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Human Rights Watch Analysis of Colombia-FARC Agreement

Under the agreement announced by government and FARC negotiators in Havana on December 15, 2015, a new “Special Jurisdiction for Peace” – made up of a Peace Tribunal and Judicial Panels that determine which cases go to trial – will be established to handle “grave violations of human rights and humanitarian law” committed by FARC guerrillas.[i] The new jurisdiction would also cover crimes committed by state agents that are “related to” the armed conflict and “connected” to it.[ii] According to Defense Minister Luis Carlos Villegas, these would include the systematic execution of as many as 3,000 civilians – known as “false positive” cases – committed by army brigades across Colombia between 2002 and 2008.[iii] On December 19, the government released a set of “guidelines,” describing the terms applicable to state agents.[iv]

The agreement sets out a regime of sanctions to be used by the tribunal that do not reflect accepted standards of appropriate punishment for grave violations and make it virtually impossible that Colombia will meet its binding obligations under international law to ensure accountability for crimes against humanity and war crimes.
I. Punishment for Perpetrators?

Colombia has an obligation under international law to provide punishments for human rights violations and serious violations of the laws of war that are proportionate to the gravity of the crimes.[v] The practice and statutes of international tribunals show that this principle requires imprisonment – deprivation of liberty – for crimes against humanity and war crimes.[vi]

The less the conditions of punishment in the agreement resemble those of actual deprivation of liberty – including limited areas of confinement, and effective control and supervision of those detained – the more likely it is that Colombia will be in violation of its obligation to provide adequate punishment.

Alternatively to prison?

The agreement states categorically that perpetrators who confess to atrocities will be exempt not only from prison or jail, but also from any “equivalent” form of detention.[vii] They will instead be subject to “sanctions” that have a “restorative and reparative function” – as opposed to a punitive one – and entail carrying out “projects” to assist victims of the conflict.

The only “restrictions on freedoms and rights” that the confessed perpetrators will face are ones “that are necessary for [the] execution” of these restorative and reparative sanctions.[viii] (Perpetrators who refuse to confess, provide incomplete confessions, or confess only after a trial is underway will face prison sentences.)

Restrictions on movement?

Confessed perpetrators will apparently be required to reside in the places where the sanctions will be carried out.[ix] While the agreement establishes that their whereabouts will be monitored, it appears to allow them to engage in any movement that is “compatible with the fulfilment of the sanctions.”[x] The agreement even allows the possibility of movement that is “not compatible with the fulfillment of the sanction,” provided that it is authorized by authorities within the Special Jurisdiction for Peace.[xi] The agreement does not place any limits (such as medical necessity) on what types of non-consistent travel could be authorized.

Duration of sanctions?


According to statements by the Colombian government – including the joint statement with the FARC on September 23 announcing a preliminary agreement – confessed perpetrators would be subject to sanctions lasting five to eight years. However, the new agreement appears to allow them to be released from any restrictions on their liberty in an even shorter time.

The new agreement also refers to a five-to-eight-year range for sanctions to perpetrators that had a “decisive participation” in the worst and most representative crimes, but it qualifies the five-year-minimum with language that appears to suggest that it refers specifically to the reparative and restorative projects. Then it states that a determination could be made that the sanctions have been carried out based either on “a pre-established period or instead according to results, such as, for example, the completion of the construction of a certain infrastructure [project].”

While the agreement states that such a determination will be “without prejudice to the duration of the sanction imposed by the tribunal,” this caveat would not appear to prolong the restrictions on liberty, given that these restrictions would no longer be “necessary” for carrying out the completed restorative and reparative project.

**Consequences for non-compliance?**

In September, the government stated that confessed perpetrators who failed to comply with the conditions imposed by the Peace Tribunal would lose the benefits of the special jurisdiction. But the new agreement does not include any such language. It does state that perpetrators who fail to make full confessions will be denied benefits, and it mandates a system of verification of compliance with sanctions, including “appropriate monitoring and supervising mechanisms” and “periodic” reports to the Peace Tribunal.

However, the agreement does not refer to any consequences for confessed perpetrators who fail to comply with the sanctions, thus leaving open the possibility that they will be able to continue enjoying the benefits of the special jurisdiction even if they disregard the conditions ordered by the Tribunal.

**II. Criminal Responsibility of Military Commanders?**
Under international law, military commanders can be found criminally liable for a human rights crime carried out by their subordinates if it can be shown that they had effective control of the subordinates, had knowledge or reason to know about the commission of the crime, and had the means to prevent the crime and/or ensure it was properly investigated.[xviii]

The agreement provides a definition of command responsibility that is very similar to the established definition in international law.[xix] However, it contains two ambiguous phrases that could potentially be interpreted to provide loopholes that would allow military commanders within the Colombian armed forces and the FARC to avoid any accountability for atrocities committed under their watch.

First, the agreement provides that liability on the basis of command responsibility requires “knowledge based on the information at their disposal before, during and after the realization the respective conduct.”[xx] Under international law, commanders’ knowledge includes both actual knowledge and constructive knowledge – that which they should have known or had reason to know. It is essential that both forms of knowledge are covered by the scope of command responsibility set out in the agreement and to be applied by the tribunal.

Second, the wording of the agreement is that liability also requires “the effective control of the respective conduct.”[xxi] While “effective control” is an essential element of command responsibility, under international law control refers to control over subordinates who have committed the offending conduct, not over the specific actions themselves. It is essential that the correct legal definition and scope of “effective control” be used by the tribunal.

The Constitutional Court has already explicitly recognized the form and scope of command responsibility liability in international law and contained in the Rome Statute of the International Criminal Court when it upheld Colombia’s ratification of the statute.[xxii]

Failure to adhere to proper international law interpretation would mean commanders could contend that they are not liable, per command responsibility, because there is no evidence to prove that they had either effective control over the acts or actual knowledge of the crime. This would place Colombia in violation of its international obligations.

III. Restrictions on Holding Political Office?
Under Colombian law, perpetrators of crimes against humanity should be barred from holding or running for office while serving their sentences.[xxiii] However, the agreement states categorically that confessed perpetrators will not be subject to any restrictions on their political rights, including the right to run for political office.[xxiv] The government and the FARC will negotiate reforms to the Constitution to make this possible.

Human Rights Watch submits that nobody who is serving a sentence upon conviction of a war crime, crime against humanity, or serious human rights violation should be able to run or hold public office while serving that sentence.

### IV. An Independent Tribunal?

For any judicial process to be credible and legitimate, the body interpreting and applying the law must be independent, structurally and in practice, with sufficient safeguards to ensure it is free from undue political interference or influence by the parties to the matters its must resolve.[xxv]

The agreement provides no such guarantees. It does not indicate how the members of the Special Jurisdiction – including the Peace Tribunal – will be selected, nor by what criteria, or even the basic safeguards to be used in developing criteria to secure an effective, independent, and impartial tribunal. It states only that the FARC and the government will establish the mechanisms and criteria for selection “by mutual agreement and before the signing of the final accord.”[xxvi] While the agreement does expressly preclude the direct participation of the parties in the selection process, it does not preclude them from creating mechanisms and criteria that may give them undue influence over who is selected.

The lack of guarantees regarding the independence of the Peace Tribunal are particularly troubling given the gravity of the crimes over which it has jurisdiction and the obligations of justice owed to the victims. The tribunal will amongst other things be responsible for resolving many of the crucial questions outlined above, if they are not previously reformed.

The tribunal’s powers under the agreement include determining which “restraints of liberty are necessary to ensure compliance” with sanctions, as well as establishing the “content,” “conditions,” and “effects” of sanctions and the place where they will be served.[xxvii] Moreover, several Judicial Panels of the Special Jurisdiction for Peace will have “the broadest powers” both
to “establish priorities” and to “adopt criteria of selection” of cases in order to ensure an efficient
and agile management of cases.[xxviii] The agreement provides that the Judicial Panels
must “take into consideration” that there should not be impunity for “grave and representative”
crimes, a category not defined in the agreement.[xxix] While the agreement does not describe the
legal situation of perpetrators not selected for prosecution, the government has announced that
state agents who do not have a “major responsibility” in the “worst and most representative
crimes” could have their sentences suspended or face no prosecution.[xxx]

[i] Acuerdo sobre las Víctimas del Conflicto [Agreement on the Victims of the Conflict],
December 5, 2015, http://www.altocomisionadoparalapaz.gov.co/procesos-y-
conversaciones/pro... (accessed December 19, 2015), p. 23.
[ii] Agreement on the Victims of the Conflict, p. 26 (“The Justice part [of the agreement] will also
be applicable to state agents that committed crimes related to the armed conflict and connected
to it. Such application will be carried out in a different manner, granting an equitable, equilibrated,
simultaneous and symmetrical treatment.”)
[iii] “Penas por falsos positivos podrán ser revisadas por Tribunal de Paz: MinDefensa,” Blu Radio,
rev... (accessed December 19, 2015).
[iv] “Mindefensa y Minjusticia firmaron compromiso sobre justicia para agentes del Estado,”
Ministerio de Defensa, December 19, 2015,
https://www.mindefensa.gov.co/irj/portal/Mindefensa/contenido/noticiamdn... (accessed
December 21, 2015).
[v] See e.g. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or
ratified by Colombia on December 8, 1987, art. 4; Inter-American Court, Manuel Cepeda case,
Judgment of May 26, 2010, Inter-Am Ct.H.R., Series C. No. 213, para. 150; Inter-American Court,
Heliodoro case, Judgment of August 12, 2008, Inter-Am Ct.H.R., Series C. No. 186, para. 203; Inter-
American Court, Rodríguez Vera et al case, Judgment of August 14, 2014, Inter-Am Ct.H.R., Series C.
No. 287, para. 459; International Criminal Court, The Office of the Prosecutor, Report on


[vii] Agreement on the Victims of the Conflict, p. 40 (“The Special Jurisdiction for Peace [SJP] will establish the conditions of effective restraints of liberty that are necessary to ensure the fulfillment of the sanction, conditions that under no circumstance will be understood as jail or prison nor the adoption of equivalent measures of detention.”).

[viii] Agreement on the Victims of the Conflict, p. 45 (“The System’s sanctions ... will have a restorative and reparative function as well as restrictions on freedoms and rights, such as freedom of residence and movement, that are necessary for their execution.”).

[ix] Agreement on the Victims of the Conflict, p. 46 (“The sanctions establish will include the places where those that must carry out projects will live. Such places will adequate conditions of dignity and habitability”).

[x] Agreement on the Victims of the Conflict, p. 41 (“The places where the sanctions will be carried out will be subject to the monitoring of the system.... The movements for carrying activities in accordance with the fulfillment of the sanction will be monitored by a national or international body agreed to by the parties. The movements of the sanctioned individuals should be compatible with the fulfillment of the sanctions.... A body will be created to verify the compliance of the sanctions. Such body will also issue the necessary authorizations for movement that is not compatible with the fulfilment of the sanctions.”).

[xi] Ibid.

[xii] Comunicado conjunto # 60 sobre el Acuerdo de creación de una Jurisdicción Especial para la Paz [Joint Communiqué # 60 regarding the Agreement for the creation of a Special Jurisdiction for Peace], September 23, 2015, https://www.mesadeconversaciones.com.co/sites/default/files/comunicado-c... (accessed
December 19, 2015), p. 26 (“The penalties of those who recognize very serious crimes will have a minimum duration of 5 years and a maximum of 8 years of effective restraint of liberty, under special conditions.”).

[xiii] Agreement on the Victims of the Conflict, p. 39 (“The sanctions by the SJP, which will be imposed against those who recognize the truth and [their] responsibility before the Judicial Panel of Acknowledgement of Truth and Responsibility, regarding certain very serious offenses, will have a minimum duration of fulfillment of the reparative and restorative functions of the sanction of five years, and a maximum of eight years.”) (emphasis added).

[xiv] Agreement on the Victims of the Conflict, p. 46 (“It will be determined that their execution is carried out during a pre-established period or instead according to results, such as, for example, the completion of the construction of a certain infrastructure [project], without prejudice to the duration of the sanction imposed by the tribunal in their case.”).

[xv] Ibid.

[xvi] Oficina del Alto Comisionado para la Paz, “Q&A: Special Jurisdiction for Peace,” September 23, 2015,


[xvii] Agreement on the Victims of the Conflict, pp. 23, 37, 40.

[xviii] Prosecutor v. Delalić, International Criminal Tribunal for the Former Yugoslavia (ICTY), Case No. IT-96-21-T, Judgment (Trial Chamber), Nov. 16, 1998, para. 346. Although the above description accurately captures current customary international law on command responsibility, the doctrine has been codified slightly differently in various international agreements. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 86-87; Statute of the International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991 (ICTY Statute), art. 7(3); Statute of the International Criminal Tribunal for Rwanda (ICTR Statute), art. 6(3); Statute of the Special Court for Sierra Leone (SCSL Statute), art. 6(3); Rome Statute of the International Criminal Court (Rome Statute), art. 28.

[xix] Agreement on the Victims of the Conflict, p. 29 (“The responsibility of members of security forces for the actions of their subordinates must be based on the effective control of the respective conduct; on the knowledge based in the information at their disposal before, during and after the realization the respective conduct, as well as on the means they had at their disposal to prevent, if already occurred, promote the corresponding investigations.”). See also Agreement on the Victims of the Conflict, para. 59 (on command responsibility for FARC guerrillas).

[xx] Ibid.
[xxi] Ibid.
[xxii] Constitutional Court of Colombia, Sentence C-578 of 2002. See also Constitutional Court of Colombia, Sentence SU-1184 of 2001.
[xxiii] Colombian Constitution, arts. 179, 197, 304 and temporary article 67.
[xxiv] Agreement on the Victims of the Conflict, p. 27 (“The imposition of any sanction in the ... [Special Jurisdiction] will not bar [anyone] for political participation nor will it limit any right, active or passive, of political participation. The parties will agree appropriate constitutional reforms.”).
[xxvi] Agreement on the Victims of the Conflict, p. 42 (“The parties will establish by mutual agreement and before the signing of the final accord, the criteria and mechanisms for selection and appointment of the Judges of the Judicial Panels and Chambers, the members of the Unit of Investigation and Accusation and the Executive Secretariat. These cannot be selected directly by the parties to the Dialogue Table.”).
[xxvii] Agreement on the Victims of the Conflict, p. 40 (“the SJP will determine the conditions of effective restraints of liberty necessary to ensure compliance with the sanctions... The sentences and resolutions established under the special rules of integral system’s component of justice will establish in a precise manner the content of the sanction, the place where it will be served, as well as the conditions and effects of the sanctions for crimes that cannot be pardoned.”).
[xxviii] Agreement on the Victims of the Conflict, p. 33 (“To ensure the efficient and agile functioning of the component of justice, the Judicial Panel will have the broadest powers to organize its tasks, create work commissions, establish priorities, gather similar cases and define in what order it will deal with them, as well as to adopt criteria of selection and decongestion. In doing so, it will take in consideration the need to avoid to avoid impunity of grave and representative actions, as well as to avoid the congestion of the Tribunal.”). See also, Agreement on the Victims of the Conflict, pp. 34, 36.
[xxix] Ibid.
[xxx] “Mindefensa y Minjusticia firmaron compromiso sobre justicia para agentes del Estado,” Ministerio de Defensa, December 19, 2015, https://www.mindefensa.gov.co/irj/portal/Mindefensa/contenido/noticiamdn... (accessed December 21, 2015) (“The Judicial Panel of Legal Situations will be in charge of establishing the legal situation of the state agents that participated in the armed conflict and did not have a major
responsibility in the worst and most representative crimes. In these cases, regarding those who comply with the conditions of the System, the Special Jurisdiction could apply, depending on the responsibility, measures to establish the legal situation, including, for instance, suspending the execution of the sentence and renouncing to criminal prosecution, among others.”).