Kirsten Ainley

The great escape? The role of the international Criminal court in the Colombian peace process

Blog entry

Original citation: Ainley, Kirsten (2016) *The great escape? The role of the International Criminal Court in the Colombian peace process.* Justice in Conflict (13 Oct 2016)

The Great Escape? The Role of the International Criminal Court in the Colombian Peace Process.

Kirsten Ainley

13th October 2016

https://justiceinconflict.org/2016/10/13/the-great-escape-the-role-of-the-international-criminal-court-in-the-colombian-peace-process/

As the shock of the referendum result in Colombia dissipates, there is an inevitable search for culprits. How can it be that this opportunity to end a fifty-year civil war has been squandered? The guilty parties must be found – former President Alvaro Uribe, Human Rights Watch, or perhaps the weather? One of the actors which has long been criticised in terms of its effects on the prospects for peace and accountability in Colombia is the International Criminal Court (ICC). But to what extent can the ICC be held responsible for the fate of the peace process between the Colombian government and the FARC?

Before setting out the details of ICC's role, it's worth questioning whether the referendum result is a catastrophe. A 'Yes' vote seems, on the surface, to be the right result, and the Yes campaign was supported by the current government, the leaders of the FARC, a wide range of NGOs, regional governments, the US government (who seem willing to prop up the peace financially), the ICC Prosecutor and many of the Colombian electorate – particularly those in areas most affected by conflict. But peace may not be worth having at any price, and one doesn't have to buy Uribe's 'fight to the death' position to reject the current deal as going too easy on war criminals — on all sides of the conflict. If the Colombian electorate has really voted against the peace deal because a large proportion of it is dissatisfied with the accountability provisions contained therein, then this is a very significant moment, and a big challenge to some of the existing scholarship on peace and justice. Critics of international criminal law have tended to assume that populations will favour peace even at the cost of impunity, and that international actors (international courts and institutions, human rights NGOs and so on) are the ones who impose their own values that justice must be done no matter what the effects are upon peace processes. Yet many in the Colombian electorate seem to have voted to some extent in favour of accountability at the expense of peace. For all that observers might disagree with their views, it is not straightforwardly mistaken to have voted as they did.

What is the role of the ICC in all of this? For an institution which is expected to be staunchly principled – pursuing justice though the heavens may fall – it has been remarkably pragmatic when dealing with Colombia. The Colombian conflict was in the midst of its most violent period (1996-2002) when the Rome Statute was drafted. Paramilitary groups were carrying out massacres of civilians, thousands of people were assassinated and thousands more were kidnapped (mostly by FARC and the ELN) or disappeared. The FARC's biggest military victories also took place during this period, and drawn-out peace talks failed. There existed significant evidence of a long list of probable war crimes and crimes against humanity, and a government that seemed unwilling and incapable of holding

anyone to account for these crimes. Colombia was identified by Luis Moreno Ocampo, upon taking office, as one of three countries in which the gravest of crimes within the jurisdiction of the Rome Statute were being committed. However, because national proceedings of a fashion were underway in Colombia, the ICC's Office of the Prosecutor (OTP) focused on Uganda and the Democratic Republic of Congo. Later, in June 2004, the OTP launched a preliminary examination into the situation in Colombia (an examination that was made public in 2006) and, in March 2005, the Prosecutor informed the government of Colombia that he had received information on alleged crimes in Colombia that could fall under the jurisdiction of the Rome Statute. However, an official investigation has never been initiated, despite the harms caused by the war continuing to increase: by 2013, the war has resulted in more than 220,000 deaths, around 80% of whom were civilians, and the displacement of more than 5 million people, making Colombia home to the world's second largest population of internally displaced people (behind only Syria).

The ICC has been criticised both for doing too little, ie for failing to progress from preliminary examination to investigation, and also for doing too much, that is, for interfering in the peace process. The truth is rather more prosaic: the OTP has done what it sensibly could, in the face of enormous challenges to Colombia and to the Court itself as a fledgling institution, to achieve its mandate. Its actions have contributed to the drafting of a peace agreement few would have predicted to be possible, and have also developed a model of how to use the threat of ICC action to help to support domestic justice initiatives. There is much to be learned from the ICC's dealings with Colombia, and many of the lessons are about what the OTP got right.

Indeed, the OTP's response to the situation in Colombia has been surprisingly nuanced. It identified early on that crimes in the jurisdiction of the ICC had been committed and indicated, through repeated assertions that the Court would step in if Colombian trials did not satisfy Rome Statute requirements, that there were no interests of justice that would mitigate against investigating the situation. However, the OTP did not rush to claim jurisdiction over cases, despite having scope to do so under Article 17 of the Rome Statute (which, arguably, would have been the proper course of action). Article 17 states that cases are inadmissible at the Court when they are being investigated or prosecuted by a State which has jurisdiction over them, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. In the face of evidence suggesting that Colombian justice mechanisms did not meet admissibility standards of a genuine attempt to investigate and prosecute, the OTP chose to wait and see if they would do so in time rather than attempt to take over the cases. In fact, the OTP remained engaged in the Colombia situation for over a decade: gathering information on alleged crimes committed, requesting information about investigations under the Justice and Peace Law (JPL), conducting visits to meet State officials, NGOs and victims, and facilitating contacts between lawmakers in Colombia and independent legal experts. And when the peace process looked to be favouring peace-with-impunity over peace-with-justice, Bensouda reminded Colombia of its Rome Statute obligations.

This is not to say that the Court's approach, or the justice programme in Colombia, was ideal. Critics of domestic Colombian processes are right that the implementation of the JPL has been very disappointing – few paramilitary figures have been sentenced, and many ex-paras continue to operate in organised crime networks. Many inside the OTP have been troubled by the amnesty-like quality, in practice, of the JPL, and the Prosecutor recognised publically in 2011 that existing investigations and prosecutions were not genuine or in good faith. And under the current peace deal most crimes on all sides are likely to remain unavenged. But the ICC has been part of a process, however flawed, which led to the establishment of a Victims' Law, a reparations program, a land restitution procedure and a National Center for Historical Memory. The ICC supported the Santos administration in its attempts to deal with the conflict through law and negotiation rather than escalating force, in part by helping to strengthen its resolve when negotiating the accountability section of the peace deal. Assuming that the ceasefire continues to hold — which seems likely as both sides have incentives to continue to pursue the deal — the ICC looks to have contributed positively to the situation in Colombia.

It appears that the wait-and-see approach might have been the best one for the Court as well as for Colombia. The ICC did not end up mired in the Colombian war – one of the most complex conflicts in recent history. A few trials would have done next to nothing to confront the root causes of the conflict. Instead, they would have risked derailing a fragile peace process. The OTP did not have to make decisions over who to prosecute – decisions which would have risked antagonising the US, a powerful ally of Uribe, whose government was potentially implicated in war crimes. And, extraordinarily, the ICC, seems to have escaped much censure in the fallout of the referendum 'No' vote. By staying involved in the Colombian situation without imposing itself by issuing arrest warrants or trying cases, the Court has helped to keep the focus on domestic approaches to peace and justice. The success of such approaches may well be inversely correlated with the number of international bodies which can be blamed for stumbles along the way, so the ICC is sensible to maintain some distance. And who knows, if the accountability provisions in the peace deal are revisited in further negotiations, the OTP could quietly congratulate itself that serious trials will take place in Colombia for crimes committed during the war – an outcome which seemed impossible only a few years ago.