

Contesting Impunity in Colombia

Written by Laura Betancur-Restrepo and Maj Grasten

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LAURA BETANCUR-RESTREPO AND MAJ GRASTEN, JAN 1 2019

“Impunity” has become a significant obstacle to the progress of Colombia’s peace process. A concern with impunity follows a global “trend toward an anti-impunity norm” in human rights and transitional justice.[1] Impunity – generally understood as pardons, amnesties, and the absence of criminal prosecution and accountability – has become grounds for conflicting perceptions of the legitimate treatment of crimes in Colombia’s transition towards peace. These conflicting perceptions may define the pace and path of the peace process. This article traces how impunity has catalyzed a contested politics among a range of actors in Colombia. Following the politics of impunity in the context of negotiated peace sheds light on the inner workings of power in transitional justice and peace processes.

In the case of Colombia, the peace process is viewed by some actors as an opportunity to punish crimes committed over an extended period; crimes which the Colombian justice system has hitherto failed to fully investigate. In this view, peace cannot justify a justice so soft that in practice the most heinous crimes go unpunished. In these terms, the laxity of transitional justice perpetuates impunity. In the words of the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, “these aspirations [for justice] must be fully addressed, including by ensuring that the perpetrators of serious crimes are genuinely brought to justice. [...] The promise of such accountability must become a reality, if the people of Colombia are to reap the full dividends of peace”[2]. From another perspective, peace resulting from negotiation justifies a flexible approach centered on a restorative and non-retributive vision of justice. From this perspective such an approach does not imply impunity. Despite a final agreement on how to end the protracted conflict in Colombia, impunity remains heavily contested. Contestation can be traced at the level of domestic and international law and legal argumentation.

In November 2016, Colombia’s Congress adopted a ratified version of the peace agreement (the Final Agreement) after the initial version failed to pass a referendum. The Final Agreement was negotiated between FARC and the now former President Juan Manuel Santos and his government. With the aim of avoiding political contestation that could jeopardize the fragile peace agreement, in 2017 Colombia’s Constitutional Court ruled that the agreement could not be revised for the next three presidential terms.[3] The decision was considered important in “protecting” the agreement from governmental politics until 2030.[4] The Constitutional Court even considered making the agreement part of Colombia’s constitution in the “bloque de constitucionalidad”. As such, the peace agreement would have the same status as the constitution in the domestic legal hierarchy and be isolated from political challenge. This possibility was dismissed by the Constitutional Court. That the possibility was considered points to the key role and significant power of the Court in a judicialized peace process.

When Colombia’s current President, Iván Duque, was elected during the summer of 2018, Santos, confident that the new government could not destroy the agreement, asserted that “the accord is bulletproofed”[5]. Despite this claim, the Special Jurisdiction for Peace (*Justicia Especial para la Paz* – JEP) has been in the firing line. The JEP formally assumed jurisdiction on March 15, 2018. It has exclusive jurisdiction to adjudicate in cases of serious violations of human rights and crimes against humanity committed before December 1, 2016 and in the context of Colombia’s armed conflict. The JEP was established as a transitional justice system for all parties to the conflict. Accordingly, it is not only former FARC members that are subject to the JEP’s jurisdictional powers. State agents and private individuals who supported the armed conflict may also be subject to the JEP, but only if they “voluntarily submit” to its special jurisdiction. The sanction system of the JEP is unique and drives much of the contestation over impunity. A list of so-called alternative sentences and penalties was included in the Final Agreement. Whereas war crimes and

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crimes against humanity cannot be fully amnestied, alternative sentences were introduced as part of the agreement. Sentences can range between five and eight years and prison time can be excluded if the accused person fully cooperates with the JEP. Moreover, the agreement allows for political participation by former FARC members. The 2018 elections were the first time that former FARC members were allowed to compete at the polls.

The politics of impunity can be traced through the shifting positions of Colombia's current President Duque on the *Justicia Especial para la Paz*, and in the discussions the JEP has spurred within his own party, Centro Democrático. In pre-election speeches, Duque and other members of his party referred to JEP as an impunity mechanism that allowed for the political eligibility of individuals responsible for crimes against humanity.[6] Critics of the Final Agreement's provisions on criminal punishment, including the Centro Democrático, found it problematic to equate state agents involved in the armed conflict with "criminals" or "terrorists" (such as the FARC) and to compel the private sector (many of them businessmen who paid armed groups) to submit to the JEP. Shortly after the elections, Duque became more conciliatory and supportive of the implementation of the agreement. This is most likely due to strong international support for the peace process and the JEP in particular.

The politics of impunity can also be traced through the discussions the JEP has spurred within Duque's own party, Centro Democrático. During the election campaign, former presidential candidate and party member, Fernando Londoño, declared that after the elections in 2018, "the first challenge of the Centro Democrático will be to tear apart that damn paper that they call Final Agreement with FARC"[7]. For some of Duque's party members JEP is a red flag. Following the 2018 presidential elections, some members of Centro Democrático launched a campaign to collect signatures to remove the JEP by referendum. Paloma Valencia, a Centro Democrático senator stated, "We are going to end the JEP, because we are not going to allow that the judges of Santos' corrupt government and of the FARC narcoterrorists, judge the citizens, and much less Colombia's armed forces"[8]. On the day of Duque's inauguration, Chairman of the Congress and Centro Democrático senator, Ernesto Macías, criticized the Peace Agreement for a lack of democratic legitimacy, arguing that there had not been an armed conflict in Colombia, but only terrorist activity. His speech was later endorsed and celebrated by fellow party members. Former President Álvaro Uribe was recorded by a hidden camera supporting this opinion in a private meeting. Commentators have noted that these radical announcements within the Centro Democrático at the time when President Duque adopted a more moderate and conciliatory stance point to a split within the governing party. The suspicion is supported by an announcement from the Vice-President of Colombia, Marta Lucía Ramírez, shortly after the inauguration: "The Government is not the same as the Centro Democrático. We are not going to support any referendum to eliminate the Special Peace Jurisdiction"[9].

Impunity has also been a contested issue from the perspective of international actors. When the then International Criminal Court (ICC) Prosecutor, Luis Moreno Ocampo, assumed office in 2003, he identified Colombia together with the DRC and Uganda "as containing the gravest occurrence of crimes within its treaty jurisdiction"[10]. Since 2004, the armed conflict in Colombia has been subject to "preliminary examination" (not investigation as such) by the Office of the Prosecutor (OTP) of the ICC. According to article 53 of the Rome Statute, the Prosecutor does not have a duty to prosecute when there are "substantial reasons to believe that an investigation could not serve the interests of justice". The OTP has implicitly approached the issue of impunity in the context of negotiated peace by distinguishing "between the concepts of the interests of justice and the interests in peace" arguing that "the latter falls within the mandate of institutions other than the Office of the Prosecutor"[11], such as the UN Security Council. Accordingly, the current ICC Prosecutor, Fatou Bensouda, asserted in letters to Colombia's Constitutional Court that the suspension of normal prison sentences for war crimes and crimes against humanity would be a "manifestly inadequate decision"[12] and that such suspension suggested the aim was to "shield the accused from responsibility"[13]. At the same time, the Deputy Prosecutor at the ICC, James Stewart, emphasized in a speech in Bogotá in 2015 that "[w]hile the Rome Statute does provide for sentences in ICC proceedings, it does not prescribe the specific type or length of sentences that States should impose for ICC crimes. In sentencing, States have wide discretion"[14].

Another concern in the view of the ICC is how command or superior responsibility is defined. Command responsibility means that a commander can be held accountable for crimes that have not been committed directly by him or her but by a subordinate. Military commanders, for instance, can be held accountable for crimes committed by forces under

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their control. Whilst Colombia's government had incorporated "command responsibility" in its domestic legislation, it had failed to refer to the Rome Statute's provisions. Colombia's Constitutional Court had considered command responsibility constitutional despite objections by organizations such as Human Rights Watch and the ICC Prosecutor on the basis that it limits the scope of those that can be held accountable. In a statement published in the Colombian weekly magazine, *Semana*, Fatou Bensouda expressed concerns over the absence of definition of this concept in the Final Agreement.[15] According to the Rome Statute, command responsibility can be established when superiors knew or should have known that their forces were "committing or about to commit" crimes. In the Final Agreement, it is stipulated that command responsibility of FARC superiors will only be established if they had actual knowledge based in available information about crimes committed. On the basis of this definition guilt is harder to prove. Impunity might result. Human Rights Watch called on Colombia's Constitutional Court to clarify this matter when the court recently reviewed the Statutory Law that defines the JEP's jurisdiction. "[The peace agreement] is a piñata of impunity [...] It is an agreement between the Government and FARC that ends sacrificing the right to justice of the thousands of victims of the Colombian armed conflict".[16]

A recent development in the Duque government's stance on impunity and negotiated peace is a proposed law currently being discussed in Congress. According to the proposal the composition of the JEP will be modified so that a total of 14 judges will be added to the rooms and sections that comprise it. The proposed law states that the additionally elected judges must be experts in the "operational manuals of the public force". This suggests that they could be military judges working on the basis of military law. This is a response to the criticism that the JEP is not competent to hear cases related to the armed forces and that its judges are illegitimate and biased. The criticism has led to alarm among several actors, especially from the newly established FARC party, who feel that the agreement is being unilaterally modified. The alarm has led to the ICC and other international actors being asked to consider the risks to the agreement that these modifications raise.[17] Other commentators feel that the modifications could strengthen the legitimacy of the Peace Agreement and guarantees against impunity as, for the first time, the Centro Democrático party recognizes the JEP and accepts that the military can be submitted its jurisdiction[18]. The politics of impunity ensues. Impunity has been key to determining the path of the Colombian peace process. The question remains whose perception of impunity in the context of negotiated peace will gain the upper hand?

Notes

NB: The authors would like to thank Mariana Hernández, Daniela Cabrera and Diego Duarte for research assistance.

[1] Engle, Karen, Zinaida Miller & D.M. Davis (2016). Introduction. In Engle, Miller & Davis (Eds.), *Anti-Impunity and the Human Rights Agenda* (pp. 1-12). Cambridge: Cambridge University Press, p. 1.

[2] International Criminal Court, "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", September 1, 2016: <https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia>

[3] Colombian Constitutional Court, judgment C-630/2017

[4] Nonetheless, some congressmen who have opposed the agreement rejected this interpretation and consider that the agreement cannot be untouchable. See: El País, "¿Está Completamente Blindado el Acuerdo de Paz con las Farc?", October 12, 2017: <https://www.elpais.com.co/proceso-de-paz/esta-completamente-blindado-el-acuerdo-de-paz-con-las-farc.html>

[5] Apnews, "Santos Sees Colombia Peace Deal Safe under Hawkish Successor," June 26, 2018: <https://apnews.com/7b987df914a1486691dde4d988191a1a>

[6] El País, Iván Duque: "No hay que hacer trizas los acuerdos con las FARC, pero sí modificaciones importantes". January 17, 2018: https://elpais.com/internacional/2018/01/17/colombia/1516162343_892303.html; El Tiempo. "A las Farc no deberían permitirles hacer política", January 18, 2018:

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<https://www.eltiempo.com/elecciones-colombia-2018/congreso/plazas-vega-cuenta-por-que-aspira-al-senado-por-el-centro-democratico-172234>

[7] El Tiempo, “Las intervenciones más polémicas en convención del Centro Democrático”, May 9, 2017: <https://www.eltiempo.com/politica/partidos-politicos/declaraciones-polemicas-en-la-convencion-del-centro-democratico-85708>

[8] Las Dos Orillas, “Registraduría dice SÍ al CD en su intento de tumbar el Proceso de Paz”, July 11, 2018: <https://www.las2orillas.co/registraduria-dice-si-al-cd-en-su-intento-de-tumbar-el-proceso-de-paz/>

[9] El Espectador, ““Una cosa es el Centro Democrático y otra, el gobierno”; Marta Lucía Ramírez”, August 4, 2018, available: <https://www.elespectador.com/noticias/politica/una-cosa-es-el-centro-democratico-y-otra-el-gobierno-marta-lucia-ramirez-articulo-804270>

[10] International Criminal Court, Office of the Prosecutor, “Policy Paper of Preliminary Examinations (Draft)”, October 4, 2010: https://www.icc-cpi.int/nr/rdonlyres/e278f5a2-a4f9-43d7-83d2-6a2c9cf5d7d7/282515/otp_draftpoli_cypaperonpreliminaryexaminations04101.pdf (para. 57)

[11] International Criminal Court, Office of the Prosecutor, “Policy Paper on the Interests of Justice”, September 2007: <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf> (p. 1)

[12] Quoted in European Center for Constitutional and Human Rights, “Special Newsletter: When Women Become Targets: Sexual and Gender-Based Violence in Colombia’s Conflict – A Matter for the International Criminal Court”, April 27, 2015: https://www.ecchr.eu/fileadmin/Sondernewsletter_Dossiers/SpecialNewsletter_Colombia_ICC_20150427.pdf (p. 13)

[13] Quoted in Washington Post, “In Colombia, a struggle between securing peace and delivering justice”, August 27, 2013: https://www.washingtonpost.com/world/in-colombia-a-struggle-between-securing-peace-and-delivering-justice/2013/08/27/68ae7dcc-0eab-11e3-a2b3-5e107edf9897_story.html?noredirect=on&_ddid=8-1545316140&utm_term=.af83856d2a26

[14] International Criminal Court, “Transitional Justice in Colombia and the Role of the International Criminal Court”, May 13, 2015: <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf>

[15] Semana, “El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad”, January 21, 2017: <https://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820>

[16] El Espectador, “Pacto de justicia en Colombia es una “piñata de impunidad”, denuncia HRW”, December 15, 2015: <https://www.elespectador.com/noticias/paz/pacto-de-justicia-colombia-una-pinata-de-impunidad-denu-articulo-607243>

[17] El Espectador, “FARC pedirá intervención de la CPI por reforma a la JEP aprobada en el Congreso”, November 1, 2018: <https://www.elespectador.com/noticias/politica/farc-pedira-intervencion-de-la-cpi-por-reforma-la-jep-aprobada-en-el-congreso-articulo-821412>

[18] El Espectador, “Reformar la JEP para fortalecerla”, November 9, 2018: <https://www.elespectador.com/opinion/editorial/reformar-la-jep-para-fortalecerla-articulo-822612>

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