

INTRODUCTION TO SYMPOSIUM ON THE COLOMBIAN PEACE TALKS AND INTERNATIONAL LAW

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In September and October of 2016, Colombians witnessed a series of political events that defied their belief. First, the Colombian Government and the *Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo* (FARC—EP), signed to great fanfare a historic peace agreement finalizing Colombia's armed conflict. The UN Secretary-General, the U.S. Secretary of State, and dozens other top diplomats and heads of states gathered in Cartagena for an emotional signing ceremony, symbolically ending a fifty-year armed confrontation that, according to the Colombian Center for Historic Memory, killed more than two hundred thousand people, 80 percent of which were noncombatants.

But then, just one week later, Colombians narrowly voted against the deal in a plebiscite. Many thought it too lenient with the rebels, most of whom would not serve prison time for their crimes. Others feared its legal architecture, which featured the direct effect of international humanitarian law (IHL) in the Colombian legal system, implied a backdoor substitution of the Constitution. And still others, particularly some Evangelical churches, saw in the deal's recognition of gender-specific policies an affront to their traditional values. But most Colombians simply did not turn out to vote: of thirty-five million registered, only thirteen million voted, a 63 percent abstention rate.

President Santos, who had gambled his legacy on the outcome of the plebiscite, was politically crippled. His margin of maneuver became minimal. But thousands of people took to the streets to press both the government and the opposition, led by ex-president Alvaro Uribe, to quickly renegotiate and sign a new agreement, thus giving the President some leeway to continue pushing for a deal. And then, just four days after the stunning vote, President Santos unexpectedly won the Nobel Peace Prize. The prize renewed his domestic political capital, and opened the possibility of a three-way negotiation (government-FARC-opposition) that is still ongoing. "It was," García Marquez wrote in *One Hundred Years of Solitude*, "as if God had decided to put to the test every capacity for surprise and was keeping the inhabitants of Macondo in a permanent alternation between excitement and disappointment, doubt and revelation, to such an extreme that no one knew for certain where the limits of reality lay."

The Peace Deal and International Law

Ongoing negotiations in Colombia are based on the defeated deal. That agreement, and, indeed, the entire negotiation process, has been exceptional in the central role that international law plays. Colombia is an intensely legalistic society, with a legal system that has been traditionally open to international law. Moreover, the peace talks are conducted in a global legal context that imposes strict legal limits—in particular, interna-

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tional criminal law and Inter-American human rights law are of constant concern to the negotiators. Human Rights Watch opposed the deal based on its interpretation of international human rights law, as did ex-President Uribe and his followers. But the government and other civil society organizations defended the deal based on *their* interpretation of international law. The failed agreement and the opposition's proposals for renegotiation are thus filled with references to international norms, and many of the deal's particular choices seemed specifically designed to comply with Colombia's international legal obligations.

The Seven Essays

The seven essays of the symposium each explore a distinct dimension of the interaction between international law and the Colombian Peace Accord ("the Accord"), with an eye to the future of the ongoing negotiations.

Using a comparative lens, Christine Bell argues that the Accord innovates within what she refers to as international *lex pax*—the cluster of practices, norms, and laws that regulate peace-making in our world.¹ The Accord goes further than any prior peace deal in acknowledging the unique suffering of LGBTI people during the conflict; breaks new ground in its considerations of women in conflict; and provides for a system of transitional justice in more detail than any prior peace accord. The Accord's authors were also creative in using a mix of humanitarian law and constitutional law to assure the Accord a firm legal status in both domestic and international law. But Bell's essay also puts the peace process in the context of Colombia's decades-long history of failed peace efforts. We can view Colombia's peace-making style as a "slow drip" process that successively brings in different actors and issues—but in a meandering manner that risks cynicism about peace, as evidenced in the plebiscite's low voter turnout.

The international law question that received the most attention throughout the Havana peace talks was that of accountability for international crimes. Early on, the FARC team declared that its members would not put down arms if only to serve time in prison. But Colombia's government, unlike any other government negotiating peace before it, was under the watch of two international courts and obliged under at least two treaties that seemed to demand prosecution of all atrocity crimes. Colombia ratified the Rome Statute in 2002, and the International Criminal Court opened a preliminary investigation in 2004. Further, Colombia has been under the jurisdiction of the Inter-American Court, renowned for its strong position against amnesties, since 1985. This aspect of the negotiation took the most months to resolve, forms the longest section of the Accord, and was one of the main reasons for its defeat.

In his essay, Camilo Sanchez argues that, under international criminal law, the Accord strikes an appropriate balance between the law's demand for truth and punishment against the FARC's demand for leniency.² It has been controversial because it allows those who committed international crimes but who cooperate with a criminal investigation to receive "alternative sentences"—and no actual prison time. In its recent statements, however, the Office of the Prosecutor of the International Criminal Court (OTP) had made statements signaling that such an arrangement, if well implemented, would pass muster under its reading of the Rome Statute. Sanchez warns that the renewed negotiations may put this at risk: even as the opposition has pushed for stronger punitivist measures against the FARC, it has also pushed for leniency towards civilians and state agents. The OTP will pay close attention to any shifts in the underlying balance between peace and justice.

¹ Christine Bell, *Lex Pacificatoria Colombiana: Colombia's Peace Accord in Comparative Perspective*, 110 AJIL UNBOUND 165 (2016).

² Nelson Camilo Sanchez Leon, *Could the Colombian Peace Accord trigger an ICC investigation on Colombia?*, 110 AJIL UNBOUND 172 (2016).

Juana Acosta addresses the question of accountability for atrocities from the perspective of the other international regime to which Colombia is obliged: the Inter-American System for Human Rights.³ The Inter-American the Court and Commission have in some ways built their reputations on striking down amnesties across the region, and both have been key participants in constructing an international norm against impunity for atrocities. The Colombian Peace Accord, by allowing some who commit fundamental rights violations to escape prison, could well run afoul of the Inter-American System's norms. Acosta argues, however, that the Inter-American Court should adopt a deferential stance in reviewing a transitional justice scheme negotiated as part of a peace deal. Relying in particular on a recent Inter-American judgment against Salvador, she shows how the Court's jurisprudence could be read to countenance the Special Jurisdiction for Peace despite its leniency.

The balance of peace and justice was not the only contentious issue: the "No" campaign voiced discomfort with several other innovations found in the Accord. Lina Céspedes argues that NGOs focused on women's rights were able to convince the negotiators that the conflict imposed disproportionate and differentiated impacts on women.⁴ The LGBTI analysis was less sophisticated, limited in part by the social movement's focus on same-sex marriage and the fact that international law itself is less developed on LGTBI issues. But the treaty's treatment of these issues nonetheless goes beyond that of prior treaties. These path-breaking compromises on gender issues, however, are now particularly vulnerable, as the Uribe-led opposition campaigned against the Accord as a threat to conservative family values.

Another legal question with significant implications refers to the Accord's legal status: is the Colombian Peace Accord an international treaty, a domestic law, something in between, or something altogether different? Laura Betancur's essay argues that the treaty negotiators' decision to constitute the Accord as a Special Agreement under the Geneva Conventions was meant to give it a stronger legal status, fortifying the bargain against legal challenges and future revisions.⁵ Her essay carefully analyzes the different implications this decision may have in both domestic and international law. But in the end, she notes, this decision contributed to the rejection of the Accord in the plebiscite.

The symposium closes with two issues that the peace negotiators seemingly preferred to avoid, despite the importance of these issues for the postconflict context. First, what will be the status of IHL after the peace treaty enters into effect? Pablo Kalmanovitz's essay shows us that, until now, Colombia has been immersed in a noninternational armed conflict that falls under Geneva Common Article 3.⁶ With the Peace Accord, that situation should arguably change, and IHL should no longer be applicable. In times of peace, criminal violence should be countered with regular civilian policing. However, some in Colombia have argued that new organized structures of violence will emerge as a result of the Peace Accord, and that the optimal legal framework will be IHL. While this debate is dressed in the language of law, it is also about power. Nonapplication of IHL implies a reduction of the offensive capacity of Colombia's military, and thus a shift in Colombia's power structure.

Rene Uruña raises the important but perhaps even more overlooked question of international investment regimes.⁷ He argues that the redistributive land reforms required by the Peace Accord are on a collision course with its foreign investment commitments. While the Colombian government negotiated with the

³ Juana Inés Acosta-López, *The Inter-American Human Rights System and the Colombian peace: Redefining the fight against impunity*, 110 AJIL UNBOUND 178 (2016).

⁴ Lina M. Céspedes-Báez, *Gender Panic and the Failure of a Peace Agreement*, 110 AJIL UNBOUND 183 (2016).

⁵ Laura Betancur Restrepo, *The Legal Status of the Colombian Peace Agreement*, 110 AJIL UNBOUND 188 (2016).

⁶ Pablo Kalmanovitz, *Ius post bellum and the imperative to supersede IHL*, 110 AJIL UNBOUND 193 (2016).

⁷ Rene Uruña, *The Colombian Peace Negotiation and Foreign Investment Law*, 110 AJIL UNBOUND 199 (2016).

FARC over redistribution of land, it continued to negotiate bilateral investment treaties and free trade agreements, betting on a model of development through capital-intensive agriculture. Urueña carefully lays out how the foreign investment regime and the Peace Accord's redistributive commitments could clash, and offers suggestions for resolving the conflicts as the negotiation is reopened.

The peace negotiations based on the Accord continue, and it is unclear how long this next stage will last. We hope this symposium, by reflecting on the process thus far, both highlights the unique role international law plays in the Colombian peace negotiations, and provides a useful analysis of the salient issues moving forward.