

Acceptance of International Criminal Justice

Country Study on Colombia

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Nelson Camilo Sánchez León ¹

1. Introduction

Colombia is faced with one of the most difficult challenges in its history: dealing with one of the world's oldest internal conflicts and the last current armed conflict in the western hemisphere. Colombia has this challenge at a time when decisions about political transitions are required to consider the judicial limits imposed by international law; among them, those derived from the Nuremberg principles of international criminal justice.

Discussion of the possible application of international criminal law in Colombia is not novel. Colombia was not only very active in the discussions of the Rome Statute, but also ratified the Statute early on. It has also, however, been investigated by the International Criminal Court (ICC). The ICC opened a Preliminary Investigation in 2004, which is still in progress today. This investigation has become very important in the country's decision-making around the peace process, and the future of those responsible for some of the worst atrocities of the conflict. While Colombian leadership and many of its citizens are familiar with the principles of international criminal justice, it does not mean that there is widespread acceptance. In fact, the meaning of the term 'acceptance,' used throughout this chapter, is still open to debate. For some, acceptance is synonymous with having international principles integrated into local procedures and norms, and so for them acceptance of these principles is broad. Others, however, equate acceptance with the actual enforcement of these principles by local courts and governing bodies. From this perspective, the view of acceptance is less optimistic.

The purpose of this chapter is to investigate this issue further by analyzing what the legal community in Colombia thinks about the acceptance of these international principles. More specifically, it will explore what 'acceptance' means to the members of this community, the processes and mechanisms by which this acceptance is exhibited, and the level of acceptance that exists in the country.

This chapter uses two types of methodological tools. First, it draws on existing literature, mainly legal and socio-legal, addressing the legal and political debates that have arisen as a result of both the ratification of the Rome Statute and the opening of the preliminary investigation of the Court. Second, to offer a more accurate view of the perceptions of the concepts discussed, the chapter analyses a series of interviews with experts in the community, selected based on experience within one of four sectors: academia, government, the judiciary, and public opinion

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leaders. We attempted to include an even distribution of interviewees from each sector. The interviews took place in October 2015.

The chapter is divided into two main sections. The first explores the Colombian context at the start of the ICC's preliminary investigation. The second is more analytical, and focuses on the Colombian legal community's perspective on the concept of acceptance. This section also includes their assessment of how and to what extent such acceptance exists or has existed in Colombia.

2. The Colombian Context and the ICC Intervention

This section is divided into four subsections: 1) the nature of the conflict and the crimes committed; 2) the process of the acceptance of the ICC's Rome Statute in Colombia; 3) the particular intervention of the OTP in Colombia; and 4) the monitoring of complementarity in the face of internal developments.

2.1 The Colombian Internal Armed Conflict

The Colombian State finds itself in an internal armed conflict that has been going on for more than fifty years. The ICC considered intervening in June 2014; the ICC's Office of the Prosecutor (OTP) initiated a preliminary examination, which tracked the evolution of the situation for more than a decade. The current conflict can be traced back to 1964, when the first communist guerrillas, namely the *Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo* (FARC-EP – Revolutionary Armed Forces of Colombia-People's Army), the *Ejército de Liberación Nacional* (ELN – National Liberation Army), and the *Ejército Popular de Liberación* (EPL – Popular Liberation Army) were established (Offstein, 2003). In the 1970s these groups were joined by a second wave of guerrillas, most of which however demobilised by 1990. During that period, the Colombian State signed peace agreements with nine guerrilla groups, the largest and most known being the M-19 guerrillas, demobilising several thousand active guerrilla members as a product of these peace agreements (IACHR, 2013, 46). The state then embarked on a process of constitutional amendment, which involved representatives of the M-19 guerrillas following their demobilisation. This culminated in the 1991 constitutional amendments, which offered demobilised guerrillas political participation.

The establishment of paramilitary groups coincided with the formation of the first communist guerrilla groups.² The paramilitary groups later organised themselves under the banner of *Autodefensas Unidas de Colombia* (AUC – United Self-Defence Forces of Colombia), (Abdala, Dario & Arisa, 2008), which developed in the 1990s from a legal framework known as *Convivir*.³ In the 1990s, the balance of power within paramilitary groups shifted from the original leadership asserted by rural elites, to military commanders. The paramilitaries took over areas controlled by drug lords and guerrillas, co-opted and expelled cartels and rural elites, and eventually

² Paramilitary groups have existed in Colombia since the 1960s, when a number of decrees and laws allowed the formation of self-defense groups to fight the guerrillas. These groups were later joined by paramilitaries funded by traffickers, and land and business owners (IACHR, 2013).

³ In 1994, Decree 356 authorised the creation and formation of private security community services known as *Convivir*. The decree defined them as community organisations, action groups, or communal companies seated in a certain geographical community. The decree provided members of with unrestricted access to weapons, in order to act as law enforcement. In practice, *convivir* legalized and strengthened the existing paramilitary groups (Medina & Tellez, 1994).

controlled a large percentage of the drug trade (Duncan, 2006). The military expansion of the paramilitary forces ran parallel to their incursion into politics and they strictly controlled the areas that fell under their control. The official decentralisation process of the 1990s had the unintended effect of tightening their grip on local and regional political institutions, and by controlling local constituencies, the paramilitaries gained access to national politics. At the same time, the guerrilla movement experienced growth, particularly in sparsely populated regions of the country that have significant economic resources, either from coca plantations, precious mineral mining, or oil extraction.⁷

In spite of the enactment of the Constitution in 1991, political violence continued throughout the 1990s and even intensified during the second half of the decade (Gutiérrez, 2011). Although the Constitutional Assembly conceived the 1991 Constitution as a peace treaty, and the Assembly writing it included members of the demobilised M-19 guerrillas, not all guerrilla groups were included in the process, particularly the two largest and still active groups – FARC and ELN. During that time, both the paramilitary and remaining guerrilla groups gathered strength. The FARC embarked on a sustained military advance during this decade, increased recruiting levels, and upgraded their weaponry. This improved their military success against the Armed Forces (Avila, 2008). At the turn of the century, the paramilitary groups had around 10,000 combatants divided into ten blocks, while the guerrillas had 21,000 fighters distributed along 100 fronts.⁴

In December 2002, the AUC declared a unilateral ceasefire which had previously been a pre-condition of the Government to initiate peace talks with any of the armed groups. The Pact of Santa Fé de Ralito signed on 15 July 2003 formalised negotiations, and AUC leaders agreed to fully demobilise by the end of 2005 (Santa Fe de Ralito, 2013). According to official numbers, a total of 31,671 members of paramilitary groups demobilised by August 2006, mostly through collective demobilisation (HCP, 2006).

The demobilisation of these combatants, however, has not resulted in the end of the armed conflict and its ensuing violence.⁵ According to the reports of the MAPP/OAS Verification Mission and the Inter-American Commission on Human Rights (IACHR), the continuity of this violence is being perpetrated by three types of groups: 1) regrouped demobilised members forming criminal gangs that exercise control over specific communities and illegal economies; 2) holdouts that did not demobilise; and 3) new armed actors and the strengthening of some existing actors in zones abandoned by demobilised groups (IACHR, 2004).

Even though the security and counter-insurgency policies of the state have struck strong military blows against the guerrillas in the last few years, these groups still have a large number of combatants, with significant offensive power and important military and political structures.⁶ According to estimates by the Bogotá-based NGO, *Corporación Nuevo Arco Iris*, by the end of 2010 FARC had over 11,000 members distributed across 64 fronts (Avila, 2008). The central

⁴ According to the 2002 National Development Plan.

⁵ After the demobilization of the AUC in August 2006, BACRIM or neo-paramilitaries emerged from their ashes. These groups include in particular the 'Self-Defence Forces of Colombia Gaitanistas' also known as 'Los Urabeños,' or 'Clan Úsuga'. The first documents stated that in 2006, 22 armed structures consisting of about 4,000 men emerged. These bands are still active and pose one of the major risks to the peace process with the guerrillas (Diego, 2015).

⁶ Currently, the major guerrilla groups that are still operating are FARC and ELN. Official estimates put FARC's strength at 7,000 men. ELN has been described as militarily ineffective and politically expensive; however, it has a military capacity that has increased in recent years (Ortega, 2016).

command of ELN was also still intact, and had even won battles against the FARC in some regions. It had also survived offensives by the state through the partial links of some of its structures with the drug trade, in a type of 'passive resistance, where they avoided direct confrontation with security forces'⁷ (Avila, 2008).

In July 2013, the Government and FARC came together for peace talks in Havana, Cuba.⁸ The Government and FARC agreed to discuss a six-point agenda: land reform; guarantees for the exercise of political opposition and citizen participation; the end of armed conflict; drug trafficking; the rights of the victims of the conflict; and Disarmament, Demobilisation, and Reintegration (DDR) and monitoring and implementation of the peace accords. On 23 September 2015, the parties publicly made an agreement on transitional justice. The agreement establishes a 'Special Peace Jurisdiction', formed around courts that will be set up to try those who have been responsible for the most serious crimes committed during the conflict. Those who cooperate with such a system and acknowledge past wrongdoings would, if convicted, serve between five and eight years under special conditions that would ensure the effective restriction of their personal freedom. Those who are slow to come forward and accept their responsibility for wrongdoings could eventually serve the same term but in ordinary prisons. Those who do not cooperate could eventually be convicted and punished with prison sentences of up to twenty years.⁹ As of April 2016, the Government and FARC have agreed upon five points of the agenda and are currently negotiating the DDR and monitoring of the accords. The parties still need to agree on the mechanism for electing the judges in the commission for truth and peace. On 30 March 2016, the ELN and the Government also started an official peace process in Caracas, Venezuela, with a six-point agenda: society's participation in the construction of peace; democracy for peace; transformations for peace; victims; the end of the armed conflict; and implementation.

2.2 The Ratification Process of the Rome Statute

Colombia played an active role in the discussions that led to the adoption of the Statute of the International Criminal Court, and voted in favor of the adoption of its final text. At that time, the Government of then President Andres Pastrana had initiated peace talks with the members of the FARC and believed that the ratification of the Statute could act as a deterrent for the guerrillas and promote a commitment to the peace process. In December 1998, the Government signed the Statute and convened a group of experts to seek ratification that would make Colombia one of the initial 60 countries to allow the jurisdiction of the ICC. A group of experts and congressional representatives who felt that the Colombian Constitution had wider guarantees, therefore making ratification impossible, argued against the Statute.¹⁰

⁷ During the period of ELN's heightened military offensive, it attempted to blend in with the civilian population as a strategy of passive resistance. Since 2011, however, its offensives have become less passive.

⁸ The Colombian government has made various attempts to negotiate with the FARC and ELN. The literature describes the main obstacles for their lack of success as: 1) the difficulty of negotiating with an illegal political party, which was exacerbated in the case of FARC by its use of violence; 2) ongoing violence against members of demobilized armed groups, resulting in the death of M-19's leader; and 3) a lack of political will among the parties to negotiate (Gutiérrez, 2012).

⁹ For the official English version of the Joint Statement #60 by the Colombian Government and FARC, see: <http://goo.gl/Foiu0T>

¹⁰ These guarantees relate to issues such as the prohibition of irredeemable penalties such as life imprisonment, and inability to relax the principle of legality in domestic law, and the prescription of criminal action and penalty. See Congress of Colombia, Presentation of Legislative Act No. 014 of 2001 Senate. Debate in the second round.

Considering various technical and legal formulas on how to unite the Colombian Constitution and the ICC Statute, Congress decided to bring about constitutional reform to ratify the Statute. This reform signaled that the eventual implementation of the Rome Statute by the ICC would be accepted in Colombia. However, this would not change ordinary criminal assurances at the domestic level. Thus, the ratification process had a double passage through Congress. First, constitutional reform was agreed to authorise the ratification.¹¹ Subsequently, once the Government signed the treaty, Congress endorsed the act ratified by ordinary law.¹² Both acts were subject to judicial review and endorsement by the Constitutional Court.¹³

Finally, on August 11, 2002, the Colombian Government formally handed over the instrument of ratification to the United Nations Secretary General. However, the decision to ratify the Statute was not based on the idea that the ICC's jurisdiction in Colombia would act as a deterrent to armed groups which, fearing the possible intervention of the Court, would cease to commit offenses and would be more inclined to negotiate a peace agreement.¹⁴ In fact, the Government thought that the jurisdiction of the Court would deter future peace talks and so decided to use Article 124 of the Rome Statute. Article 124 is an optional protocol and a transitional provision, which allows States to choose not to have their nationals subjected to the Court's jurisdiction over war crimes for a seven-year period after ratification. This decision sent the message that crimes against humanity thereafter would formally go through the justice system. It also opened the door for crimes committed during the peace negotiations to be included in a broad amnesty. Therefore, the ICC has jurisdiction over crimes against humanity committed in Colombia from 1 November 2002, and only those war crimes that have been committed on or after 1 November 2009.

2.3 The OTP Intervention

In June 2004 the OTP opened a Preliminary Examination of the situation in Colombia, in order to obtain information about crimes and to establish the 'status of related national proceedings', especially were to 'encompass persons who appear to bear the greatest responsibility for the most serious crimes and [were] genuine.' (OTP, 2012, 4). Since then, the OTP has reported that it 'has received 114 communications under Article 15',¹⁵ 20 of which the Court considered 'manifestly outside the Court's jurisdiction.' (ibid, 2). The OTP is analysing 94 more as part of the preliminary examination.

It has found that 'there is a reasonable basis to believe that acts constituting crimes against humanity have occurred within the situation in Colombia' (ibid, 10). These crimes include murder, forcible transfer of population, rape and other forms of sexual violence, severe deprivation of physical liberty, and enforced disappearance (ibid, 10). Those responsible for these crimes could be members of the guerrilla and paramilitary groups, or members of the security forces. Regarding the latter, the OTP has closely monitored the practice known as 'false positives' by which 'members of the Colombian army deliberately killed thousands of civilians,

¹¹ Congress of Colombia. Legislative Act 01 of 2001, adopted on 30 July 2001.

¹² Congress of Colombia, Law 742 of June 5, 2002.

¹³ Colombian Constitutional Court, Case C-614 and C-578 2002 2002.

¹⁴ The peace talks with the FARC, which began in 1998, had been abandoned in January 2002.

¹⁵ Under Article 15 of the Statute, the Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court, subject to authorisation from the Pre-Trial Chamber.

and dressed them in guerilla outfits, to bolster success rates in the context of the internal armed conflict and to obtain monetary profits from state funds for having successfully counteracted the guerilla' (ibid, 2).

The information also provides a reasonable basis to believe that conduct committed since 1 November 2009, in the context of the non-international armed conflict, constitutes war crimes. These crimes, in accordance with Article 8 of the Rome Statute include: murder, attacking civilians, torture and cruel treatment, outrages to personal dignity, taking hostages, rape and other forms of sexual violence, conscription, and the enlistment and use of child soldiers (ibid, 2). According to the OTP, members of guerrilla groups or state agents could be responsible for these crimes. Members of paramilitary groups were excluded from prosecution for these crime since the process of demobilisation was nominally completed in 2005, and is thus outside the temporal jurisdiction of the Court.

The OTP initiated a process of both research and exchange with local authorities to examine whether the allegations met the admissibility requirements of the Statute. To this end, delegations of the OTP, headed by the Prosecutor, have made several journeys to the country. Eventually, the Colombian Government began to openly express their dissatisfaction with being the subject of a permanent preliminary examination, and started to consider the possibilities for an argument based on the complementarity principle. This recognises that States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.

In November 2012, the OTP issued an 'interim report' to provide public information on the state of the situation after more than eight years since it began its investigations. In the interim report, the OTP concluded that, 'the Colombian authorities have carried out and are still conducting a large number of proceedings relevant to the preliminary examination against different actors in the conflict for conduct that constitutes crimes within the jurisdiction of the Court' (ibid, 4). Therefore, it was not necessary to progress to a stage of admissibility at that time. However, the OTP decided that, 'the preliminary examination should continue due to the complementarity requirement' (ibid). In other words, the prosecution did not accede to victims' rights organisations that needed to advance in the admissibility progress, nor did it accede to Government pressure to conclude its study.

The interim report recommended continuing the monitoring process, but focused on five strategic areas:

1. Follow-up on the Legal Framework for Peace and other relevant legislative developments, as well as jurisdictional aspects relating to the emergence of 'new illegal armed groups;
2. Proceedings relating to the promotion and expansion of paramilitary groups;
3. Proceedings relating to forced displacement;
4. Proceedings relating to sexual crimes; and
5. False positive cases.

2.4 Complementarity and domestic developments

Since the beginning of its intervention, the OTP has favoured a dialogic model with Colombian authorities, aimed at encouraging advances in domestic investigations. The Colombian Government has argued that this model is an example of the concept of 'positive complementarity'. However, the relationship has not been entirely harmonious. At the time, the Government and its inner circle saw the start of the preliminary examination as a response to international criticism of the negotiation process with the paramilitary groups, while some sectors of the human rights lobby did not see it as a real negotiation of peace, but rather as a possible form of impunity of allied groups (Saffon & Uprimny, 2007).

The situation became more tense with the monitoring undertaken by the OTP between 2004 and 2010. At that time, the Colombian judiciary started investigations by the Supreme Court and carried out trials of political leaders who had been allied with paramilitary groups, a phenomenon also known as *parapolitics*. By August 2012, over 50 former congressional representatives had been convicted by the Supreme Court for collaborating with and supporting illegal armed groups pursuant to an agreement with an illegal armed group. The vast majority of those leaders were political allies of President Uribe, which led to a public confrontation and prosecution by the Supreme Court. During the most critical moments of this confrontation, political analysts perceived the visits of the OTP to Colombia as an endorsement of the ICC investigations conducted by the Supreme Court. This produced a political message that the ICC closely followed the *parapolítica* investigations and, if the Executive impeded the work of the Supreme Court, the ICC would be ready to act (Sevillano, 2016).

In the 2012 interim report, the position of the OTP was, as noted above, intermediate. However, the OTP is still actively tracking two important events of the conflict. On the one hand, the OTP has continued to closely monitor the progress of investigations against members of the security forces, particularly the army, due to the allegations of false positives. On the other hand, the OTP has closely monitored the progress of the peace process, which the Government initiated later with the FARC.

On June 19, 2012, the Colombian Senate approved the Legal Framework for Peace (*Marco Legal para la Paz*), a bill establishing a transitional justice strategy that included the prioritisation and selection of cases against those bearing the greatest responsibility for crimes against humanity and war crimes. The bill also enabled conditional suspension of all other non-selected cases and the suspension of selected sentences. Several human rights organisations opposed this mechanism, declaring it a violation of Colombia's obligations under the ratification of the Rome Statute. Human rights groups brought the issue before the Constitutional Court.

During this process, Prosecutor Bensouda sent the Court two private letters that were leaked to the public and caused great controversy (Sanchez, 2013). In the first, she expressed concern that the Constitutional Court accepted one interpretation of the model that excludes sentencing for high-ranking officials who committed crimes sheltered by the Statute. Under its legal interpretation, the Prosecutor wrote, 'a conviction that is rude or manifestly inadequate (...) would invalidate the authenticity of the national judicial process' (ECCHR, 2015). In the second letter, Bensouda discussed court details on the prioritisation and selection system used by the OTP. According to the letter, the Prosecutor had information on the Colombian Court's model of

prioritisation and selection, and she emphasised that such a model was different from that which could be implemented in a domestic trial (Sanchez, 2013).

The discussion on the acceptance and not of the justice agreements by the OTP became more acute when the peace talks began. At the end of 2014, the OTP issued a preliminary examination report on its activities in which Colombia was included. The report positively assessed the fact that the parties at the negotiating table had considered the rights of the victims, but it reiterated that it would continue to monitor closely the specific agreements on justice. The OTP also concluded that, 'the Colombian authorities appear to have made some progress in their investigations for false positive cases relevant to the preliminary examination' (OTP, 2014). However, the OTP was concerned with the limited progress made investigating sexual crimes. Months later, and with the controversy caused by the letters still present, James Stewart, Deputy Prosecutor of the ICC, travelled to Colombia and presented a lecture entitled *Transitional Justice in Colombia and the role of the International Criminal Court*, in which he explained the issues that were being monitored by the OTP in relation to the peace process.¹⁶ Reactions to the speech were diverse and varied depending on the political positions of the actors regarding the peace process. The President of the Peace Committee in Congress, who was a member of the President's party, stressed that the speech showed Colombia's independence to make rules that suit Colombia, while still respecting international standards. The general prosecutor, who has defended the process, stated that international law must admit that it is not necessary for a peace process to end with the imprisonment of the guerrillas. On the other hand, the Attorney General, who opposed the process, stated that it was necessary for the FARC leadership to go to jail (Daniel, 2015).

Following the publication of the agreement on justice issued by the Government and the FARC, Bensouda issued a public statement in which she 'note[d] with optimism that the agreement excludes the granting of any amnesty for war crimes and crimes against humanity, and is designed, amongst others, to end impunity for the most serious crimes' (OTP, 2015). The Prosecutor made it clear that, 'the Office will carefully review and analyse the agreed provisions in detail as part of its on-going preliminary examination of the situation in Colombia' (ibid). For this reason, the OTP 'will be engaging in extensive consultations with the Government of Colombia and other stakeholders, including victims and relevant civil society organisations' (OTP, 2015).

¹⁶ See: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-stat-13-05-2015.aspx

3. Acceptance of International Criminal Justice in the Colombian Context

This section analyses how the legal community perceives the acceptance of the principles of international justice in Colombia.

3.1 Acceptance: Definition and Measurement

The aggregate opinion of the legal community consulted for this chapter suggests that there is an apparent consensus of the acceptance of international criminal justice in Colombia. The way in which acceptance is defined and measured, however, varies. We must distinguish between the concepts of instrumental and symbolic acceptance.

Instrumental acceptance refers to the ways in which the acceptance of international criminal justice is incorporated into the structures and systems of the country. The methods by which these principles are incorporated produce a real and direct change in policy, as well as in the political and social conditions of the country. Instrumental acceptance can also be a sign of a sincere political will to advance political and social change. Symbolic acceptance also refers to a type of rhetoric that does not necessarily change reality. However, it does affect public ideology. Symbolic acceptance is also associated with the interests of local stakeholders that are not always in line with the principles derived from international criminal justice. In this regard, several experts referred to this behaviour as 'strategic agreement,' and 'acceptance by false reasons'. Strategic agreement refers to the use of international criminal justice for a domestic political advantage. By 'acceptance by false reasons', experts refer to the acceptance of international criminal justice principles due to ignorance or a wrong understanding of what those principles mean.¹⁷

A second distinction in opinions relates to how acceptance is measured. The majority of those interviewed were connected to the legal community. Those who work in the legal sector, or who are close to it, responded positively that the degree of acceptance was high. This is in large part because their understanding and measurement of acceptance is based on the principles being incorporated into the legal and judicial framework of the country. The highest level of positive response to the idea of acceptance was from an understanding of 'regulatory acceptance'. This is not surprising considering that the community's focus is juridical. This can be verified by existing regulations, such as the Law of Judicial Courts in the implementation of such regulations.¹⁸ It is necessary to clarify that for some, an independent assessment of international criminal justice in this area is very difficult, as there is an interactive process of engagement with international bodies, especially with the jurisprudence of the Inter-American Court of Human Rights.

There is an additional approach to measuring acceptance. It is related to the degree of internalisation of these principles and how this internalisation affects behaviour, either through deterrence, which would be the reduction in the commission of crimes, or the social

¹⁷ Interview with a civil society expert. Reference 01.

¹⁸ Examples can be found in the substantive treatment of the crimes, the use of research methodologies promoted by the ICC, and the advancement of research on priority issues for the OTP, etc.

demand for justice against it. However, the legal community has limited empirical information on this topic because it has not been an area of empirical research in the country.

A further factor that causes divergence in the responses is associated with the actors of acceptance. While some have accepted international criminal justice, others have refused to do so. This will be discussed in a later section but, at this point, it is important to highlight this as one of the factors that prevented some from responding either affirmatively or negatively.

Finally, an additional factor in the assessment of the responses is one related to time. The Statute has been in place for almost 15 years, and the preliminary examination of the OTP has continued for more than ten years. An individual's view of acceptance tends to change over time. All experts interviewed stressed that with the passage of time there had been changes in their acceptance of the Court. Some interviewees emphasised that with time, acceptance had been prejudiced because after ten years without a concrete result, it became increasingly clear that the Court was a 'paper tiger'. However, the experts interviewed differ on this interpretation, noting that there was a degree of incremental acceptance. The vast majority supported this change based on a better understanding of local actors, as well as a much more respectful position of national processes by the OTP.

Most experts interviewed stressed that, in general terms, their assessment of acceptance was a positive one. That is, they felt that the political processes initiated or consolidated from acceptance were legitimate, relevant or appropriate for the country, and that domestic procedures that have been developed to comply with international obligations under the principles of international justice have been positive for both victims and society. This perception stems from a positive view of the process of 'positive complementarity' that has been submitted under the intervention of the OTP. According to the legal community, this intervention has led to processes, which have strengthened the practice of combating impunity. In this regard, the intervention is considered positive because it has made the state adopt domestic measures that probably would not have been developed otherwise. For example, the OTP has to interact with the state and is present in the public and political debate, making international justice not seem like a distant or ethereal institution, but a real possibility. In addition, the OTP guidelines and the Prosecutor's public statements have been instrumental in forcing internal processes. These processes, include initiating certain avenues of research on the Justice and Peace Law,¹⁹ particularly with regard to sexual violence; promoting the opening of proceedings against members of the security forces, particularly in terms of false positives; and reaching negotiations and agreements with the guerrillas based on the principle of no impunity, which happened a few months ago in the agreement with the FARC.

The community of experts believes this incremental development is due to the idea of complementarity as 'an interactive game' in which 'the government interacts with the OTP and the ICC, and depending on the number of interactions in a period of time, the hegemonic strategy changes'.²⁰ In this sense, the longer the OTP is active in Colombia, the less influence it has, and the less of a dominant strategy it has. In the end, the OTP ends up fulfilling several roles at

¹⁹ The Justice and Peace Law of Colombia (Law 975) of 2005 is a legal framework approved by Congress to facilitate the demobilization of paramilitaries in Colombia. The Law facilitated the demobilization of 30,000 members of the armed organisation.

²⁰ Interview with university professor. Reference 11.

different times. Currently it fulfils the task of giving legitimacy to internal actors, but through the implementation of best practices. It is a kind of application of the educational role of international criminal justice.²¹ This process, seen from the context of double-line exchange and interchange, has required an adjustment of expectations and strategies from both the Government and the OTP itself. As one of the experts interviewed stated, 'to start, the OTP was a polarising factor. However, today the OTP has taken its distance, which has helped with its acceptance'.²² Accordingly, as other interviewees expressed, today we are 'constantly adapting to the ever-changing best practices established by the OTP'.²³ This results in the appropriation of these practices, by either legitimising or questioning them.²⁴

In the field of disarmament and peace negotiations with armed groups, the general opinion is that the principles of international justice have acted as 'virtuous restrictions' because 'instead of being an obstacle to peace, they can harness the political dynamics of the peace negotiations and as a result, include the interests and expectations of antagonistic actors' (Saffon & Uprimny, 2007).

3.2 Who Accepts or Rejects International Criminal Justice?

The actors involved in the discussion about the principles of international justice are varied, given the nature of the armed conflict and the political realities of the country. Thus, several actors influence the acceptance of international criminal justice. There are those who are directly involved in the hostilities, including the military, paramilitary, and active guerrillas, and those that play a more passive role in the conflict, such as different sectors of the government and civil society. These include government officials that do not necessarily share the line of the armed forces and the Ministry of Defence, the Justice and Peace Law Department, the Attorney General's Office, and the Constitutional Court. The Court rules on the constitutionality of the implementation of these principles. Opposition parties also influence the acceptance of international criminal justice. This includes the right, which brings together landowners and other conservative groups (mainly the Democratic Centre Party) and who have opposed the negotiations with the guerrillas using arguments of international criminal law. It also includes left-wing parties that supported negotiations with the guerrillas, but who opposed the model Justice and Peace Law from its origins. Civil society organisations that are associated with the human rights movement, such as established platforms that support peace and peace agreements, including on considerations of justice and victims' rights, have also influenced the acceptance of international criminal justice. The international community is also very influential in this acceptance. When asked about the acceptance of these actors, the legal community distinguishes different approaches.

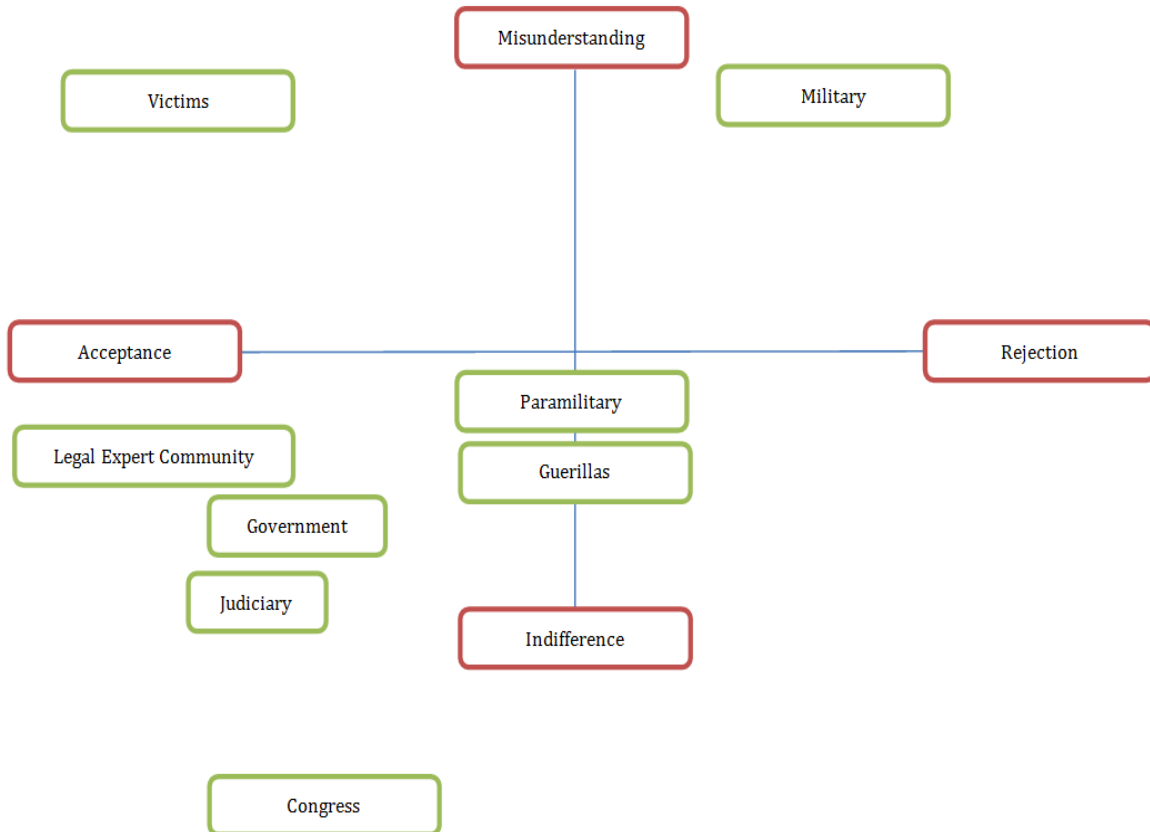
²¹ Ibid.

²² Interview with civil society expert. Reference 01.

²³ Interview with a university professor. Reference 11.

²⁴ Ibid.

The interviewees were first asked if they accepted, rejected or were indifferent to the ICC. Several respondents, however, said they would fall into another category of those who nominally accepted or rejected the principles, but did not adequately understand the background. Thus, some interviewees said that, given the great deal of uncertainty surrounding the Court and the OTP and its principles, many actors publicly reject or accept without truly knowing or understanding what it means to reject or accept the Court. Based on these answers, a methodological variable was added, as shown in the figure below.



This figure distinguishes four dynamic quadrants where the actors are positioned. In the quadrant of rejection, derived from misunderstanding, are the members of military forces. This group has publicly shown greater reluctance to the idea of international justice. The other actors in the conflict who have historically maintained a recalcitrant discourse appear to have moved to a less radical position, though not towards complete acceptance.²⁵ However, unlike the military, the guerrilla rejection or acceptance is more indifferent than a misunderstanding of the principles. The civilian sectors, both political and social, are currently located in the quadrants most associated with acceptance. Some of them tended to have greater knowledge and understanding of the actual content of the principles. Finally, the political groups represented in

²⁵ One interviewee suggested that ‘the FARC have moved from a political and ideological opposition against the ICC (because of its nature as a subversive group), to a position of political realism.’ Interview with a University Professor. Reference 02.

Congress have had to accept even with a lower level of interest and therefore are located on the axis of indifference/acceptance.²⁶

3.3 What is Accepted?

The scope of acceptance spans various degrees and perspectives. At least four of them were mentioned by the experts consulted: the principles of international criminal justice; working methods and how to conduct investigations; the preliminary examination of the OTP; and the possible opening of a case by the OTP and eventual prosecution by the Court. This list is presented in descending order of perceived acceptance.

The vast majority of experts consulted recognise that the greatest degree of acceptance is of the principles of international justice. As one respondent said, 'what the guerrillas accept are the underlying principles (which must be justice, impunity is not allowed) rather than the institution itself'.²⁷ Therefore, while the application of the principles by local judges is generally accepted and not seen as controversial, the implementation of these principles by international judges is seen as an intervention in internal, Colombian affairs. In the words of another expert, 'in Colombia, beyond an acceptance of the ICC, there is an acceptance of international criminal law as a block'.²⁸ This block would take shape in 'the Joint Undertaking for justice and the preserving [of] peace'.²⁹ At the end of the day, as an expert said, 'the official authorities have made the primary act of acceptance to be the acceptance of the jurisdiction of the Court by ratifying the Statute. This is not a minor event, considering it was made during times of armed conflict'.³⁰

A second aspect that has been widely accepted, especially by the judiciary and specialised legal community, is the research methodology promoted by the OTP and the ICC. In the Colombian context we speak today of research theories of modern criminal law, including research by chain of command, prioritisation and selection, and the prosecution of those most responsible, among others. In this regard, the system of Rome has been accepted as a legitimate authority and an institutional model to be replicated domestically.³¹

Next, is the acceptance of the concrete process led by the OTP through its preliminary review. While today there is a general level of acceptance of the process, given the scope of iterative exchange, resentment remains in government sectors as well as the legal community. This is due to the classical arguments of sovereignty and democratic legitimacy, and to a more pragmatic concern: the idea that such a long preliminary examination ends up weakening the mechanism itself because the threat of intervention is trivialised.

²⁶ The international community group was excluded from the figure because it was not proved to be influential or worthy of being included by the experts interviewed. This is because although it is considered influential in making decisions, it was decided that it should not be considered as a subject to determine acceptance or rejection for the purposes of this study.

²⁷ Interview with a member of the judiciary. Reference 03.

²⁸ Interview with a University Professor. Reference 12.

²⁹ Interview with an official of the executive branch. Reference 10.

³⁰ Interview with an expert of civil society. Reference 01.

³¹ One interviewee noted as an example that has been adapted at a domestic level, the standard procedural conduct of the prosecution in the investigation of sexual offenses to refrain from inquiring about the previous sexual life of the victim as a sample implementation, including the principles that are not in Statute but in its complementary instruments. Interview with professor and social activist. Reference 15.

Finally, the least accepted theme is the opening of a case by the ICC, namely a more concrete form of intervention. Experts close to the government felt that, despite the advances in the process of *positive complementarity*, ‘there is a latent possibility that some cases are known in Colombia, considering that much unlike other situations of the ICC, it has an institutional capacity that is much more vigorous than these countries that can be classified as failed states’.³² All interviewees agreed that if the ICC opens an investigation into the Colombian situation, the state would refuse any intervention, irrespective of the case that is being investigated – guerrilla, paramilitary or military – arguing that Colombia is able and has the capacity to prosecute the individuals at the local level. This is due to a fear that an intervention would open the possibility for the ICC to be involved in a number of future cases.

3.4 How to Accept?

This section explores the ways in which the interviewees arrived at acceptance. It is worth noting that several interviewees expressed the difficulty of isolating the role of international criminal justice in the realm of other justice norms and mechanisms, such as international law on human rights, especially from the influence of the jurisprudence of the Inter-American Court of Human Rights, or Colombian constitutional law itself from the pronouncements of the Constitutional Court of Colombia.³³

The interviewees are overwhelmingly from the legal field. Thus, the main vehicle of acceptance is understood in terms of normative compliance and application of the principles of the ICC in the domestic system. One of the aspects most often mentioned was the process of incorporating the statute into the Colombian legal system, which was described in the first part of this report. This is challenging, however, because it takes time to effectively incorporate the principles of the Rome Statute and other aspects of international criminal law into domestic law.³⁴

Judicial actors are used as a vehicle to incorporate the principles of international criminal law domestically, particularly in prosecuting paramilitary forces under the Justice and Peace Law. In the view of one of the interviewees, although the legislation is not entirely clear – for example, penal legislation does not adequately incorporate international crimes, and could thus present problems arising from the non-enforceability of international standards – ‘jurisprudence has been very progressive and has been successful in incorporating principles of international criminal law’.³⁵ Several cases of special jurisdiction under the Justice and Peace Law were cited as concrete signs of the use of international justice principles, including the case of former paramilitary Freddy Rendon Herrera.³⁶ This case highlighted the fact that the domestic court does not only accept ICC standards, but is also concerned with the issue of child recruitment, which the OTP said it would especially monitor. Thus, according to some of the experts, there is

³² Interview university professor. Reference 07.

³³ One interviewee noted that this impact, in fact, should be read in an historical context, as ‘the process of incorporating international language is a process that has more background than what is usually recognised in Colombia. As an example, we may cite the figures of the European public law to face wars between nations, that we used to face the internal wars of the nineteenth century, such as the political offense, amnesties and pardons.’ Interview with university professor. Reference 12.

³⁴ Ibid.

³⁵ Interview with judge of the jurisdiction of the Justice and Peace. Reference 09.

³⁶ Superior Court of the Judicial District of Bogota Hall of Justice and Peace. December 16, 2011. Judge Speaker: Teresa Jimenez Lopez Uldi Filing: 110016000253200782701 postulates: Fredy Rendon Herrera Crime: Homicide of protected person and other Hometown: Attorney 44 National Justice and Peace Unit Decision: Judgment Bogota.

a clear relationship between the content of domestic judgments and the monitoring by the OTP.³⁷

There is, however, a negative element to this practice. The interviews revealed that openness to international acceptance of these principles has led to a situation in which many legal practitioners make use of legal institutions in the wrong way, in search of legitimacy or international support. They cited, for example, the indiscriminate use of the term ‘crimes against humanity’, which is often used by prosecutors to denote the importance and gravity of certain criminal behaviour, without always applying a rigorous standard of review.

In political and institutional processes, the legal community highlights the enormous influence that the principles of international criminal justice have had on the design of all the mechanisms that have been developed and implemented over the last decade under the aegis of transitional justice. Several interviewees cited the Law of Justice and Peace as a clear sign of acceptance of principles of international criminal law, although it was discussed and approved almost before the OTP monitoring began.³⁸ Further developments of the model of transition, such as the Law of Victims and Land Restitution, the Legal Framework for Peace, and even the recent preliminary agreement on transitional justice between the Government and the FARC could also be considered as indicators of the acceptance of the principles of transitional justice including accountability mechanisms of international criminal justice.

3.5 Why Accept?

The Colombian legal community portrays at least five assumptions on why there has been a general acceptance of the principles of international criminal justice and, to a lesser extent, the local intervention of the Rome System. The first is that there is a shared ‘ideological’ identity that is, that there is a community of accepted principles locally in Colombia, as well as internationally. This assumption, however, was contested by a number of interviewees who felt that a dominant idea of combating impunity as a shared ethical standard did not exist, either at the government level, or at the social.

A second assumption explains the degree of acceptance from a Colombian tradition detached from substantive principles, but rather to the practical implementation of international standards and institutions. Therefore, independent of substantive principles not being internalised at the local level, there is a culture of respect for international courts and international law in general, which would foster dialogue between local institutions and institutions of the Rome system.

A third reason given is based more on instrumental reasons and relates to the idea of strategic advantage in the midst of armed conflict, which resulted mainly in the early ratification of the Rome Statute. As discussed earlier in this chapter, one of the reasons cited by the then Pastrana Arango Government to ratify the Statute was to promote peace agreements with the guerrillas under the logic of the carrot and stick; the ratification of the Statute showed that the threat of

³⁷ Interview with legal expert. Reference 06.

³⁸ In a more complex view, Rene Ureña holds that the design of the Justice and Peace Act had a distant influence on the ICC, whose presence was ‘looming in the shadows’ and is thus essentially an adaptation of the standards set by the Court of Human Rights. See: Rene Ureña. The shifting patterns of influence in preliminary examinations: The ICC’s Prosecutor in Colombia. Forthcoming. *American Journal of International Law*.

international investigation and prosecution was real. The postponement of an ICC intervention and the enforcement of the Statute provided an incentive to negotiate. For other interviewees, the reason for ratification was more unilateral in the sense that the threat of international intervention was a tool of pressure against the guerrillas, without considering that this justice could actually be enacted against state actors. Therefore, when the focus shifted from the crimes of the guerrillas to other actors, facts about the military were also included, such as the 'false positives', and as a result, the government resisted monitoring by the OTP.

However, the most common reason shared by the interviewees, which may also reflect a rather general opinion of the legal community, was that the interaction with the OTP has led to a kind of 'epistemic community' of technical professionals, particularly legal practitioners who accept the court and its principles under this exchange. In a recent study, Professor Rene Ureña stated that in opposition from what others have sustained, the doctrine of dynamic complementarity leads to the OTP filling a national space in a kind of political and legal vacuum. What has actually happened in the Colombian case is that the OTP entered 'a densely populated institutional environment, with which it is forced to interact constantly' (Ureña, Forthcoming). As a result of this interaction, the influence of the OTP 'is less a function of the OTP's purposeful strategy, and more the consequence of a process of inter-institutional interaction and adaptation that is not controlled by a single state or institution' (ibid). These interactions 'create shifting modes of influence, which in turn have kept the ICC relevant in the Colombian context, despite the long duration of the engagement' (ibid). Seen in this way, the reasons for acceptance should be understood in a more horizontal and dialogic manner and not simply as an acceptance of a unidirectional hierarchical power.

4. Conclusion

Expectations about Colombia and its path toward peace are high. While various opinion polls show that society in general is very sceptical of the chance of peace, both the government and the legal community are optimistic about the general agreement, as well as for attaining justice for the victims of the conflict³⁹.

The most optimistic perspective comes from the legal community in Colombia. According to the Colombian legal community, the government has accepted the principles of international justice, through constitutional and legal processes, incorporating them into local standards and regulations. Judges in the country are also considering these principles when making their rulings. Additionally, there is certain consensus that the intervention of the OTP has paved the way for such compliance. The principle of positive complementarity has created an environment in which Colombian authorities have felt the need to act to prevent the direct intervention of international courts.

Due to the limited scope of this study, one can assume only to a certain degree that the Colombian society and legal community in general share these perceptions. This study can offer

³⁹ Cifras y conceptos. Encuesta Polimétrica. March 2016. Módulo Proceso de Paz". Available at: <http://cifrasyconceptos.com/productos-polimetrica/>

only some possible answers or factors to consider under some caveats. Other answers may be also possible or credible such as, for example that the positive outlook on the partial intervention of the OTP could come under threat if the OTP's position on the existing peace process was more demanding. Similarly, the general idea that the military does not adhere to the principles of international criminal justice in part because it is unfamiliar with them, may also underestimate the fact that they may reject justice as a form of impunity given their involvement in the conflict.

In Colombia, it seems clear that multiple factors affect an individual's perception. Perspectives and opinions are susceptible to change with any minor change in the process, especially in an environment like Colombia that is polarised and in flux. The Colombian context highlights the advantage of approaching the issue as a process or continuum where the positions of the parties are dynamic and responsive to a multiplicity of reasons and interests.

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6. Annex

Annex 1 – Case Studies

Colombia Case Study - Tribunal	
Form of violence	Crimes against humanity / War crimes
Form of tribunal	OTP Preliminary Examination
Crimes investigated	Broad - Forced disappearances, kidnapping, extrajudicial executions, sexual violence, illegal recruitment, forced displacement among other crimes
Limits to investigation	Investigations are country-wide and are aimed at covering all 'illegal armed groups' members that committed gross crimes. It excludes state actors
Individuals indicted	High to mid -level commanders (mainly of the ex-paramilitary groups)
Level of International engagement	OTP has initiated a preliminary examination that oversees progress of domestic process under the principle of complementarity
Status of criminal proceedings	Preliminary Examination has been opened for the past 11 years

Colombia Case Study - Context	
Why were the mass atrocities perpetuated?	Internal armed conflict – 50 plus years
What parties were involved?	Insurgent guerrillas against security forces and self-defense groups
Who were the perpetrators?	Members of all groups
Who were the victims?	Approximately 15 percent of the entire population. Mostly peasants and rural communities, but also social leaders, human right defenders, and members of wealthy families that were targeted for extortion or/and kidnappings
What was the motivation?	The conflict started as a rebellion but its nature became complex over the passage of time, involving other actors and illegal economic agendas that fueled the war, such as drug-dealing, illegal mining, and massive land dispossession.

Annex 2 – Information Collection Tool

Investigation project

Acceptance of JPI in Colombia

Semi-structured interviews

This instrument is intended to serve as a guide for semi-structured interviews with a target comprised of experts with prior knowledge of the functioning of the ICC, such as the Colombian legal and political system group. The people selected to participate in this interview have been from different areas (academia, government institutions, civil society organisations, and international organisations) and have a direct knowledge of the processes of internal justice and the relationship between them and the Attorney General's Criminal Court International (OTP). Therefore, the questions are directed at specific issues, and assume the knowledge and experience of the respondents.

Definition of acceptance

At this point we explore two issues. First, the definition of acceptance that the interviewee has. Second, whether in his or her opinion the CPI has been accepted in Colombia. To do this, the subject is asked in two stages. In the first an open question looking for a spontaneous response is made. In the second the concept of acceptance is related to others to determine the degree of correlation between the opinion of the interviewee and the concept of acceptance.

Question: Do you think that the system and principles of the International Criminal Court have been accepted in Colombia?

Question: Of the following concepts, with which do you associate to a greater or lesser extent their assessment of acceptance?

- Legitimate
- Suitable
- Relevant
- Useful
- Influential

Assessment of acceptance

This section explores the positive or negative value judgment on the acceptance or rejection of the intervention of the ICC (especially through the Preliminary Examination) of the OTP in Colombia. This is done through two questions:

Question: In your view has the model of acceptance of the principles of the ICC been positive or negative for the Colombian experience? And if it is positive and negative, in what aspects positive and in what negative?

As an example, three factors can be seen here: 1) the development of political processes that determine mechanisms to address impunity at the domestic level (such as the establishment of courts); 2) progress in domestic prosecutions, 3) the development of the armed conflict (incentives/disincentives for violence and victimisation).

Question: In your view has the intervention by the OTP preliminary examination in Colombia been positive or negative?

Specific factors receptors international messages in domestic headquarters

At this point we seek to investigate whom the different actors are in the country that are involved in the acceptance/rejection of the ICC. In this regard we question about specific actors and their rank

Question: Who should (have) accepted the system, principles and intervention of the ICC?

Refer particularly to: 1) state actors, 2) armed groups; 3) social actors; and for each group the responder can use three answers:

The group X, 1) has accepted; 2) has rejected; 3) has been irrelevant.

Mechanisms to verify acceptance/reception

This section explores the mechanisms from which the acceptance or rejection are manifested. For example, a law that was adopted as a result of the intervention, or a trial that starts, etc. In the first place the interviewee is given an open question and then afterwards some aspects are suggested that can lead to more precise answers.

Question: What are the mechanisms through which acceptance or rejection of the ICC intervention in Colombia have been demonstrated?

Question: Do you know specific concrete examples of rules or laws, judgments, extra-judicial mechanisms or social processes that are started, stopped or energized from this acceptance?

Scope of acceptance

This point focuses on distinguishing what is accepted and what is rejected. The question is formulated in general (what is accepted?) like the one who accepts it.

Question: In your opinion what was accepted and what was rejected in the Colombian experience?

Reasons for acceptance

The question asks for a free hypothesis from the respondents (i.e., not necessarily empirically proven) on the reasons why something is accepted or rejected.

Question: What do you think are the reasons for the acceptance or rejection that has occurred?

Changes in the time/circumstances that affect acceptance

Here we seek to investigate political or temporal aspects that have produced a change in acceptance or rejection. The first question is formulated in a general manner, and then afterwards examples of what can determine changes are given.

Question: Do you think that this degree of acceptance or rejection has varied over the ten years that the preliminary examination of the OTP has been open?

Question: Do you think that the following aspects have led to a change in the acceptance of the ICC?

- Change of Government
- Start of the peace process with the FARC
- Change from Prosecutor Moreno Ocampo to the prosecutor Bensouda

Aspects to add

Finally, an open question is formulated to include additional aspects to the initiative of the interviewee.

Question: Do you have any other point, opinion or topic that is relevant to this study?

Annex 3 – List of interviews

No. Ref	Profile	Training	Gender	Nationality
01	Expert member of a civil society organisation	Political Scientist	Male	Foreign
02	University professor, civil society activist	Lawyer	Female	Colombian
03	Judicial officer (Senior Judge)	Lawyer	Male	Colombian
04	College professor	Lawyer	Male	Foreign
05	Judicial officer (Senior Judge)	Lawyer	Male	Colombian
06	Legal expert	Lawyer	Male	Colombian
07	University professor, government legal advisor	Lawyer	Female	Colombian
08	Opinion leader	Journalist and Lawyer	Female	Colombian
09	Judicial officer (Senior Judge)	Lawyer	Female	Colombian
10	Government official	Lawyer and Sociologist	Female	Colombian
11	College professor	Lawyer	Male	Colombian
12	Legal expert, government adviser	Lawyer	Male	Colombian
13	University professor	Political Scientist	Male	Colombian
14	University professor	Political Scientist	Male	Colombian
15	University professor, civil society activist	Lawyer and Economist	Male	Colombian

The opinions expressed in this publication are solely those of the author and do not necessarily reflect the views of the International Nuremberg Principles Academy.

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