

Colombia: Impact of the Rome Statute and the International Criminal Court

Amanda Lyons
Michael Reed-Hurtado

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Executive Summary

Colombia is one of the most conflict-ridden parties to the Rome Statute, with violence that has raged for almost four decades. Several measures have been taken to bring Rome Statute crimes to justice. Colombia's experience raises important questions about the adequacy of national proceedings and Rome Statute obligations.

In Colombia, international crimes can be tried under the ordinary national jurisdiction as well as a limited number of cases under the Justice and Peace Law of 2005 (JPL). Neither jurisdiction has served to highlight the widespread or systematic nature of state-sponsored violence. Prosecutors under the JPL have little capacity for independent investigation and rely heavily on the confessions of the paramilitaries. Since 2008 a significant number of the senior paramilitary commanders have been extradited to the United States for drug offenses. These extraditions are but one of several forms of political interference with the judiciary, including verbal attacks and illegal surveillance.

Colombia's obligations as a State Party to the Rome Statute appear to have weakened domestic tolerance of impunity. The JPL, implemented for the demobilization of the paramilitaries, constitutes a step forward from full amnesties previously granted during peace processes. In the five years that the JPL has been in effect, however, it has yet to yield a single final conviction—while 290,000 registered victims are waiting for justice. There seems to be little political will for a peace process with the guerillas and Colombia's domestic justice processes are not succeeding at trying those bearing the greatest responsibility for international crimes.

These deficiencies raise the question of whether the ICC Office of the Prosecutor should open an investigation in Colombia. The Court's existence has raised victims' hopes that justice will be delivered in Colombia. Whatever measures are adopted, whether international or domestic, should be more effective than those currently pursued.

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Introduction

This paper examines the ICC's impact on Colombia in relation to complementarity, peace, justice, victims, and affected communities. Colombia has endured the lengthiest armed conflict in the Western Hemisphere. For more than forty years, successive waves of confrontation between the government, paramilitary groups, and guerrillas have caused enormous loss of life, weakened the rule of law, and instilled hostility and despair in the national psyche. The overlapping patterns of victimization, drug trafficking, and political crimes pose particular challenges for those seeking "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."¹

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About the Authors

Amanda Lyons is legal advisor and researcher with ICTJ in the Colombia office. She has a JD and international human rights law concentration from the University of Minnesota and a BA in Sociology from the University of Notre Dame.

Michael Reed-Hurtado is a senior associate with ICTJ and head of ICTJ's Colombia office. He is a human rights lawyer who has worked in the humanitarian field with the UNHCR, and has research and activism experience in criminal due process, prison conditions and reform, military criminal jurisdiction, enforced disappearances and displacement, and more. Michael is also a professor of the theoretical study of violence and punishment with the Universidad Externado de Colombia, Columbia University and Sciences PO.

Colombia became a State Party to the Rome Statute on November 1, 2002. At that time, Colombia made a declaration under Article 124 suspending the ICC's war crimes jurisdiction for seven years. That period expired on November 1, 2009, and Colombia is now subject to the Court's war crimes jurisdiction.

The situation in the country has been under preliminary examination by the Office of the Prosecutor (OTP) since 2006, and the OTP made official visits in October 2007 and August 2008. To date, the Prosecutor has shown concern about a variety of issues, including the extradition of senior paramilitary commanders to the United States on drug-trafficking charges; the adequacy of the investigation into the responsibility of elected and military officials for paramilitary violence; extrajudicial executions by the military; international sponsorship of the Fuerzas Armadas Revolucionarias de Colombia (FARC); the limitations on victims' participation in the national process; and issues of judicial independence.

Colombia's case is particularly important due to the prevalence of national proceedings there. The fundamental question is whether these proceedings are conducted in keeping with Rome Statute obligations.

Complementarity

Ordinary Criminal Jurisdiction and Rome Statute Crimes

Under the 1991 Colombian Constitution, the human rights treaties to which Colombia is a party have constitutional status and supremacy under domestic law.² After the 1998 Rome Conference, Colombia incorporated war crimes into its new Criminal Code.³ Congress ratified the Rome Statute in June 2002,⁴ and the Constitutional Court affirmed its constitutionality soon thereafter.⁵

Colombia suffers from serious structural deficiencies in investigating and adjudicating international crimes.⁶ Consequently, prosecutions in Colombia generally do not serve to expose chains of command and criminal structures; rather, they concentrate on direct perpetrators and generally fail to target those most responsible for crimes committed as part of a particular criminal apparatus or state practice. This tendency is particularly evident in the impunity given to those most responsible for systematically perpetrated crimes such as extrajudicial executions. Extrajudicial execution by the Colombian military has been a long-standing practice,⁷ which has recently garnered increased attention from the media and the international community.⁸ Under a practice referred to as "false positives," the military has killed civilians and then dressed them in guerilla fatigues in order to portray them as combat casualties.⁹ While several high-level officials have been forced to resign or dismissed from active service as a result of international pressure, prosecutions to date have depicted these crimes as isolated cases perpetrated by a few at the operational level. No investigation has taken place into the official policy and practice that promoted some of these deaths.¹⁰

The Justice and Peace Law (Law 975)

In 2002, President Alvaro Uribe's administration began negotiating the demobilization of the umbrella paramilitary organization known as the Autodefensas Unidas de Colombia (AUC). The Justice and Peace Law (JPL or Law 975 of 2005) was designed to offer a negotiated exit strategy for the paramilitaries.¹¹ The law offers individuals significantly reduced prison sentences—between five and eight years—in exchange for their "contribution to the attainment of national peace, collaboration with the justice system, reparation for the victims, and the person's adequate re-socialization."¹² Perpetrators are required to provide full, truthful confessions regarding their participation in crimes and the criminal apparatus, to hand over all assets to a reparation fund for victims, and to cease all illegal activity.

The JPL is a special criminal procedure of limited application and should not be viewed as a panacea that guarantees the rights of victims or satisfies Colombia's international obligations regarding Rome Statute crimes. The law and the processes it mandates have at least four critical weaknesses.

First, the law only applies to a limited number of demobilized paramilitaries and explicitly excludes state agents. The executive branch, in consultation with paramilitary groups, compiled the list of eligible beneficiaries for the JPL. Therefore it does not reflect a prosecutorial strategy that seeks to dismantle the criminal structure or pursue those most responsible. The cases against a large percentage of those included (more than 1,200 of roughly 4,000 participants in the special proceedings as of February 2010) have been closed because the individuals refused to participate in the proceedings due to confidence that prosecutors did not have sufficient evidence to prosecute them in the ordinary jurisdiction, among other reasons. This pre-selection of candidates has hindered the ability of prosecutors to implement a strategy that demonstrates the widespread and systematic nature of the crimes.

A second weakness of the law is poor implementation, including both planning and management. The Justice and Peace Unit of the Colombian Office of the Prosecutor lacks the necessary tools to conduct systematic investigations. There is no effective data management system to cross-reference information from existing investigations and confessions. The investigation strategy is based on the paramilitaries' own description of the organization of their groups, as opposed to facts discovered through independent investigation. Relying too much on confessions has hindered truth-seeking, reparations and accountability for crimes that are often left out of the confessions, such as sexual violence.

Third, the cases so far have concentrated mainly on the individual responsibility of perpetrators for particular incidents, without exposing patterns of violence and more complex forms of liability such as superior responsibility. Thousands of crimes have been confessed, and 290,000 victims are registered under the JPL. Yet these victims have only limited involvement in the actual proceedings.

Finally, the JPL proceedings have moved very slowly beyond the confessional stages. The Supreme Court of Justice has passed inconsistent rulings in terms of the legal requirements for subsequent stages of the process, which has confused and frustrated prosecutors and other agents.¹³ The level of legal uncertainty is very high, and the legal framework is riddled with *lacunae*, or gaps in applicable law.

Only one case has reached the trial and sentencing phases, but the sentence was annulled by the Supreme Court of Justice and sent back for further investigation.¹⁴ In that decision, the court held that partial indictments and partial acceptance of the charges—and presumably partial sentences—were permissible under the law.

However, the JPL requires a full, truthful confession by the perpetrator and a rigorous independent investigation by the prosecutors. Permitting partial confessions undermines the process as a whole and limits even further the degree to which the criminal structure is exposed.

The JPL has received much attention from the ICC OTP as a potentially positive example of complementarity in practice. Yet the stagnation beyond the confessional stages and the lack of convictions almost five years after the law passed raises questions as to whether this lack of progress constitutes “unjustified delay” as an indicator of unwillingness under Article 17 of the Rome Statute. Indeed, it is not clear that the law—even if it were to be implemented perfectly—is aimed at judging those most responsible for the most heinous crimes.

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Overall, practice to date indicates that the JPL process is only succeeding at pursuing a specific and limited number of unsolved cases. While this is a laudable achievement, it fails to tackle the overall patterns or criminal structures related to systematic criminal activity, thus it is not addressing Rome Statute crimes or those that ICC investigations would target.

Political Interference

Another factor in assessing the situation in Colombia is the prevalence of political interference with the pursuit of justice, which points to a level of unwillingness on the part of some sectors of the Colombian government to identify and prosecute those most responsible for systematic violence.

The Uribe administration has extradited a total of 30 paramilitaries from the JPL process to the United States on drug-trafficking charges since September 2006. Notably, in May 2008 and March 2009 several of the senior paramilitary commanders were extradited. This has effectively halted JPL proceedings in Colombia for these individuals.¹⁵ The extraditions have also disrupted the Supreme Court's ongoing criminal investigations of elected officials for alleged links with the paramilitary groups, because senior commanders were providing important evidence.¹⁶ The extraditions were widely criticized and the administration's motives questioned. Two years following the extraditions of senior paramilitary leaders, what is certain is that they have hindered the domestic pursuit of justice. The Colombian government lacks the political will to guarantee judicial cooperation with the United States to ensure that the domestic processes continue.

In addition, the executive branch has challenged the Supreme Court's investigations into elected officials in ways that undermine the independence of the judicial branch.¹⁷ The president and other officials from the executive branch have verbally attacked members of the court, stating that they are conducting political persecution through their judicial roles.¹⁸

More evidence of political interference can be found in the numerous scandals involving both the presidential intelligence agency and the intelligence branch of the national police force, which have been conducting illegal surveillance of members of the judiciary and human rights defenders. While a number of prosecutions are ongoing in this respect, the general response has been to blame low-level officers.¹⁹ The use of the intelligence agencies against the judiciary is not being systematically investigated. This and the other forms of political interference in judicial issues on the part of the executive branch raise serious questions as to the government's willingness and ability to carry out effective prosecutions of international crimes committed in Colombia.

Impact of the ICC on Domestic Prosecutions in Colombia

Colombian courts, prosecutors, and defense attorneys generally are receptive to applying international law, including the Rome Statute. The preliminary examination of the ICC OTP has put pressure on all actors, particularly the courts, to implement international legal standards.

For the Supreme Court, the ICC has been an important source of support and validation for its efforts to pursue accountability in a hostile political climate. In a recent case, the Criminal Cassation Chamber described its responsibility as "avoiding at all cost impunity for the crimes allegedly committed and thereby to show the international community that intervention by the international criminal justice system is not necessary because Colombia is able to try those responsible for such crimes and to impose the punitive consequences established under national criminal law."²⁰

The ICC Prosecutor has also applied pressure to judges and prosecutors by publicly stating that if they do not do their job, he will.²¹ However, this may have led judges at all levels

to issue inconsistent rulings in an attempt to stave off an ICC intervention, which in turn has led to dubious decisions that undermine due process.

Some human rights advocates, domestic and international, believe it is time for the Prosecutor to open an investigation under Article 15 of the Statute, which would mean that Colombia could challenge admissibility under Article 19. Considering the gravity of the conflict in Colombia, some believe that it is not enough for the Prosecutor to continue to keep the situation under preliminary examination. Lack of further action has affected the ICC's credibility with domestic actors. Due to many years of Colombian civil society interaction with the Inter-American Court of Human Rights, the ICC has at its disposal an active, technically proficient, and mobilized local civil society to promote the Court's role in positive complementarity. However, the Prosecutor's Office needs to provide these NGOs with more public documentation, including the report on the preliminary examination.

Peace and Justice

Colombia has a long history of using amnesties to address the demobilization of guerrilla members and some paramilitary groups. The peace-versus-justice debate has been loaded with rhetoric and manipulation. The official discourse avoids the use of "armed conflict" and instead has cast the debate in terms of "illegal armed groups" and "terrorists," thereby avoiding questions of state responsibility. To date, no serious public discussions have occurred to outline the various stakeholders' positions.

When President Uribe introduced a bill in 2003 on alternative sentencing—an initiative that later resulted in the JPL—he told the UN that "in a context of 30,000 terrorists, it must be understood that a definitive peace is the best justice for a nation in which several generations have never lived a single day without the occurrence of a terrorist act."²² In early 2005, his administration explained its formula for the paramilitary negotiations: "As much justice as possible, and as much impunity as necessary."²³

However, since the Rome Statute came into force, there is broad agreement in public discourse that amnesties and pardons no longer satisfy Colombia's standing before the international community. This position at least includes consideration of international human rights standards and victims' rights. Parties to the negotiations between the Colombian government and the senior paramilitary leaders in 2002 reported that the perceived threat of the ICC was a factor in the discussions. The declaration under Article 124 suspending the Court's jurisdiction over war crimes until 2009 was made days before Uribe took office, reportedly in preparation for negotiations with the AUC.²⁴ There is a sense that he proposed the JPL specifically with the ICC in mind.²⁵

Avoiding ICC jurisdiction has apparently been an important motivation behind the design of the demobilization framework. In secret recordings of negotiations between the government and the AUC that were leaked to the press, the High Commissioner for Peace is heard to say, "The government has proposed a draft law that will block the action of the International Criminal Court."²⁶

The Justice and Peace Law was not put to sufficient and transparent discussion before it came into force in 2005. The following year, the Colombian Constitutional Court ruled on the law's constitutionality. It struck down numerous provisions and modified others, significantly strengthening the normative framework for victims' rights to truth, justice, and reparation.²⁷ In the wake of this ruling, many claimed that demobilization would be undermined, but the ruling still proceeded.²⁸



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Since 2002 there has not been discernable government interest in a peace process with the main guerilla group, the FARC. The Colombian state has employed the full extent of its military, police, and punitive powers, and has convicted and sentenced the FARC's main leaders *in absentia*. Recently some commentators have highlighted the potentially negative effect that the expiration of Article 124's suspension may have on future negotiations with the FARC.²⁹

Impact of the ICC on Victims and Affected Communities

In a 2008 survey carried out in four regional departments, the vast majority of affected communities supported criminal processes; 89 percent believed that guerillas should be tried and sentenced, and 88 percent believed the same about paramilitaries.³⁰ Although public confidence in state institutions was low, national prosecutors continued to be the most trusted option for criminal justice proceedings (62 percent), followed by the president (47 percent), and international justice (38 percent).³¹ Despite the fact that the president does not have a justice function, he is seen as a decisive entity for ensuring accountability in Colombian society.

In light of the strong desire for justice and the low level of confidence in state institutions, there is a risk that the ICC will give rise to unrealistic expectations of an international answer to Colombia's longstanding problems with impunity. The relatively high level of communications to the Court from Colombian victims and civil society may suggest that the ICC is imagined as a savior; few understand the highly specific nature of its jurisdiction and practice. These are issues that need to be managed through better outreach by the ICC.

Conclusion

Significant challenges remain in terms of effectively addressing Colombia's legacy of impunity. Since the Rome Statute came into force, the main debate has been about whether Colombia is meeting its obligations through pursuing justice on the domestic level. It has abandoned previous policies of amnesty and is conducting several proceedings at the domestic level. However, these proceedings have not addressed structural aspects of the violence, nor have they targeted those bearing the greatest responsibility, particularly state actors. The JPL has yet to result in a single conviction.

All of these factors raise the question of whether the situation in Colombia is ripe for an ICC investigation. In the interim, the mere possibility of ICC involvement continues to raise victims' expectations and demands for justice. These demands should be met through an effective combination of measures at domestic and international levels, but measures that are more effective than the ones currently pursued.

Endnotes

1. Preamble of the Rome Statute.
2. Political Constitution of Colombia, art. 93 (1991).
3. Law 599 of 2000, Diario Oficial No. 44.097, July 24, 2000.
4. Law 742 of 2002, Diario Oficial No. 44.826, June 7, 2002.
5. Constitutional Court, Judgment C-578/02, July 30, 2002, M.P. Manuel José Cepeda Espinosa.
6. The Inter-American Court of Human Rights has examined these deficiencies on numerous occasions in its jurisprudence on Colombia's obligations under the American Convention on Human Rights. See I/A

Court H.R., *Case of the Rochela Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of May 11, 2007 (Series C No. 163); I/A Court H.R., *Case of the Ituango Massacres v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment of July 1, 2006 (Series C No. 148); I/A Court H.R., *Case of the Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of Jan. 31, 2006 (Series C No. 140); I/A Court H.R., *Case of the Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment of Sept. 15, 2005 (Series C No. 134); I/A Court H.R., *Case of the 19 Tradesmen v. Colombia*, Merits, Reparations and Costs, Judgment of July 5, 2004 (Series C No. 109).

7. Michael Evans, *Body Count Mentalities: Colombia's "False Positives" Scandal Declassified*, National Security Archive, Jan. 7, 2009, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB266/index.htm>.
8. The international community was particularly vocal after the bodies of 11 young men from the outskirts of Bogotá were discovered in September 2008. They had been extrajudicially executed by the military and reported as "combat deaths." See *Seeking Justice: The Mothers of Soacha*, Amnesty International, AMR 23/002/2010, Jan. 22, 2010; and Rachel Godfrey Wood, *Colombia's False Positives*, Council on Hemispheric Affairs, June 10, 2009, <http://www.coha.org/colombias-false-positives>.
9. The UN Special Rapporteur on Extrajudicial Executions described this "well known phenomenon": "The victim is lured under false pretenses by a 'recruiter' to a remote location. There, the individual is killed soon after arrival by members of the military. The scene is then manipulated to make it appear as if the individual was legitimately killed in combat. The victim is commonly photographed wearing a guerrilla uniform, and holding a gun or grenade. Victims are often buried anonymously in communal graves, and the killers are rewarded for the results they have achieved in the fight against the guerillas." Press Release, Statement by Philip Alston, UN Special Rapporteur on Extrajudicial Executions, Mission to Colombia, June 8-18, 2009, (www.unhchr.ch/hurricane/hurricane.nsf/view01/C6390E2F247BF1A7C12575D9007732FD?opendocument)
10. República de Colombia, Ministerio de Defensa Nacional, Directiva Ministerial Permanente No. 29/2005 (Secret), Nov. 17, 2005 (establishing the ministerial policy on the payment of bounties or rewards in exchange for deaths of enemy combatants, seizure of weapons, and the provision of information generally).
11. Ley 975 of 2005, Diario Oficial No. 45.980 (July 25, 2005). An unofficial English translation of Law 975 is available at www.mediosparalapaz.org/downloads/Law_975_HRW_and_AI.rtf.
12. Ibid., art. 3.
13. See Michael Reed, Expert Testimony before Inter-American Court of Human Rights, *Case of Manuel Cepeda*, Jan. 26, 2010 (citing an example where the Supreme Court took eight different positions on a particular question).
14. Criminal Cassation Chamber, Supreme Court of Justice, Judgment of July 31, 2009, Justice Augusto Ibáñez Guzmán.
15. Most of the extradited paramilitaries have stopped cooperating with the JPL process. Only five have participated in some way from the United States: two have participated in several hearings, while the other three have acted in just a few.
16. As of March 2010, more than 80 members of Congress are being investigated or tried on charges of ties to paramilitary groups. More than 10 have already been convicted.
17. *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, UN Human Rights Council, UN Doc. A/HRC/13/72 (March 4, 2010), para. 10 ("OHCHR-Colombia documented public statements by high-level government officials and social and political actors discrediting the Supreme Court and its magistrates, as well as undue interference, direct or indirect, into their functions through lobbying, pressure and threats.") See also *Colombia: UN Expert on Independence of Judges and Lawyers Expresses Need for Judicial Strengthening*, UN Office at Geneva, Dec. 17, 2009.

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The Review Conference of the Rome Statute provides a unique opportunity to evaluate the progress of the International Criminal Court and the challenges that it faces. ICTJ brings a wealth of expertise in situation countries to the discussions of complementarity, peace and justice, and the impact of the ICC on the status of victims. ICTJ has developed a briefing paper series for the conference available at www.ictj.org.

18. “Uribe Must Respect Judicial Independence: President’s Interference with Ongoing Investigations Threatens the Rule of Law,” Human Rights Watch, Oct. 8, 2007.
19. In this respect, the former president of the Supreme Court’s Civil Chamber recently called on the attorney general to investigate who is behind this “plan against the Court.” “César Julio Valencia Copete dice que sigue siendo ‘chuzado,’” *Semana*, March 16, 2010.
20. Criminal Cassation Chamber, Supreme Court of Justice, March 11, 2009, No. 30510, M.P. Yesid Ramírez Bastidas (translated from Spanish original).
21. See “ICC Prosecutor visits Colombia,” ICC-OTP-20080821-PR347, Aug. 21, 2008.
22. Slevin, Peter, “Colombian President Defends Amnesty for Paramilitary Troops,” *Washington Post*, Oct. 1, 2003.
23. “El as bajo la manga de los Uribistas,” *El Tiempo*, Feb. 13, 2005.
24. *Colombia: Presidential Politics and Peace Prospects*, International Crisis Group, Latin America Report No. 14, June 16, 2005, 18. The declaration was an executive submission to the UN that was not made immediately public. Nor was it discussed in Congress when ratified. See also “Colombia’s ICC Declaration a Prelude to Impunity,” Human Rights Watch, Sept. 5, 2002 “The move appears intended to bolster the government’s bargaining power in eventual peace negotiations.”
25. For example, Law 975, art. 71, initially defined membership in an illegal armed group as sedition—i.e. a political crime—that pursuant to the Constitution would have prohibited extradition or transfer to the International Criminal Court.
26. “Revelaciones Explosivas,” *Semana*, Sept. 24, 2004.
27. Colombian Constitutional Court, Sentence C-370/2006, May 18, 2006.
28. “Horas de tensión por fallo de justicia y paz,” *El Tiempo*, May 20, 2006.
29. “Con la entrada de la Corte Penal Internacional se cerraron puertas para diálogo con la guerrilla,” *Cambio*, Aug. 6, 2009.
30. *Los Retos de la Justicia Transicional en Colombia: Percepciones, Opiniones y Experiencias*, Fundación Social & Union Europea 152 (2008)
31. Ibid., 149.

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ICTJ New York

5 Hanover Square. Floor 24

New York, NY USA 10004