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*“TRANSITIONAL JUSTICE IN COLOMBIA AND THE ROLE OF THE
INTERNATIONAL CRIMINAL COURT”*

Conference organized by:

Universidad del Rosario, El Tiempo, Cyrus R. Vance Center for International
Justice, Hanns Seidel Foundation, United Nations in Colombia, International
Center for Transitional Justice and Coalition for the International Criminal Court.

Bogota, Colombia

13 May, 2015

Introduction

Opening remarks

I thank Marie-Claude Jean-Baptiste for her kind introduction.

I am grateful for the chance to speak at this conference on “Transitional Justice in Colombia and the Role of the International Criminal Court”.

We all owe a debt of gratitude to the Universidad del Rosario, the Cyrus R. Vance Center for International Justice and those others who are sponsoring this conference, which comes at an important moment in the peace process in Colombia.

In the peace negotiations, issues of transitional justice have assumed importance.

Moreover, the Rome Statute of the International Criminal Court has set new parameters of relevance for resolving conflicts.

Notwithstanding continuing academic interest in the interface between “peace and justice”, the relationship between peace and justice is a settled issue under the Rome Statute.

Once a State joins the Rome Statute system, it accepts that justice is an integral part of conflict resolution and the creation of a sustainable peace.

The issue for the ICC Prosecutor, but most importantly for State Parties to the Rome Statute, is how to meet the requirements of justice under the Statute while achieving lasting peace and stability.

Respecting transitional justice in Colombia, I hope to clarify the role of the ICC.

The role of the Court has not been without some public controversy and it is time to put that role into its proper perspective.

As Deputy Prosecutor of the ICC, I speak for the Prosecutor and her Office and my remarks will focus particularly on the role of the Office.

I should emphasize that the Prosecutor is a separate organ of the ICC, entirely separate from the Registry of the Court and the Court's judiciary.

I am not speaking for the ICC judges or the ICC as a whole, but on behalf of the Prosecutor.

Overview of the position of the ICC Prosecutor

Let me begin with an overview: by conveying a clear and consistent message on transitional justice issues, the Prosecutor of the ICC hopes to play a positive and constructive role.

Colombia is a State Party to the Rome Statute of the ICC.

States Parties to the Rome Statute have undertaken the primary responsibility to investigate and prosecute crimes within the jurisdiction of the Court.

These crimes include war crimes and crimes against humanity of the sort that are alleged to have been committed by all sides in the armed conflict in Colombia.

Where a State Party fails to discharge its duties under the Rome Statute, then the ICC, as the "court of last resort", must intervene.

In her preliminary examination of the situation in Colombia, therefore, one of the duties of the ICC Prosecutor is to determine whether national authorities have instituted genuine proceedings against those individuals most responsible for the most serious crimes.

If so, then the cases are inadmissible before the ICC.

Transitional justice measures offer broad scope.

However, the measures Colombia adopts should advance the objectives of the Rome Statute, if they are to honour Colombia's commitment under the Statute to ensure that the most serious crimes do not go unpunished.

Outline of presentation

At the outset of my remarks, I will take a moment to speak about the establishment of the ICC and what this has meant for Colombia.

I will then address the responsibilities of the Office of the Prosecutor in transitional justice processes, referring particularly to the preliminary examination that the Prosecutor opened over ten years ago on the situation in Colombia.

I will refer to certain of our findings so far and their implications for transitional justice in this country.

In particular, I will consider some of the transitional justice measures foreseen in the Legal Framework for Peace, namely, the possibility of suspended, reduced or alternative sentences for war crimes and crimes against humanity.

I will also touch on amnesties for so-called “political crimes”.

Finally, I speak about the “interests of justice”, a consideration in the Rome Statute that allows the Prosecutor, in exceptional circumstances, to decline to open an investigation even when a reasonable basis exists to justify one.

Establishment of the ICC

In ratifying the Rome Statute in 2002, Colombia joined a community of nations that came together to establish the ICC as a permanent court to hold individuals accountable for their crimes, whatever their status or power.

That community now numbers 123 States Parties.

The creation of the ICC responded to a need.

The need was to stop genocide, crimes against humanity and war crimes from going unpunished – to end impunity.

Such mass atrocity crimes are the most serious crimes of concern to the international community as a whole, because they shock the conscience of humanity and endanger the peace, security and well-being of the world.

The effective prosecution of such crimes is meant to contribute to their prevention.

States Parties have thus created a common legal order to protect individuals from mass atrocities and to promote peace and international security.

As of 1 July 2002, the jurisdiction of the ICC extends to genocide, crimes against humanity and war crimes committed on the territory of States Parties or by State Party nationals.

By confronting massive crimes through the legal framework of the Rome Statute, the international community strives to ensure a sustainable transition from armed conflict to peace.

Under the Rome Statute, the jurisdiction of the ICC is complementary to that of States.

The ICC Prosecutor only investigates and prosecutes crimes, where States either cannot or will not do so.

In discharging her mandate, the Prosecutor acts independently and impartially, assessing the evidence and information available to her objectively.

In Colombia's situation, she wholeheartedly supports the efforts to end the armed conflict that has caused such suffering over five decades – and to do so in accordance with the principles of the Rome Statute to which Colombia has subscribed.

These principles reflect the consensus of the international community on the essential role that justice plays in creating sustainable peace, stability and security.

The ICC and transitional justice

Concept of “transitional justice”

The concept of “transitional justice” embraces a full range of processes that societies employ to deal with the legacy of past human rights abuses and to achieve accountability, justice and reconciliation.

To fulfil these aims, transitional justice commonly resorts to four measures:

- criminal prosecutions,
- truth commissions,

- reparations programs, and
- institutional reforms.

Institutional reforms may include the vetting or dismissal of police, military and government officials, as well as various other mechanisms to prevent the recurrence of crimes.

Transitional justice is not a special kind of justice, but simply an approach to achieving justice in a time of transition from state oppression or a condition of armed conflict.

Role of the ICC in transitional justice

While the ICC Prosecutor bears in mind the application of other components of transitional justice, such as truth commissions or reparations programs, her mandate obviously relates to that first component, namely, criminal prosecutions.

Her focus specifically is upon prosecution of international crimes, such as criminal conduct amounting to war crimes or crimes against humanity under the Rome Statute.

A situation of transitional justice only engages the mandate of the ICC Prosecutor, if the authorities of the State concerned are not themselves conducting genuine proceedings for such crimes.

Only where the State is unable or unwilling to act can the Prosecutor exercise her jurisdiction – and then she is under a duty to do so, a duty imposed by the Rome Statute.

I close this part of my talk by remarking that, although the Office of the Prosecutor is an organ of an international judicial institution, that institution – the International Criminal Court – is also an integral part of the judicial system of Colombia.

Colombia made it so, by becoming a State Party to the Rome Statute and by thus subscribing to the principles and values that the ICC upholds.

Preliminary examination of the situation in Colombia

The Office of the Prosecutor opened a preliminary examination of the situation in Colombia in 2004.

A preliminary examination is not an investigation; it is an information-gathering process under the Rome Statute that permits the Office of the Prosecutor to determine matters of jurisdiction and admissibility.

In light of the criteria in the Rome Statute, the Prosecutor determined that a reasonable basis did exist to believe that war crimes and crimes against humanity had been committed in Colombia from the time the jurisdiction of the Court began.

However, no investigation was opened, because the principle of complementarity of jurisdictions came into play.

In an interim report released in November 2012, the Office of the Prosecutor stated that, although a reasonable basis existed to believe that Rome Statute crimes had been committed by the FARC, the ELN, the national army and the paramilitaries, national proceedings were on-going in relation to these alleged crimes.

For this reason, the Office considered the cases to be inadmissible before the ICC at that time.

However, since alleged new crimes within the ICC's jurisdiction were being reported and national proceedings were still on-going, the Office took the view that closing the preliminary examination would be premature.

The preliminary examination remains open to this day.

Representatives of the Office of the Prosecutor meet regularly with the Colombian authorities to consult on justice issues.

Colombia, as a State Party to the Rome Statute, has engaged with the Prosecutor in a positive approach to complementarity.

Our Office continues to inquire into relevant national proceedings to determine whether those most responsible for the most serious crimes alleged to have been committed by all parties to the conflict are being brought to account.

The interim report of 2012 described our principal focus to include sexual or gender-based crimes, forced displacement of civilian population and the killing of civilians staged to look like combat deaths, commonly called “false positives”, as well as actions relating to support for paramilitary groups.

The Office also reported that it would follow legislative developments that could have an impact on national proceedings relating to Rome Statute crimes.

These legislative developments included the Legal Framework for Peace and legislation then pending to reform the military justice system.

It appeared to the Prosecutor that those within the FARC and ELN, who were alleged to be the most responsible for the most serious crimes, had been the subject of genuine national proceedings.

This conclusion was reached on the basis of sentences passed by Colombian judicial authorities on FARC and ELN leaders for conduct relevant for the ICC.

The conclusion was, however, made subject to the appropriate execution of the sentences.

In applying the Justice and Peace process, national authorities appeared to have made meaningful progress investigating and prosecuting alleged crimes of paramilitaries, despite difficulties prioritizing cases.

However, sexual and gender-based crimes alleged to have been committed in the armed conflict were a prominent feature of the paramilitary cases, and national authorities appeared to have made scant progress in investigating these crimes.

Cases involving “false positives” raised a further concern in the mind of the Prosecutor.

The Office noted in its interim report that investigations had been initiated into “false positives” incidents.

Nevertheless, proceedings had until then failed to focus on persons who might bear the greatest responsibility within the military hierarchy for the crimes alleged.

The widespread victimization resulting from the practice of “false positives” means that continued failure to inquire into responsibility at the highest levels of military authority will affect the view the ICC Prosecutor takes on the admissibility of such cases before the Court.

There must be genuine progress in investigations of “false positives” cases at the national level.

We remain in touch with the Attorney General and his office on these and the other matters.

The Prosecutor has the duty to examine information pertaining to all parties to a conflict in any given situation, including that in Colombia.

On the issue of transitional justice – so important in the current peace talks from the perspective of the victims of the conflict – the question arises:

- What mechanisms can be put in place to ensure that those most responsible for the most serious crimes are held accountable, in accordance with Colombia’s obligations under the Rome Statute?

The answer to this question concerns the Office of the Prosecutor of the ICC in the preliminary examination, because of how a peace settlement might affect the conduct of national criminal proceedings, past and present.

How a peace agreement affects national proceedings will have an impact on the Office’s assessment of the admissibility before the ICC of cases arising out of the situation in Colombia.

I acknowledge that the question raised has much wider implications for Colombia and the Colombian people.

However, I confine my remarks, as I must, to the narrower issue of what the Prosecutor must do in discharging her responsibilities under the Rome Statute in relation to the situation in Colombia.

On the issue of admissibility, the judges of the ICC have held that the Prosecutor must determine whether the same persons who might be investigated and prosecuted before the Court are subject to genuine national proceedings for substantially the same conduct.

The charges brought at the national level need not be labelled in the same way as Rome Statute crimes are, provided the underlying conduct is substantially the same.

From the perspective of the ICC, investigations and prosecutions, where warranted by the evidence, should usually occur against those most responsible for the most serious crimes.

Under the Rome Statute, genuine national proceedings occur where the proceedings

- are not undertaken merely to shield persons concerned from criminal responsibility;
- do not suffer from an unjustified delay that is inconsistent with an intent to bring the persons to justice; and
- are conducted independently and impartially in a way that is consistent with the intent to bring the persons to justice.

If these criteria of genuineness are met, then the cases are inadmissible before the ICC and the Prosecutor will not intervene.

An assessment of genuineness necessarily relates to specific national proceedings in given cases, not to transitional justice mechanisms or the national judicial system as a whole.

The assessment embraces all of the relevant stages of the particular proceedings, from investigation to trial and appeal.

Where a conviction results from the proceedings, the assessment of genuineness also includes the matter of sentence.

This is why, in the interim report on its preliminary examination, the Office of the Prosecutor viewed the national proceedings carried out against FARC and

ELN leaders, who were convicted *in absentia*, as genuine – “subject to the appropriate execution of sentences.”

Sentences in national proceedings and their compatibility with the Rome Statute

Sentencing objectives for international crimes

Measures that have been the subject of discussion in Colombia, and are foreseen in the Legal Framework for Peace as possible features of future transitional justice, involve suspended, reduced or alternative sentences.

Would such sentences be compatible with the complementarity provisions of the Rome Statute?

While 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.

National laws need only produce investigations, prosecutions and sanctions that support the overarching goal of the Rome Statute system of international criminal justice – to end impunity for mass atrocity crimes.

Effective penal sanctions may thus take many different forms.

They should, however, serve appropriate sentencing goals, such as public condemnation of the criminal conduct, recognition of victims’ suffering, and deterrence of further criminal conduct.

Such goals, in the context of international criminal law, protect the interests of victims and vindicate basic human rights.

Suspended sentences

I will deal first with suspended sentences.

In its own proceedings, the ICC seeks to impose sanctions that are proportionate to the gravity of the crimes and the degree of responsibility of the convicted persons.

At the national level, a sentence that was manifestly inadequate, in light of the gravity of the crime and the degree of responsibility of the convicted person, could vitiate the apparent genuineness of the proceedings.

For example, should existing sentences earlier imposed by national judicial authorities be suspended, the convicted persons would effectively serve no sentence at all.

Suspending sentences for those most responsible for war crimes and crimes against humanity would amount to shielding the persons concerned from criminal responsibility.

It could also suggest that proceedings were conducted in a manner that was inconsistent with an intent to bring the persons concerned to justice.

So important were the implications of sentence suspension for the Prosecutor's assessment of the admissibility of cases before the ICC, that in 2013 the Office conveyed the position I have just outlined to the Colombian authorities.

This was done confidentially and in advance of formal negotiations on the sentencing issue in the peace talks.

The step was prompted by our concern to alert the national authorities to our interpretation of the provisions of the Rome Statute in a timely way, and not after the fact, in view of the Government's stated interest in negotiating a peace agreement that was compatible with the Rome Statute.

Reduced sentences

I come now to the question of reduced sentences.

The Office of the Prosecutor has conveyed no specific position on reduced sentences, since the range of possibilities remains speculative.

Whether a reduced sentence was compatible with Rome Statute principles would depend upon the particular circumstances of the case.

These circumstances could include transitional justice measures designed to end armed conflict, for example, by requiring the convicted person to fulfil certain conditions, such as

- an acknowledgement of criminal responsibility,
- demobilization and disarmament,
- a guarantee not to repeat the conduct,
- full participation in the process of establishing the truth about serious crimes,
- a possible temporary ban from taking part in public affairs,
- and so on.

Such measures might justify reducing a sentence that was otherwise proportionate to the gravity of the crime and the degree of responsibility of the perpetrator.

Considerations such as these figured in the Prosecutor's assessment of the national proceedings carried out within the Peace and Justice framework.

Despite the difficulties and criticisms that the Peace and Justice process encountered, including the very low range of sentences, the Office of the Prosecutor has not found that the proceedings violated complementarity norms in the Rome Statute.

I am not holding up the Peace and Justice Law as a model.

I am merely pointing to it as an illustration of the wide margin that States enjoy when deciding on mechanisms designed to establish truth and that are also consistent with the Rome Statute goal of ending impunity for the most serious crimes.

It is our understanding that Colombia is drawing lessons from its experience with the Peace and Justice process in order to improve upon it, going forward.

Alternative sentences

The Legal Framework for Peace also contemplates the possibility of alternative sentences.

This category encompasses a wide range of custodial and non-custodial measures, involving differing levels of restrictions upon liberty, supervision and obligations.

It would be speculative for the Office of the Prosecutor to comment on the potential implications under the Rome Statute of alternative sentences, without knowing the details of what specific sentences were contemplated.

In assessing specific national proceedings, the Office would be obliged to consider a range of factors to determine whether sentences were consistent with a genuine intent to bring the convicted persons to justice.

Evaluating whether a sentence was manifestly inadequate would involve considering a number of factors.

These factors would include:

- the usual national practice in sentencing for Rome Statute crimes,
- the proportionality of the sentence in relation to the gravity of the crime and the degree of responsibility of the offender,
- the type and degree of restrictions on liberty,
- any mitigating circumstances,
- the reasons the sentencing judge gave for passing the particular sentence,
- and so on.

In the end, the question will be whether alternative sentences, in the context of a transitional justice process, adequately serve appropriate sentencing objectives for the most serious crimes.

The answer to that question will depend on the sort of sentences that are contemplated, when weighed against the gravity of the crimes and the role and responsibility of the convicted persons in their commission.

The category of “those most responsible” and amnesties

Two further issues have generated discussion and debate in Colombia:

- the adoption of case selection criteria that would limit prosecutions to those deemed to be in the category of “those most responsible”; and
- the granting of amnesties for so-called “political crimes”.

I would like to clarify how we would approach these two matters within the legal framework of the Rome Statute.

“Those most responsible”

In Colombia, the Legal Framework for Peace foresees the possibility of conditionally dropping prosecutions against demobilized members of armed groups who do not fall within the category of “those most responsible”.

I understand this particular category to apply to persons who were in a position of power and influence over actions and events.

By way of background, I note that the duty of States to prosecute war crimes and crimes against humanity existed before the Rome Statute came into being, and this pre-existing duty is recalled in the Statute’s preamble.

The Rome Statute sets up a permanent international criminal court to exercise jurisdiction when a State fails to discharge its duties.

The Statute contains no limitation on prosecutions based on the level of authority the perpetrator occupied.

However, in light of the global reach of the ICC’s jurisdiction, the statutory provisions governing its operations, and practical logistical constraints it faces, the Office of the Prosecutor adopted a policy of investigating and prosecuting those most responsible for the most serious crimes.

As a matter of prosecutorial discretion, therefore, our investigations and prosecutions usually affect persons at the highest echelons of authority, who are alleged to have directed, financed, or otherwise organized Rome Statute crimes.

The Office, as a matter of prosecutorial strategy, will sometimes investigate and prosecute mid-level perpetrators, or even notorious low-level perpetrators, in an effort to reach those most responsible for the most serious crimes.

The focus generally, however, is upon the highest level perpetrators.

The differences between the ICC's mandate and that of national judicial systems means, however, that ICC prosecutorial strategy cannot be taken as authority for how national jurisdictions should determine who to investigate or prosecute.

Nevertheless, the Prosecutor's admissibility assessment will be limited, as a practical matter, to those potential cases coming within the scope of our policy of investigating and prosecuting those most responsible for the most serious crimes.

Amnesties

Respecting amnesties for so-called "political crimes", such as rebellion, sedition or treason, the Office of the Prosecutor takes no view, because such crimes do not fall within the ICC's jurisdiction.

The ICC's jurisdiction extends to genocide, crimes against humanity and war crimes, nothing else.

Amnesty for conduct that amounted to Rome Statute crimes would raise very different issues, of course; but otherwise amnesty is not an issue of concern for the Prosecutor.

Interests of justice

Before concluding, I would like to touch on the notion of the "interests of justice".

The "interests of justice" under the Rome Statute would allow the Prosecutor to decline to open an investigation, despite the existence of a reasonable basis for one, in certain exceptional circumstances.

This provision has generated some confusion.

It has also been invoked in discussions here in relation to the Colombian situation.

The Office of the Prosecutor has developed an approach on how to apply the concept of the interests of justice, which I should explain.

However, it is only where a case is determined to be admissible before the ICC that the “interests of justice” question comes into play.

In other words, if a case satisfies jurisdictional criteria, no genuine national proceedings render it inadmissible, and it is of sufficient gravity, then the Statute requires the Prosecutor to consider the interests of justice before opening an investigation.

She must assess whether, taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

This is a countervailing consideration which the Prosecutor would only invoke in exceptional circumstances.

Considerations of the interests of justice, however, are entirely separate from those relating to complementarity.

Complementarity pertains to admissibility: if national proceedings meet the complementarity requirements of the Rome Statute, that’s the end of it – the case is inadmissible before the ICC.

It is only when the case is determined to be *admissible* that a question may arise about the interests of justice.

In assessing the interests of justice, the Prosecutor is obliged by the Rome Statute to consider the interests of victims and the gravity of the crimes – these are the two factors that the Statute provides for expressly.

These two factors thus figure most prominently in the Prosecutor’s policy on how the interests of justice should affect her decision whether to open an investigation.

This is why considerations of peace and security will ordinarily fall outside of the scope of the interests of justice formula in the Rome Statute.

How we interpret the interests of justice formula is explained in the Office's policy paper on the subject.

Moreover, although the prosecution of mass atrocity crimes should promote sustainable peace, the States Parties to the Rome Statute created the ICC as a judicial institution and not as a peace-making institution.

Peace-making is the responsibility of other bodies, such as the United Nations Security Council and, of course, States themselves.

Note too that the Rome Statute empowers the Security Council to defer an ICC investigation, if it determines that the investigation would jeopardize international peace and security.

For her part, the ICC Prosecutor has a duty to proceed when the criteria of the Rome Statute so dictate.

In Colombia, the deterrence of war crimes and crimes against humanity, and a measure of justice for victims, must be central concerns in the discharge of her mandate.

Conclusion

In concluding these remarks, I would like to underscore once again the Prosecutor's support for Colombia's efforts to end the armed conflict in this country, in accordance with the principles and values that the States Parties have enshrined in the Rome Statute.

These principles and values reflect the belief that justice must play an integral part in creating sustainable peace, stability and security.

The international legal framework created by the Rome Statute emphasizes the vital importance of ending impunity for the perpetrators of the worst crimes.

This framework cannot be suspended or ignored as a matter of expediency.

That same framework does, however, offer flexibility to States striving to deliver justice in post-conflict situations.

Transitional justice measures can, and should, accord with the objectives of the Rome Statute.

The Prosecutor has a statutory mandate, which the States Parties have given her that she must strive to fulfil.

She must honour her obligations under the Rome Statute, just as Colombia must fulfil its responsibilities as a State Party.

She has placed her Office at the disposition of Colombia to offer any assistance that is within her province to offer to ensure that the cycle of impunity is broken, and war crimes and crimes against humanity alleged to have been committed during the armed conflict do not go unpunished.

Thank you.

JKS