

ACCOUNTABILITY IN THE COLOMBIAN PEACE AGREEMENT: ARE THE PROPOSED SANCTIONS CONTRARY TO COLOMBIA'S INTERNATIONAL OBLIGATIONS?

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I. INTRODUCTION

For more than sixty years, Colombia has suffered one of the most violent internal armed conflicts in the world: a conflict that has produced more than eight million victims all over the country, killing as many as 220,000 persons (and shockingly, most of them civilians), forcibly disappearing 25,000 individuals, and displacing approximately 7 million individuals from their

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homes, affecting virtually all regions and every social group. The conflict has been characterized by its complexity and multiplicity of actors, but has been fought mostly between two left-wing guerrilla groups, the Revolutionary Armed Forces of Colombia (known by its Spanish acronym, FARC) and the National Liberation Army (known by its Spanish acronym, ELN) on the one hand, and the Colombian state, as well as right-wing para-military forces on the other. In the early 2000's, fighting among the military, guerrillas, and paramilitaries had the country on the brink of becoming a failed state.¹

Since 2010, the two major parties, the Colombian government and the FARC, have engaged in a peace process that brought violence to an end in 2016. In August 2016, after four years of arduous negotiations, the parties reached a peace agreement that established the foundations necessary to bring an end to the conflict. However, in a plebiscite on October 2, 2016, Colombian voters rejected, by a slim majority, the initial peace agreement negotiated by the government with the FARC. The consequent renegotiation of the most controversial topics resulted in a new peace agreement that was signed in November 2016 by the parties.

A center piece that stirred opposition to the original peace agreement was the fifth chapter of the agreement, the so-called "justice agreement." This "justice agreement" addressed the complex issue of victims' rights, as well as the question of accountability of those responsible for war crimes and serious human rights violations. This agreement was one of the most challenging and politically charged components of the negotiations.

The justice agreement was intended to provide a response to the famous "peace vs. justice dilemma"; it addressed the question of how to achieve justice for the most serious crimes without jeopardizing peace. This was a particularly challenging task because Colombia was the first country ever to be under preliminary examination by the International Criminal Court (ICC) while trying to find its own response to the question of accountability. After months of tough negotiations, the parties agreed on an arrangement that included judicial as well as non-judicial bodies, and an unconventional arrangement of traditional and alternative sanctions, to address the international crimes committed during the armed conflict. Some, including U.S. President Obama, welcomed the agreement as a new model for achieving peace while delivering (some form of) justice. Yet others, most prominently former Colombian President Alvaro Uribe and Human Rights Watch, opposed the agreement as a pact that would result in impunity.²

1. Danielle Renwick & Claire Felter, *Colombia's Civil Conflict*, COUNCIL ON FOREIGN RELATIONS (Jan. 11, 2017), <http://www.cfr.org/colombia/colombias-civil-conflict/p9272>.

2. Lily Rueda, *One Step Closer to Peace in Colombia: Implications for Accountability*, CTR. FOR INT'L CRIMINAL JUSTICE (June 24, 2016), <https://cicj.org/2016/06/one-step-closer-to-peace-in->

Critics alleged (among other things) that its alternative sanctions did not reflect accepted standards of appropriate punishment for grave violations and stated that the agreement therefore was like a “piñata of impunity” for the perpetrators.³

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

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

After analyzing the applicable legal framework, and taking into account the particular situation Colombia was facing, this article concludes that the proposed sanctions system in the Colombian justice agreement is not contrary to Colombia’s international obligations under international law and, as a consequence, that the ICC Prosecutor should respect the proposed agreement and not intervene with complementary investigations.

colombia-implications-for-the-accountability-for-international-crimes; Human Rights Watch, *Human Rights Watch Analysis of Colombia-FARC Agreement*, HUMAN RIGHTS WATCH (Dec. 21, 2015, 6:21 PM), <https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement>.

3. See, e.g., AFP, *Pacto de Justicia en Colombia es Una “Piñata de Impunidad,” Denuncia HRW*, EL ESPECTADOR (Dec. 22, 2015, 3:33 PM), <http://www.elespectador.com/noticias/paz/pacto-de-justicia-colombia-una-pinata-de-impunidad-denu-articulo-607243>.

II. INDIVIDUAL CRIMINAL ACCOUNTABILITY FOR INTERNATIONAL CRIMES IN INTERNATIONAL LAW

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

As the first international legal regime, international humanitarian law (IHL) or the law of armed conflict (LOAC) has established individual criminal responsibility under the “Grave Breaches System.” The 1949 Geneva Conventions require states to investigate, prosecute, and sanction grave breaches of those conventions.⁴ The Grave Breaches System does not, however, provide for a legal forum to adjudicate those individuals responsible, but establishes the obligation of states party to the Convention to criminalize those crimes in their domestic legislation and adjudicate those crimes in their own courts (or extradite the accused for adjudication in another state party).⁵

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

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

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

6. G.A. Res. 217 (III) A, art. 8, Universal Declaration of Human Rights (Dec. 10, 1948).

7. *Id.*; International Covenant on Civil and Political Rights art. 2, Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by Colombia on Oct. 29, 1969); International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, 660 U.N.T.S. 195 (ratified by Colombia on Sept. 2, 1981); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984) (ratified by Colombia on Dec. 8, 1987); Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (ratified by Colombia on Sept. 2, 1990); International Convention for the Protection of All Persons From Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3 (Article 6.1: Obligation to Hold Criminally Responsible; Article 7.1: Obligation to Punish; Article 11.1: Obligation to Extradite or Prosecute; Article 24.4: Victim’s Right to Obtain Reparation and Prompt, Fair and Adequate Compensation) (ratified by Colombia on July 11, 2012). Regional treaties include African Charter on Human and Peoples Rights art. 7,

Concretely, and most importantly for the Colombian case, the Inter-American Court of Human Rights (IACtHR) has recognized that states have two types of obligations regarding the right to a remedy in the case of a selected group of serious human rights violations, such as enforced disappearances, torture and extrajudicial executions. The first obligation establishes a negative obligation prohibiting amnesties for this type of violations; and the second is complimentary to the first and establishes a positive obligation to investigate, prosecute and sanction those responsible for this type of violations.⁸ The prohibition to grant amnesties established by the Inter-American Court of Human Rights has also been firmly confirmed by UN treaty bodies, as well as other regional human rights bodies.⁹

Finally, the development of modern international criminal law (ICL) since the 1990s and the creation of the various international criminal tribunals have generated new possibilities to prosecute those individuals responsible for international crimes. In 2008, states created the International Criminal Court (ICC) as a forum to prosecute individuals accused of war crimes, crimes against humanity, and genocide. The Rome Statute governing the ICC reaffirms the obligation of states to investigate, prosecute, and sanction the crimes defined in its Article 5 (acts of genocide, war crimes, and crimes against humanity, as well as—in the future—crimes of aggression), and establishes a complementary competence to adjudicate in cases where a state is unable or unwilling to comply with this obligation.¹⁰

However, while international law requires states to investigate, prosecute, and sanction these international crimes, states have broad

June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5; American Convention on Human Rights art. 25, Nov. 22, 1969, O.A.S.T.S. No. 36 (ratified by Colombia on May 28, 1973); and Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 221.

8. *Barrios Altos v. Perú*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (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 (Sept. 26, 2006); *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006); *Gomes Lund et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219 (Nov. 24, 2010); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).

9. See, e.g., OFFICE OF THE UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: AMNESTIES* (2009); G.A. Res. 60/147, Preamble, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005); Human Rights Comm., General Comment No. 31, The Nature of The General Legal Obligation Imposed on States Parties to the Covenant, ¶ 18, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (2004); *Quinteros v. Uruguay*, *Communication No. 107/1981*, in *SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL*, VOL. II, at 138, U.N. Sales No. E.89.XIV.1 (1990); *Kurt v. Turkey*, 1998-III Eur. Ct. H.R. 1152.

10. Rome Statute of the International Criminal Court art. 1 and 17, July 17, 1998, 2187 U.N.T.S. 90 (ratified by Colombia on Aug. 5, 2002).

discretion when it comes to defining the concrete sanctions. Some international treaties, as well as jurisprudence of international courts and treaty bodies, require states to provide sanctions proportional to the gravity of the crime committed. For example, the Convention against Torture requires states to “make these offences punishable by *appropriate penalties* which take into account their grave nature.”¹¹ Similarly, the Orentlicher Principles mention under Principle 1 (general obligations of states to take effective action to combat impunity) the following:

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

Also, the Inter-American Court has repeatedly stated that sanctions have to be *proportional* to the gravity of the crime.¹³ However, neither human rights treaties, nor the Geneva Conventions define what a “proportional” or “adequate” sanction for war crimes, crimes against humanity, or the most serious human rights violations is. Even the Rome Statute only defines the applicable penalties in ICC proceedings,¹⁴ but it does not prescribe the specific type or length of sentences that States should impose for crimes defined in the Rome Statute. Quite the contrary, Article 80 of the Rome Statute defers to national laws in the case of criminal proceedings in domestic courts: “Nothing in this Part affects the application by States of penalties

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

12. The Principles also establish as one of the elements of impunity the failure to “sentence to *appropriate penalties*” those found guilty of violations. Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity Principle 1, E/CN.4/2005/102/Add.1, Feb. 8, 2005, para. 8, (emphasis added).

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

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

prescribed by their national law.” Therefore, it seems that while bound by the obligation to investigate and prosecute international crimes, States have wide discretion regarding the applicable penalties, so long as the penalty is proportional to the crime.

III. THE “JUSTICE AGREEMENT” WITHIN THE COLOMBIAN PEACE AGREEMENT

The peace agreement signed in August 2016 established the cornerstone for an end of the conflict. Among the most controversial aspects was the justice agreement of September 2015, regulating the investigation, prosecution, and sanction of those responsible for the crimes committed during the conflict.

The “justice agreement,” or “victims’ agreement,” creates the “comprehensive system for truth, justice, reparation and non-repetition” (“Sistema Integral de Verdad, Justicia, Reparación y No Repetición” or SIVJRNR for its Spanish acronym). This system combines judicial mechanisms for the investigation and sanction of serious human rights violations and war crimes, with extra-judicial and complementary mechanisms for the search for truth, and the search for the missing, as well as the reparation of the harm inflicted to the victims of the conflict. According to the final agreement, its objectives are to achieve the maximum possible realization of victims’ rights, and to ensure accountability for what happened in the conflict, while at the same time guaranteeing the legal certainty of those who take part in the mechanisms of the system. Its goal is to help facilitate social coexistence, reconciliation, and guarantees of non-repetition of the conflict.¹⁵

The comprehensive system is composed of the following mechanisms: the Truth, Coexistence and Non-Repetition Commission (“Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No Repetición”), the Special Unit for the Search for Persons deemed as missing in the context of and due to the armed conflict (“Unidad Especial para la Búsqueda de Personas dadas por desaparecidas en el contexto y en razón del conflicto armado”), and the Special Jurisdiction for Peace (“Jurisdicción Especial para la Paz” or JEP for its Spanish acronym). Furthermore, it is complemented by two chapters regarding comprehensive reparation measures for peace building purposes (“Medidas de reparación integral para la construcción de la paz”) and Non-Repetition Guarantees (“Garantías de No Repetición”).¹⁶

15. Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera [hereinafter, Acuerdo Final] 128-29, Nov. 24, 2016; *see also id.* at 15.

16. *Id.* at 129-30.

According to the agreement, the “Truth, Coexistence and Non-Repetition Commission” will be an impartial and independent mechanism, of extra-judicial character, that will seek to contribute to the realization of the right to the truth for victims and for society as a whole. Its objectives are to contribute toward the historical clarification of what happened and promote and contribute to the recognition of the victims; of responsibility for those that were involved directly or indirectly in the armed conflict; and of the society as a whole for what happened. Ultimately, its goal is to promote coexistence across the country.¹⁷

The “Special Unit for the Search for Persons deemed as missing in the context of and due to the armed conflict” will be a special, high-level unit, of a humanitarian and extrajudicial nature, whose objective is to search for the individuals deemed as missing in the context of and due to the armed conflict, and thus contribute to the realization of the rights of victims to the truth.¹⁸

Finally, the only mechanism that will exercise judicial functions is the “Special Jurisdiction for Peace.” Per the agreement, the JEP will fulfill the duty of the Colombian state to investigate, prosecute, and sanction crimes committed in the context of and due to the armed conflict, and in particular, the most serious and representative violations.¹⁹ The agreement provides that the JEP will have exclusive jurisdiction over the crimes committed in the context of the armed conflict.²⁰

IV. THE SPECIAL JURISDICTION FOR PEACE AND ITS SANCTIONS SYSTEM

The Special Jurisdiction for Peace and its sanctions system was one of the most heavily criticized aspects of the justice agreement. While the proponents of this agreement hailed it as a model for future peace agreements and a new transitional justice model, critics alleged its alternative sanctions amounted to amnesty for those responsible for international crimes. In the renegotiations that took place after the people of Colombia voted “No” in the October 2 plebiscite, the parties improved some of the details that define the Special Jurisdiction for Peace, such as the conditions for the selection of the judges, as well as the criteria for prioritization of the cases. Curiously enough

17. *Id.* at 129.

18. *Id.*

19. *Id.* at 129, 147 (“22.- En materia de justicia, conforme al DIDH, el Estado colombiano tiene el deber de investigar, esclarecer, perseguir y sancionar las graves violaciones del DIDH y las graves infracciones del DIH.” Translated: “Regarding the administration of justice, and according to international human rights law, the Colombian state has the duty to investigate, clarify, prosecute, and sanction grave human rights violations and grave breaches of international humanitarian law).

20. *Id.* at 154.

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

Per the peace agreement, the Special Jurisdiction for Peace (JEP) will be made up of a Peace Tribunal and Judicial Panels. While the Judicial Panels will determine which cases go to trial, the Peace Tribunal will handle “grave violations of human rights and humanitarian law” committed by FARC guerrillas.²¹ The JEP will also have jurisdiction over crimes committed by state agents that are “related to” the armed conflict and “connected” to it.²² However, unfortunately, the peace agreement has not clearly defined to which crimes this treatment extends exactly. This will be one of the most critical aspects to define in the implementing legislation, as the exact scope of this provision will determine whether the thousands of cases of “falsos positivos” will be admitted to this special treatment.

The JEP will have exclusive jurisdiction over the crimes committed in the context of the armed conflict and over conduct “related directly or indirectly with the armed conflict.” In this sense, even perpetrators of the most serious crimes, such as crimes against humanity, genocide, serious human rights violations, and sexual and gender-based crimes will respond directly and exclusively to the JEP, as long as the crimes committed are related directly or indirectly with the armed conflict.

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

21. *Id.* at 135-36.

22. *Id.* at 134. (“El componente de Justicia también se aplicará respecto de los agentes del Estado que hubieren cometido delitos relacionados con el conflicto armado y con ocasión de éste, aplicación que se hará de forma diferenciada, otorgando un tratamiento equitativo, equilibrado, simultáneo y simétrico. En dicho tratamiento deberá tenerse en cuenta la calidad de garante de derechos por parte del Estado.”).

23. *Id.* at 135-36. However, unfortunately, which exact crimes will fall under this definition has not yet been clearly defined.

24. *Id.* at 136.

Regarding the penalties, the peace agreement establishes a staggered system of retributive and restorative sanctions that range from twenty years of prison to five years of restriction on movement.²⁵ The agreement provides the obligation to go through the proceedings at the JEP, and distinguishes between those individuals that agree to collaborate with the JEP in the establishment of the truth, and those that don't.

Those individuals who decisively participated in the most serious and representative crimes, but recognize their responsibility and engage immediately in full collaboration with the JEP (by disclosing relevant information, showing sincere remorse and offering their apology to the victims) will receive a sanction containing an effective restriction of their liberty for five to eight years. Additionally, they will be required to carry out public works and reparation efforts in the affected communities, such as demining and rebuilding activities. For individuals who fail to recognize their responsibility, oppose collaboration with the JEP, and are found guilty in the subsequent adversarial proceedings, the agreement provides for a system of increasing sanctions that range between 15 and 20 years of prison. Those individuals that initially refuse to engage with the JEP, but collaborate later, will face contentious proceedings and five to eight years of prison, if found guilty in the subsequent adversarial proceedings.²⁶

V. A VIOLATION OF COLOMBIA'S OBLIGATIONS UNDER INTERNATIONAL LAW OR AN ACCEPTABLE FORM OF JUSTICE FOR TRANSITIONS?

The system of alternative sanctions was one of the most criticized aspects of the agreement and part of the campaign for the "No" vote in the referendum.²⁷ Critics argued that the justice agreement established in the Colombian peace process contained disproportionately light sentences given the crimes involved.²⁸ Among the most vocal opponents were former president Alberto Uribe, as well as Human Rights Watch (HRW), which called the agreement an impunity trap and claimed that these alternative

25. *Id.* at 146-47.

26. *Id.*

27. Presidencia de la Republica *Notas Sobre Los Cambios, Ajustes Y Precisiones Del Nuevo Acuerdo Final Para La Terminacion Del Conflicto Y La Construccion De la Paz Estable Y Duradera* [Notes on the Changes, Adjustments, and Accuracy of the New Final Agreement for the Termination of Conflict and the Construction of Stable and Enduring Peace] (Nov. 13, 2016), <http://equipopazgobierno.presidencia.gov.co/Documents/NOTAS-SOBRE-LOS-CAMBIOS-AJUSTES-PRECISIONES-NUEVO-ACUERDO-FINAL.pdf>.

28. PAUL SEILS, HANDBOOK ON COMPLEMENTARITY 64-66 (2016), https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf.

sanctions did not comply with international law standards.²⁹ Other institutions, however, such as the renowned Colombian think tank *DeJusticia*, the International Center for Transitional Justice (ICTJ), one of the world's leading organizations dedicated to pursuing accountability for victims of mass atrocities through transitional justice mechanisms, as well as the UN Office of the High Commissioner of Human Rights in Colombia, did not agree with this characterization.³⁰

According to Human Rights Watch, “the regime of sanctions set out in the peace agreement did not reflect accepted standards of appropriate punishment for grave violations.”³¹ HRW criticized particularly that

perpetrators who confess to atrocities will be exempt not only from prison or jail, but also from any “equivalent” form of detention. They will instead be subject to “sanctions” that have a “restorative and reparative function”—as opposed to a punitive one—and entail carrying out “projects” to assist victims of the conflict.³²

The only “restrictions on freedoms and rights” that the confessed perpetrators will face are ones “that are necessary for [the] execution of these restorative and reparative sanctions.”³³ Human Rights Watch criticized that this system is deficient compared to the standard established by international law. Consequently, it would be virtually impossible for Colombia to meet its binding obligations under international law to ensure accountability for crimes against humanity and war crimes.³⁴

Indeed, the statutes of the international criminal tribunals, as well as their case law, do mention imprisonment, meaning deprivation of liberty, as the only penalty for crimes against humanity and war crimes.³⁵ The model of alternative justice under the JEP substitutes the traditional deprivation of

29. *Analysis of Colombia-FARC Agreement*, HUMAN RIGHTS WATCH (Dec. 21, 2015, 6:21 PM EST), <https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement>.

30. See International Center for Transitional Justice, *Colombia at a Crossroads: The Impact of Presidential Elections on the Peace Process*, ICTJ (June 5, 2014), <https://www.ictj.org/news/colombia-crossroad-impact-presidential-elections>; U.N. Secretary-General, *Annual Report of the United Nations High Commissioner for Human Rights*, 32 U.N. Doc. A/HRC/31/3/Add.2 (Mar. 15, 2016); Claret Vargas, *The Peace Agreement in Colombia Matters, and it Could Set an Example for Entrenched Conflicts Elsewhere*, DEJUSTICABLOG.COM, (Feb. 9, 2016), <https://dejusticiablog.com/2016/02/09/the-peace-agreement-in-colombia-matters-and-it-could-set-an-example-for-entrenched-conflicts-elsewhere>.

31. *Analysis of Colombia-FARC Agreement*, *supra* note 29.

32. *Id.*

33. *Id.*

34. *Id.*

35. Rome Statute of the International Criminal Court art. 77(1), July 17, 1998, 2187 U.N.T.S. 90; S.C. Res. 827, 24 (May 25, 1993); S.C. Res. 955, 23 (Jan. 1, 1994); Statute of the Special Court for Sierra Leone (SCSL Statute), January 16, S.C. Res. 1315, 19 (Aug. 14, 2000).

liberty with the less harsh sanction of “effective restriction of their liberty,” and combines it with restorative sanctions and reparation measures, such as community work and active participation in the search for truth and for the missing. The question is whether the “effective restriction of their liberty” in the Colombian peace agreement is a penalty that is in accordance with international law, or an unacceptable amnesty.³⁶

To answer this question, we should consider the particular context of the Colombian peace agreement. Colombia is the first country that had to face the challenge of negotiating a peace agreement with a strong and still active non-state actor, while at the same time being under the strict scrutiny of the ICC, as well as of the Inter-American human rights system.³⁷ In the last twenty years, international law and jurisprudence have developed in a way that clearly outlaws any amnesty for war crimes, crimes against humanity and serious human rights violations.³⁸ This is also reflected in the Rome Statute governing the ICC.³⁹

Taking into account these limitations, the Comprehensive System of Truth, Justice, Reparation and Non-repetition, of which the JEP forms part, aims to achieve the goals of traditional peace agreements, such as “ensure accountability for what happened in the conflict, contributing to the search for truth and achieve the maximum possible realization of victims’ rights, and to help facilitate social coexistence, reconciliation and guarantees of non-repetition of the conflict.”⁴⁰ Regarding the measures aiming at establishing accountability, the JEP clearly strives to find a balance between defining some kind of sanction for the perpetrators, while not endangering the peace process as such.

36. Vargas, *supra* note 30.

37. Colombia has been under preliminary examination by the ICC since 2004. See *Colombia*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/colombia> (last visited Jan. 31, 2017).

38. For the Latin American Context, see particularly the jurisprudence of the Inter-American Court for Human Rights, among others, *Barrios Altos*, *La Cantuta*, *Almonacid*, *Gelman*. See Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GERMAN L.J. 1203, 1211 (2011).

39. Rome Statute of the International Criminal Court, art. 77(1), July 17, 1998, 2187 U.N.T.S. 90.

40. Presidencia de la Republica, *Summary of Colombia’s Agreement to End Conflict and Build Peace* 28, <http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/summary-of-colombias-peace-agreement.pdf> (last visited Feb. 1, 2017).

As Paul Seils, Vice President of the ICTJ and a prominent expert on the theory and practice in transitional justice, particularly on the importance of national prosecutions and complementarity, emphasizes:

Unlike in South Africa, amnesty for serious crimes was simply not an option. Finding a balance between legal obligations on prosecutions, meaningful punishment provisions, and keeping parties engaged in the peace was a massive challenge.⁴¹

In fact, reaching an agreement on accountability measures was one of the hardest parts during the peace negotiations. While all the other parts of the peace agreement were successfully agreed upon after approximately six months of negotiations, it took almost one year and a half of talks to agree on the details of the so-called justice agreement. All parties to the Colombian conflict face allegations of war crimes and crimes against humanity—the Army, the FARC and the paramilitaries.⁴²

In this context, it is important to recognize that negotiating peace is necessarily a complex and difficult process, and requires a balancing of multiple interests and values in which rights cannot be understood as absolute. The obligation to investigate, prosecute, and sanction, as well as complementary rights of the victims, have now been firmly established in international law and jurisprudence. Nevertheless, transitions from conflict to peace must find a delicate balance between the respect of the rights of the victims and of international obligations on the one hand, and the necessary incentives for combatants to demobilize and the ability to implement the agreement on the other.

In recent years, even the Inter-American Court of Human Rights has signaled an increasing openness regarding alternative justice systems in the context of a peace agreement. In the case of the Massacres of El Mozote against El Salvador, Judge Diego García-Sayán, the former president of the court stated the following in a concurrent opinion:

26. With regard to the element of justice, the State's legal obligation to investigate and punish the most serious human rights violations is—as the Court has repeatedly stated—an obligation of means and forms part of the obligation of guarantee established in the Convention. Thus, States must make adequate remedies available for victims to exercise their rights. However, armed conflict and negotiated solutions give rise to various issues and introduce enormous legal and ethical requirements in the search to harmonize criminal justice and negotiated peace.

41. SEILS, *supra* note 28, at 15.

42. *Id.*

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

Judge García-Sayán even went further, and discussed the possibility of alternative and reduced sanctions in the context of negotiated peace agreements:

30. In this context, it is necessary to devise ways to process those accused of committing serious crimes such as the ones mentioned, in the understanding that a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice. Thus, for example, in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened.⁴⁴

García-Sayán recognized the challenge of pursuing justice in the context of a peace negotiation:

37. A negotiated solution to the internal armed conflict raises several issues regarding the weighing of these rights, within the legitimate discussion on the need to conclude the conflict and put an end to future serious human rights violations. States have a legal obligation to address the rights of the victims and, with the same intensity, the obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal. Peace as a product of a negotiation is offered as a morally and politically superior alternative to peace as a result of the annihilation of the opponent. Therefore, international human rights law should consider that peace is a right and that the State must achieve it.

38. Thus, in certain transitional situations between armed conflicts and peace, it can happen that a State is not in a position to implement fully and simultaneously, the various international rights and obligations it has assumed. In these circumstances, taking into consideration that none of those rights and obligations is of an absolute nature, it is legitimate that they be weighed in such a way that the satisfaction of some does not affect the exercise of the others disproportionately. Thus, the degree of justice that can

43. *The Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012) (García-Sayán, J., concurring ¶¶ 26-27).

44. *Id.* ¶ 30.

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

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

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

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

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

45. *Id.* ¶¶ 37-38.

46. RODRIGO UPRIMMY YEPES ET AL., JUSTICIA PARA LA PAZ: CRÍMENES ATROCES, DERECHO A LA JUSTICIA Y PAZ NEGOCIADA 15 (Colección Dejusticia 2014), http://www.dejusticia.org/files/r2_actividades_recursos/fi_name_recurso.363.pdf.

47. Lily Ruedas & Hamish Collings-Begg, *How Colombians Renegotiated Criminal Accountability for International Crimes*, CTR. FOR INT'L CRIMINAL JUSTICE (Nov. 29, 2016), <https://cicj.org/2016/11/how-colombians-renegotiated-criminal-accountability-for-international-crimes>.

48. YEPES ET AL., *supra* note 46, at 16-17.

49. *Id.*

50. SEILS, *supra* note 28, at 15.

Also the International Criminal Court's Prosecutor has considered this challenging context. In 2013, the Office of the Prosecutor of the ICC (OTP) still seemed to be rather cautious on the question of the possible sanctions in a future peace deal. In a letter sent to Colombian officials in 2013, the Prosecutor indicated his view that whatever sentence was to be imposed on demobilized FARC and paramilitary members, it had to be "proportionate to the offences in question, and not illusory." In particular, it specified that "any sentence that allowed a complete suspension of punishment would indicate that the proceedings were not genuine."⁵¹

However, two years later, in 2015, the Office of the Prosecutor seemed to indicate greater openness, even regarding alternative sanctions.⁵² In September 2015, the Prosecutor commented on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia with the following words:

Any genuine and practical initiative that achieves this laudable goal, while paying homage to justice as a critical pillar of sustainable peace, is of course welcomed by my Office. Our hope is that the agreement reached by the parties on the creation of a Special Jurisdiction for Peace in Colombia does just that. I note 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. 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. To this end, my Office will be engaging in extensive consultations with the Government of Colombia and other stakeholders, including victims and relevant civil society organisations.⁵³

The OTP's stand on Colombia's justice arrangement relates to the fundamental question of what standard the ICC applies to measure a state's effort to carry out *genuine* proceedings.⁵⁴ In a conference in 2015, the Deputy Prosecutor of the ICC, James Stewart, explained that the ICC considered genuine national proceedings to take place under the following conditions:

51. *Id.* at 64.

52. JAMES STEWART, LA JUSTICIA TRANSICIONAL EN COLOMBIA Y EL PAPEL DE LA CORTE PENAL INTERNACIONAL 10 (2015), <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-SPA.pdf>.

53. OFFICE OF THE PROSECUTOR, *Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia*, INT'L CRIM. CT. (Sept. 24, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=otp_stat_24-09-2015.

54. Article 17(1)(b) of the Rome Statute excludes cases from the ICC's competence when "[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State *genuinely* to prosecute" [emphasis added]. Rome Statute of the International Criminal Court art. 17(1)(b), July 17, 1998, 2187 U.N.T.S. 90.

where the proceedings: are not undertaken merely to shield persons concerned from criminal responsibility; do not suffer from an unjustified delay that is inconsistent with an intent to bring the persons to justice; and are conducted independently and impartially in a way that is consistent with the intent to bring the persons to justice. He confirmed that if these criteria of genuineness were met in domestic proceedings, potential cases would be considered inadmissible before the ICC and the Prosecutor would not intervene.⁵⁵

The deputy prosecutor also referred to alternative sentences foreseen in the Colombian Peace Agreement. While he refused to comment on the potential implications under the Rome Statute of those alternative sentences, without knowing the details of what specific sentences were contemplated, he still pointed out some of the factors the OTP would consider in assessing specific national proceedings and determining whether sentences were consistent with a genuine intent to bring the convicted persons to justice. Among others, he mentioned the following factors: the proportionality of the sentence in relation to the gravity of the crime and the degree of responsibility of the offender, the type and degree of restrictions on liberty, any mitigating circumstances, as well as the reasons the sentencing judge gave for passing the sentence in question.

He concluded that the question will be whether, in the context of a transitional justice process, alternative sentences, will adequately serve appropriate sentencing objectives for the most serious crimes:

National laws need only produce investigations, prosecutions and sanctions that support the overarching goal of the Rome Statute system of international criminal justice—to end impunity for mass atrocity crimes. Effective penal sanctions may thus take many different forms. They should, however, serve appropriate sentencing goals, such as public condemnation of the criminal conduct, recognition of victims' suffering, and deterrence of further criminal conduct. Such goals, in the context of international criminal law, protect the interests of victims and vindicate basic human rights.⁵⁶

Therefore, the discussion about the proposed sanctions in the Colombian peace agreement ultimately relates to the question of the objectives of punishment.⁵⁷ The peace agreement states that the objective of the sanctions is to satisfy the rights of the victims and consolidate peace. They should have

55. OFFICE OF THE PROSECUTOR, *supra* note 53.

56. STEWART, *supra* note 52.

57. PAUL SEILS, SQUARING COLOMBIA'S CIRCLE: THE OBJECTIVES OF PUNISHMENT AND THE PURSUIT OF PEACE 8 (2015), <https://www.ictj.org/sites/default/files/ICTJ-COL-Briefing-Punishments-2015.pdf>.

a restorative and reparative function and consider the level of recognition of truth and responsibility of the perpetrator.⁵⁸

Consequently, it seems that, under exceptional circumstances of negotiated transitions to peace, alternative sanctions such as those foreseen in the Colombian peace agreement, are not automatically contrary to a state's obligation under international law to investigate, prosecute and sanction international crimes. Rather, in this very narrowly described situation, they seem to be an acceptable form of justice, taking into account the necessity for a flexible solution and for a balancing of rights in the context of a transition from conflict to peace.

Of course, there are other aspects that should be considered in the evaluation of the admissibility of the Colombian justice arrangement, such as the perpetrators' participation in the search for truth, the accessibility of reparations for the victims, and the reforms and measures of non-recurrence realized.⁵⁹ It is important to remember that the Colombian peace agreement envisages a highly complex and complementary set of mechanisms and measures to address all of these aspects. Specifically, the justice agreement establishes a comprehensive rights-triangle for victims composed by a Truth, Coexistence and Non-Repitition Commission, a Special Unit for the Search for Persons deemed as missing in the context of and due to the armed conflict, and the Special Jurisdiction for Peace, and is complemented by comprehensive reparation measures for peace building purposes and Non-Repitition Guarantees.⁶⁰ Additionally, the peace agreement includes important political reforms and measures addressing the root causes of the conflict, such as reform regarding the ownership and the use of land, the expansion of political and civic participation of traditionally excluded sectors of society, and the demobilization and reintegration of thousands of fighters. While these policies and measures are important aspects in the analysis of the legitimacy of the justice efforts, unfortunately, this paper will not be able to analyze these mechanisms and their interplay more in detail.

58. Acuerdo Final, *supra* note 15, at 164 (“Las Sanciones tendrán como finalidad esencial satisfacer los derechos de las víctimas y consolidar la paz. Deberán tener la mayor función restaurativa y reparadora del daño causado, siempre en relación con el grado de reconocimiento de verdad y responsabilidad que se haga ante el componente de justicia del SIVJRNR mediante declaraciones individuales o colectivas.”).

59. See *The Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶ 312 (Oct. 25, 2012); see *id.* (García-Sayán, J., concurring ¶¶ 31-32).

60. Acuerdo Final, *supra* note 15, at 8.

VI. CONCLUSION

After more than fifty years of internal armed conflict in Colombia, the country is closer to achieving peace than even before. While the peace agreement is far from perfect, it is probably the best possible result and it gives the country a real chance to achieve peace. After having considered the applicable legal framework regarding the obligation to investigate, prosecute and sanction war crimes, crimes against humanity and serious human rights violations, as well as the concrete political situation of Colombia, this paper comes to the following conclusions:

1. The alternative sanctions system proposed in the Colombian justice agreement is not contrary to Colombia's international obligations under international humanitarian law, international human rights law, or international criminal law.

2. Consequently, the International Criminal Court and its Office of the Prosecutor should respect the agreement and not intervene.

The sanctions defined in the Colombian justice agreement involve suspended, reduced, or alternative sanctions that are compatible with Colombia's international obligations under IHL, IHRL and ICL. While international law requires states to investigate, prosecute and sanction war crimes, crimes against humanity and serious human rights violations, states have a broad discretion when it comes to defining the concrete sanctions, particularly in the context of peace agreements.

Also, while the Rome Statute provides for sentences in ICC proceedings, it does not prescribe the specific type or length of sentences that States should impose for Rome Statute crimes in domestic proceedings. Therefore, in sentencing, States have wide discretion, as long as the sanction is proportional to the gravity of the crime committed.

Consequently, the ICC should respect the proposed sanctions system of the Colombian peace agreement and not intervene with its own investigations, unless the proposed system has proven to produce results that fail to meet the above-mentioned standard. So far, the Colombian Office of the Prosecutor has not conveyed a specific position on the proposed sanctions, since the range of possibilities remains speculative. Whether a reduced or alternative sanction will be compatible with Rome Statute principles will depend upon the particular circumstances of the case. Generally, it seems that in deciding if prosecuting or deferring the prosecution to the state, in situations where a State favors alternative mechanisms of accountability and reconciliation, the ICC Prosecutor should not only consider the gravity of the crimes at issue, but also evaluate the particular situation and political stability of the country emerging from conflict, as well as other policies and mechanisms that complement the

justice agreement strictly speaking. In certain contexts, an insistence on prosecution by the ICC Prosecutor would be shortsighted and would fail to consider the complexities of each State's unique climate as it transitions from violence to peace.⁶¹

The fundamental importance of the obligation to investigate, prosecute and sanction war crimes, crimes against humanity and serious human rights violations, even in the context of transitions, is uncontested. Additionally, in those processes victims and their aspirations for truth and justice should have a central place. However, it has also been established that this obligation has a different significance and possibly even weight in the context of transitions to peace, as the Colombian. In this context, other aspects, such as the need to negotiate and design a stable peace arrangement, complement and shape this obligation. The state's discretion to define the applicable sanctions is particularly significant in the context of peace agreements.

Colombia's peace agreement prohibits amnesties for war crimes, crimes against humanity and serious human rights violations, but includes sanctions that some consider do not fulfill the requirement of proportionality. However, as long as those sanctions are not completely illusory and fulfil the other prerequisites and goals of punishment, such as the public rejection of the criminal act, the recognition of the suffering of the victims, and the deterrence of those acts in the future, within the bigger objective of a peace process, it does not seem that these sanctions are incompatible with Colombia's international obligation to provide an effective remedy to the victims of international crimes.

Of course, only the implementation of the justice agreement will show if justice will truly be served. As any transitional justice arrangement, the Colombian proposal will face significant challenges of being implemented in an efficient way. The initial numbers already show the challenge of dealing with the huge amount of serious and large-scale conflict-related crimes committed during the sixty years of Colombia's conflict: as of mid 2016 the Unit for Victims' Reparation had already registered more than eight million victims. Similarly, the Office of the Prosecutor General estimates that approximately 10,000 persons might be responsible for more than 100,000 instances of different crimes, being therefore eligible to benefit from the special regime established by the JEP. Therefore, even putting aside the human and economic resources necessary, a judicial strategy, an operative

61. Elizabeth B. King, *Does Justice Always Require Prosecution? The International Criminal Court and Transitional Justice Measures*, 45 GEO. WASH. INT'L L. REV. 85 (2013).

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

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

62. Rueda, *supra* note 2.