

AMICC

AN ICC INVESTIGATION IN COLOMBIA?

SUMMARY

In March 2005, the ICC Prosecutor sent a letter to the Colombian Government requesting information on steps taken by the authorities to investigate and prosecute those most responsible for crimes against humanity committed in Colombia since 2002. Following this letter, several media articles mentioned the possibility of an ICC investigation in Colombia. Speculation on this issue has grown in the latest months as the Colombian Government considered granting benefits to those involved in the commission of such atrocities.

This paper analyzes the possibility of ICC trials of crimes against humanity committed in Colombia. The first part describes the nature and complexity of the conflict that has affected Colombia for the last four decades. This includes references to both the conflict itself, its origin, the violations committed and the main actors involved, as well as the efforts made by the Government to hold those responsible for the atrocities accountable and to bring peace to Colombia. This provides background for the second part, which analyzes the conditions for and the chances of ICC involvement in the country. The scope of the ICC's jurisdiction, an examination of the factors the ICC Prosecutor must take into consideration and an account of the actions the Court has undertaken with regard to Colombia are included under this section. Both parts also address some issues regarding US interests in Colombia, which could affect the attitude of the United States toward ICC actions about the country.

PART I: THE ARMED CONFLICT IN COLOMBIA

ORIGIN OF THE CONFLICT

A very complex internal armed conflict involving illegal armed groups (guerrillas and paramilitary forces) as well as the army and the government, has ravaged Colombia for the last 40 years. A period known as “*La violencia*” (the violence), which began in 1946, is considered to be the origin of the conflict. After power changed from the Liberal party to the Conservative party, members of the two political groups clashed and the Conservative government's persecution of Liberal members resulted in a civil war that laid the foundation for the rise of insurgency groups. The armed resistance groups linked to the Liberal party laid down their arms in the late 1950s. However, even if the level of violence sank, clashes persisted and new revolutionary groups emerged in the 1960s and 1970s. Over the years, the violence became less party related and more class based, pitting peasants against landlords. Drug-trafficking emerged in the context of this violent conflict: drug cartels used violence to control politics and trade in cocaine by the late 1970s. Corruption related to drugs deepened and political assassinations became frequent in the 1980s.

Because of weak state power, guerrilla groups have succeeded in gaining extensive control of many areas of the country, where they effectively determine local government policies and exercise significant control over the local population. Guerrilla organizations initially targeted only rural areas. Since the 1990s, however, they have increasingly sought to attack urban localities. Consequently,

civilian suffering in these areas has considerably expanded as a result of widespread killings and displacement.

Paramilitary groups, which are backed by the security forces and maintain strong ties with the government, originated when the army created civilian “self-defense” groups to act as auxiliaries during counter-insurgency operations. Although their legal basis was removed in 1989, little effort has been made to disband them. Over the last few decades, paramilitaries have been responsible for most killings, disappearances and forced displacement of civilians.

The excesses committed by the parties in the internal armed conflict in the last 15 years are serious crimes. In particular, the paramilitaries have committed selective assassination and enforced disappearances against those perceived as guerrillas’ supporters. The tactics of the leftist groups, such as detonating explosives indiscriminately and kidnapping, have killed or injured many civilians. The widespread acts of violence perpetrated against the civilian population are aimed at causing terror and displacement. The unlawful appropriation of land and other property worsens the humanitarian crisis affecting more than 2 million people in Colombia.

WHO IS WHO

The Colombian conflict pits leftist groups against the paramilitary and the army.

- *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia): FARC

The Colombian Communist Party established the FARC in 1964 to defend those communities which supported it. The FARC’s initial intention was to overthrow the government and install a Marxist regime. When right-wing forces started to attack the rebels in the 1990s, the FARC became increasingly involved in the drug trade to raise money for their campaign. Their involvement has changed the way the FARC fight: kidnapping and extortion are now often an end in themselves. Today, the FARC are the oldest, largest and best-equipped Latin-American left-wing movement. Their activities include bombing, murder, rape, torture, terrorist attacks, drug trafficking, kidnapping, extortion, hijacking, forced displacement, as well as other attacks against Colombian political, military, and economic targets. **The ICC has jurisdiction over acts such as murders, kidnappings, hijacking, rapes, torture and forced displacement committed by the FARC as part of a widespread attack against the civilian population since November 2002.**

Since 1982, their official name is *Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo* (Revolutionary Armed Forces of Colombia-People’s Army): FARC-EP. This group has approximately 12,500 members.*

- *Ejército de Liberación Nacional* (National Liberation Army): ELN

* Source for number of members of the illegal armed groups: Colombia, US State Department, *Country Report on the Human Rights Practices - 2004* <<http://www.state.gov/g/drl/rls/hrrpt/2004/41754.htm>>.

ELN is the second largest guerrilla group in Colombia. It was formed in 1965 by a group of intellectuals inspired in the Cuban revolution. Its goals are characterized as anti-capitalists and anti-imperialists. ELN specializes in attacks against the energy industry; it targets, in particular are oil pipelines and the electricity infrastructure. It threatens executives of companies in this industry and also union leaders, politicians, and farmers in the oil-rich northern region. Its activities include kidnapping, hijacking, bombing and extortion. **Enforced disappearances committed by the ELN since November 2002 are subject to ICC jurisdiction.** ELN also derives resources from the illegal drugs industry, though not to the same degree as the FARC. This group has approximately 2,500 members.*

- *Autodefensas Unidas de Colombia* (United Self-Defense Forces of Colombia): AUC

The AUC were formed in 1997 by drug-traffickers and landowners to combat rebel kidnappings and extortion. This movement comprises several right-wing paramilitary groups whose aim is to rid Colombia of leftist guerrillas. It is supported by wealthy landowners, drug cartels, and segments of the Colombian military. They have grown in strength and influence because of their links with the army and financing by business interests and landowners. They use terror tactics such as massacres, selective killings and threats, mainly against human rights defenders and trade union and other social movements' leaders, journalists and candidates for elective office, to undermine perceived civilian support for the guerrillas. These sectors are targeted to silence denunciations of human rights violations committed by the security forces and their paramilitary allies, and to break any links between civilians and guerrillas. They also defend landowners who finance them against the guerrillas. **The ICC can try murders, massacres and forced displacement committed by the AUC since November 2002.** The AUC is also involved in the drug trade and it has approximately 12,000 members.*

- *Security Forces / Army*

There is evidence of significant ties and complicity between the army and the right-wing paramilitary groups. Sometimes there are tacit arrangements allowing paramilitaries to continue their operations despite military presence in the area. In other instances, the collusion is clearer: military members often join the paramilitaries when off duty. In addition, the army grants the paramilitaries permission to pass through roadblocks and provide them with information and ammunition. Besides their ties with the paramilitaries, members of the armed forces themselves have frequently committed abuses. A law introduced in 2001 expanded the military's power. Among other provisions, this law reduces the possibility for the Government to investigate military involvement in human rights violations. It also allows military personnel to arrest and interrogate suspects, and to hold them for longer periods of time before turning them over to the courts. The security forces frequently carry out collective or individual arrests without court authorization, based on mere suspicion or on irregular testimony or reports. **Crimes such as indiscriminate killing and sexual abuse of civilians committed by the security forces since November 2002 fall under the jurisdiction of the ICC.**

COLOMBIA TODAY

Violence

More than 3,000 civilians die every year as a result of the civil war in Colombia. People who are perceived as dangerous to some factions, such as social leaders, political activists, human rights campaigners and trade unionists, are especially at risk. Indigenous and Afro-Colombian groups are also particularly subject to attacks and massacres. Other specially vulnerable groups are children, women and girls. Colombia is the world's kidnap capital, with around 2,000 kidnappings a year.

The illegal armed groups, particularly the FARC-EP and the paramilitaries, continue to commit serious and numerous attacks on civilians, including mass killings, hostage-taking, forced displacement, slavery and acts of sexual violence against women and girls. Although the AUC declared a unilateral ceasefire in December 2002 to facilitate demobilization negotiations with the Government, the paramilitaries have committed more than 2,000 crimes against humanity since that date. However, despite the violations of the ceasefire, the overall level of paramilitary violence has been declining. The army also commits extrajudicial executions, indiscriminate attacks, forced displacement and sexual attacks against women. **The ICC has jurisdiction to try all these crimes perpetrated by any of the parties to the conflict, when they are committed as a part of a widespread or systematic attack against the civilian population.**

Although kidnappings and massacres began to decrease in 2001 and killings followed the same trend as from 2002, figures of incidences of violence remain high. It should be noted, however, that there is no systematic collection of crimes committed in Colombia. As a result of this, existing statistics are imprecise and contradictory. The statistics produced by the Colombian Government show a drastic reduction in the number of attacks and murders. These inaccurate figures are convenient for high-level government officials, who actually deny the existence of a civil war in Colombia, and affirm that only a terrorist threat against Colombian society exists.

Demobilization process

The problem of violence in Colombia is very old and complex. Successive governments have failed or have only partially succeeded in their political efforts to bring the armed conflict in Colombia to an end. They have focused in reaching agreements for the demobilization of illegal armed groups. These arrangements have been formalized in statutes passed by the National Congress, which provide benefits such as termination of criminal actions or of the penalty imposed in relation to the commission of political crimes¹ for those who demobilized. Present Colombian legislation authorizes the Congress to declare amnesties benefiting those who are being investigated for political crimes; it also authorizes the President to pardon individual criminals who have been imprisoned for such crimes. Neither amnesty nor pardon can be accorded to persons being investigated or having been condemned for enforced disappearances, forced displacement, genocide or torture.

President Alvaro Uribe, who came to office in 2002, has made strengthening the State's authority and improving national security his main goal. When leaders of the AUC announced a ceasefire in

¹ For example, taking up arms against the State with the intention of overthrowing the Government or removing or modifying the constitutional system, is a political crime in Colombia.

December 2002, President Uribe started to negotiate the terms for the demobilization of the paramilitary forces. Under framework agreements signed in July 2003 and May 2004, the AUC agreed to demobilize its combatants by the end of 2005. More than 5,500 paramilitaries had demobilized as of July 2005. The paramilitaries demand benefits such as amnesties, immunity from prosecution or reduction of penalties in exchange for their demobilization. Several proposals were presented and studied, and despite the opposition of human rights groups, a so-called “Justice and Peace Law” was approved on July 22, 2005.

This law applies to members of illegal armed groups who demobilize and cannot benefit from amnesty or pardon. This might be either because the crimes they have committed are not of a political nature or because, having committed political crimes, they are implicated in enforced disappearances, forced displacement, genocide or torture. Under this legislation, combatants who demobilize will benefit from reduced prison sentences of five to eight years, even if they have committed war crimes or crimes against humanity. This applies to both those under investigation and those who have been condemned. In the latter case, they will have their imprisonment period reduced.

In order to receive these benefits, a demobilized combatant has to provide information on the offences he/she and the armed group he/she belonged to have committed, as well as on his/her personal and the group’s assets. The law has a loophole: if it is later revealed that those who demobilized either lied in their statement or hid important information from the authorities, they do not lose the benefits they have gained. There is, therefore, a risk that the information provided will not help the government’s dismantling of the paramilitary organization. After spending a few years in jail, paramilitary leaders might return to the business of trafficking drugs and to the commission of wide-scale crimes.

The Justice and Peace Law, which is the result of the negotiations between the Government and the paramilitaries, could be applicable to other illegal armed groups that decide to demobilize in the future. The leftist groups have announced, however, that they have no intention of turning in their arms and dismantling their organizations.

Administration of justice

There are serious shortcomings in the effectiveness of the administration of justice in Colombia. Although the civil judiciary is largely independent of the executive and legislative branches, it is overburdened, inefficient and subject to intimidation and corruption. The military criminal system does not appropriately investigate many serious crimes. Despite the prosecutions and convictions of some members of the security forces, no high-ranking officers have been condemned. There are, therefore, high rates of impunity regarding serious violations such as enforced disappearances, forced displacement, kidnapping, torture and murder.

Additionally, many victims are reluctant to report serious violations out of fear of reprisal. Moreover, access of justice is a problem in the areas of the country which are under guerrilla control. Lack of resources for investigations, lack of protection for investigators, lack of coordination between the government entities and, in some cases, obstruction of justice by individuals, also contribute to widespread impunity in Colombia.

US – COLOMBIA RELATIONS

Colombia is one of Bush administration's closest allies in Latin America. It is also the largest recipient of US aid in the region. The US is committed to strengthening democratic institutions, promoting respect for human rights and the rule of law, fostering socioeconomic development in Colombia and addressing immediate humanitarian needs. However, the main concerns of the US are ending illegal drug production and terrorism in Colombia. Around 90% of the cocaine that enters the US comes from Colombia, and all three major illegal armed groups are included in the terrorist organizations' list of the US State Department.

Since 2000, the US has spent more than \$3 billion on "Plan Colombia", a five-year program under which Colombian forces receive training, equipment and intelligence to fight drug traffickers and eliminate coca crops. Part of this package is also spent on counterterrorism activities. Under "Plan Colombia", the US sends troops as well as civilian contractors to provide equipment, infrastructure development and planning, and logistical and intelligence support to Colombian efforts.

Part of the aid is subject to a US Government certification on the human rights situation in Colombia. The US had exempted Colombia from this certification for a few years. In July 2005, the US State Department decided not to carry on with this exemption policy and certified that there had not been any improvement in the human rights situation in Colombia. It noted, in particular, that there had not been any advances in investigation and prosecution of members of the army directly or indirectly implicated in serious violations of human rights. Consequently, the US suspended 25% of the military aid that was to be allocated in 2005. Some believe that this change of policy was fueled by the Justice and Peace Law, which was at that time being studied by the Colombian President for its final approval. However, the US decision seems to be related to the general situation of impunity in Colombia rather than to this law in particular.

PART II: ICC INVOLVEMENT

JURISDICTION

Due to their serious, massive or systematic nature, crimes committed on Colombian territory or by Colombian nationals² after November 1, 2002 are subject to ICC jurisdiction.³ Many crimes in Colombia are committed as part of a plan or policy or as part of a large-scale commission of such crimes and therefore constitute war crimes. However, although the Rome Statute does cover war crimes, the ICC only has jurisdiction to try cases of crimes against humanity and genocide with respect to Colombia. This is because Colombia took advantage of a provision in the Statute⁴ which allows States Parties to opt out of the Court's jurisdiction with regard to war crimes for a period of seven years. Most war crimes in Colombia are also crimes against humanity because they are widespread or systematic attacks which target civilians. Colombia could not and did not opt out of the ICC's jurisdiction over crimes against humanity.

² Article 12 of the Rome Statute.

³ Rome Statute entered into force with respect to Colombia on November 1, 2002.

⁴ Article 124 of the Rome Statute.

HOW COULD THE INVESTIGATION BEGIN?

In general, an investigation by the ICC can begin in a few different ways: 1) when a State Party refers the situation in which crimes under the jurisdiction of the Court have been committed; 2) when the UN Security Council does so; or 3) when the ICC Prosecutor decides to begin an investigation on his own initiative.⁵ In the latter case, the Prosecutor needs to seek and obtain the authorization of the Pre-Trial Chamber.⁶

A referral by the Government of Colombia seems very unlikely. When a State Party refers a situation, it cannot refer only the violations committed by one of the parties to the conflict. It refers the situation as a whole and the ICC can investigate crimes committed by all the parties involved. The Colombian Government would be eager to send the leftist rebels off for trial at the ICC; but it would try to avoid at any cost that the ICC look into violations committed by the government-backed paramilitaries and by the security forces.

A Security Council referral is also very unlikely. If the Colombian Government is reluctant to make a referral itself, it would then probably not support a Security Council referral either. Other Latin-American countries would also not support it and the US would most probably veto any such proposal. Furthermore, the Security Council refers a case when it determines that a particular situation poses a threat to international peace and security. So far, the Security Council has not considered that the internal armed conflict in Colombia poses such a threat. For this reason, unless the conflict worsened in a very serious way and met this condition, the Security Council would not be in a position to make a referral.

Therefore, the only probable way for the ICC to exercise jurisdiction in Colombia would be an investigation on Prosecutor's own initiative, with authorization of the Pre-Trial Chamber. Should the Prosecutor make such a decision, this would be the first case brought to the Court by this means. In order to begin an investigation on its own initiative, the Prosecutor must analyze all communications received by his office in respect of crimes committed in Colombia. He may seek additional information from States, organs of the UN, intergovernmental or non-governmental organizations, or other sources, and he may receive testimony at the seat of the Court.⁷

DECISION TO PROCEED WITH AN INVESTIGATION

A Prosecutor's decision to proceed with an investigation in Colombia would be based on the analysis of three factors:⁸

Jurisdiction

First of all, the Prosecutor would have to decide whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed. As explained above, the

⁵ Article 13 of the Rome Statute.

⁶ Article 15 of the Rome Statute.

⁷ Article 15(2) of the Rome Statute.

⁸ Article 53(1) of the Rome Statute.

widespread and systematic attacks against the civilian population committed in Colombia are crimes against humanity, and, therefore, fall under the jurisdiction of the ICC.⁹

Admissibility

Secondly, the Prosecutor would have to determine that cases would be admissible under Article 17 of the Statute. In order for a case to be admissible, Article 17 requires that it be serious enough to warrant the Court's jurisdiction ("sufficient gravity") and that the State which has jurisdiction over the case have not taken genuine steps to investigate and prosecute perpetrators itself ("complementarity").

The "sufficient gravity" requirement results from the ICC's core function of exercising "jurisdiction over the most serious crimes of international concern..."¹⁰ Crimes committed in Colombia are objectively serious. However, it is difficult to assess seriousness of crimes in an abstract way. If the number of victims and the level of violence in Colombia since November 2002 are compared, for example, with the conflict in Darfur, it will turn out that the situation in Colombia is "not as serious as" the one in Darfur. As a result of comparisons like this, the Prosecutor is likely to conclude, not that crimes in Colombia are not serious enough, but rather that situations with higher crime rates and violence levels have priority over the Colombian situation. The Office of the Prosecutor (OTP) has limited resources and, therefore, needs to set priorities. If a situation cannot be immediately investigated because it does not meet the priority requirement, the Prosecutor can still continue to monitor developments and prepare for an eventual future investigation.

The analysis of the admissibility of a case also involves assessment of domestic proceedings in order to determine whether Colombia would be likely to claim that cases before the ICC be deferred to its national courts. Colombia could only make this claim if it were able to show in good faith that it is genuinely able and willing to try the cases. When the Prosecutor assesses complementarity in this preliminary phase of the investigation in order to determine whether there is a reasonable basis to proceed, he evaluates whether Colombia would be in a position to make such a formal claim during the proceedings; in other words, whether it would be able to prove to the ICC judges that it can appropriately deal with proceedings to bring to accountability those most responsible for mass crimes.

In order to make such a determination, the Prosecutor may send regular communications to the Colombian Government asking for certain information. This request has, in fact, several purposes: not only does it allow the OTP to get further information on national proceedings, but it is also a message to the Government that the OTP is monitoring the situation because it considers that crimes within the jurisdiction of the Court have been committed. By sending this message, the Prosecutor encourages genuine national proceedings, which is one of the goals of the ICC.

The Government of Colombia is likely to try to avoid ICC involvement by arguing that genuine national proceedings are being conducted. However, given widespread impunity resulting from lack of investigations and prosecutions, it would be difficult for the Government of Colombia to offer any evidence to support such an argument. This is confirmed by the flaws of the judicial system, which lacks resources to conduct atrocity crimes trials and is not impartial as a result of intimidation and

⁹ Articles 5 and 7 of the Rome Statute.

¹⁰ Article 1 of the Rome Statute.

corruption. For these very same reasons, even if Colombia might try to block ICC action initially, it would probably not present a formal claim for complementarity before the Chambers.

Colombian efforts at accountability vary according to the different actors involved in the conflict:

Guerrillas: Their crimes can qualify as political crimes and, therefore, they can obtain amnesty or pardon as long as they are not involved in forced displacement, enforced disappearances, genocide or torture. The Colombian Government argues that granting amnesty and pardon is necessary to attain peace in Colombia. Neither amnesty nor pardon are recognized under the Rome Statute. The ICC could, therefore, decide that individuals to whom the Government has accorded amnesty or pardon, have not been held accountable and are, then, subject to ICC jurisdiction. The Colombian Government would probably not challenge this decision since it would be happy to find a way for the leftist rebels to receive punishment.

Paramilitaries: A recent reform of the Colombian Criminal Code introduces the possibility for paramilitaries' acts to qualify as political crimes. Therefore, paramilitaries that have not committed forced displacement, enforced disappearances, genocide or torture are eligible for amnesty/pardon. Those who are not eligible but decide to demobilize can benefit from the reduced alternative penalties provided for in the new Justice and Peace Law. Indeed, most of the crimes committed by the paramilitaries which fall under the jurisdiction of the ICC, are not subject to amnesty or pardon. Although human rights organizations have heavily criticized the new law because they consider that it overrides the victims' right to truth, justice and reparation, it is difficult to assert whether this legislation is evidence of the Government's inability or unwillingness to investigate and try the cases. In principle, reduced penalties do not imply lack of ability or willingness to bring those responsible of atrocity crimes to accountability. As long as the proceedings that result in imposition of these alternative penalties are conducted in a genuine way, the ICC would not be able to affirm that Colombia has not made any efforts at accountability. Some human rights organizations have argued that applying the benefits of the Justice and Peace Law is the same as granting an amnesty, given the great disproportion that exists between the nature of the crimes committed and the low penalties provided for in its text. This would probably not be a convincing argument for the ICC judges since as long as proceedings are conducted impartially and independently, and lead to a decision within a reasonable time, Colombia would be able to argue that its courts are able and willing to try perpetrators. There is, however, another argument regarding the Justice and Peace Law which could succeed before the Court. Human rights groups claim that this legislation was passed to shield perpetrators from prosecution by the ICC. If this intent were proved, this would be evidence of the Government's unwillingness to try perpetrators of mass crimes¹¹ and, therefore, the ICC would be able to exercise its jurisdiction over those who benefit from lower alternative penalties.¹² However, the Prosecutor may encounter difficulties in providing evidence on the existence of such intent.

Security forces: Top leaders of the security forces are not being investigated for crimes and, therefore, impunity reigns in respect to them. It would be difficult for the Colombian government to prove that its courts are willing and able to try such individuals since there is no evidence that any effort is being done at bringing accountability at this level.

¹¹ Article 17(2)(a) of the Rome Statute.

¹² Article 20(3)(a) of the Rome Statute.

Interest of justice

Finally, if the case passes both the jurisdiction and admissibility tests, the OTP must consider whether taking into account the gravity of the crime and the interest of victims, there are nonetheless reasons to believe that an investigation would not serve the interest of justice. This interest would not be served, for example, if the ICC investigation harmed the peace process in Colombia. The Government has been negotiating with the illegal armed groups for a long time, and amnesties and alternative penalties have been agreed in exchange for ceasefires and demobilization. If these agreements are effective and amnesties and alternative penalties help bring peace to Colombia, it would be wise for the ICC to refrain from interfering with the peace settlement. However, it is too early to assess the effectiveness of the latest peace agreements. Even if there has been a slight reduction in the number of violent incidents over the last years, crime rates still remain quite high in Colombia. The Prosecutor might want to monitor the situation for some time, maybe one or two years, before making a decision on this matter.

WHAT ACTIONS HAS THE ICC UNDERTAKEN WITH RESPECT TO COLOMBIA?

In June 2003, the OTP received the first communication on crimes committed since November 1, 2002. Since then, non-governmental organizations have been sending more information on criminal acts and lack of accountability. The Prosecutor has been monitoring the situation for two years now, and he will most probably keep doing so for some time before making any decision on a possible investigation.

On March 2, 2005 the ICC Prosecutor sent a letter to the Colombian Government to inform that he had received thousands of communications on crimes against humanity committed in Colombia since 2002 by the illegal armed groups and the security forces. In this letter, he requested information on steps taken by the Government to investigate and prosecute such crimes, and specifically to try those who have played a leading role in the commission of such atrocities. The Prosecutor also required that the Colombian Government keep his office informed on the present process of demobilization of the paramilitary forces and of the outcome of the Justice and Peace Bill. The Colombian Government reacted positively to this letter and declared that it would cooperate with the Court by providing the information requested. According to the Colombian media, President Uribe considered that the Prosecutor's letter was a clear message for the terrorist groups operating in the country that they should be punished for their acts. His declarations did not address, however, the issue of impunity regarding crimes committed by the security forces.

Communications like this will probably be sent regularly by the OTP over the next months/years. As explained above, this is not only a way for the OTP to obtain information, but it is also a tool to alert Colombia of the possibility of conducting prosecutions and trials itself and a warning that, if Colombia fails to do so, the ICC will eventually take over.

WOULD AN ICC INVESTIGATION IN COLOMBIA AFFECT US INTERESTS?

The US is concerned that its citizens are not tried outside the US and, especially, that they are not targeted by ICC prosecutions. US soldiers who operate on Colombian soil are protected against Colombian jurisdiction by a Status of Forces Agreement signed in 1974 between Colombia and the US. This agreement is complemented by a Bilateral Immunity Agreement (BIA) signed in 2003,

according to which Colombia commits itself not to surrender American nationals to the ICC without US consent.¹³ Colombia agreed to sign a BIA in order to avoid losing military aid.¹⁴

If the ICC gets involved in Colombia, this would be the first investigation on the territory of a country where the US has troops. However, the US would not be affected by such an investigation. Even if US soldiers that operate in Colombia have been accused of arms smuggling and drug trafficking, they are not directly implicated in the commission of the atrocity crimes to which the ICC's jurisdiction is restricted.

It is difficult to predict to what extent an ICC investigation could bring stability to Colombia. However, considering that successive governments have failed in holding those responsible for mass crimes accountable, ICC involvement might encourage the opening of a new era in the history of justice in Colombia. Should that happen, this could contribute to the dismantling of terrorist organizations and the ending of the drug problem in that country. In any case, ICC involvement would not have a negative effect on the Colombian conflict. As explained, the Rome Statute has safeguards against investigations that might destabilize peace settlement processes or worsen conflicts in any other way.

All in all, the US does not need to worry about the possibility of an ICC investigation. Moreover, the US should welcome any ICC action with respect to Colombia because of the prospective positive impact such an investigation could have to bring stability to Colombia and end the drug business, which is what the US has been trying to achieve for many years.

Researched and drafted by AMICC Professional Volunteer Associate: Mariana Pena

¹³ The legality of BIAs is disputed.

¹⁴ According to the American Servicemembers' Protection Act (ASPA), countries which are parties to the ICC and refuse to sign BIAs might lose military aid.