

In the Shadow of the ICC

Colombia and International Criminal Justice

Report of the expert conference examining the nature and dynamics of the role of the International Criminal Court in the ongoing investigation and prosecution of atrocious crimes committed in Colombia.

Convened by the Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London

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Executive Summary and Main Recommendations

Executive summary

The Rome Statute entered into force for Colombia on 1 November 2002. Since 2005, the Office of the Prosecutor (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.¹ The high-level conference, held at the School of Advanced Study, University of London, on 26 and 27 May 2011, examined the nature and dynamics of the role of the International Criminal Court (ICC) in the ongoing investigation and prosecution of atrocity crimes committed in Colombia. Speakers analysed the role of the ICC to date in the context of positive complementarity and criminal investigations and prosecutions in Colombia. Discussion also focused on the nature and dynamics of the future relationship between the ICC and the national jurisdiction. 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.

From the discussion on the justice and peace process in Colombia and how this would affect the future role of the International Criminal Court in the ongoing justice process, it became clear that there was a dichotomy of opinions amongst the participants:

- Some argued that the ICC should assume primary jurisdiction for prosecution as the **2005 Justice and Peace Law** is an ineffective piece of legislation that amounts to little more than a 'screening' law which protects perpetrators from prosecution.
- Conversely, other participants maintained that the Justice and Peace Law represented a bona fide attempt to combat impunity. The ICC should therefore not intervene further as Colombia represents an encouraging example of positive complementarity.

¹ Colombia's Article 124 seven-year moratorium on jurisdiction over war crimes expired in 2009.

A number of components were identified as being necessary in order to move the process of justice forward in Colombia:

- For the ICC to have impact on the ground it needs the **support of the Colombian authorities**.
- **Collaboration with other international institutions**, such as third States and transnational non-governmental organisations is desirable in order for international criminal justice to have a greater impact in Colombia.
- The ICC needs the continued **support of civil society**.
- The **OTP** needs to enhance its **outreach** and make improvements regarding how it communicates its activities to civil society and the larger public.

The conference also facilitated important discussion on the **interests of victims**. The question of reparation was identified as being pertinent for the process of restorative justice in Colombia. Key components of **reparatory measures** were highlighted including:

- The payment of compensation.
- The guarantee of non-repetition.
- The right of victims to know the truth.

In addition, it was acknowledged that there is a pressing need to focus on a number of categories of victims that thus far have received inadequate attention in the justice process:

- Members of the **indigenous communities**.
- Members of political groups, most notably **members of trade unions**.
- Victims of **gender-based violence** and sexual crimes.

A further important issue that emerged from discussions at the conference was the need for refinement of the modus operandi of investigation and prosecution of atrocity crimes by the **Colombian justice system**. Although there have been some important advancements made in the fight against impunity, investigations have to date been

carried out on an isolated case-by-case basis and thus each crime prosecuted is not seen as part of a **systematic pattern of criminality**. For example, in the case of extrajudicial executions, there has thus far been no study of the pattern of executions and there has been no investigation as to whether there was an official policy sanctioning these extra-legal killings. It was also identified during the conference that prosecutions in Colombia have focused on low-level perpetrators and there is therefore a need for a prosecutorial strategy that focuses on **command responsibility**.

Recommendations

The conference *In the Shadow of the ICC: Colombia and International Criminal Justice* facilitated a fruitful exchange of information and perspectives between the delegates. On the basis of issues raised during the conference, the following recommendations are made:

To the Colombian authorities:

- The prevalence and gravity of gender-based and **sexual violence crimes** in the Colombian conflict needs to be fully recognised and sufficient resources allocated to the investigation and prosecution of such crimes.
- Domestic investigations of crimes committed in the context of the conflict must focus on the **systemic nature of the atrocities**.
- Investigations must focus on **senior leaders** as well as low-level perpetrators.
- The **security of victims, witnesses** and operators of the justice system such as **judges**, need to be significantly improved.

To the Office of the ICC Prosecutor:

- The OTP should **communicate its actions** effectively and **engage more publically** and visibly with Colombian civil society, victims' groups and the wider public, in order to keep interested parties informed of relevant developments.
- The implementation of **reparation measures** provided in the Victims Law of Colombia will require careful and ongoing monitoring and analysis.

- The OTP needs to give further emphasis to certain crimes in its analysis, in particular **sexual violence** and crimes targeting **indigenous communities**, and other Colombian judicial proceedings beyond the scope of the Justice and Peace Law.

To other relevant International Organisations

- International and regional human rights organisations, such as the **Inter-American Commission on Human Rights** and the **Inter-American Court of Human Rights**, can even further strengthen their role in the process of peace and justice in Colombia.
- The important jurisprudence of the Inter-American Court of Human Rights, with regards to **due diligence in criminal investigations** and scope of **reparations for victims** for example, could more actively inform policy decisions.

Acknowledgements

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The conference was convened by Dr David James Cantor,² Lecturer in International Human Rights Law at the Institute of Commonwealth Studies, and Dr Par Engstrom,³ Lecturer in Human Rights at the Human Rights Consortium.

The organisers of the conference express their deep appreciation to the speakers and moderators. A note of appreciation to James Lupton and Francesca Denley who acted as interpreters for the conference. Particular gratitude goes to Olga Jimenez who took care of the conference arrangements and ensured that it proceeded smoothly. Thanks also to Margherita Blandini for her help on the day.

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Introduction

This report is a summary of the proceedings of the expert conference organised by the Human Rights Consortium, the Institute of Commonwealth Studies and the Institute for the Study of the Americas at the School of Advanced Study, University of London, on 26 and 27 May 2011, entitled *In the Shadow of the ICC: Colombia and International Criminal Justice*. The report aims to portray the discussions and recommendations made during the conference, although it does not necessarily represent the views of the organising partners or the funders.

The body of the report is divided into three parts, each corresponding to the thematic sessions of the conference:

1. The Colombian Armed Conflict and the ICC;
2. Colombian Justice and Complementarity;
3. Should the ICC Exercise Jurisdiction?

These sections are further sub-divided to correspond to the conference panels. A short summary of each presentation is provided. A synopsis of the discussion and recommendation session is included at the end of each panel or session.

Context

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 destabilise 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 the context of this preliminary examination, the OTP has focused, *inter alia*, on (a) the various criminal proceedings in Colombia against the most serious alleged perpetrators, (b) the implementation of the Justice and Peace Law, including 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 extra-judicial 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 engaged 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 engaged 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.

A central aim of the conference was to build upon existing studies of the Colombian armed conflict. In exploring the empirical effects of the ICC process at the local level, the conference addressed 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 offered a solid empirical basis to the ICC Prosecutor for assessing the impact of his engagement thus far with Colombia and therefore an opportunity to refine 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 electoral 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 40-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 engaged 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 potential '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.

Timing

The conference was 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;

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- 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?*

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 more recently in relation to Libya; 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?*

Conference outcomes

The conference fulfilled several important objectives. Firstly, it made a significant 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. Secondly, the conference provided a forum to facilitate the presentation and discussion of high-quality research and to promote research collaboration by academics and practitioners. It also brought key actors and institutions together and offered an important opportunity to build research and policy networks for future collaboration.

The conference also had important policy implications through (a) providing insights into and for the OTP's strategy for the Colombian situation, and (b) providing an opportunity to inform political and legal debates in Colombia around potential ICC prosecutions. Moreover, the conference had 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.

Presenters and participants

The conference programme involved experts – scholars, practitioners, and policy-makers – on: (a) the ICC and international criminal justice; and (b) peace, demobilisation and justice dynamics in Colombia. In addition to the participation of 24 speakers and panel chairs, more than 70 delegates attended the conference and provided some thought-provoking questions and feedback to the panels. See Annex 1 for a complete list of participants and Annex 2 for participant biographies.

Agenda

The first day of the conference was dedicated to exploring the relationship between the Colombian armed conflict and the ICC through presentations divided into two panels. The first panel explored the 'Implications for Definition of ICC Crimes' and the second panel pertained to the 'Dynamics of Armed Conflict and ICC Impact'. In addition, the keynote address was delivered by Dr Emeric Rogier from the Office of the Prosecutor at the International Criminal Court.

Day two of the conference was divided into two sessions, each with two panels. The morning session explored the theme of 'Colombian Justice and Complementarity' and consisted of a panel on 'Colombian Justice and ICC Impact' and a panel on 'Complementarity'. In the afternoon speakers explored the question of 'Should the ICC Exercise Jurisdiction?' The first panel of this session delved into the 'Meaning of Interests of Justice'. The conference was drawn to a close with a final roundtable on the 'ICC and Peace and Justice in Colombia'. See Annex 3 for a detailed conference programme.

Part 1

The Colombian Armed Conflict and ICC

I - 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.⁴ The first panel sought 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 was 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, this panel sought to address a number of key questions including:

- 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?

⁴ 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 30 September 2010

- 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* (UP)?

This panel was chaired by Mr Philippe Tremblay from Lawyers without Borders, Canada and three speakers tackled the various themes of interest to the broad question of the definition of ICC crimes.

Professor Geoff Gilbert of the University of Essex discussed two categories of crimes for which the International Criminal Court has subject matter jurisdiction – crimes against humanity and war crimes. Furthermore, he discussed some pertinent issues pertaining to criminal responsibility for acts committed in the context of the conflict including co-perpetration, ‘joint criminal enterprise’ and command responsibility.

Gilbert contended that contrary to some claims that have categorised the situation in Colombia as an international armed conflict, due to interference from third States such as Venezuela, it should be assumed that the conflict is non-international in character. Article 8 of the Rome Statute pertains to war crimes, and Article 8(c) specifically concerns acts committed in an armed conflict not of an international character. In terms of determining whether acts of violence of the nature witnessed in Colombia meets the threshold of internal armed conflict, Gilbert referred to the *Tadić* case at the International Criminal Tribunal for the former Yugoslavia. A 1995 Appeals Chamber decision established the test for determining the existence of an armed conflict: ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State’.⁵ Certain acts of violence that do not meet the necessary threshold of internal armed conflict are outlined in Article 8(2)(d)⁶ of the Rome Statute and include riots and sporadic violence. In addition, for belligerent acts to constitute

⁵ *Prosecutor v Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, Case No. IT-94-1-AR72, at paragraph 70.

⁶ Prohibited acts during armed conflicts not of an international character as outlined in Article 8(2)(c) does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

war crimes there must be a nexus between the action and the armed conflict. A further important feature of war crimes that was emphasised by Gilbert is the fact that such crimes can be committed not just by combatants. Citing the Essen lynching case he reminded that civilians may also be indicted for war crimes.⁷

Article 7 of the Rome Statute pertains to crimes against humanity. Gilbert highlighted the necessary components that must exist for acts to constitute crimes against humanity; they must be widespread, systematic and directed at civilians, with knowledge of the attack. The *Al-Bashir*⁸ pre-trial decisions of the ICC have softened the definition of 'systematic'. According to Gilbert, there is a problem in the Colombian context of how to prove that a given attack is part of a policy, due to the fragmented nature of the conflict.

Turning to the issue of modes of liability for the perpetration of crimes under the jurisdiction of the ICC, Gilbert discussed how defining co-perpetrator can be problematic. To look to the case law from the ICC for guidance, in the Lubanga⁹ trial, the defendant has been charged with responsibility for the crimes alleged as a co-perpetrator under Article 25(3)(a). Article 25(3)(a) of the Rome Statute provides that a person is criminally responsible and liable for punishment if that person commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that other person is criminally responsible. An inherent element is the existence of a 'joint plan'. In its Decision on the Confirmation of the Charges, the Pre-Trial Chamber elaborated on the concept of co-perpetration, stating it was of the view that:

the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.¹⁰

⁷ *The Essen Lynching Case, Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals, Essen, 18 – 19 and 21 – 22 December, 1945. Source: Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume I, London, HMSO, 1947, Case No. 8.

⁸ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, (Situation in Darfur, Sudan), Case No: ICC-02/05-01/09

⁹ *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06

¹⁰ *The Prosecutor v Thomas Lubanga Dyilo, Decision on the Confirmation of Charges* [2007] ICC-01/04-01/06, (International Criminal Court, Pre Trial Chamber I, Judge Jorda, Judge Kuenyehia, Judge Steiner, 29

The Pre-Trial Chamber considered that in this regard, the definitional criterion of the concept of co-perpetration is 'linked to the distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons'.¹¹

The Pre-Trial Chamber (I) in the Katanga case further elaborated its approach to modes of liability regarding co-perpetration and based its analysis on the theory of 'control over the crime'.¹² The requirement of 'control' over the act is, Gilbert contended, open to very broad interpretation.¹³ The approach taken by the ICC apropos co-perpetration diverged from the theory of 'joint criminal enterprise' developed at the ICTY. This legal doctrine has been very contentious and has been labelled by some legal scholars as JCE – 'just convict everyone'. To put joint criminal enterprise in the context of Colombia, if, for example, a FARC leader was partially responsible for the organisation of an armed attack, would that leader be culpable, via command responsibility and JCE, for the commission of international crimes during the attack regardless of how those crimes might in fact have come to be committed? In support of this proposition, Gilbert referred to Article 25(3)(d)(i) of the Rome Statute on individual criminal responsibility which makes reference to 'a crime' instead of 'the crime'. Finally, Gilbert discussed the various elements pertaining to command responsibility, as per Article 28 of the Rome Statute.¹⁴

January 2007), at paragraph 326, available at www.icc-cpi.int/NR/exeres/0814EEB0-8251-47A3-AB41-3F149BADB187.htm accessed 30 September 2011.

¹¹ *Ibid*, paragraph 327.

¹² See further, *Prosecutor v Katanga & Ngudjolo Chui*, Case No. ICC-01/04-01/07-717 (Pre-Trial Chamber I), Decision on the Confirmation of Charges (Sept. 30, 2008).

¹³ For an elaboration and evaluation of the modes of liability as interpreted by the Pre-Trial Chamber at the ICC in the Lubanga and Katanga cases see further, Rod Rastan, 'Review of ICC Jurisprudence', 7(2) *Northwestern Journal of International Human Rights*, (2009), pp.261–298.

¹⁴ Article 28: Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Mr John Jones, of Doughty Street barristers' chambers, discussed a three-stage process for defining crimes covered by the ICC Statute:

1. Determining the nature of the conflict
2. Examining the crimes committed
3. Determining the forms of criminal responsibility.

Nature of the conflict: As indicated by Gilbert in the previous presentation, the nature of the armed conflict in Colombia is disputed by some, who contend that it amounts to an international armed conflict due to the participation of outside States. In determining whether or not such interference would effectively mean such States are a party to the conflict, thus making the conflict international in character, a 'control test' is applied. In the 1984 case of *Nicaragua versus The United States of America*, brought before the International Court of Justice,¹⁵ the Court applied an 'effective control' test. In the *Tadić* case at the ICTY an 'overall control test' was applied. Financial input from a third State alone does not indicate that this State has overall control of the military groups participating in the conflict, rather the potential for control that the funding creates must be realised. As outlined in the *Tadić* Appeals Chamber Judgement; 'In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity'.¹⁶

Nature of the Crimes: The second stage is an examination of the types of acts committed. Pertaining to crimes committed during a non-international armed conflict, Article

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

¹⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 27 June, 1986.

¹⁶ *The Prosecutor v Dusko Tadić*, Case No.: IT-94-1-A, Appeal Chamber Judgement, 15 July 1999, at paragraph 131.

8(2)(c) and (2)(e) of the Rome Statute goes beyond Common Article 3 of the Geneva Conventions by including sexual violence, child conscription and ordering the displacement of civilians. Jones noted, however, that a seven-year moratorium applied in Colombia in accordance with the Article 124 reservation and so this may have an impact on the crimes that could potentially be prosecuted by the ICC were it to assume primary jurisdiction in Colombia. As addressed by Gilbert, Article 7 of the Rome Statute pertains to crimes against humanity. Article 6 of the Statute outlined the crime of genocide.¹⁷

Forms of criminal responsibility: Article 25 of the Rome Statute on individual criminal responsibility outlines that a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person is guilty of committing, ordering, soliciting, inducing, aiding, abetting, or otherwise assisting, contributing to a group commission, directing or inciting genocide, as well as attempts at the above. Article 28 of the Rome Statute pertains to command responsibility. In the jurisprudence of ICTY and International Criminal Tribunal for Rwanda (ICTR), command responsibility has extended beyond the ranks of the military to other institutions of the State, leading to several convictions of civilian leaders for international crimes committed by combatants. There are a number of criteria to be met: commission of crime, or complicity, or contribution and *chapeau* elements.

Jones submitted that a notable Colombian case study pertains to the commission of atrocities in the village of Chengue in Sucre Department. In this instance, the question of liability by Colombian State armed forces could arise in a number of contexts. Firstly there is the question of liability by omission; where a superior officer is present at the scene and their presence can be interpreted as encouraging the crime. In this way the individual is an 'approving spectator'. Liability also arises when the commander is present and has a duty to prevent the crime but fails to act. Command responsibility can also arise when a commander is not at the scene but is regarded as having effective control over the actions of those under his or her command. In addition, liability can arise under Article 28(b) when the commander becomes aware that a crime has been

¹⁷ See the comments made by Andrei Gomez-Suarez as part of this panel below for an elaboration of the workings of Article 6 in the Colombian context.

committed but fails to investigate, or due to a joint criminal enterprise or common purpose act or omission. A comparable example is that of the *Dragoljub Prcać* case at ICTY. The principle of complementarity can be triggered by the failure of a commander or official to treat crimes as criminal offences, but who deals with them instead as disciplinary offences.

The third panellist, Dr Andrei Gomez-Suarez of Sussex University, focused on the crime of genocide. The central question posed was: 'can the definition of the crime of genocide be applied (a) to the destructive effects of the armed conflict on numerically small "indigenous groups" and (b) to the extermination of political groups such as the Unión Patriótica in Colombia?'

Gomez-Suarez presented a matrix mapping violence against indigenous people in Colombia. This matrix charted the pattern of violence from 1970, when certain indigenous groups began to organise politically to fight for their rights, to 2010. Gomez-Suarez divulged how initially alliances of landlords organised attacks on indigenous civilians who were then joined by State security forces as rumours of guerrilla assistance abound. Terror was used to control the indigenous people and discourage them from assisting the rebels. A pertinent example of this was the 2001 Naya massacre.

Suicides amongst the Embera rose in the early 2000s following the imposition of dire living conditions. This ostensibly met one of the conditions of the 1948 Genocide Convention as Article 2(c) provides that 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' when committed with 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such', is one of the constituent acts of genocide. From the coining of the word genocide by Raphael Lemkin in 1944 to the adoption of the Genocide Convention by the UN General Assembly in 1948, the definition of genocide has become narrower and the difficult-to-prove 'intent to destroy' criterion was added.

It is difficult to determine that genocide has been committed against indigenous groups in Colombia as although most of the conditions seemed to be met for some types of genocide, intent to destroy remained hard to prove.

Turning to the second category of targeted groups, Gomez-Suarez discussed whether the definition of genocide was applicable to the category of political groups. One particularly pertinent example of a political group was highlighted, that of the *Unión Patriótica* (UP). The Inter-American Commission on Human Rights has determined that acts against political groups do not constitute genocide in accordance with the current definition in international law, although the nature of these acts did constitute violations of the American Convention on Human Rights.

A matrix mapping violence against the UP from 1985 to 2002 was presented. Although many genocide criteria were met, the UP is not a protected group as 'political opinion' was omitted from the genocide convention. B. Whitaker, author of a 1985 report to United Nations Economic and Social Council (ECOSOC), believed that most 20th-century genocides have been political and that an optional protocol to the Genocide Convention should be drafted to include it. It seems therefore that it cannot be determined that genocide has been committed against political groups in Colombia as UP members do not constitute a protected group under the convention. For Gomez-Suarez this illustrated that the current definition of 'genocide' was a geo-political tool to limit the application of that very term, to exclude jurisdiction of the crime of genocide for certain acts to which it might usefully be applied. The ICC forms part of a trans-national network of human rights mechanisms and as such it could seek to free itself from geo-political bias. The challenge for the ICC is to follow the precedent set by various domestic jurisdictions in interpreting the Genocide Convention to cover the targeting of all collective identities.

Discussion/recommendations

Addressing the question to the first speaker, Professor Geoff Gilbert, one participant asked what other crimes could be tried by the ICC. Gilbert responded that displacement certainly would be one. Further offences were taking place that would be more difficult to prosecute. A clear example of this was the funding of armed groups through the sale of narcotics. FARC gave criminal gangs the space to operate. It came down to a

functional question of who the ICC should investigate. Should it be drug traffickers or the people who have caused population displacement and the grave crimes as discussed by the panellists? The choice of prosecutions from the full range of possibilities was to a great extent, Gilbert contended, a functional decision.

A question on the nature of the international legal responsibility of multi-national corporations was raised. The ICC, ICTY and ICTR only have jurisdiction to prosecute individuals. State responsibility may come into play with certain corporate activities such that a case could be brought in a regional human rights court. Individuals could be prosecuted for 'aiding and abetting' the commission of an ICC crime, so it was possible to imagine situations where this could apply to certain corporate activities. In addition, corporations could be taken to court domestically.

The impact of public comments, such as those made by Judge Baltasar Garzón on the perpetrators of ICC crimes and on the Colombian authorities was a further issue for discussion. It was remarked upon that such comments make it more difficult for the Colombian authorities to avoid the issues at hand. The actions of the ICC in Colombia have the potential to empower victims. On the theme of impunity, it was inquired as to whether the current configuration and politicisation of the UN Security Council might be the real obstacle in the way of the ICC bringing an end to impunity for the most serious crimes worldwide. In response it was discussed how the ICC was capable of continuing with its work developing and driving new norms without seeking wholesale reform of the UN system, even if the latter is also highly desirable.

With regards to the case study presented by Jones, it was queried what the situation would be if the State forces were not strictly 'present'? In response it was elucidated how 'effective control' was the deciding factor for attributing command responsibility. It would not be fair to attribute responsibility to a commander for a particular geographic area as in a conflict situation they will frequently not have effective control over all of the activities in that area.

Closing comments from Gomez-Suarez reiterated that international law regarding genocide needed to be changed to reflect the current geopolitical context. Domestic law

changes all the time so there should be no objections in principle to revisiting outdated or inadequate international laws.

II – 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 panel explored 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 of 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 included:

- 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 International Committee of the Red Cross (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?

The second panel was chaired by Professor Maxine Molyneux from the Institute for the Study of the Americas.

Jineth Bedoya delivered the first address of this panel. Ms Bedoya is an accomplished journalist who has published a great deal of material on the Colombian armed conflict, but the focus of her presentation at this conference was on her experience as a victim. She has been kidnapped more than once by parties on both sides of the conflict. One of

these kidnappings included the perpetration of rape. Her case was submitted to the Inter-American Commission on Human Rights the day before the conference.

Discussing the Colombian domestic justice system, Bedoya noted that the legal institutions often exhibited a flexibility to protect certain perpetrators. She feared that the legal institutions were becoming as polarised as Colombian society. In particular, she was concerned about the effect of the Justice and Peace Law as sexual violence did not appear sufficiently high in its hierarchy of seriousness of crimes.

For many years after being raped, Bedoya chose not to self-identify as a victim. She changed her stance two years ago after a study found that most women were unwilling to speak out about their experience. She consequently felt compelled to speak out as a victim because sexual violence has been systematically used throughout the conflict but is not typically identified as one of the crimes to have emerged from it.

Bedoya reported that approximately 400,000 women have been the victims of sexual violence in Colombia over the last decade. She stated that she was hopeful that the ICC proceedings would provide empowerment and justice for female victims, but was cautious about being too hopeful as she doubted that prosecutions would be brought against establishment figures for offences relating to sexual violence.

The second panellist was Professor Eduardo Pizarro of the National University, Colombia, who is also Chair of the Board of the ICC Trust Fund for Victims. He considered whether the ICC acts as an obstacle to or a catalyst for peace in Colombia. He discussed how this question provides a real dilemma for jurists and human rights specialists beyond Colombia, as evidenced by the intense debate at the international review conferences held in Kampala and The Hague. The dilemma was characterised as being a balancing act between retributive justice *qua* punishment on the one hand and transitional justice *qua* peace process on the other, whilst acknowledging the non-mutual exclusivity and the co-dependence of the concepts.

Pizarro highlighted how the ICC tended to focus on countries in unstable processes of transition rather than consolidated democracies, which made the dilemma all the more

complex. The Ugandan context provided an illustrative example, as President Museveni first requested an issuing of warrants against members of the Lord's Resistance Army (LRA) but subsequently requested they be revoked. Debate still rages as to whether or not the ICC's actions with regards to Uganda ignored local calls for peace, or acted as a useful and genuine threat against the LRA leadership which tempered their behaviour. Pizarro referred to Linda Keller's article,¹⁸ which provides several suggestions as to how the dilemma might be addressed. Suggestions include the derogation of pending ICC warrants¹⁹ and the availability of alternative processes for situations which do not meet the ICC's admissibility criteria,²⁰ which fall foul of the *ne bis in idem* clause,²¹ or which might conflict with the 'interests of justice' if subjected to a full ICC investigation.²² Such alternatives include Truth and Reconciliation Commissions, conditional amnesties, conditional sentencing and truth and justice laws. Such alternatives, Pizarro acknowledged, are contentious, but they are also important policy options.

Pizarro further argued that it is questionable whether a State in a period of unstable transition would always or even often be able to initiate and complete such processes, especially if the justice system is inadequate to start with. Pizarro stated that he remained optimistic about the ability of the Colombian authorities to successfully deploy such processes with the help of international experts in the field, especially as President Santos had hinted at peace negotiations with the guerrillas if they were open to participation in truth and justice processes. Pizarro noted that in some countries which have attracted the attention of the ICC Prosecutor's Office, simply the threat of international action had been enough to precipitate a strengthening of the domestic justice system.

Discussion/recommendations

¹⁸ Keller, Linda (2008), *The False Dichotomy of Peace versus Justice and the International Criminal Court*, Hague Justice Journal 3(1), pp. 12–47.

¹⁹ ICC Statute Article 16.

²⁰ ICC Statute Article 17.

²¹ ICC Statute Article 20.

²² ICC statute Article 53.

A number of issues were raised for further dialogue in the discussion session for this panel. It was questioned whether actors in the conflict really take the ICC's actions into account and whether certain changes that have been observed in the Colombian situation were due to the court's presence or not. Pizarro revealed that he had met frequently with demobilised paramilitary leaders who cited two motivating factors for their voluntary disarmament. The first was the incentive of greatly reduced prison sentences offered by the Justice and Peace Law. The second was the desire to serve any prison sentences in Colombia rather than in an unknown country following an ICC indictment and trial. Furthermore, he had information that active members of the FARC-EP and UC-ELN had been making enquiries as to what risks they ran of being subject to ICC proceedings. Bedoya agreed that many paramilitary demobilisations had been catalysed by the threat of ICC proceedings. As for the FARC-EP, even though they discussed the issue of the ICC, they did not consider it a serious risk. She has seen internal FARC documents which suggest that they do not believe they will be judged for their actions before domestic courts let alone an international one.

Peace and justice are of course central themes to the debate but who defines the dynamics of peace and justice, and can peace exist without justice? It was queried whether the Justice and Peace Law constitutes a green light for repetition and the continuation of heinous crimes, the retention of spoils of war, for example, indigenous land appropriated by the State during the conflict, and the silencing of victims. Pizarro said that despite himself being a victim of the conflict, he saw the priority as the protection of 'the victims of tomorrow' and believes that this should be the determining factor in the peace/justice balancing act. Bedoya raised fears that prioritising future victims might mean that past victims could be forgotten or be denied access to justice.

The impact of the ICC in Colombia with regards to the Justice and Peace Law and the phenomenon of *falsos positivos*²³ was elaborated upon. Pizarro listed a series of substantive achievements in Colombia which can be attributed to the enactment of the Justice and Peace Law and possibly to the actions of the ICC. A great many paramilitaries have demobilised and many weapons have been melted down. A great deal of truth has

²³ The ongoing *escándalo de los falsos positivos*, the 'false positives scandal', concerns the extrajudicial execution of Colombian civilians by state officials. The civilians were then dressed in combat uniforms in an attempt to preclude their classification as protected persons.

been produced, both 'historical' and 'legal' in nature. This stands in contrast with the situation in Peru and Guatemala where, Pizarro contended, the absence of 'legal' truth has created a climate of impunity. Many have been brought to justice by the Colombian Supreme Court. While there was some evidence of the 'recycling' (remobilisation) of 10–15% of paramilitaries in Colombia, Pizarro stated that this was comparable to other transitional conflict situations worldwide and so should not be seen as a failure of the process.

Pizarro praised what the Colombian government has achieved to date, considering that the conflict is ongoing, whereas in other South American countries where there has been conflict and human rights abuses it has taken many years to instigate transitional justice proceedings. However, Bedoya disagreed with the validity of the comparison as she believed that there are too many differences between Colombia and other South American nations. She stated that she has seen some positive aspects of the policies of the Santos administration and the previous administration; however, large gaps remain including an inadequate representation of the interests of victims. She remained concerned about the prospects for peace as many of the paramilitaries she spoke with have no intention of demobilising.

Regarding the commission of atrocity crimes by State forces it was highlighted that a recent Organization of American States (OAS) investigation showed that many mid-level paramilitary commanders were still active and that 280,000 people were newly displaced in Colombia last year. With this in mind it was questioned what impact, if any, the ICC proceedings have had on the commission of atrocities by State forces. In this context, how sustainable peace and justice can be achieved becomes a pertinent question.

It was emphasised that upon ratification of the ICC Statute, Colombia committed to prosecute serious crimes. It was asked how many of the tens of thousands of perpetrators have been prosecuted domestically and how many victims have received reparations to date. In response it was divulged that around \$250,000 has been distributed to around 26,000 families in compensation. Other aspects of reparation have also been provided to help victims re-establish their lives. Approximately 2,000,000

people in Colombia are currently receiving non-financial reparation such as psycho-social counselling support. Although the accuracy of these figures remained disputed, it was commented upon that it is noteworthy that such remedies are being distributed at such an early stage.

Bedoya was asked what her opinion was of the process whereby victims can ask direct questions of paramilitary leaders. She responded that a few weeks before the conference she was called to meet with a military commander who was in the chain of command responsible for her abduction and rape, with a view to giving her information about what had happened and why. She revealed that it was very painful to hear why it had been ordered that she be abducted, tortured, raped and killed and why she had ultimately been allowed to live. It did, however, also provide some relief. Furthermore, such activity is of some help in the absence of an adequate judicial remedy. Nonetheless, Bedoya did not believe that such meetings necessarily result in the attending victim receiving much more than a very partial version of the truth.

A pertinent question that was discussed was that of why transitional justice instruments were being deployed whilst the conflict was ongoing. Pizarro said that in Colombia the decision was made to begin the transitional process now, rather than waiting for many years. This was a difficult and considered decision, but it was the correct one. Pizarro maintained that many murders have been attributed to paramilitaries who are currently in prison and 95% of demobilised paramilitaries are already engaged in reconstruction processes.

In relation to the institutions which are auxiliary to the courts, it was asked how these were perceived by victims and if they also suffer from the polarisation mentioned earlier. Bedoya replied that she has observed a polarisation of the attitudes of prosecutors with regards to sexual violence, particularly when committed against female members of illegal armed groups. Some prosecutors, she contended, seem to be of the opinion that by joining the armed groups, such women did not deserve access to justice. This ignored that fact that conscription is not always voluntary or at least is not an informed decision, as far as the use of women as sexual instruments by the commanders of these groups was concerned. These kinds of attitudes have led to rape

becoming an 'invisible crime' in the conflict, although some progress has been made in acknowledging the use of rape and the needs of victims over the last two years.

In conclusion, another participant opined that the impression of progress given by the Colombian authorities is grossly over-optimistic. 7,000 paramilitaries were reportedly still active, a similar number to the early stages of the conflict. It was contended that the Justice and Peace Law excluded State officials and legitimates land grabs. The people who were most responsible for atrocities committed during the conflict are not subject to any criminal proceedings but instead were living in luxury. It was alleged that the Justice and Peace Law was specifically designed and enacted as a 'screening technique' against the ICC.

Keynote Address

The keynote address was given by Dr Emeric Rogier, Chief of the Situation Analysis Section in the ICC Office of the Prosecutor.

Rogier noted that at that point in time three trials were ongoing at the ICC, 24 warrants for arrest had been issued, five situations were under investigation and a further nine were subject to preliminary examination. It is hoped that the preliminary examination process can in fact have an impact on the commission of crimes and lead to a strengthening of the domestic justice system such that international action ends up not being necessary.

The same analytical framework²⁴ is applied to all situations to decide whether or not to initiate an investigation. Firstly, the situation must fall within the jurisdiction of the ICC; secondly, the situation must meet the admissibility criteria, which includes the principle of complementarity and finally, initiating an investigation must be in the interests of justice.

²⁴ ICC Statute Articles 15 and 53.

The preliminary investigation of the Colombian situation began in 2004. Since then around 85 communications have been received and information has also been received from the Colombian authorities and other sources. Many serious crimes have been committed since the Rome Statute came into force for Colombia in 2002. These include killings, sexual violence, abductions, displacement and child recruitment, as well as the targeting of particular groups on ethnic or political grounds. It has therefore been determined that the first criterion of the analytical framework has been fulfilled as there is a 'reasonable basis' to believe that crimes listed in the Rome Statute have been committed since Colombia came within the jurisdiction of the ICC.

The main deciding factor determining the fulfilment or otherwise of the second criteria of the analytical framework, admissibility, is the existence or otherwise of genuine domestic proceedings to address the crimes committed. Many meetings have been held between OTP representatives and Colombian officials, individuals and NGOs. This process included a public discussion forum in October 2010. The question of the existence or otherwise of domestic proceedings is easy to answer positively. Both State and paramilitary agents have been subject to investigations, and the *falsos positivos* cases have been revisited.

Discussion/recommendations

Discussion followed on what the basis was for initiating an investigation on account of a State's unwillingness or inability to genuinely investigate. There are clear Statute scenarios for 'unwillingness'. Firstly, the intent must exist to shield persons from criminal responsibility. Secondly, there must be a lack of independence and impartiality. With regards to the Colombian context and extraditions of perpetrators to the United States, it was confirmed that the Colombian government assured the OTP of access to prisoners in the USA and of their return to Colombia after their sentences had been served. Rogier asserted that thus far the OTP cannot conclude that the process of the Justice and Peace Law is motivated by shielding perpetrators, even if the process is troubled.

Regarding the question of inability to investigate, this should equate to a total or substantial inability. This would amount to a scenario such as the collapse of the mechanisms for gathering evidence or executing procedure, although it would not necessarily have to be a 'complete collapse'. Issues regarding the ability of a State to implement the judgments of its courts against convicted persons are not taken into account. In Colombia, resource and security issues exist in the administration of justice. However, these factors alone do not lead to the conclusion that the State is unable to investigate and prosecute adequately. Indeed, it is not within the OTP or the ICC's mandate to assess the justice system as a whole, just the particular proceedings that pertain to crimes that could come under the Court's jurisdiction. While the current conclusion may be that complementarity has not been met, the preliminary examination is not being terminated. President Santos has asked the ICC Prosecutor how to stop the preliminary examinations. The Prosecutor's response: 'stop the crimes, punish the perpetrators.'

Part 2

Colombian Justice and Complementarity

I – Colombia 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 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 formed the focus of the 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 included:

- In what specific ways has the ICC process shaped recent laws such as the 2005 Justice and Peace Law (and the proposed new 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 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 refusal to extradite paramilitaries to the USA on drugs charges so they can be prosecuted for arguably more serious crimes in Colombia?

The panel was chaired by Mr Alex Wilks of the International Bar Association.

The first paper was delivered by Justice Iván Velásquez, Magistrate of the Supreme Court of Colombia. It should be noted that the opinions expressed by Justice Velásquez were made purely in his personal capacity and should not be considered as reflecting the position of the Colombian Supreme Court.

Velásquez noted that due to the many crimes committed in the course of the prolonged conflict in Colombia there have been many voices, both within and outside Colombia, calling for the ICC to intervene. Such crimes have included the appropriation of land, extra-judicial executions, notably the so-called false positives which have been carried out by members of armed forces who are not punished and dismissed but on the contrary have been decorated.

In a sense, Velásquez noted, Colombian society has been ‘re-modelled’. In the context of the current political situation, the paramilitary presence has infiltrated many layers of society and public life. It could indeed be said that a ‘para-State’ exists. The triumph of one particular sector in Colombia – the narco-sector – has led to a new phase of paramilitarism, which Colombians are still living with, particularly due to the

permeation of a paramilitary presence into local politics. A pertinent example of this Velásquez noted was the election of paramilitaries as mayors. In 2002 there was an election of a new government and since then there has been a mutual approach of the Colombian government and paramilitary groups regarding demobilisation and the subsequent integration of paramilitaries into public life.

In an early draft of the Justice and Peace legislation, judges could be ordered at the request of the government to overturn sentences. This alliance between sectors of the government and sectors of the paramilitaries against the Supreme Court was the context within which the new structure of the country has developed. There have been attacks against the Supreme Court and against human rights defenders. These attacks have been orchestrated by the paramilitary leader Don Berna. In addition, Velásquez stated that it was known that meetings had been held between the President's legal advisor and paramilitary leaders. Also it was known that close relatives of the President were involved in the meetings. Taken together these add up to the construction of impunity and impunity for crimes against humanity. Such factors merited the intervention of the ICC. Persecution constitutes a crime under Article 7 of the Rome Statute and Velásquez stated that there was an argument to be made that the events he described constituted persecution under Article 7.

A further important point was raised regarding the nature of impunity. Impunity is not just the absence of punishment; it is also the absence of truth. Victims and communities have a right to truth. This is the only way to guarantee justice. A wealth of jurisprudence from the Inter-American Court of Human Rights exists on the right to truth. It is absolutely essential to know what was done, by whom, why and how. In conclusion, Velásquez emphasised that it was just not enough to apply a model of justice that ignores the right of truth of victims and society. It would not be enough to pass sentence and pay financial reparations when there was a re-structuring of the State. If these principles of the fight against impunity are ignored, accountability and justice cannot be ensured.

Mr Reinaldo Villalba of the José Alvear Restrepo Lawyers Collective was the second speaker on this panel and spoke about the influence of the ICC on victims and the

lawyers of victims and how they have organised themselves in the struggle against impunity. Villalba contended that the economic and social powers who have supported the commission of crimes are escaping with impunity. There is fertile ground for ICC intervention in Colombia because despite the fact that the justice system has been collaborating with or supporting criminal activity, there are exceptions like the Supreme Court. There has been great dignity shown by some individuals in the Supreme Court when trying to defend rights in Colombia. With the support of the ICC, the intervention of the Supreme Court could help support the justice process in Colombia.

Villalba spoke of how a new awareness of rights and obligations stemming from international law has emerged in Colombia. He noted that this was particularly due to the mobilisation of victims' interest groups. The creation of the ICC and the Rome Statute stimulated a change and was the impetus for the legal training of victims who have become versed in the contents of the Rome Statute. The dynamic of victims' mobilisation and victims' groups has consequently changed. In fact, some victims' associations formed at the time of the Justice and Peace Law, which was seen by many as an instrument of impunity. The law in fact motivated victims to present communications to the ICC. The victims of crimes perpetrated by the State were of particular concern to Villalba as they have no guarantees of ensuring their fundamental rights and indeed face some significant obstacles such as the instigation of smear campaigns against them. Villalba gave one example of the mobilisation of a victims' movement becoming the subject of a smear campaign by high-ranking government officials alleging it was supported by FARC.

Villalba stated that it was worth emphasising that the ICC has really helped to motivate human rights defenders who see the intervention of the Court and its Statute as a work tool. There was recognition amongst human rights advocates that crimes against humanity have taken place and an awareness or knowledge of who was responsible. Therefore lawyers such as Villalba made communications to the ICC, even in the face of active opposition.

The final speaker on the 'Colombian Justice and ICC Impact' panel, Ms Catalina Díaz, of the University of Oxford, spoke on the topic of positive complementarity. A central

question that was addressed in Díaz's presentation was: 'What has been the impact of the principle of positive complementarity in the case of Colombia?' focusing particularly on the adoption of law 975, the 'Justice and Peace Law.' Díaz stated that this law illustrated very well how positive complementarity operated in practice. Two aspects of positive complementarity in Colombia were focused on:

- 1) Exploring the role that the ICC played in the establishment of the Justice and Peace Law
- 2) Examining how decisions under the law have responded or failed to respond to the influence of the ICC

Referring to an article published in the *Yearbook of International Humanitarian Law*, Díaz spoke of how the chief prosecutor of the ICC, Mr Moreno-Ocampo, referred to Colombia as an example of positive complementarity.²⁵ In contrast to other cases where the Court is conducting preliminary examinations, it seemed that for the OTP, the preliminary examination undertaken by the Court in Colombia was a component of positive complementarity.

Díaz pondered what influence the ICC had in the establishment of the Justice and Peace Law. She advanced two hypotheses. Firstly, that the leaders of the paramilitaries knew of the ICC and wanted to reach a legal agreement that would prevent ICC intervention. This created a space for the debating of the Justice and Peace Law in Congress and not in closed political circles or in the negotiating table under a general amnesty formula. The 'shadow' of the ICC contributed to having the peace and justice arrangement debated and adopted within the National Congress, where the language of international human rights law played a certain role. Importantly, the discourse included the language of justice not amnesty. Secondly, civil society organisations in Colombia who had the firm support of international and intergovernmental organisations and donors were able to effectively use the language of victims' rights to confront proposals by the Executive with high doses of impunity.

²⁵ Luis Moreno-Ocampo, 'The International Criminal Court – Some Reflections' 12 *Yearbook of International Humanitarian Law* (2009), pp. 3-12.

In terms of the effects of complementarity in the application of the Justice and Peace Law, although there have been very few final judgements²⁶ Díaz stated one could detect changes in how the Justice and Peace Tribunal has understood its role. There has been a change from an isolated-case approach to seeing the crimes as part of more systematic violations patterns.

From this observation Díaz made two important points. Firstly, that the Justice and Peace Tribunal had missed opportunities to draw attention to the gender aspects of crimes, and secondly, that it had failed to highlight a pattern of assassinations by paramilitary groups of candidates running for popular election positions. The first case before the Justice and Peace Tribunal, pertaining to the murder of a mayoral candidate and her daughter, provided a typical example. It involved five individual crimes but no reference was made to the underlying context of these crimes – namely, that they were an example of a pattern of violence against female politicians.²⁷ This constituted very clear evidence that peace and justice judicial operators had not appropriated adequate prosecution strategies addressing massive and systematic crimes. The gender aspect of the crime in a highly patriarchal area was neglected. The case was a lost opportunity to establish criminal patterns by the paramilitary group regarding the assassination of candidates running for popular election positions. One of the victims in the case, Aida Cecilia Lasso, was running for mayor of San Alberto (Cesar). The investigation and the Tribunal could have addressed that criminal pattern and confirmed it for the case of women. The decision also made clear the absolute absence of a gender perspective. The case represented a very good opportunity to address patterns of violence against female political leaders. In the appellate decision, the Criminal Chamber of the Supreme Court made clear that the crimes subjected to peace and justice proceedings are massive and systematic crimes and they should be addressed as such. Consequently, the Court annulled the decision.

In the third decision by the Peace and Justice Chamber of the Bogota Superior Tribunal, it was apparent to Díaz that lessons had been learnt. In the case against 'El Iguano', a

²⁶ Díaz reported that there have been three judgements over a two-year period. One was overturned. The second has had amendments in relation to reparations. The third is awaiting final decision.

²⁷ Sala de Justicia y Paz del Tribunal Superior de Bogotá, 19 March 2009, *Wilson Salazar Carrascal, alias 'El Loro'*.

demobilised commander of the 'Fronteras' front of the AUC, the accused was sentenced for 170 selective assassinations, kidnappings, torture and forced displacement. Throughout the decision the language of systematic and generalised crimes against civilians was used. The decision contained 30 pages of explanation of why the crimes constituted war crimes or crimes against humanity. Principles of international law were applied to the investigations that were carried out. Progress in the appropriation of human rights language in the Justice and Peace Tribunal could thus be observed.

In terms of the presence of the ICC and more broadly the international human rights movement, the principle of complementarity has helped the Justice and Peace Law to be debated in the public sphere. However, the shadow of the ICC, Díaz contended, has not been strong enough to influence decisions to extradite paramilitary leaders.

II – 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 sought 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 included:

- 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?

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- 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 Law currently being debated by the legislature impact upon such considerations?

The panel was chaired by Mr Peter van der Auweraert, from the International Organisation of Migration.

The first speaker was Mr Juan Pablo Cardona from the German International Cooperation (GIZ) organisation. For the past three years this organisation has been working alongside and supporting prosecutors, magistrates and the judicial system in Colombia with regards to the Justice and Peace Law. GIZ is not working directly with victims, but rather with those applying the law and prosecuting perpetrators.

Cardona spoke in detail on the work of the organisation in relation to the Justice and Peace Law. He stated that at the time of the adoption of the law in July 2005, there were 30,000 demobilised fighters. Recognizing the fact that when dealing with statistics in Colombia it is very difficult to get accurate figures, Cardona stated that at the current time there appeared to be over 50,000 demobilised fighters. Initially there had been collective demobilisations, which were followed by individual demobilisations by members of guerrilla groups given that these groups did not participate in the collective demobilisation.

Regarding the Justice and Peace Law, for the past six years prosecutors have been investigating cases and with admissions of guilt by defendants, GIZ had compiled statistics on the patterns of crimes. Cardona provided the following figures that represent an approximation such that it is estimated that there have been at least:

- ❖ 60,000 murders
- ❖ 8,000 displacements

- ❖ 3,000 disappearances
- ❖ 2,000 child soldiers
- ❖ 2,000 torture victims
- ❖ 40 cases of sexual violence.²⁸

The statistics referred to here are those provided by the prosecutor's office. However, some NGOs give far higher figures. But Cardona's organisation has concluded that there are two major problems with the Justice and Peace process. The first is that the prosecutorial strategy pursued lacks an adequate prioritisation of cases, and there is a lack of an effective strategy overall. Cardona specified that it is not the case that the prosecutor's office is not trying hard and that there is no enthusiasm, but in the view of GIZ the prosecutor's strategy is not effective. The second problem is that the process is complicated because its structure is not effective. It is very similar to the ordinary criminal process and therefore there are many stages that Cardona contended should not be a part of the Justice and Peace process.

The next speaker, Professor Dr Kai Ambos of the University of Göttingen, Germany, is the author of a substantial piece of research on the Colombian peace process.²⁹ From the normative perspective law 975, Ambos argued, is an interesting but also a very complicated law. Statistics posed an empirical problem and figures need to be investigated in the field. There was also the problem of the extradition of AUC commanders. The situation of the AUC commanders of the remaining 16 paramilitary groups was diverse. In order for the Justice and Peace Law to be applicable there was an obligation to make a full confession. If a perpetrator does not fully confess they can be excluded from the law. However, this clause has been used very rarely. An important question in this regard Ambos asserted was: 'How many opportunities should be given to an accused to confess a crime?' For Ambos, the question of sanctions is very important in this type of law and non-compliance must be dealt with strictly.

²⁸ Available at: www.fiscalia.gov.co/justiciapaz/Index.htm accessed 30 September 2011.

²⁹ A summary of the research and its findings including the details of the analysis are available at: www.icc-cpi.int/NR/rdonlyres/7EDB95A1-BE49-4BA7-A64A-7D9DC8F57E98/282850/civil1.pdf accessed 30 September 2011.

Ambos also discussed the general problem of peace versus justice. With regards to the Rome Statute of the ICC, the drafters wanted to have a flexible instrument. The ICC is a court of last resort. The drafters wanted to create a flexible institution in that it facilitates prosecution in the domestic sphere. For human rights groups it might be difficult to understand this approach. However, when is the point reached where there must be intervention by the ICC? That is not clear from Article 17, which covers issues of admissibility and complementarity.

There is no impunity for the core crimes as outlined in Articles 5 to 8 of the Rome Statute. An exception to this rule stems from the principle of complementarity which is found in Article 17 and Article 53 dealing with the interests of justice. It is known that in Colombia the crimes within the jurisdiction of the ICC have been committed. The question is when to intervene. It is not completely clear from Article 17 what factors would warrant the intervention of the ICC. The principle is, as to its concrete requirements, still very controversial in case law and doctrine. If one were to use the threshold of gravity, Ambos contended, it is certainly met in the Colombian case.

Mr Michael Reed from the International Center for Transitional Justice, Colombia, addressed the conference via video-link. He underscored the importance of the principle of complementarity in a country such as Colombia which has a sophisticated domestic legal system. If the will is there, the capacity is there. Reed emphasised that an important point on complementarity is being ignored and that is the role of the Inter-American System of Human Rights which has been pushing for due diligence in criminal investigations for many years.

Reed contended that a more active role of the Office of the Prosecutor of the ICC was needed due to, for example, the inability to prosecute those most responsible. For the purpose of argument, Reed highlighted, if all the problems with the Justice and Peace Law were solved and 900 paramilitaries were convicted, the question remained whether those who are most responsible for grave crimes were held to account. The answer to this question unfortunately depends not on the Justice and Peace Law but on the normal criminal justice system.

A preliminary investigation by the ICC-OTP in Colombia commenced in 2005 and was publically confirmed in 2006. However, Reed highlighted that there has not been a single public document that sheds light on the results of the investigations. A report promised by November 2010 has still not been forthcoming.

On the question of analysing the genuineness and effectiveness of domestic investigations, there were some issues of a general nature that needed to be taken into account:

- 1) Investigations are not addressing the chain of command but just the direct perpetrators
- 2) Paramilitary action in atrocity crimes were being investigated but not the political structure that enabled the crimes to take place
- 3) Extrajudicial executions – there has been no study of the pattern of executions so no investigation as to whether there was an official policy regarding extrajudicial executions

On the theme of justice and peace Reed stated that even if the Justice and Peace system works effectively, it does not have the ability to hold accountable those most responsible. It has its role but it should be part of a larger process to combat impunity in Colombia.

With regards to the Supreme Court, the convictions it has entered for atrocity crimes are extraordinary, he stated, but atrocity crimes convictions are rare, numbering about two. The rest of the cases are really about electoral fraud. Concerning ordinary jurisdiction, one of the biggest problems is the absence of security for victims, witnesses and operators of the justice system such as judges. Investigations clearly focus on direct participation perpetrators. However, by taking a specific case approach the chain of command is not exposed.

Reed also reported problems of unjustified delay in investigation, interference in proceedings, a lack of impartiality in proceedings and judgements coming to conclusions that the evidence does not support. Finally, he said it was very important

that the OTP does not focus just on the Justice and Peace Law. It should be a means to an end but was being perceived as if it were a means in itself.

Discussion/recommendations

Referring to the situation of extradited former paramilitaries, one delegate queried the extent of the contribution to the justice and peace process made by extradited paramilitary members. Cardona responded that there has been one extradition of relevance to this question, an individual who was the commander of a paramilitary block in a region in Colombia. He was the only paramilitary leader so far who is in the final phase of trial. In terms of reparation the record is questionable and truth has been fragmented. Reed referred to a report on the ICTJ website.³⁰ He commented that extraditions have had a chilling effect, in that the extraditions curtailed the depositions of the individuals who were extradited.

The three speakers from the complementarity panel also used the opportunity of the discussion segment to make some final comments. Ambos underscored that there is still an armed conflict in existence in Colombia and as such there is no transitional justice in the sense that we normally understand it. Cardona stated that he agreed with some of the opinions and visions that have been presented here especially regarding Colombia being in the process of transitional justice, although this transitional justice was fragmented at the moment. The Justice and Peace Law is not the only mechanism that can be effective. There was a need to look at other things that do not come under this law i.e. false positives and crimes of the State. Reed argued that transitional justice was not designed to end conflicts. It was designed to face truths from conflicts, not to end them.

³⁰ <http://ictj.org/sites/default/files/ICTJ-Colombia-Impact-ICC-2010-English.pdf> accessed 30 September 2011.

Part 3

Should the ICC Exercise Jurisdiction?

I – 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 the Prosecutor 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 examined included:

- What does ‘justice’ mean for the ICC and whose interests are to be considered (e.g. victims, local society, Rome Statute States 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 brought together experts on the debates surrounding Article 53 including the controversies around the impact of ICC interventions in Africa and the impact of other international tribunals on the respective societies in order to provide a comparative perspective on the evolving understandings of the interests of justice.

The chair, Professor Chandra Lekha Sriram of the School of Oriental and African Studies of the University of London, opened by highlighting how this panel differed somewhat to the previous ones in the conference as it aimed to compare and contrast situations beyond Colombia and as such was comparative in nature. Article 53 of the Rome Statute

was a compromise clause about whether accountability ought to have a wider remit, for example, the establishment of Truth and Reconciliation Commissions and other such bodies in lieu of prosecutions. For example, in the interest of justice might mean not getting involved in ongoing peace processes. However, there is vagueness in the provision as it does not expand on what the interest of justice actually is.

Dr Phil Clark of the School of Oriental and African Studies focused on the question of the influence of politics on the legal process in respect of how the ICC and particularly the OTP operated both internally and in terms of its interaction with domestic States. To illustrate his points he broadened the debate outside of the Colombian context. He focused on the ICC's relationship with Uganda and the Democratic Republic of Congo. Clark argued that the ICC was a profoundly 'political beast' that was affected by politics and affected politics. He contended that the OTP in particular has become extremely politicised and the ICC and OTP should admit its political nature and make more informed political decisions. This is particularly pertinent because as the ICC only has jurisdiction after 2002 it frequently finds itself intervening in ongoing conflicts, which raises questions of its impact on peace processes.

The ICC also influences how politics is played out on the ground, Clark maintained. In Uganda, President Museveni realised that the ICC was one of the best tools he had against the Lord's Resistance Army. This led to entrenched impunity as it sent the message that there was very little chance of the investigation of government perpetrators. Clark argued that there was a feeling in government circles that the State can do what it likes to its own citizens without any consequences. It was a similar scenario in the Democratic Republic of Congo.

During the drafting of the ICC's statute in Rome there was a sense that there would be reluctance on the part of States for self-referrals. However, Uganda and DRC have showed an eagerness to get the ICC involved. Clark asserted that this is because it is easier to manipulate international organisations than your own domestic legal system. The mistake ICC have made is to take Congolese judges at their word. When it was maintained that 'we can't do it', the lack of reluctance to ICC intervention was taken as an indication that the position maintained by the Congolese judiciary was sincere.

Finally, Clark pointed out that there was a gap in understandings of what the 'State' means and who gets to speak on behalf of the State. The ICC had taken Ituri cases from the DRC on the word of the Executive. This was disheartening. After a reform of the judicial system a State was told that it was still not up to scratch so cases would be transferred to The Hague. This state of affairs created a negative influence on the ground.

Dr Leslie Vinjamuri of the School of Oriental and African Studies of the University of London posed the question: 'If the ICC took on Colombia would it have a more effective role than it currently has as a "shadow"'? The likely answer to this question for Vinjamuri was no. And, the possibility that it would become instrumentalised, was high. At what point, she asked, does it become 'incredible' that the ICC would take on this case, a point at which its role as a shadow would cease to have any impact. To examine the substance of what 'impact' was Vinjamuri looked to the stated goals of the court which are accountability, peace, prevention and deterrence. While the claim that justice is necessary for peace is morally persuasive, the empirical evidence to date does not back this up.

Vinjamuri considered the mechanisms through which proponents implicitly and sometimes explicitly suggest that international criminal courts can affect peace and justice. Firstly, indictments are seen as an instrument for marginalising perpetrators, thereby facilitating the peace process by removing them from the process. Secondly, indictments have sometimes been issued simultaneous to military intervention, as was the case in both Kosovo and Libya. Thirdly, there is the argument that the ICC arrest warrants could be used to induce engagement with the peace process. A final argument which pertains to the work of tribunals but which is not applicable to the Colombian conflict is that their engagement could defuse future cycles of violence in ethnic conflict.

Vinjamuri also addressed broad trends in the use of the impact of trials, amnesties and truth commissions in situations of conflict in order to give a comparative lens for Colombia. Between 1945 and 1990 amnesties remained very prevalent. There were far more domestic amnesties than as components of international amnesties. Amnesties

tended to be used for conflicts that were very hard to resolve. Trials tended to be used in conflicts that were resolved by military victory.

On a final note, Vinjamuri commented that waiting works. Preliminary research demonstrates that trials are more often associated with peace when they are deferred until at least two years after the end of the conflict. The sequence of events should include not just the question of whom to trial first but also the question of what mechanisms should be put in place and how these fit with a more comprehensive strategy for liberalisation or democratisation.

Speaking on the theme of broad prosecutorial discretion and focusing particularly on the ICTY and domestic politics in the Balkans, Mr Mladen Ostojic of Queen Mary, University of London, focused his paper on an analysis of the post-2000 transition in Serbia. The main lessons to be drawn from the ICTY and the former Yugoslavia are that institutions such as criminal tribunals cannot be effective without the cooperation of domestic political elites. However, there is a systemic tension between externalised justice and efforts at establishing and maintaining the stability and legitimacy of political institutions at the national level.

The ICTY was established while conflict was ongoing. Despite inclusion of cooperation with the ICTY as a condition of the Dayton agreement, obstruction by the target States' governments paralysed the ICTY in the 1990s. Regime change in Croatia and Serbia in 2000 created the conditions for the ICTY to become operational. The ICTY's record in Serbia was summarised briefly:

- State cooperation had been sporadic, protracted and incomplete
- ICTY failed to establish legitimacy and raise awareness about war crimes

Ostojic maintained that there has been a clear discrepancy between bringing perpetrators to justice and public impact and public opinion.

On the question of justice versus stability, Ostojic's research has found that the ICTY provoked instability for a number of reasons. There was no political consensus on ICTY

cooperation in Serbia and conditionality generated political polarisation. Further, opposition to ICTY cooperation from armed forces and nationalist circles destabilised the government. Two incidents were noteworthy; the mutiny of the Special Operations Unit in November 2001 and the assassination of Prime Minister Djindjic in March 2003. Instead of arresting indictees, the authorities increasingly sought to promote their surrender through financial incentives and public recognition. The policy of involuntary surrender led to the transfer of 16 indictees between 2004 and 2005. As a result ICTY cooperation was detached from any notion of justice and truth. Only 15% of the population have supported cooperation for the sake of justice. Others have supported for strategic reasons, e.g. succession to the EU.

In conclusion, Ostojic asserted that in order to fulfil their didactic mission, international tribunals need the support of political elites in target States. Tribunals can reduce the tensions between the pursuit of justice and the safeguard of stability and legitimacy by exercising prosecutorial discretion. Failure to do so may result in justice being done without being seen to be done.

Discussion/recommendations

The issues advanced in the panel on “The Meaning of “Interests of Justice”” gave rise to some lively discussion. The representative of the ICC, Dr Emeric Rogier, made comments on the position of the ICC in regards to the meaning of the interests of justice. This doctrine was not defined by the Rome statute so the court has had to make its own determination. They have conflated the interests of justice with the interests of victims. The court has not looked at the interest of peace as there was another provision that addressed this, namely Article 16.³¹ The United Nations Security Council can defer an investigation or prosecution under this Article in the interests of peace. Vinjamuri asked Rogier to define what he meant by the interests of the victims. Responding, it was stressed that the interests of victims vary from case to case but the OTP does not assume that victims will always welcome the interaction of the ICC. Of course there will

³¹ Article 16: ‘Deferral of investigation or prosecution’: No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

not be a homogenous view but the OTP took the views of different victims on board. The OTP also takes into account the security of victims, particularly the security of future victims.

One participant asked if cooperation of the elites was needed in order to have a judicial process and what happens when the elites were the perpetrators? Ostojic responded by stating that by political elite this means essentially those who were in a position of power. When there is a regime change there usually is a change of the elite. However, in situations like Sudan where there had been no regime change accountability has to date been impossible.

Regarding the assertion that with the *ad hoc* tribunals there had been a lack of engagement with national institutions, it was questioned whether a different approach has been seen with the ICC. Clark replied that he thought it was a really serious question for international justice as a whole. There has been inflated rhetoric from scholars over time and public figures making lofty claims – public expectations have been based on this. Clark contended that there was a need to be much more modest about what can be achieved. Vinjamuri also responded to this question and commented that she agreed with Clark that part of the critique has been a result of inflated rhetoric. Big non-governmental organisations have retreated somewhat with less focus on deterrence and more on accountability, but this has been less the case with the ICC. She clarified that she was not opposed to international criminal justice but for her the key questions are *when* and *what mechanisms*.

Finally, Ostojic commented that one of the more controversial aspects of the ICTY has been its failure to prosecute the actions of NATO. The ICTY Prosecutor, Ms Del Ponte, claimed in her memoirs that this investigation would have been outside the political realm of the ICTY's jurisdiction.

II – Roundtable on the ICC and Peace and Justice in Colombia

The preceding panel directed attention squarely towards the question of whether it would be in the 'interests of justice' for the OTP to initiate prosecutions in Colombia. This provided the starting point for the 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 thus included:

- 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?

This session offered an opportunity for final reflections on the themes of the conference as well as a discussion on future directions in research and policy on the ICC and Colombia.

Professor Jenny Pearce of the University of Bradford convened and introduced the panel by underlining the importance of context. For many years Colombia was not looked upon as a country with serious human rights violations. It has taken a long time for the international community to realise that widespread human rights violations have been occurring there.

The first speaker on this closing panel was Dr Francisco Lloreda, the Colombian High Presidential Adviser for Public Safety. Whilst undoubtedly peace and justice are legitimate values in every society, he pondered whether nations were entitled to sacrifice justice for peace. This question can be answered in the affirmative but a further

aspect that needs to be explored is what exactly is meant by justice. The meaning of justice varies and this is why, some scholars argue, the Rome statute was drafted to provide flexibility. Lloreda argued that there had been a clear understanding on the part of Colombia from the beginning concerning the scope of the ICC. For example, at the moment of ratification, Colombia made a series of declarations, including the decision to request the postponement of the jurisdiction of the Court regarding war crimes (Article 124). Colombia also declared that none of the dispositions of the Statute would impede the concession of amnesties and penal pardons for political crimes.

Furthermore, Lloreda stated that Colombia has been carrying out genuine investigations and that despite the challenges, there is the will and judicial ability to bring the main individuals responsible for atrocious crimes to justice. Some people, however, regard the Justice and Peace Law as a shield to avoid the jurisdiction of the ICC. Nonetheless, Lloreda highlighted that within the Peace and Justice Law, perpetrators are judged simultaneously for an ordinary sentence and for an alternative penalty. But the alternative penalty only applies under some conditions (telling the truth, victims' reparation, and no repetition). Contrary to what has been suggested, Lloreda contended, the alternative sentence is not a given; it's a conditional penalty. The number of those being investigated under this law though is not small – 4535 members of the IAG-29 paramilitary commanders are under investigation, Lloreda maintained.

Although the Colombian authorities would like to see more convictions, the low conviction rate did not mean they are not succeeding in the fight against impunity. Lloreda conceded that the Justice and Peace Law is not perfect and requires amendment. The Colombian government is aware of this. The Law constitutes shades of grey, it embodies the tension between peace and justice, and it is a post-conflict mechanism applied to a conflict situation. Lloreda also stated that is wrong to analyse Colombia only through the lenses of the Peace and Justice Law. This legal procedure applies to the illegal armed groups but does not cover the entire spectrum of the ICC and the State's actions. The Supreme Court, for example, has already condemned 32 politicians for their linkages with the paramilitary groups or for their responsibility in some atrocious crimes. Regarding '*falsos positivos*' Lloreda maintained that 1,486 active cases are under investigation; that 344 members of the military have been condemned;

and that 27 high-ranking officials have retired. Lloreda emphasised that the Colombian government understands the needs of victims and reparation. A recent Victims Law has been approved and includes provision for the restitution of land for victims.

Lloreda also emphasised that the ICC is a last resort Court and as such was not created nor intended to replace domestic justice processes. The ideal situation is that in which domestic justice assumes its duties within the Rome Statute and the Court has none or just a few cases. That is why the Office of the Prosecutor encourages all State Parties to comply with their obligations. In this respect, Lloreda contended, the Colombian government is committed to working hand in hand with the justice system in order to bring the main perpetrators of atrocious crimes to justice. Lloreda emphasised that Colombia's President, Juan Manuel Santos, has affirmed that the government is interested in peace but not at any price. Colombia understands its international obligations and its duties within the Rome Statute and will not save any efforts to strengthen the Court. The ICC, he said, is 'not an enemy, it is an ally'. Perhaps a more accurate title for the conference, Lloreda suggested, would have been *Under the light of the ICC – Colombia and the International Criminal System*.

Professor Chandra Lekha Sriram commented that she had been conducting research elsewhere on the topic of the shadow of the ICC. She said that in light of other examples, while it is by no means perfect, it must be remembered that Colombia is a work in progress. The shadow of the ICC has had an impact but how much of an impact is unclear. An important factor to take into account is that there are wider problems that result from a culture of impunity that get embedded in situations of protracted armed conflict.

Mr Philippe Tremblay stated that he has drawn a number of key ideas from the past couple of days of the conference. Firstly, there is a need to shift the focus from the Justice and Peace Law and focus on domestic law instead. There is a need to look at the Colombian justice system as a whole. There are a number of areas of concern, one of which is the fact that indictments have not reflected the gravity or the organised manner of the crimes. Secondly, there has so far been little desire to unearth material authors of crimes who are members of the elite in Colombia. There is a need to

acknowledge the fact that Colombian authorities have faced some serious challenges in attempts to execute measures.

Mr Emeric Rogier stated that one of the reasons for attending this conference was to get the views of Colombian and other actors regarding the ICC's role. He confirmed that he will report the fruitful feedback to the Prosecutor. He highlighted a number of components needed to move the process forward. Firstly, for the ICC to have impact it needs the support of the Colombian authorities. Secondly, there is a need for other international cooperation such as national authorities from third States and NGOs in order to make a greater impact in Colombia. Thirdly, the ICC needs the support of civil society. In this regard the human rights movement has played a very important role in documenting abuses.

Identifying the measures necessary for the OTP to achieve this objective of moving the process forward, Rogier remarked that there is a need for the OTP to give emphasis to certain crimes in its analysis, for example, sexual violence and crimes targeting indigenous communities. There is also a need to look into other proceedings outside of the Justice and Peace Law. This is something the OTP is doing already but there is a need to communicate this more effectively. The OTP ought to engage more publically and visibly in what they do. Rogier committed that the OTP will try to refine their analysis on the issues of key importance and have greater public engagement.

Discussion/recommendations

On the issue of extradition, it was discussed whether US jurisdiction takes priority over Colombian jurisdiction and whether economic crimes are given priority over crimes committed by paramilitaries which threaten the right to life. Lloreda commented that being prosecuted in the US for economic crimes did not exempt the investigation of suspects for atrocity crimes. There have been difficulties but where there is a will there is a way and the Colombian authorities have been making progress.

Lloreda was asked what the Colombian State has done to investigate State crimes. He responded that there are 1486 active cases under investigation regarding false positives. If the Colombian Prosecutor's office was doing its job, officials who have retired would be included in its investigations, but this has not been the case. It was the role of the government to provide the tools to provide justice but it was the job of the judiciary to administer justice.

Another delegate remarked that over the course of the conference there has been much discussion on how truth and justice can help in non-repetition. In Colombia there has been a 'recycling' of paramilitaries but under another name. The delegate asked how this fits into the framework of truth, justice and the guarantee of non-repetition. Rogier replied that this was a very difficult question since the crimes allegedly committed by 'recycled' individuals and newly emerging bands may not necessarily fall under the ICC jurisdiction. Nonetheless, if there is no justice of any form there is a bigger risk that the same individuals will commit more crimes in the future.

Díaz commented that the Colombian judiciary was making efforts to prosecute crimes against trade unionists. In those investigations some agents of the State have been prosecuted and also some paramilitaries but the treatment of the evidence has been very poor in terms of systematic analysis. Villalba remarked that there were currently 2,700 cases of trade unionists murdered, according to some estimates.

Lloreda pointed out the changing dynamic of crime in Colombia. The main purpose of the so-called BACRIMs (*Bandas Criminales Emergentes*, [emerging criminal groups]) was drug trafficking. That was not the case with the guerrillas or paramilitaries. Some say the numbers of BACRIMs are higher than the numbers for paramilitaries. Some say they are not. The lack of consensus means there are no accurate figures. Finally, participants commented upon the potential correlation between a decline in homicide rates and the demobilisation of fighters.

Conclusion

This high level conference was convened with the intention of fulfilling a number of important objectives. Firstly, it aspired to make a constructive contribution to existing research on cutting-edge themes, ranging from the dynamics of international criminal justice, to questions of transitional justice, to those of the ongoing conflict and peace process in Colombia. Speakers explored the progress of the transitional justice process in Colombia in the context of positive complementarity and scrutinised the effectiveness of the 'Shadow of the ICC' in this country. Questions pertaining to the nature and dynamics of transitional justice included delving into the questions of what mechanisms are most effective, whether it is desirable to instigate transitional justice mechanisms whilst a conflict is ongoing, whether justice and peace can be pursued simultaneously, or whether indeed the pursuit of peace and justice in Colombia is inherently conflictual?

It was clear from the proceedings that the mobilisation of a grass-roots movement has been a driving force behind the pursuit of peace and justice in Colombia. There has been an appropriation of the language of international human rights law and of victims' rights and an informed awareness of the contents of international criminal law which has assisted in this movement. Thus civil society has made a very positive contribution to the advancement of criminal justice in Colombia. However, this process has not been without significant complexity and victims' groups have found themselves further victimised as they have been subject to harassment and smear campaigns. There is also significant scope for tension between outside institutional legal interventions and sectors of domestic society. In addition to examining the particularities of the Colombian context, a comparative study of societies that have undergone a process of transitional justice, including the former Yugoslavia, enabled lessons to be drawn from past experience. It was concluded that the effectiveness of international institutions such as the ICC would be seriously diminished without the cooperation of key domestic political actors.

The conference further aimed to provide a forum to facilitate the presentation and discussion of high quality research, bringing together key actors and institutions

involved in the quest for justice in Colombia. During the two-day conference delegates were afforded the opportunity to engage in fruitful dialogue and exchanged significant information and ideas, as the contents of this report indicates. It was expected also that the conference would have important policy implications through *inter alia* (a) the provision of an analytic framework for the OTP's strategy for the Colombian situation, and (b) providing an opportunity to inform political and legal debates in Colombia around potential ICC prosecutions. The conference was successful in this regard.

Annex 1

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

Speakers and Chairs:

- | | |
|-----------------------------|--|
| 1. Kai Ambos | University of Göttingen, Germany |
| 2. Jineth Bedoya | El Tiempo newspaper, Colombia |
| 3. David Cantor | Institute of Commonwealth Studies |
| 4. Juan Pablo Cardona | GIZ, Germany |
| 5. Phil Clark | SOAS & Oxford Transitional Justice Research |
| 6. Catalina Díaz | University of Oxford |
| 7. Par Engstrom | Human Rights Consortium |
| 8. Geoff Gilbert | University of Essex |
| 9. Andrei Gomez-Suarez | Sussex University |
| 10. John Jones | Doughty Street Chambers |
| 11. Chandra Lekha Sriram | SOAS, University of London |
| 12. Francisco Lloreda | President advisor for Public Safety, Colombia |
| 13. Maxine Molyneux | Institute for the Study of the Americas |
| 14. Mladen Ostojic | Queen Mary, University of London |
| 15. Jenny Pearce | Bradford University |
| 16. Eduardo Pizarro | National University, Colombia |
| 17. Michael Reed | International Center for Transitional Justice |
| 18. Emeric Rogier | Office of Prosecutor, International Criminal Court |
| 19. Philippe Tremblay | Lawyers Without Borders, Canada |
| 20. Peter van der Auweraert | International Organisation of Migration |
| 21. Iván Velásquez | Magistrate, Supreme Court of Colombia |
| 22. Reinaldo Villalba | José Alvear Restrepo Lawyers Collective |
| 23. Leslie Vinjamuri | SOAS, University of London |
| 24. Alex Wilks | International Bar Association |

Attendees:

- | | |
|-----------------------------|--|
| 25. Ulrike Beck | Amnesty International |
| 26. Simon Bennett | University of London |
| 27. Catherine Bevilacqua | — |
| 28. Annie Bird | London School of Economics |
| 29. Margherita Blandini | Refugee Law Initiative, School of Advanced Study |
| 30. Miriam Bradley | Oxford University |
| 31. Kimberly Brody | The London School of Economics |
| 32. Peter Burbidge | University of Westminster |
| 33. Gwen Burnyeat | Peace Brigades International |
| 34. Maria Cecilia Cabal | — |
| 35. Alexandra Cárdenas | University of London |
| 36. Giuliana Cascella Carbó | International Committee Against Disappearances |
| 37. Andrea Diaz Rozas | K. V. Leuven |
| 38. Maria Cecilia Dómine | Universität Göttingen, Germany |
| 39. Marjolijn de Puyot | Bournemouth University |
| 40. Virginia Dellavalle | UCL |
| 41. Peter Drury | Amnesty International |
| 42. Beatriz Echeverry | — |

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43. Hugo Ellis	Foreign & Commonwealth Office
44. Nicola Evans	Colombian Caravan Lawyers Group
45. Karinna Fernandez	—
46. Don Ferencz	The Planethood Foundation
47. Roxana Ferllini	University College London
48. Diana Milena Florez	London School of Economics
49. Arantxa Geigo	Amnesty International
50. Anne Marie Glover	SOAS
51. Rodrigo Andrés González-Fuente	Universität Göttingen, Germany
52. Christopher Keith Hall	Amnesty International
53. Ole Hansen	Hansen Palomares Solicitors
54. Rob Hawke	Peace Brigades International
55. Jeremy Hobbs	Foreign & Commonwealth Office
56. Daniel Jackman	—
57. Szymon Jaczarek	Brunel University
58. Indiana Jimenez Guerrereo	University of Essex
59. Aleksandr Khechumyan	Penal Reform International
60. Carol Lasbrey	—
61. Gavin Latin	Bournemouth University
62. Clara Leal Patarroyo	University of Essex
63. Primrose Lovett	University of York
64. Helena-Ulkike Marambio	Freelance consultant, NGO
65. Ruth Mackenzie	University of Westminster
66. Marek Marczyński	Amnesty International
67. Jasmin Meiea	—
68. Eadaoin O'Brien	Human Rights Consortium
69. Thomas Pegram	New York University Law School
70. Margarita Prieto Acosta	University of Kent
71. Maria Jose Poveda Ochoa	University of Sussex
72. Bridget Petherbridge	QEB Hollis Whiteman Chambers
73. Marcelo Pollack	Amnesty International
74. Mark Pope	Royal Holloway, University of London
75. Jill Powis	Peace Brigades International
76. Farid Mohammed Rashid	East London University
77. Jimena Reyes	FIDH
78. H.E Mauricio Rodríguez Múnera	Embassy of Colombia
79. Indira Rosethal	Amnesty International
80. Pablo Sapiains	—
81. Daniel Slee	—
82. Miguel Angel Sierra	—
83. Daniel Saxon	Cambridge University
84. Diego Terapués Sandino	Universität Göttingen, Germany
85. Isabelle Therriault	Bournemouth University
86. Jimena Trujillo-Molano	University of York
87. Juan Manuel Uribe	Embassy of Colombia
88. John Warwick Montgomery	Patrick Henry College
89. Claire Welling Herrera	ABColombia
90. Louise Winstanley	ABColombia
91. Andres Zaragoza Montesano	Essex University
92. Miša Zgonec-Rožej	Amnesty International

Annex 2

Participants' Biographies

Kai Ambos, University of Göttingen, Germany

Kai Ambos is an internationally renowned expert on international law and human rights. He is a professor of criminal law, criminal procedure, international criminal law and comparative law at the University of Göttingen. He is also a judge at the Provincial Court in Göttingen. He is the author of numerous publications including *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: An inductive, Situation-based approach* (Berlin Heidelberg: Springer: 2010).

Jineth Bedoya Lima, *El Tiempo* newspaper, Colombia

Jineth Bedoya, Deputy Editor (Justice) at *El Tiempo*, has worked for 14 years as a radio, newspaper and television journalist in Colombia. In 2000, after conducting an interview in La Modelo prison in Bogotá, she was kidnapped for 16 hours, apparently by paramilitaries. In 2003, she was again kidnapped, this time for eight days by the FARC-EP. Despite this, she has continued her journalist work in Colombia, which has received national and international recognition, including the Premio Mundial al Coraje Periodístico in 2001 (International Woman Media Foundation) and the Premio Internacional a la Libertad de Prensa in 2000. Her published works include 'Los Patios del Infierno' (2002), 'Diario de un Combate' (2005), 'En Las Trincheras del Plan Patriota' (2008), 'La Pirámide de David Murcia' (2009), 'Te hablo desde la prisión' (2010) and 'Vida y Muerte del "Mono Jojoy"' (2010). She has taught journalists from across the world on journalism and the Colombian armed conflict. Since September 2009, Jineth has been the face of the Oxfam campaign 'Violación y otras violencias: saquen mi cuerpo de la guerra', during which she has spoken about her experiences in a range of countries, including the USA, where she met with representatives of Congress, the State Department, the White House and the UN.

David James Cantor, Institute of Commonwealth Studies, University of London

David Cantor is a Lecturer in International Human Rights Law and Co-Convenor of the Institute's MA program in Understanding and Securing Human Rights. After seven years at the Refugee Legal Centre as Legal Officer, he now conducts research and advocacy on the protection of refugees and other displaced persons, particularly in Colombia. His doctoral thesis in Law at the University of Essex will shortly be published as *The Return of Internally Displaced Persons during Armed Conflict: International Law and its Application in Colombia* (Martinus Nijhoff). He has just returned from two months of UNHCR-funded field research with Colombian refugees in Venezuela, Ecuador and Panamá working on the question of reparation for these populations, which has already fed into Congressional debates in Colombia on the proposed Victims Law. David recently established the Refugee Law Initiative within the School of Advanced Study as a national focal point for promoting and facilitating the international refugee law research agenda.

Phil Clark, School of Oriental and African Studies, University of London

Phil Clark is a Lecturer in Comparative and International Politics at the School of Oriental and African Studies, University of London, and Convenor of Oxford Transitional Justice Research (OTJR) at the University of Oxford. Phil's research addresses the history and politics of the African Great Lakes, focusing on causes of and responses to mass violence. His work also explores the theory and practice of transitional justice, with particular emphasis on community-based approaches to accountability and reconciliation and the law and politics of the International Criminal Court. He has a DPhil in Politics from Balliol College, University of Oxford, where he studied as a Rhodes Scholar. Dr Clark's latest books are *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (CUP, 2010) and *Doing Justice during Conflict: The International Criminal Court in Uganda and the Democratic Republic*

of Congo (under review). He has advised a wide range of government and non-governmental organisations on conflict issues in Africa.

Catalina Díaz, University of Oxford

Catalina Díaz is a Colombian human rights lawyer with ten years of professional and academic experience in the intersecting domains of law and social change. Catalina has concentrated in designing, implementing and monitoring the functioning of legal instruments for the promotion, defence and development of human and victims' rights in armed conflict and transitional contexts in Latin-America. In addition to her engagement with governmental institutions, she has focused on the potential of grass-roots and other actors from below to transform conflict dynamics and recover communal life. Since she graduated from New York University School of Law in 2005 (LL.M.), where she was the recipient of a Global Public Service Law Scholarship, she has provided technical advice to key institutions designing and implementing the transitional justice arrangement in Colombia. On behalf of the International Center for Transitional Justice (ICTJ), Catalina has also assisted the Truth and Reconciliation Commission in Ecuador and the Mexican Secretary of Interior in the design of reparations measures for victims of political violence during past repressive regimes. She has also worked as a law clerk at the Constitutional Court of Colombia. Since August 2007 she has taught legal theory at the Rosario University in Bogotá.

Par Engstrom, Human Rights Consortium, University of London

Par Engstrom is Lecturer in Human Rights at the Human Rights Consortium, School of Advanced Study, University of London. He teaches human rights at the Institute for the Study of the Americas and the Institute of Commonwealth Studies. He is also co-chair of the London Transitional Justice Network. Par Engstrom studied Philosophy and Economics at University College London (BA), gained his MSc at the Institute of Latin American Studies (currently the Institute for the Study of the Americas), and his DPhil in International Relations at Oxford University. His current research interests focus on regional human rights institutions both comparatively and with a particular reference to the Inter-American human rights system. Recent publications include 'Brasil: los derechos humanos en la política exterior de una potencia emergente' in *Los derechos humanos y la política exterior de los países de América Latina*, Ana Covarrubias Velasco and Natalia Saltalamacchia Ziccardi (eds.) (2011); 'Human Rights: Effectiveness of International and Regional Mechanisms' in *The International Studies Encyclopedia*, Robert A. Denemark (ed.), (Blackwell Publishing, 2010); and 'Why the human rights regime in the Americas matters' (with Andrew Hurrell), in *Human Rights Regimes in the Americas*, Mónica Serrano and Vesselin Popovski (eds.), (United Nations University Press, 2010).

Andreas Forer, Deutsche Gesellschaft für Internationale Zusammenarbeit, GTZ

Andreas Forer is a German lawyer who is currently the Director of the Project 'Supporting the Peace Process in Colombia within the context of the Justice and Peace Law', Bogotá, German Cooperation, GIZ. He is implementing the project on behalf of the German Federal Foreign Office. It supports the Office of the Public Prosecutor with the legal application and operative implementation of the Justice and Peace Law. In addition, since 2009 it has provided advisory services to the judges of the Supreme Court, taking into account international doctrines, jurisprudence and lessons learned from comparable transitional justice processes in other countries. It expressly observes the needs of victims, in particular those from vulnerable parts of the population, such as women and those of indigenous or afro-Colombian descent.

Geoff Gilbert, University of Essex

Geoff Gilbert is Professor of Law in the School of Law and a member of the Human Rights Centre at the University of Essex. He teaches courses in international criminal law, the protection of refugees and displaced persons in international law, and international law and acute crises; his further research interests are extradition law, international human rights law and the

protection of minorities in international law. He has been Editor-in-Chief of the *International Journal of Refugee Law* (Oxford University Press) since 2002. In addition to his academic work, Geoff Gilbert has served in advisory and consultancy capacities. He was an expert adviser to the IBA at its Belgrade closed door meeting with the Ministry of Justice on a War Crimes Court (2003). He has worked with the United Nations High Commissioner for Refugees (UNHCR), for whom he was founding Director of Studies for the Thematic Refugees and Human Rights Course from 2005 to 2007. Geoff Gilbert has also carried out human rights training programs on behalf of the Council of Europe and the UNHCR in the Russian Federation, Georgia, Bosnia-Herzegovina, Croatia, Macedonia and Kosovo. He was also Director of the Organization for Security and Co-operation in Europe (OSCE) training program for judges on combating torture in Serbia and Montenegro.

Andrei Gomez-Suarez, Sussex University

Andrei Gomez-Suarez (BA Political Science, MA in Cotemporary War and Peace Studies, PhD in International Relations) is Lecturer in International Security at the University of Sussex. He taught Politics at the University of Cauca and International Relations at Externado University. His PhD dissertation explores the geopolitics of the genocide of the Union Patriótica in Colombia. His publications to date include: 'Perpetrator blocs, genocidal mentalities and geographies: the destruction of the Union Patriótica in Colombia and its lessons for genocide studies', *Journal of Genocide Research*, 9(4), 637–660, 'Bloques Perpetradores y Mentalidades Genocidas: el caso de la Destrucción de la Unión Patriótica en Colombia' *Revista de Estudios Sobre Genocidio* 1(2) 2008, 42–55, and 'US-Colombian Relations in the 1980s: Political Violence and the Onset of the UP Genocide' in Esparza, Marcia, Huttenbach, Henry and Daniel Feierstein Eds. *State Violence and Genocide in Latin America: The Cold War Years* (London: Routledge, 2010).

John Jones, Doughty Street Chambers

John Jones specialises in the law of extradition, war crimes and counter-terrorism. In addition to his domestic practice, which has included cases before the House of Lords, the Privy Council and Supreme Court, John has appeared as counsel before a number of international courts and tribunals, including various war crimes tribunals and the European Court of Justice. From 1995 to the present, John has practised as an international criminal lawyer at the war crimes tribunals for the former Yugoslavia, Rwanda and Sierra Leone. He has recently been involved as counsel in three separate war crimes cases (Mehmed Alagic, Naser Oric and Rasim Delic). He has published numerous books and articles on international criminal law. John has appeared in a number of high-profile extradition cases, notably *Serbia v Ganic* and the *Assange* (Wikileaks) case in the past year. He is also co-author of the recently published *Extradition and Mutual Legal Assistance Handbook* (Oxford University Press: 2010). John read Philosophy, Politics and Economics as an open exhibitioner at St. Edmund Hall, Oxford University where he gained an M.A. He also has an M.A. in Law from City University in London and an LL.M. from George Washington University in Washington, D.C.

Francisco Lloreda, High Presidential Advisor for Public Safety, Colombia

President Juan Manuel Santos appointed Dr Lloreda High Presidential Advisor on Public Safety (a new Cabinet position) in January 2011. Dr Lloreda remains a member of Colombia's International Court of Justice judicial team and advises the government on issues associated with the International Criminal Court in The Hague. From 2008 until his latest appointment, Dr Lloreda served as both the Ambassador to the Netherlands and Colombia's Permanent Representative to the Organization for the Prohibition of Chemical Weapons. He has served in a variety of other government roles, including Minister of National Education (2000–2002), interim Minister of Economic Development (2002), and a number of positions in Cali and Bogotá's local governments. He was Editor-in-Chief of *El PAIS*, Colombia's third largest newspaper (2006–2007, 1998–2002), Director of the Public Policy Centre at ICESI University in Cali, and has taught at several universities. Dr Lloreda holds a law degree from Pontificia

Universidad Javeriana in Bogotá, Colombia (1990), a master's degree in Public Administration from Columbia University, New York (1994), a master's degree in Latin American Public Policy, and a Ph.D in Politics, both from Oxford University (2010).

Maxine Molyneux, Institute for the Study of the Americas

Maxine Molyneux is Professor of Sociology and Director of the Institute for the Study of the Americas, at the School of Advanced Study, University of London, where she teaches and supervises Doctoral students on Latin American Development policy and practice, gender, politics, social policy, memory and migration. She has written extensively in the fields of political sociology, gender and development, human rights and social policy, and has authored books on Latin America, Ethiopia and South Yemen. She has acted as senior adviser, consultant and researcher to UNRISD, and has undertaken funded research for the UK's Department for International Development, the ILO, and other development policy agencies. Her current research is on social protection, rights, and citizenship and the link between economic and social policy in Latin America. Maxine Molyneux is on the Editorial Boards of *Economy and Society*, the *Journal of Latin American Studies*, and *Development and Change*. She is the editor of the ISA/Palgrave 'Studies of the Americas' Series and the ISA in-house book series.

Mladen Ostojic, Queen Mary, University of London

Mladen Ostojic is a PhD student at Queen Mary, University of London. His thesis, entitled 'International Judicial Intervention and Regime Change in Serbia 2000–2010', explores the repercussions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) on domestic politics in Serbia following the overthrow of Milosevic. This research aims to critically re-appraise the arguments put forward by proponents of transitional justice by reconsidering the relationship between the promotion of justice, truth-telling and democratisation.

Jenny Pearce, Bradford University

Jenny Pearce is Professor of Latin American Politics, and Director of the International Centre for Participation Studies at Bradford University. Jenny published a number of studies on the post-war peace-building processes in Central America in the 1990s. Between 1999 and 2004, she focused on a particular debate in the political economy of war, around resources, economic agendas and civil war. She undertook three field trips to Casanare, Colombia to research the relationship between oil and conflict, participating in a Ford Foundation research project led by the Centre for Global Governance at the LSE. Jenny continues to be deeply involved in contemporary debates on politics and social change in Latin America and has published a number of conceptual studies around the themes of civil society, collective action and public participation. She currently directs a comparative ESRC-funded research project on municipal innovation in non-governmental public participation, UK and Latin America. She coordinates a team of five field researchers in Porto Alegre, Caracas, and Medellin in Latin America and Bradford and Manchester in the UK.

Eduardo Pizarro Leongómez, National University, Colombia

Co-founder, ex-director and professor of the Political Studies and Foreign Relations Institute of the Universidad Nacional of Colombia, Eduardo Pizarro has also served as a visiting professor at the universities of Columbia, Notre Dame and Princeton in the United States, Paris III in France, Tübingen in Germany and Salamanca in Spain. He is considered an academic authority on the armed conflict in Colombia and has published many works on the subject, including the books 'Las FARC 1949–1966: de la autodefensa a la combinación de todas las formas de lucha' (1991), 'Insurgencia sin revolución. La guerrilla en Colombia en una perspectiva comparada' (1996), and 'Ley de justicia y paz' (2009). Eduardo is the former President of the National Reconciliation and Reparation Commission of Colombia, and was also appointed as member of the Board of Directors of the Trust Fund for Victims of the International Criminal Court.

Michael J. Reed Hurtado, International Center for Transitional Justice, Colombia

Michael Reed holds a B.A. and B.J. from University of Texas and a J.D. from University of Minnesota. He also holds a Specialization in Applied Statistics from the Universidad Nacional de Colombia. Michael is a human rights lawyer who has conducted research and activism in the following fields: criminal due process; prison conditions and reform; military criminal jurisdiction; enforced disappearances; forced displacement; gang violence; and freedom of speech. He has also worked in the humanitarian field with UNHCR. He has worked mainly in Latin America, with sporadic work in Asia and Africa. In the academic field, Michael is a professor of the theoretical study of violence and punishment in the Masters Program on International Affairs offered by the Universidad Externado de Colombia, Columbia University and Sciences PO Paris.

Emeric Rogier, Office of the Prosecutor, International Criminal Court

Emeric Rogier is Head of the Situation Analysis Section at the Office of the Prosecutor, International Criminal Court.

Mauricio Romero, Javeriana University, Colombia

Mauricio Romero is an Associate Professor at the Javeriana University in Bogotá, where he teaches at the Faculty of Politics and International Relations. Since 2008, he has also worked as the Director of the 'Observatorio del Conflicto Armado' at the Colombian non-governmental organisation, Corporación Nuevo Arco Iris. He has written on paramilitary groups in Colombia, including aspects of the 'para-politica' scandal.

Chandra Lekha Sriram, School of Oriental and African Studies, University of London

Chandra Lekha Sriram is Professor in Law. Her areas of teaching expertise include war and human rights, public international law, international criminal law, human rights, and conflict prevention and post-conflict peace-building. Professor Sriram received her PhD in Politics from Princeton University in 2000, her JD from the University of California, Berkeley, Boalt Hall School of Law in 1994, and her MA in International Relations and BA in Political Science from the University of Chicago in 1991. She is author and editor of various books and journal articles on international relations, international law, human rights and conflict prevention and peace-building. She was previously founder and director of the Centre on Human Rights in Conflict at the University of East London, an interdisciplinary centre promoting policy-relevant research and events aimed at developing greater knowledge about the relationship between human rights and conflict. From 2008 to 2010, she was Chair of the International Studies Association Human Rights Section. She is on the UN Development Program's expert roster as a human rights expert, a member of the Economic and Social Research Council's Peer Reviewer College, a member of the advisory board of the Review of International Studies and a member of the advisory board of Palgrave/MacMillan publishers' Rethinking Peace and Conflict Studies book series. She has also engaged in consultancies for the United Nations Development Program, Crisis Management Initiative (Finland), the Centre for Humanitarian Dialogue (Switzerland), and Human Rights Internet (Canada).

Philippe Tremblay, Lawyers Without Borders, Canada

Philippe Tremblay has been Lawyers Without Borders' (LWB) Colombia program manager since January 2009. Prior to his entry into function at LWB, he worked for more than four years in Geneva for the Association for the Prevention of Torture (APT), first as the Coordinator of the International Campaign in favour of the Optional Protocol of the United Nations Convention Against Torture, and later as the Program Manager for the APT in the Asia Pacific region. Mr Tremblay received his Bachelor's degree from the Faculty of Law of the University of Montreal in 1994 and was called to the Quebec Bar in 1996. In June 1997, after 18 months at the Quebec Court of Appeal as a legal researcher, he went to Rwanda with the office of the United Nations High Commissioner for Refugees. Upon his return to Quebec, he pursued a Masters degree in International Law at the University of Quebec in Montreal, which he completed in 2000. His thesis was on the international protections available for internally displaced persons within

their country. Mr Tremblay subsequently pursued his commitment to supporting the most vulnerable peoples by joining the International Committee for the Red Cross in Colombia and Afghanistan, and later working as a Research officer at Rights and Democracy. Philippe is fluent in French, English and Spanish.

Peter Van der Auweraert, International Organisation of Migration

Peter Van der Auweraert is Head of the Land, Property and Reparations Division at the International Organization for Migration (IOM) in Geneva, Switzerland. He has worked on reparations, land and transitional justice issues in, amongst other countries, Burundi, Colombia, Iraq, Nepal, Timor-Leste and Turkey. Prior to his current post, Peter Van der Auweraert was Executive Director of *Avocats Sans Frontières*, an international NGO working on access to justice issues in post-conflict and transitional countries. From 1999–2006, he held a Visiting Lectureship in International Criminal and Public Law at the University of Turku, Finland.

Iván Velásquez, Supreme Court of Colombia

Iván Velásquez is a ‘magistrado auxiliar’ at the Colombian Supreme Court of Justice, where he acts as the principal investigator in the process known as the ‘para-política’ scandal.

Reinaldo Villalba, José Alvear Restrepo Lawyers Collective, Colombia

Reinaldo Villalba is a criminal lawyer and human rights defender who has spent the past 18 years working in the José Alvear Restrepo Lawyers Collective (CCAJAR). Working in the field of human rights in Colombia, CCAJAR is a non-governmental organisation that represents victims before national and international tribunals. Reinaldo is currently both the Vice-President of CCAJAR and the coordinator of its criminal law section. He has represented victims in the ‘Holocausto del Palacio de Justicia’ case, the cases of massacres in Los Uvos, Caloto, Cajamarca and Chengue, as well as many other cases of extrajudicial executions, torture, forced displacements, forced disappearances and other serious human rights violations.

Leslie Vinjamuri, School of Oriental and African Studies, University of London

Dr Leslie Vinjamuri is Convenor of General Diplomatic Studies and Practice at the Centre for International Studies and Diplomacy and a Lecturer (Assistant Professor) in the Department of Politics and International Studies. Dr Vinjamuri chairs the International Relations Speaker Series for CISD and is also Co-Chair of the London Transitional Justice Network. Dr Vinjamuri's research includes projects on the role of Justice and Accountability in War and Peace Negotiations, Faith-Based Humanitarianism, Secularism and Religion in Transitional Justice, and the effects of Counterterrorism in Democracies. Dr Vinjamuri speaks and writes widely on the politics of transitional justice. She has served as a consultant to the Ford Foundation, the Open Society Institute, the International Law Institute, and the Centre for Humanitarian Dialogue. Currently, she holds a research grant from the Smith Richardson Foundation for a project that looks at strategies for addressing the problem of accountability during war and post-conflict reconstruction. Prior to joining SOAS, Dr Vinjamuri was on the Faculty of the School of Foreign Service and Department of Government at Georgetown University. She has previously held visiting fellowships at Harvard University's John M. Olin Institute for Strategic Studies, and at the Centre for the Study of Human Rights, and the Centre for International Studies of the London School of Economics. Dr Vinjamuri previous worked at Congressional Research Service and at the US Agency for International Development. She received her Ph.D. from Columbia University.

Alex Wilks, International Bar Association

Alex Wilks is a UK-qualified lawyer and Senior Programme Lawyer at the International Bar Association. He was previously a legal adviser on human rights issues in the House of Lords. Between 2007 and 2008 he was the IBA's Legal Specialist in Kabul where he worked to establish Afghanistan's first ever national bar association. At the IBA Human Rights Institute in London, he is responsible for projects in Latin America, Libya, Afghanistan, Sri Lanka and Timor Leste, human rights trainings for parliamentarians and manages the IBA Task Force on Terrorism. He

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speaks Spanish and French and has an LL.M in International Human Rights Law from the University of Essex.

Annex 3

Conference Programme

In the Shadow of the ICC
Colombia and International Criminal Justice

26–27 May 2011
Senate House, University of London

Co-convenors: David Cantor, Institute of Commonwealth Studies
Par Engstrom, Human Rights Consortium

Kindly supported by the British Foreign and Commonwealth Office, the Embassy of Colombia in London, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), Planethood Foundation, Lawyers Without Borders Canada, and Peace Brigades International

Thursday 26 May 2011

The Macmillan Hall, Senate House, University of London

12.30 Registration

13.00 Welcome
Maxine Molyneux, Institute for the Study of the Americas
David Cantor, Institute of Commonwealth Studies

Session I – The Colombian Armed Conflict and the ICC

13.15 – 15.00 **Panel 1: Definition of ICC Crimes**

Chair: **Philippe Tremblay**, Lawyers Without Borders, Canada

Geoff Gilbert, University of Essex
John Jones, Doughty Street Chambers
Andrei Gomez-Suarez, Sussex University

15.00 – 15.30 Coffee

15.30 – 17.30 **Panel 2: Dynamics of Armed conflict and ICC Impact**

Chair: **Maxine Molyneux**, Institute for the Study of the Americas

Mauricio Romero, Javeriana University, Colombia³²
Jineth Bedoya, *El Tiempo* newspaper Colombia
Eduardo Pizarro, National University, Colombia

18.00 – 19.00 *Keynote Address*

Emeric Rogier, Office of the Prosecutor, International Criminal Court

³² Mr Mauricio Romero, scheduled to address the conference on the impact of the ICC on the dynamics of the armed conflict, unfortunately was unable to attend.

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19.00 – 20.00 Wine reception

Friday 27 May 2011

The Chancellor's Hall, Senate House, University of London

9.00 – 9.15 Opening Comments

Session II – Colombian Justice and Complementarity

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

Chair: **Alex Wilks**, International Bar Association

Iván Velásquez, Magistrate, Supreme Court of Colombia

Reinaldo Villalba, José Alvear Restrepo Lawyers Collective

Catalina Díaz, University of Oxford

11.00 – 11.30 Coffee

11.30 – 13.15 **Panel 4: Complementarity**

Chair: **Peter van der Auweraert**, International Organisation of Migration

Juan Pablo Cardona, GIZ, Germany

Kai Ambos, University of Göttingen, Germany

Michael Reed, International Center for Transitional Justice, Colombia, *via videolink*

13.15 – 14.00 Lunch

Session III – Should the ICC Exercise Jurisdiction?

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

Chair: **Chandra Lekha Sriram**, SOAS, University of London

Phil Clark, SOAS, University of London and Oxford Transitional Justice Research

Leslie Vinjamuri, SOAS, University of London

Mladen Ostojsic, Queen Mary, University of London

15.45 – 16.15 Coffee

16.15 – 18.00 **Panel 6: Roundtable on the ICC and Peace and Justice in Colombia**

Chair: **Jenny Pearce**, Bradford University

Francisco Lloreda, Presidential Advisor for Public Safety, Colombia

Emeric Rogier, Office of the Prosecutor, International Criminal Court

Chandra Lekha Sriram, SOAS, University of London

Philippe Tremblay, Lawyers Without Borders, Canada

18.00 – 18.10 Convenors' Closing Thanks