SYMPOSIUM ON THE COLOMBIAN PEACE TALKS AND INTERNATIONAL LAW

THE LEGAL STATUS OF THE COLOMBIAN PEACE AGREEMENT

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One of the many roles played by international law in the Colombian Peace Accord is that of *guarantor*—that is, creating assurances that the parties will comply with their commitments. To this end, negotiators declared that the Final Peace Accord would constitute a Special Agreement (SA) in "terms of Article 3 common to all Geneva Conventions of 1949," which "will be introduced [in the Colombian legal system] as part of the constitutional block" and deposited "before the Swiss Federal Council." Furthermore, they stated, "a presidential declaration will be made taking the form of a unilateral declaration of the Colombian State before the Secretary-General of the United Nations," and its incorporation in a Resolution of the Security Council will be requested.[1]

According to Common Article 3, SAs bring the Geneva Conventions (and international humanitarian law (IHL) in general) "into force" in a noninternational armed conflict (NIAC). SAs have, thus, traditionally been used to enhance compliance with a narrow set of humanitarian obligations in NIACs. However, in the Colombian context, the SA was used with a much broader objective: to increase legal certainty for the parties by reinforcing the deal's domestic and international effects.

Although this essay will focus mainly on international law, it is worth noting that the domestic legal effects consist of the deal's incorporation into Colombian law as part of the "constitutional block." The doctrine of the "constitutional block" generally allows for the incorporation of international law into the Constitution. Thus, the idea was that the Peace Accord would gain constitutional status simply *because* it was an SA under international law,[2] rather than occupying a lower rank in the Colombian legal hierarchy. However, many opposed the peace vote in the plebiscite for precisely this reason, considering it an undemocratic means of modifying the Constitution.

My main focus in this essay, however, is on the international effects of the Peace Accord as an SA; and particularly, on the additional international legal protection this legal form provides. I will explore that issue in reference to three themes: (a) the international legal capacity of the FARC guerrilla; (b) the international legal status of the Agreement; and (c) the scope of an SA. Then I will consider whether greater legal certainty would actually be achieved in the Colombian case by assimilating a Peace Accord to an SA. Overall, I argue that adopting the form of an SA as an international legal guarantee was a highly controversial choice, with no well-defined effects. While this move made it possible to provide an interpretation of international law that

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[1] Comunicado Conjunto # 69 (May 12, 2016).

[2] *See also,* Christine Bell, Lex Pacificatoria Colombiana: *Colombia's Peace Accord in Comparative Perspective*, 110 AJIL UNBOUND 165 (2016).

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satisfied the needs of the negotiating parties, it did so at the cost of creating uncertainty and fomenting resistance, adding to the "No" vote in the plebiscite.

International Legal Capacity

SAs are concluded between the parties of a NIAC, where at least one of them is not a recognized subject of international law. It is, therefore, important to discuss first the international effects that an SA would have on the signatories. Common Article 3 underlines that its provisions "shall not affect the legal status of the Parties to the conflict."

However, scholars have discussed whether SAs do imply recognition in terms of nonstate armed groups' (NSAGs) capacity or personality. It is frequently accepted that NSAGs are subjects of IHL, but not subjects of general international law, but there is little clarity about the effects of this distinction. Sheerman believes that if NSAGs are recognized as bound by IHL, this is akin to recognizing a limited capacity to acquire international obligations.[3] Zegveld states that "they are to be regarded as international legal entities (subjects of international law)" [4] while Roberts and Sivakumaran argue that NSAGs also have a role in lawmaking, but only regarding IHL.[5]

The Legal Status of Peace Agreements

It has been argued that the Vienna Convention on the Law of Treaties (VCLT) only refers to treaties concluded between states. However, Article 3 opens the possibility that agreements concluded between other subjects are recognized by international law, albeit outside of the VCLT's scope. Are agreements concluded with NSAGs recognized outside of the VCLT, thus making the Peace Accord an actual treaty under international law?

Several courts have rejected assimilating peace deals in NIACs to treaties. The Colombian Constitutional Court indicated that Peace Accords could not be considered treaties since the guerrilla is not a subject of international law.[6] For similar reasons, the Special Court for Sierra Leone, in *Kallon* (2004), rejected that the Lomé Agreement (1999) concluded between the government and the rebels of the Revolutionary United Front could be considered a treaty. Both cases held that these agreements were binding only under domestic law. However, the Inter-American Court of Human Rights in the case *"El Mozote" v. El Salvador* (2012), highlighting that the case referred to acts committed in a NIAC, found that it was appropriate to analyze the applicable legal framework "in light of the provisions of Protocol II . . . as well as of the specific terms . . . of the Peace Accord of January 16, 1992."[7]

Courts' lack of clarity on the legal nature of peace agreements has been evident even in their review of agreements concluded between states. Lang criticizes the ICJ in the case *Armed Activities on the Territory of the Congo* (2005), arguing that when the Court classified the Lusaka agreement between Congo and Uganda as a simple "*modus operandi*" it "downgraded the legal status of peace agreements." This, says the author, allowed the Court "to accommodate the special character of peace agreements outside the traditional categories of

[3] Scott Sheeran, *International Law, Peace Agreements and Self-Determination: The Case of the Sudan*, 60 INT'L & COMP. L.Q. 423 (2011).

[4] LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 134 (2002).

[5] Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107 (2012).

[6] Corte Constitucional [C.C.] [Constitutional Court], Sentencia No. C-225/95 (Colom.).

[7] Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, para. 284 (Oct. 25, 2012).

international law while avoiding controversial issues of international law such as the status of non-state actor."[8]

Scholarly commentary is also inconclusive as to the nature of these agreements, their international effects, and whether they confer legal capacity on NSAGs. While most authors do not view peace agreements as treaties, some suggest that they form part of new transnational regimes. Christine Bell proposes that they are part of a *lex pacificatoria* similar to the *lex mercatoria*[9], whereas Sassòli's *lex armatorum,* includes SAs in IHL.[10] Critics of these proposals point out that the creation of new regimes leads to new self-contained categories that go against the purpose of these agreements: often, parties to a peace accord and/or an SA do not want to be separated from international law, but rather connected to it. To Lang, peace accords must be understood as binding agreements under international law because this legal status is key to achieving the benefits sought by these agreements. Indeed, one of the reasons why states and NSAGs conclude agreements "is to achieve some political recognition from States in the realm of international law."[11]

Lang suggests altering the soft law/hard law distinction, proposing instead a "continuum along which lies a variety of different forms and degrees of soft law."[12] However, he does not challenge the subject/object dichotomy. He distinguishes peace accords between state actors and nonstate actors and considers that international law applies only to state actors, while nonstate actors "could be regulated in domestic courts . . . with international legal norms serving as soft normative guidelines."[13] In contrast, Heffers and Kotlik do propose putting aside the subject/object dichotomy. Quoting Higgins, they consider that "international rights and obligations are created by participants in a continuing process of authoritative decisions"[14] which allows them to accept that agreements concluded by nonstate actors have international effects, without having to determine whether a change in subjects or sources of international has taken place.

The Legal Status of Peace Accords as Special Agreements

Until now, I have equated the discussion of SAs and peace accords. What changes when a peace accord is also an SA? In its last commentary on Common Article 3, the International Committee of the Red Cross (ICRC) considers it relevant to emphasize the "voluntary nature"[15] of the decision by the parties to make an agreement an SA. In cases like Colombia, it is clear that the parties wish to have additional effects by making a peace accord an SA and, although there is no consensus on *what* those effects are, several authors support that the idea that this move creates *some* international effects. This intention was made evident when, after the plebiscite, the head of the FARC said the deal had international effects as an SA.[16]

[8] Andrej Lang, *"Modus Operandi" and the ICJ's Appraisal of the Lusaka Ceasefire Agreement in the* Armed Activities *Case: The Role of Peace Agreements in International Conflict Resolution*, 40 N.Y.U. J. INT'L L.&POL. 107, 109(2008).

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

[10] Marco Sassóli, *Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law*, 1 J. INT'L HUMANITARIAN LEGAL STUD. 5, 6 (2010).

[11] Ezequiel Heffes & Marcos D. Kotlik, *Special Agreements Concluded by Armed Groups: Where is the Law?*, EJIL:*TALK!* (Feb. 27, 2014).

[12] Lang, *supra* note 8, at 162.

[13] *Id.* at 163.

[14] Ezequiel Heffes & Marcos Kotlik, *Special agreements as a means of enhancing compliance with IHL in non-international armed conflicts: An inquiry into the governing legal regime*, 96 INT'L REV. RED CROSS 1195, 1218 (2014).

[15] *Commentary on Article 3: Conflicts not of an International Character*, ICRC (2016).

[16] *'Timochenko': El no en el plebiscito no tiene "efecto jurídico" porque el acuerdo ya estaba firmado*, CNN (Oct. 3, 2016, 2:47 PM).

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The ICRC also asserts that SAs have international legal effects (even if they are not treaties).[17] Similarly, for Heffers and Kotlik the characteristics of SAs (having their origin in Common Article 3 and the objective of increasing compliance with IHL) make them instruments ruled by international law. SAs can contain international legal rules to which parties of a NIAC bind themselves through Common Article 3.

Conversely, the Colombian think-tank "Ideas for Peace" and the Colombian Academy of International Law have said that SAs are *complementary agreements*. Thus, "SAs would be *sui generis* international instruments"[18] that are able to create internal, but not international legal effects, since "they do not create autonomous obligations under international law."[19]

Scope of the Special Agreement

Finally, the third question that arises concerns the content of an SA. From a contextual reading of Common Article 3, one can argue that the object of SAs is the implementation of IHL in NIAC, which seems to limit their content to the development of IHL norms, without being able to include all the characteristic contents of a peace accord. However, the ICRC stated in its commentary to Common Article 3 that a peace agreement can be considered an SA. Furthermore, it broadened considerably what is considered "implementation of IHL." According to the ICRC, in order for a peace accord to be considered an SA it must contain "clauses that bring into existence further obligations drawn from the Geneva Conventions and/or their Additional Protocols," other humanitarian law sources or "obligations drawn from human rights law" that "help to implement humanitarian law."[20]

But even if we accept that a peace accord can be considered an SA, some questions remain. A peace accord typically includes multiple contents that are not easily assimilated to IHL.[21] Can it be said that everything related to peace is also related to IHL, thus falling within the definition of an SA? If not, what happens with the parts of the accord that are not related to IHL? Can different sections of the same agreement have different legal effects?

Most international scholars interested in the relationship between SAs and international law have addressed these questions. In Colombia, however, the subject has received more attention because this issue is closely linked to the deal's intended domestic legal effect: ensuring that it enters the domestic legal order as part of the "constitutional block."[22] Some have argued that a peace accord that is an SA is always part of IHL.[23] Others deny any form of assimilation between a peace accord and an SA, precisely because an SA is restricted to the development of content related to IHL and a peace agreement exceeds this content.[24] Another line of

[17] *¿Qué dice el DIH sobre los acuerdos especiales en el marco de un proceso de paz?*, ICRC (June 20, 2016).

[18] Daniel Pardo Calderón et al., *Los interrogantes del "blindaje jurídico" para la paz*, FIP OPINA (June 27, 2016).

[19] ACCOLDI, INTERVENCIÓN AL EXPEDIENTE D-11329 ANTE LA CORTE CONSTITUCIONAL 22 (2016).

[20] *Commentary on Article 3: Conflicts not of an International Character*, ICRC paras. 850-851 (2016).

[21] For example the topic on agrarian development and on illicit drugs of the Colombian PA.

[22] This is the subject of an ongoing case before the Constitutional Court (Case file D-11329).

[23] FISCALÍA GENERAL DE LA NACIÓN, SOLICITUD DE DECLARATORIA DE LA CONSTITUCIONALIDAD CONDICIONADA DE LA EXPRESIÓN "ACUERDO", CONTENIDA EN EL ACUERDO GENERAL PARA LA TERMINACIÓN DEL CONFLICTO Y LA CONSTRUCCIÓN DE UNA PAZ ESTABLE Y DURADERA (2016); FISCALÍA GENERAL DE LA NACIÓN, INTERVENCIÓN AL EXPEDIENTE D-11329 ANTE LA CORTE CONSTITUCIONAL (2016); Francisco Barbosa, *El acuerdo especial y el plebiscito*, EL TIEMPO (Mar. 16, 2016, 4:24 PM).

[24] PROCURADURÍA GENERAL DE LA NACIÓN, INTERVENCIÓN AL EXPEDIENTE D-11329 ANTE LA CORTE CONSTITUCIONAL (2016); Alfredo Ramos, *Agumentos Para Enviar A La Corte Constitucional Frente A Demanda De Constitucionalidad De La Palabra "Acuerdo"* (2016).

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thinking accepts that a peace accord is an SA, but argues that this is not equivalent to an instrument of IHL[25] and does not generate autonomous international obligations.[26]

Achieved Effects?

My purpose is not to say what the "real" status of the Colombian Peace Accord is, or what are the "true" consequences achieved by constituting the Peace Accord as an SA. Considering the different debates, there is no certainty on those issues. However, this uncertainty offers the possibility of accepting an interpretation that satisfies the Colombian need: to provide "protection" for the peace deal through international law.

In Colombia, the parties undoubtedly hoped that, by using international law, their peace deal would be more secure. To this end, they resorted to all available international instruments. In this text I have dealt with the decision to use SAs. However, the parties decided to shield the agreements with additional mechanisms as well: it was deposited in Switzerland; the Colombian government made a unilateral declaration before the Secretary-General of the United Nations; and it also requested the Accord's inclusion in a Security Council Resolution. Only the recognition of belligerence was missing, which is something that has always been avoided. I believe that this explicit use of international instruments should have legal effects (at least under IHL), and that the Peace Accord and SA could be considered binding in the international legal order, without the need to define them within the traditional system of subjects and sources, as Heffers and Kotlik propose.

This legal architecture was intended to provide protection from possible modifications and future breaches, assuming that the deal would be implemented. After the plebiscite, the deal's internal effects and implementation are in doubt. The deal cannot be implemented as it is, but it has been declared an SA and deposited as such in Switzerland. Can an SA have international effects regardless of its internal status? Its international and internal effects are independent, but the uncertainty of the subject and this unfamiliar situation raise further practical questions with no clear answers: how can one claim the effects of an SA that cannot be implemented? Who is responsible for the breach of the Agreement, if its implementation is prevented by the result of the plebiscite? The operational uncertainty (and, therefore, the uncertainty of the protection it provides) increases when the internal implementation of the Agreement is in doubt.

Finally, it is interesting to note that the use of international legal mechanisms as a guarantee for the deal reveals a deep faith in international law that is surprising, particularly on the part of the FARC. SAs were originally understood to promote the application of IHL in a space that was not traditionally regulated by international law (NIAC), in order to obtain commitments on the part of actors that were not traditional subjects of international law (NSAGs). In Colombia, an NSAG and a state together seek protection in the international legal order. They believe that international law is a relevant tool that will help guarantee peace and promote legal security to parties torn apart by war and mutual distrust. Instead of giving privilege to a discourse of power and interests outside international law, or of denying its effectiveness and relevance, they manifest in all possible ways their desire to be protected by it and to be part of it. It nonetheless remains to be seen whether international law is able to provide legal venues for the pacific settlement of the main kind of conflicts that proliferate in the planet. The Colombian case provides an excellent opportunity to do just that.

[25] DEJUSTICIA, INTERVENCIÓN AL EXPEDIENTE D-11329 ANTE LA CORTE CONSTITUCIONAL (2016).

[26] ACCOLDI, *supra* note 19; Daniel Pardo Calderón et al., supra note 18.

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