



HUMAN RIGHTS CONSORTIUM



Institute of  
Commonwealth Studies



INSTITUTE FOR THE STUDY OF THE  
**A M E R I C A S**  
UNIVERSITY OF LONDON - SCHOOL OF ADVANCED STUDY

## ***In the Shadow of the ICC: Colombia and International Criminal Justice***

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### **Introduction**

Since 2002, the International Criminal Court (ICC) has taken a central but contentious role within the rapidly evolving international criminal law system. With 114 States parties to the Rome Statute, for its many supporters the ICC offers the promise of accountability for grave human rights violations in the face of domestic impunity, deters future violations, and assists conflict resolution by removing potential ‘spoilers’ of fragile peace processes. Detractors, however, challenge the ICC’s asserted deterrence effect and argue that in practice the ICC selectively applies international criminal justice against less powerful States, threatening to destabilize already precarious peace processes. This criticism is bolstered by the predominantly African focus of investigations initiated thus far by the ICC’s Office of the Prosecutor (OTP). These controversies have obscured the OTP’s increasing attention on another country with a history of armed conflict and human rights challenges: Colombia.

The Rome Statute entered into force for Colombia on 1 November 2002. Since 2005, the OTP has been following the situation there in order to decide whether to open an investigation into crimes alleged to fall under the ICC’s jurisdiction. In recent visits to the country, the OTP has focused on (a) the criminal proceedings in Colombia against the most serious alleged perpetrators, (b) the extradition of former paramilitary leaders to the USA on drugs charges, (c) the allegations that international support networks assist armed groups in Colombia; (d) the recruitment of child soldiers by armed groups; and (e) the Colombian military’s extrajudicial execution of civilians later presented as guerrilla fighters killed in combat (the so-called *falsos positivos* scandal). Within Colombia, the possibility of an investigation by the OTP, and eventual prosecutions before the ICC, has provoked intense debate in political and legal circles, and among civil society, victims and armed groups.

These developments raise urgent questions about any impending OTP investigation, particularly in terms of the impact of an ICC intervention on peace initiatives and efforts to hold perpetrators of mass atrocities to account within Colombia. A key strand of these domestic processes was Colombia’s adoption of a 2005 “Justice and Peace Law”, aimed at demobilising the illegal armed groups that have grown economically and politically powerful through the lucrative drugs trade. However, the implementation of this law has been criticised for its leniency towards the perpetrators of atrocities, as well as its shortcomings in securing reparation and safety for the victims and in clarifying the truth of these brutal events.

The conference engages with the profound themes of peace and justice that have been brought into sharp focus by Colombia’s ratification of the Rome Statute and the OTP’s strategy towards the country. In particular, from the perspective of ongoing ICC investigations into the violations committed during the Colombian armed conflict the conference engages with the core question of whether the pursuit of peace *and* justice in Colombia is inherently conflictual or whether efforts to address both can be reconciled within the broader context of processes of conflict resolution and democratisation.

## The ICC and Colombia

### *Impact of the ICC process on Colombia*

Colombia's ratification of the Rome Statute, and the OTP's ongoing interest in the country, has already had an important impact in Colombia that goes far beyond merely influencing domestic criminal law. The prospect of prosecutions before the ICC has played directly into the dynamics of the armed confrontation, including the recent demobilisations of right-wing paramilitary groups. Various high-level initiatives are being undertaken by the government to avoid Colombian military officials and their civilian counterparts being brought before the ICC, and the left-wing guerrilla groups equally appear to be engaged in damage-limitation measures. In tandem, heightened sensitivity around issues of justice and peace has developed across Colombian society, as different sectors re-evaluate their positions or build new forms of alliances, both in elite political circles and among the diverse victims of the armed conflict.

The conference will build upon and extend existing studies of the Colombian armed conflict. In exploring the empirical effects of the ICC process at the local level, the conference speaks to wider debates within the academic literature:

- Dynamics of armed conflict. Colombia is a good case study of how international laws and institutions actually affect events on the ground, which is particularly under-theorised in relation to combatants and other potential perpetrators of atrocities.
- Reparation and justice. The interaction between international and local processes of justice and reparation, especially in times of continuing armed conflict, is an area of substantial debate in current academic work. Key questions relating to the impact of the ICC process on legal and social processes in Colombia remain to be answered.

These questions regarding the impact of the ICC process have significance far beyond the academic sphere to inform the policy and practice of State, non-governmental and international institutions working on armed conflict, reparation and justice in Colombia and in other countries. Most directly, the conference will offer a solid empirical basis to the ICC Prosecutor for assessing the impact of his engagement thus far with Colombia and therefore refining his prosecutorial strategy in that country and elsewhere.

### *Challenges posed by Colombia for the ICC*

Simultaneously, Colombia represents a special challenge to the OTP. It has paradigmatic value both as a long-standing democracy with a sophisticated legal system and as the first country in the Western Hemisphere to be monitored by the OTP. These factors must be balanced against the extraordinary longevity and complexity of the violence in that country. Whilst atrocities remain a constant of this forty-year war, the armed confrontation has become increasingly fragmented and its nature blurred in recent years, especially in its crossover with the drug trade. This dynamic is further complicated by regional 'spill-over' effects as well as questions regarding the role of powerful North- and South-American States in the conflict.

Against this background the conference will engage actively with scholarship on international criminal law and the role and functioning of international institutions. The particular challenges that Colombia poses for the ICC offer to break new ground in these areas:

- Definition of international crimes. Our understanding of these crimes has been refined by the international jurisprudence relating to the ethno-political conflicts in

Rwanda and Yugoslavia; their application to other kinds of complex contemporary conflicts – such as Colombia – raises vivid new questions regarding interpretation.

- Complementarity for international criminal tribunals. Whilst scholars have long debated *in abstracto* the Rome Statute's novel complementarity provisions, Colombia represents an instructive case study of their application in the context of a developed legal system and 'shielding' measures such as the 2005 Justice and Peace Law.
- Interests of justice. Where the ICC has the legal basis to act the question is whether it *should*. Given its strategic importance, Colombia serves as a crucial counterpoint to preliminary work in Uganda on when an investigation 'would not serve the interests of justice' and how international institutions actually impact on conflictive situations.

These questions substantially broaden existing academic debate on the ICC process and Colombia, which has thus far been confined to a narrow assessment of whether the 2005 Justice and Peace Law ousts the ICC's complementary jurisdiction,<sup>1</sup> and their practical importance is immediately evident. In the face of such challenges, a firm and clear prosecutorial strategy on the part of the ICC Prosecutor is called for. The conference provides the theoretical and empirical contributions necessary for achieving this objective.

### Timing

The conference is designed to capture the intense interest that exists on this topic at the moment from both the Colombia and ICC perspectives.

### *Colombia at the crossroads*

The possibility of prosecutions before the ICC is a subject of constant and intense debate in Colombia and rarely far from the headlines. This reflects the strong underlying perception that the political future of Colombia itself hangs in the balance in various inter-related ways:

- The Colombian government's military campaign against the guerrilla groups is at a critical juncture;
- The outcome of recent paramilitary demobilisations is uneven;
- Justice for victims stands at the brink of collapse;
- Tensions remain with some neighbouring States
- Plans for a significantly increased US military presence in Colombia; and
- Hopes are high for the new Santos government that entered office in August 2010.

Such factors have not only intensified these highly politicised debates still further but illustrate clearly the importance of an objective and balanced assessment of the situation. The ever-present question: *Whither ICC involvement in Colombia?*

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<sup>1</sup> J.S. Easterday, 'Deciding the Fate of Complementarity: A Colombian Case Study' (2009) 26 *Arizona Journal of International and Comparative Law* 50; K. Ambos, 'The Colombian Peace Process and the Complementarity Principle' (Research Conference on the ICC and Complementarity: from Theory to Practice, 15-16 September 2009) and *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An Inductive, Situation-based Approach* (Springer, New York 2010); C. Aptel, 'Domestic Justice Systems and the Impact of the Rome Statute' (Consultative Conference on International Criminal Justice, 9-11 September 2009).

### *ICC at the crossroads*

The ICC also stands at a critical juncture. Its Prosecutor has made clear that he intends to fulfil the high hopes of some of the Court's founders that 'the most serious crimes of concern to the international community... must not go unpunished'. Yet a series of developments raise the question of whether the institution or its approach will be sustainable in the political realities of today's world as highlighted by:

- The initiation of substantive criminal trials before the ICC;
- Intimations of a change in USA policy towards the ICC by the Obama administration;
- The fact that ICC jurisdiction has so far been exercised only in Africa;
- Ongoing controversy surrounding the *Al-Bashir* arrest warrant; and
- Persistent criticisms of the 'politicised' nature of the ICC's justice.

The potential for ICC prosecutions related to the Colombian situation both encapsulates and heightens these quandaries, not least due to its western Hemisphere location and its critical strategic importance regionally: *Will Colombia make or break the ICC?*

### **Objectives**

The proposed conference fulfils several important objectives. It makes a strong academic contribution to research on cutting-edge themes, ranging from international criminal justice and transitional justice to those of the ongoing conflict and present peace policies in Colombia. Second, the conference provides a forum to facilitate the presentation and discussion of high quality research and to promote research collaboration by academics and practitioners. It also brings key actors and institutions together and offers an important opportunity to build research and policy networks for future collaboration.

The conference also has important policy implications. It will (a) provide an analytic framework for the OTP's strategy for the Colombian situation, and (b) inform political and legal debates in Colombia around potential ICC prosecutions. Moreover, the conference has broader policy relevance beyond the case of Colombia, especially for concerns regarding the role of the ICC in Africa and beyond, transitional justice, the promotion of the rule of law, and mechanisms and strategies of conflict resolution.

A material objective of the conference will be the production of an edited volume. The editors will be asking authors to prepare papers in advance of the conference to be circulated to all participants. The editors will select 12 chapters to be included in a volume entitled *In the Shadow of the ICC: Colombia and International Criminal Justice*. In Europe, the conference organizers have identified a number of presses that have published volumes on international criminal justice, the ICC, and transitional justice, including: Cambridge University Press, Oxford University Press, Hart and Intersentia. The volume will also be translated into Spanish and the editors will collaborate with a Colombian partner institution when exploring publishing options in that country.

### **Target audience**

The conference will draw a core audience of researchers, policy-makers, lawyers, NGOs, journalists, and students. In addition to the participation of the OTP, the co-convenors are actively seeking the attendance of the Colombian Embassy in The Hague, which bridges the relationship between the Colombian government and the ICC. We will extend invitations to

certain targeted Colombian policymakers and state officials working on issues directly relevant to the ICC, for whom the conference will serve a very useful purpose. From the UK government, attendance is anticipated from DFID and FCO officials as well as a representative of the All-Party Parliamentary Groups on Human Rights and Colombia.

### **Draft Conference Programme**

To achieve its objectives, the conference programme involves experts – scholars, practitioners, and policy-makers – on: (i) the ICC and international criminal justice; and (ii) peace, demobilisation and justice dynamics in Colombia.

### **Conference First Day**

#### **13.00 – 13.15 Opening Session and Welcome**

#### **Session I – The Colombian Armed Conflict and ICC**

##### **13.15 – 15.00 Panel 1: Dynamics of armed conflict and ICC impact**

Colombia's ratification of the Rome Statute and the OTP's investigations has exerted an important influence over Colombian society and politics. This impact has been particularly acute among the parties to the Colombian conflict. The first panel explores both where and how the ICC process has influenced the positions and actions of these crucial actors to change the wider dynamics of the armed conflict. This will aid understanding not only the future of Colombia but also how the ICC can influence local events at different stages of its investigation and prosecution process. Seeking to provide a balanced assessment of the impact of this ICC process on patterns of violence in Colombia, key questions include:

- How have the main players in the Colombian conflict sought to position themselves vis-à-vis the ICC process? What about organisations such as the ICRC?
- What have been the most important effects of the ICC process on the dynamics of violence and armed conflict in Colombia? Where have these been most keenly felt?
- What role has the background presence of the ICC played in negotiations and interactions between the parties to the conflict?
- What influence has the OTP exerted in these processes?

This panel will be composed of leading scholars and analysts working on different dimensions of the Colombian armed conflict.

- Mauricio Romero (Javeriana University, Bogotá) – Overview of dynamics of past ten years of conflict; impact of ICC
- Markus-Schultze-Kraft (IDS Sussex; formerly Head of Americas, International Crisis Group) - Leading analyst on Colombian conflict
- Jineth Bedoya (Assistant Editor of Justice section, *El Tiempo* newspaper) - Journalist working on armed conflict in Colombia
- Eduardo Pizarro (ICC Trust Fund; former President, National Commission on Reparation and Reconciliation) – analyst of Colombian conflict

#### **15.00 – 15.30 Coffee**

### 15.30 – 17.30 Panel 2: Implications for definition of ICC crimes

The ICC Statute entered into force for Colombia on 1 November 2002, and the Article 124 seven-year moratorium on jurisdiction over war crimes has now expired. However, the complex and blurred nature of the Colombian situation raises real doubts over whether acts committed after these dates in fact constitute crimes over which the ICC has jurisdiction.<sup>2</sup> The second panel seeks to draw out and analyse the challenges posed by the Colombian situation for establishing criminal responsibility under the ICC Statute in a comparative perspective, grounded in the practice of other international criminal tribunals and national jurisdictions. This is important not only in terms of the potential for ICC prosecutions in Colombia but also for broader juridical debates in international criminal law. As a means to engage with the challenges posed by the Colombian situation to the exercise of jurisdiction by the ICC over acts committed there, key questions will thus include:

- What implications does the fragmented nature of the conflict in Colombia and the unclear division of criminal/political objectives among non-State armed groups have for the definition of crimes and command responsibility in the ICC Statute?
- How is civilian complicity in crimes legally to be constructed in light of allegedly close links between the armed groups and powerful civilian supporters in Colombia?
- Should other North- or South-American States be concerned about the prosecution of their nationals by the ICC for acts committed in the Colombian context?
- Can the definition of the crime of ‘genocide’ be applied (a) to the destructive effects of the armed conflict on numerically small ‘indigenous peoples’ in Colombia, and (b) to the extermination of political groups such as the *Unión Patriótica*?

The international criminal law focus of this panel is reflected in its composition.

- Geoff Gilbert (Professor of Law, University of Essex) - Specialist on ICL
- William Schabas **tbc** (Professor of Law, Galway University) - Specialist on the ICC
- Héctor Olásolo (Professor of Law, Utrecht University) – Specialist on the ICC

### 18.00 – 19.00 Keynote Speaker – OTP Representative

- Luis Moreno Ocampo **tbc** (Prosecutor of the ICC)

### 19.00 – 20.00 Wine reception

## Conference Second Day

### 9.00 – 9.15 Opening session

### Session II – Colombian justice and complementarity

### 9.15 – 11.00 Panel 3: Colombian Justice and ICC Impact

The potential for prosecutions before the ICC has played strongly into debates on reparation and justice in Colombia. At the national level, it has reinvigorated fierce controversies about the ability and willingness of the legal system to prosecute serious crimes and afford remedy to the victims. These dynamics articulate with wider historical patterns of external influence

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<sup>2</sup> For example, one prominent commentator recently suggested that the ICC would have no jurisdiction over acts committed by the main guerrilla organisation in Colombia, the FARC-EP. See in B. Henander, ‘The Future of War Crimes: An Interview with Professor Cherif Bassiouni’ (3 November 2009) <<http://warcrimes.foreignpolicyblogs.com/2009/11/03/the-future-of-war-crimes-an-interview-with-professor-cherif-bassiouni/>> accessed 19 March 2010

upon Colombian judicial and legislative processes, as with extradition in the 1990s. They have also formed a rallying point for civil society and a means for articulating its demands within these processes, reflecting a long history of victims using international procedures to hold the State to account. Elucidating these dynamics forms the focus of the third panel. In order to explore how the ICC process has affected judicial and legal processes in Colombia and the participation of victims thereof, key questions will include:

- In what specific ways has the ICC process shaped recent laws such as the 2005 Justice and Peace Law (and the rejected 2009 Victims' Law), their application by prosecutors and courts, and public debates about their legitimacy?
- How has the ICC process played into wider societal debates about the adequacy of Colombian/'foreign' justice in the form of extraditions to the USA and the decisions of international human rights bodies?
- What role has the ICC process played in the formation and/or consolidation of victims' movements in Colombia and how has it been used by such movements?
- Has the ICC process influenced existing Colombian 'judicial activism' in themes of justice and reparation, as with the Supreme Court's recent refusal to extradite paramilitaries to the USA on drugs charges so they can be prosecuted for arguably more serious crimes in Colombia?

The panel will comprise lawyers, practitioners and socio-legal experts on the Colombian legal system.

- Iván Velásquez **tbc** (Magistrate, Supreme Court of Colombia) – Magistrate in charge of coordinating investigations into the *parapolítica* scandal
- Renaldo Villalba (José Alvear Restrepo Lawyers Collective) – Prominent criminal lawyer working on issues relating to victims rights and the ICC
- Catalina Díaz (International Center for Transitional Justice, Colombia) - Specialist on reparations for victims
- Iván Orozco-Abad **tbc** (Professor of Law, Andes University, Bogotá) – Specialist on legal and political factors in transitional justice processes

#### 11.00-11.30 Coffee

#### 11.30 – 13.15 Panel 4: Complementarity

The ICC has a 'complementary' jurisdiction, meaning that efforts at the national level to investigate and prosecute crimes take primacy so long as they are effective. Scholars have already begun to explore the complementarity implications of the 2005 Justice and Peace Law. This panel seeks to incorporate and build upon such work by placing it in the context of the much broader set of legal challenges posed by the Colombian context for any potential exercise of complementary jurisdiction by the ICC. For instance, Colombia represents an important case study for complementarity in view of its very developed legal system and the relatively high degree of independence of its higher courts. To enable us to understand whether the efforts of the Colombian State are sufficient to oust the complementary jurisdiction of the ICC, key questions will include:

- What is the legal effect of domestic measures taken with a view to ensuring that Colombian State officials are not liable to prosecution before the ICC, as in the response to the *falsos positivos* scandal of Army extrajudicial executions?
- Do defects such as extensive delay and inadequate enforcement capacity in the intricate Colombian legal system have implications for complementarity?

- What are the legal implications for complementarity (and for any eventual proceedings) of the extradition to the USA – a non-party to the Rome Statute - of some of the most serious criminal suspects on unrelated drugs charges?
- What legal effects do transitional justice instruments - such as the 2005 Justice and Peace Law - have on assessments of complementarity? How will the new victims' laws currently being debated by the legislature impact upon such considerations?

This panel brings together experts on the Colombian domestic system and experts in questions of complementarity in international law.

- Kai Ambos (Professor of Law, University of Göttingen) - Author on complementarity and JPL
- Clara Sandoval (Senior Lecturer of Law, University of Essex) - Specialist on Colombia and the Inter-American system
- Alberto Lara (Lawyer, Norwegian Refugee Council) – Specialist on *falsos positivos* and the State response
- Gustavo Gallón (Director, Colombian Commission of Jurists) - Expert on Colombian courts and extradition

### 13.15 – 14.00 Lunch

### Session III - Should the ICC Exercise Jurisdiction?

#### 14.00 – 15.45 Panel 5: The Meaning of 'Interests of Justice'

Article 53 of the Rome Statute provides that the OTP may desist from opening an investigation if it appears to him that this would be in the 'interests of justice'. However, the Rome Statute gives little guidance on what criteria the OTP should apply to determine what these constitute. Beyond the obligation to consider the gravity of the crime and the interests of victims, the Rome Statute makes no reference to the interests of peace and security for example. Moreover, Article 53 highlights the question of whether prosecution is the only appropriate response to international crimes, or whether other mechanisms (such as amnesties and truth commissions) are acceptable alternatives. The questions to be examined are:

- What does 'justice' mean for the ICC and whose interests are to be considered (e.g. victims, local society, Rome Statute parties, the international community as a whole)?
- How have the interests of justice been constructed thus far by the OTP and the ICC in the course of their work on other countries?
- How have prosecutions by other international criminal tribunals impacted upon domestic processes of peace and justice?

This panel will bring together experts on the debates surrounding Article 53, the controversies around the impact of ICC interventions in Africa, and the impact of other international tribunals on the respective societies, to provide a comparative perspective on the evolving understandings of the interests of justice.

- Maria Varaki (Adviser, ICC OTP) – The Legal Debates surrounding Article 53 of the Rome Statute
- Phil Clark (Professor of Politics, University of Oxford) – The ICC, Africa, and the Interests of Justice
- Leslie Vinjamuri (Director, Centre for the International Politics of Conflict, Rights and Justice, SOAS) – The Pursuit of International Justice in Situations of Conflict

- Iavor Rangelov (Global Security Research Fellow, LSE) – The ICTY and Transitional Justice in the Balkans

#### 15.45 – 16.15 Coffee

#### 16.15-18.00: Panel 6: Roundtable on the ICC and Peace and Justice in Colombia

The preceding panel directs attention squarely towards the question of whether it would be in the ‘interests of justice’ for the OTP to initiate prosecutions in Colombia. This provides the starting point for this final panel to explore both normatively and empirically what practical effect different types of ICC intervention could have in Colombia. The decision on whether or not to indict individuals for crimes committed in the Colombian context cannot be delayed indefinitely. Once taken, this decision will have profound social, political and legal effects in the country, not least in relation to the prospects for peace, demobilisations of armed actors, and reparations for victims. Key questions include:

- Would ICC prosecution of crimes committed in the Colombian situation serve the ‘interests of justice’? Does this depend on how widely the OTP seeks to cast the prosecutorial net?
- Is there a societal demand in Colombia for an ICC intervention?
- Does the ICC have the potential to act as a deterrent on actors involved in Colombia’s armed conflict and prevent future violations?
- Is the OTP properly equipped to make judgements about the prospects for peace and the broader implications of an ICC prosecution for Colombia?

The panel takes the form of presentations by representatives of each of the previous panels summarising the main strands of the debates in so far as they touch on these questions, joined by the OTP Colombia Analyst. The presentations will be followed a roundtable discussion between the panellists with the participation of other key attendees. This session offers an opportunity for final reflections on the themes of the conference as well as a discussion of future directions of research and policy on the ICC and Colombia.

- Francisco Lloreda (Colombian Ambassador to The Hague)
- Chandra Sriram (Professor of Law, SOAS)
- Selected panellists/chairs from earlier panels
- Colombia Analyst from the OTP

#### 18.00 – 18.10 Convenors’ Closing Thanks

**End of Conference**