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Narcotraffic as Connected Political Crime in Colombia: the FARC Case

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NARCOTRAFFIC AS CONNECTED POLITICAL CRIME IN COLOMBIA: THE FARC CASE

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The current peace process between the Colombian government of President Juan Manuel Santos and the Revolutionary Armed Forces of Colombia—People’s Army (“FARC-EP”) has been in progress for the past five years and recently led to a historic Final Agreement between the two parties signed in Havana, Cuba, August 24, 2016. One of the main points on the agenda throughout the negotiations has been finding a solution to the country’s problem with illicit drugs. Both the government and the FARC themselves have recognized the FARC’s involvement in the illicit drug industry. This has led to the negotiations on how the FARC can now work with the government to put an end to the industry that has plagued the country for so long. Within these negotiations, there have been indications that the government may be preparing to pardon the FARC’s narco-trafficking crimes by connecting them to the group’s political crimes. This article focuses on the FARC’s involvement in narco-trafficking. As an insurgent group committing the political crime of rebellion, the FARC’s crime of rebellion qualifies for certain special treatment (i.e., amnesty and pardon) because of the political motive of the crime. Whether that special treatment can be extended to the crime of narco-traffic is a separate and important question. This article looks at whether the FARC’s narco-trafficking can legally be considered a crime connected to their political crime of rebellion. According to the amnesty law issued by the Colombian congress as a result of the peace agreement, the Special Jurisdiction for Peace will address this discussion of whether the crimes can be connected. In this article, we support this decision by the Congress. Considering that a deeper analysis of the full extent of the FARC’s participation in narco-trafficking is required to answer this question, there must be room for investigation and application of legal criteria to arrive at the right answer—the one that is closest to the truth.

I. INTRODUCTION

For more than five decades, Colombia has suffered a domestic armed conflict. Different illegal armed groups have participated in this conflict against the government. One of these armed groups is the oldest guerrilla group in Latin America: Revolutionary Armed Forces of Colombia—the People’s Army (*Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo*) known globally as the FARC.¹ Around 2010, the current President of Colombia, Juan Manuel Santos, initiated conversations with this armed guerrilla group with the intention of reaching a peace agreement.² In August 2012, the Colombian government officially announced that they had reached an agreement with the FARC to begin formal negotiations.³ On the agenda for negotiation were six items, one of those—Point Four—focuses on the goal of ending the illicit drug trade in Colombia, and in so doing, refers to the issue of the FARC’s involvement in the illicit drug trade.⁴ That issue—the FARC’s involvement in drug trafficking and its legal consideration as a connected crime to the political crime of rebellion—is the subject of this article.

In November 2016, both parties arrived at a final agreement on all six points of the agenda constituting “The Final Agreement for the Termination of Conflict and the Construction of a Stable and Lasting Peace” (*Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*).⁵ Point Four of the agreement recognized the involvement of the FARC in the illegal drug trade. However, it was careful to refer to it in a manner that implied all the involvement was strictly tied to the rebellion.

“Rebellion” is a political crime that consists of using arms to overthrow the national government, *or to suppress or modify the constitutional or legal regime in force*.⁶ As established in the

¹ Secretariado Nacional de las FARC-EP, *Quiénes Somos y Por Qué Luchamos*, FARC-EP, <http://www.farc-ep.co/nosotros.html>

² JUNE S. BEITEL, CONG. RESEARCH SERV., R42982, PEACE TALKS IN COLOMBIA 15-16 (2015).

³ *Id.*

⁴ *See id.* at 22.

⁵ *Id.* at 15-16.

⁶ ECONOMIC HISTORY OF WARFARE AND STATE FORMATION 26 (Jari Eloranta et al. eds., 2016).

Colombian Constitution as well as the Final Peace Agreement, in contexts such as peace processes, perpetrators of rebellion and other such political crimes can receive the benefits of amnesty, pardon, and exemption from extradition. In addition, in most cases, common crimes perpetrated by the insurgent groups that are deemed connected to the group's political crimes receive the same benefits.

Neither the Final Agreement nor the **amnesty law** issued under the Agreement expressly state that the drug trafficking committed by the FARC constitutes a connected crime.⁷ However, the language used when referring to the relationship of this armed group with drug trafficking, as well as the inclusive criteria laid out for the determination of the connectedness of the conduct, give a strong indication that the FARC's involvement in drug trafficking will be considered a connected crime. For example, this would be achieved by considering drug trafficking a crime related to the political crime of rebellion by stating that the crime was carried out solely for the purpose of financing the rebellion, and that the proceeds were used exclusively to this end.

In this paper, by applying universally accepted tests, and Colombian case law, we arrive at specific results that the FARC's involvement in drug trafficking cannot be excused as a connected crime to the rebellion. This article does not aim to present a definitive answer regarding the extent of the FARC's involvement in the drug trafficking industry—that is a question various governments and organizations have been trying to answer for over thirty years. Instead, it will lay out facts that introduce doubt as to whether the FARC's involvement in narco trafficking went beyond being merely a tool to commit rebellion.

Given the relationship of narco traffic with the Colombian armed conflict, the need for truth and reconciliation, and for a “stable and permanent” peace, we argue that it is essential to have a serious investigation, analysis, and discussion before the Special Jurisdiction for Peace on the issue of narco traffic and the true extent of the FARC's involvement.

This article is organized into three parts. Part I contextualizes the FARC's history and its different phases as an armed group in

⁷ See generally *id.*

Colombia, as well as its involvement with the illicit drug business throughout the decades. Part II presents the concept of political and connected crime through the different theories developed worldwide culminating in the historic and legal development of political and connected crime in Colombia. Part III, applies those theories to the issue at hand—whether the FARC’s involvement in narco-trafficking could be a connected crime. Finally, we conclude that regardless as to which test is applied, for phases four to six, the FARC’s narco-trafficking activities could not qualify as connected crimes to the political crime of rebellion.

II. THE FARC—THE OLDEST GUERRILLA GROUP IN THE AMERICAS, AND ITS INVOLVEMENT WITH THE MOST PROFITABLE ILLEGAL BUSINESS ON THE CONTINENT.

A. *History of the FARC*

The origin of the armed conflict in Colombia is not necessarily connected with the guerrilla movement⁸ as we know it today. The history of violence goes back to the early 1900s and the sociopolitical realities of Colombia as a new independent republic.⁹ Both the causes of the violence and the actors carrying it out have evolved during the course of the twentieth and twenty-first centuries; the guerrilla actors born in the 1960s have sustained the fight over the longest period in history, and the FARC¹⁰ has been one of the most prominent contributors to the violence the country has suffered.

Though it began before the Cuban Revolution, the guerrilla movement in Colombia was heavily influenced by that event and

⁸ See generally Fernán E. González, *The Colombian Conflict in Historical Perspective*, 14 ACCORD 10, 10-15 (2004) (discussing the historical context of the current Colombian armed conflict).

⁹ See generally John H. Coatsworth, *Roots of Violence in Colombia: Armed Actors and Beyond*, REVISTA HARV. REV. OF LATIN AM., Spring 2003, at 3, 3-7.

¹⁰ *Id.*

the Communist Party.¹¹ The guerrilla movement was organized as a response to the accelerated economic development model implemented in Colombia. The model was to maximize capital by the redistribution of agricultural lands to a select few, and the industrialization of that land.¹² “This economic model led to the creation of a ‘peasant guerrilla’ discontent with the mal-use, misuse, and under-use of human resources with the underutilization of the country’s best lands.”¹³

This guerrilla movement started in Colombia’s southern regions, in the Department of Tolima where the peasants colonized themselves.¹⁴ In September 1964, the different armed groups created a coalition called the Guerrilla South Block.¹⁵ This coalition was transformed into *Las Fuerzas Armadas Revolucionarias de Colombia* or the Revolutionary Armed Forces of Colombia—the FARC—a year and a half later.¹⁶ The FARC became the peasants’ refuge from the repression of La Violencia;¹⁷ and their collective way of self-defense.¹⁸ From the beginning, the FARC and the Colombian Communist Party (*Partido Comunista Colombiano* or “PCC”) were independent and separate organizations, despite both maintaining a relationship based on the Marxism-Leninism ideology.

¹¹ Eduardo Pizarro Leongómez, *La Insurgencia Armada: Raíces y Perspectiva*, in AL FILO DEL CAOS: CRISIS POLÍTICA EN LA COLOMBIA DE LOS AÑOS 80 411, 411-43 (Francisco Leal Buitrago & Leon Zamosc eds., 1991).

¹² EDUARDO L. MONTERO & DALE W. ADAMS, ALGUNAS CONSIDERACIONES SOBRE REFORMA AGRARIA EN REGIONES DE MINIFUNDIO: UN EJEMPLO COLOMBIANO, CON BIBLIOGRAFIA REFERENTE A LA SITUACION COLOMBIANA 69 (1965).

¹³ JAMES J. BRITAIN & JAMES PETRAS, AN OVERVIEW OF THE REVOLUTIONARY ARMED FORCES OF COLOMBIA-PEOPLE’S ARMY (FARC-EP): A HISTORY OF RADICALISM IN THE COUNTRYSIDE, IN REVOLUTIONARY SOCIAL CHANGE IN COLOMBIA: THE ORIGIN AND DIRECTION THE FARC-EP 7 (2009).

¹⁴ GONZALO SANCHEZ & RICARDO PENARANDA, PASADO Y PRESENTE DE LA VIOLENCIA EN COLOMBIA 362 (1987).

¹⁵ Roman Ortiz, *Guerrilla Y Narcotrafico en Colombia*, 22 REV. SEG. PÚB. 1, 9 (2000), available at <http://www.ugr.es/~ceas/America%20Latina/Guerrilla%20y%20narcotrafico%20en%20Colombia.pdf>.

¹⁶ *Id.*

¹⁷ La Violencia is a decade between 1948 to 1958 of political and economic violence in Colombia. See BRITAIN & PETRAS, *supra* note 13, at 6.

¹⁸ *Id.* at 8.

Marxism-Leninism is a dogma based on the theory and tactics of the proletarian revolution.¹⁹ “This dogma rises out of the struggles of the working and oppressed people and promotes their revolution against capitalism and imperialism.”²⁰ The FARC adopted this dogma as a peasant movement campaigning for land reform, fighting for better distribution of the wealth in the country,²¹ and promoting a change of the economic model to communism.²²

The FARC, the oldest revolutionary movement in Colombia,²³ has fought against the State for more than five decades putting the group through different historical, sociological, and political challenges under which it has had to adapt and transform in order to survive and sustain its campaign. It started as a “ragtag movement committed to land reform, the FARC has developed into a well-founded, capable fighting force, known more for its brutal tactics than its Marxists-Leninist influenced political program.”²⁴ Historians describe four phases of this group.²⁵ However, it is necessary to add three more phases when considering the transformation that has occurred over the past two decades.

1. Phase One: Germination and Consolidation (1962-1973)

The FARC was created from a peasant group located in the departments of Tolima, Huila, Valle, and Cauca in the southern

¹⁹ Victor Barraza, *Foundations of Leninism*, MARXIST INTERNET ARCHIVE (May 2008), <https://www.marxists.org/reference/archive/stalin/works/1924/foundations-leninism/ch02.htm>.

²⁰ *Id.*

²¹ *¿Qué es la Conferencia Nacional de los Guerrilleros [What is the National Conference of Guerillas?]*?, FARC-EP, <http://www.farc-ep.co/octava-conferencia/que-es-la-conferencia-nacional-de-guerrilleros.html>.

²² *Central Report to the Expanded Plenary of the Central Major State of the FARC-EP*, FARC-EP (Oct. 6-20, 1983), <http://www.farc-ep.co/pleno/pleno-ampliado-farc-ep-octubre-6-20-de-1983.html>.

²³ *See generally* Secretariado Nacional de las FARC-EP, *supra* note 1.

²⁴ George J. Tenet, Statement by the Director of Central Intelligence Before the Senate Select Committee on Intelligence on the Worldwide Threat 2001: National Security in a Changing World, (Feb. 2001) https://www.cia.gov/news-information/speeches-testimony/2001/UNCLASWWT_02072001.html.

²⁵ Gilberto Vieira, *Colombia: Combinación De Todas Las Formas De Lucha* (Entrevista con Marta Harnecker), BIBLIOTECA POPULAR, Oct. 1988.

region of Colombia.²⁶ Influenced by the communist economic and political model, its purpose was to promote an economic and political change through refusal to recognize the legitimacy of the Colombian government as representatives of the people.²⁷

From its inception, the PCC funded FARC activities, aimed at harassing the government in order to achieve their purpose.²⁸ This strategy shifted the violence in Colombia from violence with bureaucratic underpinnings during the period of *La Violencia*,²⁹ to violence with strong ideological underpinnings.³⁰

During this germination and consolidation phase, the FARC armed activities were always executed within the limits of the territories colonized by its members,³¹ and its military offensive was of rural character. The military objective was the Colombian Army,³² since the FARC was established as a collective self-defense group by the peasant communities in the south of the country who organized themselves for protection against the extreme political and militaristic coercion by the government during the period of *La Violencia*.³³

2. Phase Two: Crisis and Division (1973-1980)

During the second national conference of guerrillas,³⁴ the FARC's military plan was modified to incrementally increase the

²⁶ See BRITTAIN & PETRAS, *supra* note 13, at 8.

²⁷ See DANIEL PÉCAUT, *GUERRA CONTRA LA SOCIEDAD* 28 (1st ed. 2001).

²⁸ BRITTAIN & PETRAS, *supra* note 13, at 8.

²⁹ Bureaucratic violence presents itself as the bastion of *status quo*, and operates within a type of organization that by the guidelines of conduct demanded within, it behaves as an efficient mechanism to dissolve or neutralize protests of all kinds; whether as citizens or individuals, whether within the public or private sphere, whether for political, economic or other reasons. See Edgar Straehle, *En torno a la violencia burocrática: observaciones sobre uno de los rostros de la violencia contemporánea*, 4 ANUARI DEL CONFLICTE SOCIAL 427 (2015).

³⁰ SANCHEZ & PENARANDA, *supra* note 14.

³¹ *Id.*

³² *Id.*

³³ See DANIEL PÉCAUT, *GUERRA CONTRA LA SOCIEDAD* 36-39 (1st ed. 2001), http://www.mamacoca.org/docs_de_base/La_Representacion_Social_del_narcotrafico/PecautDaniel_Guerra_Contra_la_Sociedad_EdEspasa_2001.pdf.

³⁴ The "National Conference of Guerrillas" is a national meeting held by the FARC, where the guerrilla group discusses the "current phenomena that affect

number of members and fronts (*frentes móviles*)³⁵ to distribute their presence across the country. The goal was to expand the military activities to other regions³⁶ but this plan translated into a weakening of the military offensive and a slow growth of its presence in the territory.³⁷

The PCC, Cuba, and the USSR funded the FARC during this phase.³⁸ The FARC, however, was only considered as a “strategic reserve” of affiliates for the PCC in the probable scenario that a dictatorship or extreme right government would take power in Colombia³⁹ as had happened in several Latin American countries.

3. Phase Three: Rebound and Boom (1980-1989)

Towards the end of 1970s, the expansion of the fronts to other territories led to the rebound of the FARC, which grew from nine to eighteen fronts by 1982.⁴⁰ In May of 1982, the Seventh Guerrilla conference took place. There, the FARC designed the ultimate military objective of war against the State: surround and take over the capital, Bogotá.⁴¹ In order to achieve this ultimate objective, the FARC needed 16,000 members, enough food for the population in the city, and to successfully provoke a civilian uprising against the Government.⁴²

the Colombian society.” In the conference, the group discuss the action plan to be taken regarding that phenomena as well as the revolutionary process and the military and political confrontation.

³⁵ The fronts are units of the FARC that were implemented as a strategy to go to other parts of the Colombian territory and to find supporters. Their purpose was to expand the cause.

³⁶ BRITAIN & PETRAS, *supra* note 15, at 13.

³⁷ JAMES D. HENDERSON, VICTIMA DE LA GLOBALIZACIÓN: LA HISTORIA DE COMO EL NARCOTRÁFICO DESTRUYO LA PAZ EN COLOMBIA 185 (Siglo del Hombre 1st ed. 2012).

³⁸ Luis Fernando Trejos Rosero, Dos Momentos en la Actividad Política Internacional de las Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo (FARC-EP: Un Análisis desde la Categoría de Actor no Estatal 1 ESPACIO REGIONAL 99, 104-105 (2013).

³⁹ *Id.*

⁴⁰ Ricardo Vargas, *The Revolutionary Armed Forces of Colombia (FARC) and the Illicit Drug Trade*, TNI (June 7, 1999), <https://www.tni.org/my/node/1464>.

⁴¹ HENDERSON *supra* note 37, at 197.

⁴² *Id.*

To carry out this ultimate military objective, the FARC followed the plan designed during the '70s. The FARC grew without any problems between 1982 and 1986 to the point of increasing its membership by twenty-five percent.⁴³ However, the socio-political scenario was not only stirred up by the FARC-EP; the M-19 group⁴⁴ executed significant operations like the hostage situation at the Embassy of The Dominican Republic, which demonstrated the power of guerrilla groups in Colombia.

The significant growth in membership, followers of guerrilla groups, and escalation of the confrontation with the Colombian Army led the government to implement a policy of repression across the territory, a policy that some compared to Brazil and Argentina's extreme-right government's policies.⁴⁵ By 1982, the increase in violence motivated a stand from the government to resolve the armed conflict with a peace agreement. The government under President Belisario Betancur⁴⁶ initiated negotiations with all the guerrilla groups: ELN,⁴⁷ EPL,⁴⁸ the FARC, and others. As a result, the Government issued a General Amnesty Law to incentivize demobilization and, from there, reached a cease-fire Agreement in 1984 with all the guerrilla groups, including the FARC.⁴⁹

The FARC created the Patriotic Union (*Unión Patriótica* or "UP"), a political party, which became the political branch of the

⁴³ *Id.*

⁴⁴ The M-19 was an insurgent Colombian movement originated as a protest against the alleged fraud of the presidential elections of the April 19, 1970.

⁴⁵ LEONGÓMEZ, *supra* note 11, at 432 n.21.

⁴⁶ Colombian President Belisario Betancur's term in office lasted from August 7, 1982 to August 7, 1986.

⁴⁷ El Ejército de Liberación Nacional (ELN), National Liberation Army in English, is an insurgent guerrilla organization operated in Colombia. It is defined by a Marxist-Leninist orientation and pro-revolution Cuban ideology.

⁴⁸ El Ejército Popular de Liberación (EPL), or Popular Liberation Army in English, was a Colombian guerrilla group that formed part of the internal armed conflict with a Marxist-Leninist ideology. Though founded in February 1967, the EPL did not initiate military action until 1968 in Antioquia (the Urabá and Bajo Cauca regions). Later, it expanded into the departments of Córdoba and Sucre and the region of Magdalena Medio until its demobilization in 1991.

⁴⁹ Álvaro Francisco Patrón Marchena & Werlington Rojas Hernández, *Evolución y Situación Actual de las Fuerzas Armadas Revolucionarias de Colombia (FARC)*, NUEVA GRANADA MIL. UNIV. (2012).

guerrilla group⁵⁰ as part of the peace negotiations with President Betancur's government. The FARC and the UP movements allowed the guerrillas to leave behind its peasant group image guided by the PCC (whom had abandoned the use of force as an option by the time the peace negotiations took place).⁵¹ The UP's birth marked the FARC's rupture from the PCC and it exposed the FARC's political independence, despite the fact that the FARC still promulgated a socialist/communist agenda separating them from the PCC which was a legitimate Colombian political party participating in government and society.⁵²

4. Phase Four: Deterioration and Delegitimation (1989-1993)

The 1984 Cease Fire Agreement came to an end as result of acts of harassment against the State executed by the FARC, as well as the assassination of UP members by paramilitaries with the alleged participation of the Colombian Army.⁵³ This deterioration of the peace talks led to the formation of the Simón Bolívar Guerilla Coordinating Board (*Coordinadora Guerrillera Simón Bolívar* or "CGSB"), which brought together all the guerrillas groups⁵⁴ to advance their campaign.

During this period, other armed actors appear in the history of Colombia, intensifying and diversifying the violence.⁵⁵ The guerrilla movement was a relevant actor in intensifying the violence, particularly the FARC. The guerrillas, however, were unable to gain direct and massive support for the insurgent project from the Colombian people.⁵⁶

⁵⁰ HENDERSON *supra* note 37, at 13.

⁵¹ ROSERO, *supra* note 38, at 110.

⁵² *Id.* at 104.

⁵³ *See generally id.* at 103.

⁵⁴ MARCHENA & HERNANDEZ, *supra* note 49, at 13.

⁵⁵ Some of the other armed groups during the history of the Colombia internal armed conflict, are: Quintin Lame, M-19, PRT, MIR Patria, EPL, ELN, and AUC. *See* Int'l Crisis Grp. [ICG], *Colombia: Prospects for Peace with the ELN*, at 7, ICG Latin America Report N°8 (Oct. 4, 2002).

⁵⁶ SANCHEZ & PENARANDA, *supra* note 14, at 15.

After the fall of the Soviet Union, the FARC stopped receiving the same support, particularly the financial support;⁵⁷ this forced acquisition of funds from other sources. The FARC increased its tactics of kidnapping and extortion of the Colombian population,⁵⁸ as well as its involvement in the illegal drug trafficking industry, in order to finance its operations.⁵⁹

The FARC's militarization of the insurgent project, the Government's policy of annihilation of the leftist movement, and the proliferation of violence across the board, changed the perception of the guerrillas in the eyes of the Colombian people delegitimizing the insurgent project.⁶⁰

5. Phase Five: Reorganization and Redirection (1993-1998)

By 1993, the FARC had reorganized both its political and military strategies. It had forty-eight fronts around the country,⁶¹ increasing in control of great number of small towns, urbanized the conflict by positioning a great number of members to the cities—especially Bogotá, and implemented large-scale military operations.⁶²

Due to the loss of international supporters, in order to finance its operations, the group used the relocation of the coca production to the south of the country—FARC territory—to its advantage. The guerrilla implemented a tax on coca buyers.⁶³ Even after the drug cartels from Medellín and Cali were dismantled in the '90s, the coca production and the cocaine business kept on growing and the FARC continued controlling those territories.⁶⁴ The FARC's continued growth as an organization during this period points to the conclusion that it became more involved in the illegal drug operations with many theorizing the drug trade became the group's main source of economic resources.

⁵⁷ See Luis Monroy Gonzalez, *Consecuencias Regionales del Conflicto en Colombia*, WASHINGTON COLEGIO INTERAMERICANO DE DEFENSE 34, 34 (2010).

⁵⁸ SANCHEZ & PENARANDA, *supra* note 14.

⁵⁹ González, *supra* note 8.

⁶⁰ PÉCAUT, *supra* note 33, at 172.

⁶¹ ROSERO, *supra* note 38, at 106.

⁶² See ROSERO, *supra* note 38, at 102.

⁶³ MARCHENA & HERNANDEZ, *supra* note 49, at 14.

⁶⁴ *Id.*

During this period the Colombian government lost control of great parts of the territory causing criminal activity and the production of illicit drugs to increase substantially.⁶⁵ The drug business spread its ink at all levels of Colombian society all the way up to the highest office. The President elected in 1994, Ernesto Samper-Pizano, was exposed to scandal immediately after taking office.⁶⁶ It was uncovered that Samper received drug money to finance his electoral campaign.⁶⁷

The “drugalization”⁶⁸ of the Colombian society—the levels of illegality and the lack of legitimacy of the Colombian Government—created the best socio-political circumstances both nationally and internationally, during the FARC’s existence, to achieve their ultimate military objective. The FARC had become economically and militarily autonomous and self-sustaining as a result of its role in this crisis.⁶⁹

6. Phase Six: Military and Economic Power (1998-2002)

Towards the end of the ‘90s, the inefficiency of Samper’s Government due to the scandal for receiving drug money to finance his campaign, allowed the FARC to reach the peak of its military capacity to achieve the objective to overthrow the Colombian government.⁷⁰ In 1998, the state of violence in Colombia was so high that President Pastrana was elected under the agenda of negotiating a peace agreement.⁷¹ The peace talks were achieved in exchange for several benefits: the warrants for arrest on numerous FARC leaders were suspended, and a piece of the Colombian territory was demilitarized for the FARC to control.⁷² The peace conversations took place in *El Caguán*,⁷³ or

⁶⁵ HENDERSON, *supra* note 37, at 173.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Drugalization is a term created to refer to the phenomenon of the drugs and drug-business affecting every aspect and sector of the Colombian society.

⁶⁹ González, *supra* note 8, at 34.

⁷⁰ HENDERSON, *supra* note 37, at 172.

⁷¹ *Id.* at 211.

⁷² *Id.*

⁷³ “*La zona de despeje*” was equivalent to 42.319 km between the departments of Meta and Caquetá. Germán Hislén Giraldo Castaño, *Apuntes*

zona de despeje, over the course of three years. The FARC, however, intensified its military activities against the State and the civilians during these talks, and *El Caguán* became the center of operations for their trafficking businesses:⁷⁴ drugs and arms.

Again, the FARC increased its extortion and kidnapping tactics against the civilians in the country; it also escalated its attacks against the Colombian Army and police forces, especially in the municipalities strategically located in the drug-trafficking areas.⁷⁵ As the guerrilla groups continued their campaign and gained more control over the remote areas of the country and the drug-trafficking business increased in Colombia,⁷⁶ the FARC's economic and military power increased. As consequence, the peace conversations failed despite the Government's efforts to achieve a political solution to the armed conflict in the country.⁷⁷

7. Phase Seven: Crackdown on the FARC (2002-2012)

By the end of Pastrana's Government in 2002, Colombia was the primary base of the global cocaine industry.⁷⁸ Guerrilla groups controlled most of the municipalities where the coca grew⁷⁹ and the FARC's involvement in the business also increased.⁸⁰ Additionally, the number of murders and kidnappings were higher than ever. Colombia was considered the kidnapping capital of the world due to the FARC's campaign.⁸¹

As a result, the Colombian people started to unite and protest against the FARC,⁸² and the European Union and the United States

Acerca del Canje de Prisioneros en la Historia de Colombia, 15 *Grafia* 106, 122 (2015).

⁷⁴ MARCHENA & HERNANDEZ, *supra* note 49, at 15.

⁷⁵ *Id.*

⁷⁶ Due to the U.S.'s plan to eradicate coca fields in Bolivia and Peru. *See generally* Jeremy Bigwood & Phillip Coffin, *Coca Eradication*, Inst. for Policy Studies (Oct. 6, 2005), https://ips-dc.org/coca_eradication/.

⁷⁷ González, *supra* note 8, at 35.

⁷⁸ Claire Felter & Danielle Renwick, *Colombia's Civil Conflict*, COUNCIL ON FOREIGN RELATIONS (Jan. 11, 2017), <https://www.cfr.org/backgrounder/colombias-civil-conflict>.

⁷⁹ *Id.*

⁸⁰ GARRY LEECH, *REBELS: FARC: THE LONGEST INSRUGENCY* 83 (2011).

⁸¹ HENDERSON, *supra* note 37, at 228.

⁸² *Cacerolazo Contra Las FARC*, *EL TIEMPO* (Jan. 30, 2002, 5:00 AM), <http://www.eltiempo.com/archivo/documento/MAM-1338501>.

listed the FARC as a terrorist organization for their known links to narco trafficking, kidnapping, and violations of International Humanitarian Law.⁸³

President Uribe, who promised to debilitate the guerrilla groups, especially the FARC, was elected in 2002, and a military campaign was put in place against all the groups involved in the armed conflict.⁸⁴ The FARC was cracked down on during Uribe's government; its membership was reduced to half, the Colombian army took control over a great number of remote municipalities considered guerrilla's territories, and the FARC leaders were neutralized by detention or elimination in the battlefield.⁸⁵

It has been recognized that the current peace process, negotiated with President Santos, is only a consequence of the crackdown of the FARC during the previous government. Thus, Uribe's policy to debilitate the FARC's military indicates that the group had the opportunity to achieve the objective designed in the 1970s—overthrow the government—during the 1990s' state of chaos and insecurity, but it was not carried out, rather the objective seems to have been abandoned.

B. *FARC and Narcotraffic*

1. The origins of the relationship of the FARC with narco trafficking

Around the 1970s, Colombian cartels initiated the promotion of coca crops in Colombia when acquiring the coca base from other countries turned impossible.⁸⁶ At its outset, the FARC purposefully refrained from any involvement with drugs or drug trafficking⁸⁷

⁸³ ROSERO, *supra* note 38, at 110-12.

⁸⁴ *Id.*

⁸⁵ *Cuatro claves del Estado que pusieron a las Farc en su peor momento*, EL TIEMPO (Nov. 6, 2011, 1:58 AM), <http://www.eltiempo.com/archivo/documento/CMS-10713652>; *Los golpes más contundentes dados en los últimos años a las Farc*, EL ESPECTADOR (Nov. 4, 2011, 10:50 PM), <http://www.elespectador.com/noticias/judicial/los-golpes-mas-contundentes-dados-los-ultimos-anos-farc-articulo-309633>.

⁸⁶ *War and Drugs in Colombia*, 11 CRISIS GROUP LATIN AMERICA REPORT 1, 4 (Jan. 27, 2005).

⁸⁷ *Id.* at 8. For instance when in 1978, narco traffickers distributed seeds among peasants in Caquetá, the FARC banned its use.

believing that any involvement with drugs would undermine their insurgent purpose.⁸⁸ This opposition, however, did not last. Due to the structural change caused by the military plan and objective design created in the '70s and implemented in the '80s,⁸⁹ the story of the relationship between the organization and narcotraffic began.

In 1982, in its seventh conference, the FARC announced its intention to move from a defensive approach to an offensive one.⁹⁰ To this end, the organization aimed at shifting into a "Revolutionary Army."⁹¹ This required changes not only in strategy and structure, as mentioned above, but also in the financing sources. These developing circumstances, as well as the interest of winning the support of the population (which was mainly comprised of farmers who derived their wage from the product of illicit crops), facilitated the conditions to open the door to drugs.

Taxing the coca buyers was a starting point but never an ending point. A ten to fifteen percent per kilogram tax was established as the *gramaje*—that is the amount charged by the FARC to the coca buyers.⁹² In the '90s taxation was extended to other stages and participants in the drug business.⁹³ Growers and harvesters had to pay the FARC as well. By the '90s, the use of illegal routes by narcotraffickers to transport both essential chemicals for the processing of coca and the final product were also on the FARC's list of things taxed.⁹⁴

⁸⁸ Thomas R. Cook, *The Financial Arm Of The FARC: A Threat Finance Perspective*, 4 J. STRATEGIC SEC. 19, 22 (Spring 2011). Others affirm that getting involved with the drug business ignored FARC's ideology that went against the "exploitation by free-market traffickers."

⁸⁹ *See id.* (explaining that for those who sustained that as the FARC arrived to a new territory, it propelled Lockheed to win over the population).

⁹⁰ *Id.* at 21.

⁹¹ *Séptima Conferencia De las Fuerzas Armadas Revolucionarias de Colombia Ejército del Pueblo*, FARC-EP (May 4-14, 1982), <http://www.farc-ep.co/septima-conferencia/septima-conferencia-de-las-fuerzas-armadas-revolucionarias-de-colombia-ejercito-del-pueblo.html>.

⁹² *War and Drugs in Colombia*, *supra* note 86, at 8.

⁹³ Juan Guillermo Ferro & Graciela Uribe Ramón, *El orden de la guerra: las FARC-EP Entre la organización y la política*, 15 REVISTA DE ESTUDIOS SOCIALES 173, 174 (2002).

⁹⁴ *War and Drugs in Colombia*, *supra* note 86, at 8.

This means that the FARC's link with narcotraffic survived both the tension between the guerilla group and the Medellín Cartel,⁹⁵ and the emergence of the paramilitary groups⁷⁸—who took over the FARC's former position of protecting the cartel's illicit crops. Through all this, the FARC managed to maintain and gain control of over thirty-seven percent of the small towns in Colombia, and of a great majority of the coca municipalities.⁹⁶

2. Beyond the gramaje

By 1998, the FARC had monopolized the market in certain areas of Colombia such as Caquetá, ordering the farmers to sell at a specific price and only to the local FARC fronts.⁹⁷ The scope of the FARC's participation in narcotraffic, however, is still uncertain. There are different positions on the matter; some, going as far as to assimilate this group with the narcotraffic organizations, based on what they consider an intrinsic and indivisible relationship between them. Although, it is not clear that the FARC's involvement in narcotrafficking shifted them from their original political motivations, what is clear is that there is enough evidence to infer that FARC's participation in narcotraffic goes beyond what they have admitted to—the *gramaje*.

The FARC has maintained that their only involvement in narcotrafficking was the *gramaje*, and explicitly stated during the peace negotiations that they did not participate in any of the stages of drug cultivation or distribution. In 2011, Alfonso Cano (FARC commander), declared: “according to the documents and decisions that rule us, no Farian front is allowed to cultivate, process, commercialize, sell or consume hallucinogens or psychotropic substances. Whatever else is said, is just propaganda.”⁹⁸ In the

⁹⁵ The tension between the FARC and the cartels who ran the illegal drug trade resulted in the alliance of the cartels and the paramilitary groups. This new alliance ousted the FARC from control of the farmers who produced the illicit crops. That control was given to the paramilitary groups. *See also* Susan Virginia Norman, *Narcotization as Security Dilemma: The FARC and Drug Trade in Colombia*, 41 *STUDIES IN CONFLICT & TERRORISM* 638 (2018).

⁹⁶ ROSERO, *supra* note 38, at 10.

⁹⁷ *War and Drugs in Colombia*, *supra* note 86, at 8.

⁹⁸ *Siempre Será Posible Construir Escenarios de Negociación con el Gobierno*, PÚBLICO (June 11, 2011), <http://www.publico.es/internacional/siempre-sera- posible-construir-escenarios.html>.

context of peace negotiations, another FARC high commander, Iván Márquez, declared that “we are not coca producers neither do we have [processing] laboratories nor export [cocaine] or have routes, those are the cartels.”⁹⁹ On the contrary however, the FARC’s known narcotraffic activities, the number of fronts estimated to be involved in those activities, the *Plan Colombia*,¹⁰⁰ and the offers made by the armed group to the government during the 1999 peace process regarding the substitution of illicit crops, all speak otherwise. Further still, the more recent accusations of liaisons between the FARC and Mexican drug dealers, clash against what the organization is prepared to accept.

According to a report of the Defense Ministry of Colombia, by 2000, there were twenty-three FARC fronts suspected of operating in an active way within the country’s coca regions.¹⁰¹ In 2005, the International Crisis Group (ICG) revealed that, “[t]he strongest FARC presence is in the narrow coca belt that begins in southern Nariño and stretches northeast through the Amazon basin and to the grasslands of eastern Vichada, accounting for about 69,000 of the 86,000 hectares of coca cultivated in 2003.”¹⁰² Also according to the ICG, in the northern part of Colombia, though primarily paramilitary zones, 110 FARC fronts are located in nine of the north departments where coca and poppy cultivations occurred.¹⁰³ There are reports that establish that by 2004, around sixty-five of the 110 fronts¹⁰⁴ operate in coca growing areas and trade.¹⁰⁵ All this data points to the idea that the FARC had an elaborate network of coca cultivation fronts, which it controlled throughout the entire country.

⁹⁹ Will Grant, “Las FARC No Tienen Dinero,” *Dice Iván Márquez, El Número 2 del Grupo Guerrillero Colombiano*, BBC MUNDO (Dec. 17, 2015), http://www.bbc.com/mundo/noticias/2015/12/151216_farc_colombia_conflicto_ivan_marquez.

¹⁰⁰ See Bigwood & Coffin, *supra* note 76. *Plan Colombia* was an official initiative entered into by the US and Colombian governments and signed into law in 2000. Its purpose was to combat the drug cartels and the Colombian insurgent groups.

¹⁰¹ *War and Drugs in Colombia*, *supra* note 86, at 9.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

The United States and Colombia's *Plan Colombia* partnership consisted of both military and monetary aid and was launched to: (1) reduce coca cultivation, (2) pursue the end of the Colombian armed conflict, and (3) reform the country's economy.¹⁰⁶ Both governments have acknowledged that the FARC's earnings exceed what a mere ten to fifteen percent tax would be capable of creating.¹⁰⁷ For instance, the CIA director in 2001 affirmed that the FARC, "earns millions of dollars from taxation and other involvement in the drug trade."¹⁰⁸ In the same vein, according to some authors, the FARC earn around \$500 and \$600 million USD annually from the illegal drug industry.¹⁰⁹ More cautious, the ICG warned in a report that the main sources calculating the FARC's income are military, creating doubts as to their impartiality. Other authors also advise that these numbers fluctuate depending on who is making the estimate. In any case, the ICG report concluded that even being conservative in the numbers, it can be fairly affirmed that the FARC earn an average of \$100 million USD per year in drug related business; an amount that surpasses the organization's annual expenses five-fold.¹¹⁰ The reality that the majority of the FARC's income is derived¹¹¹ from illicit drug activities further supports that the organization's involvement with the industry goes far beyond just a ten to fifteen percent per kilogram tax.

Another indication that the FARC's involvement in the illegal drug business surpasses the *gramaje* is its capacity to control the illicit crops industry in Colombia. During the 1999 peace talks, the FARC presented the government with a proposal to collaborate in the substitution of the illicit coca crops for legitimate crops in

¹⁰⁶ *Id.* at 21.

¹⁰⁷ *See id.* at 8.

¹⁰⁸ Tenet, *supra* note 24.

¹⁰⁹ *War and Drugs in Colombia*, *supra* note 86, at 19.

¹¹⁰ *Id.*

¹¹¹ En junio de 2017, el Fiscal General de la Nación de Colombia, afirmó que se están adelantando investigaciones que apuntan a demostrar que las FARC cuenta con un patrimonio de "varios billones en bienes." *See Fiscal asegura que las Farc tienen varios billones en bienes*, SEMANA (June 5, 2017, 5:11 AM), <http://www.semana.com/nacion/articulo/farc-tienen--varios-billones-en-bienes-fiscal-general-nestor-humberto-martinez/527507>.

Cartagena del Chairá,¹¹² a region in which the guerrilla group operated. During the same peace process the FARC negotiated control of the demilitarized zone *El Caguán*, to be used as an area where they would not face persecution and could therefore keep the peace talks going. During the negotiations however, after the FARC began to occupy *El Caguán*, the production of illicit crops in the zone increased significantly. The peace talks of 1999 fell through and by the end of the year Colombia was the leading drug cultivator in the world and the production levels of the coca leaf more than doubled from the previous year.¹¹³

Recently, a lot has been published concerning the FARC's involvement in trafficking cocaine internationally.¹¹⁴ Though there are some¹¹⁵ that consider that there is not enough evidence to establish the FARC's participation, or even its capacity to participate, in the latest stages of the drug business (i.e. refining and trafficking), there are facts that point to the FARC's participation in those stages. The exchange of cocaine for arms with other criminal groups is one example of the group's participation in the illegal drug business in the post-production stages. FARC alliances with Russian criminal groups¹¹⁶ and Mexican drug cartels¹¹⁷ for example, are both relationships sustained by the FARC's trading of cocaine for arms. Some may argue that since the exchange is to acquire weapons it is simply the continuance of the organization's rebellion and therefore a support

¹¹² *Propuesta de las FARC-EP a la Audiencia Especial con Representación de 21 Países*, INDEPAZ (Mar. 10, 1999), <http://www.indepaz.org.co/wp-content/uploads/2013/04/Propuesta-de-las-Farc-sustituci%C3%B3n-de-cultivos.pdf>.

¹¹³ Bruce Michael Bagley, *Tráfico de Drogas, Violencia Política y Política Estadounidenses en Colombia durante la Década los Noventa*, LA GLOBALIZACIÓN Y SUS MANIFESTACIONES EN AMÉRICA DEL NORTE 334 n.2 (2002).

¹¹⁴ See Richard Boucher, U.S. Dep't of State Spokesman, Statement by Spokesman Boucher: Colombian Rebel Connection to Mexican Drug Cartel (Nov. 29, 2000).

¹¹⁵ See *War and Drugs in Colombia*, *supra* note 86.

¹¹⁶ Tamara Makarenko, *The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism*, 6 GLOBAL CRIME 129, 132 (Feb. 2004).

¹¹⁷ Boucher, *supra* note 114.

of the group's political motive rather than an implication of a criminalization of the organization.

It is important to note that these dealings at minimum reveal that the FARC's involvement in the drug trade industry goes beyond their admission of the *gramaje*. The exchange of cocaine for arms requires at least a relationship with the producer of the final product and the national seller and international buyer. The FARC are linked to those in stage one—the growers—in three ways: (1) The admission of the *gramaje* in which the FARC acknowledges its taxation of those carrying out the first stage of cultivation, (2) its negotiations with the government in 1999 where it used its power over the production of illicit crops as a negotiating chip, and (3) the steady growth of drug crops in FARC controlled territories. By exchanging drugs for arms, as the Mexican and Russian cases show, the FARC is also linked to those in the final stages. Together, these facts speak volumes of the FARC's relationship with the crop production and the latest stages of the business.

The clear relationship links between the FARC and those working the first stages and last stages of production raises the question of whether the FARC has had connections throughout every stage of illicit drug production. Though it is clear that the FARC's relationship goes beyond the accepted *gramaje*, there is still the unanswered question of how far it actually goes.

Additionally, further evidence of an unanswered relationship can be inferred by looking at the three following situations: (1) *Operación Gato Negro*, (2) the accusation against the chief of finances of the southern block of the FARC, alias Sonia, and (3) the capture of Carlos Gamarra.¹¹⁸

First, *Operación Gato Negro* was a military operation implemented by the Colombian Army.¹¹⁹ It took place in 2001 in the eastern Colombian departments of Vichada and Guainia.¹²⁰ This operation produced detailed information obtained directly

¹¹⁸ See generally Jeremy McDermott, *Las Farc y el Narcotráfico: ¿Gemelos Siameses?*, INSIGHT CRIME (May 26, 2014), <http://es.insightcrime.org/investigaciones/las-farc-y-narcotrafico-gemelos-siameses>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

from FARC documents regarding the production, processing and transportation of cocaine by this organization.¹²¹ Relationships between FARC members and international drug dealers were also revealed as result of the operation. For instance, Fernandinho Beira-Mar, a Brazilian drug baron, was captured while hiding in the harborage of Tomás Medina, alias “Negro Acacio” and then leader of the 16th Front of the FARC.¹²² Acacio was considered a baron of narcotraffic; he was the first FARC member requested for extradition purposes by the United States in relation to narcotraffic.¹²³ According to a 2003 Intelligence Report cited by the International Crisis Group, the 16th Front, led by Acacio, produced large amounts of cocaine (a capability estimated at fifteen to twenty tons per month) “for sale to traffickers with routes through Brazil and Suriname to Europe.”¹²⁴ Several arrest warrants and a red corner notice issued by the INTERPOL requested Acacio’s capture for different charges, among them, narcotrafficking. He was never captured and was ultimately killed by the Colombian Army in 2007.¹²⁵

Second, alias Sonia was another FARC leader legally prosecuted for relations with narcotraffic.¹²⁶ In 2004, she was accused of shipping cocaine to Panama and the United States.¹²⁷ In 2005, she was extradited to the latter for exporting cocaine there. Two years later a District Court of Washington D.C. found her guilty for the processing and exportation of cocaine to the U.S.¹²⁸

¹²¹ *Id.*

¹²² *Id.*

¹²³ *La ruta de 'Acacio' la siguieron otros capos, como 'Jhon 40*, EL TIEMPO (June 10, 2016, 1:58 AM), <http://www.eltiempo.com/archivo/documento/CMS-16616154>.

¹²⁴ *Latin America Drugs I: Losing the Fight*, INT’L CRISIS GRP. (Mar. 4, 2008), <https://d2071andvip0wj.cloudfront.net/25-latin-american-drugs-i-losing-the-fight.pdf>.

¹²⁵ *E.U. contra las FARC*, SEMANA (Nov. 16, 2002, 12:00 AM), <http://www.semana.com/nacion/articulo/eu-contra-farc/55067-3>; *Colombian military: Key rebel and drug trafficker killed*, CNN (Sept. 3, 2007, 8:22 PM), <http://www.cnn.com/2007/WORLD/americas/09/03/farc.rebel.death/index.html?iref=nextin>.

¹²⁶ McDermott, *supra* note 118.

¹²⁷ *Id.*

¹²⁸ *See United States v. Celis*, 608 F.3d 818, 846 (D.C. Cir. 2010).

Third was the case of Carlos Gamarra, an international trafficker who had business with the FARC.¹²⁹ He was arrested in April 2004 for “trying to provide material support to a designated foreign terrorist organization, attempting to export defense weapons without a license, conspiracy to distribute cocaine, and possession of machine guns.”¹³⁰ According to the U.S. Department of State, Gamarra was buying weapons for the FARC and had received a down payment of \$92,000 USD, where part of the remainder was to be paid by the FARC with cocaine.¹³¹

Aside from the previous examples, thousands of media documents speak of the FARC’s deeper involvement with drug trafficking. However, some of the sources have not been confirmed as concluded through academic studies and their reliability is not 100 percent supported.¹³² Thus, for purposes of certitude, we rely solely on the result of both military operations and judicial cases to affirm that the involvement of the FARC with the drug business goes beyond the *gramaje*.

Again, the precise scope of the FARC’s involvement is yet to be determined. Thus, we argue that the peace process opened a great window of opportunity for this to be assessed; especially when reconciliation, truth, and historical memory are at stake. Unfortunately, it seems the peace negotiators thought otherwise. When looking at the wording of Point Four of the Final Agreement and the criteria established by the Amnesty Law to determine the connectivity of a common crime, it appears the window of opportunity to learn the truth may be at risk. Indeed, it leaves the sensation that the negotiators agreed that the FARC’s involvement in narcotraffic was always related to rebellion and solely for

¹²⁹ News Release, Dep’t of Homeland Sec., Man sentenced to 25 years in prison for scheme to arm Colombian terror group with 4,000 grenades and 2,000 firearms (Aug. 9, 2005) (*available at* <https://fas.org/asmp/campaigns/smallarms/Illicit/ICE9aug05.pdf>).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Carolina Castillo Marín & Paola Pérez Díaz, La ‘Narcoguerrilla’ Como Noticia: Un Análisis de la Representación de las Relaciones entre Narcotráfico y Guerrilla en la Prensa Colombiana (2009), (unpublished thesis, Universidad del Rosario) (*available at* <http://repository.urosario.edu.co/bitstream/handle/10336/1624/Portada.pdf?sequence=2>).

financing purposes. A connection like that to the political crime of rebellion paves the way for the group's amnesty. This decision now relies on the Special Jurisdiction for Peace, where we hope that the window of opportunity to conduct a thorough investigation and a deeper analysis on this matter is seriously considered by the prosecutors and the Justices.¹³³

III. THE POLITICAL CRIME AND THE CONNECTED CRIME, FROM THE WESTERN HEMISPHERE AND THE COLOMBIAN VIEWPOINTS.

A. *Political Crime and Connected Crime*

There is no universal or uniform definition for a political crime, because it is a controversial matter and a matter of power.¹³⁴ The inception of a political crime, both internationally and nationally, was to address matters of security and stability of the State in relation to conduct that negated and sought to obliterate the State or its government. Thus, the political crime has an extra-judicial character,¹³⁵ it is not purely juridical, it is also political.

This reality of political crime has led legislators and judges across the globe to try to conceptualize it with a concrete definition. A common ground can be identified among this conceptualization, which supposes the identification of two general components: a subjective and objective element.¹³⁶ The subjective element comprises the intent or motivation of the actor, which must be political. The objective element considers the aim of the

¹³³ See Rocío Quintero, *Three major challenges the Special Jurisdiction for Peace in Colombia faces*, OPINIO JURIS (July 30, 2019), <http://opiniojuris.org/2019/07/30/three-major-challenges-the-special-jurisdiction-for-peace-in-colombia-faces/>.

¹³⁴ IAN JEFFREY ROSS, *THE DYNAMICS OF POLITICAL CRIME* 18 (2003).

¹³⁵ Laura Rocío Espinosa Marcka, *A Look At Political Crime, Support The Existence Of Dams And Political Prisoners*, 20 REV. PRINCIPIA IURIS. 151, 155 (2013).

¹³⁶ Margalida Capellà, *¿Qué queda del delito político en el Derecho Internacional contemporáneo? (Observaciones en los ámbitos de la extradición y del asilo)*, 28 REV. ELECTRÓNICA DE ESTUDIOS INTERNACIONALES 1, 10-43 (2014).

conduct or the particular juridical interest at stake, which has to be political. Thus, worldwide, political crimes are those that if compared with common crimes would denote a political component: a “political motive” or a “political context” or “political consequences.”¹³⁷

In light of the said political component, either as an objective or subjective element, political crimes have been classified in order to create a more scientific and juridical typology of the crime, and also to be able to objectify their application to real scenarios. Even today, the jurisprudence in the Western Hemisphere continues following the French classification from the 1800s: the pure political crime and the connected political crime.

1. Pure political crime

Pure political crime is conduct directed against the State,¹³⁸ the government, or the constitutional and legal system, which does not involve elements of a common offense¹³⁹ because there is no harm to civilians, their property or interests.¹⁴⁰

The pure political crime overlaps with the exercise of the right of self-determination since it encompasses the right to resist tyranny.¹⁴¹ This overlap is one of the reasons why the nature or character of the pure political crime is extremely complex.

In order to achieve objectivity, the pure political crime has been categorized into various types: rebellion, sedition, treason, and espionage.¹⁴² These types of political crimes involve conduct in of opposition to the State, system, or government (anti-systemic)¹⁴³ irrespective of having a violent or non-violent nature. In specific contexts, such as peace processes, the perpetrators of

¹³⁷ James J. Kinneally III, *The Political Offense Exception: Is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?*, 2 AM. U. INT'L L. REV. 203, 209 (1987).

¹³⁸ See Manuel R. Garcia-Mora, *Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VA. L. REV. 1226, 1230 (1962).

¹³⁹ Stuart R. Phillips, *The Political offense: exception and terrorism*, 15 DICK. J. INTL.L. 337, 340-42 (1997).

¹⁴⁰ Capellà, *supra* note 136, at 8.

¹⁴¹ Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/80 (Dec. 10, 1948).

¹⁴² ROSS, *supra* note 134, at 47-57.

¹⁴³ *Id.* at 32.

pure political crimes could be granted allowances such as asylum, exemption from extradition, and amnesty.

2. Connected political crime

A connected political crime is conduct that involves a complete independent common crime committed jointly with a political crime. The degree of connection between the political crime and the connected crime is the element that determines the potential for the application of the allowances mentioned above such as amnesty.¹⁴⁴

Despite the efforts to categorize, classify, and identify elements of a connected political offense, determining when conduct is a connected political crime is not a simple or straightforward process.¹⁴⁵ Attempts to make this classification throughout history have led to three different approaches, which are typically used worldwide: the political incidence test of Anglo-American law, the political objective test of French law, and the political predominance or proportionality test of Swiss law.

a. The Political Incidence: Test of Anglo-American Law. Under this test, a connected political crime is a common crime that is incidental to, and formed as part of, political disturbances (British Approach).¹⁴⁶ Further, political disturbances need to occur with the valid intent to change the government or the system and the connected crime must directly produce a political effect or consequences (United States Approach).¹⁴⁷

b. The Political Objective: Test of French Law. Under this test, a connected political crime is a common crime directed against the State, government, or system; it is not only a political crime by the motivation of the actor or its context, but also by the juridical interest that is affected with the conduct.¹⁴⁸ The test takes into consideration the motivation and the gravity of the means used in the commission of the crime.¹⁴⁹

¹⁴⁴ Manuel R. Garcia-Mora, *War Crimes and the Principles of Non-Extradition of Political Offenders*, 9 WAYNE L. REV. 269, 277-78 (1963).

¹⁴⁵ Phillips, *supra* note 139.

¹⁴⁶ Capellà, *supra* note 136, at 12.

¹⁴⁷ *Id.* at 13.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

c. The Political Predominance or Proportionality: Test of Swiss Law. Under this test, a connected political crime is a common crime that has a political motivation as a controlling one; there is a direct connection between the common crime and the purpose pursued by a party to modify the political organization of the State, and that political motivation is the predominant factor.¹⁵⁰

The three tests developed by State practice, which are followed beyond the jurisdictions that gave birth to them, demonstrate the difficulties of identifying a connected political crime when facing the reality.

B. Political Crimes and Their Connected Crimes under the Colombian Legal Framework

The political crime in Colombia, as such, has been recognized from both legislative and case law sources. On one hand, the basis for its recognition has been the Constitution and the Criminal Code has established its definition and the conduct that falls within this category of crimes. On the other hand, case law has created the basis for its continued development such as the idea of a connected crime to the political crime, and the consequential legal response that should be given to these related conducts.

1. Constitution of 1991

Colombia's current Constitution, the Constitution of 1991,¹⁵¹ recognizes the existence of political crime in Colombia and its special treatment. Numerous articles in the Constitution relate to political crimes, for example the prohibition of extradition (article 35), the granting of amnesties and pardons (articles 150.17 and 201.2), and an exemption from the ban on holding some public positions due to the commission of a crime (articles 179.17, 232.3 and 299).¹⁵²

It is useful to consider the context in which the Constitution of 1991 was written, as political crime itself was a factor. The

¹⁵⁰ *Id.* at 14.

¹⁵¹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P].

¹⁵² CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] arts. 35, 150.17, 179.17, 201.2, 232.3, & 299, available at <http://www.secretariasenado.gov.co/index.php/constitucion-politica>.

Constitution was the product of both the people's movement, known as the *Séptima Papeleta*, and the peace process with the M-19. The peace process with the M-19 was the first peace process to succeed between the government and a Colombian armed group. The peace agreement, signed on March 9, 1990, included as one of the points, a constitutional amendment (*constituyente*).¹⁵³ The *Séptima Papeleta* was an intellectual's and union's proposal backed by the student's movement, which sought to include an additional ballot item in the election of 1990 requesting for the establishment of a Constitutional Assembly (*Asamblea Nacional Constituyente*) to write a new Constitution.¹⁵⁴ When the decision to promote an amendment of the Constitution was taken, the public had the opportunity to vote for who would sit on the Constitutional Assembly. Among those chosen were several former M-19 members and the *Asamblea Nacional Constituyente* was summoned to draft the new Constitution in 1991.¹⁵⁵ As a result, the new Constitution was established with transitory provisions that guarantee the societal integration of former members of the armed group.

Envisioned within this context, transitory Article 30 gave, within the peace process, the power to the National Government to grant amnesties and pardons for political and connected crimes.¹⁵⁶

The concept of connected crimes in Colombia was addressed again in 2012 when the legislative and the executive branches amended the Constitution with the Legislative Act 01 of 2012.¹⁵⁷ This Act, known as the Legal Framework for Peace, added a new

¹⁵³ DAVID RAMPF & DIANA CHAVARRO, THE 1991 COLOMBIAN NATIONAL CONSTITUENT ASSEMBLY – TURNING EXCLUSION INTO INCLUSION, OR A VAIN ENDEAVOUR? 6 (Inclusive Political Settlements Paper 1. Berlin: Berghof Found. 2014).

¹⁵⁴ *Séptima Papeleta*, LATINNO, <https://www.latinno.net/en/case/5180/> (last visited Jan. 24, 2020).

¹⁵⁵ *Constitutional history of Colombia*, CONSTITUTION NET, <http://constitutionnet.org/country/constitutional-history-colombia> (last visited Jan. 24, 2020).

¹⁵⁶ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 30.

¹⁵⁷ INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=0B91DFB1D904F555C1257C60004EC36F&action=openDocument&xp_countrySelected=CO&xp_topicSelected=GVAL-992BUA&from=state (last visited Jan. 24, 2020).

transitory provision—Article 67.¹⁵⁸ It affirms that genocide and crimes against humanity are not to be considered as connected crimes.

The Legal Framework for Peace set the legal framework for the peace talks between the FARC and the Colombian government. Equipped with legislation allowing special treatment, the government was able to negotiate with the guerilla group. These negotiations culminated in the “Final Agreement to End the Conflict and the Construction of a Stable and Permanent Peace,” signed on November 24, 2016 in Bogotá, Colombia.¹⁵⁹

The Final Agreement provides three including criteria, and two excluding criteria, in determining what is considered a connected crime within the context of this peace process.¹⁶⁰ It also adds “grave war crimes” to the list of crimes that cannot be considered connected.¹⁶¹

2. Colombian Criminal Code

The current Criminal Code of Colombia refers in Articles 467, 468, and 469 to three crimes committed against the legal and constitutional regime: rebellion, sedition, and riot.¹⁶² Specifically, Article 467 defines rebellion as the “conduct in which, by the use of arms, individuals aim to overthrow the national government or to suppress or modify the current constitutional or legal regime.”¹⁶³

Neither the current Colombian Criminal Code, nor any previous versions, define or even mention connected crimes as a specific or recognized category. Nonetheless, historically, in specific contexts such as transitional or partial transition from war to peace in Colombia, some criteria for its determination has been developed.

¹⁵⁸ *Id.*

¹⁵⁹ *See generally* Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace, Colom.-FARC-EP, art. 1-59, Nov. 24, 2016 (*available at* <http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf>).

¹⁶⁰ *See id.* at art. 7.

¹⁶¹ *Id.*

¹⁶² CÓDIGO PENAL [CÓD. PEN] art. 467-69 (Colom. 2000).

¹⁶³ CÓDIGO PENAL [CÓD. PEN] art. 467 (Colom. 2000).

3. Amnesty Law

As a result of the Final Agreement, Amnesty Law 1820 was issued at the end of 2016.¹⁶⁴ Article 2 of the law explains that its objective is to regulate the amnesties and pardons that can be given for political crimes and connected crimes.¹⁶⁵ The Amnesty Law also lays out specific criteria for what can and will be considered a connected crime.¹⁶⁶

Article 8, entitled “Recognition of the Political Crime,” affirms that crimes that are considered political crimes are “those in which the State and its current constitutional regime are the target of the conduct when they are committed without the pursuit of any personal profit.”¹⁶⁷ It continues by saying that perpetrators of political crimes can still be entitled to amnesties if they have committed crimes connected to the political crime. It describes these connected conducts as those “specifically related to the development of the rebellion and committed in association with the armed conflict, as well as conduct intended to facilitate, to support, to finance, or to hide the development of the rebellion.”¹⁶⁸

Article 16, gives a non-exhaustive list of conduct that is considered connected crimes to the political crimes: conduct related to the illegal use or appropriation of means of transportation, communications, weapons, and elections, among others.¹⁶⁹ Article 16 goes on to establish that if the Special Jurisdiction for Peace Chamber, which grants amnesties and pardons, considers conduct outside of what is listed, then its consideration must be guided by the aforementioned criteria and always bear in mind the exclusion of genocide, crimes against humanity, “grave” war crimes, torture, forced displacement, and rape.¹⁷⁰

¹⁶⁴ L. 1820, diciembre 30, 2016, DIARIO OFICIAL [D.O.] (Colom.).

¹⁶⁵ *Id.* at art. 2.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at art. 8.

¹⁶⁸ *Id.*

¹⁶⁹ L. 1820, diciembre 30, 2016, art. 16, DIARIO OFICIAL [D.O.] (Colom.).

¹⁷⁰ *Id.*

4. Case Law

The greatest contribution to the Colombian conceptualization of the connected crime comes from case law. Both the Colombian Supreme Court of Justice and the Colombian Constitutional Court have dealt with the question of what can be considered a political connected crime. In the cases related to narcotraffic, each of the Courts have had occasion to rule on narcotrafficking regarding whether it could be viewed as a connected crime. These narcotrafficking decisions still did not establish precedent as to whether narcotrafficking is to always, or never, be considered a connected crime. Both Courts have made important contributions to the conceptualizations of the political crime and the connected crime; the establishment of criteria to determine when a common crime may or may not be considered a connected crime; the exclusion of specific crimes from the category of connected crimes; and specifically, on the analysis of the relation between narcotraffic and a political crime.

5. Conceptualization

In 1945, the Colombian Supreme Court of Justice determined that the distinctive element of a political crime was its political and social motive, defining it as a “notorious interest of improvement of the socio-economic and political conditions in the regime of the institutions or in the exercise of the power given by the people to the government.”¹⁷¹ According to the Court, this element distinguished political crimes from common crimes.¹⁷² In the absence of political and social motives, criminal conduct is perpetrated with “individual aims and egoistic motives.”¹⁷³

Identifying the socio-political motives of a crime does not mean stifling the punitive power of the State. If conduct goes against “public peace and the conditions of the constitutional organization,”¹⁷⁴ it has to be punished since it is in violation of the law. The Court, however, recognized that different domestic

¹⁷¹ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. septiembre 1, 1945, M.P: D. Sarasty Montenegro, Expediente 1945-412615, Gaceta Judicial [G.J.](Colom.).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

systems globally have given special treatment to the perpetrators of these crimes, once legal order was re-established.¹⁷⁵ The Court mentions the special treatments afforded perpetrators of political crimes, which include lesser penalties, exemptions to extradition, amnesties, and pardons.¹⁷⁶

Over the next several decades the Court continued to elaborate on this definition. The Court maintained the distinctive element that is the political motive element and framed it under two categories, objective and subjective.¹⁷⁷ The Court affirmed that for a crime to be political, it has to be objectively political, meaning the judicial interests protected with this crime relates to the State and the Constitutional or legal regime.¹⁷⁸ The Court went on to rule that the crime must also have a subjective element that is the political motive.¹⁷⁹ The former, that is the juridical interests protected, are the “State organization” and “the correct functioning of the government.”¹⁸⁰ The latter, that is the political motive, refers to “seek the improvement in the direction of public interests . . . to overcome the legitimate government, or change in whole or in part the current constitutional or legal regime, or to disturb the specific enjoyment of social activities.”¹⁸¹ Finally, the Supreme Court affirmed that the identification of these political elements are what allow for separate sanctions between political crimes and common offenses that are committed within a subversive movement, “such as fire, homicide and injuries caused outside combat, and, generally, the acts of ferocity and barbarism.”¹⁸²

In 1996,¹⁸³ the Court referred again to the concept of political crimes, this time presenting five characteristics of this conduct: (1)

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, abril 25, 1950, M.P: A. Gómez Prada, Expediente 1950-413077, Gaceta Judicial [G.J.] (Colom.).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, agosto 20, 1950, M.P: Carlos Eduardo Mejía Escobar, Expediente 1996-11439, Gaceta Judicial [G.J.] (Colom.).

it always involves an attack against the institutional and political organization of the State; (2) it is committed to pursue the maximization of social transcendence and political impact; (3) it is committed by a real or apparent representation of a social or political group; (4) it is inspired in social, political, and philosophical principles that can be determined; and (5) it is committed with real or apparent aims of socio-political vindication.

Finally, in 2007,¹⁸⁴ the Supreme Court synthesized the concept of political and connected crimes from a theoretical perspective. The approach to the connected political crime can be summarized in three theories according to the characteristic element of the crime, in terms of determining its political character: (1) objective theory, where the characteristic element is that the juridical interests protected are the State organization and the right functioning of the government; (2) subjective theory, where the characteristic element is the political motive; and (3) the eclectic theory, where both the objective and subjective elements are present in a political crime.¹⁸⁵

The Constitutional Court has dealt in different decisions with the concept of the political crime. In decision C-009 of 1995, the Court defined the political crime, as a crime “inspired in an ideal of justice,”¹⁸⁶ that leads its authors and participants to commit acts prescribed in the constitutional and legal order, “as a means to an end.” Next, the Court considered that there should be different legal treatment for those who committed a crime motivated by the common well, as oppose to those who act with egoistic and perverse motives.¹⁸⁷ Finally, the Court delineated the concept of conduct considered as political crimes under the Criminal Code.¹⁸⁸

¹⁸⁴ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, diciembre 5, 2007, M.P: M. del Rosario González de Lemos, Expediente 1996-25931, (Colom.).

¹⁸⁵ *Id.*

¹⁸⁶ Corte Constitucional [C.C.] [Constitutional Court], enero 17, 1995, Sentencia C-009/95, Gaceta de la Corte Constitucional [G.C.C.], (Expediente No. D-630) (Colom.).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

6. Criteria applied by the Colombian Courts to determine a connected crime.

In 1963, the Supreme Court developed what can be called the “strict relationship test,” which gave criteria to determine the degree of connection of a common crime to a political crime.¹⁸⁹ According to this test, a common crime comes into the political sphere “when one of the crimes cannot be explained without the existence of the other,” and the essential motive is political.¹⁹⁰ The Court continues its explanation by stating that the degree of connection is apparent when the harm to the juridical interest of the political crime is linked with the political motive underlying the commission of the common crime.¹⁹¹

Additionally, the Supreme Court in a decision regarding the determination of granting pardon to members of the M-19 for committing robbery, came up with another criterion that can be called the “ideological (teleological) connectivity test.”¹⁹² Starting from the subjective theory of the political crime, the Supreme Court of Justice names “the ideological connection” between a common crime and a political crime, as the determining factor for the degree of connection.¹⁹³ In that case, the Court concluded that the ideological connection was the factor to determine that the robbery was a “means to obtain economic resources for the rebellion.”¹⁹⁴ Thus, this is a teleological connection that the Court referred as “ideological” due to the relation with rebel conduct.

In 1993, without establishing a test, the Constitutional Court clarified that in determining the degree of connection of a common crime to a political crime, the connection does not depend on the crime itself but on the characteristics of the specific criminal

¹⁸⁹ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, diciembre 13, 1963, M.P: Humberto Barrera Domínguez, Expediente 1963-404438, Gaceta Judicial [G.J.] (Colom.).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, mayo 6, 1987, M.P: Jorge Carreño Luengas, Expediente 1986-406567, Gaceta Judicial [G.J.] (Colom.).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

conduct.¹⁹⁵ For instance, the Court explained that when a homicide is committed outside of combat, taking advantage of the defenseless situation of the victim, there can be no connection between the crime of homicide and the political crime.¹⁹⁶

In 2002, the same Court created the “reasonable and proportionality/equality” test, which explained that there is criminal conduct that can be subsumed, reasonable and proportionate, within the political crimes.¹⁹⁷ The Court used interchangeably the words proportionality and equality when referring to the criteria, but explained the latter in terms of the power of the legislator of including or excluding conduct to be benefited by an amnesty or pardon.¹⁹⁸ When doing so, the legislator is prevented by the Court from doing it in an unjustified, differentiated way. Regarding reasonability, the Court referred to not making arbitrary decisions that failed to take into account the nature of the conduct to be considered as a connected crime or as a subsumed crime within a political crime.¹⁹⁹ The Court failed, however, to give factors that help limit each of the concepts of the test.

In 2007, the Supreme Court of Justice established another criterion derived from the classification of conduct as political crime. Connected crimes are the ones that are closely intertwined as a means to an end (teleological connectivity); as a means to assure the product of other criminal conduct (paratractic connectivity);²⁰⁰ or as a means to hide a previous crime (“*hipotática*” (subordinate) connectivity).²⁰¹ Thus, the central

¹⁹⁵ Corte Constitucional [C.C.] [Constitutional Court], junio 9, 1993, Sentencia C-214/93, Gaceta de la Corte Constitucional [G.C.C.] (Expediente R.E.-041) (Colom.).

¹⁹⁶ *Id.*

¹⁹⁷ Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2002, Sentencia C-695/02, Gaceta de la Corte Constitucional [G.C.C.] (Expediente D-3945) (Colom.).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, diciembre 5, 2007, M.P: M.del Rosario González, Expediente 2007-415134, (Colom.).

²⁰¹ *See also* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, noviembre 24, 2010, M.P: M. del Rosario González de Lemos, Expediente 2010-34482, (Colom.).

factor in determining whether conduct is a connected crime is the closely intertwined relationship between the two crimes and whether the common crime was in fact a means to accomplish something related to the political crime.

7. Excluding Specific Crimes

When excluding specific crimes from the category of a connected crime, the Constitutional Court has noted the atrocious character of certain crimes. The Court has affirmed that any conduct committed in an atrocious way without respect for human dignity must be excluded from the category of connected crimes.²⁰²

In this sense, the Court has expressly excluded certain conducts as political offences. First, homicide only when it is committed during combat and the aggressor took advantage of the victim's defenseless situation.²⁰³ Second, kidnapping is considered by the Court as atrocious due to the defenseless state in which the victim is placed, the social instability that it causes, and the various fundamental rights that are violated by this crime.²⁰⁴ Third, terrorism, that as analyzed by the Court, the international community has unanimous and repeatedly recognized as an atrocious crime.²⁰⁵ Fourth, enforced disappearance of persons was

²⁰² Corte Constitucional [C.C.] [Constitutional Court], junio 9, 1993, Sentencia C-214/93, Gaceta de la Corte Constitucional [G.C.C.] (Expediente R.E.-041) (Colom.).

²⁰³ *Id.*

²⁰⁴ Corte Constitucional [C.C.] [Constitutional Court], febrero 23, 1994, Sentencia C-069/94, Gaceta de la Corte Constitucional [G.C.C.] (Expediente No. D-388 Y D-401) (Colom.).

²⁰⁵ *See* Corte Constitucional [C.C.] [Constitutional Court], noviembre 11, 2003, Sentencia C-127/93, Gaceta de la Corte Constitucional [G.C.C.] (Expediente LAT-237) (Colom.); Corte Constitucional [C.C.] [Constitutional Court], mayo 28, 2008, Sentencia C-537/08, Gaceta de la Corte Constitucional [G.C.C.] (Expediente LAT-300) (Colom.).

The Constitutional Court in Decision C-037 of 2004, analyzed the constitutionality of the law through which Colombia domestically approves the International Convention for the Suppression of the Financing of Terrorism. Article 14 of this Convention states that: "None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be

refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.” The crimes referred in Article 2 are the following:

“Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”; “Unlawfully, by force or threat thereof, or by any other form of intimidation, seize or exercise control of, (an) aircraft, or attempt to perform any such act”; Unlawful acts against the safety of civil aviation, according to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971, and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988;

A murder, kidnapping or other attack upon the person or liberty of an internationally protected person; A violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty; threat to commit any such attack; An attempt to commit any such attack; and act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law;

“Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") ... ”;

Any unlawful taking of nuclear material, according to the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980;

Any unlawful act against the safety of maritime navigation according to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988;

Any unlawful act against the safety of fixed platforms located on the Continental Shelf, according to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988;

“Unlawfully and intentionally deliver, place, discharge or detonate an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility

- (a) With the intent to cause death or serious bodily injury; or

excluded as a political crime (and thus, as a connected crime) when the Court studied the institution towards the extradition consequence.²⁰⁶ Fifth, though not expressly mentioning the crime of extortion, in 1993, the Court made a wider list of atrocious conduct in which extortion might be included given the context of “narco-terrorism.”²⁰⁷ In the concurring opinion of decision C-095 of 2002, three Justices affirmed that, together with terrorism and kidnapping, the crime of *extortion* is an atrocious crime that cannot be included within the concept of political crimes and connected crimes.²⁰⁸ Sixth, the conduct that is a result of “narco-terrorism”, such as massacres, kidnapping, *systematic murders* and the *use of explosives* against the civilian population, fall into the category of *crimes against humanity*, and thus, will never be considered as political crimes.²⁰⁹ Four years later, in decision C-456 of 1997, the Court expressly excluded from the category of connected crimes, *crimes against humanity* and *all other crimes that are ferocious and barbaric*, as those international crimes.²¹⁰

In conclusion, though over the years the Constitutional Court has excluded specific crimes from falling under the category, the Court has not named crimes that are to be considered, across the board, as connected to political crimes. The Tribunal recognizes that this is a legislative task of the Congress. Its exclusions,

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.”

The Constitutional Court found the law and the treaty in agreement with the Constitution. Therefore, in Colombia, those crimes can not be considered neither political crimes, nor connected crimes to the former.

²⁰⁶ Corte Constitucional [C.C.] [Constitutional Court], julio 31, 2002, Sentencia C-580-02, Gaceta de la Corte Constitucional [G.C.C.] (Expediente L.A.T.-218) (Colom.).

²⁰⁷ *Id.*

²⁰⁸ Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2002, Sentencia C-695/02, Gaceta de la Corte Constitucional [G.C.C.] (Expediente D-3945) (Colom.).

²⁰⁹ Corte Constitucional [C.C.] [Constitutional Court], febrero 5, 1993, Sentencia C-171/93, Gaceta de la Corte Constitucional [G.C.C.] (R.E. 034) (Colom.).

²¹⁰ Corte Constitucional [C.C.] [Constitutional Court], septiembre 23, 1997, Sentencia C-456/97, Gaceta de la Corte Constitucional [G.C.C.] (Expediente No. D-1615) (Colom.).

however, come from the recognition of the consequences of affording certain benefits such as amnesty, pardon, and exemption from extradition.

Without articulating an exhaustive list, the Supreme Court of Justice has declared some specific conduct as connected crime. Its decisions have been based on the “means to an end” ideology and have been passed down on a case-by-case basis studying the possible connection of common crimes to the political crimes of rebellion and sedition. This has been done in the already mentioned terms of finding robbery as a connected crime when used “to obtain economic resources for the rebellion.”²¹¹ Another specific conduct crime has been committed when determining that the illegal acquisition of weapons is “a means to its subsequent use” by the rebels or seditious. Thus, this conduct was found to be a connected crime taking into account that the political crimes of rebellion and sedition presuppose the use of weapons.²¹²

Under the same rationale, the Supreme Court denied connected crime status to a homicide committed outside of combat.²¹³ The Court found that the conduct lacked a political and altruistic motive and ruled that “from a political point of view, in a revolutionary sense, the conduct was useless,” and thus, did not share the political connection required to the political crime.²¹⁴ The same reasoning led the Court’s decision in 2003, when it found lack of a political motive, together with an inconsistency between the juridical interests affected by the alleged connected crime and the political crime.²¹⁵ In that decision, the Court affirmed that

²¹¹ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, mayo 6, 1986, M.P: J.Carreño Luengas, Expediente 1986-406567, Gaceta Judicial [G.J.] (Colom.).

²¹² Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, mayo 27, 1986, M.P: L.Martínez Zuñiga, Expediente 1986-406579, Gaceta Judicial [G.J.] (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, junio 4, 1986, M.P: H. Baquero Borda, Expediente 1986-406583, Gaceta Judicial [G.J.] (Colom.).

²¹³ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Interlocutorio, agosto 20, 1996, M.P: C. Eduardo Mejía Escobar, Expediente 1996-409438, Gaceta Judicial [G.J.], (Colom.).

²¹⁴ *Id.*

²¹⁵ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Interlocutorio, septiembre 10, 2003, M.P: Á. Orlando Pérez Pinzón, Expediente 2003-390055, Gaceta Judicial [G.J.] (Colom.).

conspiracy to commit a crime cannot be considered as a connected crime, since not only are its motives selfish and individualistic (as opposed to the altruistic, generous, and collectively-oriented motives common in political crimes), but the juridical interests affected (public safety) do not correspond to the interests attacked by the political crime (constitutional and legal regime).²¹⁶

8. Narcotrafficking

Specifically regarding crimes related to narcotrafficking, both Courts have had the opportunity to deal with decisions related to political crimes, connected crimes and narcotrafficking.

The Constitutional Court has never expressly given or denied criminal activities related to narcotrafficking the character of a politically connected crime. Some approximations and indirect references, however, have been made.

The clearest rejection of narcotrafficking as a connected crime came in 1993. In decision C-171, during a scheduled constitutional review of Decree 264 the Court affirmed that common criminality cannot be confused with political criminality.²¹⁷ In making this point, the Court pointed to the violence produced from narcotrafficking as an example. In its words:

The aim pursued by organized crime, particularly through narco-terrorist violence, consists of putting civil society in a defenseless position, when threatening with irreparable harm, if they oppose their ideals The atrocious acts committed by narco-terrorism . . . constitute crimes against humanity, that could never be covered up with the mantle of a political crime.²¹⁸

²¹⁶ *Id.*

²¹⁷ Corte Constitucional [C.C.] [Constitutional Court], febrero 5, 1993, Sentencia C-171/93, Gaceta de la Corte Constitucional [G.C.C.], (Colom.).

²¹⁸ *See id.* (Following the same path, in 2006, the Vice-Minister of Justice and Interior of Colombia, affirmed that it should be taken into account that the legislator has expressly denied the connection between sedition and genocide, crimes against humanity or narco-traffick, in his official opinion requested by the Constitutional Court. This was considered within the specific context of the demobilization and the special jurisdiction for the paramilitary groups); *see also*

Within the context of the FARC, the 2013 Decision C-579 assesses the constitutionality of the Legal Framework for Peace. In doing so, the Constitutional Court's decision refers to narco-trafficking alongside conduct that it has already determined will be prosecuted by the Special Jurisdiction—genocide, crimes against humanity, and war crimes. This introduces doubt as to the validity of the apparent silent decision taken by the negotiators to grant narco-trafficking connected crime status.

Regarding the Supreme Court of Justice, the reference to the narco-traffic activities in relation to political crime, has been analyzed mainly in the context of requests for extradition. The decisions have been related to one of two scenarios: first, when the required person is not a member of an illegal armed group, and second, when the person belongs to one of these groups, namely, the FARC or the paramilitaries. The distinction between these two groups is important because, the Colombian judicial system has recognized the FARC's ability to commit political crimes as opposed to the paramilitary groups, which it expressly stated, committed common, not political, crimes.²¹⁹

In the second scenario, the Supreme Court has ruled on whether FARC members would be extradited for narco-trafficking or whether they could be exempted from extradition by calling the narco-traffic a connected crime and extending it the same special treatments as a political crime.²²⁰

When FARC members have been requested for extradition, the Court has responded in two different ways. In 2004, the Court affirmed that narco-traffic related conduct perpetrated by FARC members can be considered connected with the political crime of

Corte Constitucional [C.C.] [Constitutional Court], mayo, 18, 2006, C-370/06, Gaceta de la Corte Constitucional [G.C.C.], (Colom.).

²¹⁹ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Pen. M.P: Y. Ramírez Bastidas, Radicado 26949, Gaceta Judicial [G.J.], (Colom.). (stating that during the peace process with the paramilitary groups, the Congress issued Law 975 of 2005. Article 71 of Law 975, defined sedition as a political crime, amending article 468 of the Criminal Code by indicating that members of guerrilla or paramilitary groups also commit this crime if their “conduct interferes in the normal functioning of the constitutional and legal order.” L. 975, art. 71, julio 25, 2005, DIARIO OFICIAL [D.O.] (Colom.).

²²⁰ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Pen. M.P: Y. Ramírez Bastidas, Radicado 26949, Gaceta Judicial [G.J.], (Colom.).

rebellion when the narco trafficking facilitated the execution of the political crime.²²¹ The Court went on to affirm, however, that activities related to narco trafficking may still warrant extradition even when considered as a connected crime—that is, the connected crime status does not automatically give the perpetrators an exemption from extradition.²²² In that case, the Court affirmed that the FARC perpetrator of narco trafficking would not be exempted and as result, the request for extradition was granted and alias Simón Trinidad was extradited to the United States.²²³ The Court based its decision on the fact that Congress has not established that narco trafficking activities are *per se* connected crimes, and that “the international community denies narco trafficking this characteristic,” explained in Article 3.10 of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.²²⁴

The Supreme Court opined on the FARC’s narco trafficking activity again in 2015 this time concluding that it did not constitute a connected crime.²²⁵ In the decision, which was also based on the UN Convention of 1988, the Court maintained that connected crime status, even if granted, cannot be an obstacle for extradition purposes.²²⁶ In the 2015 case, the circumstances in which the narco trafficking activities occurred were: the coordination of the “Tenth Front’s narcotics trafficking activities (of the FARC), including the purchase, manufacture and transportation of cocaine and cocaine base.”²²⁷ This means that the Court considered that even in this specific context (FARC narco traffic related activities), those criminal activities are prevented from being considered as a connected crime for the purposes of the UN Convention of 1988,

²²¹ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Concepto de Extradición, noviembre 27, 2004, M.P: S. Espinosa Pérez, Expediente 2004-22450, (Colom.).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Concepto de Extradición, Sept. 2015, M.P: Eugenio Fernández Carlier, CP 117-2015 (Colom.).

²²⁶ *Id.*

²²⁷ *Id.*

which includes not only extradition (article 6) but also investigation and prosecution (article 7).

As per the paramilitary's requests, the Court arrived at the same conclusion of not preventing extradition for narcotraffic related activities based on the absence of definition by the Congress of a list of crimes that can be considered as connected to the political crimes and the "denial of this character (narcotraffic as a connected crime) by the international community", as established in the UN Convention of 1988.²²⁸

Worthy of noticing is decision No. 24187, in which the Court in the context of extradition, affirmed, "there is no way in which narcotrafficking can have a connection with sedition as a political crime." The Court based this last affirmation in the two arguments already mentioned and used in previous decisions.²²⁹

In conclusion, we can affirm that the Supreme Court of Justice considers that in principle, narcotrafficking activities are neither political crimes nor connected crimes, when there is no rebellion or sedition context. However, we can also affirm that the Court has not been conclusive with respect to this classification given the rebellion or sedition context. Noteworthy also, is that the Court did not find a difference when analyzing and concluding the degree of connection of narcotrafficking activities on the part of the FARC (capable of political crime), with that of the paramilitaries (incapable of political crime).²³⁰

Finally, it should be highlighted that the Supreme Court's case law seems to ignore the fact that the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 does not make a difference or exception relying on a given context (for example, financing or supporting a rebellion) when it denies the character of connected crime to narcotrafficking related

²²⁸ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Concepto de Extradición, diciembre 2007, M.P: S. Espinosa Pérez, 28505, (Colom.).

²²⁹ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Concepto de Extradición, septiembre 26, 2007, M.P: J. Enrique Socha Salamanca, 24187, (Colom.).

²³⁰ This might have changed after the Constitutional Court's decision declaring unconstitutional Article 71 of the Law of Justice and Peace. This article proposes the possibility to consider that paramilitarism in Colombia consisted in the crime of sedition.

activities. The Convention only refers to the purposes in which this prohibition applies, that is, not only extradition but also mandatory investigation and prosecution. Thus, based on this Convention, there is no reason to conclude that the international rule (of no exception to the prohibition of categorizing crimes against humanity, genocide and war crimes as connected crimes to political crimes) is not applicable or extended to narco trafficking.

IV. DETERMINATION OF FARC'S NARCOTRAFFICKING ACTIVITIES AS A CONNECTED CRIME TO REBELLION

In order to determine if there is a connection between the FARC's political crimes and their involvement with narco trafficking, the universal tests as well as Colombia's principles should be applied to the facts. Before this application however, it is important to understand where Colombia currently stands politically in order to have a context with which to assess the results of the analysis.

Point Four of the Final Agreement that ended the peace negotiations between the FARC and the Colombian government is officially titled, "The Solution to the Problem of Illicit Drugs."²³¹ As optimistic as that title is, it seems from the terms the two groups finally agreed to that their aim became more realistic throughout the process.

In arriving at the Final Agreement, the *Mesa de Negociaciones* (Negotiation Table) began the discussions around this goal of ending the illicit drug industry, back in November 2013.²³² Different proposals were at the table, specifically those coming from two celebrated national forums, one in Bogotá and the other in San José del Guaviare (a zone notorious for its involvement in the cocaine trade).²³³ The two forums took place two months before the negotiations in Havana with the participation of the civil

²³¹ Colombian Government and FARC Joint Release, Comunicado Conjunto No. 34: Acuerdo sobre "Solución al Problema de las Drogas Ilícitas" [Agreement on the "Solution to the Illicit Drug Problem"] mayo 17, 2014, available at <http://www.humanas.org.co/archivos/comunicadoconjunto34.pdf>.

²³² *Id.*

²³³ *Id.*

society, among them peasants and cultivators of poppy and of other base elements for the production of illicit drugs.²³⁴ Moreover, 4,000 proposals came from the *Mesas Regionales* (similar to a town hall meetings) summoned by the Peace Commissions of the Senate and the House of Representatives of the Colombian Congress.²³⁵ On May 17, 2014, the government and the FARC issued Joint Release Number 34, informing the public that they had reached an agreement on the fourth point of the agenda.²³⁶

The result of the discussions culminated in a commitment by the Colombian government to establish a criminal policy strategy. This policy has three prongs, all aligned with the aspirations expressed by both parties in the agreement, that is, to have “a country without narcotraffic.”²³⁷ The first prong identifies the war against corruption; the second one discusses the investigation, prosecution, and judgment of crimes carried out by any criminal organization and related to the production and trade of illicit drugs.²³⁸ Finally, the third prong addresses a strategy against laundering of assets and assets that in general are involved with narcotraffic.²³⁹

The FARC’s commitment is to contribute in an effective way to the solution of this problem. The agreement’s careful wording stated, “within the context of ending the conflict, (the FARC) will end any relationship with the drug trafficking phenomenon that had operated as a function of the rebellion.²⁴⁰” From these words, it seems apparent that the government and the FARC have agreed that the guerilla group’s involvement in narcotrafficking was within the frame of rebellion. Thus, it seems to have already been quietly decided by the government that the FARC’s

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Final Accord, Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz y Estable y Duradera [Final Accord for the End of Conflict and the Construction of a Stable and Lasting Peace], Nov. 24, 2016, available at <http://www.altocomisionadopalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

narcotrafficking is considered a connected crime to their political crime of rebellion.

Nonetheless, a clear policy in regard to narcotraffic within the context of the transition to justice and peace in Colombia remains to be publicly recognized. Whether narcotraffic can be considered as a connected political crime cannot be an exclusive matter of politics but must also be a matter of law. Therefore, in answering the legal question presented in this article, we apply the various legal tests to this particular common crime committed by the FARC–narcotrafficking–to see if it can fall under connected crime status.

A. A Determination of FARC's narcotrafficking activities as a connected crime to rebellion is in Conformity with the Universally Accepted Tests²⁴¹

1. Political Incident Test (Anglo-American):

This test supposes that conduct qualified as “politically connected” is conduct that occurs within the context of a political incident or an uprising. It should be part of the political incident or uprising and should be committed with the intent to derive political consequences.

The political incident in Colombia is the domestic, armed conflict in which the FARC and the government (among other actors) were immersed for more than five decades. The FARC got involved in this conflict with the intent to overthrow the government, and thus rebellion is the political incident they have been charged with.

Considering this is such a long incident (spanning several decades), in order to conclude whether the FARC's narcotrafficking could be connected to their crime of rebellion, their involvement needs to be qualified through the historical context of the group, as its dynamics changed several times during the fifty years of armed conflict.

²⁴¹ The Seventh Phase of FARC's history is not analyzed in this article due to the disparity on the sources and lack of possibility to verify the information found during the research process.

As explained in Section I, during the five or more decades of the FARC's war, its ideology, military strategy, and policies changed over time. It is widely accepted that during the "rebound and boom" phase of the 1980s, the FARC's *gramaje* was a strategy within the context of their rebellion used to finance the military campaign. Thus, at that point, under the political incident test, the FARC's ties to narcotrafficking could qualify as a connected crime.

During the phase of "deterioration and de-legitimization," the FARC's activities in narcotraffic are not as clear. In addition to the *gramaje*, which was maintained, the FARC's activities into the drug business during this period are known to have progressed. Throughout this phase the FARC's military campaign continued to escalate, this required more resources in personnel, finances, and infrastructure. These facts support the reports that estimate an increase in the FARC's involvement with narcotrafficking in the 1990s. Different organizations have calculated that taxing the coca growers and the buyers, along with the FARC's other practices of kidnapping and extortion, combined could not have been sufficient to account for their military growth during this phase. Because this increase in involvement is thought to have been to increase their military capacity, it can be argued that in its fourth phase, the FARC's narcotrafficking activities were still committed to finance their rebellion, and thus, with the intent to derive political consequences.

The FARC's activities during phases five and six, however seem to point to an abandonment of their military objective. During the fifth phase of "reorganization and redirection," the FARC had already grown enough to sustain forty-eight fronts, control thirty-seven percent of the country's small towns, urbanized the conflict, and escalate the military campaign, all while fighting a severely weakened government inundated by the narcotraffic epidemic. Despite the vulnerability of the government and its own surge in power, the FARC did not advance on its objective to overthrow the government.

During this period Colombia was a nation plagued by an illegal drug epidemic that was at its peak. The crime rates were at an all-time high, there was political and social instability with a society frightened by the level of violence, and a government failing at

trying to control the problem. In the midst of this, the FARC had become economically and militarily autonomous. Thus, having all the circumstances present to achieve the organization's military objective of overthrowing the government, the fact that the FARC did not seriously pursue that goal points to the conclusion that the group had lost sight of the rebellion. Therefore, under the political incident test, during the fifth and sixth phases of its development, from 1993-2002, the FARC's activity in narcotrafficking would not be considered a connected crime to the political crime of rebellion, because their narcotraffic activities were not carried out to finance the rebellion but rather to grow their business.

In conclusion, by using the incident test to look at the context and the intent, the FARC's involvement in narcotrafficking having evolved from financing a rebellion during the third phase to turning a profit during the fourth and fifth phase. Therefore, the fourth phase cannot be qualified as a connected crime, because it ceased to be part of the incident and was not committed with a political motive.

2. Political Objective Test (French):

This test supposes that a connected crime involves conduct that has a political component, and that the means used to carry it out do not outweigh the seriousness of the crime committed.

Let us remember that the political component is the aim or motive, the context, or the sought consequences. In the studied case, the political component depends on the phase in which FARC activities took place. During the three initial phases, the motive might have been the defining political component. However, in the subsequent phases (fourth through sixth), neither the political motive nor the desired political consequences were present in the FARC's narcotraffic activities. Finally, even if one argues that the political context existed, the seriousness of the offense outweighs the crime committed.

Although core crimes of international law have primarily been considered when assessing the seriousness of a crime for application of the French test, grave violations of human rights are not limited to these core crimes. The Preamble of the Rome Statute recognizes that genocide, crimes against humanity, war crimes, and aggression are the *most* serious crimes. This means that there

are other crimes that are serious apart from those related to grave violations of human rights. In the same vein, the UN Convention Against Transnational Organized Crime establishes a broad definition of serious crimes under Article 2.²⁴² This definition describes in terms of the amount of penalty, more specifically in the number of years of deprivation of liberty as a result of the commission of the crime. The number of years for trafficking, production, or possession of drugs, established under article 376 of the Criminal Code of Colombia, exceeds these number of years. Even though the UN Convention Against Transnational Organized Crime does not explicitly include narcotraffic activities, or any specific crime, as a serious crime, the *travaux préparatoires* show that, during negotiations, the different proposed lists of crimes considered as serious crimes always include the trafficking in drugs.

Moreover, this crime is so serious that an analysis of conduct constituting crimes against humanity committed by FARC might lead to the conclusion that narcotraffic perpetrated by this group constitutes the “organizational policy to commit” the attack directed against the civilian population.²⁴³ For instance, an example of this might be the enforced displacement of the civil population in order to guarantee the control over the drug routes.

Finally, narcotrafficking is a transnational criminal activity that goes against the “health and welfare of human beings,” that “threatens stability, security and sovereignty of States,” that “penetrate[s] [and] . . . corrupt[s] structures of government” and society at all its levels,²⁴⁴ as was recognized by Colombia when signing and ratifying the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Thus, narcotrafficking could be considered a serious international crime.

²⁴² G.A. Res. 25/55, United Nations Convention Against Transnational Organized Crime, 4 (Jan. 8, 2001).

²⁴³ I.C.C. OFFICE OF THE PROSECUTOR, INTERIM REPORT OF THE SITUATION IN COLOMBIA, (Nov. 2012), <https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>.

²⁴⁴ ECOSOC, *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, (Dec. 19, 1998), Preamble, <http://www.refworld.org/docid/49997af90.html>.

Therefore, when applying the proposed approach by the political objective test, narco trafficking by the FARC in Colombia could not be considered as a political connected crime due to the fact that drug trafficking has a degree of seriousness that, although not necessarily comparable to the already accepted standards of barbarity and atrocity, supports the probable conclusion.

While the level of seriousness of narco trafficking is still under discussion, factors such as the severe social instability it has caused in the Colombian society,²⁴⁵ the juridical interests it affects, and the importance the international community²⁴⁶ has placed on fighting this crime, all tip the balance in favor of the seriousness of the crime excluding it from connected crime status. Under this theory, despite having a political component during the three initial phases, the seriousness of the crime of narco trafficking during every phase of the organization's history (first through sixth), outweighs the benefit of connecting it to their political crime.

3. Predominance or proportionality Test (Swiss):

This test supposes that when the political motivation is the most important aspect of the conduct, which supposes that the connection between the pure political crime and the common crime is strong, it can be said that the common crime is strictly necessary to achieve the political crime. Thus, there is a proportionality of the common crime to the goal of the pure political crime—an element that makes this test a restrictive approach on how to qualify a connected crime.

Generally speaking, the principle of proportionality is used when assessing a norm that might violate fundamental rights. This is the reason why courts such as the Inter-American Court on Human Rights have largely developed this principle. According to this Court's case law, the proportionality test is composed by three prongs: (i) the necessity, requiring that the method used to restrict a fundamental right was the most benign, or, in general terms, that the end could not have been reached in a different way that caused

²⁴⁵ See Sentencia C-069/94, *supra* note 204 (referencing that The Constitutional Court of Colombia said that kidnapping is an atrocious crime due to the social instability caused to the society, among other reasons, and it could not be considered a political crime.).

²⁴⁶ G.A. Res. 17/8, (Feb. 23, 1990).

less suffering to the individual; (ii) the suitability, requiring that the means used to make the restriction be the most adequate to the factual possibilities according to the end that is pursued; and (iii) the proportionality, requiring the weighing the rights at stake.

Now, in terms of political crimes and the determination of the connected crimes, the proportionality test has also been used, this time not necessarily in relation to fundamental rights, but to the juridical interests protected by denominating conduct as a common crime or a political crime. The proportionality test, as envisioned by the Swiss, encompasses three prongs: (i) that the common crime was committed within the framework of the political objective; (ii) that the common crime had effectively contributed to achieve the political objective; and (iii) that the commission of the common crime was indispensable and necessary to achieve the political objective.

Regarding the first two prongs, as we will later elucidate, the argument about narco trafficking within the framework of the political objective and its contribution to the achievement of this political objective, existed during the three first phases of FARC. Thus, necessity is the prong to be analyzed.

In the context of FARC's activities related to narcotraffic, during the initial phases of the organization, the *gramaje* could be considered a non-excessive means in the Colombian armed conflict. However, serving as a gateway between production and distribution to contribute with the "drugalization" of the society and the proliferation of violence in Colombia suggest that the *gramaje* could actually be considered an excessive means to finance the crime of rebellion. This is not to say that the *gramaje* was not used to finance the rebellion, but it was not necessary since there were other sources of income that the organization could have pursued or at least explored during its origins, such as looking for additional funding from its international and national supporters.

The other argument is viable as well, in terms that the *gramaje* was necessary to finance the military strategy and to expand and conquer other territories in the country. Nevertheless, we affirm that the balance inclines towards the lack of necessity of narco trafficking activities since the *gramaje* was not indispensable to reach their goal. The organization could have pursued its

funding objective, for example, through the exploitation of natural resources as many other armed groups have done.²⁴⁷ In that case, the political component would be more evident, as the link with the political motive is directly connected with the interest harmed by the conduct committed, due to the fact that it continues to affect the State's juridical interest and still furthers the political objective.

The application of the predominant test to FARC's drug activities during the initial phases, when it emerged and started growing, furthers the assertion that those could not be qualified as common crimes connected to the political crime of rebellion, since at least one of the prongs was not met because FARC's drug activities were excessive and not indispensable means.

Nevertheless, while looking to FARC's narco-trafficking activities the beginning of the 1990's, during the subsequent phases of the organization, we can conclude that narco-trafficking does not meet any of the three prongs of the proportionality test. FARC's activities that guide this conclusion are: (1) FARC's presence in a great number of municipalities where the coca was produced, (2) FARC's control over the price and the merchants involved in the local trade of coca and cocaine, (3) FARC's monopoly of the market in certain areas of Colombia to the point that they were in a position to trade arms for drugs internally and internationally.

FARC's narco-trafficking activities, as described above, go beyond the framework of the political objective due to the fact that the predominant motivation was economic profit and not the overthrowing of the government. The billions of dollars acquired from the business, even in the most conservative calculation, exceeds the operational cost of the organization. Additionally, even though those billions of dollars have contributed to advance their military tactics, it has not guided the achievement of the political objective. When the best possible circumstances were present to achieve the political objective, FARC did not pursue the path to execute the military strategy and continued pursuing profits and their market participation in the drug business. Lastly, affecting the public health of the Colombian society and the world (the juridical

²⁴⁷ See Ursula Daxecker & Brandon C. Prins, *Financing rebellion*, 54 J. PEACE RES. 215, 216-18 (Jan. 1, 2017).

interest protected under the crime of narcotraffic) is not the ultimate consideration, meaning is not necessary or is an excessive means, because it could have pursued other, less harmful, means of financing. For example, they could have pursued the financial support of the Colombian nationals, as they claim to be the “army of the people” (FARC-EP). Thus, the application of the Swiss test to the facts, meaning FARC’s activities during the phases four to six of the group, persuades the conclusion that narcotrafficking could not be a connected crime since none of the three prongs are met.

However, as said before, the lack of clarity regarding FARC’s relationship with narcotraffic, does not allow a definite conclusion on whether those activities could be a connected crime to the crime of rebellion. That is why the discussion about classifying it, *a priori*, as a connected crime to FARC’s rebellion should not prevent this relationship. It is essential to disclose FARC’s extent of involvement in narcotrafficking during the armed conflict, since a “permanent and stable peace” can only be achieved with truth, the foundation and guarantee of reconciliation for any society, especially in a society like Colombia’s, which has suffered a drug epidemic.

B. Determination of FARC’s narcotrafficking activities as a connected crime to rebellion in Conformity with the Colombian Case Law

The apparent silent decision to consider narcotrafficking as a connected crime to rebellion within the context of the peace negotiations and the Final Agreement is not necessarily consistent with the case law of the two High Courts of Colombia. In 1963, the Supreme Court of Justice opted for the “strict relationship test,” thereby applying the Swiss Test.²⁴⁸ The Constitutional Court did so as well in 2002 when applying the “reasonable and proportionality/equality test.”²⁴⁹ As we explained above, the

²⁴⁸ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, diciembre 13, 1963, M.P: H. Barrera Domínguez, Expediente 1963-404438, Gaceta Judicial [G.J.] (Colom.).

²⁴⁹ Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2002, Sentencia C-695/02, Gaceta de la Corte Constitucional [G.C.C.] (Expediente D-3945) (Colom.).

conclusion when applying this test is that the narcotraffic activities committed by the FARC could not be considered a connected crime.

In 1986 and 2007, the Supreme Court of Justice applied the Anglo-American Test when referring the teleological, paratractic, and subordinated (hipotáctica) connectivity as a determinative factor of the qualification—a means to accomplish the end, the product, or the commission of the political crime.²⁵⁰ When applying this test to the studied case, narcotraffic can be considered a connected crime under the third and fourth phases. However, under the fifth phase (1993-1998) and sixth phase (1998-2002) there is a lack of connection between FARC's rebellion and narcotraffic activities. This allows the inference that according to the most recent decision analyzed on this matter by the Supreme Court (2007), the applicable test would lead to excluding the narcotraffic activities of the FARC as a connected crime, at least between 1993 to 2002.

Finally, both High Courts of Colombia, when excluding a specific conduct from qualifying as a connected crime, applied the French Test in referring to the atrociousness and barbarism of the conduct. In these decisions, the Courts never excluded narcotraffic related conduct from the possibility of being considered connected. The determination on whether narcotrafficking is of sufficient seriousness to be excluded from ever qualifying as a connected crime is still under discussion. The fact that neither of the Courts has expressly excluded this conduct as a connected crime does not necessarily lead to the conclusion that narcotrafficking is not serious enough to be excluded from the connected crime category. In this analysis we have argued that narcotrafficking is serious enough and that this assertion seems to be backed by the international community.

²⁵⁰ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, May 6, 1987, M.P: J. Carreño Luengas, Expediente 1986-406567, Gaceta Judicial [G.J.] (Colom.); Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Casa. Pen. Sentencia, Dec. 5, 2007, M.P: M. del Rosario González, Expediente 2007-415134, Gaceta Judicial [G.J.] (Colom.).

V. CONCLUSION

The peace talks in Havana designed to bring about a stable and lasting peace in Colombia seem to have culminated in the Colombian government and the FARC quietly agreeing to consider the FARC's narco-trafficking activities over the decades as a connected crime to their political crime of rebellion. As laid out in this article, the context of the peace negotiations, the peace agreement, and Transitory Article 67 of the Constitution support the theory that the Colombian government has agreed to connect the crime. Therefore, an agreement on this connection between the government and the FARC that circumvents the court system could lead to undesirable consequences both nationally and internationally.

On the international level, Colombia could be ignoring an international obligation derived from the UN Convention Against Illicit Traffic of 1988. According to Article 3.10,

[f]or the purpose of co-operation among the Parties under this Convention . . . offences established in accordance with this article²⁵¹ shall not be

²⁵¹ ECOSOC, *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, (Dec. 19, 1988), <http://www.refworld.org/docid/49997af90.html>. Article 3.1(a) establishes as criminal offences:

i). The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;

iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in i) above;

iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

v) The organization, management or financing of any of the offences enumerated in i), ii), iii) or iv) above.

Article 3.1 (b) and (c), also considered as criminal offences, the following conducts:

considered as . . . political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.²⁵²

This is a safeguard clause that could open the door for Colombia to qualify the FARC's narco-trafficking activities as connected political crimes and to derive consequences like non-extraditions, amnesties and pardons. In principle, the Colombian Constitutional system operates within that safeguard clause. Even though the Colombian Constitution does not specifically mention any of the conduct related to narco-trafficking as a connected political crime, the constitutional transitory disposition, Article 67, recognizes the concept of connected crimes and dictates that a

i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;

ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such an offence or offences;

c) Subject to its constitutional principles and the basic concepts of its legal system:

i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph a) of this paragraph or from an act of participation in such offence or offences;

ii) The possession of equipment or materials or substances listed in Table I and

Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or

iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;

iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

²⁵² *Id.*

statutory law will regulate these types of crimes.²⁵³ In this context, the Constitutional Court of Colombia, as explained in section II of this article, stated that the legal benefits applicable to the main crime (e.g. rebellion) are extended to the connected crime (e.g. narcotraffic). Thus, the constitutional benefits granted to the political crimes in Art. 150.17 of the Colombian Constitution (amnesty and pardon), and in Art. 35 paragraph 3, (exception for extradition), are extended to the connected crimes.

Therefore, the Colombian Constitution allows for any aspect of narcotrafficking to be considered a connected crime to the political crime (provided that the factual connection was established) creating a permissible exercise under Art. 3.10 of the UN Convention Against Illicit Traffic.

However, the safeguard clause of Art. 3.10 of the Convention, is not to be read and applied as an open door to include any crime within the category of “political motivated” crimes. This article has a strict interpretation as reflected in the negotiations²⁵⁴ and in the commentary of the Convention. When referring to the Article 3.10 prohibition to consider certain conducts related to narcotraffic as politically motivated crimes, the commentary on the Convention states that “this provision is intended to restrict the possibility of an individual invoking the protection of the so-called political offence exception” in circumstances such as terrorism and “other like circumstances.”²⁵⁵ That assertion in the Commentary is based on General Assembly Resolution S-17/2, where the States expressed a concern of the “growing link between illicit traffic and terrorist activities.”²⁵⁶

Therefore, categorizing conduct by the FARC prescribed in Article 3.1 (a) and (b) during phases four through six as “politically connected” to FARC’s rebellion “would be an obstacle to the provision of the measures of international cooperation provided for in articles 5 [Confiscation], 6 [Extradition], 7 [Mutual

²⁵³ See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 201.

²⁵⁴ For example, see Richard Vogler & Shahrzad Fouladvand, *UN core Conventions on Transnational Organised Crime*, in: INT’L L. & TRANSNATIONAL ORGANISED CRIME 117-19 (2016).

²⁵⁵ ECOSOC, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, at 98 (Dec. 19, 1998).

²⁵⁶ *Id.*

legal assistance] and 9 [other forms of co-operation and training],”²⁵⁷ something that the article was precisely designed to avoid. Specially, if read in conjunction with Article 24 which only allows for flexibility in the sense that the State Parties could take more severe or stricter measures than those mandated in the Convention, it does not allow for flexibility to ameliorate the grave nature of the offences in Article 3.1 (a) and (b).

Reading and applying Articles 3.10 and 24 together shows that the drafters of the Convention, including Colombia after ratification, agreed that there is a link between illicit trafficking and politically motivated crimes,²⁵⁸ but they also acknowledged that “an act carried out in a political context (such as an armed uprising) may not be regarded as political if done for a private or personal reason.”²⁵⁹ This does not mean that the safeguard clause contained in Article 3.10 does not have any effect, but that it has a limitation in the scope of application when the connection of the conduct is non-existent and therefore cannot be categorized as a connected crime.

In these terms, Colombia may be breaching an international obligation. The general principle of international law of *pacta sunt servanda bona fides* requires not only compliance with the international obligation but also good faith.²⁶⁰ Qualifying FARC’s narco-trafficking activities as a connected crime, without considering the real extent of the group’s involvement in every phase and the real degree of connection according to the test that the State decides to apply, put Colombia in breach of this international principle articulated in Article 3.10 of the Convention Against Illicit Traffic.

On a national level, the consequences for qualifying narco-traffic as a connected crime goes directly to the terms, obligations, and aspirations of the Peace Agreement. The analysis presented in this article is based on the reality of what Colombia has undergone during the armed conflict and is still undergoing as part of the Peace Process between the government and the FARC.

²⁵⁷ *Id.* at 96.

²⁵⁸ *See generally id.*

²⁵⁹ *Id.* at 96.

²⁶⁰ ANTHONY AUST, *PACTA SUNT SERVANDA* (Oxford Public International Law 2007).

Colombia signed a Peace Agreement to transition to a “stable and permanent peace” in 2016. In order to achieve the desirable peace, a system needs to be put into practice. This system is universally known as the Transitional Justice System (TJS).

Every TJS is different and there is not a unique formula to implement it. However, the tools commonly used are designed for, and envision, the desired peace. Thus, regardless of the form and mechanism used by the society undergoing a transition to peace, the ideas of adequate accountability, reparations to the victims, and reconciliation between perpetrators and victims are always an important element to achieve peace.

The government of Colombia and the FARC during the negotiations selected the tools to be implemented as this TJS. The Colombian Peace Agreement explicitly creates, “the integral system of truth, justice, reparation and non-repetition,” a system that would be composed of several mechanisms and measures like the Truth Commission, the Special Unit for Enforced Disappearances, the Special Jurisdiction for Peace, the Measures of Integral Reparations, and Guarantees of Non-Repetition.²⁶¹ Despite this selection of mechanisms and tools, Colombia still needs to form them, create them, and give them a legal and institutional framework to operate and achieve the desired “permanent and stable peace” agreed on by the government and the FARC.

As said before, Colombia has already decided that the TJS would seek the disclosure of truth of the events that took place between the armed actors and against the civilians during the more than five decades of armed activities. Further, it would seek to achieve the peaceful coexistence between Colombians, and it would seek guarantees of non-repetition. Thus, narrowing every tool could only attain the goals sought and envisioned.

In light of narcotraffic as an important element of Colombian history and a major problem of the Colombian society, one that surpassed the common criminality and contaminated groups like the FARC, narcotraffic crime cannot be ignored in the implementation of the truth mechanisms, special jurisdiction

²⁶¹ *Final Accord for the End of Conflict and the Construction of a Stable and Lasting Peace* 8 (Nov. 24, 2016), available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf>.

mechanisms, the reparation mechanism, and the mechanism for guarantees of non-repetition. Particular to this assertion, the Government and the FARC included the issue of illicit drugs with the intention to find a “Solution to the Problem of Illicit Drugs” as part of the issues to negotiate at the table in Havana, demonstrating that both parties recognized the role of narcotrafficking in the non-international armed conflict in Colombia, implicitly FARC’s involvement, to a certain extent, with the crime of illicit trafficking or narcotrafficking.

Despite the title “Solution to the Problem of Illicit Drugs” and the intention to address “coca eradication and crop substitution, public health and drug consumption, and the solution to the phenomenon of drug production and trafficking”, neither the agenda nor the peace agreement expressly mentions the disclosure of the FARC’s involvement in narcotrafficking or the accountability of their narcotrafficking activities.

Even if we agree that defining criminal conduct in a transitional justice system is a dilemma between law and politics,²⁶² in the context of Colombia we cannot ignore the commission of this crime. As we argued primarily on this article, the decision to qualify FARC’s illicit drug trafficking, as a political connected crime to the crime of rebellion, requires a complete picture of the facts, and it could not be considered a politically connected crime in some phases of the organization’s history. Thus, the opportunity opened by the Amnesty Law, to approach this by the Special Jurisdiction for Peace, should be taken seriously and should not be influenced by the terms used in the Final Agreement and the Amnesty Law which could compel the conclusion that the FARC’s narcotrafficking activities were committed entirely for the purposes of financing its rebellion.

In conclusion, looking at the parties’ intentions at the negotiation table, the purpose of the peace agreement, and the values underlying the Transitional Justice System selected by Colombia, narcotrafficking has to be part of the process, and discussed openly with appropriate criminal accountability for the FARC’s activities. This is required if non-repetition is to be

²⁶² Kai Ambos, *The Legal Framework of Transitional Justice: A Systematic Study with Special Focus on the Role of the ICC*, in BUILDING A FUTURE ON PEACE AND JUSTICE, 19, 23 (Springer et al. 2009).

guaranteed, if a real reconciliation in the Colombian society is desired, and if a real, stable, and permanent peace is to be achieved.