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The Limits of a Peace Agreement: An Analysis of the Havana Agreements

*by Eduardo Bertoni**

I. Introduction

After many years of internal armed conflict, the government of Colombia and the former Revolutionary Armed Forces of Colombia (FARC) signed the "Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace" (Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera)[1] in 2016 in Havana, Cuba, lending the Agreement it's colloquial name. The Agreement was the culmination of many frustrated attempts to achieve peace throughout the 80's and the 90's. In 1984, then-President Belisario Betancur initiated the first peace agreements. In 1998, former president Andrés Pastrana promoted a new attempt towards a peace agreement. This initiative did not prosper until, in 2002, former president Uribe Vélez initiated negotiations for another peace agreement. The Havana Agreement resulted from different attempts, all of which sought to diminish violence and generate a lasting peace for Colombia.

Chapter 5 of the Havana Agreement bears the title "Agreement regarding Victims of the Conflict: 'Comprehensive System of Truth, Justice, Reparation and Non-Repetition' including the Special Jurisdiction for Peace; and Commitment to Human Rights," and occupies a large portion of the treaty's full text.[2] A careful reading of the text in Chapter 5 reveals the meticulousness with which the negotiators endeavored to align the commitments with international human rights standards, particularly concerning the maxims of the field of transitional justice.

II. The Relevant Standards

A. The Inter-American System for the protection of Human Rights

The Inter-American Human Rights system's current jurisprudence adopts a well-established stance regarding the incompatibility of norms exempting responsibility and the duty to investigate grave violations of human rights.[3] In countless opinions,[4] the Inter-American Court of Human Rights (IACtHR) has ruled that amnesty, prescription dispositions, and exemptions of responsibility that hinder the investigation and criminal sanction of those responsible for grave human rights violations are inadmissible. In the case of Almonacid Arellano y otros v. Chile,[5] the IACtHR evaluated both the absence of an investigation as well as the lack of penalties against those responsible for the extrajudicial

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1 *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera* (Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace), Nov. 24, 2016, S/2017/272 Annex II A/71/365/Add.7 para. 2 [hereinafter Peace Agreement]. Accessed in English at: https://www.peaceagreements.org/viewmasterdocument/1845.

2 *Id*. at 132–203.

3 On this point one may consult the Cuadernillo de Jurisprudencia N° 15: Justicia Transicional, published by the IACHR in Spanish. https://biblioteca.corteidh.or.cr/adjunto/39023.

4 *See, for example*, *Corte Interamericana de Derechos Humanos v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. ___ (Sept. 26, 2006); *Caso Myrna Mack Chang Vs. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 101, 276 (Nov. 25, 2003). *Caso 19 Comerciantes v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, 262 (July 5, 2004); *Caso de la "Masacre de Mapiripán" v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, 304 (Sept. 15, 2005); *Caso La Cantuta Vs. Perú*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 162, 152 (Nov. 29, 2006); *Caso de la Masacre de La Rochela Vs. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 163, 294 (May 11, 2007); *Caso Masacres de Río Negro v. Guatemala*. Preliminary Exception, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 250, 283 (Sept. 4, 2012).

5 Judgment from September 26, 2006. Preliminary Exceptions, Fondo, Reparaciones y Costas.

killing of Mr. Almonacid Arellano. Similarly, in Gomes Lund y otros ("Guerrilha do Araguaia") v. Brasil,[6] the State's responsibility in the forced disappearance of victims was not at issue. Instead, the IACtHR evaluated whether, in that case, the State had met its obligation to conduct a criminal investigation that would try and sanction those responsible for the forced disappearance of seventy victims and the extrajudicial execution of Maria Lúcia Petit da Silva. In that case, the court found proof of the violation of the rights to judicial guarantees and protection due to the absence of an investigation, trial, and eventual sanction against those responsible for the case's facts. In Gelman v. Uruguay[7], where the so-called 'Law of Expiration' had been the argument to impede the investigation and sanction of grave human rights violations, the court found that "[t]he mere existence of a democratic regime does not guarantee, per se, the permanent respect towards International Law, including International Human Rights Law, which has been considered even by the Inter-American Democratic Charter."[8]

In Masacres de El Mozote y lugares aledaños v. El Salvador,[9] the court's jurisprudential posture remained unchanged. However, given that in the Havana Agreement, and in certain opinions from the Special Justice for Peace, only Judge Diego García Sayán's vote is cited. He states (in English):

> A context such as the one outlined here–and that is described in more detail in the judgment–is different from the one that preceded the other amnesty laws to which the Court's case law has referred. Thus, as previously indicated, the Court's analysis and reasoning has characteristics that led it to incorporate elements of international humanitarian law elements to produce an interpretation that harmonized with the obligations established in the American Convention, in order to make a juridical assessment of amnesty in a context such as this one.[10]

Furthermore, he reinforces his idea of a possible exception to the duty to investigate and adequately sanction, stating that "the acknowledgment of responsibility by the most senior leaders can help promote a process of clarifying both the facts and the structures that made such violations possible." [11] The Judge continues to acknowledge that other forms for justice could be considered, such as reparations or public acknowledgment of responsibility.[12]

In no previous case, not even in the case of the Mozote massacres,[13] did IACtHR take as valid considerations, for example, penalties that were not in accordance with the grave violations incurred by the perpetrator. Take Manuel Cepeda Vargas v. Colombia[14] case, for example.[15] That is, due to its own jurisprudence, the court has yet to close the door to analyzing the proportionality of penalties or the selection of cases that the Inter-American System may investigate under the Havana Agreement.

B. The Special Rapporteur's Clear View on Human Rights Protections

The universal system for the protection of human rights provides many standards for acceptable mechanisms for justice, truth, and reparation. The Inter-American System has constantly considered and

6 Judgment from November 24, 2010. Excepciones Preliminares, Fondo, Reparaciones y Costas.

7 *Gelman v. Uruguay*, Series C No. 221, Merits and Reparations (I/A Court H.R. Feb. 24, 2011), full opinion can be assessed in Spanish at: https://www.corteidh.or.cr/docs/casos/votos/vsc_vio_221_ing.doc.

8 *Cfr*. OAS General Assembly, Resolution AG/RES. 1 (XXVIII-E/01 of September 11, 2001.

9 [*Massacres of El Mozote and surrounding areas v. El Salvador*] (*The Mozote Massacres Case*), Series C No. 252, Interpretation of the Judgment on Merits, Reparations and Costs (I/A Court H.R. Oct. 25, 2012) [hereinafter The Mozote Massacres Case]; *see also* WOLA, On 40th Anniversary, Search for Justice in El Mozote Massacre Must Continue, Washington Office on Latin America (Dec. 9, 2021), https://www.wola.org/2021/12/el-mozote-justice-40-years/ (discussing the general background ot the Mozote massacre and the ongoing fight for legal remedy)

10 The Mozote Massacres Case, *supra* note 10 at 4, ¶ 16 (Garcia Sayán, J.; concurring).

11 *Id*. at 7, ¶ 31.

12 *Id*.

13 *Id*.

14 Judgment from May 26, 2010. Preliminary Exceptions, Fondo, Reparaciones y Costas.

15 IPU, Manuel Cepeda Vargas, Columbia, Inter-Parliamentary Union (May 30, 2014), https://www.ipu.org/news/features/human-rights-cases/2014-05/manuel-cepeda-vargas-colombia (explaining the circumstances surrounding the assassination of a Colombian government official).

referenced these. In this section, it is necessary to mention that, in 2021, the Special Rapporteur on truth, justice, reparations, and guarantee of non-repetition, Fabián Salvioli, presented his report on "Accountability: Prosecuting and punishing gross violations of human rights and serious violations of international humanitarian law in the context of transitional justice processes."[16] The report details the scope of the judicial obligation to sanction said violations and the limitations faced when seeking to comply with this obligation. As for the duty to investigate and sanction, the report is conclusive, especially in transitional justice processes. The Rapporteur affirms that "States need not choose between truth and justice. Transitional justice mechanisms should not be seen as an alternative to the criminal responsibility of perpetrators of serious violations of human rights and international humanitarian law."[17]

III. Chapter 5 of The Havana Agreement[18]

The "Final Peace Agreement," signed in 2016 in Havana, resulted from various attempts to negotiate a lasting peace agreement. It sought to diminish violence and generate a lasting peace for Colombia.[19] According to its Preamble, the Agreement's objective is to "end the armed conflict and build a stable and lasting peace."[20] Focusing on Chapter 5, the Agreement's text[21] explains that it creates the Comprehensive System of Truth, Justice, Reparation and Non-Repetition, which contributes to the fight against impunity combining judicial mechanisms that allow for the investigation and sanction of grave human rights violations and the grave infractions against International Humanitarian Law (IHL), with complimentary among extrajudicial mechanisms that contribute to the clarification of truth, the search for missing persons, and the reparation of the harm caused to peoples, collectives, and entire territories.[22] The so-called "Comprehensive System"[23] combines judicial mechanisms for investigating and sanctioning grave human rights violations and grave infractions of IHL. These processes are carried out in accordance with the terms stated in the Special Jurisdiction for Peace and include extrajudicial mechanisms whose objective is to clarify the truth behind what occurred.[24]

This "Comprehensive System" is composed of the Truth, Coexistence, and Non-Recurrence Commission; the Special Unit for the Search for Persons deemed as Missing in the context of and due to the armed conflict; the Special Jurisdiction for Peace; and Comprehensive reparation measures for peacebuilding purposes.[25] According to the official text,[26] the Truth, Coexistence and Non-Recurrence Commission is a temporary organism of an extrajudicial character that seeks to know the truth of what has happened and to contribute to clarifying the violations and infraction.[27] Several judicial panels for justice make up the Special Jurisdiction for Peace, including a Judicial Panel for Amnesty and Pardon and a Tribunal for Peace to administer justice and investigate, clarify, prosecute, and punish serious human rights violations and severe infringements of IHL.[28]

As for the concession of amnesties and pardons, the Agreement is explicit: Colombia's own constitution allows for granting amnesties or pardons for the crime of rebellion or other political crimes. Alongside this established reality, the Agreement proclaims:

> crimes against humanity, genocide, serious war crimes [. . .], hostage taking or other serious deprivations of freedom, torture, extrajudicial executions, forced disappearances, rape and other forms of sexual violence, child abduction, forced displacement and the recruitment of minors will all be ineligible for an amnesty or pardon, [. . .]. Common crimes unrelated to the rebellion shall also be ineligible for an amnesty

16 *See* Salvioli, Fabián, Rep. of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence U.N. Doc. A/HRC/48/60, at 1 (2021).
17 *Id.* at 5 (internal citations omitted).
18 *See* Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Gov't of Colom.-FARC, Nov. 24, 2016, https://www.peaceagreements.org/viewmasterdocument/1845 [hereinafter "Peace Agreement"].
19 *See, generally* Beittel, June S., Colombia's Peace Process Through 2016, R42982 at 1. https://crsreports.congress.gov
20 *See* Peace Agreement, *supra* note 19 at 1-2.
21 *Id*. at 132.
22 *Id*. at 136.
23 *Id*. at 132.
24 *Id*. at 153-188.
25 Peace Agreement, *supra* note 19 at 134.
26 *Id*. at 138.
27 The commission presented its final report in mid-2022 and stopped operating. *See* https://comisiondelaverdad.co/.
28 *See* Peace Agreement, *supra* note 19 at 138.

or pardon [. . .], in accordance with the Amnesty Law.[29]

As for investigating the crimes committed, the Agreement states that Colombia state has a duty to "investigate, clarify, prosecute and sanction serious violations of international human rights law or serious breaches of [IHL]."[30] To do so, the Commission establishes a mechanism to select cases via the Judicial Panel for Acknowledgement of Truth, Responsibility, and Determination of Facts and Conduct ("the Panel"). The Panel has two distinct functions: the first, verifying the competence of the Special Jurisdiction of Peace over cases[31] and the second, undertaking a selection and prioritization process to center on grave and representative cases.[32] This task is complex, and the Agreement establishes that the Panel will receive reports from official bodies,[33] non-profit organizations that work with victims or defend human rights, and others, to inform its decisions to impose responsibility for crimes committed. With these reports, the Panel can consider conduct that took place and, if grave violations are found, give notice to those involved so that they can decide whether or not to come forward to acknowledge truth and responsibility or whether to come forward to defend themselves from the charges made.[34]

Among its functions, the Panel can send cases to the Investigation and Prosecution Unit to proceed with the investigation and eventually with the accusation before the Tribunal for Peace, which imposes sanctions that vary depending on the perpetrators.[35]

IV. Analysis

This Essay does not aim to exhaustively or definitively analyze those standards in the Inter-American Commission on Human Rights (IACHR) and the universal system that the parties should have considered during negotiations for the Havana Agreement. Neither does it aspirate to inquire about the political difficulties and complex context that could have shaped the negotiations and then culminated in the Agreement. As such, a reasonable mind may see the Agreement as the best available result to achieve the peace Colombia has and continues to demand.

Nonetheless, as stated from the outset, and despite the efforts and good faith during negotiations, this Essay questions whether this Agreement will contribute to achieving these Systems' standards. An efficient accord should uncover the truth of what happened and provide justice for violations during the armed conflict. A commitment to truth and justice, among other things, is part of the minimum standards that the IACHR requires to validate these types of agreements.

Regarding investigations, the Agreement generates a mechanism that might be challenging to execute in practice if the organisms entrusted to investigate lack the required experience and resources. The Agreement includes what it labels "selection and decongestion criteria," without clarifying how these will be applied and if they would directly permit ceasing to investigate certain conducts. This ambiguity stems from the functions of the Judicial Panel for Determination of Legal Situations.[36] Those mechanisms are not expressly defined, and, on this type of issue, the IACHR had already expressed concern, as it is unclear which selection and decongestion criteria the Agreement's system will effectively implement.

As a result, it is questionable to agree with the idea of complying with the proportionality for these types of crimes, especially if one considers that Colombia applies much higher penalties in cases concerning an injury to judicial goods whose value is vastly inferior to those the Havana Agreement refers to. In this sense, it might be enough to consider the current Penal Code of Colombia and a recent draft to "Humanize criminal and penitentiary policy so as to contribute to the overcoming of the state of unconstitutional matters and dictating other provisions." This initiative includes modifications to the Penal Code to "humanize criminal

29 *Id*. at 161-62.
30 *Id*. at 157, ¶ 22.
31 *Id*.
32 Peace Agreement, *supra* note 19 at 164, 167, ¶ 48(s), (p).
33 For example, the Office of the Attorney General, the relevant body of military penal justice, the Commission of accusations in the House of Representatives or the organism that replaces it, the Controller General of the Republic, and any other jurisdiction operating in Colombia with pending investigations.
34 Peace Agreement, *supra* note 19 at 165.
35 *Id*. at 169, 182.
36 Peace Agreement, *supra* note 19 at 160, ¶ 33.

policy." According to all of this, the penalties in Colombia can reach up to forty or fifty years of prison.

Therefore, the standards on the proportionality of penalties are not met. The potential consequences of not meeting these standards are significant, raising serious questions about the Agreement's effectiveness. This is indeed only speculation. But insofar as that door remains open, it seems clear that the perpetrators of human rights violations during armed conflict will not have incentives to voluntarily present and declare themselves within the Agreement's dispositions to obtain its benefits. In other words, if someone who seeks to be charged to a lower penalty knows that in the future their case could be reopened, they are unlikely to contribute to the investigations. This baked-in potential lack of perpetrator cooperation is a pressing issue that needs to be addressed.

The current standards, if ratified, will not help sustain the Havana Agreements at an international level. If this speculation is true, the situation created by the Agreement could be even worse: the standards will not have achieved the objectives stated by those who negotiated and signed them. The future of the Agreement is uncertain, underscoring the need for further analysis and potential action.

V. Conclusions

Upon reading this Essay, one may have a pessimistic view of the future of the Havana Agreement. It is crucial to understand that the future of the Havana Agreement is not a simple story, nor is it inevitably doomed.

There is a risk of the IACtHR challenging the Havana Agreement, especially regarding the selection of cases to investigate and the imposition of sentences, but it may be overstated. If taken up, the IACtHR could evaluate the complex system outlined in the Havana Agreement and assess it in light of the international obligation of states to make all efforts to achieve peace. However, considering this aspect and IACtHR's responsibility to determine the proportionality of sentences, the likelihood of a court condemning the Colombian State for the structure of the Havana Agreement would be low at an international or regional level.

The risk of challenging the agreement is further reduced if one considers jurisprudential signals IACtHR has already made. IACtHR has made a clear distinction in handling cases involving armed conflicts, such as the Masacres del Mozote and Gelman[37] cases, compared to cases with no armed conflicts. This distinction suggests that the court will treat different instances differently. In the Members and Militants of Unión Patriótica v. Colombia[38] case, for example, the IACtHR explicitly states that:

> On the other hand, for this Court, regarding the logical lines of investigation, in several cases, particularly in more remote times, most of them were focused on the determination of individual responsibility without a systemic crime perspective. Notwithstanding the foregoing, in more recent times, and as recognized by the Commission, there has been a sophistication of the hypotheses of investigation both in the ordinary justice system and in the special jurisdiction of Justice and Peace, as well as in the Special Jurisdiction for Peace (JEP), which address the criminality against members and militants of the UP in a systemic manner.[39]

Ultimately, taking a stand on either the normative static or dynamic position seems more like a speculative act than a legal analysis. The future decisions of the Colombian courts and the IACtHR are far from certain. It is impossible to predict how these entities will rule, particularly in cases involving victims who

37 *Gelman v. Uruguay*, Series C No. 221, Merits and Reparations (I/A Court H.R. Feb.24, 2011), full opinion can be assessed in Spanish at: https://www.corteidh.or.cr/docs/casos/votos/vsc_vio_221_ing.doc.

38 *Caso Integrantes y Militantes de la Unión Patriótica v. Columbia* [*Members and Militants of Unión Patriótica v. Colombia*], Series C No. 515., Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs (I/A Court H.R. Jan. 24, 2024) (finding that "Columbia is responsible for the elimination of the Patriotic Union Political Party" (Unión Patriótica)), opinion can be accessed in Spanish at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_455_esp.pdf.

39 *Caso Integrantes y Militantes de la Unión Patriótica v. Columbia* [*Members and Militants of Unión Patriótica v. Colombia*], Series C No. 355, Preliminary Objections, Merits, Reparations and Costs, 130 ¶ 483 (I/A Court H.R. June 27, 2022), opinion can be accessed in Spanish at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_455_esp.pdf.

were not considered in the Colombian jurisdiction or disagreed with the sanctions imposed on their violators. The future of the Agreement and post-conflict Columbia is undoubtedly complex, and both pessimistic and hopeful perspectives provide insight into the potential trajectory of the Havana Agreement. The conclusions reached by the court's decisions and subsequent scholarly analysis will undoubtedly have significant implications for future post-conflict resolutions.