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SYMPOSIUM ON LATIN AMERICAN INTERNATIONAL LAW

INTERNATIONAL LAW AND TRANSITIONAL JUSTICE: EXPLORING SOME CHALLENGES THROUGH THE COLOMBIAN CASE

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Latin America has always been central to the configuration, interpretation, and operation of the field of transitional justice. Starting in the late 1980s with contributions from scholars interested in democratic transitions after dictatorships in the Southern Cone, the 1996 signing of the Peace Agreement in Guatemala, and the Truth Commission in Peru, to the more recent case of Colombia, Latin American academics and activists have contributed significantly to the theory and practice of transitional justice. This essay explores a question central to recent transitional justice processes: the interaction and possible contradictions between the aim of ending a violent internal conflict and the demands imposed by international law. Colombia serves as an example. The Colombian case is informed by all previous experiences, but it is also novel because it is the first transitional justice process established in the region since the establishment of the International Criminal Court. Although the Colombian process is still being implemented and it is too early to claim its success or failure, the case offers important insights into the tense, complex, and overarching interactions between international law, internal peace, and transitional justice. This essay explores how local and external actors involved in negotiating and implementing the agreement presented international law as if it were univocal and universal, as if there were no competing interpretations within the discipline, and as if it were neutral in relation to local political discussions. Building upon this analysis, the goal is to shed light upon the ideological uses of international law.

Strategic Use of International Law During the Peace Talks

For more than sixty years, an internal armed conflict took place in Colombia between leftist guerrilla groups, the government, and paramilitary groups. Like other internal armed conflicts, it was characterized by violence and massive human rights violations. Since the 1980s, multiple peace processes were attempted in Colombia with various guerrilla groups—many of them failed or had partial results.[1] Between 2012 and 2016, the Colombian government of President Juan Manuel Santos and the Revolutionary Armed Forces of Colombia (FARC–EP, the largest guerrilla group in the country) held peace talks in Havana, Cuba. After several partial agreements, a first Final Peace Agreement was signed in Cartagena on September 26, 2016. This agreement had to be endorsed

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[1] Within these, we can point out the 1990 Peace Agreement with the M-19 guerrilla that led to the call for a National Constituent Assembly (and in turn to the 1991 Constitution). Several negotiations were attempted, unsuccessfully, with the main guerrillas: the Revolutionary Armed Forces of Colombia (FARC-EP) and the National Liberation Army (ELN). Of these, the peace process with the FARC (1998–2002) stands out.

in a referendum in which citizens had to vote "Yes" or "No." The result was a victory for the "No," with 50.2 percent of the votes, against 49.7 percent votes for the "Yes." This led to a renegotiation of the agreement taking into consideration the objections of the opponents of the agreement. The second, and definitive, Final Peace Agreement was signed on November 24, at the Teatro Colón in Bogotá.

During the peace talks in Havana, international law was present more forcefully than in any previous peace process in the country. The language used by different actors (both locally and internationally) during the negotiations depicted a univocal and universal international law. Despite this characterization, its content depended upon the agenda of each of the actors. We argue that international law was used in at least three different ways throughout the peace agreement negotiations: (1) as a set of rules that impose limits on peace; (2) as a tool that opens possibilities for victim representation or the discussion of certain issues; and (3) to safeguard what was agreed upon.

For politicians on the right opposing the agreement, international law was used as a set of rules that determines a rigid frame of what can be included in these types of agreements. From this perspective, the interpretation of international law was a building block that could not be ignored because the current international legal context imposed inflexible obstacles to peace and would therefore justify not signing the Colombian Peace Agreement.

This instrumentalization of international law was especially prevalent when discussing criminal responsibility, in particular the types of punishment that *could* and *could not* be included in the agreement. For example, in the early stages of the negotiations, the FARC were emphatic in stating that the agreement was not a process of submission, surrender, or punishment, and that they were not planning on spending even one day in prison.[2] The government's response, in turn, was to point out that Colombia was bound by international obligations and that the process was being closely followed by international tribunals that demanded the prosecution of international crimes.[3] In this context, the roles of the Inter-American Court of Human Rights and the International Criminal Court were presented as swords hanging over Colombia, threatening to fall on the agreement if their rules and regulations were violated.

In particular, the International Criminal Court was perceived as a clear limitation to peace negotiations and as an obstacle to achieving a negotiated peace.[4] The content of the Rome Statute,[5] the constant pronouncements of the Office of the Prosecutor of the Court (which had a preliminary investigation open in Colombia since 2004)[6] along with the long history of rejecting total amnesties for crimes against humanity and serious human rights violations in the inter-American human rights system,[7] probably influenced the FARC to change their initial position rejecting all punishment and responsibility for their actions, and accept an alternative justice proposal.

[2] *Kofi Annan se equivoca, no vamos a pagar ni un día de cárcel: FARC*, Semana Mag. (Mar. 2, 2015).

[3] *¿Habrá cárcel en el posconflicto?*, Semana Mag. (Feb. 28, 2015).

[4] *Con la entrada de la Corte Penal Internacional se cerraron puertas para diálogo con la guerrilla*, Cambio Mag. (Aug. 6, 2009); Lucy Mary Rincón Romero, *Corte Penal Internacional: ¿Un obstáculo para la paz en Colombia?*, 8 Revista Misión Jurídica 133 (2014).

[5] *See, e.g.*, Rome Statute of the International Criminal Court, Arts. 17(1)(b), 25(2), July 17, 1998, 2187 UNTS 38544.

[6] *See, e.g.*, Int'l Crim. Ct., Situation in Colombia Interim Report (Nov. 14, 2012); Int'l Crim. Ct., Report on Preliminary Examination Activities (Situations in Honduras and Colombia) (Dec. 2, 2014); Int'l Crim. Ct., Report on Preliminary Examination Activities (Situations in Colombia and Honduras) (Nov. 12, 2015); and Int'l Crim. Ct., Report on Preliminary Examination Activities (Situation in Colombia) (Nov. 14, 2016).

[7] *See, e.g.*, Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 37 (Mar. 8, 1998); Barrios Altos v. Peru, 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); Gelman v. Uruguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011).

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For progressive actors, on the other hand, international law was seen as a tool that could open new possibilities. Several scholars argue that the establishment of a Gender Subcommittee broadened the spectrum of those who considered themselves victims (by including, for example, the suffering of the LGBTQI population) and foregrounded the role of women in conflict.[8] Along the same lines, the negotiation process and the peace agreements were a platform through which victims and minorities actively sought political, social, economic, and legal recognition. This was important for local actors and an inspiration for international processes to come.

Despite the possibilities provided by international law, the Colombian Peace Agreement had a narrow view of equality. After the Agreement's rejection, conservative politicians restricted its distributive impulse even further. For example, the Agreement was centered upon equal rights for women and the LGBTQI population instead of a more nuanced perspective of gender as a social construct; it often assimilated the term "gender" to "woman". In addition, the Agreement defined violence against the LGBTQI population and women as marginal and produced by the war, instead of understanding the historical, structural character of resource dispossession and patriarchal violence suffered by both LGBTQI and women that are also present in the form and substance of international law.[9] In any case, the scope of redistribution of resources and power across gender lines was limited further after the Agreement's rejection through popular referendum. In fact, one of the strongest demands for change by right wing opponents to the Peace Agreement was the elimination of the term "gender." Those opposing the Agreement falsely accused it of being an attack on the Colombian family by including special protection for the LGTBI population and replacing the binary understanding of women/men with "gender." After the text was amended, the term "gender inclusion" was replaced by the more traditional "women's rights perspective."[10]

International law was also seen as a basis for demanding compliance. The parties hoped that, by invoking international law, the Peace Agreement, including its transitional justice framework, would be less prone to challenges from future governments who opposed it. To this end, they accessed all available international instruments. For example, they decided to deposit the treaty in Switzerland as a Special Agreement in "terms of Article 3 common to all Geneva Conventions of 1949"; the Colombian government made a unilateral declaration before the UN secretary-general; and it requested the Agreement's inclusion in a Security Council resolution.[11]

We do not mean to suggest that there is a correct interpretation of international law. Some of the strategic uses contradict each other, while others could be complementary. These strategic uses hide the political agendas of those who deploy them. International law is, like all law, a field in which interpretive battles are fought. In this struggle, the different political actors belong to diverse ideological currents, and they support their position accordingly. Its interpretation is permeated by different agendas that have concrete consequences.

[8] Christine Bell, Lex Pacificatoria Colombiana*: Colombia's Peace Accord in Comparative Perspective*, 110 AJIL Unbound 165 (2016). Peace topics where discussed in thematic subcommittees, this one in particular included delegates from eighteen feminist organizations as well as a representative of the Colombian government and of the FARC guerrilla group.

[9] Hillary Charlesworth, Christine Chikin & Shelly Wright, *Feminist Approaches to International Law*, 85 AJIL 613 (1991); Susan Harris Rimmer & Kate Ogg, *Introduction*, *in* Research Handbook on Feminist Engagement with International Law (Susan Harris Rimmer & Kate Ogg eds., 2019).

[10] On the inclusion and exclusion of gender in the peace agreement, see Helena Alviar-García, *La Lucha por el Género en la Paz, in* Género en transición: Estudios sobre el papel del derecho en la distribución de recursos para y en el posconflicto colombiano 37 (Isabel Cristina Jaramillo Sierra ed., 2020).

[11] Laura Betancur Restrepo, *The Legal Status of the Colombian Peace Agreement*, 110 AJIL Unbound 188 (2016).

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Risks and Challenges of International Law Deployed as a Coherent Body of Law

Arguing that international law is an external body of rules and regulations with unique and neutral standards not only hides the political agendas of those who use it strategically but has additional consequences. One of them is that it tends to see the design of international law as a univocal, foreign imposition where individual states have little influence—as opposed to a field where context at times provides opportunities for dialogue, interaction, and pushback.

Perceiving legal influence as a straight line from the international to the domestic, conceals the two-way relationship in which the international is constantly influenced and modified by the domestic. It also obscures the possibility that the creation and modification of international law comes from different parts of the world and not only from certain centers of knowledge (such as Europe or the United States), but also from states of the Global South that face legal and political challenges and respond with innovative legal solutions, both international and domestic.

For example, among the prominent transformations in the field of transitional justice in Latin America is the prohibition of amnesties for crimes committed in the context of serious human rights violations. Both in Peru and other states that transitioned from dictatorship to democracy in the Southern Cone, broad pardons, amnesties, and forgiveness had been legally granted. These laws protected perpetrators of crimes from accountability for any possible crimes committed during periods of authoritarianism. As noted before, the Inter-American Court of Human Rights, through a large body of jurisprudence, prohibited absolute amnesties, finding that they are contrary to the international obligations of the states.[12] These important decisions, which gave great legitimacy to the inter-American human rights system, were not an achievement that came exclusively from international law, but a collaboration between judges and local human rights movements that struggled to find ways to fight impunity despite existing domestic legal frameworks.

The Colombian case is an example of this two-way influence. As we described above, during the negotiations in Havana, there were many discussions about whether alternative sentencing and transitional justice mechanisms could be defined internally without violating Colombia's international obligations. Undoubtedly, this shows the influence of the international legal framework during the peace negotiations, particularly international criminal law, international human rights law, and international humanitarian law. However, the influence was not unidirectional. In fact, the initial interpretation of the International Criminal Court's Prosecutor's Office on several key aspects of the proposed transitional justice system changed as the Colombian peace process progressed. The Office went from being an outspoken critic of the process, to an advocate of what had been agreed.[13] Another example of the two-way interaction in the Colombian case is the design of the judicial component. The web of institutions that are part of the transitional justice system—Integral System of Truth, Justice, Reparation and Non-Repetition—is a product of complex and technical discussions with both national and international actors. Within

[12] *See* note 7, *supra*.

[13] Regarding the change of opinion of the Office of the Prosecutor (OTP) of the International Criminal Court regarding whether the Peace Agreement complied with the standards of the Rome Statute, Camilo Sánchez states: "OTP Prosecutor Bensouda's first response was negative. . . . After numerous law scholars expressed their rejection of the analysis and reasoning of these letters and of the specific context in which the letters were sent, the OTP publicly explained its position in a speech read by Vice-Prosecutor James Stewart in Colombia in 2015. The Vice-Prosecutor struck a different tone, explicitly accepting that 'in matters of sentences, States have ample discretion' and that 'effective criminal sentences can adopt different forms.'" Nelson Camilo Sanchez Leon, *Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?*, 110 AJIL Unbound 172 (2016). *See also* René Urueña, *La CPI ya intervino: Complementariedad positiva e interacción institucional en Colombia*, *in* A los 5 Años del Acuerdo: ¿Cómo va la Paz en Colombia? (Angelika Rettberg & Laura Betancur-Restrepo eds., forthcoming).

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it, the Special Jurisdiction for Peace (which is not a hybrid tribunal, but a domestic one) may apply both international and national law in its decisions, including what is to be considered alternative punishment (other than spending time in prison). In sum, these innovations in the design and functioning of the system may influence how impunity and punishment is understood not only locally but also internationally.

Conclusion

In the relationship between international law and peace, and between international law and transitional justice, international law is often presented as an external and neutral law that is applied in a standardized and apolitical way to complex and convulsive internal contexts. Analyzing the strategic uses of international law, as we have proposed here, reveals the political purposes that are hidden under the supposed neutrality of international law and, at the same time, provides a set of tools to understand who wins and who loses when a specific interpretation prevails.

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