

SYMPOSIUM ON THE COLOMBIAN PEACE TALKS AND INTERNATIONAL LAW

COULD THE COLOMBIAN PEACE ACCORD TRIGGER AN ICC INVESTIGATION ON COLOMBIA?

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It is very unlikely—if not impossible—that a guerrilla movement would voluntarily agree to demobilize if the cost is that a majority of its members will receive long prison sentences.¹ For this reason, any peace accord between the Colombian government and the FARC (Revolutionary Armed Forces of Colombia) Marxist guerilla will not be able to adapt to a strict interpretation of the duty to investigate, judge, and penalize.² The challenge in this context is to incentivize demobilization while fulfilling the accountability standards of criminal law.

In this essay, I will explain how the negotiators of Colombia's peace have tried to resolve this challenge, and evaluate the possibility that the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) will find their agreement to be in compliance with the Rome Statute. First, I will describe the main characteristics of the context that defined the recently signed accord. Second, I will explain the discussions that the parties had in order to comply with the restrictive lines of modern international law, and the signals that the OTP has given regarding its opinion of the Colombian Peace Accord. Finally, I will consider the implications of the subsequent vote against the Accord, and evaluate new proposals voiced by the Uribista opposition under the Rome Statute.

The Context of the Accord

The purpose of the Accord is to end one of the longest internal armed conflicts in the world and the last ongoing armed conflict in the Western Hemisphere. This particular characteristic presents two challenges to any justice formula. First, after fifty-two years of war, the total number of serious violations committed is overwhelming: it is estimated that more than eight million people were direct victims of at least one violation that could be considered an international crime.³ Second, many of these violations were committed decades ago, which will make it very difficult to reconstruct the necessary elements of the respective crimes and to establish criminal responsibility.

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¹ Clara Sandoval, *Facing the justice dilemma in Colombia*, JUSTICE INFO (June 5, 2015).

² Rodrigo Uprimmy & Nelson Camilo Sánchez, *The ICC and negotiated peace: reflections from Colombia*, OPENDEMOCRACY (Feb. 11, 2015).

³ REGISTRO ÚNICO DE VÍCTIMAS.

Furthermore, during this long period, international crimes have been committed by several armed actors, including guerilla members, the paramilitary groups that fought them, and state agents, as well as the insurgency. Thus, the balance between peace and justice must take into account not only how much justice the guerrilla is willing to accept, but also how much and what type of justice the military forces are willing to accept. Making sure that the parties do not to agree to bilateral impunities thus becomes an important challenge.

In addition, any accord has to balance many perspectives: those of a Marxist guerrilla opposed to liberal law and skeptical of human rights law; military forces that mistrust ordinary justice (and that claim that the only institution that can understand war and can judge them is their very own military justice); and public and political opinion with a highly punitive tendency. In fact, this was one of the reasons why the accord reached between the government and the FARC was not approved by the electorate through the plebiscite on 2 October 2016. With a margin of less than 1 percent, the majority of the electorate decided that the Accord should be renegotiated. One of the points under renegotiation seeks to make the justice requirements for guerrillas more stringent, while increasing the flexibility for state and civil agents.

The Acknowledgment of the Duty to Investigate and Punish as the Starting Point

In 2010, when the negotiations were still at an exploratory stage, the Colombian government surprised the country with a bold proposal for promoting peace negotiations with the existing guerrilla groups. The proposal included amending the Constitution to recognize the rights to truth, justice, and the reparation of victims regarding serious human rights violations, as well as the “general duty” of the state to investigate, judge, and to penalize “serious human rights violations and offenses against international humanitarian law.” The reform, approved in 2012, also established that within the context of peace negotiations and a transitional justice framework, the state could prioritize certain criminal cases, and could employ alternative sentences.⁴

Although Colombia’s constitutional reform assumes that states have a general duty to investigate and penalize, there is an important sector of legal scholars who disagree.⁵ Among them, the Belfast Group maintains that there is only a concrete duty for those states that have ratified certain treaties that explicitly state this duty and include specifically determined behaviors. These scholars have been critical of the punitive hardening of political transitions since, on the one hand, it makes it very difficult to reach peace accords and, on the other, it may violate the rights of the accused.⁶

By the same token, the constitutional reform relied on an expansive vision of what is included in this duty to investigate and punish. It includes the nebulous concept of “serious human rights violations and offenses against international humanitarian law.” This category is clearly more inclusive than “international crimes” or the three crimes established under the Rome Statute.

At the same time, however, the reform moved away from a reading of international human rights standards and international criminal law that suggests that the scope of this duty requires judicial investigation, processing, and sanction with prison sentences for each individual that participated in the crimes. By admitting the principles of selection and alternative sentences, it allowed for a more flexible regime.⁷ The Colombian model holds that the state’s duty to punish is not absolute and that in practice, especially during times of

⁴ El Congreso de Colombia, *Por Medio Del Cual se Establecen Instrumentos Jurídicos de Justicia Transicional en el Marco del Artículo 22 de la Constitución Política y se Dictan Otras Disposiciones*, Acto Legislativo No. 01, Jul 31, 2012.

⁵ Transitional Justice Institute, *The Belfast Guidelines on Amnesty and Accountability* (2013).

⁶ Louise Mallinder, *The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America’s Amnesty Laws*, 65 INT’L & COMP. L.Q. 645 (2016).

⁷ *CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIME CASES* (Morten Bergsmo ed., 2d ed. 2010).

political transitions, its implementation can come into conflict with other duties and values that the state should protect, such as the value of peace or the victim's rights. Thus, the Colombian Constitution upholds the idea that the duty to investigate must be weighed against other specific duties and is dependent on the specific context.

The constitutional reform encountered fierce rejection by the FARC delegation, which argued that it had been conducted by the state without consulting them, and was therefore an imposition of justice by one party to the negotiation on the other. In addition, the FARC objected that the discussion's frame was that of individual responsibility and liberal human rights.⁸ For the guerrilla, the responsibility judgments should be collective, and the ideal of justice should be that of social justice. Finally, the FARC refused to be subject to any national justice mechanism since they considered that ordinary state justice was their enemy's justice and thus, could never be impartial.

The Result: The Special Jurisdiction for Peace

The parties came to a detailed agreement on the issue of justice in December 2015.⁹ The Agreement called for a series of additional extrajudicial mechanisms like a truth commission and a search commission for disappeared persons. Additionally, the Agreement called for the Colombian state to establish a Special Jurisdiction for Peace, a judicial system composed of several divisions and a tribunal with an expert chamber and an appeals chamber. This jurisdiction would have a special division that would receive available information regarding crimes (including confessions by ex-combatants and state officials who want to participate in the mechanism) and would decide if the acts committed can be forgiven (in which case they would be sent to a division that would determine amnesties or pardons). At no point would gross human rights violations, including extrajudicial killings, enforced disappearances, sexual crimes, etc., fall within the category of crimes that could be amnestied. In the case that facts indicated responsibility for crimes against humanity, war crimes, genocide, or other serious violations of human rights, the case would be sent to the Special Jurisdiction.

The Special Jurisdiction would be the tribunal of last resort related to the conflict and thus, anyone—and not just FARC members—could resort to it voluntarily or be summoned if they are responsible. The tribunal would judge state officials and those civilians who “regularly and decisively” financed the war.

On the other hand, one of the basic principles of the system is that crimes (including international crimes) that are not categorized as fundamental violations would receive less strict legal treatment. Congress would enact an Amnesty Law “as ample as possible.” Further, state officials and third parties would receive similar treatment as the FARC. This implies that if state agents were committed to truth and reparation requirements they could be pardoned for less serious offenses and be eligible for alternative sanctions for grave human rights violations.

The system would establish three types of sanctions, depending on the degree of responsibility of the accused. Those who do not contribute to the process and are defeated in court would face prison sentences of between fifteen and twenty years. Those who recognize their responsibility but belatedly would receive between five and eight years in ordinary prison. Those who immediately confess their participation and offer the truth would be subject to the system's unique sanctions.

⁸ FARC-EP: *Una mirada distinta en torno a la justicia transicional*, LA PLUMA (Jan 28, 2015, 12:48 AM).

⁹ Sibylla Brodzinsky, *Colombia's government and Farc rebels reach agreement in step to end civil war*, THE GUARDIAN (Dec. 15, 2015, 7:01 PM).

The great novelty of the Special Jurisdiction is found in the so called unique sanction, which includes the restriction of liberty, but adopts a reparatory and restorative approach. These sanctions would be uniquely applied to those who have recognized responsibility and have not refused to participate in the truth component. The sanction would include measures such as: participation in victim reparation programs, environmental protection, infrastructure construction and reparation, implementation of rural development programs, and removal and cleaning of explosive war remains and antipersonnel mines, among others. The tribunal would decide the punishment considering the degree of truth that the person offers, the severity of their behavior, the level of participation and responsibility, and the commitments in terms of reparation and nonrecurrence.

Thus, someone who is charged with an international crime and fully cooperates would be sentenced by a court of law to a period of five to eight years, and would never go to prison. In said period, the individual would have to contribute in a personal fashion to the reparation of victims and public infrastructure that was affected during the war. The Special Jurisdiction would be in charge of monitoring compliance.

The ICC's Office of the Prosecutor and the Accord

In a country that has been under preliminary investigation by the OTP for more than a decade, the issue of ensuring that any negotiated accord meets the ICC's standards is far from rhetorical. The defeated Accord's carefully constructed justice regime raises two questions of interpretation of the Rome Statute. First, is it possible to concentrate the penal action on those most responsible for the most serious crimes or is it necessary to domestically prosecute all those who are responsible? Second, does the application of alternative sentences for international crimes that do not include prison violate the Rome Statute?

OTP Prosecutor Bensouda's first response was negative. First, the Prosecutor warned that the Rome system's selection process should not be used as a model for national systems. She thus generated doubts about whether it would be acceptable to have a nationally-based selection process. Second Bensouda warned that the total suspension of a sentence for a Rome Statute crime could trigger an international investigation. Although she did not directly establish the type of sentence to be applied and its duration, Bensouda observed that the suspension of prison time to the extent that the accused does not spend any time imprisoned would be a "manifestly inadequate decision."

With this position, the Prosecutor held to an inflexible line of interpretation that would seem to give little room to a peace process, as she had done in Kenya and Uganda. In both cases, the OTP seemed to equate the principle of "interests of justice" of the Rome Statute's Article 53 (which allows the OTP to not open an investigation when there are substantial reasons to believe that an investigation would not serve the interests of justice) to the victims' interests.¹⁰ Arguably, the arguments are based on reasonable interpretations of international law, but not on explicit norms in international treaties, or even the Rome Statute. States have a wide margin of autonomy to define their criminal policy; the question is whether a domestic case selection strategy would amount to the unwillingness standard of Article 17.

After numerous law scholars expressed their rejection of the analysis and reasoning of these letters and of the specific context in which the letters were sent,¹¹ the OTP publicly explained its position in a speech read by Vice-Prosecutor James Stewart in Colombia in 2015.¹² The Vice-Prosecutor struck a different tone, explicitly accepting that "in matters of sentences, States have ample discretion" and that "effective criminal

¹⁰ *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 UNTS 38544.

¹¹ Rodrigo Uprimny, *¿Cartas bombas?*, EL ESPECTADOR (Aug. 24, 2013, 11:00 PM).

¹² James Stewart, *Transitional Justice in Colombia and the Role of the International Criminal Court* (May 13, 2015).

sentences can adopt different forms.” He clarified that the OTP’s position was that the absolute suspension of sentences was incompatible with the Rome Statute, but that prison time was not an indispensable punishment.

This speech was fundamental for those who wrote the Justice Accord and undoubtedly was a key guideline to determine the nature of the unique sanctions. Nonetheless, although the local judicial human rights community and several international organizations believe that the Accord meets the guidelines established by the OTP;¹³ an influential human rights organization, Human Rights Watch, has publicly insisted that the Accord promotes impunity by allowing perpetrators of the most serious violations to avoid prison.¹⁴

The stakes are high. Not only does the future of the Colombian process hang in the balance, but also the meaning and scope of important subjects like the ability to select cases nationally; positive complementarity; the “interests of justice” clause; and the nature and content of sanctions.

On 1 September 2016, Prosecutor Bensouda submitted a press release on the final Accord.¹⁵ Her tone was celebratory. While the press release does not replace a real procedural decision, it marks an important milestone in what could be expected from the OTP in the near future. At least seven relevant themes stand out. First, the Prosecutor celebrates the Accord because she considers that to promote disarmament is to contribute to the prevention of international crimes. Second, the Prosecutor recognizes and congratulates the parties for having put victims at the center of the debate and given them an important role in the Agreement. Third, she shows her satisfaction that the crimes under the Rome Statute have been excluded from amnesties or pardons. Fourth, she emphasizes that the commitment of states, and in this case, of Colombia, is the imposition of “effective punishment,” but not prison, which can be interpreted as a reference to the acceptability of nonprison terms. Fifth, the Prosecutor reiterates that the state’s duty is to take the perpetrators before justice and finds that the special jurisdiction is an adequate path for this. Sixth, the Prosecutor accepts that the Special Peace Jurisdiction focuses on those “most responsible for the most serious crimes,” accepting the nationally based selection process over international crimes. She concludes the press release with a satisfactory tone regarding the design, but warns that she will be monitoring its implementation so that what is promised becomes reality. In other words, the Prosecutor announces that she will continue her preliminary examination to oversee the domestic developments, in the spirit of positive complementarity.

The prospective for the opening of a concrete investigation of Colombia by the OTP in the near future seems very limited since both this press release and another one published by the Security Council supporting the process indicated that the two legitimate organs that could initiate this action are relatively satisfied with the model agreed to in Havana, yet attentive to its effective implementation.¹⁶

The Vote Against the Accord

However, the popular vote against the Accord has reopened this discussion. The voices who campaigned against the Accords have opposed the formula explained above. Their critiques are directed towards 1) the special jurisdiction’s structure (because it is outside the jurisdiction of ordinary justice); 2) the exemption of prison sentences for the most responsible FARC members (instead, they propose reclusion for the same amount of time in “agrarian colonies”); and 3) the acceptance of drug trafficking as a political crime and not an ordinary one.

¹³ Paul Seils, *Squaring Colombia’s Circle*, ICTJ BRIEFING (June 2015).

¹⁴ *Colombia: Agreeing to Impunity*, HUMAN RIGHTS WATCH (Dec. 22, 2015, 8:36 AM).

¹⁵ Office of the Prosecutor, *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia—People’s Army*, INTERNATIONAL CRIMINAL COURT (Sept. 1, 2016).

¹⁶ *Security Council reiterates commitment to Colombian peace process*, UN NEWS CENTRE (Aug. 26, 2016).

The first point requires the FARC to accept that the ordinary jurisdiction (which they consider their enemy's justice since it has not given them any guarantee) be in charge of judicial proceedings. The second one pretends that alternative sanction measures with a restorative and repairing character are fulfilled in fixed rural areas, which changes the idea that measures can be carried out in different parts of the country, where personal work by ex-combatants is required. For the opposition, it is fundamental that in the sanction the retributive component comes first, even to the detriment of its repairing and restorative function. The last point is mostly political: the opposition seeks to reaffirm that the FARC are above all a drug trafficking cartel and not an organization with political aims. These issues do not modify the analysis on the Accords' compatibility with international law, since, in fact, they would make the Accord more punitive and thus even more likely to pass muster from the ICC's perspective. However, the challenge will be getting the FARC to accept these new conditions, which seems unlikely.

Two other issues, however, do seem to affect this analysis. The promoters of modifying the Accord have also claimed that the Accord must 1) consider more ample benefits for state agents, and 2) foreclose the possibility that civilians who were indirectly related to the conflict be prosecuted. Should a new negotiation hew to these two demands, the OTP evaluation will radically change. For example, the opposition's requests eliminate the incentives for state agents to participate in a broad process of uncovering the truth of what happened. Further, they are opposed to holding superior officers responsible for the crimes of their subordinates. Were these proposals to succeed, the discussion regarding the ICC and Colombia's Peace Accord may yet change.