 2007); Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 213, ¶¶ 150, 153 (May 26, 2010); Heliodoro Portugal v. Panama, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R., (ser. C) No. 186, ¶ 203 (Aug. 12, 2008); Rodríguez Vera et al. v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R., (ser. C) No. 287, ¶ 459 (Aug. 14, 2014).

14. Rome Statute of the International Criminal Court art. 77, July 17, 1998, 2187 U.N.T.S. 90.

prescribed b
the obligation to investigate and prosecute international crimes, States have wide discretion regarding the applicable penalties, so long as the penalty is

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of extra-

however, the parties left the proposed system of alternative sanctions untouched.

Per the peace agreement, the Special Jurisdiction for Peace (JEP) will be made up of a Peace Tribunal and Judicial Panels. While the Judicial Panels

guerrillas.[21] The JEP will also have jurisdiction over crimes committed by state agents that [22]
However, unfortunately, the peace agreement has not clearly defined to which crimes this treatment extends exactly. This will be one of the most critical aspects to define in the implementing legislation, as the exact scope of this provision will determine whether the

The JEP will have exclusive jurisdiction over the crimes committed in the context of the armed co

even perpetrators of the most serious crimes, such as crimes against humanity, genocide, serious human rights violations, and sexual and gender-based crimes will respond directly and exclusively to the JEP, as long as the crimes committed are related directly or indirectly with the armed conflict.

Contrary to public opinion, the agreement does not allow for amnesty for the most serious crimes. It allows for amnesty only for political and connected crimes, meaning conduct such as treason, sedition, and insurrection.[23] According to the agreement, war crimes, crimes against humanity, and serious human rights violations will not be the object of amnesty or pardon (or any such equivalent treatment). Concretely, the following crimes are explicitly excluded from this provision: crimes against humanity, genocide, serious war crimes, hostage taking, and other serious deprivation of liberty such as the kidnapping of civilians, torture, extra-judicial executions, forced disappearance, violent sexual intercourse and other forms of sexual violence, forced displacement, and the recruitment of minors.[24]

21. *Id.* at 135-36.

22. *Id.* at 134. (El componente de Justicia también se aplicará respecto de los agentes del Estado que hubieren cometido delitos relacionados con el conflicto armado y con ocasión de éste, aplicación que se hará de forma diferenciada, otorgando un tratamiento equitativo, equilibrado, simultáneo y simétrico.

Regarding the penalties, the peace agreement establishes a staggered system of retributive and restorative sanctions that range from twenty years of prison to five years of restriction on movement.[25] The agreement provides the obligation to go through the proceedings at the JEP, and distinguishes between those individuals that agree to collaborate with the JEP in the establishment of the truth, and those that d

Those individuals who decisively participated in the most serious and representative crimes, but recognize their responsibility and engage immediately in full collaboration with the JEP (by disclosing relevant information, showing sincere remorse and offering their apology to the victims) will receive a sanction containing an effective restriction of their liberty for five

sanctions did not comply with international law standards.[29] Other institutions, however, such as the renowned Colombian think tank *DeJusticia*, the International Center for Transitional Justice (ICTJ), one of

liberty with the less
and combines it with restorative sanctions and reparation measures, such as community work and active participation in the search for truth and for the

the Colombian peace agreement is a penalty that is in accordance with international law, or an inacceptable amnesty.[36]

To answer this question, we should consider the particular context of the Colombian peace agreement. Colombia is the first country that had to face

> 27. This harmonization must be carried out by weighing these rights in the context of transitional justice itself. Thus, particularities and specificities may admittedly arise when processing these obligations in the context of a negotiated peace. Therefore, in these circumstances, States must weigh the effect of criminal justice both on the rights of the victims and on the need to end the conflict.[43]

Judge García-Sayán even went further, and discussed the possibility of

> be achieved is not an isolated component from which legitimate frustrations and dissatisfactions can arise, but part of an ambitious process of transition towards mutual tolerance and peace.[45]

The Colombian experience showcases the challenge of this weighing of rights Judge García-Sayán was referring to. There is no single one correct formula, and even less, a perfect one, but rather a wide array of possibilities, which greatly depend on the importance one assigns to the different values at stake and the concrete conditions that define the context of the particular transition.[46] The Colombian case illustrates that the discussion on justice and accountability after mass atrocities cannot be decontextualized from national political circumstances.[47]

DeJusticia emphasizes that while the obligation to investigate, prosecute and sanction is a central one, it is not the only one and should be carefully weighed against other duties of the state, such as the duty to achieve peace and other rights of the victims.[48] Also, in doing so, the state must consider the factual limitations and real alternatives of the solution in question. Therefore, *DeJusticia* concedes that while a state emerging out of a conflict such as Colombia could not use as reference the standard set by other transitions twenty years ago, it is also unrealistic to require the full standard international law has established for the prosecution of serious crimes in times of peace and political stability.[49]

Paul Seils also recognizes that Colombia was facing a particularly challenging context:

> Colombia demonstrates the difficulty of trying to make peace and punish crimes at the same time. [. . .] It is clear that in this case something had to give. [. . .] It is naive to think parties will put down their arms and gladly walk into prisons for lengthy terms. The alternative is to give up on the peace process and hope for a military solution that has not been forthcoming for 50 years. The Colombian example may be of relevance in future cases where similar balances of power are at play in a negotiated peace deal.[50]

45. *Id.* ¶¶ 37-38.

46. RODRIGO UPRIMMY YEPES ET AL., JUSTICIA PARA LA PAZ: CRÍMENES ATROCES, DERECHO A LA JUSTICIA Y PAZ NEGOCIADA

Also the International Criminal Court

challenging context. In 2013, the Office of the Prosecutor of the ICC (OTP) still seemed to be rather cautious on the question of the possible sanctions in a future peace deal. In a letter sent to Colombian oficials in 2013, the Prosecutor indicated his view that whatever sentence was to be imposed on

justice agreement strictly speaking. In certain contexts, an insistence on prosecution by the ICC Prosecutor would be shortsighted and would fail to consider the complexit
violence to peace.[61]

The fundamental importance of the obligation to investigate, prosecute and sanction war crimes, crimes against humanity and serious human rights violations, even in the context of transitions, is uncontested. Additionally, in those processes victims and their aspirations for truth and justice should have a central place. However, it has also been established that this obligation has a different significance and possibly even weight in the context of transitions to peace, as the Colombian. In this context, other aspects, such as the need to

approach, and a coherent prioritization strategy will be necessary in order to deliver meaningful results within a reasonable timeframe.[62]

Aside from these practical challenges, on a more theoretical level it seems clear that a national plan for justice and peace that includes investigative, retributive, and reparative elements, such as the Colombian proposal does, fulfills the requirements established by international law as it relates to the obligation to investigate, prosecute and sanction international crimes, crimes against humanity, and serious human rights violations, and that the ICC Prosecutor should respect this agreement as an adequate response to the challenge of how to deal with these crimes
past. Many will remain vigilant to ensure that the promise of peace with accountability effectively becomes a reality for Colombia.

62. Rueda, *supra* note 2.