Colombia: Prosecution of False Positive Cases under the Special Jurisdiction for Peace

Human Rights Watch Analysis

On December 15, 2015, the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) guerrillas announced an Agreement on the Victims of the Conflict that creates a ‘Special Jurisdiction for peace’ in charge of handling “grave violations of human rights and international human rights law.”[i] The special jurisdiction would handle atrocities committed both by FARC guerrillas and by members of the Colombian armed forces. Four days later, the government announced a set of ‘guidelines’ describing the terms applicable to state agents. This analysis shows how the rules announced by the government and FARC could be used to ensure broad immunity for state agents who perpetrated war crimes or crimes against humanity, including creating a shield against prosecution for 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.

Are prosecutions of false positive cases in the ordinary justice system going to be transferred to the Special Jurisdiction for Peace?

In the absence of any enforceable guarantee otherwise, many, if not all, the investigations and prosecutions of false positive cases carried out by Colombia’s Attorney General’s Office likely will be transferred to the Special Jurisdiction for Peace.

The Agreement on the Victims of the Conflict states that the new jurisdiction will handle cases by the armed forces that are “related to the armed conflict and [were] committed in occurrence of it.”[ii] The guidelines for state agents broaden this provision by establishing that the Special Jurisdiction will have “exclusive jurisdiction” over crimes committed by state agents “in occurrence of the conflict, that were caused by the conflict, or [that were] directly or indirectly related to it.”[iii]
Colombian courts have already determined that hundreds of false positive cases were related to the armed conflict by trying such cases as “homicides of protected persons,” a crime defined under Colombian law as a type of homicide committed “in occurrence and during the development of the armed conflict.”[iv] Similarly, the Colombian Supreme Court has held that “there is no doubt that the so-called false positives… are closely linked to the internal armed conflict, since the conflict was a necessary condition for such excesses to take place.”[v]

Furthermore, several officials from the Colombian government—including the Minister of Defense and the Deputy Attorney General—have reportedly stated that all the false positive cases could be transferred to the Special Jurisdiction for Peace.[vi]

**Will the Special Jurisdiction for Peace prosecute all false positive cases?**

It is likely that many state agents directly implicated in false positive cases would not be prosecuted if the cases were transferred to the Special Jurisdiction.

As noted above, the guidelines announced on December 19 provide that the Special Jurisdiction will have “exclusive jurisdiction” over crimes committed by state agents directly or indirectly related to the conflict. They also provide that a Judicial Panel from the Special Jurisdiction will determine the legal position of state agents who did not have a “major responsibility” in the “worst and representative crimes,” and depending on their level of responsibility could grant them suspended sentences, other measures or waive criminal prosecution altogether.[vii]

Taken together, these provisions could mean that the Special Jurisdiction would only prosecute a limited number of cases of any crimes and a limited number of those responsible, while the prosecution of other cases and other perpetrators would be precluded. Effectively this creates the potential for broad immunity to be bestowed on a large number of state agents who bear direct responsibility for crimes, but may be deemed to not have “major” responsibility or be involved in cases that are the “worst and representative” crimes.

The legal consequences of these provisions violate international human rights standards in so far as they provide a de facto amnesty or immunity for perpetrators of serious crimes. The Inter-American Court on Human Rights, whose rulings are authoritative and binding for Colombia, has repeatedly stressed “that investigation into events must be conducted… in order to pursue, capture, prosecute, and convict all the material and immaterial authors.”[viii] The Office of the Prosecutor of the International Criminal Court (ICC) has stressed that the fact that it focuses on those “most responsible” as a matter of policy “cannot be taken as authority for how national jurisdictions should determine who to investigate or prosecute.”[ix]
Given the systematic character of false positive cases and their gravity, it is likely that the Special Jurisdiction for Peace will describe all false positives as “worst and representative” crimes. However, by referring to those who did not have a “major responsibility” in such crimes, the guidelines open the door to allowing numerous perpetrators in false positive cases—especially, those amongst the lower and middle ranks—to fully escape justice. That would strongly undermine investigations and prosecutions against thousands of members of the Colombian army.

**Will senior army officers be held accountable?**

Colombia’s Attorney General’s Office is currently investigating at least 16 active or retired army generals for false positive killings, including some under investigation for their alleged responsibility for crimes committed by troops under their control. Human Rights Watch has presented evidence that numerous generals could be allegedly responsible for false positive cases committed by their subordinates. At the moment, nine active or retired generals have been called to testify on their alleged participation on false positives, but none has been charged.

Generals involved in false positives will presumably be described as those with “major responsibility.” If that is the case, the Special Jurisdiction would not be able to drop their cases.

However, the definition of command responsibility included in the FARC agreement and in the guidelines for state agents could be used to allow generals tried before the Special Jurisdiction for Peace to escape justice for the crimes committed by troops under their control.

Under international law, military commanders can be held 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.

The definition of command responsibility included in the agreement contains two phrases that could be interpreted—in a manner inconsistent with international law—to allow military commanders within the Colombian armed forces 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.” 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.” 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.

**What punishment will officials face if they are convicted?**

Given the provisions that allow Judicial Panels to drop cases, it is likely that only a small portion of the hundreds of members of the armed forces that engaged in false positive killings will be effectively sanctioned.

The government has yet to fully define how state agents will be sanctioned, but it has stated that the sanctions will have the same duration and “nature” to those established for FARC members.[xvi] The guidelines for state agents provide that their treatment under the Special Jurisdiction will be “differentiated,” but “always equitable” to that governing participation by guerrillas.[xvii] Similarly, President Santos has “promised” that the armed forces will receive “any justice benefit that is given to the FARC.”[xviii]

Under the FARC agreement, perpetrators who confess promptly and fully to atrocities will be exempt not only from prison or jail, but also from any “equivalent” form of detention.[xix] Instead, they would be required to carry out “restorative and reparative” projects while being subject to very flexible “restraints to rights and liberties.” Such restraints of liberty are limited to those “necessary for [the] execution” of these restorative and reparative sanctions, and allow those sanctioned to carry out movements that are “compatible” with the fulfillment of the sanctions.[xx] The guidelines for state agents explicitly provide that state agents could also be subject to “restraints to rights and liberties.”[xxi]

The Colombian government has repeatedly stated that these sanctions would last five to eight years.[xxii] However, Human Rights Watch has shown that provisions in the agreement would appear to allow those responsible for atrocities to be released from any restrictions on their liberty in an even shorter time. [xxiii]

Moreover, a provision in the FARC agreement allows the Peace Tribunal to impose two-to-five year sentences for those who did not have a “decisive participation in worst and representative acts.”[xxiv] This provision could benefit senior officers responsible for false positives. They could easily argue that only the actual perpetrators of crimes had a “decisive” participation (not those responsible due to command responsibility)—and, meanwhile, there is a real risk that cases against actual perpetrators will
be dropped under the provision that allows Judicial Panels to drop the prosecution of those who did not have a “major responsibility.”

**Will those convicted in the ordinary justice system benefit from the Special Jurisdiction for Peace?**

Colombian courts have sentenced at least 610 members of the armed forces responsible for false positive cases, repeatedly convicting defendants to over 40 years in prison.[xxv] Under the FARC deal, a Chamber of the Peace Tribunal could replace such convictions for those included in the agreement.[xxvi] The Chamber could determine that the sanctions have already been fulfilled, potentially allowing dozens of perpetrators to be released.[xxvii]

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[ii] Agreement on the Victims of the Conflict, para. 32 (“The Justice part [of the agreement] will also be applicable to state agents that committed crimes related to the armed conflict and committed in the occurrence of it. Such application will be carried out in a different manner, granting an equitable, equilibrated, simultaneous and symmetrical treatment.”)

[iii] “Mindefensa y Minjusticia firmaron compromiso sobre justicia para agentes del Estado” [Guidelines on justice for state agents], Ministerio de Defensa, December 19, 2015, http://cgfm.mil.co/-/mindefensa-y-minjusticia-firmaron-compromiso-sobre-... (accessed March 25, 2016). (“The Special Jurisdiction for Peace will prevail over criminal, disciplinary and administrative proceedings regarding acts committed by members of the public force in occurrence of the conflict, that were caused by the conflict, or [that were] directly or indirectly related to it, assuming exclusive jurisdiction over such acts.”)


[v] Supreme Court of Justice, Criminal Chamber, Ruling of August 28, 2013, case number 36460, judge María del Rosario González Muñoz.

[vii] “Penas por falsos positivos podrán ser revisadas por Tribunal de Paz: MinDefensa,” [Sentences for false positives could be reviewed by the Peace Tribunal: Minister of Defense], Blu Radio, December 16,
Guidelines on justice for state agents, para. 9. (“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 worst and 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 waiving criminal prosecution, among others.”)


Data on Human Rights Unit investigations into extrajudicial killings as of December 2014, on file with Human Rights Watch.


[xvi] Agreement on the Victims of the Conflict, para. 44. (“Command responsibility of state agents for acts committed by their subordinates must be based on the effective control of the respective conduct; on the knowledge based on the information at their disposal before, during and after the respective conduct was carried out; as well on as the means available to prevent it and, if the conduct was carried out, promote the relevant investigations.”) See also Guidelines on justice for state agents, para. 7.

[xvi] Guidelines on justice for state agents, para. 5 (“The final configuration of the sanctions of the Integral System for State Agents will be proposed by the National Government before the signing of the Final Agreement. The duration of the sanctions –that can have a special, alternative or ordinary nature- that will be imposed to state agents will be the same as that defined in the Special Jurisdiction for Peace for all of those responsible [for abuses].”)

[xvi] Guidelines on justice for state agents, para. 3 (“Regarding state agents… their treatment [under the Special Jurisdiction for Peace] will be symmetrical in some aspects, different in others, but always equitable, balanced, and simultaneous.”)


[xix] Agreement on the Victims of the Conflict, para. 60 (“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.”)

[xx] Agreement on the Victims of the Conflict, pag. 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.”); Agreement on the Victims of the Conflict, para. 60 (“The movements of the sanctioned individuals should be compatible with the fulfillment of the sanction.”)
Guidelines on justice for state agents, para. 5 (“The sanctions to members of the public forces that entail a deprivation of liberty will be carried out in the establishments created for them… regarding sanctions that entail effective restraints of rights and liberties, different modalities of execution will be regulated.”)

E.g. 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-conjunto-60-ingles-1443452175.pdf (accessed March 17, 2016), para. 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.”)


Agreement on the Victims of the Conflict, para. 60 (“[new] rules will determine in which way the sanctions will be adjusted and for which cases there will be sanctions of less than five years for those who did not have a decisive participation in worst and representative acts, although they participated in them. In those cases, the sanctions will have a minimum of two years and a maximum of five years.”)


Agreement on the Victims of the Conflict, para. 58 (“The Chamber of Review will have the following purposes: (a) Convictions by the [ordinary] justice will be sent to the Chamber of Review, at request of the Panel of Legal Situations, so the Chamber decides… the respective sanction under the list of sanctions, and determines if the [defendant] has effectively fulfilled it, without prejudice to the satisfaction of the rights of victims to reparations and non-repetition.”)

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