

# IMPLEMENTING PEACE IN COLOMBIA: TWO STEPS FORWARD, ONE STEP BACK?

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Between 2012 and 2016, Simon Crabb worked in conflict zones in Colombia. He provided training to local lawyers, students and victims on international justice and contributed to a number of legal publications. He also undertook advocacy work before the Colombian Constitutional Court, United Nations, and the Office of the Prosecutor of the International Criminal Court in the Hague and New York. Here he provides a comprehensive account of the peace process so far.



Over a year has passed since the historic peace deal was signed between the Colombian State and the Guerilla organisation FARC-EP. After a narrow defeat in a popular referendum on 2 October 2016, the original agreement was modified and signed by the parties on 24 November 2016. The agreement includes commitments relating to rural land reform, political participation, illicit drug production, the end of the armed conflict, verification and victims. While the agreement been widely heralded for bringing armed confrontations between the parties to an end and for its commitment to the victims of the armed conflict, real challenges remain in terms of ensuring justice and defending human rights in Colombia.

## Over fifty years of armed conflict and impunity

Colombia has suffered one of the world's longest and bloodiest armed conflicts. While the exact origins of the conflict are complex and remain in dispute, factors include high levels of inequality in terms of wealth and land distribution, lack of political participation and the presence of weak state institutions, or their complete absence, in some areas of the country. What is clear is the massive human cost left by the legacy of mass atrocities committed by state actors, paramilitary forces and guerilla groups. Over 260,000 people have been murdered, 60,000 have been disappeared and over six million people have been forcibly displaced from their land and homes. In total, there are over eight million victims of the armed conflict registered. Ensuring the rights of victims to truth, justice, reparation and non-repetition in the face of such large scale violations is no easy task.

Impunity rates in the Colombian criminal justice system remain extremely high. The lack of progress in investigating and sanctioning those most responsible for war crimes and crimes against humanity has been highlighted by the Office of the Prosecutor of the International Criminal Court (OTP) in the course of its preliminary examination of the situation in Colombia. Furthermore, prior attempts at transitional justice have not meet victims' expectations. In 2005, the Justice and Peace Law provided for reduced sentences for paramilitary fighters on the condition that they disarmed, told the truth and provided reparation. This system has been criticised for the limited number of prosecutions, the failure to orientate the investigations towards those most responsible and a lack of genuine will and collaboration on the part of the perpetrators to tell the whole truth and make meaningful reparations.

## The Special Jurisdiction for Peace: justice for victims?

The current peace accord involves the creation of a transitional justice mechanism called the Comprehensive System for Truth, Justice, Reparations and Non-Recurrence. This system includes the creation of a truth commission and the Special Jurisdiction for Peace (SJP), the justice component to investigate and sanction perpetrators of the most serious crimes committed during the conflict by state forces, members of the guerilla and, in some cases, third parties. In addition, a special unit for the recovery of persons presumed to have been disappeared or missing and further mechanisms for reparations of victims are to be created.

The system is designed so that the different components work in an coordinated manner, with the emphasis on restorative justice, reparation and the search for truth. In this respect, the agreement states that state actors or members of the FARC-EP who confess crimes, provide reparation and cooperate with the SJP will receive alternative sanctions, involving some restriction of liberty but not prison, of up to eight years. Should perpetrators recognise their responsibility later on or refuse to recognise it entirely, they may be sanctioned to up to 20 years in prison.

A specially created selection committee recently appointed 51 magistrates who will hear cases before the SJP. In a country that is geographically and culturally as diverse as Colombia, and where the conflict has been most severe in rural areas, it is positive that 60 per cent of the magistrates come from outside the capital Bogotá, 50 per cent are women and 10 per cent are from ethnic minorities. Rather interestingly, the SJP will be able to base its decisions and resolutions on Colombian criminal law, as well as international criminal law, international humanitarian law and international human rights law. How this will work in practice is yet unclear, but may well create tensions between the aims of upholding victims rights on the one hand, and procedural fairness and legal certainty on the other.

A recent intervention by the OTP has highlighted other concerns in the proposed regulation of the SJP. The current definition of command responsibility (the attribution of criminal responsibility to military or civilian leaders for failing to control or supervise subordinates who have committed crimes) does not comply with customary international law and may mean that Colombia will fail in its duty to prosecute those most responsible for atrocities. Furthermore, the current definition of war crimes used for the SJP has been restricted and may mean that such crimes may not be investigated by the SJP, and rather be subject to amnesties or pardons in contravention of international law. Finally, the OTP considers that the effectiveness or otherwise of the proposed sanction regime will depend on how it is operated, implemented and verified in practice.

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## Representing victims and at what cost?

Under normal Colombian law, there is a role for the victim's legal representative, as well as the prosecutor and the defence in criminal proceedings. Legislative Act 01 of 2017, will allow victims to participate as "interveners" before the SJP in accordance with national and international law. Such participation will include procedural safeguards, as well as the opportunity to present evidence and to receive disclosure. How this will work effectively in practice is still unclear, especially when victims currently face real challenges to have meaningful access to justice under ordinary criminal procedure.

An additional and unfortunately recurring problem in this respect, is the precarious situation of human rights lawyers, defenders and peace activists in Colombia. Colombia remains one of the most dangerous countries in the world to defend human rights. According to the human rights platform *Somos Defensores*, between September 2016, when the peace accords were signed, and June 2017, 82 human rights defenders were murdered. Many human rights lawyers and defenders have played a key role in the advancement of the peace negotiations and the fight against impunity in the country. Notwithstanding the finer details of the transitional justice framework, lawyers, victims and their representatives must have the protection and safeguards to allow them to play their part in justice being done. The role of international NGOs such as Peace Brigades International and Lawyers Without Borders Canada in providing protection and support to threatened human rights lawyers and defenders will remain vitally important.

## The road ahead for Colombia and International Justice

There is no doubt that the advances in Colombia are historic, not just for the country but potentially for the wider world. The brutal conflict in Syria and the current challenges faced by the ICC remind us of the real demands faced by international justice. If the commitment to upholding international law and human rights in the peace agreement is effectively implemented, Colombia could become a successful example for other countries of how to make the transition to peace. Significant obstacles remain, however, given the number of victims of the conflict, the difficulties identified in the proposed implementation, the grave situation of human rights defenders and the lingering questions that remain regarding the existence of genuine political will to end the culture of impunity. It should also be remembered that parallel peace talks remain ongoing with Colombia's second guerilla group the ELN and that there has been a rise in the presence of neo-paramilitary groups in certain parts of the country. All these issues raise serious questions and will influence the eventual success or otherwise of the ongoing peace process in Colombia.