SYMPOSIUM ON THE COLOMBIAN PEACE TALKS AND INTERNATIONAL LAW

LEX PACIFICATORIA COLOMBIANA: COLOMBIA'S PEACE ACCORD IN COMPARATIVE PERSPECTIVE

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In this short piece, I open a conversation over how the Colombian Final Peace Accord provides evidence of, and a contribution to, a more general *lex pacificatoria* or "law of the peacemakers" *(lex pax* for short).[1] In light of the Accord's recent ballot defeat, I integrate into this assessment the merits of using a referendum to approve (in Colombia's case "affirm or deny") the Agreement as a whole. Throughout, I draw on a peace agreement database which has coded over one thousand four hundred peace agreements since 1990 for comparative insight.[2]

Lex Pacificatoria*: A New Law of the Peacemakers*

The practice of negotiating ends to conflict within states can be understood as producing a *lex pacificatoria* or "law of the peacemakers."[3] This *lex pax* arises from the attempt to fit the existing laws of war or of peace to the distinctive dilemmas that arise in transitions from conflict. These legal innovations clarify and extend existing international law as it applies to transitions. The *lex pax* is created by the interaction of both state and nonstate actors involved in the transition process, who respond to legal norms and try to craft solutions that comply with them in creative ways so as to respond to the distinctive dilemmas of peace-making. Other similar attempts to characterize the distinctive application of law in times of transition have argued that a new regime in the form of a *ius post bellum* or "law of the postconflict period," is at play.[4] In contrast, I have used the term *lex pacificatoria* that, like the concept of *lex mercatoria* (law of the merchants), suggests legal developments that have a more "intimated" existence rooted in a legalization of practice rather than a coherent and distinctive new legal regime.[5] The *lex pax* is not a new coherent distinctive legal regime, because that project is

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Originally published online 03 November 2016.

[1] Christine Bell, *Agreements: Their Nature and Legal Status*, 100 AJIL 373 (2006); CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA (2008).

[2] PA-X: PEACE AGREEMENTS DATABASE (initial version of provisions of women, available at www..peaceagreements.org, full version forthcoming 2017).

[3] Bell, *supra* note 1; BELL, *supra* note 1.

[4] Carsten Stahn, '*Jus ad bellum*', '*just in bello*' . . . '*just post bellum*'?—*Rethinking the Conception of the Law of Armed Force*, 17 EUR. J. INT'L L. 921 (2007).

[5] Cf. NEIL WALKER, INTIMATIONS OF GLOBAL LAW (2015).

neither desirable nor possible.[6] Rather, the *lex pax* has a more intangible quality and involves state and nonstate actors adjusting their behavior to the expectations of norms articulated by other international actors and domestic constituencies. They do so in ways that are given legal effect in peace agreement texts and, sometimes, later international standards and jurisprudence.

From this perspective, the Colombian Peace Agreement and its eventual success or failure is of global significance to peace processes in the future, and even to new norm creation and application.

Lex Pax Colombiana*: The Colombian Peace Agreement in Comparative Perspective*

Length and Style of the Agreement

The Colombian Peace Agreement—the latest in a long line—at nearly three hundred pages long (297), is the longest peace agreement produced in intrastate conflict. As such it has only a few close comparators, notably the South Sudan/Sudan Comprehensive Peace Agreement (2005) at 245 pages. Past Colombian peace agreements with armed groups (up until the agreements of this process) were at longest sixteen pages, reflecting agreements which focused on demobilization of armed groups in exchange for resources, and commitments to enable the conversion of armed combatants to political actors. They were limited in remit, although the process in the 1990s broadened by civil society, culminated in a detailed "peace agreement constitution" of 1991 which was 128 pages, and arguably forms the precursor to this peace agreement.

The length of the Colombian Agreement owes something to its negotiation style and process. Like the Sudanese Comprehensive Agreement, and the El Salvador Final Peace Accord (seventy pages), the final agreement brings together a series of issue-by-issue agreements (themselves of considerable detail), into a final unified comprehensive document which largely repeats the earlier documents but affirms them in final form. Like the Northern Irish peace process and the Ugandan peace process, the latest Colombian process between the government and the FARC moved forward on a "nothing is agreed until everything is agreed" formula.

This formula assists step-by-step agreement, which in this case has led successfully to a comprehensive agreement (although not, as we will see, to a successful referendum outcome). However, it also risks a long process with a lot of agreements that can fail at the final stage as happened in Uganda in the mid-2000s, where the Lord's Resistance Army initialed a series of issue-by-issue agreements which would have largely addressed and resolved the conflict with the Ugandan government, but then disappeared without signing any final overarching version. Reaching a final accord as Colombia did, whatever happened thereafter, remains a significant achievement.

New Colombian Lex Pax *Contribution: The "Slow Drip" Peace Process?*

Depending on its eventual success, there are several different ways in which the Colombian peace process (or peace processes) may come to be understood as historically significant, both within Colombia and as a contribution to a wider global peace-making practice. Colombia may be viewed as having developed a new type of "slow drip" process, where peace processes with particular armed groups, characterized at best as partial successes, can over time add up through gradual persistence and many stops, starts, phases, and mutations, to something approaching a comprehensive national political settlement. Whereas in the past the partial nature of these agreements seemed to dampen some conflicts and exacerbate others, their flaws can now also

[6] Christine Bell, *Of* Jus Post Bellum *and* Lex Pacificatoria*: What's in a Name?*, *in* JUST POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 181 (Jens Iverson et al. eds, 2014).

https://doi.org/10.1017/S2398772300003019 Published online by Cambridge University Press

perhaps be understood to always inform the next stage of the process with regard to what a fuller peace would require. The referendum's failure to garner sufficient support is a serious blow. However, given that the anti peace-agreement vote appears to have emanated from areas in which opposed right-wing or paramilitary communities were strong, also looks a little like "more of the same"[7]: yet another reaction and counter-reaction in a government-nonstate actor process developed through cumulative distinct processes with different nonstate actors which will now have to be addressed and hopefully extended, through other bilateral negotiations, in an ongoing "slow drip" dynamic that requires persistence.

A more pessimistic view of the peace process of course can be presented. This would suggest that the process might also be viewed as just one more failure in a peace process trajectory which reached a high moment in 1991, and then went on an almost twenty-five year detour, before finding a way to incorporate the FARC, and which must still struggle to find a way to incorporate all the relevant armed and nonarmed actors in one overarching political settlement. And perhaps multiple incremental peace processes which never track smoothly forward, can always be read as both exercises which enabled ultimate agreement, and unfortunate detours. The Northern Ireland Peace Agreement of 1998 was described as "Sunningdale for slow learners" in reference to a failed peace agreement in the early 1970s (which if it had been successful would have avoided thirty years of conflict).[8] Indeed most peace processes when viewed over a long duration have had many different peace initiatives and "peace processes" and have had to find a way back from setbacks. Unlike other contracts, when the peace agreement "contract" fails, it is not possible to simply walk away from the relationship or look for solutions to be imposed by a third party. At some point the parties have to come back and renegotiate the contract if the conflict is to be ended.

Participation and Breadth

The length of the Agreement may also be linked to its modes of participation and the breadth of issues which the Agreement addressed as a result. Like the Colombian Constitutional process in 1991—this process has been innovative in its mechanisms and breadth of participation.[9] Notably, inclusion was enabled by the Gender Subcommission and the range of international and domestic actors that engaged in the Havana negotiations. The breadth of participation has been matched by the breadth of coverage of issues and the detail in which they have been addressed. Agreement by agreement, the process has dealt with: comprehensive rural reform, political participation, illicit crops, victims and conflict termination, and a procedural issue dealing with implementation modalities. Some innovations deserve particular mention:

(1) Illicit crops and drugs: the Colombian Final Accord includes a detailed agreement on drugs which breaks new ground in addressing organized criminality in a peace agreement. This is somewhat of a new development in peace agreements, but not entirely so. Earlier Colombian peace agreements (1999) had addressed the issue, as have several interstate peace agreements, notably: Agreements in Afghanistan (2002-2012), the Malvinas/Falkland Islands agreements between the United Kingdom and Argentina, an Armenia Turkish agreement (2009), an Israeli Jordanian agreement and Israel-Palestine agreement (1994), and ceasefire agreements between the government and ethnic armed organizations in Myanmar (2011-12).

[7] Redacción de El Pais, *¿Por qué el centro del país voto No, pero Cali y el Valle se fueron por el Sí?*, EL PAÍS (Colom., Oct. 3, 2016).

[8] *On This Day, 9 December 1973: Sunningdale Agreement signed*, BBC.

[9] Kristian Herbolzheimer, *Innovations in the Colombian peace process*, NOREF REPORT (June 2016).

https://doi.org/10.1017/S2398772300003019 Published online by Cambridge University Press

(2) Women and diversity: the Colombian process leading to the Final Peace Accord was notable—both with respect to earlier Colombian processes and with reference to processes globally—for the comprehensive way in which it addressed women,[10] although arguments have been made that this provision galvanized church opposition to the referendum.[11]

(3) Sexual orientation: The Colombian Final Accord, like its earlier *Participatión Política* precursor, has what is arguably the first substantive provision of any peace accord on sexual orientation. While other past accords have referenced issues of sexual orientation some of these references have been negative (for example, a banning of same sex marriage in the "peace agreement constitutions" in Burundi (2005), Democratic Republic of Congo (2003), and Zimbabwe (2013)). The only other clearly positive reference was included in the Comprehensive Agreement on Respect for Human Rights and International Humanitarian law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines (1998)—where "sexual preference" was included in an equal rights provision. While notable, not least for how early it was, it falls far short of the Colombian treatment.[12]

(4) **Dealing with the past:** The Colombian Accord has the longest provision on dealing with the past of any peace agreement, with a complicated and elaborate mechanism. It is interesting to note the contrast between the sixty-three page victims agreement, and the five and a half line provision on amnesty in the South African "peace agreement" Interim Constitution (1993), which provided the basis for the Truth and Reconciliation Commission. The Colombian detail reflects: an attempt to work within the shadow the International Criminal Court; the complexity of past mechanisms agreed in other past processes with other armed groups, with which this process had to be squared; and the complex business of reconciling victims' needs and the demands of the respective parties to the accord.[13]

The Final Accord's Legal Status and Enforceability Mechanisms

The Agreement is also innovative in its attempts to provide for its own legal status and enforceability. Enforceability in any agreement is dealt with through a number of different techniques, many of which are used here, but at times with innovative Colombian twists and turns.

(1) A referendum for the Agreement as a whole: Referenda on peace agreements or to bring in "peace agreement constitutions" are a mechanism (but only one) for trying to widen the legitimacy of an agreement beyond the "elite deal" of the parties to the conflict. This is intended to both bind the parties to their commitments by linking them to a wider social contract, but also to bind in that wider society and constrain would-be "spoilers" of the deal. Referenda have been used in the Democratic Republic of Congo, Indonesia/East Timor, Iraq, Northern Ireland, and Somalia. The Northern Ireland Agreement was probably most similar in involving an agreement to endorse

[10] *See* Lina M. Céspedes-Báez, *Gender Panic and the Failure of a Peace Agreement*, 110 AJIL UNBOUND 183 (2016).

[11] *Id.*, see also new joint communication between FARC and Christian groups, on gender, *FARC y grupos cristianos llegan a puntos comunes sobre enfoque de género*, SEMANA (Oct. 29, 2016).

[12] *But see*, Roxanne Krystalli & Kimberly Theidon, *Here's how attention to gender affected Colombia's peace process*, WASH. POST (Oct. 9, 2016), for arguments that these provisions connected to the referendum "No" campaign.

[13] *See* Nelson Camilo Sanchez Leon, *Could the Colombian Peace Accord trigger an ICC investigation on Colombia?*, 110 AJIL UNBOUND 172 (2016); Juana Inés Acosta-López, *The Inter-American Human Rights System and the Colombian peace: Redefining the fight against impunity*, 110 AJIL UNBOUND 178 (2016).

or reject the peace agreement itself. Referenda on complex political arrangements that involve packages rather than clear "Yes" or "No" propositions are notoriously high risk.[14] Historically, an important and similar referendum on the transitional constitution in Spain (1978) enabled the transition but raised enduring controversy because of its lack of support by Basque and Catalan separatists. The Colombian process provided for a simple majority of votes for the referendum to be carried.[15] The victory of the "No" vote, however, has now posed a challenge to implementation, as I address further below.

(2) Attempts to fashion legal status for the Agreement: Achieving some form of "binding" status for a peace agreement is often a tricky issue in peace processes.[16] State and nonstate armed forces are often imbalanced in terms of the risk each must take on committing to a final accord: while the armed group commits to end violence permanently, the state retains its monopoly on the use of lethal force, and it alone has the ability to ensure that legal and constitutional commitments are implemented. For that reason, and also often for reasons of status, nonstate armed actors in particular often want a form of legal status for the peace agreement. In Colombia this was resolved by an interesting approach with a peculiar Colombian "twist." The Agreement itself is explicitly stated to be an agreement under Common Article 3 of the Geneva Conventions, 1949.[17] This move is not without international precedent: an agreement in Aceh was similarly stated to be a Special Agreement for the purposes of humanitarian law, and the Guatemalan Comprehensive Agreement on Human Rights (1994) excluded the possibility—indicating that without exclusion the agreement could have been automatically considered a Common Article 3 Special Agreement. In the 2016 Commentary to the Geneva Conventions, the International Committee of the Red Cross names a number of additional peace agreements which it views as Common Article 3 Special Agreements, despite the circumstance that those agreements do not state this in their text.[18] They include in this list the Humanitarian Exchange Accord between the FARC and the Government of Colombia (2004). International treaties and agreements on human rights ratified by Congress have a "priority" in domestic law (see Article 93) and a Constitutional Amendment approved by Congress on 7 July 2016 affirmed by the Constitutional Court (18 July 2016), approved a special legislative procedure for implementation of the Peace Accords, although this was conditioned on popular endorsement of the Agreement. Spoken of in Spanish as a "legal shield," interestingly (at least to myself!), public justifications of this Common Article 3/constitutional move,[19] including those of the government's chief negotiator when presenting the Agreement to the Constitutional Court[20], articulated it self-consciously as *lex pacificatoria* in action—capturing the idea of the legal status of the Agreement itself as somewhere "hybrid" between international and constitutional law. Howev-

[14] For the example of the recent "Brexit" vote in the United Kingdom, see Brian Wheeler & Alex Hunt, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS (Oct. 2, 2016); on referenda generally, see STEPHEN TIERNEY, REFERENDUMS: THE THEORY AND PRACTICE OF REPUBLICAN DELIBERATION (2012).

[15] Possibly requiring only 13% of all registered voters to vote "Yes"; see Juan Forero & Kejal Vyas, *Colombian Peace Plan Heads for Vote*, WALL ST. J. (Aug. 25, 2016, 7:06 PM).

[16] *See* Bell, *supra* note 1.

[17] *See* Laura Betancur Restrepo, *The Legal Status of the Colombian Peace Agreement*, 110 AJIL UNBOUND 188 (2016).

[18] *Commentary on Article 3: Conflicts not of an international character*, ICRC (2016).

[19] Arlene B. Tickner, Lex pacificatoria, EL ESPECTADOR (May 18, 2016, 12:14 AM).

[20] *Intervención del Jefe de la Delegación del Gobierno, Humberto de la Calle, en la Corte Constitucional*, PRESIDENCIA DE LA REPÚBLICA (Colom., May 26, 2016).

https://doi.org/10.1017/S2398772300003019 Published online by Cambridge University Press

er, the international and constitutional status, the constitutional court judgment, and the referendum result, now leave the Agreement's legal and political status somewhat unclear.

(3) Reciprocal commitments: Often peace agreements provide for staged reciprocal commitments and the Colombian Final Peace Accord uses this technique in terms of steps to be taken by the parties, and through a continued dialogue process focused on implementation and producing new implementation commitments. The referendum itself, however, constituted one of the commitments on which others were conditioned, indicating the limitations of this approach which can act as a brake on commitments the parties wish to continue to implement, as well as an enforcement mechanism.

(4) **Innovative peace agreement monitoring:** Monitoring was to take place in a number of ways, for example through reciprocity and UN involvement and an Implementation, Monitoring, Verification, and Dispute Resolution Commission of the Final Peace Agreement (*Comisión de Implementación, Seguimiento y Verificación del Acuerdo Final de Paz y de Resolución de Diferencias*). These are all fairly standard types of monitoring mechanism for peace agreements, albeit Colombian in their detail. A key unique provision was that the Kroc Peace Accord Matrix, a peace agreement database which focuses on implementation of comprehensive peace agreements, was to be developed and used to provide "in time" assessment of implementation of the Agreement.[21] This was perhaps the most curious Colombian twist on the *lex pax*: comparative research on peace agreement implementation itself becoming an adjudicative mechanism to ensure implementation.

Conclusion: Where to Go from here?

Inevitably many will wonder whether the referendum and the approach to the campaign was a wise one. Postreferendum analysis of reasons for the narrow "No" vote, has already pointed variously to a natural margin of error (which might support a recount),[22] the hurricane and low voter turn-out,[23] Uribe and fellow-traveller vested interests,[24] the opposition of groups such as Human Rights Watch,[25] and the Agreement's approach to gender.[26]

Was It Wise to Have a Referendum?

In peace processes, ceasefires are rarely just about ceasefires. Like the Colombian one, they often have constitutional dimensions and implications. Yet these agreements are agreed primarily between those who have been at the heart of the conflict including—as in this case—armed actors. The need for some sort of broader public legitimacy can therefore be very high, and a referendum can seem like a useful tool for achieving it. The clear risk is that with so many provisions and issues, people who are opposed to just one dimension of the Peace Agreement can end up voting against it. In Northern Ireland the argument that people should not

[21] *Peace Accords Matrix*, UNIVERSITY OF NOTRE DAME.

[22] Michael Spagat & Neil Johnson, *Colombia did not vote 'no' in its peace referendum—what the statistics reveal*, THE CONVERSATION (Oct. 4, 2016, 2:18 PM).

[23] Clea Broadhurst, *Why did Colombians reject Farc peace deal?*, RFI (last modified Oct. 4, 2016, 9:15 AM).

[24] Jan Pospisil, *Colombia: Don't they want peace?*, POLITICAL SETTLEMENTS RESEARCH PROGRAMME (Oct. 4, 2016).

[25] Greg Grandin, *Did Human Rights Watch Sabotage Colombia's Peace Agreement?*, THE NATION (Oct. 3, 2016).

[26] Krystalli & Theidon, *supra* note 12.

https://doi.org/10.1017/S2398772300003019 Published online by Cambridge University Press

"cherry-pick" the agreement was a strong campaign message for those who sought a "Yes" vote and was largely accepted by the voters.

Was It Badly Timed?

As regards timing, the Government had a difficult call to make—whether to move to a vote fast and try to secure a referendum quickly before any opposition to the agreement had time to mobilize and enthusiasm was at its height; or whether to move more slowly and build a campaign which could address doubts. Opting for the former now looks like a miscalculation, but the benefit of hindsight is a wonderful thing. The peace process itself had timetables for implementation built-in as necessary to the parties reaching agreement which had set the pace. And more time is not always a good thing where cementing of a peace agreement is concerned. Sometimes a long referendum campaign fuels discontent which moves the public away from, rather than towards peace. Delaying a referendum can open up a window in which "spoilers" to a peace agreement (on both sides) are incentivized to undertake a spectacularly violent acts which can undermine public trust (think the "real IRA's" Omagh bomb a few months after the referendum in Northern Ireland). Concerns regarding the need to move quickly to stabilize any fragile consensus must have been uppermost in the Colombian government's minds.

Where to Go from Here?

The no vote does pose a clear obstacle to implementing the Final Accord, and has to be taken seriously as an exercise in democracy. However, while "Yes" and "No" votes were finely balanced, the clearest majority was that of those who voted with their feet by not turning out. It is arguably this voice of the "silent majority" that requires further attention. The low turnout perhaps reflected the costs of the "slow drip" process which has quite literally worn people out, and exhausted their faith in peace processes.

It is easy to oppose peace agreements on the ground that there will be a better time to make a better deal. Colombia's own tortuous peace-making history indicates how this assumption is misplaced. It indicates how conflict dynamics tend to become more complicated and more difficult to resolve over time, rather than less so. Perhaps the most striking comparative lesson of Colombia for other conflicts is that the long-term costs of failure of successive peace agreements lie not just in the risk or actuality of a return to war, but more profoundly in the loss of faith of people in peace processes, peace agreements, and politics more generally as having capacity to change anything.