

September 25, 2015

Excellency

Juan Manuel Santos Calderón
President
Republic of Colombia

Dear Mr. President:

Thank you for the honor of appointing me as one of the lawyers who helped to negotiate the agreement to create the Special Jurisdiction for Peace, signed on September 23 in Havana by your Government and by the Revolutionary Armed Forces of Colombia (“FARC”).

This letter summarizes my legal opinion that the Special Jurisdiction for Peace (“SJP”) meets Colombia’s international legal obligations to respect the rights of victims to truth, reparations, justice and non-repetition, in regard to gross violations of international human rights and humanitarian law allegedly committed by members of the FARC.

There are three starting points. First, international law recognizes the rights of victims to truth, reparations, justice and non-repetition for serious violations of human rights and humanitarian law. Both global and regional standards make this clear.¹ The SJP addresses each of these rights.

Second, in a transitional situation, as in Colombia, the measures taken to satisfy these rights must be evaluated as an integral whole. Individual components, such as measures of justice, should not be assessed in isolation, but rather in combination with the other components (truth, reparations and non-repetition). “Where transitional justice is required,” the UN Secretary-General and the UN Special

¹ E.g., *UN 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*, UN General Assembly Res. 60/147 Annex, UN Doc. A/RES/60/147, 2 March 2006; UN Commission on Human Rights, Res. 2005/81, *Impunity*, adopted 21 April 2005; *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005; UN Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004; UN Human Rights Council, Res. 21, *Right to the Truth*, UN Doc. A/HRC/21/L.16, 24 September 2012; Inter-American Court of Human Rights: *Velásquez v. Rodríguez v. Honduras*, Judgment of July 29, 1988, *Barrios Altos v. Perú*, Judgment of March 14, 2001, and *Gelman v. Uruguay*, Judgment of Feb. 24, 2011; *Common Article 3 of the Geneva Conventions* of 12 August 1949; and *Geneva Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977.

Rapporteur agree that “strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, ... , or an appropriately conceived combination thereof.”²

Third, in the case of Colombia, transitional justice measures must be assessed by international standards applicable to peace processes, not by standards that apply in a society already at peace. This has two key implications. One is the international law stipulation that in ending a civil war, the State should grant the “broadest possible amnesty” for crimes inherent in an armed uprising, such as rebellion and illegal possession of arms.³ Otherwise insurgent groups, facing inevitable prosecutions, would never lay down their arms unless defeated.

But the amnesty must not and will not cover serious international crimes. While allowing a broad amnesty for rebellion and political crimes, the SJP does not permit amnesty for such international crimes as genocide, crimes against humanity, grave war crimes, taking of hostages, grave privations of liberty, torture, extrajudicial executions, forced disappearances, rape and sexual violence, forced displacement, and recruitment of children. Nor is amnesty allowed for similar crimes as defined in Colombian law.

The other implication of the peace negotiation context is that respect for the rights of past victims must be balanced against respect for the rights of potential future victims. Justice for the past must be tempered by the demands of negotiating a peace for the future. As five of the seven judges of the Inter-American Court of Human Rights jointly explained:

A negotiated solution to the internal armed conflict raises several issues regarding the weighing of these rights [of victims], 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.⁴

The SJP adheres to this admonition. A commendable effort to pursue justice for past victims should not lead Colombia to neglect its duty to achieve peace and to safeguard the lives of potential future victims.

² *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, UN Doc. A/HRC/21/46, 9 August 2012, par. 20, quoting UN Secretary-General’s report on the rule of law and transitional justice in conflict and post-conflict societies, UN Doc. S/2004/616, par. 26. The quoted sentence refers also to institutional reform and vetting and dismissals. Institutional reform is a matter being dealt with by other elements of the peace process, not by the SJP, and vetting and dismissals apply mainly to agents of the State, not guerrillas.

³ *Geneva Protocol II Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, art. 6.5.

⁴ Int.-Am.Ct.H.Rts., *Case of the Massacres of El Mozote v. El Salvador*, Judgment of Oct. 25, 2012, Concurring of Judge Diego García Sayán (joined by four other judges), par. 37.

Thus the SJP should be assessed as an integrated approach to meeting the rights of past victims to truth, reparations, justice and non-repetition, while also achieving peace, and thereby respecting the rights of countless Colombians not to become future victims. So viewed, as it must be, the SJP meets Colombia's international legal obligations.

Evaluating each component as part of the integrated whole, the following comments on each aspect of the SJP:

Truth:

The provisions of the SJP on truth are strong and would meet international standards even in a nation already at peace. The FARC are offered a stark alternative: Either fully disclose the truth of their allegedly serious crimes, and receive comparatively lenient sentences, or fail to tell the full truth and face prison sentences of up to 20 years. The incentives to disclose the full truth could hardly be stronger.

The incentives are also credible. The Special Tribunal for Peace ("Tribunal") will receive complete reports from Colombia's Prosecutor General, who has investigated the FARC for decades, as well as from other State agencies, and from victims' groups and human rights organizations. If the FARC attempt to shade the truth, the well-informed Tribunal will be in a position to detect any deficiencies in the disclosures.

Moreover, in addition to the case-by-case disclosures in the SJP justice mechanism, the peace accords will also include a truth commission, which will examine broader historical causes and truths.

In short, the SJP plainly meets the victims' and society's right to know the truth about the serious international crimes allegedly committed by the FARC.

Reparations:

The same incentives to truth-telling by the FARC and its members should equally encourage their public acceptance of responsibility for their crimes. Experience in transitional justice around the world teaches that public acceptance of responsibility by perpetrators is an important means of moral reparation and psychological healing for victims. The SJP requires that the FARC and its members not only disclose the full truth, but also publicly accept responsibility for their serious international crimes. Only so will they receive relatively lenient sentences. In contrast, if they fail to accept responsibility, they face sentences of up to 20 years in prison. This dramatic differential in sentencing provides a powerful incentive for the FARC to provide this form of moral reparation.

In addition, for FARC members who disclose the truth and accept responsibility, the Tribunal will impose sanctions of from five to eight years of reparative labor. The procedure is designed to ensure meaningful reparation. The FARC must first propose a plan of work. The FARC must then

consult with the victims in the affected area to ascertain their views and to be sure that they do not oppose the reparations plan. The victims then have an opportunity to make their views known to the Tribunal. Only then will the Tribunal determine whether to accept, reject or modify the plan, and to impose sanctions of reparative labor accordingly.

This approach – collective reparations – is well-suited to a situation of mass violations, such as Colombia, where individual lawsuits by massive numbers of victims are not practical.⁵

In short, the reparations component of the SJP reasonably and feasibly meets Colombia's obligation to provide reparations. And this component of the SJP is in addition to other reparations measures required by the broader peace accords.

Justice:

For those FARC members who fail to disclose the full truth or to accept responsibility, the justice component of the SJP plainly meets international standards: the perpetrators must stand trial and face imprisonment of up to 20 years.

But what about FARC members who tell the truth and accept responsibility and are then sentenced to five to eight years of reparative labor? Will that satisfy the victims' right to justice?

In a country at peace, serious international crimes should be punished by imprisonment. But Colombia is not at peace. In attempting to negotiate a peace with armed rebels, sanctions must be found that are acceptable to both sides – otherwise there will be no peace. And no peace means more victims.

In all events, the SJP does not grant even truth-telling FARC rebels a free pass. Their sanctions are ordered by the Tribunal and must last for five to eight years. Their sanctions restrict their liberty of movement and residence. The FARC members must serve their time under a regime by which they will be monitored. They will require authorization to leave or to move. The Tribunal will decide whether they have met the conditions of their sanctions, and may send them for trial and possible lengthy imprisonment if they do not. The Tribunal may also impose more exacting restrictions at the outset.

Even this aspect of the SJP, then, is more restrictive than the “amnesty for truth” agreement by which South Africa ended apartheid. In South Africa, perpetrators who told the truth were amnestied. In Colombia under the SJP, FARC perpetrators who tell the truth (and accept responsibility) will not be amnestied. They will instead be sentenced to five to eight years of reparative labor under a restrictive regime.

⁵ See, e.g., Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157 (2004).

The SJP approach is innovative and unprecedented. Will it meet international law standards? It is a pathway to an otherwise unattainable peace. Viewed as an integral part of a package that respects victims' rights to truth, reparations and non-repetition, the SJP meets Colombia's Inter-American obligation to pursue peace "with equal intensity." In the words of the judges of the Inter-American Court, the SJP meets Colombia's "obligation to prevent further acts of violence and to achieve peace in an armed conflict by the means at its disposal."

The International Criminal Court:

Will the ICC Prosecutor attempt to step in? If so, will the ICC judges permit her to do so? Because the SJP design is unprecedented, with unique, interconnected components, it would be imprudent to make a definitive prediction.

However, the early signs that ICC Prosecutor Fatou Bensouda may accept the SJP are encouraging. As quoted in a major Colombian newspaper,⁶ her initial comments on the SJP were cautious. Noting that she will engage in "extensive consultations" with the Colombian government and society, including victims' groups, she viewed "with optimism" the fact that the SJP does not allow amnesty for serious international crimes. She saw the SJP accord as an "important step toward the end of the armed conflict," adding, "Any practical and genuine initiative that permits the achievement of this laudable objective and that pays homage to justice as a fundamental pillar of a sustainable peace is of course welcomed by the Prosecutor's Office."

ICC prosecutorial policies developed years ago seemed to rule out considerations of peace.⁷ But even then, they allowed consideration of victims' interests.⁸ This should include consideration of future victims. If peace is not achieved in Colombia, one thing is certain: there will be more victims – many more.

Most recently, the ICC has expressed sensitivity to the complex relation between peace and justice. Choosing to make a public statement on the occasion of the International Day of Peace, September 21, 2015, the Court stated through its President the following: "Justice for atrocity crimes, both retributive and restorative – taking into account the interests of the victims and affected communities – is an important factor for long-term stability in post-conflict societies ..." The Court's recognition of both "retributive and restorative" justice could augur well for the Court's assessment of the SJP, in the event the Prosecutor were to make a request to the ICC to permit her to open an investigation.

⁶ *CPI ve 'con optimismo' exclusión de amnistías por crímenes graves*, EL TIEMPO, September 24, 2015.

⁷ ICC Prosecutor, *Policy Paper on Interests of Justice*, Sept. 2007, pp. 8-9, accessible at http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf

⁸ The ICC Prosecutor's "Office will consider issues of crime prevention and security under the interests of justice, and there may be some overlap in these considerations and in considering matters in accordance with the duty to protect victims and witnesses ..." *Id.*

Non-repetition:

As part of the broader peace process, the SJP is by definition designed to contribute to non-repetition: the FARC will demobilize, disarm, and will no longer exist as an armed group. The FARC will be literally incapable of continuing to act and to commit crimes as in the past.

Of course, individual (former) members of the FARC may commit crimes. But if they do, the SJP provides that they will lose the benefit of any special treatment and can be sent for trial and sentenced to 20 years in prison.

On both the collective and individual dimensions, then, the SJP respects victims' right to non-repetition.

CONCLUSION

Viewed integrally and in the context of a negotiated peace following decades of civil war, the Special Jurisdiction for Peace, in my opinion, meets applicable international standards to respect victims' rights to truth, reparations, justice and non-repetition with regard to serious international crimes allegedly committed by the FARC.

Sincerely,



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