

SYMPOSIUM ON THE COLOMBIAN PEACE TALKS AND INTERNATIONAL LAW

THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND THE COLOMBIAN PEACE: REDEFINING THE FIGHT AGAINST IMPUNITY

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The results of the plebiscite suggest that Colombia's international obligations regarding the right to justice will be a key issue in the new postplebiscite phase of the peace negotiation. Perhaps, then, the best starting point for an analysis of these obligations is the rejected Peace Accord. If it complies with international obligations, then it seems likely that any new agreement will also be in compliance: opponents focused much of their arguments on the high level of impunity supposedly embedded in the original deal.

The original agreement established a "Special Jurisdiction for Peace." This jurisdiction was to be charged with judging those who bear most responsibility for crimes that constitute serious violations of international human rights law and for grave breaches of international humanitarian law that were committed during an armed conflict that has affected the country for more than sixty years. However, the Special Jurisdiction would have authority to prioritize both the most responsible perpetrators and the most serious crimes. In other words, not all crimes or actors would be prosecuted. Further, even those convicted for the most serious crimes would be eligible for alternative punishments, including the deprivation of liberty without imprisonment.¹

The most common argument against this selection tool is that it generates impunity and, thus, goes against the state's international obligation to investigate, judge, and punish, especially as established in the jurisprudence of the Inter-American Court of Human Rights ("the Court"). Against this view, I argue that (i) this system of selection would be found to be in compliance with the American Convention on Human Rights under the *conventionality control* test² as practiced by the Inter-American Court; and (ii) the organs of the Inter-American System should show deference both in undertaking an abstract review of Colombia's transitional system, and in reviewing individual petitions claiming that its application violates their rights.

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¹ Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace. (Aug. 24, 2016).

² The Inter-American Court of Human Rights exercises a form of *Conventionality Control* between domestic law and the Inter-American Convention on Human Rights. In this task, The Court takes into account not only the text of the Convention, but also its own interpretation of it. See Almonacid Arellano et al v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, para. 124 (Sept. 26, 2006).

A Holistic System of Transitional Justice

Under the American Convention, Colombia not only has the obligation to investigate, judge, and punish, but also the international obligation to prevent violations of human rights;³ to guarantee the nonrepetition of such violations;⁴ to clarify the truth;⁵ to guarantee security; and to maintain the public order.⁶ These obligations cannot be interpreted in isolation, since they are interdependent,⁷ particularly in a context of transition.

This implies, for example, that in transitional justice contexts it is not possible to analyze the obligation to investigate and judge human rights violations without taking into account that judicial truth has considerable limits. The accused has little incentive to contribute to the truth in an ordinary trial. Therefore, clarification of the truth cannot depend exclusively on criminal procedure. Given these limits, transitions require complementary extrajudicial mechanisms, such as truth commissions. Under exceptional circumstances, especially when it is necessary to balance several principles, states must direct their efforts to guarantee the highest possible level of *all* of their obligations. Compliance with these obligations in contexts of transition from armed conflict to peace is especially complex.

It is also crucial to bear in mind that, according to the Inter-American Court, the obligation to investigate complex cases implies the duty to direct the efforts of the state apparatus to uncover criminal structures.⁸ In transitional settings, where massive violations have occurred, this is not possible without concentrating efforts on the investigation of those who bear the greatest responsibility, and encouraging the base structure of the criminal organization to participate in nonjudicial mechanisms to provide information that contributes to unveiling the causes of violence and to preventing them.

The system originally designed in the Peace Agreement aspired to guarantee all of the interdependent obligations mentioned before as a whole, based on a holistic strategy for transitional justice involving different tools:⁹ a judicial mechanism, the Special Jurisdiction for Peace; two nonjudicial tools, the Truth Commission and the Search Commission of Disappeared Persons;¹⁰ and a policy of holistic reparation and guarantees of nonrepetition. In the original text, this strategy can be found in the Victim's Chapter, as the "Holistic System of Truth, Justice, Reparation and Non-repetition."¹¹ The Agreement also included the FARC's commitments, such as the commitment to lay down arms, to acknowledge responsibility; to contribute to the clarification of truth, and the holistic reparation of victims; and to release hostages and illegally recruited minors.

³ See, e.g., Velasquez Rodriguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 174 (July 29, 1988); Gelman v. Uruguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, para. 77 (Feb. 24, 2011).

⁴ See, e.g., Río Negro Massacres v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, para. 272 (Sept. 4, 2012); Las Dos Erres Massacre v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211 para. 240 (Nov. 24, 2009); MARIA CARMELINA LONDOÑO LÁZARO, LAS GARANTÍAS DE NO REPETICIÓN EN LA JURISPRUDENCIA INTERAMERICANA: DERECHO INTERNACIONAL Y CAMBIOS ESTRUCTURALES DEL ESTADO (2014).

⁵ Bámaca Velásquez v. Guatemala, Reparations, Inter-Am. Ct. H.R. (ser. C) No. 91, para. 76 (Feb. 22, 2002); El Mozote and nearby places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, para. 242 (Oct. 25, 2012).

⁶ Montero-Aranguren et al (Detention Center of Catia) v. Venezuela, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150, para. 70 (July. 5, 2006); Neira Alegria et al v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 20, para. 75 (Jan. 19, 1995).

⁷ Manuel Cepeda Vargas v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 213, para. 171 (May 26, 2010).

⁸ *Id.* at para. 118.

⁹ Citizen Security and Human Rights, Inter-Am. Comm'n H.R. OEA/Ser.L/V/II, doc. 57, para. 66 (2009).

¹⁰ COMISIÓN DE BÚSQUEDA DE PERSONAS DESAPARECIDAS.

¹¹ Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace. (Aug. 24, 2016).

The Court's Turn in the Mozote Massacre Case

Many argue that the Inter-American jurisprudence prohibits the selection of cases. However, while that could be the *ratio decidendi* in ordinary contexts (where prosecution for every human rights violation is required), it is not the case in transitional contexts.¹² Until 2012, the Inter-American Court had only ruled on amnesty cases in the context of postdictatorship periods. It was only then, in the 2012 *Masacres de El Mozote v. El Salvador* judgment, that the Court analyzed the transition from armed conflict to a *negotiated* peace.

In *El Mozote*, the Court took an important step that departed from its postdictatorship jurisprudence. On the one hand, it took into account international humanitarian law, especially Article 6.5 of Protocol II Additional to the Geneva Conventions that promotes granting “the broadest possible amnesty” at the end of hostilities; and, on the other hand, it acknowledged the way in which peace was agreed upon in El Salvador and the limits that the country imposed on itself for the judgment and punishment of violations.¹³

In sum, the Court created a new *ratio decidendi* for cases of transitions from armed conflict to a negotiated peace. This allows us to dismiss the argument that states must investigate, judge, and punish all human rights violations in any context, and to affirm, by contrast, that not all serious human rights violations must be necessarily investigated, judged, and punished (as is the case in contexts of transitions from dictatorship to democracy).¹⁴ In the context of El Salvador, the Court held that all *international* crimes must be investigated, judged, and punished: it ruled against El Salvador not because the government had granted amnesties, but because the amnesties included international crimes.

In a concurring opinion in *El Mozote*, five out of seven judges (including the President of the Court) affirmed that the degree of justice that can be achieved in a transition from conflict to peace “is not an isolated component . . . but part of an ambitious process of transition towards mutual tolerance and peace.”¹⁵ Furthermore, they emphasized that: (i) there is no universally applicable solution since each context is different;¹⁶ (ii) where victims can be counted in the hundreds of thousands it is necessary to create exceptional mechanisms which include both judicial and nonjudicial components;¹⁷ and (iii) the isolated application of criminal penalties would only produce an “apparent relief” in the situation of victims, but not a transformation of the conditions that gave rise to the violations.¹⁸ The prioritization or selection of cases—as part of a holistic transitional justice strategy that is different from any the Inter-American Court has ever had the opportunity to review—seemingly fits within these parameters.

¹² *Goiburú et al. v. Paraguay*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, para. 53 (Sept. 22, 2006); *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-T, First Section Decision (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).

¹³ *El Mozote and nearby places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, Concurrent Vote, Diego García-Sayán, paras. 38 (Oct. 25, 2012).

¹⁴ *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, paras. 41-44 (Mar. 14, 2001); *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, paras. 105-114 (Sept. 26, 2006); *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, paras. 152-168 (Nov. 29, 2006); *Gomes Lund et al. (Guerrilha do Araguaia) v. Brasil*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, para. 147 (Nov. 24, 2010); *Gelman v. Uruguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, para. 195 (Feb. 24, 2011).

¹⁵ *El Mozote and nearby places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, Concurrent Vote, Diego García-Sayán, para. 38 (Oct. 25, 2012).

¹⁶ *Id.* at para. 20.

¹⁷ *Id.* at para. 22.

¹⁸ *Id.* at para. 23.

Towards an Inter-American Margin of Appreciation

Although El Salvador is the closest case to the Colombian situation to be found in the Court's jurisprudence, the *Mozote Case*'s standard cannot be automatically applied to Colombia, not only because the context is different, but also because the content and focus of the Peace Agreement differs in each situation.

The original Colombian Peace Agreement is based upon the idea that in the Colombian context, the state's obligations can only be fulfilled to their maximum potential when efforts are focused on complying with *all* obligations in the Convention, and not only with the obligation to investigate and punish. For this reason, the Colombian peace deal's justice mechanism would withstand the *conventionality control* test before the Inter-American System. Even though such mechanisms can imply a restriction of some rights contained in the American Convention, they do not necessarily constitute a violation of the treaty.¹⁹

The most complex challenge would be determining the level of deference that organs of the Inter-American System ought to show in reviewing individual petitions. Facing an event of such historical significance as a definitive Peace Agreement, the organs of the Inter-American System would be loath to deviate from the international community's inclination to support the end of the conflict, and the implementation of a carefully negotiated deal. However, there is a difference between supporting the model in the abstract, and evaluating its implementation in concrete cases—particularly in the case of victims who argue that their specific cases were not investigated.

While the Peace Agreement and the selection policy should be analyzed under the conventionality control test when considered in the abstract, the analysis is different in individual cases. The only possible and coherent response that the organs of the Inter-American System can give in individual cases is to apply the doctrine of the margin of appreciation, which implies that international organs should show deference to the discretionary capacities of national authorities regarding issues that fall under their jurisdiction.²⁰

The margin of appreciation has never been adopted by the Inter-American Court. On the contrary, it is seen as suspicious by many of the Court's judges and by human rights defenders in the Americas. This skepticism stands in contrast to the attitude of European Court of Human Rights, which regularly applies the margin of appreciation. However, the Inter-American Court should reconsider the relevance of this doctrine, which is especially apt in contexts of transitional justice,²¹ where the very different historical, political, and social circumstances demand unique solutions.

The recent communication of the Prosecutor of the International Criminal Court (ICC) Fatou Bensouda²² could serve as significant input for the organs of the Inter-American System. Fatou noted that the original Agreement in Colombia is a historical achievement; and, although the Prosecutor warns that the state cannot omit the obligation to effectively judge those most responsible for the commission of international crimes, she expresses satisfaction that the agreement does not allow amnesties for international crimes.

The communication also emphasized the important role of the Special Jurisdiction for Peace in guaranteeing the fulfillment of the obligations to investigate, judge, and punish the most responsible for crimes

¹⁹ An analysis of the reasons that justify that *self-restraint* and how these reasons have been used by the ECtHR is available in: Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, 14 CAMBRIDGE Y.B. EUR. LEGAL STUD. 381 (2015).

²⁰ HOWARD YORROW, *THE MARGIN OF APPRECIATION IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996).

²¹ Juana Acosta & María Londoño, *Juicio de sustitución: la participación política de excombatientes como desarrollo del marco democrático participativo*, in JUSTICIA DE TRANSICIÓN Y CONSTITUCIÓN II: ANÁLISIS DE LA SENTENCIA C-577 DE 2014 DE LA CORTE CONSTITUCIONAL 89 (Kai Ambos ed., 2015).

²² *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).

committed during the armed conflict. Moreover, it recognized that victims, and their right to justice, have been at the center of the peace process, and warned that peace is intrinsically related to the satisfaction of the right to justice.

This communication has a fundamental value, since it expresses the Prosecutor's political will to respect the process. Although this opinion is not legally binding and the Prosecutor of the ICC maintains competence over the situation in Colombia, it can be expected, by virtue of the principle of good faith, that any agreement that complies with the same parameters will be treated similarly by the ICC. Surely, the Inter-American Commission and Court will not ignore this statement when it comes to analyzing the agreement's design and its implementation, considering that the Inter-American *ratio decidendi* in negotiated peace agreements refers to international crimes, and therefore the applicable *lex specialis* is that of international criminal law.

The Silence of the Inter-American Jurisprudence on Alternative Sentencing

Regarding suspended, reduced, and alternative sentences, neither the American Convention on Human Rights nor the system's jurisprudence excludes their application; nor are prison penalties required. In this matter, the doctrine of the margin of appreciation might be, in fact, the most appropriate tool, considering that the ICC's Deputy Prosecutor affirmed in reference to the Colombian case in 2015, that (i) the Rome Statute does not prescribe the specific type or length of sentences; (ii) in sentencing, states have wide discretion; and (iii) effective penal sanctions may take many different forms.²³ Again, as *lex specialis*, the human rights organs should show deference to the international criminal law dispositions, which here seem to endorse the margin of appreciation doctrine.

In short, the postconflict context in Colombia is an opportunity for the Inter-American System's organs to redefine the fight against impunity. This fight should not only focus on punishment; it must also be seen as part of a holistic strategy to allow the highest possible level of satisfaction of victims' rights to truth, justice, reparation, and guarantees of nonrepetition. There is no doubt that investigation and punishment of those most responsible will be a key element, but not the only one in the construction of the peace that Colombia urgently needs.

²³ James Stewart, *Transitional Justice in Colombia and the role of the International Criminal Court* (May 13, 2015).