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## **Law in Peace Negotiations**

Morten Bergsmo and Pablo Kalmanovitz (editors)





# **Law in Peace Negotiations**

**Morten Bergsmo and Pablo Kalmanovitz (editors)**

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## **PREFACE TO THE SECOND EDITION**

In addition to editorial changes such as the introduction of an index prepared by FICHL Fellow Mats Benestad, some of the chapters have been modified in this Second Edition. The book has been reformatted, so the page numbering differs from that of the First Edition.

Identical versions of this Second Edition are available online and as a printed book. Although the Torkel Opsahl Academic EPublisher does not itself charge for either version, the printed version is modestly priced to cover the costs of the printer and the distributor. The online version is freely accessible through the website of the Forum for International Criminal and Humanitarian Law (see [www.fichl.org](http://www.fichl.org)). By publishing both online and in print, the Forum seeks to reinforce its open access programme.

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## **PREFACE BY THE SERIES CO-EDITOR**

This volume contains papers presented at the seminar “Peace and accountability in transitions from armed conflict” held in Bogotá on 15 and 16 June 2007. The seminar was co-organised by the Vice Presidency of Colombia, the National Commission for Reparation and Reconciliation of Colombia, Universidad del Rosario and PRIO (its Forum for International Criminal and Humanitarian Law).

The Forum seeks to contribute to scholarship and practice. To this end, we not only organize or co-organize seminars and other activities, but we also promote seminar findings and other publications through this Publication Series. We aspire to place high quality products on an Internet-based platform that is open and freely accessible to all, including those in less resourceful countries. We are therefore pleased to Internet-publish the papers presented at the June 2007 seminar. Both the seminar and this volume were made possible by financial support from the Norwegian Ministry of Foreign Affairs.

The open-mindedness and high level of the Colombian interventions at the seminar were striking. Their papers in this volume are clearly reasoned. The armed conflicts and peace processes in Colombia, on the other hand, are consistently referred to in the transitional justice discourse as factually not easily accessible. This rhetoric of complexity can operate on several levels. Some non-Colombians may feel that the effort required to be factually relevant to the Colombian situation exceeds their will to intellectually engage the complex problems of peace and justice in the country. Or they may be tempted to address fundamental principles, concepts or law with few, if any, strings to Colombian reality. Applied transitional justice is so fact-sensitive that outsiders are necessarily disadvantaged in the Colombian discourse. Colombians must decide which ideas coming from the outside are useful for Colombia – just as Colombians alone can answer for the serious problems of peace and justice in their country.

The rhetoric of complexity can also serve as a screen that prevents open confrontation with the root causes of the protracted armed violence in Colombia and the full extent of suffering among her subjects. Take the massive forced displacement of civilians within the country. By drawing on data from the Colombian Commission of Jurists, *Kalmanovitz* points out in his introduction that

[u]p until October 2007, the aggregated area of all estates given by the paramilitaries to the government in the context of JPL proceedings is 3,642 hectares. The most moderate estimate of the aggregated area of land abandoned by people displaced by the conflict is 2.6 million hectares, *which means that the total returned land makes about 0,13% of the abandoned land* (italics added).

How far does the power of those who control unreturned land reach?

*Elster* frames the issue elegantly in his book chapter:

[...] Fearon (Stanford University) made the following perceptive remark. "If a conference on political conflicts in Colombia had taken place here forty years ago, the name most frequently cited would have been Marx. Today, it is Hobbes." In Colombia today, Hobbesian violence rather than Marxian exploitation is perceived as the main social ill. To create a durable peace, however, it is not enough to address the issue of violence by measures of transitional justice. One will also have to address the issues of exploitation, inequality and poverty by measures of distributive justice. Land reform is even more needed today than in the past, as vast land properties are concentrated in the hands of drug-lords and paramilitary leaders.

*Elster* is indeed the only contributor to this book who mentions Marx. Marx may not be the answer to Colombia's crises of peace, security and justice. But I do think land reform and economic redistribution is a critical part of the answer. Colombian transitional justice will not get as far as it aspires to without a greater measure of distributive justice. Absent a genuine programme of social and economic justice, sustainable transition appears unlikely.



The contributions by *Arjona* on the nuanced reality of local orders in communities affected by armed conflict and by *Saffon and Uprimny* on the political use and abuse of the transitional justice discourse in Colombia both provide important reminders of the human factor in the Colombian story – good and bad. Human beings are at the centre of all social transitions. Suffering in armed conflicts tends to be so massive that the personal dimension is overshadowed by broader patterns of victimization. The scale of suffering invites quantification and analytical generalisation. But human suffering is always individual. Although the face of suffering has its rightful place in any discourse on war, peace and justice, the victims of armed conflict – who often lack the sophistication and education of capital cities – rarely participate in transitional justice seminars.

Against this background it is important that the foundational contributions to this volume by *Petersen and Zukerman Daly* and *Mockus* focus on the human conditions of anger and forgiveness respectively. They point to questions of lasting importance, while opening new frontiers of research and inquiry. *Mockus* draws us in by suggesting that,

[a]s a start, it may be a good idea to come together in asking humanity for forgiveness for all the things we Colombians have done to each other, for not having done enough to prevent the propagation of the “anything goes” rationale, and for all the times in which we could have collaborated with justice or acted to protect the rights of others but we failed.

*Kreß and Grover* and *Stahn* show that the international lawyers have not only discovered the international discourse on transitional justice, but they have commenced more systematic doctrinal analyses of legal principles of particular relevancy to transitional justice.

*Hartmann’s* chapter may not be as academic as other contributions, but she is an investigating journalist who has penetrated the political context of the ex-Yugoslavia war crimes process more deeply than most. Her propositions are as unconcealed as were the interests behind the recent Balkan wars naked. Courageously, she ends her paper by stating:

When impunity is no longer a key to peace, *then* justice will start to operate as a deterrent to crimes and war.

Is criminal justice for atrocities a mere passing experiment? Or is it the start of an historic normalisation of the administration of armed conflict – towards more rule of law? The visions differ sharply. As does our approach to the wealth of facts on the co-existence between international criminal justice and peace mandates in conflict theatres since 1994. Accessing this material more persistently and systematically will strengthen the empirical basis of the transitional justice discourse. I think that may be helpful.

*Morten Bergsmo*

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**Introduction:  
Law and Politics in the Colombian  
Negotiations with Paramilitary Groups\***

**Pablo Kalmanovitz\*\***

The majority of chapters in this volume make some reference to the 2003-2005 peace negotiation process in Colombia. The reason for this common reference is partly that the chapters originated in a seminar held in Bogotá, Colombia, in June of 2007, and most speakers felt compelled to reflect on the particular complexities of the Colombian case. But the seminar location aside, the Colombian attempted transition to peace provides a uniquely relevant, difficult, and interesting case to study the interactions between violence, politics, peace, and law in transitional contexts. The main purpose of this introductory Chapter is to outline critically the political process behind the production of the legal framework that made peace negotiations possible in Colombia, in particular the sanction of the Justice and Peace Law (JPL) in Congress in 2005. In keeping with the core theme of the 2007 seminar, the account will underline the synergies and tensions between the political process and the law. A second aim of the Chapter is to provide a broad sketch of the main features of the Colombian transitional legal framework. The Chapter is then organized as follows: Section 1.1 provides an account of the politics behind the transitional legal framework, from the time peace talks began in 2003 to the first official “confessions” at the end of 2006. Section 1.2 discusses the main features of the framework and reviews some of the criticisms it has received. Section 1.3 provides a brief assessment of the overall process and concludes.

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\* I would like to thank Jon Elster and Maria Paula Saffon for useful comments and suggestions.

\*\* **Pablo Kalmanovitz** holds a PhD in Political Science from Columbia University.

### 1.1. The Trajectory of the Legal Transitional Framework<sup>1</sup>

In July of 2003, representatives of the Colombian government and of the United Self-defence Forces of Colombia (*Autodefensas Unidas de Colombia*, AUC) signed a ceasefire and demobilization agreement.<sup>2</sup> Aside from the ceasefire, the AUC agreed to gradually demobilize its troops, with full demobilization to be completed by the end of 2005, while the government agreed to set conditions for a peace agreement and to reintegrate the demobilized combatants into civil life. The paramilitary groups agreed to the ceasefire, to concentrate their leaders and the bulk of its troops in predefined areas, and to a massive demobilization process – which included turning in all weapons – prior to any clear arrangement as to the concrete conditions for their transition into civil life. No document produced at the early stages of the process mentioned any type of accountability measure to be implemented in an eventual reintegration process, nor were the specific terms of a peace accord anticipated. Probably the paramilitary chiefs' sympathy for president Uribe and his policy of "democratic security" made them think that the terms of the transition would be mild; it is not unlikely that informal agreements between government officials and paramilitary leaders were made to this effect prior to the formal peace negotiations.<sup>3</sup> The government, on the other hand, carried on the process

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<sup>1</sup> Note that the term "legal transitional framework" will be used in a positivistic vein, simply to denote the legal measures that have *in fact* been enacted in pursuit of the demobilization of non-State armed actors. The term should not be read as implying that the legal transitional framework satisfies basic principles of transitional *justice*, or that a deep regime transition is in fact taking place in Colombia at this time. These are contentious claims in the current Colombian public debate, as the discussion in Section 1.3. will show.

<sup>2</sup> The AUC is an umbrella organization created to unite paramilitary fronts that acted more or less autonomously; for a thorough study of paramilitarism in Colombia see Mauricio Romero, *Paramilitares y Autodefensas, 1982-2003*, Editorial Planeta Colombiana, Bogotá, 2003. The laconic text of the agreement, which came to be known as the Agreement of Santa Fe de Ralito, may be found at: <http://www.c-r.org/our-work/accord/colombia/key-texts.php>

<sup>3</sup> As Uprimny and Saffon suggest in their contribution to this volume. If there was an informal agreement, a key question is why the paramilitaries would think that the government would deliver its side of the bargain; Monika Nalepa's Chapter offers a possible answer. Another key question is whether the government *could*

without a consolidated legal framework, and was forced several times, following domestic and international pressures, to make the conditions of AUC's demobilization tougher than initially intended. The process was far from steady. When conditions were readjusted and made tougher, paramilitary chiefs threatened to quit the process and resume war, which predictably produced widespread public fear.

The current transitional legal framework is the direct product of three actors, which entered the process at critical moments: the executive, Congress, and the Constitutional Court. Indirectly, the legal framework resulted from the pulls and pushes of different political forces, particularly the AUC chief commanders, national NGOs and organizations of victims, international official organs such as the United Nations High Commissioner of Human Rights, and international NGOs such as Human Rights Watch.<sup>4</sup> It should be no surprise that the law as it stands is not fully satisfactory to any of the involved parties. A central element of contention throughout the process has been the level and types of accountability measures that the transition must include. On the one hand, the government's peace negotiators have in general been oriented to assuring the integrity of the process, their central consideration being *peace in the short run*, particularly that the demobilizations end in a well-functioning reintegration process, that arms are laid down and crime and violence are kept low. On the other hand, the Colombian high courts, some members of Congress, NGOs acting on behalf of victims, and some influential international actors have been the main forces propelling demands for *justice*

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indeed deliver its promise; the roles of the Colombian Constitutional Court and of the US in the process, to be discussed below, provide reasons to think the answer is negative.

<sup>4</sup> The UN High Commissioner for Human Rights (UNHCHR) has followed the peace process closely. Its 2006 and 2007 country reports have lengthy passages on the process and its laws; see, e.g., UNHCHR, 2005 Report (E/CN.4/2006/9), Annex V, §§16-26; UNHCHR, 2006 Report (A/HRC/4/48), §§ 28-32. See also the manifold documents and legal studies issued by the UNHCHR office in Colombia, in particular "Consideraciones sobre la Ley de Justicia y Paz", Bogotá, 2005, available at: <http://www.hchr.org.co/publico/comunicados/2005/cp0535.pdf>. Human Rights Watch makes constant reports on Colombia; for an overview, see Human Rights Watch, "Some and Mirrors. Colombia's Demobilization of Paramilitary Groups" (2005).

*and long-term peace*, often in direct opposition to the government. Overall, with time the transitional framework moved away from an emphasis on peace and very little accountability to incorporate larger requirements of truth, justice and reparations (at least *de jure*; it is still to be seen whether the levels of accountability *de facto* achieved at the end of the process will be close to what the main transitional law (JPL) requires).

The government took the first steps in the elaboration of the transitional legal framework. In December of 2002, Congress approved Law 782, which president Uribe crafted with the specific purpose of starting negotiations with the AUC. The law, which is still valid, empowers the government to carry on peace talks, specifies conditions and benefits for demobilized members of armed groups, and gives amnesty for so-called political crimes – sedition and rebellion – and for crimes linked to these. However, the law does not give amnesty for serious crimes such as massacre, forced disappearances, terrorism, kidnapping, and murders *hors de combat*.

In order to deal with serious crimes, which amount to serious violations of International Human Rights Law and International Humanitarian Law, the government initially introduced a bill in Congress in August of 2003 – the so-called “Alternative Penalties Law” – which aimed to fill the gaps left by Law 782. The Alternative Penalties Law was made with virtually no consultation to members of civil society, congressmen, or international actors, and was extremely lenient: it did not condition legal benefits on full and truthful confessions, it did not specify mechanisms for reparation to victims, and the alternative penalties it contemplated were in fact not punitive at all.<sup>5</sup> As could be expected, the proposal was received badly by the public, particularly by domestic and international NGOs, by the Colombian Attorney General and by some members of Congress, and was withdrawn by the gov-

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<sup>5</sup> The draft bill (Art. 11) listed as alternative penalties exclusion from public office, prohibition of holding and/or owning weapons, exclusion from certain regions of the country, and prohibition to approach victims. There was no word about prison sentences. For more on the bill see Catalina Díaz, “Colombia’s Bid for Justice and Peace”, in *International conference Building a Future on Peace and Justice*, Nuremberg, 2007, p. 16.

ernment. Under the leadership of Senator Rafael Pardo a more plural deliberative process followed, with congressional hearings and regional audiences open to a wide public. At the end of this consultation process, two main bills were competing in Congress, one a revised version of the government bill and the other a more stringent bill introduced by Senator Pardo and a few other members of Congress.<sup>6</sup> The bills were debated from April of 2004 onwards; the draft version of the JPL was officially presented by government to Congress on February of 2005 and became law in July of that year.

While deliberation was ongoing in Congress, the demobilization process saw little progress. In 2003, two groups and a total of 1,036 combatants demobilized, the most noted of which was the *Cacique Nutibara* bloc, demobilized in November of 2003 in the city of Medellín.<sup>7</sup> One year after the signature of the formal demobilization agreement, in July of 2004, ten representative paramilitary leaders finally gathered in a “concentration zone” where peace negotiations proper were to take place. Once concentrated, a chronogram for demobilizations was drawn and demobilizations resumed at the end of 2004. From November of 2004 to February of 2005 almost 4,000 AUC members demobilized. Many among the demobilized troops, particularly its leaders, had ordered or committed precisely the types of serious crimes about which there was legal uncertainty. Thus, extremely important (arguably irreversible) steps in the demobilization process were taken under complete legal uncertainty, with no terms of individual accountability and liability specified for serious crimes that were often committed.

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<sup>6</sup> Pardo gives a summary of the draft law he proposed – which turns out to be strikingly similar to JPL after the Colombian Constitutional Court’s revisions – in his contribution to Cynthia Arson, *The Peace Process in Colombia with the Autodefensas Unidas De Colombia–Auc*, Woodrow Wilson International Center for Scholars, Washington D.C., 2005, p. 18.

<sup>7</sup> All data on dates and numbers of demobilized troops come from the consolidated table in MAPP/OEA, 8<sup>th</sup> Report, Annex A. MAPP/OEA reports are available at <http://www.mapp-oea.org>. More detailed information on demobilizations is available from the Colombian High Commissioner of Peace, at: <http://www.altocomisionadoparalapaz.gov.co/web/index.asp> (last accessed August 2007).

As a matter of fact, such decisive steps taken in spite of legal uncertainty has been a distinctive mark of the transitional process. It has mostly paid off for the government – and arguably for the AUC – as it has been a way of putting pressure on Congress and other State organs to follow suit, with some amount of arm-twisting involved. In February of 2005, with about 5,000 paramilitary troops commencing their reintegration process and over 10,000 in the brink of demobilization, the AUC decided to put the process on hold and wait for Congress’s approval of the JPL.<sup>8</sup> Similarly, by the end of 2005, when the Constitutional Court was studying demands against the JPL, there were already about 14,000 demobilized troops, the legal situation of many of which depended decisively on the Court’s pronouncement. Paramilitary leaders had at the time full access to the public media and hence to the opportunity of making public threats, which they effectively did.<sup>9</sup>

As the trajectory so far suggests, the main locus of (dis)agreement in the peace negotiations has been the law. Instead of a finalized and duly signed peace accord, the process produced the Justice and Peace Law. Even though the AUC chiefs had earlier rejected the milder Law of Alternative Penalty as overly strict and unduly blind to their political status, when the JPL was passed in Congress prominent paramilitary chief Salvatore Mancuso publicly stated that the Law

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<sup>8</sup> See MAPP/OEA, 5<sup>th</sup> report, §4.

<sup>9</sup> In this regard, it is illustrative how the Constitutional Court’s public announcement of its ruling on JPL somehow came two months before the release of the official written sentence, and was made in two steps. In the first step it was said that in cases for which a sentence had already been made (typically *in absentia*), benefits of JPL would not apply. In the second official pronouncement, which was delivered as a clarification, it was said that past sentences would be put on hold and reactivated only if the requirements to obtain the JPL benefits were not satisfied (see Section 1.2.2. below for details). There was the rumour that there had been some recanting by the Court due to political pressures, as the process was indeed very near collapse after the first pronouncement. Be this as it may, the two pronouncements, which were made by different Court Justices, certainly showed deep fissures inside the Court. For the Court’s president’s version, see Maria Isabel Rueda, “¿Es cierto que la corte ‘reculó’ con el fallo de la Ley de Justicia y Paz?” [“Is it true that the Court recanted in the JPL sentence?”], *Revista Semana*, 27 May 2006.

was in fact “sufficient” for them.<sup>10</sup> Indeed, later on the paramilitary chiefs claimed that the original version of the JPL, prior to the Constitutional Court’s revisions, was a closed deal between the government and the AUC, and in this vein AUC leaders declared that changes to the original Law were a breach of promise. The truth is that the executive was in no position to deliver the Law as a peace accord, and moreover, given the foreseeable international and domestic political reactions, probably did not intend to do so either. The Colombian Constitution empowers the Constitutional Court to review all legislation upon demands of unconstitutionality, and, as could be expected, several demands were filed against the JPL. The Court reviewed and pronounced its main verdict on the JPL on June of 2006, changing some key provisions and making it tougher overall (see Section 1.2 below for details).

The main Constitutional Court’s ruling on the JPL – C-370 of 2006 – marked a key moment in the peace process and unleashed a deep crisis. The Court stated that the broad purpose behind the JPL was valid, but added that the Law had to be more stringent in order to comply with constitutional and international legal standards. In the Court’s view the balance between peace and justice sought by the Law was not in line with the Colombian Constitution. In consequence, the Court took over the task of re-balancing the Law in a way that would not affect excessively the rights and interest of victims, and that would protect sufficiently the broad values of peace and justice.<sup>11</sup> The Court struck down some crucial passages in the Law, making it overall tougher. Among the changes that worried paramilitary chiefs were the following: time spent in a “concentration zone” would not count as part of the penalty; all assets (not only illegally obtained assets) should

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<sup>10</sup> Carmen Andrea Becerra, “Crónica de una ley hecha a la medida” [“Chronicle of a tailored law”], *Le Monde Diplomatique, Edición Colombia*, October 2006. The paramilitaries publicly declared early in the process that they wanted a high profile political negotiation, not a mere plea bargaining, and, moreover, that they would not spend one single day in jail (“Comunicado De Las Autodefensas Sobre El Proyecto De Alternatividad Penal”, *Revista Semana*, 11 April 2004). At the end, the political pressures for a regime of reduced penalties was overwhelming; here the shadow of the International Criminal Court but especially the US played a decisive role.

<sup>11</sup> For details on the Court’s balancing act, see C-370, §5.

be available for reparations; a false confession is sufficient reason to lose all JPL benefits; paramilitary groups and crimes linked to paramilitary activities have no political status. These had all been contentious elements at the time the JPL bill was debated publicly and in Congress.<sup>12</sup>

In August of 2006, shortly after the Court's pronouncement, president Uribe gave the order to put all paramilitary chiefs under temporary custody in a small town called La Ceja. The order was presented publicly as a disciplinary measure in reaction to the misbehaviour of some paramilitary chiefs which had caused much public outrage, but was in all likelihood also linked to the Court's ruling. Most chiefs complied with Uribe's order, but a few decided to leave the process at that point. Foremost among these was Vicente Castaño, who by all accounts was assassinated a few months later, allegedly by his own bodyguards. The government's assurance to the paramilitaries that ways would be found around an eventual unfavourable Court ruling were not to the complete satisfaction of all paramilitary commanders. After his escape Castaño declared that the government had broken the peace agreement, and that he would turn himself back in only if the government stuck to the original accord, which, he claimed, was more lenient and included a no-extradition-to-the-US proviso.<sup>13</sup> Castaño's claims are hard to assess because the executive kept the terms of the original agreements undisclosed, but at any rate, even though the process was at the brink of collapse shortly after the Court pronouncement, at the end it did not collapse. Several reasons may explain this: the paramilitaries may have felt they already had invested too much in the process and they may have consequently updated their expectations and come to see the strengthened Law as acceptable; or maybe they

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<sup>12</sup> For a rich sample of these deliberations see UNHCHR, 2005 Report (E/CN.4/2006/9), Annex V, §§16-26, and Rodrigo Uprimny and Maria Paula Saffon, "La Ley de 'Justicia y Paz': ¿Una Garantía de Justicia y de Paz y de no Repetición de las Atrocidades?" ["The Law of 'Justice and Peace': Guarantee of Justice, Peace and no Repetition of Atrocities?"], in Rodrigo Uprimny *et al.* (eds.), *¿Justicia Transicional Sin Transición? Verdad, Justicia Y Reparación Para Colombia* [*Transitional Justice without Transition? Truth, Justice and Reparation for Colombia*], DeJusticia, Bogotá, 2006.

<sup>13</sup> "La Historia Secreta" ["The Secret Story"], *Revista Semana*, 4 November 2006.



just believed that the government would somehow manage to remove the Law's new teeth in its application (for some teeth removals, see Section 1.2.2. below).

One thing the Castaño affair shows clearly is that extradition to the US has been the most decisive international legal instrument throughout the whole process. As is well known, paramilitary groups have been implicated to varying degrees in the production and shipment of illicit drugs to the US, and during negotiations several of their most prominent chiefs had pending requests of extradition to the US for charges of drug trafficking.<sup>14</sup> Paramilitary chiefs really feared the normal extradition path to the US (normal as opposed to the special route of making deals *ex ante* with US authorities, which drug-dealers sometimes do<sup>15</sup>), and president Uribe typically managed crises in the process very effectively by threatening to lift the suspension of extradition orders. The main reason why extradition could be used to such good effect is that, according to the Colombia Constitution, the president has discretion to decide upon duly petitioned cases of extradi-

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<sup>14</sup> According to a 2006 estimate by the International Crisis Group (ICG), fifteen top members of the AUC had extradition orders pending. See ICG, "Tougher Challenges Ahead for Colombia's Uribe", in *Crisis Group Latin American Briefing*, International Crisis Group, Bogotá/Brussels, 2006, p. 6.

<sup>15</sup> See "Las Autodefensas Queremos Negociar Con Los Gringos" ["The Self-defence Groups want to Negotiate with the *Gringos*"], *Revista Semana*, 7 October 2006. Two prominent Colombian journalists have shown that plea-bargains between US officials and drug traffickers have not been rare. The bargains are made behind the back of Colombian authorities and thus sidestep extradition procedures. To many drug traffickers this path has been attractive and some paramilitary commanders have attempted to take it. However, the human rights record of paramilitary groups plus the labelling of AUC as a terrorist organization by the US government in 2000 seems to have foreclosed this alternative path. See Edgar Téllez and Jorge Lesmes, *Pacto En La Sombra: Los Tratos Secretos De Estados Unidos Con El Narcotráfico* [*Pact under Shadows: The Secret Deals of the US with Narcotrafficking*], 1. ed., *Colección Premio De Periodismo*, Planeta, Bogotá, 2006.

tion.<sup>16</sup> Extraditions can be made for all and only conducts that are criminal in Colombia, except for so-called political crimes (Article 35).

Importantly, the principle of double jeopardy or *non bis in idem* normally applies to crimes for which extradition is requested, and therefore if a case is taken by or decided in the Colombian penal system, it can no longer be the basis for an extradition request. On this basis, paramilitary chiefs made several attempts to close the possibility of extradition to the US. One illustrative attempt made was to include in JPL an article that gave the formation of self-defence groups a political status. This would have “connected” – in a technical legal sense – their drug-related crimes to a political crime, and in this way made drug crimes, through a shady legal argument, extradition-proof.<sup>17</sup> If it is granted that drug trafficking is connected to the formation of self-defence groups – e.g., in a means-to-end relationship – then a key proviso in Law 782 that gives pardons for political crimes and “connected” (non-atrocious) crimes would apply.<sup>18</sup> As per the double jeopardy constraint, drug crimes tried (but pardoned) in Colombia could not be tried abroad. There was no occasion to see the US government’s reaction had this attempt succeeded because the Constitutional Court struck down the political status article of JPL and in this way gave the strategy a fatal blow. Nonetheless, alternative strategies of avoidance may still be available. For example, it is currently unclear whether the JPL framework can be applied to *all* cases that do not fall under Law

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<sup>16</sup> The Supreme Court has the faculty to decide whether a petition is duly made. Recent Colombian jurisprudence on extradition, on which my analysis is based, may be found in the Constitutional Court sentence SU110 of 2002.

<sup>17</sup> The shady argument – or rather one of them – boils down to the claim that paramilitary groups engaged in drug trafficking *in order to* surpass the military power of the guerrillas, which were themselves, it should be noted, involved in the drug business. Note that, according to the definition in the Colombian Code of Criminal Procedure, for crimes A and B, one way in which A is connected to B is if A *is a means to* B.

<sup>18</sup> According to Maria Paula Saffon (personal communication), even though the law as it stands is silent as to whether drug-trafficking can indeed be considered as connected to a political crime, there was significant resistance in Congress to have it treated as such. But the silence of the law in this regard clearly leaves open the possibility of making the connection.

782 or only to atrocious crimes and serious human rights violations (the JPL is surprisingly silent on this regard). It is unclear, then, whether cases of drug-trafficking may or may not enter the JPL framework.<sup>19</sup>

In any case, politically speaking it is clear that the Colombian government would never issue a blanket “extradition amnesty”, as some paramilitary chiefs requested at some point. The reason is not only that this would seriously compromise relationships with the US, but also that the government would have lost its most powerful stick in the process. In this sense, resistance by the US has been very useful to the government: it has allowed president Uribe to tie his hands profitably. The stick, moreover, has been instrumental not only to keep chiefs at bay during the negotiation process but also to discipline them after the process consolidated, when they were in jail waiting for their cases to be processed. Events showed all too clearly Uribe’s willingness to actually *use* the stick when a handful of top paramilitary chiefs were indeed extradited to the US in May of 2008. The main reason for the extradition, Colombian officials have said, is that these paramilitary chiefs continued to carry on illicit drug business from jail.<sup>20</sup> It is still to be seen whether the extradition will have a discouraging effect on all

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<sup>19</sup> The issue seems to hinge mainly on the interpretation of JPL Art. 2 which reads: “This law regulates matters of investigation, prosecution, punishment, and judicial benefits with respect to those persons linked to illegal armed groups as perpetrators or participants in criminal acts committed *during and on occasion of* their membership in those groups, who have decided to demobilize and contribute decisively to national reconciliation” (emphasis added). Nothing in the Law precludes the inclusion of drug trafficking as one of the criminal acts committed “during and on occasion” of membership.

<sup>20</sup> In a cataclysmic move by Uribe, top paramilitary chiefs Salvatore Mancuso, Jorge 40, Don Berna and Hernán Giraldo were all sent, along with ten others, to the US – all on the very same day and on board of the very same plane. Perhaps ironically, victims organizations opposed the extradition. They feared that once the paramilitaries were under custody of a US court, the process of truth-telling, reparations and punishment would not go on. It is still to be seen (October 2008) whether the US judiciary will somehow cooperate with Colombian authorities so that the process can continue. There is indeed something perverse in the public message sent if these men were tried for drug trafficking instead of serious violations of Human Rights.

relevant others (they may be already too entangled in the drug business to be able to leave it at will), and also whether or how it will hamper the transitional justice process.

One may wonder whether indictments from the International Criminal Court (ICC) could not eventually have a similar political and strategic effect as US extradition requests, all the differences between the two jurisdictions notwithstanding. My overall impression is that the shadow of the ICC has so far been relatively minor in the Colombian process. The late paramilitary commander Carlos Castaño – Vicente’s brother, at some point the leading man behind the AUC and a strong early advocate of peace negotiations – seems to have been acutely aware and fearful of transfers to The Hague, but his case is exceptional.<sup>21</sup> Even though paramilitary commanders are certainly aware of the risk of transfer to the ICC, and even though this perception possibly had some role in their change of mind about spending time in jail, that risk has been overshadowed by the formalized and imminent extradition requests from the US government.<sup>22</sup> The US has unsurpassed means to monitor the paramilitaries’ conduct, and has a strong expectation that they spend some time in prison. On the other hand, the perceived remoteness of the ICC may have to do in part with the fact that, when ratifying the Rome Statute in 2002, Colombia appealed to the transitional provision in article 124, which means that ICC jurisdiction over war crimes will begin only at the end of 2009. So things are likely to be different in future processes, for example with the FARC or ELN guerrillas.

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<sup>21</sup> See “Habla Vicente Castaño” [“Vicente Castaño speaks”], *Revista Semana*, 5 June 2005.

<sup>22</sup> Cf. Díaz, “Colombia’s Bid for Justice and Peace”, pp. 7, 14. Díaz’s illuminating analysis of the peace process tends to overplay, I think, the role of transfers to the ICC. The ICC did make a brief intervention at an early stage of the peace process, in April of 2005, when it sent an official letter to the Colombian government to the effect that the Court was aware and worried about serious violations of human rights in Colombia (see “El brazo largo de la justicia”, *Revista Semana*, 3 April 2005.) Admittedly the letter arrived at a critical moment, when the JPL draft was discussed in Congress, but, as far as public appearances go, the ICC has been absent throughout the rest of the process.

## 1.2. Accountability in the Legal Transitional Framework

The Justice and Peace Law is a transitional justice law and as such seeks to strike a balance between the imperatives of peace and the imperatives of justice. The purpose of the law is, as article 1 says, “to facilitate the processes of peace and individual or collective reincorporation into civilian life of the members of illegal armed groups, guaranteeing the victims’ rights to truth, justice, and reparation”.<sup>23</sup> Thus, the Law states the victims’ rights to justice, truth, and reparation as its three main substantive axes, which are supposed to operate as constraints in the process of reincorporation into civil life of former combatants. These axes aim to capture widely accepted standards of international law on the rights of victims of armed conflict. However, as critics of the Law have repeatedly observed, the important issue is not what the Law aims or declares to aim but what concrete mechanisms it puts into place for the satisfaction of these rights.<sup>24</sup> The following discussion of such concrete mechanisms will be divided into two subsections, substance and procedure. To the latter belong issues such as the terms of prosecutorial investigation and the special trial procedures and to the former the special regime of penalties and reparations.<sup>25</sup>

Before considering issues of substance and procedure, a few words about the Law’s place in the larger legal transitional framework are in order. Currently, legal support for demobilizations and for reincorporation into civil life of members of illegal armed groups comes from two main sources, Law 782 of 2002 and the JPL. Aside from these laws, the jurisprudence of the Constitutional Court (especially,

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<sup>23</sup> I quote from the English translation of the JPL made by the Colombian Commission of Jurists, on file with the author.

<sup>24</sup> See Uprimny and Saffon, “La ley de ‘justicia y paz’: ¿una garantía de justicia y de paz y de no repetición de las atrocidades?” in Rodrigo Uprimny *et al.* (eds.), *¿Justicia Transicional Sin Transición? Verdad, Justicia Y Reparación Para Colombia*, Bogotá, Dejusticia, 2006.

<sup>25</sup> My discussion does not intend to be exhaustive but rather to highlight central accountability mechanisms in the Law, and also to discuss some of the main criticisms it has received. For an excellent and thorough juridical analysis of the Law, see Florian Huber, *Ley de Justicia y Paz: Desafíos y Temas de Debate*, FESCOL, Bogotá, 2007.

but not exclusively, the Court's ruling C-370 of 2006), and a series of governmental decrees are the building blocks of the legal transitional framework. Nominally at least, the current legal transitional framework applies to members of any type of armed group,<sup>26</sup> be it a leftist guerrilla organization or a rightist self-defence group.<sup>27</sup> Recourse to the laws may be had individually or collectively, that is, the laws and decrees do not apply exclusively to members of groups that have demobilized as a whole but also provide incentives to favour individual defections from active armed groups.<sup>28</sup>

As pointed out in the previous Section, Law 782 of 2002 creates the legal space for conducting peace talks and demobilizations. It also offers amnesties to former combatants who have been sentenced or

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<sup>26</sup> The definition of "armed group" in Law 782 is very broad. Art. 3(1) gives two defining conditions: to have a responsible command structure that effectively exercises control over a territory, and to be able to carry "sustained and planned" military operations. Note that the Law makes no explicit mention to wearing uniforms or carrying weapons visibly, although it does say that such groups ought to conform to the norms of international humanitarian law.

<sup>27</sup> I say that the legal framework is open to all groups "at least nominally" because the design of Law 782 was tied to the project of having peace talks with the paramilitary groups and, more importantly, because the JPL was the result, to a large extent, of the particular vicissitudes of the peace negotiations with the paramilitaries in 2003 and 2004, as the previous Section has shown. For an analysis of the extent to which the JPL was tailored for the AUC, see Leopoldo Múnera Ruiz, "Procesos de paz con actores armados ilegales y pro-sistémicos", *Revista Pensamiento Jurídico* 17 (2006), pp. 68-69.

<sup>28</sup> This has been deemed a flaw of the JPL on the grounds that by allowing individual defections instead of demanding collective demobilizations, the law "ensures that the power structures of illegal armed groups keep functioning" (Rodolfo Arango, "La Ley de Justicia y Paz en perspectiva iusfilosófica", *Revista Pensamiento Jurídico* 17 (2006), 39; see also UNHCHR, "Consideraciones sobre la Ley de Justicia y Paz", Bogotá, 2005, §1; and CCJ, "Without Peace and without Justice", Colombian Commission of Jurists, Bogotá, 2005, § 2.1. As it stands, however, the argument is flawed, as it is clear that giving incentives for defection is a way of undermining the well-functioning and existence of armed groups. For example, according to recent (June 2008) estimates by the Colombian Commissioner for DDR, Frank Pearl, over 8,000 guerrilla fighters have demobilized through this channel, which has without doubt contributed to the weakening of their groups.

charged of so-called political crimes such as rebellion, sedition, rioting, and crimes connected with these. However, it does not – and could not, given the jurisprudence of the Constitutional Court – give amnesty for serious violations of human rights, e.g., for kidnapping, disappearances and massacres committed in and outside combat. The JPL takes care of the cases for which Law 782 does not provide amnesty.<sup>29</sup> Thus, the JPL creates a special regime of criminal and civil justice to deal with gross human rights violations committed by members of illegal armed groups. Of the total 31,689 AUC members who officially demobilized, only 2,812 (less than 9%) appear in the government’s list of candidates for JPL benefits,<sup>30</sup> which is not to say that this ratio reflects the ratio of serious to less-serious crimes committed, for those who did not apply to JPL may have opted for a sort of gamble, hoping that their serious crimes will not be discovered. If serious crimes are eventually discovered (which is not easy given the resources of the National Prosecutor’s Office and the number of cases), then their perpetrators will be processed under the harsher regime of ordinary criminal justice; this is the strategic core of the JPL. It should also be noted that law 782 does not consider any reparative measure. Claims of reparation are decided either on the basis of the JPL or of ordinary Colombian Civil Law. The JPL deals with reparations for serious violations of Human Rights and Humanitarian Law, ordinary law deals with ordinary torts.

### 1.2.1. Procedure

Candidates to the benefits of the JPL must be included in an official list that the government submits to the National Prosecutor. The JPL created a special unit of the Prosecutor’s Office — the “Justice and Peace Prosecutor’s Unit”, which is exclusively in charge of the JPL cases. For those included in the list, the first step is to render a “free version” before a special prosecutor. In free versions, a former combatant must “describe the circumstances of time, manner, and place in

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<sup>29</sup> Note that, as was said above, it is not wholly clear whether the JPL can take care of *all* such cases, particularly of drug-trafficking, which is not pardoned by Law 782 either.

<sup>30</sup> “En qué va la Ley” No. 3, Fundación Ideas para la Paz, Bogotá, 2007.

which they have participated in the criminal acts committed on occasion of their membership” to an illegal armed group (JPL, Article 17). Goods that can be used for reparations must also be declared at the free version. Each free version is announced publicly twenty days prior so that those having a claim of reparation against the alleged perpetrator or a personal stake in the process can be present. Victims present at the free audiences can suggest questions to the prosecutor and provide information relevant for the eventual indictment. Free versions, however, are not open to the public; it is necessary to be a *certified victim* to be present.

Once a free version has been rendered, the prosecutor begins the criminal investigation proper, which includes the verification of the truthfulness and completeness of the perpetrator’s confession. At the end of the investigation, charges are made before a Justice and Peace judge. At this point, victims may officially file claims of reparation against the accused. If the accused accepts the charges (that is, pleads guilty), the judge pronounces a sentence; if the charges are not accepted, the case exits the JPL framework and goes to the ordinary criminal system. After charges are accepted, the case splits into its punitive and reparative components. The perpetrator may dispute particular claims of reparation and conciliate with a victim on reparative arrangements. Sentencing is in the hands of the Justice and Peace judge and may be appealed before the Supreme Court.

The Constitutional Court made two key revisions to the JPL procedures. First, in the original version the prosecutor had an extremely tight deadline to verify the free version; the Court ruled that the time given should be sufficient to carry out a full prosecutorial investigation. Second, the Court widened the scope of the status of victim and in this way made free versions and individualized reparations in principle more accessible.

### **1.2.2. Substance**

The main benefit offered by the JPL is a reduced sentence, with the reduction conditional on the satisfaction of certain requirements (JPL may be described in a nutshell as a *law of conditional reduced penalties*). Under the regime of so-called “alternative penalties” (JPL, Arts.



29-31), sentences cannot exceed eight years or be less than five years. To have a sense of the reduction's size, note that under the Colombian penal code the sentence for aggravated homicide – of which a majority of applicants for the JPL benefits would probably be guilty – is fifty years in prison, and sentences for other crimes may be added to up to sixty years, which is the permissible maximum. Procedurally, a judge decides at the end of the JPL process what the penalty is according to the ordinary penal code, and then grants the benefit of a reduced sentence if applicable. The reduction is conditional throughout the sentence period and also over a “proof period” at the end of the sentence period; during this time a failure to satisfy the Law's requirements activates the longer ordinary sentence.<sup>31</sup> If all requirements are met after the period in question, the record of the beneficiary is cleared and he goes free.

The requirements to enjoy the JPL benefits are of two classes, access requirements and keeping requirements.<sup>32</sup> Satisfaction of the *access* requirements makes someone a suitable candidate for having the benefits (JPL, Arts. 10, 11); satisfaction of the *keeping* requirements is necessary to reach the last stage in the process, when the criminal record is cleared and the person goes free (JPL, Article 29). Among the main access requirements for combatants demobilizing as a group are that his group is not organized for the sake of drug trafficking, that the group is dissolved (which presumably includes handing in weapons, although the Law is not explicit), that assets sufficient for reparations are handed in to the state (in particular all illegally obtained assets), and that all kidnapped persons are freed.<sup>33</sup> For combatants demobilizing individually, the second requirement above is replaced with

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<sup>31</sup> The Constitutional Court intervened to assure that *all* previous sentences were added to the (latent) ordinary penalty (see C-370, § 6.2.1.6). For a gloss of the intricate jurisprudential issues involved see Uprimny et al. (eds.), *¿Justicia Transicional Sin Transición?*, pp. 208-15.

<sup>32</sup> The terms “access” and “keeping” are not in the Law.

<sup>33</sup> In keeping with the imperative to obtain vital information, the Court also made stricter the access requirements. To the original access requirement of liberating kidnapped persons, it added the requirement of disclosing all information about disappeared persons (C-370, §§ 6.2.2.2.7–11).

the requirement that they provide tactically useful information about their group.

Initially, keeping requirements were left vague in the Law. A key effect of the Constitutional Court's ruling was to define them more precisely and to make them more demanding.<sup>34</sup> As the Law originally stood, keeping requirements consisted mainly in a demobilized person agreeing to "commit himself or herself to contribute to his or her re-socialization through work, study, or teaching during the time that he or she is deprived of liberty, and to promote activities geared to the demobilization of the illegal armed group of which he or she was a member" (JPL, Article 29). The Court ruled that, in addition to this, a JPL beneficiary had to make a full and truthful confession in his free version before the prosecutor, and also that the beneficiary had to stay away from any form of criminal conduct. In the original version of the Law, discovery of undisclosed criminal acts would at most increase the alternative penalty by 20% (JPL, Article 25); the Court held that failure to tell the truth on past crimes was in effect a keeping requirement, that is, it activates the ordinary penalty (which may amount to about a 1,000% increase).<sup>35</sup> In the original version of the JPL, the requirement of non-recidivism applied only to the conducts for which the beneficiary had been condemned; the Court ruled that it should cover all criminal conducts.

One thing that the Constitutional Court did not do was to insist on the imperative of making retribution proportional to the gravity of crimes; indeed, it validated the mild regime of alternative penalties in

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<sup>34</sup> For understanding the details of the Constitutional Court's ruling in this respect (and others as well), I have relied on Margarita Zea, "Marco Jurisprudencial de Aplicación e Interpretación de la Ley 975 De 2005", Observatorio Verdad, Justicia y Reparación, ILSA, 2006.

<sup>35</sup> The government may have weakened this requirement in the regulatory decree 3391 of 2006. According to the decree (Art. 12), benefits are lost only if the undisclosed crimes are verified by a judicial sentence *finalized before the end of the "proof period"*. Given that finalizing a judicial sentence typically takes a long time, the requirement of truthfulness may have little bite in practice (see Múnica Ruiz, "Procesos de Paz", p. 90). For more on decree 3391, see "Boletín No. 4: Serie sobre los Derechos de las Víctimas y la Aplicación de la Ley 975", Colombian Commission of Jurists, Bogotá, 2006.

the JPL, in spite of the gravity of the crimes to which the Law applies.<sup>36</sup> The possible effects of such soft regime of penalties may be particularly worrisome given the wave of former low- and middle-level combatants who are at large and could potentially rise in the emerging structure of new illegal armed groups or criminal organizations; it is clear that they should be the primary targets of a strong deterring message. However, the Court is not alone in thinking that a regime of reduced sentences is legitimate. Several voices in public debates have defended some form of amnesties, if not blanket amnesties then some sort of “accountability pardons”.<sup>37</sup>

In regard to the way sentences could be served, the Court struck down a provision in the Law according to which the time spent in provisional demobilization areas could be counted as sentence time (up to 18 months). The argument was that conditions in such areas did not fit the character of a punitive seclusion centre. The Court further stated, more generally, that the places where the alternative penalty was to be served had to satisfy standard criteria of the Colombian penitentiary system. However, the government has seemed inclined to water down this element of the Court’s decision. One of its regulatory decrees has stated, first, that seclusion centres may hold “restorative programs” that contribute to national reconciliation (Decree 3391, Arts. 13, 19), which may in effect mean that places holding so-called restorative programs – for example industrial plantations (that is, farms) or “voca-

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<sup>36</sup> Múnera Ruiz, “Procesos de Paz”, pp. 80-82.

<sup>37</sup> Ivan Orozco has made by far the most sophisticated defence of amnesty. Simplifying much, in Orozco’s view the violence in Colombia has been horizontal, i.e., all sides in the conflict have been equally violent, and so there is ultimately no legitimate authority to punish; as everyone has been to some degree involved in violence, Orozco says, the focus should be on reconstruction rather than retribution (Iván Orozco Abad, *Sobre Los Límites De La Conciencia Humanitaria. Dilemas de la Paz y la Justicia en America Latina*, Universidad de los Andes, CESO and Editorial Temis, Bogotá, 2005. Uprimny has made a moderate defence of pardons. For him, pardons are valid only if they are clearly necessary for future peace and made on a case-by-case basis. Pardons should not be given in cases of serious wrongdoing, when there is high responsibility for atrocities, and if they do not otherwise produce dividends for truth elucidation and justice (Uprimny et al. (eds), *¿Justicia Transicional Sin Transición?*, pp. 28-29).

tional training” programmes – could count as prisons for former combatants. Second, the government’s decree holds, in what appears to be downright contempt of the Court, that the unconstitutionality regarding time spent in “concentration areas” does not apply retroactively (decree 3391, article 20), which seems to mean that such time will after all count towards the sentence.<sup>38</sup>

Turning now to reparations, the JPL follows standard doctrine of international human rights law by holding that reparations can be satisfied in several ways: it may be restitution of assets, payment of compensation, access to rehabilitation procedures, and guarantees that the crimes will not be repeated (JPL, Article 8).<sup>39</sup> The primary duty to repair falls first on the shoulders of the perpetrators and second on the State. The Law institutes a “reparation fund” to which perpetrators, the State, and international donors are expected to contribute. The National Commission of Reparation and Reconciliation (CNRR) – also a

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<sup>38</sup> It is hard to see where such use of the non-retroactivity principle could stop, for all changes introduced by the Court took place after the paramilitaries submitted to the terms in the original version of the Law. On the jurisprudential issues surrounding the use of the non-retroactivity principle in this and similar situations, see Constitutional Justice Beltrán’s dissenting opinion in C-370, §5.2. According to Beltrán, retroactivity is rather a non-issue because at the time of the Court’s ruling no JPL process had officially started. While it may seem far-fetched to claim that JPL was enacted law before any processes had started, the National Commission of Reparation and Reconciliation, for example, was indeed created prior to the Court’s ruling. In this sense at least, there is little doubt that the Law was indeed enacted prior to the Court’s ruling (I owe this point to Maria Saffon). The legal issues regarding the uses and abuses of the non-retroactivity principle are far beyond this footnote’s scope; for a recount and more detailed analysis, see “Siguiendo el Conflicto: Hechos y Análisis de la Semana” No. 45, Fundación Ideas para la Paz, Bogotá, 2006.

<sup>39</sup> The jurisprudence of the Inter-American Court of Human Rights has been particularly relevant in the Colombian context, as well as the expert reports submitted to, and the resolutions issued by, the United Nations Commission on Human Rights (after a long process of discussion and negotiation, the expert reports by Theo van Boven and M. Cherif Bassiouni eventually led to the Commission’s Resolution 2005/35 of 19 April 2005, stating the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”).

creature of the JPL – has issued general criteria for the judicial use of the reparation funds, whose allocation is in the hands of the Justice and Peace judges.<sup>40</sup> Further criteria from the CNRR for non-judicial (that is, administrative) reparations are expected any time, which should address the likely fact that reparation claims will be massive.

The legal procedure by which reparations are to be made begins with a claim from a victim or by a prosecutor on his or (most likely) her behalf to the effect that a wrong has been committed for which a remedy is due. In making the claim, evidence has to be produced before a judge, who decides whether the claim can be incorporated into the alleged perpetrator's file (JPL, Article 23). This proceeding has been criticized for putting an excessive burden on the victims, as it assigns to them the main responsibility of instituting a claim of reparation. It is clear that by making victims the main source of reparative claims, there is an additional incentive for former combatants to force them into silence, more so given that the Law explicitly stipulates that a victim's failure to exercise his or her right to claim reparations does not affect in any way the perpetrator's enjoyment of benefits (JPL, Article 23(2)). Threats to the leaders of victims' organizations have indeed been common, and some have ended tragically.<sup>41</sup>

The Constitutional Court contributed significantly to make the reparations regime in the JPL stricter, and overall more favourable to victims and less to perpetrators. In the original version of the Law, it was required only that illegally obtained assets be handed in for reparations, and also handed only "if they are available" (original Article 11(5)), that is, if they had not been sold or somehow alienated. Similarly, in the original version of the JPL the State's "subsidiary responsibility to repair" (that is, its duty to repair when the wrongdoer is either not indentified or lacking the means to adequately repair) was conditional on the availability of funds; instead of making funds for

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<sup>40</sup> The CNRR released its report on criteria of reparations in April 2007. It may be downloaded at [http://www.cnrr.org.co/new/interior\\_otros/RCRPR.pdf](http://www.cnrr.org.co/new/interior_otros/RCRPR.pdf).

<sup>41</sup> The murder of Mrs. Yolanda Izquierdo on January of 2007 has perhaps been the most noted one. See Human Rights Watch, "Colombia: Murders Undermine Credibility of Paramilitary Demobilization" (February 2007), available at <http://hrw.org/english/docs/2007/02/01/colomb15246.htm>.

reparation a priority in the national budget, the JPL downgraded their priority level. The Court ruled, first, that *all* assets of perpetrators should be used to discharge valid claims of reparation; moreover, perpetrators are obliged to hand in enough goods to cover not only the claims made against them individually, but also those made against their groups in cases in which it is impossible to assign individual responsibility (the Court thus instituted a regime of vicarious liability, or as its ruling says, a “solidarity duty” to repair). Second, the Court held that funds for reparation should be given priority in the national budget.

The government and the CNRR have repeatedly said that there should be no over-expectations about reparations, and that the main emphasis should be put on symbolic, collective and administratively allocated reparations, rather than individualized, monetary and litigation-based reparations. As is to be expected, such stance has been strongly criticized by victims groups, NGOs, and international actors. In the regulatory Decree 3390 (Article 17(1)), it is stated that a former combatant’s setting up productive projects in violent (or formerly violent) areas that could benefit displaced people and other victims – alongside, of course, the former combatant themselves – can be counted as a reparative measure. The effect of this provision is that former combatants can more easily comply with the access requirement of repairing their victims, but the outcome is likely to be utterly perverse: victims end up employed in plantations run by former paramilitaries, and such employment counts as a form of reparation of the bosses to their employers! The distinction between compensation for work and reparation for a wrong is perversely dissolved.

### **1.3. Conclusions**

The full legal transitional framework began running with its first free versions rendered on December of 2006. Commander Salvatore Mancuso was the first to appear. His declarations caused public stir because they involved high governmental officials – the current Minister of Defence, Francisco Santos, among others – and army officers. The information disclosed by Mancuso added to previous findings on the close links between national and especially regional politicians and

paramilitary groups, which have come to be termed by the Colombian media “the scandal of parapolitics”.<sup>42</sup> Several free versions have been rendered after Mancuso’s. Media reports, although under surveillance of the Prosecutor’s Office, consistently followed the initial steps in the process. By January of 2007, there were over 100,000 cases before the Justice and Peace Prosecutor; up to the end of April, over 50,000 denunciations from victims had been filed.<sup>43</sup> It will probably take a good while before the first JPL sentence is pronounced.

To conclude this Chapter, I would like to address briefly a widespread and general objection to the transitional process, which I believe strikes at the heart of the legal measures taken. The objection is that even if the current process succeeds in meeting its own standards (which itself is far from an easy task), the outcome will not be satisfactory; the reason is that the transitional law as it stands does not cut deep enough. As senator Pardo said in 2005, “paramilitarism is a phenomenon that goes beyond its armed or military manifestation; it is about the accumulation of political and economic power. Those aspects have not been considered in the government’s policy or in the peace process”.<sup>44</sup> The transitional legal framework may indeed result in a formal dismantling of paramilitary structures, but it is far from clear that it will undercut their influence in communal organizations, local (and to an extent national) politics, governance and economy. The transition may well end up just legalizing ties and powers that originated in crime and coercion instead of dismantling them, and will in this way sanction highly anti-democratic and inequitable forms of political control.

For example, it is to be seen the extent to which the current regime of expropriations and reparations will weaken paramilitary bosses or their allies financially. The prospects are not encouraging. So

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<sup>42</sup> See Juan Forero, “Paramilitary Ties to Elite in Colombia Are Detailed”, *Washington Post*, 22 May 2007. For more detailed analysis, see Gustavo Duncan, *Acerca de la Parapolítica*, Fundación Seguridad y Democracia, Bogotá, 2007; Leon Valencia, “Paramilitares y Políticos”, *Revista Arcanos* 13 (2007).

<sup>43</sup> *El Tiempo*, 7 January 2007.

<sup>44</sup> Arnson, *The Peace Process in Colombia with the Autodefensas Unidas De Colombia–Auc*, pp. 21-22.

far there have been no forced expropriations, only voluntary alienation of a few properties, and it is clear that wealthy paramilitaries can find easy ways to hide their assets or give them away to their kin, friends and allies.<sup>45</sup> The task of tracing these hiding transactions would be daunting for prosecutors. Equally important, it is uncertain that the legal transitional framework will contribute to dissolve the networks and associations that have allowed paramilitaries to become highly powerful regional political figures. Former paramilitary chiefs may continue to have influence in their regions, and may even become official political figures later on, as the transitional framework does not contemplate any sort of lustration or banning mechanisms. One may be inclined to say that the transition from war-lordism to official politics must be an improvement, but this is the case only if official politics are done cleanly, fairly and democratically. So far, the politics of warlords have been done mostly through intimidation, threats to (and murder of) competitors, and purchase of votes.<sup>46</sup> As we know, old habits die hard. Again, what the current process may in effect accomplish is to legalize and legitimize existing paramilitary political powers and their networks of influence.

The bulk of the peace negotiations went into fine, detailed transactions: how much for reparations, how long the punishment, what counts as prison, etc. But, as Antanas Mockus has noted, in the deliberations surrounding the transitional framework, instead of a discussion of public principles there was a discussion of private interests.<sup>47</sup> Officially, judicial truth has been privileged over historical truth; the CNRR lacks enough powers to do otherwise and only the zeal of the

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<sup>45</sup> Up until October 2007, the aggregated area of all estates given by the paramilitaries to the government in the context of JPL proceedings is 3,642 hectares. The most moderate estimate of the aggregated area of land abandoned by people displaced by the conflict is 2.6 million hectares, which means that the total returned land makes about 0,13% of the abandoned land. See Colombian Commission of Jurists, *Colombia: El Espejismo de la Justicia y la Paz. Balance sobre la Aplicación de la Ley 975 de 2005*, Bogotá, 2008, p. 201.

<sup>46</sup> For an account of the practices of paramilitary warlordism, see Gustavo Duncan, *Los Señores De La Guerra*, Planeta and Fundación Seguridad y Democracia, Bogotá, 2006.

<sup>47</sup> Antanas Mockus, personal communication (August 2006).



high courts in prosecuting co-opted politicians can produce a broad picture of the links between politics and paramilitarism. Now, attention to details and to the concrete and individualized mechanisms of justice-implementation are no doubt of paramount importance, but in the Colombian process the focus on detailed transactions seems to have come at the cost of a deeper and wider encompassing transitional process. The possibility of so doing is certainly not foreclosed, but it will require a shift of focus and a fair amount of political will.

Someone may say that this objection is over-demanding. After all, only so much can be asked from a transitional process. Indeed, a well established research foundation has argued that, compared with peace processes such as those in South Africa, Guatemala, Peru and Ireland, the Colombian process has comparatively high doses of accountability.<sup>48</sup> Aside from the fact that this assessment completely disregards recent cases in Southeast Asia and Africa, it is framed in the logic of detailed transactions. In addition to a sufficient dose of individual accountability, there are other necessary tasks in the Colombian transitional process, such as purging public offices and the armed forces, drafting a policy of land reform that takes into account the massive forced displacement brought about by the conflict, and reversing the penetration of the paramilitaries into regional politics.

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<sup>48</sup> Fundación Seguridad y Democracia, “Informe Especial: El Rearme Paramilitar”, pp. 5-10.



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## Justice, Truth, Peace

Jon Elster\*

### 2.1. Introduction

The mind seems to have a natural tendency to assume that all good things go together. We know from psychological studies that people dislike having to make trade-offs among different values.<sup>1</sup> The French Revolution was not based on the idea of an “optimal trade-off among equality, liberty and fraternity”, but on the (mostly tacit) optimistic assumption that these values supported and reinforced each other, so that more of one led to more of the others, not less. Although each of the three values is endlessly ambiguous, on many common understandings they are more likely to work against one another or limit one another than to favour one another. This question is not, however, my topic here.

Instead I shall consider a similar question that arises in the context of transitional justice. Although the bulk of the literature on that issue concerns transitions to *democracy* after an authoritarian or totalitarian regime,<sup>2</sup> there is an emergent understanding that questions of justice also arise in the transition to *peace*.<sup>3</sup> As will be explained below, these include but are not limited to transitional justice as traditionally conceived, notably punishment of wrongdoers and reparations to victims.

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<sup>1</sup> Eldar Shafir, Itamar Simonson and Amos Tversky, “Reason-based choice”, *Cognition* 49 (1993).

<sup>2</sup> Jon Elster, *Closing the Books*, Cambridge University Press, 2004.

<sup>3</sup> See notably Scott Gates, Helga Malmin Binningsbø and Tove Grete Lie, “Post-conflict justice and sustainable peace”, World Bank Working Paper 4191 (2007).

The issue I shall consider, therefore, is the relation among the aims of achieving *justice*, *truth* and *peace*. The main purpose of the chapter is to point to ways in which attempts to realize one of these aims may interfere – positively or negatively – with the others. In this Introduction I shall first briefly characterize each of the three aims, and then spell out the grounds on which their realization can be desirable. In doing so, my purpose is only to lay the necessary groundwork for later sections, not to undertake the impossibly ambitious task of providing a general analysis of these aims and the reasons to value them.

*The idea of peace* will be understood in a large sense. It includes the absence of armed conflict between and within states, the absence of violent repression of the population by the government, and social or civic peace. The last idea is somewhat amorphous, but will be taken to include (i) a low level of ordinary (criminal) violence, (ii) some form of psychological healing, and (iii) a cooperative attitude of public officials to the post-transitional regime. To put it the other way around, factors undermining civic peace include high rates of crimes against persons, strong emotions of hatred and resentment, and sabotage of the new regime by agents and collaborators of the former regime.

*The idea of justice* can be defined either in intrinsic (deontological) or in instrumental (utilitarian) terms. I shall be carefully agnostic with regard to the choice between consequentialism and non-consequentialism, for the simple reason that I do not believe this is the choice we face. Full-blown non-consequentialism – let justice be done even though the heavens might fall – is absurd. Full-blown consequentialism – such as allowing the killing of innocent individuals “*pour encourager les autres*” – is no less absurd. Any reasonable policy must have both consequentialist and non-consequentialist components. Unfortunately, I have no theory that would define the limit and the proper scope of each; nor, I believe, has anyone else.

*The idea of truth* seems more straightforward. In the context of transitional justice, however, what we seek is not truth *per se*, but *knowledge* – justified true belief. Hence the idea of justification, or proof, is crucially important. The publication of the names of allegedly guilty individuals without documentary proof or an opportunity for the accused to refute the charges does not amount to knowledge. In addi-

tion, we may note that what matters is often *public knowledge*, rather than simply judicial knowledge that might be kept *in camera*.

*The value of peace* is mainly the intrinsic one of alleviating suffering and of allowing individuals to get on with their lives. Often we value peace in the ordinary sense – the sense in which it is the antonym of war – because it brings *peace of mind*. For this outcome to occur, the peace must obviously be perceived as *durable*. In my view, peace has no instrumental value, in the sense of causing other desirable outcomes. Peace may be a condition for other good things – such as economic growth, or even justice and truth – but it does not bring them about.

*The value of truth* is two-fold. On instrumental grounds, one will usually be better able to realize one's aims if one has true beliefs about the world. Following a transition, for instance, it may be useful to be able to identify collaborators and agents of the previous regime to make sure they do not sabotage efforts to rebuild society. On intrinsic grounds, one may prefer to know the truth rather than live in a fool's paradise. A person may want to get access to his security file to learn whether certain individuals informed on him, even when the latter are no longer alive. Others, when faced with the same question, may decide that, for them, ignorance is bliss.

*The value of justice* – the value of living in a just society – can also be intrinsic or instrumental. The knowledge that one is treated with equal concern and respect, on a par with other citizens, can be a source of intrinsic satisfaction. More importantly, being the target of discriminatory behaviour can be deeply disturbing, even when the discrimination has no material consequences. An example would be the disenfranchisement of low-income or low-education citizens. If the conception of justice in question has a consequentialist component, its realization may also make the citizens better off in material terms.

I shall now proceed as follows. In Section 2.2 I examine the relations between justice and truth, in Section 2.3 the relations between justice and peace, and in Section 2.4 the relations between peace and truth. Whenever appropriate, I shall refer to current developments in Colombia, notably to the Justice and Peace Law. As is well known, the

Colombian situation is unique and highly complex. It involves not only the government and several insurgency groups, but also paramilitary groups and drug-lords. The highly opaque relations among these actors are determined by the interplay of money and violence, two currencies that in Colombia have been deployed in truly enormous quantities. Although these features may be unique, other aspects of the current situation in Colombia have much in common with what we observe in transitions elsewhere.

## 2.2. Justice and Truth

Justice may serve the goal of truth, produced as a by-product of the ordinary workings of the justice system. Trials of wrongdoers will make the wrongdoings known to the public, especially if they are tried on camera rather than *in camera*. The Nuremberg trials served this function, as did the trials of the Argentine military in the 1980s. In the latter country, when “the trial to the members of the military Juntas was initiated [...] the everyday media were flooded by the horrors of state terrorism”<sup>4</sup>.

Truth may also serve as a substitute for justice. Truth commissions, in South Africa and elsewhere, are typically created in circumstances where the leaders of an autocratic regime retain enough power to block or severely limit the extent of penal proceedings. The creation of a truth commission can then serve as a compromise. The findings of these commissions vary in their extent. In many countries, the main task has been to document wrongdoings and to identify victims. Except for South Africa and El Salvador, the task of identifying wrongdoers has not been part of the mandate of the commissions. In South Africa the exposure of wrongdoers did not lead to their prosecution if the commission found that their crimes were politically motivated. The truth commission in El Salvador also named the wrongdoers, but parliament granted them a full amnesty five days after the report was published.

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<sup>4</sup> Carlos H. Acuña, “Transitional justice in Argentina and Chile”, Jon Elster (editor) in *Retribution and Reparation in the Transition to Democracy*, Cambridge University Press, 2006, p. 211

Yet even in the absence of mandate, truth-finding may reveal the identity of the perpetrators. In Argentina, on a parallel track to the trials of a small number of military personnel, the government created the National Commission of the Disappeared, which documented 9,000 persons who had “been disappeared”. The commission itself did not name perpetrators, but someone inside it leaked 1,351 names to the press. Although Brazil never had an official truth commission, the Archdiocese of Sao Paulo secretly prepared a report on “Torture in Brazil” that received wide attention when it was published in July 1985. Five months later, the Archdiocese published a list of 444 torturers. In Chile, the truth commission documented 3,000 human rights violations and recommended extensive reparations. Although the report did not name perpetrators, the Communist party paper, *El Siglo*, published a list of the names of human rights violators.

In such cases, public knowledge of the identity of wrongdoers may, at least partially, serve the purposes of justice. According to Wechsler, the Brazilian torturers “had little more to suffer than the people’s contempt”.<sup>5</sup> This statement is somewhat misleading, however, since individuals publicly known to have committed wrongdoings may suffer social ostracism, which can be as painful as traditional forms of punishment. Thus A. O. Lovejoy quotes Voltaire as saying that, “[t]o be an object of contempt to those with whom one lives is a thing that none has ever been, or ever will be, able to endure. It is perhaps the greatest check which nature has placed upon men’s injustice”; Adam Smith that, “[c]ompared with the contempt of mankind, all other evils are easily supported”; and John Adams that, “[t]he desire of esteem is as real a want of nature as hunger; and the neglect and contempt of the world as severe a pain as gout and stone”.<sup>6</sup> In addition to being targets of contempt and ostracism, known wrongdoers may also suffer physically. In Argentina, one navy captain who was well known for his bru-

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<sup>5</sup> Lawrence Wechsler, *A Miracle, a Universe, Settling Accounts with Torturers*, University of Chicago Press, 1978, p. 76.

<sup>6</sup> Arthur O. Lovejoy, *Reflections on Human Nature*, Johns Hopkins Press, 1961, pp. 181, 191, 199 respectively.

tal acts “suffered dozen of attacks [...] by strangers on the street or people who say he tortured them and their relatives”.<sup>7</sup>

Shaming and revenge, even when based on accurate information, do not amount to justice, however. In a civilized society, justice should be left to the courts, not to observers of wrongdoings or victims of wrongdoings. This statement is even more obviously true when names of wrongdoers are made public without proper verification of their guilt. In several post-Communist countries, lists of large numbers of alleged informers or collaborators have been posted on the Internet: 75,000 in the Czech Republic and 160,000 in Poland. The security archives on which the lists were based are notoriously incomplete and inaccurate (some files being mere fabrications), thus giving rise both to false positives and false negatives.

Although one can easily imagine the reactions of the individuals who were named, there has not, to my knowledge, been any systematic study of the subject. In a small-scale precedent from 1998, an unknown organization in Lublin (Poland) published the names of 119 persons who had allegedly cooperated with the militia before 1989. Two of the individuals who were named killed themselves.<sup>8</sup> It seems reasonable to assume that the longer lists had similar effects. Arguably, this “rough justice” is worse than abstaining altogether from seeking justice. Note that in these cases, unlike the Latin American ones, there is not even the excuse that ordinary legal prosecution was unavailable.

Truth may also be an instrument for providing justice to victims. This idea comes in a modest and in a more ambitious version. In the modest version, fact-finding by truth-commissions can lay the factual groundwork for reparations to victims. The South African and Chilean commissions, for instance, performed this task. The South African Commission also made the more ambitious claim that truth may contribute to “restorative justice”. Knowledge of the facts is obviously a necessary condition for the victim-perpetrator interactions that are supposed to be at the core of restorative justice. Whether – in the ab-

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<sup>7</sup> *New York Times*, 12 August 1997.

<sup>8</sup> Keszek Kuk, *La Pologne du post-communisme à l'anti-communisme*, l'Harmattan, Paris, 2001, p. 209.



sence of retributive justice – these interactions are likely to do much good is another matter. One might think that from the victim’s point of view, knowing who the offender is *and* knowing that he will go free is likely to generate resentment and bitterness rather than catharsis and healing. Given offender immunity, ignorance about offender identity might be better. This is to some extent an empirical matter, on which it seems that the jury is still out.<sup>9</sup> Yet independently of the feelings that may be created, I believe – as stated earlier – that the rule of law favours a clear separation of victim and offender rather than their interaction.

There is also some evidence that in the aftermath of a civil war, physical separation rather than interaction favours peace. The amnesty that the Athenian democrats granted to the oligarchs in 403 B.C. went together with a demand that the oligarchs leave the city. The French wars of religion came to an end only when the Protestants were granted their own fortified cities, after the failure of earlier attempts to have Protestants and the Catholics coexist on a local basis.<sup>10</sup> Writing about Bosnia, Nalepa says that, “the strategy developed by the War Crimes Chamber staff is to begin prosecutions with those perpetrators who are most visible in public life. If administered consistently, this will gradually create an incentives mechanism for former perpetrators to shy away from public office [...] This outcome also satisfies victims, who are not confronted by the glaring presence of their former perpetrators on a daily basis.”<sup>11</sup> In the Colombian context, a relevant measure might be to ensure that demobilized paramilitaries and members of guerrilla forces do not resettle in areas where they inflicted harm on civilians. To cite another example, it may be impossible to settle the Israeli-Palestine conflict if Jerusalem is to be the Holy City of both religions.

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<sup>9</sup> See special issue of *Journal of Peace Psychology*, v. 13, no. 1 (2007).

<sup>10</sup> Oliver Christin, *La paix de religion*, Liber, Paris, 1997.

<sup>11</sup> Monika Nalepa, “Why do they return? Evaluating the impact of ICTY justice on reconciliation”, University of Notre dame, unpublished manuscript.

### 2.3. Justice and Peace

In 1944, Henry Morgenthau, Secretary of the Treasury in the Roosevelt administration, devised a plan for how to deal with Germany after it was defeated.<sup>12</sup> He wanted to set the clock back to 1810, and turn the country into a “pastoral economy”. The coal mines in the Ruhr should be flooded or dynamited and sealed for fifty years to make the Germans “impotent to wage future wars”. The Germans should be prohibited from developing any kind of industry that could be converted into military production (ploughshares into swords). “If you have a bicycle, you can have an airplane. [...] If you have a baby carriage, you can have an airplane.” Although Morgenthau initially persuaded both Roosevelt and Churchill to go along with his plan, they backed off when it became clear that it might have negative effects on the conduct of the war. As George Marshall, William Donovan and others pointed out, knowledge of the extreme severity of their punishment would stiffen the German will to resistance. For this reason (and for several others), the plan was not implemented in its draconian form.

Justice and peace have been at odds in other cases too. In Bosnia, France and Britain “saw the issue of war criminals as a potential impediment to making peace in ex-Yugoslavia, binding the hands of policymakers who might have to cut a deal with criminal leaders”.<sup>13</sup> In another example, a “perverse scenario of inducing a dictator to fight for his survival may have happened recently when the prosecutor for Sierra Leone’s International Criminal Tribunal indicted Charles Taylor in Nigeria. This action prevented diplomatic efforts from striking a deal with the former dictator, who arguably could have facilitated a smoother transition”.<sup>14</sup>

We have to be careful, though, in characterizing these conflicts in terms of justice versus peace. Morgenthau’s desire for a heavy punishment was based on a non-consequentialist desire for vengeance. In recent discussions, the demand for severe punishment of dictators and

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<sup>12</sup> See Elster, *Closing the Books*, Chapter 7, for details and references.

<sup>13</sup> Gary Bass, *Stay the Hand of Vengeance*, Harvard University Press, 2000, p. 211.

<sup>14</sup> Kaminsky, M. and Nalepa, M., “Judging transitional justice”, *Journal of Conflict Resolution* 50 (2006), p. 396.

autocrats has been based on the consequentialist argument that courts must set a clear precedent to dissuade would-be dictators in the future. As noted by Otto Kirchheimer, the precedent might “backfire, however, if it induced the leaders of a future war to fight to the bitter end rather than surrender and face the possible future of war criminals”.<sup>15</sup> It is possible (although in my opinion psychologically implausible) that some aspiring dictators might refrain from grabbing power because of the consequences of losing it. It is certainly plausible, as we have seen, that the same fear may cause dictators to hang on to power longer than they would otherwise have done. I have yet to see a convincing argument why the first of these effects would dominate the second. Orentlicher merely asserts, with no argument (and one example), that “the prospect of facing prosecutions is rarely, if ever, the decisive factor in determining whether a transition will occur”.<sup>16</sup> If that were so, why would the prospect of facing prosecution be a decisive dissuasive factor?

Even if an argument to that effect were forthcoming, the advocate of strong punishment would also have to show that the long-term net benefits dominate the short-term cost of prolonging or rekindling conflict. For the non-consequentialist, this cost is of course irrelevant. After the fall of the military dictatorship in Argentina, some human rights activists refused the pragmatic line of President Alfonsín, who feared that extensive punishment of the military might trigger a new coup. Consequentialists cannot, however, ignore short-term costs or risks. To accept the prolongation of a given conflict for the sake of the non-beginning of future conflicts they have to argue not only that the expected smaller number of future conflicts offsets their expected longer duration, but also that the net effect in the future exceeds the costs in the present. If one believes – as I do – that neither of these arguments can successfully be made, the idea of “sacrificing peace for justice” by punishing dictators severely has no consequentialist foundation. In fact, a consequentialist argument could be made for treating

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<sup>15</sup> Otto Kirchheimer, *Political Justice*, Princeton University Press, 1960, p. 325, fn. 290.

<sup>16</sup> Diane Orentlicher, “Settling accounts: The duty to prosecute human rights violations of a prior regime”, *Yale Law Journal* 100 (1991), p. 2549.

all dictators leniently, if I am right in my belief that this policy would reduce the duration of current and future conflicts while having little impact on the number of conflicts.

Yet this policy could run into either of two related problems: unpopularity and lack of credibility. The population at large may require that those responsible for wrongdoing and atrocities be severely punished. If they are not, the government might fall and the peace process might come apart. The wrongdoers, however, may not be willing to step down if they face the prospect of spending the rest of their life in prison. The question, then, is whether there exists a degree of punishment that is severe enough to satisfy the population and mild enough to satisfy the wrongdoers. In Colombia this window seems to exist, because of the threat of extradition to the United States that, as recent events show, is a highly credible one. At the same time, the Justice and Peace Law opened for the possibility that drug-lords could go free or receive reduced sentences, and at any rate escape extradition to the US, by virtue of the clause that granted amnesty for crimes with an “indirect” political purpose, the drug trafficking being a “means” to finance political ends.<sup>17</sup> This clause was later struck down by the Constitutional Court.

The Law in its original form was negotiated between the government and the paramilitaries. The fact that this crucial clause was struck down by the Court points to an intrinsic problem in the negotiated settlement of conflicts in a democracy. When the government negotiates with insurgents or paramilitaries, the latter know – or should know – that the government is constrained by parliament and the courts. It is in fact a defining characteristic of democracy based on the separation of powers that the government cannot force the legislative and judiciary branches to uphold its promises. This has been an acute issue in Latin American as well as in East European transitions.<sup>18</sup> In Colombia, the threat of extradition was credible because the govern-

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<sup>17</sup> Pablo Kalmanovitz, this volume.

<sup>18</sup> Elster, *Closing the Books*, Ch. 7; Monika Nalepa, *Transitional Justice in Post-communist Europe: Skeletons in the Closet*, Cambridge University Press, 2010, chapter 5.

ment had both the power and the motivation to carry it out if necessary, but it lacked the power to enforce the promise of amnesty for political crimes.

So far I have discussed tensions between peace and *transitional* justice. There is a need, however, also to address the relation between peace and *distributive* justice, a question that is especially important in the aftermath of civil wars. The general issue is the following: if a conflict settlement fails to address the root causes of the conflict and limits itself to the problems created by the conflict itself, the peace may very well fail to be a durable one. (The distinction between problems causing the conflict and problems caused by the conflict is not always sharp, since the root causes may be exacerbated by the conflict. Yet in many cases it is clear enough.) Root causes include distributive injustice, such as unequal distribution of land, but other causes such as religion and discrimination of minorities are also found. Here I limit myself to conflicts arising on distributive grounds, with the implication that a durable peace requires distributive and not only transitional justice.

The following anecdote provides an illustration. In one of the several conferences in Bogotá that I have co-organized with Antanas Mockus and Vice President Santos over the last years, James Fearon (Stanford University) made the following perceptive remark. “If a conference on political conflicts in Colombia had taken place here forty years ago, the name most frequently cited would have been Marx. Today, it is Hobbes.” In Colombia today, Hobbesian violence rather than Marxian exploitation is perceived as the main social ill. To create a durable peace, however, it is not enough to address the issue of violence by measures of transitional justice. One will also have to address the issues of exploitation, inequality and poverty by measures of distributive justice. Land reform is even more needed today than in the past, as vast land properties are concentrated in the hands of drug-lords and paramilitary leaders.

Ideally, new regimes should aim at both transitional and distributive justice. In South Africa the bulk of the black population received neither. Wrongdoers were not brought to justice, reparations to victims have been minimal, and there has been almost no land reform. The

country today has among the highest rates of murder, armed robbery and rape in the world. Although the causality is opaque, it is not unthinkable that this failure of civic peace can be traced back to the failures of justice. Although there is no collective violence that might be transformed into a civil war, the high level of individual violence shows that the conflict resolution is very far from perfect.

Given the need for both transitional and distributive justice, governments face an allocative question. They must decide whether to give priority to compensating victims of the conflict itself or to improving the situation of the landless poor in general. In abstract terms, should compensation be made on the basis of *entitlement* or of *need*?<sup>19</sup> Whereas the aim of a durable peace may favour the latter criterion, that of transitional justice may favour the former. Whereas redistribution often encounters great resistance among entrenched elites, transitional justice may command greater agreement. In the current demobilization process in Colombia, scarce resources are also devoted to subsidizing the ex-paramilitaries to prevent them from taking up their arms again. Although this may be a necessary measure to ensure a durable peace, victims of the conflict may see this subsidy to their perpetrators as deeply unjust.

#### **2.4. Truth and Peace**

Earlier I distinguished between several components of peace. With regard to the impact of truth on peace, I shall focus on peace as the absence of violent repression and as civic peace.

The most important effect of truth commissions is perhaps to make it impossible to deny that massive wrongdoings took place prior to the transition. In South Africa, many members of the white elite might have refused – in more or less good faith – to believe claims about apartheid wrongdoings had they not been so fully documented in the hearings of the Truth and Reconciliation Commission. The work of the commissions in Argentina and Chile also made it impossible to sustain the myth that the dictatorships were justified by the task of weeding out criminal subversive elements. If the truth had not been

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<sup>19</sup> Elster *Closing the Books*, Chapter 6.

publicly recognized, the new regimes might have been jeopardized and the previous repressive regime been restored. The work of the truth commissions underwrote the enormously effective message “Never Again”.

The most important impact of truth on civic peace concerns the effort to stabilize the new regime. If agents and collaborators of the old regime remain in high office after the transition, there is a risk that they may either work actively to undermine the new regime or be vulnerable to blackmail by members of the former security services who are aware of their involvement. For both these reasons, it is important to find out the truth about their past. In Poland, Romania, Estonia and Lithuania, security files have been used as an instrument of truth *revelation*, by creating an incentive for individuals to tell the truth about their involvement with the pre-transitional regime. In this procedure, known as “lustration”,<sup>20</sup> individuals seeking elective or high appointive office are asked whether they ever collaborated with the security services under Communism. If they answer Yes, voters or administrators are free to elect or appoint them – or not. If they answer No and are later found out to have lied, they are blocked from office for a certain number of years. (This solves the problem of retroactivity, since they are not penalized for “what they did then” but for “what they say now about what they did then”). A similar procedure has been used in South Africa, where individuals testifying before the Truth and Reconciliation may be denied amnesty if they do not tell the full truth about their involvement with apartheid crimes.

The *gacaca* courts in Rwanda offer sentence reduction in exchange for full disclosure. This idea is also applied in the Colombian peace process. As noted by Pablo Kalmanovitz in his Introduction to this volume, the Justice and Peace Law has created the possibility of “gambling with the truth”, by offering the incentive of reduced sentences in exchange for full confession and reparation to victims. If a serious wrongdoer gambles (does not apply for the benefits provided by the Law) and loses (is found out), he faces ordinary criminal law sentences, which are five or ten times higher than those imposed by the

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<sup>20</sup> Kaminski and Nalepa, “Judging transitional justice”.

Justice and Peace Law. If he wins (his crimes are not discovered), he serves a reduced sentence. The efficacy of this procedure obviously depends on the government's knowledge (or more accurately: on the belief of the wrongdoers about the government's knowledge) about serious crimes and on its capacity to enforce prosecutions.



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## International Criminal Law Restraints in Peace Talks to End Armed Conflicts of a Non-International Character

Claus Kreß and Leena Grover\*

### 3.1. Introduction

[T]here should be on the one side and the other a perpetual oblivion, amnesty, or pardon of all that has been committed since the beginning of these troubles ... in words, writings, and outrageous actions, in violences, hostilities, damages and expenses.<sup>1</sup>

The two Peace Treaties of Westphalia (1648) that ended the Thirty Years War contained the amnesty clause above,<sup>2</sup> which formed the basis for a consistent State practice within Europe regarding the transition from war to peace.<sup>3</sup> In a leading treatise on international law, this practice led to the conclusion that, “unless the contrary is expressly

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<sup>1</sup> Article 2, Peace Treaties of Westphalia, repr. in Fania Domb, “Treatment of War Crimes in Peace Settlements – Prosecution or Amnesty?”, *Israel Yearbook on Human Rights* 24 (1995), pp. 255-256.

<sup>2</sup> An amnesty is the “...sovereign act of oblivion for past acts, granted by a government to all persons (or to certain persons) who have been guilty of crime or delict, generally political offences, - treason, sedition, rebellion, - and often conditioned upon their return to obedience and duty within a prescribed time.” It is “the abolition and forgetfulness of the offence...”, *Black’s Law Dictionary*, 5<sup>th</sup> Ed., Thomson West, 1983, p. 76.

<sup>3</sup> Domb, *supra* n. 1, pp. 255-256.

stipulated in the treaty, so called war crimes which were not punished before the conclusion of peace may no longer be punished after its conclusion”.<sup>4</sup> This finding echoed Immanuel Kant’s famous words in 1797 that amnesty is implied in the very concept of the conclusion of peace.<sup>5</sup> It was only the peace settlements after the First World War that initiated a change. The new policy was “based on the twofold principle of prosecution of war criminals from among the vanquished aggressor States, on the one hand, [...] and the granting of an amnesty to eventual war criminals who acted against the aggressor States”.<sup>6</sup>

While this policy of asymmetrical prosecution was the State practice for war crimes committed in the Second World War, the 1949 Geneva Conventions (GCs) established a symmetrical legal duty to try or extradite perpetrators of a core category of war crimes, the so-called grave breaches of the GCs.<sup>7</sup> This new legal regime of *aut dedere aut judicare* for international armed conflicts was confirmed and expanded through the 1977 First Additional Protocol to the Geneva Conventions (AP I).<sup>8</sup> In her 1994 study on the “Treatment of War Crimes in Peace Settlements”, Fania Domb linked this legal development to the emergence of the concept of *jus cogens* in international law, and consequently reached the following conclusion that turned the traditional European international law concerning amnesties on its head: “[A]n international settlement providing for an amnesty for war crimes would nowadays be null and void, on the ground of derogation from a peremptory norm of repression of war crimes”.<sup>9</sup>

At first sight, the legal situation appears to be radically different in respect to crimes committed during non-international armed con-

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<sup>4</sup> Hersch Lauterpacht, *Oppenheim’s International Law*, 7<sup>th</sup> Ed., David McKay Company Inc., 1952, p. 612.

<sup>5</sup> Immanuel Kant, *Metaphysik der Sitten. Erster Teil Anfangsgründe der Rechtslehre*, Verlag Felix Meiner, 1954, p. 179 (§ 58 *in fine*).

<sup>6</sup> Domb, *supra* n. 1, p. 256

<sup>7</sup> Art. 49 GC I, Art. 50 GC II, Art. 129 GC III, Art. 146 GC IV; repr. in *Documents on the Laws of War*, 3<sup>rd</sup> Ed., Roberts and Guelff (eds.), Oxford University Press, 2000, pp. 215, 238, 295, 352.

<sup>8</sup> Art. 85, repr. in Roberts and Guelff, *supra* n. 7, p. 470.

<sup>9</sup> Domb, *supra* n. 1 at pp. 264, 265.

flicts. The relevant treaty provisions do not set up a system of grave breaches and Article 6(5) of the 1977 Second Additional Protocol to the Geneva Conventions (AP II) reads as follows:

At the end of the hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to armed conflict, whether they are interned or detained.<sup>10</sup>

This explains why Domb thought that amnesties were expressly permitted, recommended even, at the end of non-international armed conflicts.<sup>11</sup> Her legal assessment was made, however, one year before the groundbreaking *Tadić* decision (1995) in which the International Criminal Tribunal for the Former Yugoslavia (ICTY) recognized the existence under customary international law of war crimes committed in non-international armed conflict (civil war crimes),<sup>12</sup> and four years before the drafters of the Rome Statute of the International Criminal Court (1998) (ICC Statute) adopted the same view.<sup>13</sup>

The purpose of this contribution is to determine whether States have a duty under international law to prosecute perpetrators of genocide, crimes against humanity and war crimes committed during a non-international armed conflict, and if so, whether this duty leaves room for transitioning societies to invoke alternatives to prosecution. These include alternative (reduced) sentences (as in Colombia),<sup>14</sup> conditional

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<sup>10</sup> Repr. in Roberts and Guelff, *supra* n. 7 at p. 488.

<sup>11</sup> Domb, *supra* n. 1 at pp. 266, 267.

<sup>12</sup> ICTY, *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995 at paras. 65 *et seq.*, in particular paras. 128-136.

<sup>13</sup> Art. 8(2)(c) to (f), repr. in *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> Ed., Triffterer (ed.), Verlag C. H. Beck/Hart Publishing/Nomos, 2008, at pp. 277, 278.

<sup>14</sup> Peter Burbridge, "Justice and Peace? - The Role of Law in Resolving Colombia's Civil Conflict", 8 *International Criminal Law Review* (2008) at p. 557.

amnesties (as in South Africa),<sup>15</sup> traditional forms of justice (as in Rwanda)<sup>16</sup> and blanket amnesties (as in Sierra Leone).<sup>17</sup>

Defined in this way, our contribution deals with a rather specific question of international criminal law, a question that forms a limited part of the much broader topic of transitional justice,<sup>18</sup> and that stands in the vicinity of the emerging topic of a *lex pacificatoria*.<sup>19</sup> Even within these confines, we do not aim to present an encyclopaedic summary of the rapidly evolving international practice and case law. Instead, we seek to ascertain and clarify the main legal developments and the correlative scholarly discussion. In so doing, our analysis will deal with all three levels of criminal jurisdiction over crimes under international law committed during a non-international armed conflict: the territorial State, the ICC and third States exercising universal jurisdiction.

### **3.2. Legal Method and the Need for Restraint in the Field of Transitional Justice**

Since the 1990s, customary international criminal law has developed in ways that fall short of the stringent test articulated in the North Continental Shelf case (1969).<sup>20</sup> This is particularly true for the crystalliza-

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<sup>15</sup> Catherine Jenkins, “A Truth Commission for East Timor: Lessons from South Africa?”, 7 *Journal of Conflict and Security Law* (2002) at p. 233.

<sup>16</sup> Gerd Hankel, “Vergangenheitsbewältigung durch die Justiz? - Das Beispiel Ruanda” in *Vom Recht der Macht zur Macht des Rechts? Interdisziplinäre Beiträge zur Zukunft internationaler Strafgerichte*, Neubacher and Klein (eds.), Duncker and Humblot, 2006, at p. 263.

<sup>17</sup> Simon M. Meisenberg, “Legality of amnesties in international humanitarian law: The Lomé Amnesty Decision of the Special Court for Sierra Leone”, *International Review of the Red Cross* 86 (2004), at p. 837.

<sup>18</sup> For a helpful overview, see Carsten Stahn, “The Geometry of Transnational Justice: Choices of Institutional Design”, 18 *Leiden Journal of International Law* (2005) at 425.

<sup>19</sup> For a good introduction, see Christine Bell, “Peace Agreements: Their Nature and Legal Status”, 100 *American Journal of International Law* (2006) at 373.

<sup>20</sup> ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark)*, Judgment, 20 February 1969 at 3, 44 (para. 74).

tion of civil war crimes under customary international law.<sup>21</sup> In the eloquent words of Luigi Condorelli, the adoption of Article 8 of the ICC Statute marked,

[l']enrichissement du droit international humanitaire d'importance exceptionnelle: il s'agit de l'aboutissement et de la consecration solennelle d'un processus coutumier qui, en l'espace de quelques années seulement, a reformé de manière fondamentale le droit conventionnel de 1977.<sup>22</sup>

Indeed, the emergence of customary civil war crimes reflects what Bruno Simma and Andreas Paulus have called a modern positivist understanding of the process of international law-making.<sup>23</sup> In full accordance with this approach, the Tadić decision (1995) stated that a rule of international humanitarian law may be ascertained by primarily relying on “elements such as official pronouncements of States, military manuals and judicial decisions”.<sup>24</sup> In the following analysis, we will subscribe to this methodological starting point and would even be prepared to add a degree of deductive reasoning to it because we be-

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<sup>21</sup> For a somewhat more detailed exposition of this view, see Claus Kreß, “War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice”, *Israel Yearbook on Human Rights* 30 (2000), pp. 104-109. This development is usefully placed in a more general context by Anja Seibert-Fohr, “Unity and Diversity in the Formation and Relevance of International Law: Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order” in *Unity and Diversity in International Law*, Zimmermann and Hofmann (eds.), Duncker and Humblot, 2006, at 257.

<sup>22</sup> L. Condorelli, “La Cour Pénale Internationale: un Pas de Géant (pourvu qu’il soit accompli ...)”, *Révue générale de droit international public* 103 (1999) at 11.

<sup>23</sup> Bruno Simma and Andreas Paulus, “The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View”, 93 *American Journal of International Law* (1999) at 302 *et seq.* We will not pursue the largely academic debate of whether the “modern positivist” approach should be disconnected from custom and be conceptualized under the separate and new heading of “general principles of international law”. For an important scholarly view in this direction, see Bruno Simma, “International Human Rights and General International Law: a Comparative Analysis”, *Collected Courses of the Academy of European Law* 4 (1995) at 224 *et seq.*; and Seibert-Fohr, *supra* n. 21 at 278-280.

<sup>24</sup> *Tadić*, *supra* n. 12 at para. 99.

lieve that States acknowledge the need for international criminal law to achieve internal coherence.<sup>25</sup> At the same time, we would insist that hard State practice carries most weight where it can be identified. In our context, this means that careful attention must be paid to what States in transition actually do and whether and how other States react in legal terms to the solution adopted in a given case. Finally, the modern positivist approach entails the possible emergence of vulnerable legal rules – rules that are not (yet) very resistant to change. As will be seen, such rules permeate the field of transitional justice.<sup>26</sup> Where a State acts in such a situation of legal vulnerability, its dual role as subject and creator of international law becomes most visible. As such, States in transition apply existing law and, in so doing, contribute to its refinement.

It is important to note that the field of transitional justice is so diverse and complex that it does not lend itself easily to the formation of “hard and fast” legal propositions.<sup>27</sup> The international lawyer should heed the words of Jon Elster, a learned transitional justice scholar, who confesses that he has “found the context-dependence of the phenomena

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<sup>25</sup> For the insertion of elements of deduction into the process of identifying rules of international law in our context, see also Theodor Schilling, “Ungeschriebene Strafpflichten”, 54 *Zeitschrift für öffentliches Recht* (1999) at 387 *et seq.* For such an argument in the context of universal jurisdiction, see Claus Krefß, “Universal Jurisdiction over International Crimes and the *Institut de Droit International*”, 4 *Journal of International Criminal Justice* (2006) at 573-574.

<sup>26</sup> On customary international law’s relative resistance to change, see Michael Byers, *Custom, Power and the Power of Rules*, Cambridge University Press, 1999, pp. 157-160.

<sup>27</sup> In his report, “The rule of law and transitional justice in conflict and post conflict societies”, the UN Secretary-General understands the notion of “transitional justice” to comprise “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination hereof” (S/2004/616, 23 August 2004).

to be an insuperable obstacle to generalizations”.<sup>28</sup> In a similar vein, Mahnoush H. Arsanjani rightly points out that legal questions of the kind discussed in the following analysis “cannot be readily addressed by reference to black-letter law techniques of legal analysis because [they] involve fundamental questions of policy with far-reaching implications for the international human rights program and the maintenance of minimum public order”.<sup>29</sup> To this it may be added that, in attempting to answer the legal questions raised in this comment, one must recognize the terrible dilemmas that negotiators may confront in their endeavour to end a violent (non-international) conflict. We thus begin with a strong sense of caution as to the appropriateness of offering too stringent and detailed a legal response and a sense of hesitation in believing that the legal answers found will be entirely satisfactory in all possible circumstances.

### **3.3. Territorial States and the Prosecution of International Crimes**

#### **3.3.1. Treaties of International Criminal Law and International Humanitarian Law**

Genocide, crimes against humanity, war crimes and the crime of aggression are crimes under customary international law.<sup>30</sup> Two treaty

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<sup>28</sup> Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, 2004, at 77.

<sup>29</sup> Mahnoush H. Arsanjani, “The International Criminal Court and National Amnesty Laws”, 93 *American Society of International Law Proceedings* (1999) at 65.

<sup>30</sup> For the narrow concept of crimes under customary international law, see Kreß, *supra* n. 25 at 565-569. As far as the precise scope of criminalization under international law is concerned, Arts. 6 to 8 of the ICC Statute provide a very useful but not in all cases conclusive indication. For customary civil war crimes outside Art. 8 of the ICC Statute, see Kreß, *supra* n. 21 at 134-136. For a slightly broader list of crimes that are referred to as *jus cogens* crimes under international law, see Leila N. Sadat, “Exile, Amnesty and International Law”, 81 *Notre Dame Law Review* (2006) at 974. For an emphatic argument in favour of crimes against humanity being a *jus cogens* violation, see Judge A.A. Cançado-Trindade’s concurring opinion in *Almonacid-Arellano*, *infra* n. 110 at para. 28 and in *Goiburú*, *infra* n. 106 at paras. 40-43.

regimes support the possibility that territorial States have a conventional duty to investigate these crimes and, where the evidence so justifies, to prosecute and to punish perpetrators for their commission. First, Article VI of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contains an unqualified duty of the territorial State to try persons charged with genocide.<sup>31</sup> Second, the bulk of war crimes committed in international armed conflicts are covered by the legal regime of *aut dedere aut iudicare* for grave breaches of the GCs and AP I.<sup>32</sup> At the same time, no such conventional duty to prosecute exists for aggression, crimes against humanity or civil war crimes. These latter two categories of crimes are particularly relevant for the present study.

Taking a step back, Article 6(5) of AP II<sup>33</sup> forces the preliminary question of whether international law currently favours the grant of amnesties for the commission of civil war crimes.<sup>34</sup> This question can safely be answered in the negative.<sup>35</sup> Article 6(5) was not included in

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<sup>31</sup> 78 United Nations Treaty Series 277. On this duty, see: ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007 at para. 442.

<sup>32</sup> Roberts and Guelff, *supra* n. 7.

<sup>33</sup> *Ibid.*

<sup>34</sup> The recent customary law study by the International Committee of the Red Cross (ICRC) affirms the customary status of Art. 6(5): ICRC, *Customary International Humanitarian Law*, Vol. I: Rules, Henckaerts and Doswald-Beck, (eds.), Cambridge University Press, 2005, at 611.

<sup>35</sup> This position is almost unanimously shared among international lawyers. For the concurrent position of the ICRC, see *Customary International Humanitarian Law*, Vol. II: Practice, Part 2, Henckaerts and Doswald-Beck, (eds.), Cambridge University Press, 2005, at 4043 (§ 759). See also: Jessica Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court", 51 *International and Comparative Law Quarterly* (2002) at 102-103; Meisenberg, *supra* n. 17 at 850; Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002, at 206- 207. For a different view, however, see: Constitutional Court of South Africa, *Azanian Peoples Organization (AZAPO) et al. v. President of the Republic of South Africa et al.*, Judgment, 25 July 1996, 4 South African Law Reports (1996) at para. 53.



AP II to apply to civil war crimes, a legal category of crimes that was only recognized after AP II was drafted. Instead, Article 6(5) of AP II must be read in light of the following:

[I]n internal armed conflicts ... those who have taken up arms do not in principle enjoy prisoner-of-war status and are consequently subject to penal sanctions imposed by the State, since they are not legally entitled to fight or to take up arms. In so doing they are guilty of an offence, such as rebellion or sedition.<sup>36</sup>

By encouraging the State to grant an amnesty in respect of these domestic crimes, Article 6(5) wishes to create an incentive for non-State fighters to conduct the hostilities in accordance with the law of non-international armed conflict. This intention is radically different from that of recommending an amnesty for war crimes committed in such a conflict, an intention that would inexplicably stand in diametric contradiction to the grave breaches regime that applies to international armed conflicts.

### 3.3.2. International Human Rights Treaties

While international human rights treaties with a general scope of application do not expressly oblige territorial States to prosecute perpetrators of crimes against humanity and civil war crimes,<sup>37</sup> they often oblige States Parties to “ensure” the enjoyment of treaty rights on their territory and/or to provide an “effective remedy” for their breach. Judges have variously interpreted these obligations as encompassing a duty to “investigate” and “punish” the breach of convention rights. In the landmark *Velásquez Rodríguez* case (1988), the Inter-American Court of Human Rights (IACHR) held as follows:

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<sup>36</sup> Constitutional Court of Colombia, No. C-225/95, L.A.T.-040 at para. 42. The English translation of this decision is taken from Marco Sassòli and Antoine Bouvier, *How Does Law Protect in War: Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC, 1999, at 1370.

<sup>37</sup> See, however, the *aut dedere aut judicare* regime contained in Arts. 6 and 7 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 United Nations Treaty Series 85.

The State is obligated to investigate every situation involving a violation of the rights protected under the [American] Convention [on Human Rights]. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.<sup>38</sup>

Essentially the same analysis was adopted under the European Convention on Human Rights (ECHR)<sup>39</sup> and the International Covenant of Civil and Political Rights (ICCPR).<sup>40</sup> The recognition of such a State duty has led regional human rights courts and commissions as well as the UN Human Rights Committee to make far-reaching statements against the admissibility of amnesty laws covering serious human rights violations. While the Inter-American Commission of Human Rights initially took a very cautious approach on the matter in its Annual Report of 1985/86,<sup>41</sup> the IACHR decisively reversed this trend in the *Barrios Altos* case (2001):

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights

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<sup>38</sup> IACHR, *Velásquez Rodríguez v. Honduras*, Judgment, 29 July 1988 at para. 176; the subsequent case law of the IACHR has clarified that the duty to 'punish' implies the obligation to make use of the criminal justice system *stricto sensu*; cf., e.g., IACHR, *Goiburú et al. v. Paraguay*, Judgment, 22 September 2006, paras. 129, 130, where the Court states that the State may be bound to make an extradition request to fully comply with this duty.

<sup>39</sup> See for example: European Court of Human Rights, *Yaman v. Turkey*, Judgment, 2 November 2004 at para. 55 (concerning torture and ill-treatment).

<sup>40</sup> For an excellent analysis, see Anja Seibert-Fohr, "The Fight against Impunity under the International Covenant on Civil and Political Rights", 6 *Max Planck Yearbook on United Nations Law* (2002) at 301.

<sup>41</sup> 1985-1986 Annual Report (1986) at 192: "The Commission recognises that this is a sensitive and extremely delicate issue where the contribution it - or any other international body for that matter - can make is minimal". For a more detailed account, see Gavron, *supra* n. 35 at 94-95.

violations, such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.<sup>42</sup>

In *Yaman v. Turkey* (2004), the European Court of Human Rights pointed out the following:

[W]here a State agent has been charged with crimes involving torture and ill-treatment, it is of utmost importance for the purposes of an “effective remedy” that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.<sup>43</sup>

Similarly, the UN Human Rights Committee stated:

Where the investigations [...] reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations are notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment [...], summary and arbitrary killing [...] and enforced disappearance [...]. Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity [...] Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpe-

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<sup>42</sup> IACHR, *Barrios Altos Case (Chumbipuma Aguirre et al. v Peru)*, Judgment, 14 March 2001 at para. 41, confirmed, e.g., in IACHR, *Almonacid-Arellano et al. v. Chile*, Judgment, 26 September 2006, paras. 112-114.

<sup>43</sup> *Velásquez Rodríguez*, *supra* n. 38.

trators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)).<sup>44</sup>

This essentially consistent treaty practice has already left its stamp on subsequent State practice. Perhaps the most important example of this is the *Simón* decision where the Argentinian Supreme Court declared the two well-known amnesty laws from the country's recent past, the *Ley de Punto Final* and the *Ley de Obediencia Debida*, unconstitutional and void.<sup>45</sup>

The aforementioned treaty law is directly relevant to serious human rights violations committed by State organs. To the extent that such violations amount to crimes against humanity and civil war crimes, an international treaty obligation to prosecute those crimes under international law can thus be derived from the relevant international human rights conventions.<sup>46</sup> The picture is less clear as far as the conduct of insurgents is concerned. There is certainly a potential to attribute a horizontal effect to the treaty obligation in question.<sup>47</sup> Indeed, as early as in the Velázquez Rodríguez case (1988), the general obligation of territorial States to punish serious human rights violations

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<sup>44</sup> General Comment No. 31 [80], CCPR/C/21/Rev.1/Add.13, 26 May 2004 at para. 18. In para. 15 of General Comment 20 [44], HRI/GEN/1/Rev.6 at 153, 1992, the Committee stated: “[S]ome States have granted amnesty in respect of torture. Amnesties are generally incompatible with the duty of States to investigate such acts...”. In the special case of torture, the ICTY has also ruled out amnesties in *Prosecutor v. Furundžija*, Judgment, IT-95-17/1-T, 10 December 1998 at § 155.

<sup>45</sup> Supreme Court of Argentina, *Simón, Julio Héctor et al. (privación ilegítima de la libertad)*, Judgment, 14 June 2005. For a useful analysis, see Christine A.E. Bakker, “A Full Stop to Amnesty in Argentina”, *Journal of International Criminal Justice* 5 (2005) at 1106.

<sup>46</sup> On the overlap of international criminal law and human rights law at the juncture of crimes against humanity, see: IACHR, *Almonacid-Arellano et al. v. Chile*, Judgment, 26 September 2006, where the Court held that “the prohibition to commit crimes against humanity is a *jus cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law (para. 99)” and that “crimes against humanity are crimes which cannot be susceptible of amnesty (para. 114)”.

<sup>47</sup> Seibert-Fohr, *supra* n. 40 at 327.

was extended to the conduct of “private persons”.<sup>48</sup> In spite of this ruling, the precise scope of this treaty obligation as applied to insurgents who commit crimes against humanity or civil war crimes remains unclear, owing to the absence of an elaborate body of case law on this point. It is not clear, for example, whether alternatives to prosecution such as the establishment of a truth commission or the grant of a conditional amnesty coupled with other measures, would satisfy this duty.

### 3.3.3. Customary International Law

The essentially convergent human rights treaty practice is relevant to the possible development of a customary international duty to prosecute crimes against humanity and civil war crimes, but remains insufficient in and of itself to give birth to such a new rule.<sup>49</sup> Importantly, though, there is a strong tendency in the verbal State practice that supports the emergence of a coherent customary standard on the obligation in question for all crimes under international law. This trend was foreshadowed by the 1996 International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind,<sup>50</sup> whose Article 9 says:

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime [under international law] is found shall extradite or prosecute the individual.<sup>51</sup>

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<sup>48</sup> The relevant paragraph cited in the above text accompanying n. 106 concludes as follows: “The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention”.

<sup>49</sup> The ICJ held in the *North Sea Continental Shelf* cases that international treaties may be a source of customary international law in the case of “very widespread and representative ratification” (*supra* n. 20 at 41). See also ICJ, *Continental Shelf Case (Libyan Arab Jamahiriya v Malta)*, 3 June 1985 at 29 *et seq.*

<sup>50</sup> A/51/10 (1996).

<sup>51</sup> Text and commentary repr. in *Substantive and Procedural Aspects of International Criminal Law*, Vol. II, Part I, Kirk McDonald and Swaak-Goldman (eds.), Kluwer Law International, 2000, at 361.

The most powerful expression of the same idea is contained in the sixth preambular paragraph of the ICC Statute, which recalls: “[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.<sup>52</sup> This statement may be “delightfully ambiguous” as to the scope of the duty *ratione personae*,<sup>53</sup> but it leaves no doubt about the conviction of a very large part of the international community that there is a customary duty of the territorial State “to exercise its criminal jurisdiction” over crimes under international law.

In the same vein, the UN Security Council has emphasized that,

the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible from amnesty provisions.<sup>54</sup>

Accordingly, the UN representative who signed the peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (1999) (*Lomé Agreement*) to end the eight-year civil war appended to it a disclaimer providing that the blanket amnesty contained therein “shall not apply to the international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”<sup>55</sup> Some years later, the UN Secretary-General even stated that “United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights”.<sup>56</sup>

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<sup>52</sup> Repr. in Triffterer, *supra* n. 13 at 1.

<sup>53</sup> Tuiloma N. Slade and Roger S. Clark, “Preamble and Final Clauses” in *The International Criminal Court: The Making of the Rome Statute*, Lee (ed.), Kluwer Law International, 1999, at 427.

<sup>54</sup> S/RES/1325 (2000), 31 December 2000 at 3.

<sup>55</sup> *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000 at para. 23.

<sup>56</sup> *Rule of Law Report*, *supra* n. 27 at para. 64.

Additional reference may be made to a number of State military manuals as collected in the ICRC customary law study.<sup>57</sup> The study itself endorses the existence of a customary duty of both the territorial State and the State of active nationality to investigate and prosecute perpetrators of war crimes, including civil war crimes, in the following terms: “States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects”.<sup>58</sup>

Thus, not only the scholarly ambition for coherence in international criminal law but also the international verbal practice support the conviction that the same legal standard for ending impunity should be applied to all crimes under international law, irrespective of whether they were committed during an international or non-international armed conflict, and irrespective of the status of the individual who committed them.

While most of the cited statements seem to support the emergence of a rigorous duty to prosecute, there are important nuances. In particular, the UN Security Council qualified its call to exclude crimes under international law from amnesty provisions by the caveat “where feasible”.<sup>59</sup> And while delegations chose to use very strong language in the sixth preambular paragraph of the ICC Statute, there was “widespread sympathy with the South African model” of conditional amnesty to facilitate the peaceful transition from Apartheid to the new system.<sup>60</sup>

The reluctance of States to endorse a rigid customary duty to prosecute crimes against humanity and civil war crimes is even more apparent in their actual behaviour. This is true even if one rightly attaches little weight to the widespread amnesty practice, particularly in Latin America, before the adoption of the ICC Statute.<sup>61</sup> Some third

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<sup>57</sup> ICRC, *supra* n. 34 at 608 (fn. 212).

<sup>58</sup> ICRC, *supra* n. 34 at 607 (Rule 158).

<sup>59</sup> Cf. the citation in the above text accompanying n. 123.

<sup>60</sup> Sharon Williams and William Schabas in Triffterer, *supra* n. 13, Art. 17, marginal note 26.

<sup>61</sup> For a summary of some of the most significant amnesties enacted and pardons granted prior to the establishment of the ICC, see U.S. Delegation, Draft Paper,

States have exercised their criminal jurisdiction on the basis of an *opinio juris* that the *aut dedere aut judicare* regime for grave breaches of the GCs also covers civil war crimes.<sup>62</sup> A more nuanced picture emerges, however, when looking at the behaviour of countries in transition. In Sierra Leone<sup>63</sup> and Cambodia,<sup>64</sup> it seems that an amnesty for low and mid-level perpetrators was not excluded. The same may hold true for Uganda.<sup>65</sup> In Rwanda, many alleged low-level perpetrators are being dealt with outside the ordinary criminal justice system,<sup>66</sup> and Colombia has introduced a system of alternative sentences that was essentially upheld by its Constitutional Court.<sup>67</sup> None of these decisions has provoked widespread international protest. Finally, and most importantly perhaps, the South African decision to complement its

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ICC PrepCom, 17 August 1997, available at: <http://www.iccnw.org/documents/USDraftonAmnestiesPardons.pdf> (accessed on 28 August 2008). For a discussion of this State practice, see Gavron, *supra* n. 35 at 93-95.

<sup>62</sup> For a detailed analysis, see Christian Maierhöfer, *Aut dedere – aut judicare Herkunft, Rechtsgrundlagen und Inhalt des völkerrechtlichen Gebotes zur Strafverfolgung oder Auslieferung*, Duncker and Humblot, 2006, at 195-206.

<sup>63</sup> Anja Seibert-Fohr, “Human Rights as Guiding Principles in the Context of Post Conflict Justice”, 13 *Michigan State Journal of International Law* (2005) at 192-193; Stahn, *supra* n. 18 at 446.

<sup>64</sup> Cf. the formulation of Art. 11(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea and the analysis hereof by Seibert-Fohr, *ibid.* at 192; Stahn, *supra* n. 18 at 446 (fn. 118).

<sup>65</sup> On the Ugandan Amnesty Act 2000, see Manisuli Ssenyonjo, “Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court”, 10 *Journal of Conflict and Security Law* (2005) at 419-422; para. 14 of the 2008 “Annexure to the Agreement on Accountability and Reconciliation” (2007 “Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement Juba, Sudan”) reads as follows: “Prosecutions shall focus on individuals alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions”. The text is on file with the authors.

<sup>66</sup> Hankel, *supra* n. 16; Stahn, *supra* n. 18 at 453-455.

<sup>67</sup> Sentencia No. C-370/2006, 18 May 2006.



transitional process with a system of conditional amnesties attracted worldwide attention and was rather favourably received by the international community.<sup>68</sup>

The comprehensive evaluation of the international practice summarized above poses quite a challenge and, unsurprisingly, opinions among scholars are divided. Some, like the authors of the ICRC study, affirm the existence of a customary duty,<sup>69</sup> while others remain sceptical.<sup>70</sup> Where the crystallization of a customary duty is denied, its “emerging nature” is often emphasized.<sup>71</sup> It is also not unusual to couch one’s view in particularly cautious terms. Leila Nadya Sadat, for example, nuances her conclusion in a recent and thorough study of the subject as follows,

[t]hese decisions [rendered under the various human rights instruments] are highly significant, particularly when viewed in light of emerging state practice. Without more, they perhaps do not establish that a duty to investigate and prosecute is imposed upon states as a matter of international law. However, they do suggest that a prohibition of blanket amnesties for the commission of *jus cogens* crimes may now have crystallized as a matter of general customary international law.<sup>72</sup>

In a comparable attempt to retain a degree of flexibility, the Special Court for Sierra Leone stated:

The submission by the Prosecution that there is a ‘crystallising international norm that a government cannot grant

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<sup>68</sup> Gavron, *supra* n. 35 at 115.

<sup>69</sup> ICRC, *supra* n. 34 at 607 (Rule 158).

<sup>70</sup> For two particularly sceptical voices that could not, however, take the more recent practice into consideration, see Arsanjani, *supra* n. 29 at 66 and Michael P. Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court”, 32 *Cornell International Law Journal* (1999) at 521.

<sup>71</sup> “Although international law does not – yet – prohibit the granting of amnesty for international crimes, it is clearly moving in this direction”: John Dugard, “Possible Conflicts of Jurisdiction with Truth Commissions” in *The Rome Statute of the International Criminal Court*, Cassese, Gaeta and Jones (eds.), Oxford University Press, 2002, at 698.

<sup>72</sup> Sadat, *supra* n. 30 at 1021-1022.

amnesty for serious violations of crimes under international law' is amply supported by materials placed before the Court. The opinion of both *amici curiae* that it has crystallized may not be entirely correct [...] It is accepted that such a norm is developing under international law.<sup>73</sup>

In our view, the best way to interpret the complex picture is to recognise the crystallization of an admittedly vulnerable customary duty to investigate and, where the evidence so justifies, prosecute perpetrators of crimes under international law, including crimes against humanity and civil war crimes. However, the new rule has not taken the form of a rigid obligation, but rather that of a *prima facie* duty. In other words, the customary duty of the territorial State to prosecute crimes under international law has crystallized as a principle open to exceptions or as a presumption open to rebuttal. The flexibility so attained is crucial to make an attempt to accurately reflect the complexities of a situation of transition. This basic approach is in line with the "Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity". These principles emphasize the obligation of territorial States to prosecute "serious crimes under international law", but do not categorically exclude exceptions from that rule, the underlying purpose of which is "to establish conditions conducive to a peace agreement or to foster national reconciliation".<sup>74</sup> The conclusion adopted in this comment also appears to receive a growing measure of support in international legal scholarship.<sup>75</sup>

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<sup>73</sup> Special Court for Sierra Leone, *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 2004-15-AR72 and 2004-16-AR72, 13 March 2004 at para. 82.

<sup>74</sup> Cf. Principle 24(a) in conjunction with Principle 19, E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>75</sup> For an early, though not yet very elaborate pronouncement in this direction, see Kreß, *supra* n. 21 at 162-168; for subsequent expressions of similar views see, in particular, Kai Ambos, *El Marco Jurídico de la justicia de transición*, Editorial Temis S. A., 2008, at 37 ("A pesar de todos estos convincentes argumentos a favor persecución, el deber de perseguir es considerado en general una regla o principio y como tal permite excepciones - estrictamente definidas."); Gavron, *supra* n. 35 at 116 ("As a result of these developments it is evident that in most cases an amnesty will be in violation of international law."); Seibert-Fohr, *supra* n. 63 at 195-196 ("The above outlined jurisprudential development speaks for a single

It was also recognized in the recent and impressive judgment of the Colombian Constitutional Court on the legality of the Justice and Peace Law (2005).<sup>76</sup> The flexibility of the customary principle to prosecute crimes under international law, including, in particular, crimes against humanity and civil war crimes, allows for the integration of a set of exceptions that can be derived from the recent practice of States in transition. The three guiding principles that may justify exceptions are the impossibility to prosecute, the desire of a given society to achieve national reconciliation through alternative methods and the urgent necessity to achieve (negative) peace by ending a violent conflict.

Typically, crimes under international law are systemic in nature and thus involve mass criminality. A State in transition may simply not have a criminal justice system that is capable of dealing with all possible cases, at least not in accordance with internationally recognized human rights standards.<sup>77</sup> In such a situation, the principle must give way to a suspension of prosecution. It should be noted, though, that the

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rule, which notes that there is a rebuttable presumption against amnesties for serious human rights violations.”); Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court”, 14 *European Journal of International Criminal Law* (2003) at 491 *et seq.* (“[T]here are convincing reasons to suggest that under current or emerging customary international law, there is a duty to bring to justice perpetrators of genocide, crimes against humanity and war crimes, at least with respect to crimes committed on the state’s territory or by its nationals. ... The other major question is the extent of this duty.”). The term “rebuttable presumption” is also used by Sadat, *supra* n. 30 at 1028, albeit in a slightly different context. On a clear trend towards a strong customary prosecution principle, see Ben Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws*, Longman, 2002, at 169-170 (“[A]fter custom has run its full course, a fully fledged binding norm of customary international law will result that adds rather than subtracts from the gains of the positive human rights law tradition, to prohibit for all time such national amnesty laws ... Exceptions to that prohibition would have to be construed very narrowly.”).

<sup>76</sup> Ley 975 (2005), Official Gazette No. 45.980, 25 July 2005. Constitutional Court of Colombia, *supra* n. 67, in particular sub 4.2.2. and sub 5.4. (though couched in terms of a proportionality test under national constitutional law).

<sup>77</sup> Robinson, *supra* n. 75 at 493; Seibert-Fohr, *supra* n. 63 at 191. On the situation in Rwanda, see Stahn, *supra* n. 18 at 453-455.

international community has increasingly offered its support in this type of scenario by expressing its readiness to contribute to the establishment of internationalised criminal tribunals to prosecute, in particular, high-level perpetrators.<sup>78</sup> A good argument can be made that the prosecution principle will then be transformed into a duty to cooperate with the international community in the setting up of such a judicial complement.<sup>79</sup>

A more difficult scenario arises should a conflict-ridden society take an unquestionably democratic decision to come to terms with its violent past by methods different from criminal proceedings. The international practice surveyed suggests that current customary international law does not rule out such a decision altogether. More specifically, an exception to the prosecution principle is to be admitted where a State in transition takes the democratically legitimised decision to limit prosecutions to those bearing the greatest responsibility for past crimes while using other measures of transitional justice to deal with low and mid-level perpetrators.<sup>80</sup> Thus, the view taken by Diane Orentlicher in 1991 in her groundbreaking study on the State obligation to punish serious human rights violations can still be applied today to crimes under international law:

The duty to punish human rights crimes imposed by customary law can readily accommodate the restraints faced by transnational societies [...] [C]ustomary law would not require prosecution of every person who committed such an offense. Prosecution of those who were most responsi-

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<sup>78</sup> For a good summary of the recent practice, see Stahn, *supra* n. 18 at 449-451.

<sup>79</sup> On the related point of a duty of the State of active nationality to cooperate with an international criminal tribunal in the prosecution of the crime of genocide, see *Genocide Decision*, *supra* n. 31 at paras. 443-450.

<sup>80</sup> Concurring Sadat, *supra* n. 30 at 969; Seibert-Fohr, *supra* n. 63 at 191-196; Stahn, *supra* n. 18 at 459; Robinson, *supra* n. 75 at 493-495. For a policy proposition to the same effect, see Angelika Schlunck, *Amnesty versus Accountability: Third Party Intervention Dealing with Gross Human Rights Violations in Internal and International Conflicts*, Verlag Arno Sitz GmbH, 2000, at 255 *et seq.* Such a hybrid model of accountability could, *a fortiori*, include the application of a legal regime of traditional justice, conditional amnesties or alternative sentences for low and mid-level perpetrators.

ble for designing and implementing a system of human rights atrocities or for especially notorious crimes that were emblematic of past violations would seemingly discharge government's customary-law obligation not to condone or encourage such violations, provided the criteria used to select potential defendants did not appear to condone or tolerate past abuses.<sup>81</sup>

On policy grounds, views may differ about the reservation regarding the prosecution of those who bear the greatest responsibility, which is implied in the exception under discussion. The policy argument can certainly be made that international law should accept the decision of a given society to achieve national reconciliation through an amnesty without any restriction *ratione personae*. Yet the international practice summarized above clearly points in a different direction and limits a possible national reconciliation interest where it unduly compromises the international interest in strengthening the validity of those fundamental international rules of conduct that underlie crimes under international law.<sup>82</sup> In practice, conflicts of interest are unlikely to occur if a genuinely democratic process of national decision-making is applied – there is no strong evidence that views on the “amnesty

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<sup>81</sup> Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, *Yale Law Journal* 100 (1991).

<sup>82</sup> During the drafting of the ICC Statute – and contrary to what is suggested by Scharf *supra* n. 70 at 508 and Claudia Cárdenas, *Die Zulässigkeitsprüfung vor dem Internationalen Strafgerichtshof. Zur Auslegung des Art. 17 IStGH-Statut unter besonderer Berücksichtigung von Amnestien und Wahrheitskommissionen*, Berliner Wissenschaftsverlag, 2005, at 156 – the United States delegation did not express any view on whether the ICC should respect certain amnesties, in particular those by a democratic government in the interests of peace and national reconciliation. For such an opinion, however, see John R. Bolton, “The Risks and Weaknesses of the International Criminal Court”, *Law and Contemporary Problems* 64 (2001) at 178. The US “Non-Paper” on “State Practice Regarding Amnesties and Pardons” (*supra* n. 61) simply presents a collection of relevant material “to promote a fuller discussion”. Accordingly, the issue of whether the US can claim to have persistently objected to the international rule set out in the above text does not arise.

versus prosecution” debate are culturally relative when it comes to the most serious perpetrators of crimes under international law.<sup>83</sup>

This brings us to the final question of whether the (drastic) necessity to end a violent conflict (or to achieve the (peaceful) transition to and protection of democracy and the rule of law) justifies another exception, this time including even those who bear the greatest responsibility for the commission of crimes under international law. The most important instance of hard State practice on point remains the South African move away from the Apartheid system. In this case, the international community accepted the possibility that the amnesty may extend to every perpetrator concerned and this position was heavily influenced by the assessment of insiders such as Richard Goldstone that, otherwise, “[t]he transition would never have happened”.<sup>84</sup> On the other hand, the overall endorsement of the South African model by other States must also be seen in light of the fact that the amnesty regime that was finally adopted was a conditional one requiring the alleged perpetrator to fully disclose the truth about his or her conduct before a truth commission vested with judicial powers. The South African precedent thus provides a strong case for the acceptance of a “limited necessity exception” to the prosecution principle, which goes as far as the establishment of a regime of conditional amnesty coupled with a judicial investigation or one conducted by a quasi-judicial truth commission. It does not, however, support the international legality of a blanket amnesty for the worst perpetrators of crimes under international law on grounds of necessity.<sup>85</sup> In the absence of any other recent incident of State practice revealing the international community’s acceptance of a wholesale blanket amnesty exception on grounds of necessity, it would seem that current customary international law does

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<sup>83</sup> For a very stimulating discussion in the context of the present Ugandan conflict, see Diane Orentlicher, “‘Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency”, *International Journal of Transnational Justice* 1 (2007) at 20-21

<sup>84</sup> Richard Goldstone, “Past Human Right Violations: Truth Commissions and Amnesties or Prosecutions”, *Northern Ireland Legal Quarterly* 51 (2000) at 168.

<sup>85</sup> Concurring Sadat, *supra* n. 30 at 987.

not allow for such a far-reaching exception to the prosecution principle.<sup>86</sup>

In light of the earlier practice of granting blanket amnesties to facilitate the conclusion of peace agreements,<sup>87</sup> there can be no doubt that the law remains particularly vulnerable at this point. At the same time, it will remain a matter of much controversy whether or not international law should remove the granting of blanket amnesties as a bargaining chip available to peace mediators.<sup>88</sup> The extreme difficulty in giving an entirely satisfactory answer to this question is readily admitted. Perhaps it can be said in all modesty that at least two weighty considerations underpin the negative stand of current customary international law on blanket amnesties for those who bear the greatest responsibility for crimes under international law. First, such an amnesty would substantially and detrimentally impact the key function of international criminal law, which is to strengthen the validity of the respective international rules of conduct. Second, it remains an open question whether amnesties granted under duress will ensure lasting “negative” peace. The following general assessment by Leila Nadya Sadat should not be easily dismissed.

[T]he cases of Sierra Leone, the Former Yugoslavia, and Haiti suggest that amnesties for top-level perpetrators imposed from above or negotiated at gunpoint do not lead to the establishment of peace but at best create a temporary lull in the fighting. Indeed, amnesty deals typically foster a culture of impunity in which violence becomes the norm, rather than the exception.<sup>89</sup>

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<sup>86</sup> Concurring Orentlicher, *supra* n. 83 at 21; Robinson, *supra* n. 75 at 496; Sadat, *supra* n. 30 at 1021.

<sup>87</sup> In that respect, the case of Haiti (Governors Island Agreement) figures prominently in the debate. See the UN Secretary-General’s Report, “The Situation of Democracy and Human Rights in Haiti”, A/47/975 – S/26063, 12 July 1993 at para. 5.

<sup>88</sup> For a negative answer, see Scharf, *supra* n. 70 at 508.

<sup>89</sup> Sadat, *supra* n. 30 at 966; the President of the ICC expressed a similar view in his “Address to the United Nations General Assembly” (1 November 2007): “More often than not, there were attempts to resolve such conflicts through expedient political compromises. More often than not, these compromises ignored the need

### 3.3.4. Towards a Unified Legal Regime on the Duty to Prosecute Crimes under International Law?

It is not entirely clear whether or not the above-cited<sup>90</sup> judicial and quasi-judicial pronouncements under the various international human rights treaties leave room for the same exceptions to the prosecution principle that are permissible under customary law.<sup>91</sup> In any event, the subsequent State practice that reflects the complexities of transitional justice should give the various treaty bodies reason to reconsider some of their most rigorously-worded statements on the subject,<sup>92</sup> and to move treaty law closer to the more flexible customary legal regime on this thorny matter.<sup>93</sup> Moreover, it is necessary to question the widely-

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for justice and accountability. And more often than not, expedient political solutions which ignored the need for justice unravelled, leading to more crimes, new conflicts and recurring threats to peace and security”: [http://www.icc-cpi.int/NR/ronlyres/B3B8B89D-B9E5-441E-A3D5-EA9E91B22142/277274/PK\\_20071101\\_ENG1.pdf](http://www.icc-cpi.int/NR/ronlyres/B3B8B89D-B9E5-441E-A3D5-EA9E91B22142/277274/PK_20071101_ENG1.pdf) (accessed on 29 August 2008); again in the same vein, Schlunck, *supra* n. 80 at 280 concludes her legal policy analysis on the issues as follows: “Amnesty as an “easy fix”-strategy can no longer be recommended as part of the tool-kit used by third-party intervenors to encourage spoilers to demobilize. Rather, the array of instruments to deal with wrongdoers of the past has significantly expanded. Tailor-made interventions should consist of combination of investigative commissions, truth and reconciliation commissions, national jurisdiction, lustration procedures and international tribunals”. See also *Assessing the Impact of Transitional Justice: Challenges for Empirical Research*, van der Merwe, Baxter and Chapman (eds.), US Institute of Peace Press, 2009.

<sup>90</sup> Citations accompanying *supra* n. 42-44.

<sup>91</sup> For a sceptical view, see Ambos, *supra* n. 75 at 31-33. For a more nuanced assessment of the position of the UN Human Rights Committee, see Seibert-Fohr, *supra* n. 40 at 343: “By stating that amnesties for torture are “generally incompatible” in its General Comment on article 7 the Human Rights Committee did not entirely rule out the possibility for an amnesty. Whether an amnesty, which is accompanied by stringent alternative measures to deal with the past, could be accepted will be seen in the future”.

<sup>92</sup> Concurring, Christian Tomuschat, “The Duty to Prosecute International Crimes Committed by Individuals” in *Tradition und Weltoffenheit des Rechts*, H.-J. Cremer *et al.* (eds.), Springer, 2002, at 344 *et seq.*

<sup>93</sup> Interestingly, the growing importance to view and reconcile the interaction between international criminal law and human rights law at this juncture, was recently recognized by the IACHR in *Almonacid-Arellano*, *supra* n. 42, paras. 93-114 (this part of the judgment was highlighted and further elaborated upon in



held position that the rigour of the applicable treaty provisions categorically excludes exceptions from the duty to prosecute in cases of genocide and grave breaches.<sup>94</sup> The carefully balanced following statement of Colombia's Constitutional Court may be read as pointing in this direction.

Dentro de este panorama de evolución hacia la protección internacional de los derechos humanos, la comunidad de las naciones ha puesto su atención sobre aquellos Estados en que se adelantan procesos de transición hacia la democracia o de restablecimiento de la paz interna y consideración de los principios de Estado de Derecho. La comunidad internacional ha admitido la importancia de alcanzar estos objetivos sociales de la paz, pero ha hecho énfasis en que estas circunstancias de transición no pueden conducir a un relajamiento de las obligaciones internacionales de los Estados en el compromiso universal de respeto a la dignidad y los derechos humanos. En este contexto, se ha entendido que la necesidad de celebrar acuerdos políticos de reconciliación con amplios grupos sociales exige cierta flexibilidad a la hora de aplicar de principios que dominan el ejercicio de la función judicial. Se aceptan con ciertas restricciones amnistías, indultos, rebajas de penas o mecanismos de administración judicial más rápidos que los ordinarios, que propicien el pronto abandono de las armas o de los atropellos, como mecanismos que facilitan la recuperación de la armonía social. La comunidad internacional ha reconocido esta realidad, admitiendo una forma especial de administración de justicia para estas situaciones de tránsito a la paz, a la que ha llamado "justicia

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Judge A.A. Cançado-Trindade's concurring opinion at para. 28; however, the tendency currently supported by the IACHR rather points in the opposite direction to inform the international human rights law by an allegedly rigid prosecution rule under international criminal law.

<sup>94</sup> Interestingly, Scharf, who otherwise argues in favour of a rather broad "amnesty exception", insists that the duty to prosecute genocide and grave breaches is "absolute" (*supra* n. 70 at 516). There is, however, a degree of artificiality in treating grave breaches and genocide in a distinctly rigorous manner; suffice it to recognize how thin the borderline between genocide and crimes against humanity may be and to ask whether this borderline should be decisive in a case like Rwanda.

transicional” o “justicia de transición”, pero no ha cedido en su exigencia de que las violaciones a los derechos fundamentales sean investigadas, enjuicadas y reparadas, y los autores de las mismas contribuyan a identificar la verdad de los delitos cometidos y reciban algún tipo de sanción.<sup>95</sup>

### **3.4. The ICC Statute and National Decisions Against (Full-fledged) Prosecution**

In its early years, the ICC has already been confronted with the tension between its mandate to prosecute crimes under international law and local demands for alternatives to the international criminal justice system. The intriguing policy problems were alluded to in a 2006 “Briefing by the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator” on developments in Uganda in the following terms:

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<sup>95</sup> Constitutional Court of Colombia, *supra* n. 67 at § 4.2.2. [“In this context of evolution towards the international protection of human rights, the community of nations has focused its attention on those States where processes of transition to democracy, or of reestablishment of internal peace and consideration of the principles of the rule of law, are ongoing. The international community has recognized the importance of reaching the social objectives of peace but has also emphasized that transitional circumstances cannot lead to a relaxation of the international obligations of States in their universal commitment to respect human dignity and human rights. In this context, it has been understood that the necessity to reach political agreements of reconciliation with broad social groups requires some flexibility when it comes to applying the principles that govern the exercise of judicial functions. With some restrictions, it is permissible to use amnesties, pardons, sentence reductions or expedite mechanisms of judicial administration, all of which may facilitate a rapid abandonment of arms and violence, and serve as mechanisms conducive to social harmony. The international community has recognized this reality by accepting a special type of administration of justice for these situations of transit to peace – which has been called “transitional justice” – but it has not given up its demand that violations of fundamental rights be investigated, tried, and remedied, and that the perpetrators contribute to identify the truth regarding the violations made, and also that they receive some kind of sanction.” (Translation by P. Kalmanovitz.)] On Colombia generally, see also Kai Ambos, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court*, Springer, 2010.

It is important for the Council to know that the International Criminal Court indictments were the number one subject of discussion with the internally displaced persons in Uganda and the parties and civil society in Juba. All expressed a strong concern that if the indictments were not lifted, they could threaten the process in these most promising talks ever for northern Uganda. I said I believed that the indictments had been a factor in pushing the LRA into negotiations, that the indictments should not disrupt the talks, and that there could be no impunity for mass murder and crimes against humanity. The parties should look now at the different ways to develop a solution that meets local needs for reconciliation and universal standards of justice and accountability. I believe that this can be done, and that peace and justice can work together. For the Council's information, I have discussed that approach with Chief Prosecutor Luis Moreno-Ocampo, who repeated that the United Nations should indeed support the peace talks, aiming for the return of women and children, the demobilization of fighters and a solution that makes peace and justice work together.<sup>96</sup>

Three preliminary remarks can be made on the legal position of the ICC where the territorial State decides not to prosecute perpetrators of crimes under international law which are within the Court's jurisdiction.<sup>97</sup> First, the ICC Statute contains no explicit rule dealing with the issue of national amnesties or equivalent national decisions of non-prosecution.<sup>98</sup> Second, a national amnesty law does not bind the ICC *per se*. By their very nature, crimes under international law are rooted in a *jus puniendi* of the international community and are therefore amenable to direct international enforcement. That possibility cannot, as a matter of principle, be eliminated through a decision at the national level. In its *Lomé Accord Amnesty* decision (2004), the Special Court for Sierra Leone essentially took the same view while relying

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<sup>96</sup> S/PV.5525, 15 September 2006.

<sup>97</sup> On the jurisdiction *ratione materiae* of the Court, see Arts. 5-8 of the ICC Statute, *supra* n. 13. On the jurisdiction *ratione personae* of the Court, see Art. 12 of the ICC Statute, *supra* n. 13.

<sup>98</sup> Dugard, *supra* n. 71 at 700; Robinson, *supra* n. 75 at 483.

unnecessarily heavily on the power of all States to exercise universal jurisdiction over crimes under international law.<sup>99</sup> Third, and crucially important for the delimitation between respective spheres of activity at the national and international levels, the ICC has affirmed that the ambit of its activities be confined to the most serious crimes<sup>100</sup> and its Chief Prosecutor wishes to focus on pursuing those most responsible

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<sup>99</sup> *Lomé Amnesty Accord* decision, *supra* n. 73 at paras. 66-74. For a critique of the Court's primary reliance on universal jurisdiction in this decision, see Meisenberg, *supra* n. 17 at 845 *et seq.*

<sup>100</sup> In *Prosecutor v. Lubanga Dyilo*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01706, 24 February 2006 at paras. 46-52, Pre-Trial Chamber I transformed this policy statement into a legal requirement and also a somewhat rigid limitation of the most senior *leaders* of the organisation in point; this decision was then overturned in *Prosecutor v. Ntaganda*, Judgement on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", ICC-01/04-169, 13 July 2006 at paras. 77 and 79, which reads as follows:

[I]ndividuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes. In other words, predetermination of inadmissibility on the above grounds [most senior leaders] could easily lead to the automatic exclusion of perpetrators of most serious crimes in the future. [...] [T]he preamble to the Rome Statute mentions "most serious crimes" but not "most serious perpetrators". The Preamble to the Statute in paragraphs five and six respectively states "perpetrators" and "those responsible for international crimes". The reference in paragraph five of the Preamble to "perpetrators" is not prefixed by the delineation "most serious" or "most responsible". Such language does not appear elsewhere in the Statute in relation to the category of perpetrators. Had the drafters of the Statute intended to limit its application to only the most senior leaders suspected of being most responsible they would have done so expressly.

This decision of the Appeals Chamber remained sealed until 23 September 2008. On the issue of gravity, see further Margaret M. deGuzman, "Gravity and the Legitimacy of the International Criminal Court", 32 *Fordham International Law Journal* (2009) 1400.

for the commission of crimes under international law.<sup>101</sup> As a result, the Court will likely not step in where a State in transition has decided to confine the use of its criminal justice system to the prosecution of those who bear the greatest responsibility for the most serious crimes. In light of this, the following analysis will focus on the question of how the Court is to react where the territorial State decides not to prosecute even these persons. A comprehensive answer must give consideration to the ICC Statute's complementarity regime under Article 17 *et seq.*, the scope of prosecutorial discretion that exists under Articles 53 and 15(3) of the ICC Statute and Rule 48 of the Rules of Procedure and Evidence (RPE), and the powers of the Security Council as confirmed by Article 16 of the ICC Statute and Article 39 of the UN Charter.

### 3.4.1. Article 17 of the ICC Statute

Mahnoush H. Arsanjani stated:

But the Statute does not appear to provide the ICC a right to review the acts of national legislatures. Amnesty laws are usually adopted by national legislation; thus it is unclear whether the ICC has even been given the competence to review the lawfulness of national amnesty laws.<sup>102</sup>

While it is true that the ICC has no power to rule on the international legality of any national amnesty law, this does not mean that criminal proceedings before the ICC are inadmissible because of such an amnesty decision. To the contrary, as a national amnesty law does not bind the ICC *per se*, the Court can determine the inadmissibility of any proceedings before it only in light of the conditions set out in Article 17 of the ICC Statute. Importantly, those conditions do not refer to

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<sup>101</sup> In its September 2003 policy paper, the Office of the Prosecutor states at sub. 2.1, *supra* note 128: "The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as leaders of the State or organisation allegedly responsible for those crimes".

<sup>102</sup> Arsanjani, *supra* n. 29 at 67.

the “situation stage” of the international investigation. Instead, the complementarity test under Article 17 of the ICC Statute applies where the investigation into a given country or conflict *situation* concerned has yielded a *case* (that is, “specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects”).<sup>103</sup>

A blanket amnesty is not one of the grounds listed in Article 17(1)(a)-(c) for determining that a case before the ICC is inadmissible. Accordingly, the overwhelming and correct view in the scholarship is that the grant of a blanket amnesty “could never satisfy the complementarity test”.<sup>104</sup> At the same time, Article 17(1)(a)-(c) of the ICC Statute covers cases that form part of a “good faith” national scheme for alternative (reduced) sentences and traditional forms of justice.<sup>105</sup>

The difficult and controversial question is whether a national decision to grant amnesty on the condition of full disclosure of the truth before a judicial or quasi-judicial body (and other conditions such as the laying down of arms) falls under Article 17(1)(b) of the ICC Statute.<sup>106</sup> Article 17(1)(b) reads as follows:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is admissible where: ... The case has been investigated by a State which

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<sup>103</sup> *Lubanga Dyilo*, *supra* n. 100 at paras. 30-31.

<sup>104</sup> Robinson, *supra* n. 75 at 501; Ambos, *supra* n. 75 at 144, 145.

<sup>105</sup> For a more detailed and useful analysis, see Ambos, *supra* n. 75 at 148-150. See also Alexander K.A. Greenawalt, “Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court”, 50 *Virginia Journal of International Law* (2009) 107.

<sup>106</sup> For positions against the applicability of Art. 17(1)(b), see: Cárdenas *supra* n. 82 at 182-183; Dugard, *supra* n. 71 at 702, Andreas O’Shea, *Amnesty for Crimes in International Law and Practice*, Kluwer Law International, 2002, at 126. For positions favouring the application of this provision, see: Ambos, *supra* n. 75 at 145-147; Anja Seibert-Fohr, “The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions”, 7 *Max Planck Yearbook of United Nations Law* (2003) at 567-576; Carsten Stahn, “Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court”, 3 *Journal of International Criminal Justice* (2005) at 708-716; and Robinson, *supra* n. 75 at 501-502.

has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.<sup>107</sup>

The more natural reading of this provision suggests a negative answer:

While the first part of the provision might be interpreted imaginatively to cover South African-style amnesty – that is the decision not to prosecute and instead to grant amnesty after an investigation – it is difficult to maintain such an interpretation in the face of the second part of the provision as the decision “not to prosecute” will result from an “unwillingness” to prosecute, or “to bring the person concerned to justice”, because the State has decided to grant amnesty instead of prosecuting!<sup>108</sup>

Still, imaginative interpretations have been offered claiming that a conditional amnesty decision does not result from the unwillingness of a State genuinely to prosecute: “Judges of the Court might consider that a sincere truth commission project amounts to a form of investigation that does not suggest “genuine unwillingness” on the part of the State to administer justice, thereby meeting the terms of article 17 para. 1 (a) and (b)”.<sup>109</sup> Such an explanation will certainly not do. Article 17(1)(b) specifically refers to the unwillingness to genuinely *prosecute* and this unwillingness cannot be argued away by reference to the completion of a genuine *investigation*.

The question remains whether a conditional amnesty (with all the necessary evidence to launch a prosecution) can ever overcome the test of “genuine unwillingness to prosecute”. At a minimum, for this to be the case, all three scenarios of unwillingness listed in Article 17(2) would have to be inapplicable to such an amnesty.

In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of

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<sup>107</sup> Repr. in Triffterer, *supra* n. 13 at 605.

<sup>108</sup> Dugard, *supra* n. 71 at 702.

<sup>109</sup> Williams and Schabas, *supra* n. 60 Art. 17 marginal n. 26.

due process recognized by international law, whether one or more of the following exist, as applicable.

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”<sup>110</sup>

Our analysis will begin with the latter two subparagraphs of this provision. On a literal reading of Article 17(2)(b) and (c), one may argue that the absence of intent to bring a person to justice can only be proven by evidence of an unjustified delay or lack of independence.<sup>111</sup> Such a reading would give way to reliance on the fact that, “[i]n most cases truth commissions are not problematic for reason of delay or bias”.<sup>112</sup> However, a less formalistic and more natural reading of these two subparagraphs would suggest that the lack of “an intent to bring to justice” is the overarching criterion for testing the existence of a genuine unwillingness to prosecute. On this basis, it would be natural to argue that the grant of a conditional amnesty evidences lack of this intent. Two more imaginative and strained interpretations of Article 17(2)(b) and (c) have been advanced. First, it has been questioned whether the “intent to bring a person to justice requires an investigation aiming at the prosecution of the accused”, thus alluding to the possibility that “alternative forms of accountability are also permissible”.<sup>113</sup> Second, it has been suggested that quasi-judicial procedures

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<sup>110</sup> Repr. in Triffterer, *supra* n. 13 at 605.

<sup>111</sup> Seibert-Fohr, *supra* n. 106 at 569.

<sup>112</sup> Seibert-Fohr, *supra* n. 106 at 571-572.

<sup>113</sup> Seibert-Fohr, *supra* n. 106 at 569.



may be sufficiently independent and impartial where “such proceedings may lead to normal criminal trials, e.g. because the perpetrator does not comply with certain procedural conditions (e.g. full disclosure) [...] Such forms of proceedings might be said to be in accordance “with an intent to bring the person to justice” because they retain the possibility of criminal prosecution as an option of last resort”.<sup>114</sup>

However one chooses to interpret Article 17(2)(b) and (c), one is still left with Article 17(2)(a). The question here is: how can this provision be interpreted in such a way that the decision to grant a conditional amnesty is not found to be “made for the purpose of shielding the person concerned from criminal responsibility”? Anja Seibert-Fohr has made the following argument:

[I]f criminal prosecution is waived by a truth commission in the interest of re-establishing peace, the purpose is not to shield individual persons but to serve a greater objective at the expense of criminal justice. The non-prosecution is merely a means to this end. This suggests that a state in such cases is not unwilling genuinely to carry out the prosecutions as required by article 17.<sup>115</sup>

Though perhaps possible, this is again a far from obvious reading of the relevant texts. First, the distinction between “means to an end” and “(ultimate) purpose” is a very subtle and difficult one.<sup>116</sup> Second, if such a distinction is accepted, it will be possible to draw it in quite a number of amnesty scenarios. To then confine the determination of inadmissibility to a South-African style model of conditional amnesty would require further distinctions. Seibert-Fohr is fully aware of this consequence and continues:

To be clear, it is not sufficient to maintain that the waiver of criminal responsibility was a means to an end. In de-

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<sup>114</sup> Stahn, *supra* n. 106 at 716.

<sup>115</sup> Seibert-Fohr, *supra* n. 106 at 570. For a very similar explanation, see Robinson, *supra* n. 75 at 501. For a clarification on the word “genuinely” modifying “to carry out” and not “unable or unwilling”, see Daryll Robinson, “The Mysterious Mysteriousness of Complementarity”, 21 *Criminal Law Forum* (2010) 67 at fn. 63.

<sup>116</sup> Against the possibility of such a distinction, see Cárdenas, *supra* n. 82 at 183.

termining a legitimate purpose for the waiver of criminal punishment special attention should be given to the purpose of the Rome Statute. Taking into account that it is intended to put an end to impunity for the most serious crimes, the exception for truth commissions should be narrowly interpreted.<sup>117</sup>

Carsten Stahn appears to favour the same result from an only slightly different reasoning. He tends to admit that the distinction between “ultimate purpose” and “side effects” cannot be maintained completely to limit any determination of inadmissibility to acceptable forms of conditional amnesties.

There may, however, be less flexibility towards the acceptance of alternative forms of justice, if the notion “for the purpose of shielding” is interpreted in the light of both the aim and the effect of the institutional choice, including its side effects. In this case, it may be discussed whether certain origin-neutral mechanisms, such as truth and reconciliation mechanisms with full amnesty powers or far-reaching pardons, may in fact be subject to review under Article 17(2)(a), particularly where they relieve the most responsible perpetrators or a specific group of key suspects from all forms of criminal responsibility.<sup>118</sup>

These suggestions to further distinguish between different “ultimate purposes” and “side effects” demonstrate that such a narrow interpretation of “purpose” in Article 17(2)(a) to exclude certain forms of conditional amnesties leads either to unacceptable results or to a balancing of interests for which the provision itself, being rather technically construed, does not offer any guidance.

From all this, it must be concluded that any attempt to exclude certain amnesty decisions from the scope of Article 17(1)(b) of the ICC Statute is fraught with very considerable difficulties in terms of a black-letter legal analysis.

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<sup>117</sup> Seibert-Fohr, *supra* n. 106 at 571.

<sup>118</sup> Stahn, *supra* n. 106 at 715.

### 3.4.2. Articles 53(1)(c) and 15(3) of the ICC Statute and Rule 48 of the Rules of Procedure and Evidence

Article 53(1)(c) of the ICC Statute reads as follows:

The Prosecutor shall, having evaluated the information available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: [...] taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial grounds to believe that an investigation would not serve the interests of justice.<sup>119</sup>

In light of the difficulties identified with the interpretation of Article 17(1)(b), a body of scholarly opinion holds that the position of the Court with respect to alternative forms of justice should find expression exclusively or at least primarily within the “interests of justice” standard.<sup>120</sup> This prosecutorial discretion is viewed as an “additional instrument [...] going beyond the rather ‘technical’ Art. 17”.<sup>121</sup>

The first argument against this position is that the criteria specifically listed therein “make it clear that the notion of “interest of justice” is linked to justice in a specific case (“*Einzelfallgerechtigkeit*”) rather than general policy considerations” and that it is “therefore doubtful whether Art. 53 offers vast space to weigh general interests of national reconciliation or objectives of peacemaking versus interests of accountability”.<sup>122</sup> In response, it must be noted that the legal standard for the exercise of prosecutorial discretion applies to both the situation and case stage in ICC proceedings.<sup>123</sup> It is thus wider in scope than

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<sup>119</sup> Repr. in Triffterer, *supra* n. 13 at 1065.

<sup>120</sup> *Informal expert paper: The principle of complementarity* (ICC Office of the Prosecutor, 2003): <http://www.icc-cpi.int/iccdocs/doc/doc654724.PDF> at para. 71 (accessed on 28 August 2008); Dugard, *supra* n. 71 at 702; Robinson, *supra* n. 75 at 486.

<sup>121</sup> Ambos, *supra* n. 75 at 155.

<sup>122</sup> Stahn, *supra* n. 106 at 718.

<sup>123</sup> ICC, Office of the Prosecutor, *Policy Paper on the Interests of Justice* (September 2007): <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09->

Article 17(1)(a)-(c) of the ICC Statute. Accordingly, confining the exercise of prosecutorial discretion to case-related considerations is not a compelling interpretation.

Perhaps, however, the reference to “justice” significantly limits prosecutorial discretion in another way. One commentator observes that it is peace and security rather than justice that is served by the proclamation of an amnesty.<sup>124</sup> The following assertion is even more far-reaching:

As the ostensible purpose of amnesty laws is to create an atmosphere of reconciliation, often at the expense of victims of the crime but for the interest of the larger community, amnesty is a political act, in which the element of ‘justice’ in a judicial sense does not figure.<sup>125</sup>

But this very narrow interpretation of “justice” in a “judicial sense” is again not a necessary one. Almost by logical necessity, the meaning of justice within Article 53(1)(c) of the ICC Statute must go beyond criminal justice.<sup>126</sup> It may even be construed so broadly as to include the definition of justice set forth in the 2004 Report of the Secretary-General on transitional justice:

‘[J]ustice’ is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of the victims and

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[73422BB23528/143640/ICCOTPIterestsOfJustice.pdf](#) at 1 (accessed on 28 August 2008).

<sup>124</sup> Seibert-Fohr, *supra* n. 106 at 579.

<sup>125</sup> Arsanjani, *supra* n. 29 at 67.

<sup>126</sup> *Policy Paper on Interests of Justice*, *supra* n. 123 at 8 (fn. 13). See also Kenneth A. Rodman, “Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court”, 22 *Leiden Journal of International Law* (2009) 99; Louise Mallinder, “Can Amnesties and International Justice be Reconciled?”, 1 *International Journal of Transitional Justice* (2007) 208. For an argument in favour of limiting prosecutorial discretion in respect of the ‘interests of justice’, see Dražan Đukić, “Transitional justice and the International Criminal Court – in the “interests of justice”?”, 89 *International Review of the Red Cross* (2007) 691.

for the well being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.<sup>127</sup>

Such a broad understanding of justice significantly widens the scope of prosecutorial discretion. The wording of Article 53(1)(c) does not therefore preclude the Prosecutor from taking the national interest of reconciliation into account where the State concerned claims that ICC proceedings are detrimental to this interest despite their focus on persons who bear the greatest responsibility for crimes. However, the international interest in conducting proceedings against those who are most responsible must weigh very heavily against this national interest. In light of the decision taken under Article 17(1)(d) of the ICC Statute to confine ICC proceedings to a particular category of persons,<sup>128</sup> the Office of the Prosecutor's 2007 "Policy Paper on the Interests of Justice" (Policy Paper) correctly emphasizes that, "the exercise of the Prosecutor's discretion under Art. 53(1)(c) [...] is exceptional in nature and that there is a presumption in favour of investigation or prosecution wherever the criteria established in Article 53(1)(a) and (b) [...] have been met".<sup>129</sup> When exercising its discretion, the Prosecution should, in particular, consider the international obligations of the State concerned. As there is no general "national reconciliation exception" to the customary prosecution principle that would include those who

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<sup>127</sup> *Supra* n. 27 at para. 7.

<sup>128</sup> It is worth mentioning that the ICC-OTP had expressed its "policy" of focusing its investigations on those bearing the greatest degree of responsibility before the same result was reached as a matter of law in *Lubanga Dyilo*, *supra* n. 100; in this context, the Prosecutor did not only refer to Art. 17(1)(b), but also to Art. 53(1)(c) of the ICC Statute; ICC, *Paper on some policy issues before the Office of the Prosecutor*, (September 2003) [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf) at 7 (accessed on 28 August 2008); the reliance on Art. 53(1)(c) of the ICC Statute was confirmed in the *Policy Paper on the Interests of Justice*, *supra* n. 123 at 7.

<sup>129</sup> *Policy Paper on Interests of Justice*, *supra* n. 123 at 1.

bear the greatest responsibility,<sup>130</sup> the international interest in prosecution should also trump in the exercise of prosecutorial discretion.

The situation is different where the national decision to grant conditional amnesty for persons who bear the greatest responsibility for crimes under international law is driven by the urgent necessity to facilitate the peaceful transition to democracy or to end a non-international armed conflict. We have seen that the existing customary international law recognizes a “limited necessity exception” in such a scenario.<sup>131</sup> However, it remains true that, in a case of necessity, it is rather peace and security than justice (even if widely construed) that is served by the proclamation of an amnesty. The Office of the Prosecutor’s Policy Paper is fully aware of this problem, as can be seen from the following statements:

The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security [...] The Office will consider issues of crime prevention and security under the interests of justice [...] As indicated, however, the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.<sup>132</sup>

### **3.4.3. The Need for a Policy Decision on the “Limited Necessity Exception”**

It follows from the foregoing considerations that the granting of conditional amnesty in a South-African type of necessity situation cannot be easily accommodated by “interpreting” Article 17(1)(b) and/or 53(1)(c) of the ICC Statute. At the same time, it appears unsatisfactory to have the Court insist on the initiation of international criminal pro-

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<sup>130</sup> *Supra* § 3.3.3.

<sup>131</sup> *Ibid.*

<sup>132</sup> *Policy Paper on Interests of Justice, supra* n. 123 at 8-9.

ceedings while customary international law recognizes such a necessity exception *vis-à-vis* the State concerned and while “widespread sympathy with the South African model was expressed in the course of the negotiations”.<sup>133</sup> Against this background, an “imaginative interpretation” of either of these provisions to carve out such an exception would appear to be justified. Intellectual honesty requires us to acknowledge the policy nature of such an “interpretation”. On a methodological level, it is at least arguable that such a policy decision may legitimately be made where the drafters of the Statute have deliberately left the Court with “a conflict [that] cannot be readily addressed by reference to black-letter law techniques of legal analysis because it involves fundamental questions of policy with far-reaching implications”.<sup>134</sup>

#### **3.4.4. Possible Role of the United Nations Security Council**

It has been suggested that the ICC should accommodate a “limited necessity exception” under either Article 17(1)(b) or Article 53(1)(c) of the ICC Statute. Related to this point, we should consider whether the UN Security Council can prevent the ICC from proceeding where a State confers a blanket amnesty on persons most responsible in order to end a (non-international) armed conflict. According to Michael Scharf, Article 16 of the ICC Statute goes a long way in this direction. As he writes,

[w]ith respect to a potential amnesty exception, the most important provision of the Rome Statute is Article 16. Under Article 16, the International Criminal Court would be required to defer to a national amnesty if the Security Council adopts a resolution under Chapter VII of the United Nations Charter requesting the Court not to commence an investigation or prosecution, or to defer any proceedings already in progress. The Security Council has the legal authority to require the Court to respect an amnesty if two requirements are met, namely: (1) where the Security Council has determined the existence of a threat to the peace, a breach of the peace or an act of aggression

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<sup>133</sup> Williams and Schabas, *supra* n. 60, Art. 17, marginal note 26.

<sup>134</sup> Arsanjani, *supra* n. 29 at 65.

under Article 39 of the U.N. Charter; and (2) where the resolution requesting the Court's deferral is consistent with the purposes and principles of the United Nations with respect to maintaining peace and security, resolving threatening situations in conformity with principles of justice and international law, and promoting respect for human rights and fundamental freedoms under Article 24 of the U.N. Charter.<sup>135</sup>

“Deference to a national amnesty” in this citation probably means “permanent respect for an amnesty”, because usually an amnesty law is intended to have permanent effect. It is unconvincing, however, to construe Article 16 of the ICC Statute as covering Security Council resolutions that require permanent respect for an amnesty. Article 16 reads:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.<sup>136</sup>

Despite the possibility of a renewal, the 12-month limitation of any Security Council request strongly suggests it was never intended to allow the Council to create a permanent bar to investigations or prosecutions. Rather, this power was included in the ICC Statute to allow the Security Council to react to immediate needs within a conflict situation, such as the need to broker a peace agreement. Article 16 of the Statute is “thus an unwieldy provision to invoke to achieve permanent respect for an amnesty law”.<sup>137</sup>

Having said this, Article 16 of the ICC Statute cannot limit the powers of the Security Council under Chapter VII of the UN Charter. Thus, one must ask whether the Council might use its Chapter VII

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<sup>135</sup> Scharf, *supra* n. 70 at 522-523.

<sup>136</sup> Repr. in Triffterer, *supra* n. 13 at 595.

<sup>137</sup> Gavron, *supra* n. 35 at 109; concurring Stahn, *supra* n. 106 at 717; on the possibility of the ICC being able to review a decision of the Security Council in our context, see, e.g., Ambos, *supra* n. 75 at 152-153; Scharf, *supra* n. 70 at 523.



powers to require Member States to “defer to a national amnesty” through non-cooperation with the ICC where the Council determines that the amnesty is necessary in the interests of international peace and security. The Council’s very wide margin of appreciation in applying Article 39 of the UN Charter would make it difficult to argue that its decision to protect a blanket amnesty in a peace agreement constitutes an abuse of its powers. However, in light of the customary prosecution principle developed above,<sup>138</sup> the question would arise whether the Council could, through such a resolution, deviate from general international law.<sup>139</sup> This question is delicate because the (repeated) Security Council decision to protect blanket amnesties in peace agreements could also very well have the effect of changing the (still vulnerable) customary prosecution principle by widening the necessity exception to it. In any event, a Security Council resolution under Chapter VII to endorse and protect a blanket amnesty in a peace agreement would stand in stark contrast to the above-mentioned UN policy not to recognize amnesties for crimes under international law.<sup>140</sup> For this reason alone, the Council may be expected to think very hard before going down this road.

### **3.5. Third States and National Decisions Against (Full-Fledged) Prosecution**

Existing customary international law forces decision-makers in transitioning States to consider the power of third States to exercise universal jurisdiction over international crimes.<sup>141</sup> This power is not limited

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<sup>138</sup> *Supra* § 3.3.3.

<sup>139</sup> The same question is posed by Scharf, *supra* n. 70 at 523.

<sup>140</sup> Cf. citation accompanying n. 95.

<sup>141</sup> As is well known, this view is controversial. Instead of taking up the general discussion about this subject in this contribution, reference is made to Kreß, *supra* n. 25 at 561-585. The same reference applies for a detailed explanation of the legal propositions that follow in the text. In our legal context, the power to exercise universal jurisdiction over crimes under international law has been confirmed by the Special Court of Sierra Leone in its *Lomé Amnesty Accord* decision, *supra* n. 73 at para. 70. For an example of third State policy debates on this issue, see Advisory Council on International Affairs and Advisory Committee on Issues of Public International Law, *Transitional Justice: Justice and Peace in Situations of Transition*, Report Commissioned by the Netherlands Foreign Ministry (2009).

to situations where the suspect is present on the territory of the universal jurisdiction State and it acts as the *forum deprehensionis*. Instead, States may exercise universal jurisdiction over crimes under international law also *in absentia*, though this form of adjudicative universal jurisdiction is confined to investigative measures undertaken as a form of anticipated legal assistance benefiting the *forum conveniens* or with a view to preparing an extradition request.

Only recently has the relationship between amnesty decisions taken by the territorial State and the legal position of a universal jurisdiction State attracted close scholarly attention.<sup>142</sup> The legal starting point is the same as for the vertical relationship between a territorial State and the ICC: the national decision not to prosecute does not bind the third State *per se*.<sup>143</sup> The *Lomé Accord Amnesty decision* (2004) confirmed this view; as it holds,

Where the jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember.<sup>144</sup>

It must be asked whether a national amnesty's lack of extraterritorial effect should be qualified by some of the exceptions to the customary prosecution principle identified above. In other words, the question is whether and to what extent the opposability of national amnesty decisions by third States could operate as a discretionary principle open to exceptions such as impossibility, democratic will and necessity. The impossibility exception is not applicable to a universal

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<sup>142</sup> For a particularly important contribution, see Sadat, *supra* n. 30 at 1009-1014, 1023-1030.

<sup>143</sup> Concurring Sadat, *supra* n. 30 at 1027; Robinson, *supra* n. 75 at 503-504.

<sup>144</sup> *Supra* n. 73 at 67. For the same position, see Supreme Court of Mexico, Decision on the extradition of *Ricardo Miguel Cavallo*, 10 June 2003 in 42 *International Legal Materials* (2003) at 908-909.

jurisdiction State because it is precisely one of the functions of this jurisdiction to serve as a fall-back option where the *forum conveniens* is not available for practical reasons. The situation is different with respect to national decisions not to (fully) prosecute low and mid-level perpetrators as part of a hybrid accountability model and the limited necessity exception, as applied in South Africa. In those instances, considerations of sound judicial policy speak against the exercise of universal jurisdiction.<sup>145</sup> Obviously, the rationale of anticipated legal assistance benefiting the *forum conveniens* is inapposite where a lawful decision not to prosecute was taken in that forum. But the national amnesty decision, if considered lawful under international law, should also not be upset by extradition requests or proceedings against amnestied persons that are temporarily present in the universal jurisdiction State. If broadly construed, this can be explained on the basis of the subsidiary nature of the universal jurisdiction principle. Where an internationally legitimate accountability model has been chosen in a *forum conveniens* to achieve transitional justice, there is no need for a universal jurisdiction State to complement the decision taken in the transitional State by instituting criminal proceedings. There is perhaps room for the admission of an “exception to this exception” where the suspect will be permanently present in the universal jurisdiction State. The permanent residence of an amnestied person may give the universal jurisdiction State a national interest in prosecution of the crime that complements its fiduciary power to advance the interests of the international community.

### 3.6. Conclusion

The *Westphalian* principle of “perpetual oblivion, amnesty, or pardon on one side and the other” is dead as far as international armed conflicts are concerned and has not been revived to govern peace talks to end non-international armed conflicts. At the same time, the categorical preference for amnesty for war crimes in the *lex pacificatoria* of classical international law has not been replaced by the opposite solution of a comprehensive duty to prosecute crimes under international law. Rather, the international criminal law restraints imposed on the

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<sup>145</sup> Sadat, *supra* n. 30 at 1028; Robinson, *supra* n. 75 at 504.

peace-makers of our time are nuanced. Decision-makers must take account of an international legal presumption in favour of prosecution that excludes blanket amnesties for those who bear the greatest responsibility for crimes under international law.

Yet, the presumption can be legitimately rebutted in a number of ways and, most importantly, by accepting institutional designs of transition that include hybrid accountability models and, if the necessity to restore peace so demands, conditional amnesties coupled with (quasi-)judicial investigations. This “prosecution principle with exceptions” may provide less legal certainty and may be less easy to apply than a rigid obligation. But it avoids the shortcomings of a legal absolute that overtakes diverse realities on the ground and does not reflect a ripened and widespread State practice. In any event, it is only fair to add that the legal framework set out in this contribution is derived from the analysis of a rather recent body of State practice and has thus not yet reached a state where it is very resistant to change. Only the future practice at all three available levels of criminal jurisdiction and inside the Security Council can tell whether the international legal regime identified above will establish itself as a robust pillar of the emerging system of international criminal justice.

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## **“Hybrid” Tribunals and the Limits of Accountability: Aims, Resources and Political Will**

**David Cohen**\*

Since 1999 numerous so-called “hybrid” tribunals have been created – for Kosovo, East Timor, Bosnia, Sierra Leone, Cambodia and Lebanon – as institutional mechanisms to provide accountability for crimes against humanity, war crimes and genocide in transitional contexts. Such tribunals are typically established through an agreement between the UN and the government of the country in question, except where, as in East Timor or Kosovo, the UN itself has taken over governmental functions. To a significant degree their creation arose from a recognition of the shortcomings of the much larger ad hoc International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY). To simplify somewhat, the two major shortcomings which the smaller hybrid courts were to remedy were, (1) the cost and duration of trials before the ICTY and ICTR, and (2) the difficulty of purely international tribunals located outside of the country where the violence took place to adequately address goals related to transitional justice. In particular, it was hoped that speedier, cheaper trials, the incorporation of nationals into the tribunal, and being situated in the country would enable these courts to contribute to promoting reconciliation, providing closure and a sense of justice for the victims, building capacity in the local judiciary and establishing the rule of law – and all at an affordable price.

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This chapter discusses the strengths and weaknesses of the hybrid tribunals of Sierra Leone, East Timor, and Cambodia in regard to meeting the aims which led to the creation of these hybrid courts. It argues that these various courts might be regarded as a series of unintended experiments by the international community to find a workable formula for addressing the need for accountability in transitional situations where grave human rights abuses have occurred. Even though such tribunals may have considerable potential, much greater efforts will have to be made if they are to achieve such broad and ambitious goals. More specifically, I will argue that a more systematic mechanism for learning from the successes and failure of previous “experiments”, greater discipline and determination in applying those lessons and in meeting minimum international justice standards, greater realism in regard to what can be achieved with only modest resources, and, above all, greater political will and accountability, are all required to make these mechanisms more effective.

#### **4.1. Aims, Aspirations, Accountability**

##### **4.1.1. Aims and Aspirations**

Hybrid tribunals are typically justified on several grounds. It has been said that, as an institutional response to cases of widespread violations of human rights, they are superior to international tribunals because they are held in close proximity to the people to whom they are meant to serve. By virtue of their proximity and the participation of nationals in the process, they can give the people of the country where the crimes occurred a sense of what has been called “ownership” of the process.<sup>1</sup> This, in turn, can make the trials more meaningful to the community where the wrongdoing took place. Victims will be more aware of the progress and outcomes of the justice process and will have a sense that justice is being done. Such a perception on the part of victims can serve to bring closure and reconciliation in post-conflict societies. It is also claimed that hybrid tribunals can bring other bene-

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<sup>1</sup> On “ownership”, see Judge Phillip Rapoza, “Hybrid Tribunals and the Concept of Ownership: Who owns the process?” *American University International Law Review*, 21 (2006).

fits to their “host” countries. They can serve as models of the rule of law, by showing how fair trials ought to be conducted and international standards implemented. They can also provide opportunities for “capacity building” through placing national and international judges, prosecutors, investigators, defence counsel, administrators and other specialists together so as to enable what is often called “knowledge transfer”.

There is no doubt that such aims are valuable and important. UN officials, diplomats, government officials and spokespersons for the tribunals often invoke them to underscore the significance of these institutions. As will be discussed below, however, too often such aspirations have remained in the realm of rhetoric. On the one hand, there has been a reluctance to acknowledge the scope of the human and financial resources that would be required to seriously pursue such goals. On the other hand there has been a concomitant reluctance on the part of the UN and relevant governments to critically and honestly assess to what extent such aims have actually been fulfilled and to analyze the reasons for the failures. One need only consult the many self-congratulatory reports of the Secretary General of the United Nations on the success of the East Timor mission in nation building, providing accountability, and promoting the rule of law to see the contrast between aspiration and reality.<sup>2</sup> When the complete breakdown of Timorese political and justice institutions in April–May 2006 revealed all too clearly the unreality of such claims, there was no apparent appetite in New York for investigation of this failure, holding to account those responsible, and fundamentally rethinking its strategy for development of the Timorese judiciary. The consequences of a UN administration committed to lofty goals in their rhetoric and to “Justice on the Cheap” in practice were all too apparent. But what lessons were learned from the experience? This question will also be considered below in the discussion of the East Timor and Cambodian tribunals.

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<sup>2</sup> See, e.g., *End of Mandate Report of the Secretary General on the United Nations Mission of Support in East Timor* (12 May 2005, S/2005/310); Report of the UN Secretary General (17 January 2006, S/2006/24).

Yet there are even more fundamental concerns in regard to the aims articulated for hybrid tribunals. It is not clear what evidence there is that *any* such tribunal can fulfil all of these goals. Certainly to date none have come close to doing so. The most fundamental questions about aims is thus whether it is at all realistic to expect so much of these (often all too imperfect) judicial mechanisms. What courts can do, if they are properly supported and conducted, is to provide accountability in regard to a discrete set of crimes by calling the perpetrators of those crimes to account. In the process, they can also augment the historical record of the conflict by collecting and preserving documents, witness testimony, and so on. What they can do beyond this remains, for the most part, an open question. However, what is clear from previous experience is that without strong political will and the provision of sufficient resources none of these goals can be achieved.

#### 4.1.2. Political Will

A review of the experience of the tribunals in East Timor, Sierra Leone and Cambodia indicates that political will is the single most important factor that determines a tribunal's failure or success. First, political will is necessary to create the tribunal and to make it work in a way that provides justice for victims and meets international standards for fair trials. It has often been the case that political will is sufficient to *create* a tribunal, but not to *carry through its trials to completion of the mandate*. The case of East Timor suggests that if tribunals are not given enough support to complete their tasks, then it may be better not to create them in the first place. In East Timor a justice process that was deeply flawed from its very inception too often produced trials that did not meet minimum international standards and that only succeeded, after years of effort, in, for the most part, convicting the lowest level perpetrators while commanders and political leaders enjoyed total impunity.<sup>3</sup>

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<sup>3</sup> The discussion of the East Timor trials in this paper relies on David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, East-West Center, 2006. See also, Suzannah Linton, "Putting Things into Perspective: The Realities of Accountability in Timor Leste, In-



In Cambodia, on the other hand, a lack of political will in the multi-year negotiations between the UN and the Cambodian government produced a judicial structure that is intrinsically flawed. Here, the lack of sufficient political will on the part of the UN in the creation process has created handicaps that will only make it more difficult for the trials to achieve satisfactory results. To what extent these handicaps can be overcome remains to be seen, as the Extraordinary Chambers in the Courts of Cambodia (ECCC) are still in their pre-trial phase. To simplify again, there appear to have been two major problems underlying the eight-year negotiations. First, at crucial points the UN decided that compromise was necessary in order to move the process ahead towards a “successful” conclusion. But creating a court is different than some other kinds of international negotiations where compromise may be necessary or appropriate. If compromises on the structure of a tribunal potentially compromise its ability to be independent, impartial, and meet international standards, then it is better to let the negotiations fail. This was the position of Hans Corell, negotiating on behalf of the UN, but he was overruled and the process moved forward with all these structural problems intact. Second, in order to make the negotiating process succeed some of the most difficult issues were left unresolved. These unresolved issues inevitably come back to haunt the tribunal because they must necessarily be resolved one way or the other in the trial process. Again, while deliberately leaving certain of the thorniest issues vague or ambiguous may be an acceptable strategy in certain kinds of international negotiations it is not in the creation of a court. Two examples from the ECCC may illustrate this point.<sup>4</sup>

The most basic issue involves that of ownership and identity: To what extent is the ECCC an international tribunal bound by interna-

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onesia, and Cambodia”, University of Maryland Series in Contemporary Asian Studies 3, 2005; Caitlin Reiger, *Hybrid Tribunals Case Study: The Serious Crimes process in East Timor*, International Center for Transitional Justice, 2006, and the many excellent reports of the Judicial System Monitoring Programme, available at [www.jsmp.minihub.org](http://www.jsmp.minihub.org).

<sup>4</sup> On the ECCC see the many excellent reports by Heather Ryan, the monitor of the ECCC for the Open Society Justice Initiative. These reports and a number of other important publications by OSJI are available at <http://www.soros.org/initiatives/justice>.

tional standards and to what extent is it a domestic court “owned” by the Cambodian judiciary? Because this issue was not clearly resolved, and because it was decided that the court would be an “extraordinary” tribunal located “*in*” the courts of Cambodia, the Cambodian position has consistently been that it is “their” court. That is, it is a purely Cambodian court, applying Cambodian law, in which internationals have been permitted to participate by agreement of the Cambodian government. As for the law that applies, the Statute provides that the law of the ECCC is Cambodian law, except that international law applies where there are gaps in Cambodian law or where Cambodian law conflicts with international norms and standards. It was the lack of a clear structure specifying that this was an “internationalized” court within the courts of Cambodia that led to protracted conflicts in 2007 between the Cambodian and international participants, which at several points threatened to bring an abrupt end to the whole process.

The second example also derives from the original failure to clearly resolve the issue of identity and ownership. In creating the structure of the judicial chambers and prosecutorial arm of the ECCC, the UN wanted to ensure the independence of the judges and of the process more generally from political interference by the Cambodian regime. The Cambodian side, on the other hand, wanted control and justified this by saying that it was a Cambodian court and, hence, there should be a majority of Cambodian judges in each of the three chambers (pre-trial, trial, and appeals, the latter known as the Supreme Court Chamber). The compromise reached was that there would be a majority of Cambodian judges in all three chambers but that a majority vote would not suffice for a decision. Instead, the voting system is known as “supermajority”, whereby at least one of the international judges would have to vote along with Cambodian counterparts to reach a valid decision. The problem was that this left open what would happen in various kinds of instances (interlocutory appeals, for example) when no decision could be reached. The completely abstract decision formula was left to be interpreted and implemented by the court itself. This again produced serious conflicts between the international and national judges and it remains to be seen how the system will work in practice. Similar problems were inherited by the Office of the Co-prosecutors, led by one Cambodian head prosecutor and one interna-

tional. If both do not agree on the names of persons to be investigated by the Co-investigating judges the prosecutorial process comes to a standstill. In this instance the case may be referred to the Pre-Trial Chamber to resolve the dispute between the Co-prosecutors. But if the dispute is political in its origin (that is, the Cambodian government does not want a particular person to be investigated or indicted) then the same political constellation will likely determine the result on appeal in the Pre-Trial Chamber. In short, there is no effective mechanism to provide for the independence of the initiation of the prosecutorial process. Leaving such issues unresolved may have enabled the process of negotiation to move forward, but it also created structural flaws whose consequences may serve to undermine the integrity or legitimacy of the process in practice.

#### **4.1.3. Political Will and Accountability**

Another dimension of political will comes into play after the creation of the tribunal. It involves providing the kind of accountability and oversight necessary to make the process work and make sure that mistakes are corrected and not made again in other courts. The UN is not particularly well known for its commitment to accountability and this has certainly manifested itself in regard to difficulties encountered in various tribunals in which it has been involved. In regard to East Timor, for example, during the five-year trial process problems of incompetence, structural flaws, lack of political will, and general failure to meet minimum international fair trial standards were repeatedly brought to the attention of local UN administrators and to New York. The general reaction was to ignore such problems until and unless they became so embarrassing that some action was required, and then to do the absolute minimum necessary to save face. As will be seen below, some very serious problems were never addressed at all, or in some cases were, but not adequately.

To give but one example of such lack of accountability, in 2004–2005 a program was established in East Timor to regularize the appointments of Timorese judges and prosecutors who had been working under a probationary status, many of them since appointment early in the UN mission’s regime. The device chosen to vet them was what was

described by the country's chief judicial officer, the Portuguese international judge serving as President of the Court of Appeal (who designed and oversaw the evaluation and training program) as a "minimum competency examination". All of the forty-two judges and prosecutors then practicing in East Timor failed this examination. This includes the four Timorese judges who had been serving in the UN Special Panels trial process at the trial and appellate level. The result of the examination was that not a single Timorese judge or prosecutor was authorized to serve in office. This left the country literally without a judiciary or public prosecution service for several years, as the failed examinees were required to undergo a three year training period at the UNDP financed and administered by the Judicial Training Centre.

The result of the examination also called into question the legitimacy of the judgments in which the Timorese Special Panels judges participated. If they were really incompetent, what did that say about the results of the trials they participated in or presided over, or of the judgments that they wrote? However, because of various perceived irregularities in the examination process and the implausibility of the result itself, the examination was widely perceived in the Timorese judiciary and by many observers as having been rigged. This supposition was in fact confirmed by the UNDP Coordinator of the Judicial Training Centre, who stated directly and without equivocation that the judges had been failed because it was the only way to force them to learn Portuguese, which the Timorese government, in a neo-colonial reflex, has decided is to be the sole language of the law and the courts in East Timor (despite a provision in the Constitution which made both Tetun and Portuguese co-equal national languages).<sup>5</sup> An analysis of the examination itself confirmed that it was so full of errors and so sloppily put together that it could not have provided a legitimate and fair basis for evaluation.<sup>6</sup>

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<sup>5</sup> This statement was made to me in an interview with this UNDP official. See Cohen, *Indifference and Accountability*, pp. 93-105.

<sup>6</sup> The text of the examination, with errors highlighted and analyzed, is available in the Appendix to Cohen, *Indifference and Accountability*. There are 31 errors in 26 questions.

This information was published and brought to the attention of the UN authorities in East Timor and New York, both formally and informally. In addition, one of the most respected international judges from the Special Panels, who participated in the grading of the examination, brought his concerns about the integrity and fairness of the evaluation process directly to the attention of the head of the UN mission, the Special Representative of the Secretary General. Despite this information no formal investigation was undertaken. The results of the examination, though lacking legitimacy among the Timorese judiciary, stood officially unquestioned. The UNDP Coordinator, whose job was to administer the program on behalf of the UN, and who had admitted that the results of the examination were rigged, remained (and still remains) in her position. The UN-paid President of the Court of Appeal, who had himself written the deeply flawed and unprofessionally drafted examination and overseen the evaluation process that deprived the country of its judiciary – and put international, Portuguese speaking appointees in their place – was not called to account and was reappointed in 2007 (despite being the author of decisions in Special Panels cases that gained international notoriety for their glaring lack of fundamental judicial knowledge). All of this was financed and overseen by the United Nations and its international appointees in a process that was supposed to build capacity in the Timorese judiciary and help establish the rule of law in this fledgling country. Such examples could be multiplied.<sup>7</sup> One can only question how the UN aims to end the culture of impunity through a justice process that itself displays indifference and contempt for basic principles of accountability.

This failure of political will has two important consequences. First, it fosters an institutional culture of virtual impunity. When individuals who, whether through incompetence or neglect, are known within the tribunal community to have made egregious errors with serious consequences, or to have failed to perform to even minimum standards, are then reappointed to other important positions or promoted, the lesson to others is that performance does not matter and connections, cronyism, and institutional loyalty are more important.

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<sup>7</sup> See also David Cohen, *The Legacy of the Serious Crimes Process*, International Center for Transitional Justice, forthcoming.

Second, when failures and mistakes are not honestly acknowledged and appropriately dealt with, it is difficult, if not impossible, for “lessons learned” in one place to be used to avoid similar mistakes in others. Nearly all participants in the world of international tribunals that I have spoken to or worked with complain that in every case it seems to be a matter of “re-inventing the wheel” and making the same mistakes all over again in every tribunal. There are, of course, exceptions to this, particularly when successful personnel from one court are appointed to positions at other tribunals and bring their hard-earned knowledge with them. This, however, does not mitigate against the central importance of political will in providing effective oversight, management, and accountability on the part of the UN. Various scandals about alleged corruption, flawed hiring practices, and ineffective management have dogged the ECCC almost since its inception. It took many months for the UN to react vigorously to these problems, vital months lost in terms of adequate pre-trial preparation, and it still remains to be seen how effective the reaction will be in actually addressing and correcting the underlying problems.

#### **4.1.4. Political Will: International Dimensions**

A final, and potentially most critical, dimension of political will involves the international community. This dimension includes several components. First, because tribunals lack international enforcement powers, cooperation of national governments is often necessary to ensure that those accused come into the custody of the court. Those accused often involve the most notorious individuals sought by a court because they are the ones most likely to have the political connections and financial means to avoid international arrest warrants. In the case of the ICTY, only protracted pressure by the United States and the European Union, assisted in some cases by changes in government, led to greater cooperation on the part of Serbia and Croatia. Even so, one of the most sought indictees, Radovan Karadžić, remains at large some twelve years after the end of the conflict. The legitimacy and success of the Special Court for Sierra Leone might have been seriously jeopardized if Charles Taylor had not come into the custody of the tribunal, and this was only made possible by high level pressure and protracted

negotiations with the government of Nigeria, by whom he had been granted refuge.

In East Timor, on the other hand, the Special Panels for Serious Crimes never obtained custody of a single Indonesia military officer from among the very large number that had been indicted. Several factors appear to distinguish this case from the success of the Special Court in obtaining custody of Taylor, but the key one is clearly the political will of major powers like the United States in pursuing the matter with real commitment. Countries like the US and Great Britain that are major donors to the Special Court have a stake in its success. In the case of Timor, the process was supported not by donor states but out of the budget of the UN peacekeeping mission (UNTAET and then UNAMET). No major powers exerted serious pressure on Indonesia to cooperate in complying with international arrest warrants or indictments, and this was especially the case after the Bali bombing in the fall of 2002. In US eyes this event elevated Indonesia to a major ally in the War on Terror and undercut any political will to jeopardize that alliance by threatening repercussions on the Timor issue. It is also the case that Indonesia is the major regional power and dwarfs East Timor in strategic, economic, and political importance. Finally, the Timorese government itself, after independence in May 2002, often undermined efforts to obtain custody of Indonesian generals. After UN prosecutors sought to issue an arrest warrant for General Wiranto, the Timorese Prosecutor General disavowed this step and President Xanana Gusmao flew to Bali to meet Wiranto, whom he, notoriously, embraced in front of gathered photographers. The lack of political will on the UN part was made manifest as well, when the UN issued a statement saying that the decision to pursue Wiranto was a purely Timorese matter and had not been supported by the UN in New York.

In light of these developments the track record of the East Timor justice process before the Special Panels for Serious Crimes is easily explicable. Of 87 defendants brought to trial, of whom 84 were convicted, not one was either a high ranking Timorese militia leader or an Indonesian army officer responsible for the crimes committed. Almost all were Timorese villagers who had been conscripted into militias at the village level and participated at the lowest level of responsibility.

Prior to 2002, the Serious Crimes Unit (SCU, the prosecution function) had not pursued indictments and arrest of high-ranking Indonesians.

Disappointment at these results was manifest among many Timorese, and was only exacerbated by the decision of the UN to end the trial process midway, with hundreds of investigations still pending and so many indicted cases not brought to trial. This disappointment was made clear at the eleven community meetings the SCU held to inform Timorese in outlying districts that they were closing up shop and going home without providing the justice and accountability desired by victims and so many Timorese. The lesson to be learned here seems clear enough: If the political will is lacking from the beginning to carry the process through to its completion and to bring to justice those who are most responsible for the crimes, then it may be better not to raise unrealistic expectations about bringing justice, ending impunity, promoting reconciliation, establishing the rule of law and the like. Indeed, in East Timor, given what was achieved, what was left undone, and the failure of much of the trial process to meet international standards, it is legitimate to ask whether it would have been better not to begin in the first place. As one of the Timorese Special Panel Judges, Maria Natércia Perreira Gusmao, put it, “Every individual must be responsible for his crimes. But speaking as a Timorese and not as a judge, I think this system is not fair. Is it fair to prosecute the small Timorese and not the big ones who gave them orders?”<sup>8</sup> One must, of course, acknowledge that there were substantial achievements in terms of assembling the documentary basis of a historical record of the violence, preparing indictments of leading figures, and convicting some individuals guilty of very serious crimes. Nonetheless, the question deserves to be asked, and to my mind the answer is not easy if the question is asked with honesty.

#### **4.2. Mandate, Resources, Limitations**

The previous section discussed some of the overarching political factors that shape the way tribunals are able to conduct their business. In this and ensuing sections we turn to some of the more practical aspects

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<sup>8</sup> Quoted in *The New York Times*, 4 March 2001.



of the work of tribunals and to factors that help shape their success or failure: mandate, resources, and limitations. Of these, a clearly defined and realistic mandate, commensurate with the political support behind the tribunal and the resources available to support it, is the second most important factor after political will in determining its success or failure.

#### **4.2.1. Institutional Actors**

The focus here will be on the hybrid tribunals discussed already, and for the sake of comparison, on the national tribunal created by the government of Indonesia to try crimes against humanity committed in East Timor during the 1999 violence (this is the violence associated with the popular consultation, in September of 1999, which led to the end of Indonesian rule). The inclusion of this national tribunal incorporating international law will serve not only to round out the portrayal of the East Timor justice process, but also to highlight some of the problems common to both national and internationalized trials. The discussion will examine aspects of the following institutions:

- a. *The Special Panels for Serious Crimes (SPSC) and Serious Crimes Unit (SCU), created by the UN in East Timor in 2000.* The Special Panels comprised the judicial chambers, including trial panels and a Court of Appeal. Each was composed of two international and one Timorese judges. The Special Panels were created by the UN transitional administration as part of the Dili District Court, with exclusive jurisdiction over international crimes enumerated in their statute. The Serious Crimes Unit was placed within the Office of the Prosecutor General of East Timor and was headed by an international prosecutor, the Deputy Prosecutor General for Serious Crimes, who operated with functional independence. As the UN peacekeeping mission to East Timor (UNTAET) functioned as the government of the country until May 2002, it created, staffed, and managed the tribunal with virtually complete control until that date. No “Registrar” or other court official with general management responsibility was ever appointed. A significant feature of this arrangement was that the justice process was administered simply as another part of the

peacekeeping mission rather than as an independent institution reporting to the UN Office of Legal Affairs in New York. After independence, issues of “ownership” became more complicated and both the Timorese government and the UN used this situation to deny responsibility when convenient to do so. The debacle over the arrest warrant for General Wiranto provides one of the clearest examples of such behaviour. The Special Panels conducted trials until May 2005, encompassing 55 trials with 87 accused.

- b. In 2000, in the context of its transition to democracy, the Indonesian government enacted a law (26/2000) creating a system of “*Ad Hoc Human Rights Courts*”, to try gross human rights violations, such as crimes against humanity and genocide, including cases that occurred before the enactment of the law, like the 1999 violence in East Timor. While the major impetus behind the speedy enactment of this legislation was to inhibit the international community from creating a court for East Timor on the model of the ICTY and ICTR, the law went beyond this goal and envisaged a permanent system of human rights courts. In other words, somewhat dubious political motives made possible a potentially significant human rights reform that could contribute to ending the culture of impunity that had reigned in the New Order era of authoritarian rule. In 2003–2004 the Jakarta Ad Hoc Human Rights Court conducted 12 trials, including three Indonesian army generals, the provincial governor, the chief of police, and various lower ranking officers and soldiers among the 18 defendants. Pursuant to law 26/2000, the process was initiated by a recommendation to the Attorney General of Indonesia from a special investigatory commission (KPP HAM) set up under the auspices of the Indonesian National Human Rights Commission. At trial, however, the prosecution appeared in most of the cases to proceed with a mixture of incompetence and indifference. Six accused, including two generals, were convicted, but five of these convictions were overturned on appeal. The sole conviction upheld was that of the only Timorese among the accused, the *Aitarak* militia leader, Eurico Gutteres. While the flaws in the Indonesian trial process were widely and loudly condemned inter-

nationally, equally serious flaws in the UN justice process in East Timor received much more muted and polite criticism, despite the fact that one might well think that the UN should be held to a higher standard than a national judiciary in the first few years of transition from a long period of authoritarian rule.<sup>9</sup>

- c. *The Special Court for Sierra Leone* was created following negotiations between the UN and the Sierra Leone government. As a “treaty-based” tribunal not created, like the ICTY or ICTR, under the Chapter VII powers of the Security Council, the Special Court depends for its funding on the voluntary contributions of donor countries, which also comprise the “Management Committee” for the tribunal. This feature provides a level of oversight independent of United Nations but also serves as a source of pressure on the court in regard to duration of trials, budget management, etc. As noted above, however, it also gives the donor countries a direct stake in the success of the process, which can serve as a source of political will in regard to issues like obtaining custody over Charles Taylor. The Special Court will try four cases, involving ten accused. Charles Taylor is currently standing trial alone and in The Hague, where the Special Court has leased a courtroom from the ICC. Because of security concerns that many observers regarded as ill-founded, the UN decided not to hold this long awaited trial in Sierra Leone. The nine other accused were tried in Freetown over a four-year period, in groups of three, representing the three major parties to the conflict. The two trial panels of three judges each include one judge appointed by the government of Sierra Leone. Only one of these appointees is in fact Sierra Leonean. In the case of Trial Chamber II, the Sierra Leonean government appointed a jurist from Uganda. A majority of the staff of the Special Court are from Sierra Leone, but none of the prosecutors. The defence operates for the most part in mixed teams of international and Sierra Leonean counsel. The Appeals Chamber includes a Sierra Leonean member. One of the

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<sup>9</sup> On the Jakarta trials see David Cohen, *Intended to Fail: East Timor Trials before the Ad Hoc Human Rights Court in Jakarta*, International Center for Transition Justice, 2004, and Suzannah Linton, “Putting Things into Perspective”.

most significant features of this court in comparison with East Timor and the ICTY/ICTR is that its mandate is limited to trying those who bear “the greatest responsibility” for the horrific violence of the ten-year civil war. Some observers consider the Special Court to be the most successful hybrid tribunal to date and have urged that “lessons learned” from this court be applied elsewhere, such as in Cambodia.<sup>10</sup>

- d. The *Extraordinary Chambers in the Courts of Cambodia* was created by the protracted negotiations between the UN and Cambodia described above.<sup>11</sup> As such it is also a treaty based tribunal and answers both to the UN and the Cambodian government. Whereas the government of Sierra Leone has played a relatively passive role in regard to the operations of the Special Court, the government of Cambodia has from the beginning considered the ECCC to be “its court” and has attempted to exert commensurate control. Although there is a dual administration that has caused very severe management problems, the top UN administrator is officially the Deputy Director of Administration, while a Cambodian is the Director. When queried, UN officials in court administration explain that they are only there in an “advisory” capacity. Significantly, there is no single “Registrar” with overall responsibility for management and administration as at the Special Panels, Bosnia, and the ICTY and ICTR. Appointments on the international side are made by the UN and on the Cambodia side by the government of Cambodia. The three chambers of judges are composed of a majority of Cambodians, while the investigative and prosecutorial functions are exercised by co-equal international and Cambodian appointees. The mandate of this court is also limited and its jurisdiction only extends to those “most responsible” for the Khmer Rouge genocide that claimed

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<sup>10</sup> On the Special Court for Sierra Leone, see weekly trial reports and the thematic Special Reports by the monitors of the Berkeley War Crimes Studies Center, at <http://warcrimescenter.berkeley.edu/>.

<sup>11</sup> For the best recent scholarly account of the ECCC, see Suzannah Linton, “Putting Cambodia’s Extraordinary Chambers into Context”, *Singapore Yearbook of International Law* (forthcoming).

the lives of some 1.7 million Cambodians in 1975–1979. The complex dual administrative structure of the court has already in the pre-trial phase produced numerous management, accounting and performance difficulties that have required the intervention of various UN offices. Five individuals whose names were forwarded by the Co-Prosecutors are currently under investigation by the Office of the Co-Investigating Judges. These five are the surviving Khmer Rouge “senior leaders” and the Cambodian government has repeatedly indicated that it is prepared to see them stand trial. A critical issue facing the legitimacy of the ECCC will be whether the Cambodian government will permit the prosecution to operate independently and identify further subjects for formal investigation. This challenge for the court’s legitimacy is, of course, a legacy of the failure on the part of the UN to negotiate a structure that would have provided greater independence to the prosecution in fulfilling its mandate to identify those who are the “most responsible”. The “lesson” here is that structural difficulties created in the negotiations for a tribunal can never, as a practical matter, be remedied once the process begins. Strategies of compromise or postponement in regard to difficult issues of control, management, independence, and so on will inevitably come back to haunt the tribunal in ways that may cripple its integrity or its ability to fulfil its mandate according to international standards. This raises the underlying issue on which there is a diversity of opinion and a lack of research in the world of international tribunals: Is a significantly flawed tribunal better than no tribunal at all?

#### **4.2.2. Mandates and Goals**

A clear mandate is an essential factor for the success of a tribunal. This point seems obvious, but the fact is that most tribunals have had to function without one. Yet without a clearly and narrowly defined mandate a tribunal has no formal guidelines for how to prioritize cases, allocate its limited resources, and develop a manageable timeline for the overall process. In other words, a clear mandate is essential to the development of an efficient and effective prosecutorial strategy and, on

the administrative side, for effective management of the tribunal's resources.

In the case of the ICTY and ICTR their mandate was clear in the sense that it was to prosecute those responsible for serious violations of international law in the former Yugoslavia and Rwanda. Other than temporal and spatial factors and categories of crimes, however, there was no limit on the kinds of perpetrators who could be brought before the court. Mass criminality of the kind which leads to the creation of most international or hybrid criminal tribunals typically involves thousands, if not tens or hundreds of thousands of potential perpetrators. No tribunal yet created has had the resources to try any more than a tiny fraction of these. The ICTY, which has enjoyed by far the greatest resources of any tribunal to date (approximately 1,200 permanent staff and an annual budget of around US\$140 million) has completed in fifteen years trials of less than one hundred accused. At this pace all of the potential accused would have long been dead before they could all be brought to trial. In other words, prosecutors must choose the kinds of crimes and the kinds of accused they want to pursue and these decisions will always have a symbolic value in that those accused will stand for the vastly larger number who will never be held accountable.

From the beginning, the prosecutorial strategy of the ICTY was born of pragmatic political considerations and evolved over the years in response to changing political constellations in the former Yugoslavia and internationally. The first cases brought to trial at the ICTY involved the lowest level perpetrators like Duško Tadić. It was felt that cases had to be brought forward in order for the tribunal to justify its continued (and expensive) existence, and these were the only cases that could be relatively quickly prepared. Although circumstances led to the ICTY obtaining custody of many of its high level political and military indictees, the prosecution continued to bring to trial cases of many low and mid-level perpetrators. It was only under the pressure of the Security Council mandate to complete all trials by 2008 that the ICTY was forced to move aside many lower level cases by plea bargaining or transferring them to national jurisdictions in the former Yugoslavia (a strategy which itself raises many interesting and difficult questions). The fact is, however, that with limited resources (even if

very substantial) and limited time (human mortality) every case brought to trial represents other cases that will not be brought to trial. Every perpetrator of mass atrocity convicted represents others who are likely to enjoy impunity for the same or similar crimes. For this reason prosecutorial and judicial resources are scarce commodities and it is essential to have a coherent strategy for how they are to be expended.

Provision of a clear and narrow mandate at the political level at which tribunals are created drastically narrows the range of choices that prosecutors face and directs them towards the kinds of cases they should prosecute. Of course this can also have its drawbacks as political considerations could in principle lead to prosecutors being prevented from going as far as they otherwise might in seeking accountability. On balance, though, it seems that provision of a clear and limited mandate brings more advantages in terms of efficient direction of resources, a coherent and transparent strategy, and built-in political approval for this strategy from donor countries or the Security Council. It was considerations such as these, gleaned from reflection on the time and expense involved in the ICTY and ICTR prosecutions, that led to decisions to significantly limit the mandate of what we might call the “second generation” hybrid tribunals in Cambodia and Sierra Leone. This was done, as indicated above, by limiting the jurisdiction of the court to prosecuting those “most responsible” or those who bear “the greatest responsibility.” A comparison of the experience of these courts with their “first generation” counterpart in East Timor will underscore the importance of such limitations.

The Special Panels for Serious Crimes were never given a clear mandate that might have provided clear direction for the prosecution. The result was a constant shifting of prosecutorial strategies and priorities. In the initial phase (2000–2001) there was no real prosecutorial strategy. In 2001 the prosecution began to identify what came to be called the “ten priority cases”, but this was more of a public relations move than a coherent strategy. Cases outside of these ten continued to be investigated and prosecuted, and the composition of the ten shifted over time. When Siri Frigaard took over as Deputy Prosecutor General for Serious Crimes in January 2002, she immediately moved to articulate a strategy and re-organize the Serious Crimes Unit accordingly.

Most significantly, she decided to shift substantial resources away from the prosecution of low-level Timorese perpetrators and work towards the investigation and indictment of the Timorese militia commanders and Indonesian Army officers, and commanders who allegedly bore greater responsibility. This strategy, laudable and appropriate as it clearly was, presented two major difficulties that were both outside of Ms. Frigaard's control. First, the lack of political will noted above meant that those individuals located in Indonesia would never be brought before the court. Second, changing strategy in mid-stream can never really fully correct the mistakes of the past. To some extent, by January 2002, the ship had already left the port: trials were underway, investigations had been completed, indictments issued and so on. That is, the momentum of the ongoing process could not be undone and the result was that the existing "priority cases" continued, low-level cases not included in these continued to be brought to trial, new cases were investigated, and at the same time the investigation and indictment of high ranking Indonesians and militia commanders continued.

The whole process was, of course, much better organized and managed than previously, but the Serious Crimes Unit had limited resources and they were thinly spread by being pushed in all of these directions. These limitations were exacerbated by the fact that just as, under Frigaard's leadership, the prosecution unit had reached its maximum staff level and had a clear direction to pursue, the UN decided to begin "downsizing" the unit. Perhaps if the Serious Crime Unit had been given a clear mandate by the UN from the beginning it would have been in a better position to defend its performance and justify the resources that it needed. But without a clear mandate there were no agreed upon goals to measure the Unit's performance or to use as criteria to explain the resources that it needed to do its job properly. To make matters worse, in mid-2004 the Security Council unexpectedly mandated that all trials and appeals be completed within one year, and the Special Panels and Serious Crimes Unit be closed by May 2005. This was an extremely short timeline for a court, and it was in no way related to the completion of the court's business as approximately 480 cases remained in the pipeline, only about 40% of the prioritized murder investigations had been completed, and the trial panels had just



begin to function with far greater efficiency. In other words, this was a purely political decision unrelated to the goals the court was supposed to fulfil and driven by lack of political will to continue, and, most probably, by a recognition of the court’s relatively poor performance in certain areas. Yet the existence of a clear mandate might have made it more difficult for the UN to act so arbitrarily, and easier for the court to defend its performance and justify its continued existence.

Looking at the balance sheet of the five years of the Serious Crimes process as a whole is sobering and points to the institutional failure not of those court actors who conducted the trials but of UN management at the local and international level. When the Special Panels were prematurely disbanded in May 2005, of approximately 1,400 murders committed during the 1999 violence only 572 had been investigated and indicted. Far fewer had been brought to trial, even though these were the crimes that received absolute priority over sexual violence, torture, forcible transfer or deportation, etc. Some 55 trials, involving 87 accused, were completed, but only 21 of these cases were prosecutions for crimes against humanity. The rest were prosecutions brought for ordinary murder or other crimes under the Indonesian Penal Code rather than international law.<sup>12</sup> All of these cases in both categories involved almost exclusively very low-level perpetrators and many, if not most, of the trials were startlingly brief and not characterized by a vigorous defence. Not a single high level commander or military officer was brought to trial. At key moments, such as the arrest warrant for General Wiranto, both the UN and the Timorese government disavowed the actions of the tribunal whose work they were supposedly supporting. This diminished the likelihood of high-level accountability to zero. In May 2005, approximately 450 pending investigations remained either incomplete or had been virtually completed but not brought to indictment. Hundreds of cases that had been indicted were not brought to trial. Large numbers of very serious cases of sex violence, including gang rape, sexual slavery and forced marriage,

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<sup>12</sup> Under the statute of the Special Panels they were to apply international law as incorporated into their statute in the form of crimes against humanity and so on, and the Indonesian Penal Code as the law applicable in East Timor at the relevant period in 1999 (UNTAET Regulation 2000/15 Section 3.1).

were never prosecuted or properly investigated. The forcible transfer and deportation of perhaps as many as 300,000 persons were never prosecuted or properly investigated.

The Special Court for Sierra Leone was given a mandate that limited its jurisdiction to those bearing “the greatest responsibility” for the violence committed during the ten-year civil war. While two of the dozen individuals identified as belonging to this category died before they could be brought to trial, ten have been or are now being tried. Considerable international political will and cooperation from the national government were required to secure custody of individuals such as Charles Taylor and Samuel Hinga Norman. Without Taylor the impact and legitimacy of the tribunal would have been called into question, and it took the kind of concerted and sustained effort of major powers and the UN, noticeably lacking in the Timor case, to achieve his delivery from Nigeria to the Special Court. In general, there have also been no significant conflicts between the government of Sierra Leone and the UN over “ownership” or applicable law and standards that have impeded the work of the court or undermined its integrity. Although the annual budget of the Special Court is about three times greater than that of its East Timor counterpart, all of those resources were focused upon four trials (as opposed to fifty-five in Timor). This, together with a number of other factors that will be discussed in the section on resources, resulted in trials and investigations much closer to the scope and standards of the ICTY and ICTR than the proceedings in Dili. In other words, the mandated focus of effort meant that limited resources could be used in a more effective way and avoided the diffused effort and repeated changes in strategy that hampered prosecutorial efforts at the Serious Crimes Unit. Further, the independent Management Committee of donor nations provided ongoing, if not always welcome, oversight and pressure to complete the mandate within the agreed budgetary guidelines and on time. This is not to say that the Special Court has functioned perfectly or not suffered, as all courts do, from various problems or shortcomings. Observers have expressed concerns over a number of aspects of the performance of the court and recent inquiries into investigatory practices have uncovered serious issues. The concern here is the way in which a clear mandate can at least focus the process in a way that may avoid other kinds of prob-

lems, and particularly intractable structural ones, and can set a measurable and realistic goal for the court to achieve.

In the case of the ECCC, there is a similar limited mandate and a concomitant focus on a small number of high-level perpetrators. As of this writing, five accused are in custody and under formal investigation, and one other died in military custody before he could be transferred to the court. These five are likely to be brought before the court in two trials. As a result, the relatively small staffs of the Office of the Co-Prosecutors and Office of the Co-Investigating Judges may be focused on the preparation of a very small number of cases. On the other hand, structural impediments created by the mandate raise serious questions that remain unanswered at this stage. While there are four Khmer Rouge “senior leaders” in custody, one of the accused was much lower-level but commanded the notorious Tuol Sleng (S-21) interrogation centre. If he is to be classified as one of those who are “the most responsible” for the crimes of the Khmer Rouge regime, how many other individuals at a similar, or much higher, level of responsibility will be investigated or indicted? There is a well known lack of political will on the part of the Cambodian government to see the investigation spread beyond this initial group of accused. The mandate does not make clear either what kinds of defendants should be encompassed within this group, exactly what standards are to govern the process, or who ultimately has responsibility for ensuring that the decision of whom to prosecute is made independently and not as a result of political interference. In other words, the issue of “ownership” and control is not clearly resolved in the mandate and, as noted above, is left ambiguous by the tribunal’s statute. Similar problems may make themselves felt at other stages of the process as it moves forward.

The mandate of the Ad Hoc Human Rights Court in Jakarta was broad and potentially encompassed all those Indonesians who might bear responsibility for the violence in East Timor in 1999 before, during, and after the Popular Consultation that led to independence.<sup>13</sup> Un-

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<sup>13</sup> On the first three trials before the Ad Hoc Court see Suzannah Linton, “Unraveling the first three trials at the Ad Hoc Court for Human Rights Violations in East Timor”, *Leiden Journal of International Law* 17 (2004).

der Law 26/2000 the first step in the process involved an investigation of a commission of inquiry (KPP HAM) under the auspices of the National Human Rights Commission. Their investigation identified more than 100 suspects, up to the level of the commander-in-chief of the Indonesia Armed Forces, General Wiranto. Out of this very large group only 18 were investigated and prosecuted by the Public Prosecution Service. As noted above, these included both civilians and military officers from relatively low-level to the two-star general Adam Damiri, who commanded the entire eastern military region of Indonesia of which East Timor was a part. The prosecutions encompassed twelve trials, with no discernable common strategy. All twelve cases were seemingly treated by the prosecution as isolated and unrelated incidents. Without guidance from the mandate, the Attorney General's Office was able to diminish the impact of the trials from the outset by indicting only for a failure to prevent the violence and not even mentioning the direct perpetration and provision of material support that had been documented in the report of the commission of inquiry.

Because there was no requirement in the mandate to focus on those "most responsible" it was easy for the Attorney General's Office to avoid investigating or prosecuting anyone above the level of Damiri (that is from the Jakarta High Command) despite the recommendation of the Commission of Inquiry (KPP HAM) to do so. The underlying problem here was a lack of political will in the Attorney General's Office, and in the highest political leadership, to take on the leaders of the politically and economically powerful military establishment. In this sense the lack of a focused mandate had a crippling effect on the process from its inception. Further, while Law 26/2000 incorporated international crimes from the Rome Statute, it did not specify the applicability of international norms and standards. This gave room for different interpretations by different trial panels on the key issue of whether Indonesian law or international law took precedence in defining and applying legal doctrines such as command responsibility.<sup>14</sup> In

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<sup>14</sup> Because of the controversy and confusion over this crucial issue, the Supreme Court of Indonesia later promulgated a *Guideline: Elements of Crimes, Gross Human Rights Violations, and Command Responsibility*, Mahkamah Agung, 2006, to resolve this question for the Human Rights Courts.

short, although the trials were beset by a whole range of difficulties that undermined their performance and threatened their independence and impartiality, the lack of a focused mandate was a crucial factor in limiting their scope and potential impact.

What the trials before the Indonesian national Human Rights Court also make clear is that on the one hand the potential domestic impact of the trials is much higher, but on the other hand, the structural and political impediments to an effective trial are much greater. While internationalized tribunals have to struggle with issues of community outreach, this was scarcely a problem in Jakarta, where in some of the trials, like that of General Adam Damiri, the courtroom was often packed with journalists and TV camera crews. Similarly, if the prosecution had introduced the inculpatory evidence that was actually available, it could have had a significant public impact on the culture of impunity that the Army (TNI) has long enjoyed. Instead, however, the prosecutors regularly called witnesses who were subordinates or colleagues of the accused, or who were defendants in the other cases, and questioned them as if they were witnesses for the defence. So instead of informing the public of what had actually happened in East Timor, the prosecution in effect gave the military a public forum in which to defend itself and deny that any gross human rights violations even occurred. There were numerous reasons for this failure on the part of the prosecution and the divergent opinions of the judges on the different trial panels. Political pressure ranging from the presence of TNI officers and armed special forces personnel as part of the public in the courtroom every day to direct threats against the judges doubtless played a part. While lack of political will clearly played a role in undermining the prosecution effort, lack of competence in investigating and trying such complex cases also made itself felt. In other words, the Jakarta trials provide a textbook example of why international or “hybrid” tribunals are necessary. While the Jakarta trials could have in theory made a great contribution to accountability and the rule of law in Indonesia, it was unrealistic to expect them to do so in the context in which they had to operate. The hope for tribunals like the ECCC that are largely Cambodian with an infusion of international personnel is that they will be able to perform better than a purely national court. The ECCC, of course, does not face the kind of direct political obstruc-

tion and pressure that hampered the ability of the Jakarta Ad Hoc Court to perform adequately. Nonetheless it remains to be seen to what extent this “hybrid” arrangement has tipped so much more heavily to the national side than will be necessary to function independently, impartially and at an acceptable level of international practice.

What are some of the lessons related to mandate that may be learned from considering the balance sheet of the East Timor trials in relation to the experience of the tribunals in Indonesia, Sierra Leone and Cambodia?

- Unless mandated to do otherwise prosecutors may expend too much effort on low or mid-level accused rather than concentrating on the leadership level and those “most responsible”.
- Without a clear mandate it is difficult to develop an efficient prosecutorial strategy. Otherwise, scarce resources will be squandered in an effort than is shifting, diffuse, and unfocused.
- Without a clear mandate there are no agreed benchmarks for accountability and performance. This may undermine the process in a number of ways, including the political support for its continuation.
- The mandate must be commensurate to the political will. It must lead to clearly defined goals that are realistic given the available resources. These goals must be translated into a commensurate strategy so that the court can on the one hand explain and defend its performance and on the other hand be held to account for its shortcomings.
- Once a mandate has been agreed upon, the tribunal must be provided with the resources necessary to do its job according to accepted international standards. That the tribunal is obliged to meet such standards must be made completely and unequivocally clear in the mandate.
- The mandate must resolve issue of “ownership”. It must make clear who controls the process and who bears responsibility for its success or failure. It must make clear that, regardless of “ownership” or its “hybrid” character or its location within the

domestic justice system of the host country, it is bound by international norms, practices, and fair trial standards.

#### 4.2.3. Goals

What is it that war crimes trials are meant to accomplish? What can they accomplish? One would think that after fifteen years of experience of numerous tribunals and an investment by the international community of billions of dollars the answers to these questions would be clear. But they are not. This section will briefly examine some of the reasons why the answers to these most basic and pressing questions remain uncertain.

In the first instance, it is apparent that everyone agrees that tribunals are created to provide “justice” for the victims. There is no denying the desire for justice on the part of victims and outsiders in the aftermath of mass atrocity. What is far less clear is what this means and how it is to be achieved in concrete institutional terms. Criminal violence on the scale seen in Rwanda, Cambodia, Sierra Leone or the former Yugoslavia involves the participation of tens of thousands of individuals, from direct perpetrators to military and political commanders and leaders. Some tribunals, like the ICTY, have tried perpetrators from the very lowest trigger-puller to the head of state. Yet even here, after fifteen years of trials and the expenditure of well over 1 billion US dollars by this court, the ICTY has tried less than one hundred persons. That such tribunals cannot possibly try all the perpetrators is obvious. Yet what victims often demand is that the person who killed, raped, or tortured their family member be punished. They may have to live with those perpetrators in the same small community, and justice for them may be focused on that community context. From their perspective the national leaders in the defendant’s dock and the policies they were responsible for may be more of an abstraction, especially in countries with very low levels of education or literacy and little access to national media.

The question here is whether the conviction of, relatively speaking, a handful of individuals can provide that “justice” to the victims that is one of the main *raisons d’être* for the creation of the court. The challenge for the tribunals is to communicate what they are doing in a

way that enables the victim in the village to see a connection between the justice dispensed by the court and the unpunished perpetrator that he or she sees on a daily basis. We lack empirical evidence on whether any court to date has accomplished this. We also lack empirical evidence on questions such as how many Timorese actually think it is more important to place General Wiranto before a tribunal as opposed to doing something about the militia member now living down the street who burned his house or worse. This is not to say that if the majority of Timorese declared their relative indifference to the fate of General Wiranto then the international community should not pursue prosecution. It is only to say that we should not claim we are doing so in order to provide the justice that the people of East Timor are yearning for, and should justify this goal on other grounds (e.g., ending the culture of impunity in Indonesia). The real point here is that many speak in the name of the victims to justify a particular justice policy or mechanism but very seldom are their claims supported by solid empirical evidence. In general, until some recent academic research that is just beginning to open up these questions, tribunals and policymakers had evinced little, if any, interest in what specific populations in post-conflict transitional contexts actually think or want in relation to justice, accountability, peace, reconciliation, and their other, more material, needs.<sup>15</sup>

An obvious response to questions about the small number of convictions in relation to the vast number of perpetrators is that the “symbolic” justice dispensed by holding accountable some individuals, particularly those especially notorious or in leadership positions, demonstrates to the victims that their suffering has not been met with indifference and impunity, that those who did the most to cause that suffering have been punished for their acts. This response raises three issues that cannot be dealt with here but deserve our attention: (i) Are tribunals that cannot obtain custody of or convict (for whatever reason) the “most notorious” or “most responsible” (Mladić, Karadžić, Milošević, Pol Pot, Ta Mok) doomed to failure? (ii) How can these trials and convictions be communicated and made comprehensible to a population of

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<sup>15</sup> See for example the path-breaking surveys conducted by the Human Rights Center at the University of California, Berkeley, available at <http://hrc.berkeley.edu/>.



victims so as to satisfy their desire for justice? This is especially difficult when the victims are located in another country (as is the case at the ICTY, ICTR, and ICC) and when they may be largely illiterate and not have access to television (Sierra Leone, East Timor, Cambodia). (iii) Is there any empirical evidence that demonstrates that international tribunals, for all of their expense, have been able to satisfy the demands of victims for justice? Or is there evidence that they are better able to do so than the kinds of informal community justice mechanism used in places like East Timor or Sierra Leone where perpetrators and victims now live together in the same communities?

These questions are not aimed at calling into question the need for international tribunals. On the contrary, the point is that such tribunals need to take far more seriously the central importance of communicating in a meaningful way what they are achieving, and of leaving a lasting and important legacy to the victims in whose name they say they are doing justice. Only the Special Court for Sierra Leone, through its highly innovative community outreach and legacy programs, seems to have had significant success in doing this. The challenges are vastly greater for tribunals located outside the country, but these tribunals (ICTY, ICTR, ICC) also have vastly greater resources at their disposal than their more impoverished “hybrid” counterparts. Rather than learning from the experience of the Special Court in Sierra Leone, however, the ECCC is leaving it to NGOs to develop outreach programs for the people of Cambodia. This suggests that neither the UN nor the Cambodian government views the task of providing justice for the victims as central to the mission of the court in any meaningful sense.

When we turn to the other goals often articulated for tribunals the difficulties in achieving them and measuring the success of the court in doing so are much greater. Such goals, as noted above, include promoting reconciliation, providing closure and healing for victims, ending impunity, “knowledge transfer” and “capacity building”, education of the public, elucidation of the truth, promoting the rule of law, etc. These goals are important, but the question is whether the institutions created to fulfil them are actually capable of doing so? In the first instance it is not clear that any tribunal can actually accomplish some

of these goals, but what is clear that they are seldom given the resources to try to do so in a serious way. Even in the case of Sierra Leone, the Management Committee insisted that community outreach and legacy could not be included in the budget, so the Registrar had to take the initiative in seeking and obtaining outside funding. The Security Council and international donor community articulate such goals but nonetheless seem to feel that the actual courtroom work of prosecution and judgment (and what is directly needed to enable and support them) are the only legitimately fundable activities, and that other goals will somehow mysteriously fulfil themselves when verdicts are handed down.

Or to take another example, it is often stated that by enabling nationals and internationals to work together, “knowledge transfer” will raise the level of the administration of justice in the host country. Yet few tribunals seem to have acknowledged that just putting people in the same physical space does not necessarily accomplish anything. At the beginning of the work of the Special Panels for Serious Crimes, each Timorese judge was supposed to be mentored by a designated international judge. Of course, the Timorese judges did not speak English and the international judges did not speak Tetun, and as the UN provided no translators, for the first few years until two of the four Timorese judges learned English on their own initiative, this goal remained more of an abstraction than a reality. “Capacity building” and “knowledge transfer” in any real sense require an intellectual and financial investment in training and mentoring programs that can actually accomplish something of lasting value. Without provision of resources to fulfil broader goals it seems more realistic to accept that the central task of the courts is to provide justice in the most immediate sense of punishing individuals who bear responsibility for horrific crimes, hopefully including those whose responsibility is the greatest.

What the experience of the hybrid courts examined here seems to show is that it is easy to articulate such goals at the beginning but that insufficient thought is given as to how they can actually be achieved. One difficulty is that much more research is required on whether some of these goals are achievable by courts, and if so how that might be accomplished. In this light, the contributions of traditional community

justice mechanism need to be studied seriously rather than ignored. Another difficulty is that, once the tribunals are created, budgetary constraints inevitably make themselves felt and the easiest thing to do is to convince those providing the funding to furnish the resources to punish guilty people. It is much more difficult to make them understand that it is also necessary to spend a lot of money to ensure that punishing those guilty individuals provides something of value for the victims, and more generally creates an enduring legacy for the country where the violence occurred.

### **4.3. Resources, Limitations, Conclusions**

The foregoing discussion of the limitations of what some tribunals can accomplish aims not at questioning their legitimacy but rather suggests that what is required in each case is a sober awareness from the start about what the process can and cannot do in the concrete context in which it is created. This requires a clear grasp of the limitations under which the tribunals will have to operate and the goals that can be realistically achieved under these conditions. Only on this basis can decisions be made properly about whether a flawed or delimited process is better than none at all. Only in this way can a realistic and achievable mandate be crafted and a determination made of what resources are required to fulfil it. In short, clarity about goals, limitations, and resources is a pre-requisite for efficiency and effectiveness. This is particularly the case in regard to the “hybrid” tribunals examined here because all of them operate in a constant state of greater (East Timor) or lesser (Sierra Leone and Cambodia) under-funding. This is one of the features that distinguishes them from the “Rolls Royce tribunals” such as the ICTY, ICTR and the ICC, and it raises the question of why “grade A” justice is provided by the international community in one context and “grade B or C” in another. Naively, one might imagine that defendants and victims are entitled to the same quality of justice wherever the United Nations and the international community create a tribunal, but the reality is much different.

The limitations of the kind of justice that these courts can and cannot provide must be communicated effectively to the people who are supposed to benefit from the process. The decision to try only high-

level cases is a justifiable and expedient one, but it places a very high burden on these institutions to communicate what is happening in these processes to local communities in a way that makes them meaningful. This is one of the reasons why hybrid tribunals were created in the first place, because the ICTY and ICTR were far too removed from the countries and communities where the violence took place. In a recent survey conducted in Rwanda, almost 9 out of 10 Rwandans surveyed said they either had not heard of the ICTR or did not know what it did.<sup>16</sup> More than ten years after it had been created, and after approximately 1 billion US dollars spent in financing that institution, what does this tell us about the goal of pronouncing justice in the name of the Rwandan people? This problem also represents a very serious challenge for the ICC, which is pursuing prosecutions in the Congo, the Sudan, Uganda and the Central African Republic, but will conduct all of these trials in The Hague.

Another perceived advantage of hybrid tribunals located in the country and run partly by its nationals is that this would give the population a greater sense of connection to the tribunal and would make it easier to communicate to them what the tribunal was accomplishing. This is true, but as seen above, it does not happen on its own and donors are too often unwilling to provide the necessary resources. It certainly did not occur in East Timor, where virtually no resources were provided for such programs. It must also be recognized, that being located in the country may also bring significant disadvantages if it jeopardizes the independence of the tribunal or its ability to function with integrity and meet international fair trial standards. This must be clarified in the tribunal mandate to avoid the kinds of difficulties encountered in East Timor and Cambodia.

Resources must be sufficient to meet the mandate and fulfil the goals of the institution. This may seem obvious but it was not the case in East Timor or Sierra Leone. In the former, resource problems crippled the process from its inception and in too many cases led to a failure to meet minimum standards of international practice and fair trials.

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<sup>16</sup> See Eric Stover, Harvey Weinstein (eds.), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, 2004.

Above all this was manifested in the inadequacy of the defence provided to many accused, the toleration of a pattern of repeated and prolonged illegal pre-trial detention, and also in other less glamorous but vitally important areas of court services like translation, transcription, research, training and witness protection. In all of these areas the Special Panels for Serious Crimes were inexcusably deficient for much, if not all, of the five years of trials. These deficiencies had a direct impact on the quality and fairness of the trials and the appeals process. The UN, almost two years after the creation of the ECCC, is only now beginning to address similar problems in regard to technical services there, but because trials have not yet begun there is some hope that with enough political will the shortcomings can be remedied before trials actually begin. One might ask, given that observers have been pointing out these problems since the very beginning, why it has taken so long to address them. One of the greatest deficiencies seems to be applying lessons learned at one tribunal to the creation of newer ones.

Part of the underlying difficulty in regard to resources seems to be for those who fund and oversee the creation of these courts to grasp that the quality of what happens in the courtroom depends upon a broad array of activity that is vital for meeting mandated international standards. Without adequate human and financial resources in the provision of these vital technical services even the most qualified judges, prosecutors, and defence counsel will be unable to ensure the integrity of the trial process. Too often in the hybrid tribunals, however, budgetary and resource decisions are left to individuals who have no experience of managing a court system. Key areas which are often underfunded and neglected include:

- *Witness protection and support.* In East Timor there was virtually no witness protection program, in Sierra Leone it is world class, and in Cambodia it is woefully understaffed and after two years has still not taken the first step of conducting a risk assessment.
- *Training.* Both internationals and nationals require an ongoing training program in the typically unfamiliar body of international law and practice they must apply. None of the hybrid courts to date have developed such a program. At best, they rely on the

initiative of outside organizations to offer and provide such training, which is too often conducted in an *ad hoc* manner. In the case of East Timor there was virtually no training at all.

- *Community outreach.* As noted above, the Special Court for Sierra Leone developed an effective, widely praised and innovative outreach program through the initiative of court personnel apart from the court's approved budget. In East Timor there was virtually no outreach program apart from sporadic efforts by public affairs officers to do what they could to disseminate information and occasional initiatives by particular prosecutors. In Cambodia, the court has left this vital area to NGOs.
- *Translation and interpretation.* Accurate and adequate translation and interpretation is essential to a fair trial. In East Timor the complete lack of professional translators, let alone professional legal translators, in any of the court's four main working languages was widely recognized as a very serious problem damaging the quality of the proceeding, but almost nothing was done to correct the situation. In Sierra Leone an ongoing training program oversaw the provision of interpretation and translation services. In Cambodia it has long been recognized that the ECCC has very serious deficiencies in the number and quality of translators and interpreters, but as yet the situation has not been remedied as trials draw near.
- *Transcription.* Judges require accurate transcripts to review the trial record in reaching their judgments and in ruling on some kinds of motions. The appeals process necessarily depends on accurate transcripts. In East Timor there were no transcripts at all for the first three years. When they were introduced, because there were no professional transcribers, they were inaccurate and full of significant gaps where the transcribers could not keep up. In Sierra Leone the court has a world-class system where judges and other court actors could receive transcripts within a few hours after the session. In the ECCC the provision of adequate transcription is still uncertain.

- *Capacity building and knowledge transfer.* There has to be active work in capacity building; just working side by side with international experts does not accomplish this goal. None of the three courts developed systematic programs to address this need, although the Special Court for Sierra Leone did so in several specific areas.

The foregoing analysis has indicated a number of important failings of the courts under review. It must be remembered that the performance of a court is fundamentally different than many other corporate entities: what is at stake is not the balance sheet but the lives and liberty of the individuals on trial and the justice that victims deserve. It is for this reason that such courts are obliged to meet fair trial standards and bound by international norms and practices. For this reason, it is hard to imagine the justification for courts created by the United Nations to fail to meet the very standards that that organization is bound to espouse, embody and protect. Yet in East Timor that is precisely what happened, and continued to happen over a five-year period. The analysis above has also highlighted a number of successes, for example at the Special Court for Sierra Leone. What accounts for the differences in performance between the UN “hybrid” tribunals in Sierra Leone and East Timor? There are a number of lessons that may be learned here.

First, the Special Panels were funded and administered through a UN peacekeeping mission (UNTAET/UNAMET) that had other priorities in rebuilding a conflict ravaged country, and that also had no experience in creating or managing a court, let alone a war crimes tribunal with its special characteristics and needs. On the other hand, the fact that funding came through voluntary contributions of donor nations gave these countries a stake in the success of the tribunal and in its effective management. They created a Management Committee to provide oversight. Second, in East Timor the UN never appointed a registrar or created an executive management position with overall responsibility for the court and its performance. The Special Court for Sierra Leone, like the ICTY and ICTR, has a Registrar who fulfils this function and bears responsibility for the performance of court administration. Third, in part because of the interest of the donor nations, bet-

ter international recruitment provided qualified individuals to the court in its various branches. In East Timor the recruitment process in some key areas was notoriously inept and badly managed. Finally, decisions as to court resources in East Timor were made by individuals with no understanding of what a trial process requires or of the standards that must be met to ensure fair trials. They also appear to have been at best benignly indifferent to the needs of the tribunal and the quality of justice dispensed. In Sierra Leone, on the other hand, they recruited as the first Registrar a highly experienced, qualified and well-regarded professional court administrator from a major municipal jurisdiction in England. Most observers rightly credit him for much of the success of the Special Court in the areas described above. There was a marked change in performance in effective management when he left after three years and a less qualified successor was appointed to replace him. One lesson here is that individuals matter, and particularly at the foundational stage of a tribunal. It is very difficult, if not impossible, to correct serious mistakes made at the beginning and institutionalized through long practice.

The underlying problem in all of the institutional shortcomings discussed above is the failure of accountability and effective oversight. More precisely, this involves the failure of the UN to properly manage its tribunals and to ensure that they have the resources to meet appropriate standards, to correct faulty practices and to hold accountable those responsible for them. A good portion of the literature on hybrid tribunals is about how to structure different models. To my mind this is not the real issue. What determines the success or failures of the tribunal has to do with political will, with a clear mandate and clearly defined “ownership”, and with effective leadership and management. Effective recruitment is vitally important and the UN has too often been notoriously weak in this area. Much also depends upon the context and its possibilities. What may be possible in one context may not be possible in another, which is why a “cookie-cutter” approach is inadequate. One cannot assume that a “model” that is workable or effective in one tribunal will operate the same way in another. Hybrid tribunals can do very important work, but only if we are realistic and clear-sighted about what they can and cannot do and, above all, about what is required for them to do it effectively.



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## **Infiltration as Insurance: Committing to Democratization and Committing Peace<sup>\*</sup>**

**Monika Nalepa<sup>\*\*</sup>**

### **5.1. Introduction**

Many important features separate the dilemmas of transitional justice in East Central Europe (ECE) from those of Colombia. Countries such as Poland or Hungary endured authoritarian rule for a little over forty years, while Colombia is still suffering from over forty years of civil war. The goal of this short chapter, however, is to focus on the similarities between the ECE and Colombia and to see how lessons learned from the ECE transitions and from settling accounts with the former communists can be applied to the Colombian government's dealing with demobilizing paramilitaries and guerrilla groups. I believe that the problems with making the enforcement of the Justice and Peace Law (JPL) credible to demobilizing paramilitaries resemble those of making promises of refraining from transitional justice credible to the outgoing communist regimes of East and Central Europe. The Colombian problem with credible commitments to amnesty has become particularly important in the light of opinions from human rights groups and the UNCHR criticizing the JPL. In summary, these criticisms amount to pointing out that paramilitaries should be held accountable for human rights violations and that the benefits awarded to demobilizing para-

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militaries are too generous. Such opinions put a strain on the prospects of conducting similar negotiations with other armed groups in Colombia, such as the ELN or the FARC. How can the Colombian government make credible promises of amnesty or partial amnesty made to these groups? I begin this chapter with a brief description of the Justice and Peace Law (JPL). This is followed by a simple analytical model to present the nature of credible commitments in the context of paramilitary demobilization. The problem of making commitments credible is much more general than settlements in the aftermath of armed conflict. It has been applied, for instance, to pacted transitions from communism to democracy that took place in ECE in 1989-1999. I use a solution to the commitment problem from the ECE transitions – the “Skeletons in the Closet” model – to illustrate how infiltration of negotiating elites may serve as an insurance mechanism that makes promises of amnesty credible in the context of demobilizing fighters ending civil wars.<sup>1</sup> In the empirical part of the chapter, I first show applications of the Skeletons model from Poland and Hungary, and next I discuss how the model could apply to Colombia. In the final section I consider explanations for the most recent developments in Colombia: that paramilitaries from the *Autodefensas Unidas de Colombia* (United Self-defense Forces of Colombia, AUC) who have been participating in the judicial procedures established by the JPL have been revealing in their testimonies that the current Colombian government was infiltrated with links to paramilitaries and to violations of human rights.

## 5.2. The Justice and Peace Law

The JPL (Law No. 975 of 2005) is an innovative transitional justice mechanism which combines three elements of transitional justice procedures – amnesty, reparations and truth revelation into one procedure. Passed in June 2005, it extends partial amnesty to demobilizing members of the AUC. In order to qualify for sentence reduction, paramilitaries must confess all crimes committed by them, as well as members of their unit and surrender illegally acquired assets. While testimonies are

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<sup>1</sup> The complete model is presented in Monika Nalepa, “Skeletons in the Closet: Transitional Justice in the Post-Communist World”, Houston, TX: Rice University, 2007.

used to investigate human rights abuses committed by the paramilitaries, the surrendered assets are used to compensate victims or, if the direct victims are deceased, the next of kin. The Law was aimed to “facilitate the processes of peace and individual or collective reincorporation into civilian life of the members of illegal armed groups, guaranteeing the victims’ rights to truth, justice, and reparation” (Chapter 1, Principles and definitions). In practice, it offered a three-tiered transitional justice system that provides perpetrators with a sentence reduction and benefits in exchange for the disclosure of truth and illegally acquired assets. By combing the three elements of truth, justice and reparations in one system, the JPL presented itself as an advancement over incentives-based truth-revelation procedures, as illustrated by the amnesty committee of the Truth and Reconciliation Commission, that combined justice in exchange for truth.<sup>2</sup>

The law had not even been implemented when in October 2005, 31 civil society groups lodged a complaint with the Constitutional Court, questioning its legal basis. The Court dramatically increased the costs of failing to disclose the full truth about the nature of the criminal activity in question. In the extreme case, the applicant penalty could be reversed to the original sentence. The sentence reduction was also restricted to apply to non-recidivists only.<sup>3</sup> Since the draft proposed in 2004 by the government, which resulted from many months of negotiations with AUC leaders envisioned even leaner treatment for the ex-combatants, the eventually implemented mechanism landed far from what the AUC had bargained for. The government challenged the Court’s ruling and fought tirelessly for a reversal to the original proposal. Upsetting the expectations of the AUC led to a series of defections, in the summer of 2007, in which paramilitary leaders exposed embarrassing connections of government officials to drug trafficking and to violent paramilitary units. What is really puzzling about this

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<sup>2</sup> See Monika Nalepa, “To Punish the Guilty and Protect the Innocent: Comparing Truth Revelation Procedures”, *Journal of Theoretical Politics* 20:2 (2008); Marek M. Kaminski and Monika Nalepa, “Judging Transitional Justice: A New Criterion for Evaluating Truth Revelation Procedures”, *Journal of Conflict Resolution* 50 (2006): 383-408.

<sup>3</sup> See Kalmanovitz, Section 1.2.2 of the introduction to this volume.

turn of events is why the government of President Uribe fought so hard to keep its end of the deal. After all, once the paramilitaries had disarmed, a more popular decision would have been to crack down on the fighters with harsh transitional justice measures. The Uribe government chose to do otherwise. Why? Over the course of this chapter, I will systematically show that the decision to opt for leniency could be directly related to the infiltration scandals that broke out in late the spring and summer of 2007.

### 5.3. Credible Commitments to Amnesty

There is a generic problem in human relationships. Consider the following situation between two sides: a violent aggressor and a target of violence.<sup>4</sup> Suppose that the violent side has been using repression to control the behaviour of the target, but now he decides to abandon his violent tactics and resigns control over the means of repression. To protect himself, he thinks to negotiate a pact with the target. According to this pact, the violent side would stop using violence in exchange for the target's promise not to seek justice for the harm that was done to her. The problem is that this pact is not enforceable, since the target is better off seeking justice than keeping her promise of amnesty. Once the violent side retires, he has no means of protecting himself and the target may deal with him as she desires. This stylized fact adequately describes the situation of exchanging promises of benefits for reduced sentencing made to guerrilla groups and to paramilitaries in exchange for surrendering their weapons. This problem is also captured in the scholarly literature on credible commitments.<sup>5</sup> Barry Weingast writes that “to succeed, a pact must be self-enforcing” and that “successful pacts create a focal solution that resolves the coordination dilemmas confronting elites and citizens”.<sup>6</sup>

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<sup>4</sup> For convenience, I will use the female pronoun to describe the victim and the male pronoun to describe the dominant side of the relationship.

<sup>5</sup> Thomas Schelling, *The Strategy of Conflict*, Harvard University Press, 1980; Barbara Walter, *Committing to Peace: The Successful Settlement of Civil Wars*, Princeton University Press, 2002.

<sup>6</sup> Barry Weingast, “The Political Foundations of Democracy and the Rule of Law”, *American Political Science Review* 91, no. 2 (1997).

The dilemma also features prominently in pacted transitions to democracy: the literature on negotiated transitions predicts that autocrats concede to democratization only after they are guaranteed the immunity for past misbehaviours.<sup>7</sup> Examples of such institutional guarantees include constitutions that render retroactive legislation illegal or electoral laws that give the outgoing regime an upper hand.

Observers of the ECE transitions will often associate the peaceful nature of those transitions with promises exchanged at the roundtable negotiations between outgoing communists and the incoming opposition. Traditionally, such pacts present outgoing autocrats with the opportunity to extract from the opposition guarantees of amnesty. Hence, in Greece, Argentina, Uruguay and Spain, the local autocrats exchanged control over political institutions for immunity from criminal investigations.<sup>8</sup> In South Africa, Apartheid members were guaranteed the security of their property rights.<sup>9</sup> According to this argument, in those transitions that occurred through pacts between the communist leaderships and the dissident opposition, such as in Hungary, Poland, Bulgaria and Czechoslovakia, the communists offered the opposition, open and free elections in exchange for promises of refraining from transitional justice. In Colombia, paramilitaries from the AUC negotiated with the government the terms of surrendering arms in exchange for significant sentence reductions and benefits in their reincorporation into society. Under the honour code of *pacta sunt servanda* all such willingly entered agreements should be kept. But are they?

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<sup>7</sup> See Adam Przeworski, “The Games of Transition” in *Issues in Democratic Consolidation*, edited by Mainwaring, O'Donnell and Valenzuela, University of Notre Dame Press, 1992, and *Democracy and the Market. Political and Economic Reforms in Eastern Europe and Latin America*, Cambridge University Press, 1992; also Josep Colomer, *Strategic Transitions. Game Theory and Democratization*, The Johns Hopkins University Press, 2000, and “Transitions by Agreement: Modeling the Spanish Way”, *American Political Science Review* 85, no. 4 (1991): 1283-302.

<sup>8</sup> Colomer, “Transitions by Agreement”.

<sup>9</sup> A.M Omar, “Foreword” in *Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa*, edited by Rwelamira and Werle, Butterworths, 1996.

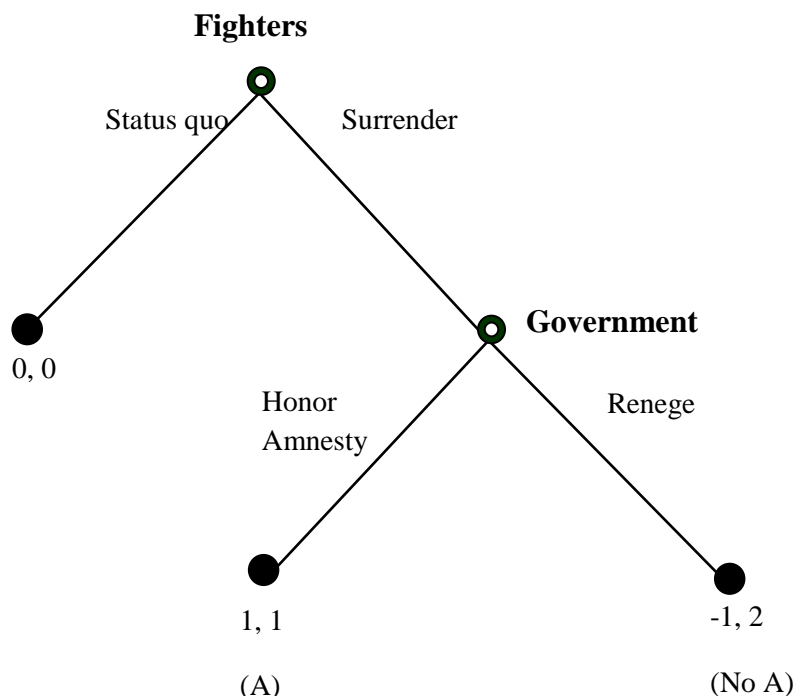
For the sake of clarity, let us formalize this problem a little in a simple game that matches both situations described above, pacted transitions as well as demobilization. Figure 1 represents the preferences and choices that players face while negotiating pacted transitions to democracy or while negotiating civil war settlements, assuming that such pacts involve trading amnesty for the surrendering of arms.

There are two players, the Fighters ( $F$ ) and the Government ( $G$ ) and two stages of the game. In the first stage,  $F$  decides whether to accept the offer of surrendering arms in exchange for amnesty or not. If  $F$  does not surrender, the game ends with the status quo payoffs of 0 to everyone. If  $F$  surrenders, in the next stage  $G$  decides whether or not to honour the agreement about providing amnesty. If  $G$  decides to keep the promise, players get a payoff of 1 each. But if  $G$  reneges on the agreement, it gets a payoff of 2, while  $F$  gets a payoff of -1. The three possible outcomes of the game are:

*Status quo (SQ)*: Fighters do not enter the settlement.

*Transition with amnesty (A)*: Fighters enter settlement and receive amnesty.

*Transition without amnesty (NoA)*: Fighters enter settlement but Government reneges on the promise of amnesty.



**Figure 1:** A simple game of credible commitments

As noted above, exactly the same model can be used to represent pacted transitions to democracy such as those accompanying the roundtable negotiations in ECE.<sup>10</sup> Instead of “fighters” we would have “outgoing communist autocrats” and instead of the “government” we would have the “dissident opposition” negotiating the transition to democracy with the communists; “entering settlements” would be replaced with “initiating roundtable negotiations” and “amnesty” would be replaced with “refraining from transitional justice”.<sup>11</sup> The most important result from solving this model is that *SQ* is the unique Nash equilibrium outcome.<sup>12</sup> However, in real life, we also observe *A* and *No A*. Furthermore, note that *A* Pareto dominates the Nash equilibrium

<sup>10</sup> Jon Elster, *The Roundtable Talks and the Breakdown of Communism, Constitutionalism in Eastern Europe*, University of Chicago Press, 1996; Nalepa, “Skeletons”.

<sup>11</sup> For details on this application of the model see Nalepa, “Skeletons”.

<sup>12</sup> The unique subgame perfect (and also Nash) equilibrium strategy profile is (SQ; Renege). The strategy Renege for Player *G* is weakly dominant.

outcome SQ (this is why the game resembles somewhat the Prisoner's Dilemma). Both *F* and *G* prefer *A* to *SQ*. However, *A* fails to satisfy the conditions for Nash equilibrium, because when *G*'s decision node is reached, it is better off renegeing on the promise. *Reneg*e is in this game a weakly dominant strategy for *G*.

To help the reader grasp the generality of this model – how it extends to pacted transitions as well as settlements in civil war aftermath – I present side by side the two interpretations of the simple model in Table 1.

Model	Civil war settlements	Pacted transitions
Fighters	AUC, FARC, ENL	Outgoing Communists in 1989
Government	Executive since implementation of JPL	Dissident opposition, e.g. Solidarity in Poland
A (mnesty)	Benefits awarded to paramilitaries demobilizing under the JPL	Refraining from transitional justice
NoA (mnesty)	Failure to deliver benefits under JPL to surrendering paramilitaries	Transitional Justice
Status quo	Paramilitaries failing to demobilize (may result in prolonged civil war, associated with losses to both the government and paramilitaries)	Failure to invite dissident opposition to roundtable negotiations (may result in Revolution or regime breakdown which is undesirable to both communists and dissidents)

**Table 1:** Interpretation of simple game of credible commitments.

In earlier work, I have argued that this model adequately represents the dilemmas confronting actors engaged in pacted transitions in ECE according to Adam Przeworski.<sup>13</sup> Przeworski argues that ECE communists in the late eighties preferred a democratic transition

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<sup>13</sup> See Nalepa, "Skeletons"; Przeworski, "Games of Transition" and *Democracy and the Market*.



in which they could continue their political careers to a revolution potentially depriving them of any political prospects and, possibly, of life. A democratic transition with transitional justice is a mild equivalent of such a revolution. The simple model above suggests that a transition without transitional justice is not feasible because the former opposition has incentives to default on any promise, depriving the former autocrats of political positions via transitional justice. However, we cannot use this model to explain the actions of the oppositionists in Poland and Hungary. Contrary to the model's predictions, instead of renegeing, they kept the promises made to communists. For years during which the opposition was in power, Poland, Hungary and a few other countries in ECE refrained from administering transitional justice.

Applied to the context of civil war settlements the simple model suggests that promises of amnesty given to fighters to induce their disarming will not be kept by the government and thus, fighters should refrain from entering such settlements. The structure of the game and payoffs are common knowledge. Thus, all players have perfect and complete information and know the payoffs of all other players, and, consequently, the fighters should anticipate the government's defection. Since the delivery of amnesty is expected to take place *after* the surrender of arms, how can the government ensure the fighters that it will keep its promise? Jon Elster describes this dilemma as the "delivery problem".<sup>14</sup> I present one possible solution to the credible commitment problem in the following section.

#### **5.4. Skeletons in the Closet**

The "Kidnapper's Dilemma" version of the commitment problem comes from the, now classic, *Strategy of Conflict* by Thomas Schelling. Imagine there is a kidnapper who abducts a victim and demands ransom in exchange for releasing her. However, once the ransom is paid out, the kidnapper is better off doing away with the victim. After

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<sup>14</sup> Jon Elster. *Closing the Books: Transitional Justice in Historical Perspective*, Cambridge University Press, 2004, pp. 190-1.

all, she may provide the police with information identifying him.<sup>15</sup> The victim cannot credibly commit to not revealing her abductor's identity to the police. The kidnapper's dilemma shares the same structure with the simple game presented above. The strategy of releasing the victim is weakly dominated by disposing of her. How can the abducted victim save her life? How can she make her promise to the kidnapper credible? A possible solution to this dilemma runs as follows: let's allow the victim to commit some heinous crime and supply her abductor with evidence of this crime. If she were to reveal the identity of the kidnapper, he would uncover the evidence against her. Since the disutility from being held responsible for such an act outweighs the victim's utility from punishing the kidnapper, she refrains from revealing his identity and the optimal solution is ensured. The victim "leaves a skeleton in the kidnapper's closet" and the abductor will reveal it, if he himself is revealed by the victim. This secret information makes the victim's commitment not to reveal any information to the police credible.<sup>16</sup>

In pacted transitions, such as the ones that took place in ECE, the embarrassing "skeletons" are files of former dissidents who were secret police informers. A note of explanation is in place here: Why are there informers among dissidents? This is related to the long tenure of communist authoritarian regimes in ECE, which lasted nearly half a century. Especially after the death of Stalinist dictators throughout the region, the communist regimes ECE rarely engaged in costly violence against the organized resistance. They preferred to maintain secret enforcement apparatuses capable of monitoring the expansion of dissident activity by infiltrating opposition organizations with a network of undercover agents. The agents would be regular citizens who would report forbidden or illegal activity of their co-workers, neighbours, and sometimes even family members and friends. While sympathizers of the communist regime were eager to become informers, the secret po-

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<sup>15</sup> Below, I call the victim "she" and the kidnapper "he".

<sup>16</sup> The plot of "The Albino Alligator" thriller runs along this scenario. After killing one of the co-abductees in custody of the kidnappers, the surviving victim tells the police who rescued her that the only surviving kidnapper was a victim as well (<http://www.imdb.com/title/tt0115495/>).

lice valued most highly the informers from within the opposition itself. The identity of such informers had to be kept secret, especially from their fellow dissidents.

Secret police files allowing for the identification of these agents remained secret when the opposition entered the transition negotiations with the outgoing autocrats. The easiest, but also most costly, way to assess the opposition's level of infiltration would have been to adopt lustration laws, that is, a law uncovering links of politicians to the former secret police. If infiltration levels were low, the opposition could gain from lustration, since the procedure would mainly target successors of the communist regime. In the opposite case, adopting lustration could hurt the opposition. Although the opposition was uncertain about the extent of its infiltration, the communists had considerably more information about it. After all, the secret police had worked for the *ancien régime*. The communists could exploit this informational advantage by blocking the transition, if they feared that the low levels of informers would induce the opposition to break its obligation. However, since the opposition did not know to what extent it would be implicated by a transitional justice procedure, such as lustration, the communists could try to convince the opposition that it was highly infiltrated. One may think of their decision to open the gates to transition as a message signalling the level of infiltration in a game of incomplete information. The signal could be noisy, since the communists had an obvious incentive to bluff. To dissuade them, the opposition could respond with ambiguity whether to adopt or refrain from transitional justice.

The strategic interaction outlined above helps to explain two puzzling phenomena observed in ECE: (1) some countries, such as Poland, Slovakia or Hungary, refrained from transitional justice for many years;<sup>17</sup> (2) in other countries, such as the Czech Republic or

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<sup>17</sup> Although transitional justice in the form of lustration laws was eventually adopted, it was not implemented until the late nineties, or in the case of Slovakia, even as late as 2003. Furthermore, in these cases of delayed transitional justice, the opposition negotiating the transition kept its promises – lustration laws were adopted by their successors, or in some cases, the post-communists themselves; see Nalepa, “Skeletons in the Closet”.

East Germany, promises of amnesty were broken very quickly. The short answer to the ECE puzzles is: the dissident opposition refrained from lustration in fear of revealing “the skeletons in its own closet”. Exploiting the opposition’s uncertainty, the communists entered round-table negotiations leading to democratization to signal that levels of infiltration are high.<sup>18</sup> The explanation sheds light onto why transitional justice will sometimes be significantly delayed or avoided altogether.

Before I present a formalization of the intuitions outlined above, let me sketch the interpretation of the game for civil war settlements, such as Colombia’s. The government can credibly commit to delivering amnesty to the surrendering fighters if the government has “skeletons in the closet” that the fighters could release in the event that the government reneged on the promise of amnesty. In this interpretation, Colombian paramilitaries would hold the government hostage for as long as it takes for the amnesty promise to be delivered. The “skeletons” could take the form of infiltration of governmental elites with members of the paramilitary. Any information embarrassing the reputation of the government elites that the paramilitaries are at liberty to release could play the role of “skeletons”. I now turn to presenting a signalling model that formalizes these intuitions.

### **5.5. The Skeletons in the Closet Model**

In the Skeletons in the Closet (SC) model, I use a signalling game to formalize the intuition that the fighters can exploit, as an insurance of amnesty, the government’s uncertainty about its infiltration levels and that the government can learn the extent of infiltration from the fighters’ actions.

In its canonical form, a signalling model has two players: a *Sender* and a *Receiver*. The *Sender* has private information (about his “type”), unknown to the *Receiver*, which affects the payoffs of both players. Through his choice of message the *Sender* can pass on to the

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<sup>18</sup> However, because the communists’ signal was “noisy”, the opposition responded with caution and was somewhat ambiguous about refraining from or engaging in transitional justice.

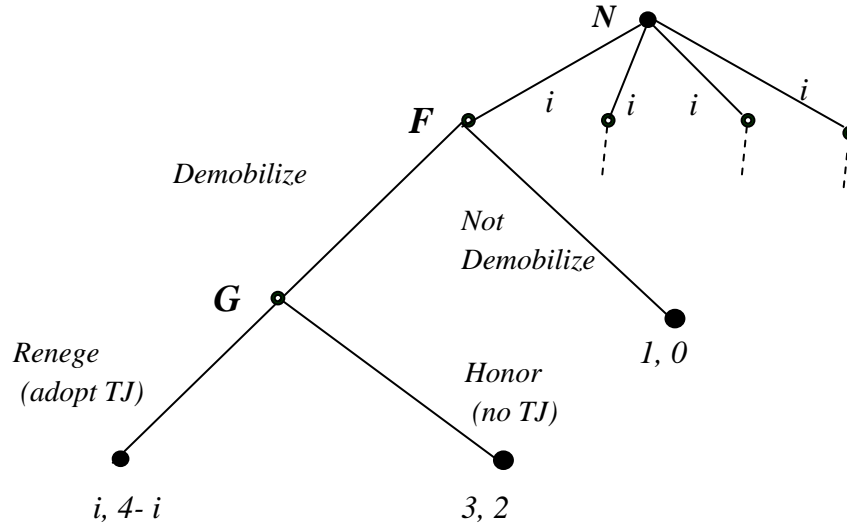
*Receiver* some originally unknown information. In response, the *Receiver* chooses an action. The credibility of the *Sender*'s signal depends on how closely his preferences are aligned with those of the *Receiver*. Equilibria in signaling games (usually Perfect Bayesian Equilibria) have two parts: the strategy profile and the beliefs of the *Receiver* about the type of *Sender*'s private information. In one important class of equilibria – separating equilibria – *Sender* conditions its actions on the type of private information it has. In this process, some information is revealed by the *Sender*, and the *Receiver* gets to update his *a priori* beliefs to *a posteriori* status, and meaningfully conditions his actions on this information. In the other important class of equilibria – known as pooling equilibria – different types of senders choose the same action. Such messages convey no information to the *Receiver*, whose *a posteriori* beliefs remain unchanged. In such equilibria, receivers always act in the same way.

The following SC game is a discrete version of the original Transitional Justice with Secret Information (TSI) game discussed in previous work of mine.<sup>19</sup> The fighters (*F*) are the *Sender*, while the *Receiver* is the government (*G*). The private information is the level of infiltration of the government,  $i \in \{0,1,2,3\}$ , where  $i = 3$  represents the highest level of infiltration while  $i = 0$  represents the lowest level. The government prefers less infiltration to more while the preferences of the fighters are the exact opposite. The fighters have private information about the exact value of  $i$  but the government does not know it — it believes that each level of infiltration is equally likely. This assumption is supported by the fact that those maintaining contact with the paramilitaries are anxious that this information does not reach the top echelons of power.<sup>20</sup> The game is represented in figure 2 below.

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<sup>19</sup> Nalepa, “Skeletons in the Closet”. The discrete version of the game is more tractable than the original version were infiltration is continuous over a one-dimensional space.

<sup>20</sup> Although commentators of the Colombian case may express some doubt as to whether those who had contacts with paramilitaries were able to hide it from the leaders in top echelons of power, the fact that most contacts took place in relatively remote areas suggests that concealing infiltration was at least possible. It is worth noting, however, that relaxing this assumption and assuming that the government knows  $i=3$  would lead to an equilibrium in which the promise of amnesty



Players	Actions	Incomplete information	Payoffs at terminal nodes
Fighters (F) Government (G)	$A_F = \{\text{Demobilize, not Demobilize}\}$ is F's action set $A_G = \{\text{Renege, Honor}\}$ is G's action set	$i \in \{0, 1, 2, 3\}$ is F's private information about the level of infiltration represented by move of Nature in stage 1	(Fighters, Government)

Figure 2: The Skeletons in the Closet game.

In stage 1, Nature determines the level of infiltration  $i$ . There are four possible levels, 0, 1, 2 and 3. The fighters observe the exact level of  $i$  and, in stage 2, choose which message to send. The two types of messages are: enter the settlement with the government (*Surrender*) or hold on to arms longer (*Status Quo*). If the fighters refuse to settle with the government, the game ends and the fighters and the government receive their reversion payoffs,  $N_F$  and  $N_G$ , respectively. In stage 3, after observing the fighters' action, the government updates its beliefs regarding its infiltration level and chooses one of two actions. It can renege on the promise of amnesty. In such a case, the game ends with

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is honoured. I thank Pablo Kalmanovitz (personal communication) for pointing this out to me.

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the payoffs of  $i$  for the fighters and  $4-i$  for the government.<sup>21</sup> The government can also honour the agreement, in which case the payoffs are of  $t_F$  and  $t_G$ , for the fighters and the government, respectively. I assume the following relations between the parameters defining payoffs:

$$0 < N_F < t_F \leq 3 \text{ and } 0 < N_G < t_G$$

Note that  $i$  can take any of the four values described above. However, if the game ends with the opposition reneging, payoffs depend on the value of  $i$ , just as they depend on the values of the parameters. The justification of the relations between parameters is as follows. As was explained before, if amnesty is broken, the more compromised the government is by links to the fighters, the better off the fighters are (their payoff in such a case is  $i$ ). In this situation, if the amnesty agreement is broken, the fighters have incentives to reveal compromising information about the government. This may involve naming army generals and politicians who bankrolled paramilitary operations and even “worked hand in hand with [paramilitary] fighters to help carry them out”.<sup>22</sup> Why would the fighters choose this course of action? A possible justification is that after the fighters have surrendered their arms, they can no longer revert to violence. They are forced to seek political influence within the public arena, perhaps by organizing political parties or supporting existing ones, competing for legislative and executive seats with the existing government. Exposing the corruption of existing governmental elites makes it easier for the fighters to place representatives of their own in positions of responsibility. The fighters already have a reputation of perpetrators of human rights. By sharing the responsibility for these crimes with some government officials they can only gain. The costs of revealing embarrassing information are fully absorbed by government elites and they can expect to suffer the consequences of such revelation. These costs could be expressed in electoral currency (as lost legislative representation) or – in areas with

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<sup>21</sup> This implicitly assumes vNM utility functions, i.e., players who are risk-neutral.

<sup>22</sup> For an example of top paramilitary commanders revealing that governmental elites were involved in the killing of civilians and cocaine trafficking, see “Paramilitary Ties to Elite in Colombia Are Detailed”, WashingtonPost.com, 22 May 2007.

unreliable democratic procedures – as losses in clientelistic relations.<sup>23</sup> Hence  $F$ 's payoff is increasing in  $i$ . When infiltration is extremely high, that is,  $i$  close to 3 revealing the government's infiltration might even be better for the fighters than an amnesty (thus  $t_F \leq 3$ ).

On the other hand, for the government side, revealed infiltration translates into reputational losses and thus their payoff from renegeing on the promise of amnesty (which implies the revealing of “skeletons”) is decreasing in  $i$ . The government prefers renegeing when its level of infiltration is low (that is, when  $t_G \leq 4-i$ ). In this case, the fighters bear the greater burden of responsibility for human rights abuse and the government stands a better chance at surviving in power and reaping the benefit of bringing human rights violators to justice. However, for higher levels of infiltration (that is,  $i$  close 3) the government will prefer to keep its promise of amnesty to renegeing. This is the case because circulating information about corrupt governmental elites shames members of the governmental elites and reduces their chances of re-election. The worst outcome for the government, however, is if the fighters were to refuse giving up arms altogether ( $N_G \leq t_G$ ). Two informal propositions that characterize certain properties of the game follow.<sup>24</sup> Both propositions refer to what happens in a Perfect Bayesian Equilibrium. Proposition 1 summarizes the main result of the model.

*Proposition 1:* No separating Perfect Bayesian Equilibria in pure strategies exist.

This proposition says that whenever the fighters surrender, the government will sometimes renege and sometimes honour the promise. The risk of defection is something the fighters are always aware of and despite that, they surrender. Most importantly for us, both outcomes in which agreements are kept and in which they are broken are consistent with the model's predictions. Contrary to the predictions from the simple model presented in section 5.3, demobilization as well the efforts

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<sup>23</sup> Pablo Kalmanovitz (personal communication) points out that the Colombian electoral system, particularly in the regions with higher paramilitary infiltration, may be highly corruptible. Thus, contrary to the ECE, payoffs should rely less on electoral incentives and more on reputational effects.

<sup>24</sup> Proofs can be found in Nalepa, “Skeletons”.



of the government to deliver their side of the bargain are not irrational. Proposition 2 provides an example of a separating equilibrium in which fighters condition their action on the observed level of infiltration  $i$ .

*Proposition 2:* Let  $q$  represent the probability of renegeing by  $G$ ,  $(1-q)$  represent  $G$ 's probability of honoring and  $i^*$  represent the threshold infiltration, so that if  $i \geq i^*$   $F$  demobilizes and if  $i < i^*$   $F$  does not demobilize. The following profile and set of beliefs form a Perfect Bayesian Equilibrium:

$$(q=1/4, i^*=1)$$

$$Pr(i=0|Neg)=0, Pr(i \neq 0|Neg)=1/3$$

In this equilibrium, the fighters will demobilize whenever the level of infiltration is higher than very low ( $i > 0$ ). After observing demobilization, the government can update its beliefs about the level of infiltration. It knows that it is at least 1. The government's beliefs about the level of infiltration change from complete ignorance to confidence that with one third probability it is moderately low (1), average (2) or high (3) In making their actions consistent with those beliefs, the government will play a mixed strategy, in which it honours the terms of the terms of the settlement with probability and reneges on the amnesty promise with probability.

From our point of view, the separating equilibria are more interesting because in these equilibria the government is able to learn about infiltration levels from the fighters' action. The process of learning is referred to as "updating *a priori* beliefs to *a posteriori* beliefs". Over the course of it, fighters base their decision of whether or not to surrender arms on the level of infiltration that they observe, and the government uses the fighters' decision to initiate negotiations to update its beliefs about the level of infiltration.

In the more general TSI model, comparative statics<sup>25</sup> on the parameter  $q$  reveal that a marginal increase in the fighters' utility from amnesty ( $t_F$ ) will make the government more likely to renege, while

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<sup>25</sup> See Nalepa, "Skeletons", mathematical appendix to chapter 4.

marginal increases in the government's utility from amnesty ( $t_G$ ) or the fighters' utility from not surrendering, ( $N_F$ ) will make the government less likely to renege.  $F$ 's willingness to surrender increases with  $G$ 's level of infiltration. Furthermore, the more  $F$  has to gain from a transition with amnesty relative to the status quo of no surrender, the more likely is  $G$  to renege on promises of amnesty. The government will be more likely to abide by its promises, the more it values transition with amnesty and the better equipped the fighters are to hold out without surrendering.

### 5.6. Illustrations from Poland and Hungary

Before discussing the implications of this model for Colombia, I provide illustrative examples from Poland and Hungary. As remarked above, the original version of the SC game – the Transitions with Secret Information game – was originally developed for explaining delayed transitional justice in East Central Europe. The embarrassing “skeletons” represent evidence of dissident members' collaboration with the communist secret police prior to the transition. While the extent of this infiltration is known to communists who are deciding whether or not to negotiate with the dissident opposition the terms of the democratic transition, the dissidents are ignorant about the extent of their infiltration. Breaking promises of amnesty in ECE amounts to implementing lustration laws, that is, laws exposing links of politicians running for office to the communist secret police.<sup>26</sup> As Table 1 did for the simple model in section 5.3, the table below Figure 2 presents the interpretation of the SC model for pacted transitions and civil war settlements.

The most important empirical implication from solving the above model is that all outcomes of the Skeletons in the Closet game may become PBE outcomes for different parameter values. Another main result is that no separating Perfect Bayesian Equilibria in which the

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<sup>26</sup> This exposure results in undermining the reputation of politicians running for office; lustration laws may additionally ban verified collaborators from running for office or issue such a ban if the politician has lied about his or her collaboration; see Nalepa, “To Punish the Guilty and Protect the Innocent: Comparing Truth Revelation Procedures”, *Journal of Theoretical Politics* 20:2 (2008).

opposition (or government) uses pure strategies exist. The SC game is a parameterized family of games with four parameters defining payoffs, that is, when we assume specific values for these parameters, we define a specific game. Interestingly, only three of these parameters matter for the equilibrium. In addition, for every specific set of parameters and every equilibrium, equilibrium outcomes depend on the level of infiltration. Thus, the parameters that determine which equilibrium outcome is possible are:

- a. How infiltrated is the opposition with secret collaborators?
- b. How attractive is for the opposition transition without lustration?
- c. How attractive is for the communists to hold out without initiating negotiations?

Note that the value of  $i$  does not affect the Perfect Bayesian Equilibrium strategy profile because its distribution is fixed. Thus,  $i$  is not an internal parameter of the game, but a parameter that characterizes the decision node of the autocrats, and subsequently the decision node of the opposition;  $i$  does have an impact on what is the equilibrium outcome, even though it does not have an impact on the equilibrium strategy profile. To summarize: although equilibrium strategies depend on only three parameters,  $N_F$ ,  $t_F$  and  $t_G$ , the equilibrium outcomes depend on the four parameters  $N_F$ ,  $t_F$ ,  $t_G$ , and  $i$ .

Between January and July 2004, I interviewed 51 elite members in Poland and 26 in Hungary. The respondents came from all political camps and included the current President of Hungary Laszlo Solyom, the former Polish Premier Jan Olszewski as well as numerous ministers and MP's. In the research summarized below, I used data from these open interviews both to approximate parameters of the SC model and to provide empirical support for some of the critical assumptions of the model, such as the claim that the opposition's preferences over lustration were closely linked to its beliefs over infiltration.<sup>27</sup>

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<sup>27</sup> A more systematic comprehensive analysis of data collected in ECE is presented in Nalepa, "Skeletons".

### 5.6.1. Poland

A former Polish samizdat publisher, asked to assess the size of the secret informer network in Poland, exclaimed: “The opposition in Poland was so numerous that it must have had more secret police agents in its ranks than there were oppositionists in the remaining countries of the communist bloc all taken together!”

How could the opposition become so numerous? Timothy Garton Ash’s statement “In Poland the transition lasted ten years, in Hungary ten months, in Czechoslovakia ten days” provides a concise answer. Solidarity, the first independent trade union in the Soviet bloc, was legalized in 1980 after signing the first accords with the communist government in Gdansk. Many believed that Poland was about to become the first state in the bloc to be independent of the Soviet Union.<sup>28</sup> At the height of its popularity, the trade union had 9.5 million members, nearly four times more than the communist party organization (*Polish United Workers’ Party, PZPR*).<sup>29</sup> Furthermore, over the sixteen months during which Solidarity was a legal trade union, other civic associations proliferated, including a few more million of members in independent professional unions, the Farmers’ Solidarity, student unions and even independent unions of the police and armed forces.

This outburst of civil society came to a dramatic finale with the enactment of Martial Law on 13 December 1981 by General Wojciech Jaruzelski. Jaruzelski appointed the “Military Council of National Salvation” (*Wojskowa Rada Ocalenia Narodowego*) as an interim executive body. The Polish communist state managed to carry out the military crackdown on Solidarity without any aid from the Warsaw pact or

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<sup>28</sup> Membership in the communist Polish United Workers Party at its peak barely reached 3 million.

<sup>29</sup> PZPR’s membership declined between 1979 and 1982 from 3.091.000 to 2.327.000, mainly as a result of voluntary departure in reaction to Martial Law policies. Paradoxically, one can speculate that the departure of these members ensured the party’s survival; see Jadwiga Staniszkis and Jan Tomasz Gross, *Poland’s Self-Limiting Revolution*, Princeton, N.J.: Princeton University Press, 1984.

Soviet armies. The introduction and implementation of martial law was a fully internally administered operation. The total number of those arrested for political offenses reached 4,790 by the July, 1983 amnesty. One of the interviewed academics in Poland gave the following interpretation of Martial law:

In 1981 Urban [the communist government's press secretary] wrote to Kania [the prime minister of the communist government] that Solidarity was becoming a force impossible to contain or control and he said that he believed that introducing martial law was necessary to destroy its network. He also planned a scenario according to which tens of thousands of Solidarity members would be temporarily arrested and confronted with the secret police, which would conduct preparatory activities for recruiting them as agents. The sole purpose of the operation would be to figure out who among them would agree to collaborate and who would not. Persons who acted tough so that it was obvious they would not collaborate were left alone and no sanctions were ever taken against them.

The quote suggests how after arresting more than ten thousand opposition members, Solidarity could have been infested with hundreds of informers. How common was this knowledge about the level of infiltration among dissidents? The President of one of the leading libertarian NGO's in Poland volunteered the following answer:

Those who participated in the Roundtable negotiations knew what was in the files. For instance, Adam Michnik, along with two historians, established the, so called, 'Historical Commission,' which for a couple of months in 1990 surveyed the archives of the secret police. After that, Michnik became a staunch resister of opening the files in any form or of carrying out lustration, but he never said what he found in those files.

Adam Michnik was a prominent dissident who after the transition became editor in chief of *Gazeta Wyborcza*, the first Polish daily that was not controlled by the communist government. An attorney and former dissident, who had defended two of his colleagues in lustration court cases concurred with the opinion of PN8 saying "Kozlowski [the

liberal Interior Minister] and the Solidarity left knew well what is in the files”. One archivist went as far as to say that,

The secret police organized the Roundtable negotiations. The communists promised not to come back to power in return for lack of transitional justice. The files of secret agents who had been Solidarity members were the guarantor of the promise. The contract was of the sort “we have something on you and you’ve got something on us.

Indeed, shortly after the “Historical Commission” had surveyed the contents of the former secret police archives, Michnik became a staunch opponent of lustration. His newspaper started advocating the restraint against transitional justice in favour of “forward looking reconciliation”. Former prominent dissidents would complain that although *Wyborcza* promised to be a forum of debate about the desirable extent of lustration, it refused to publish articles calling for lustration.

How did government actors respond to the signals communicated by dissidents who were allowed to consult the files? For an answer to this question we have to move back a few months to the beginning of the Roundtable negotiations.

The Polish Roundtable negotiations were held from 9 February to 6 April 1989, between the representatives of the underground Solidarity, the representatives of communist-controlled trade unions OPZZ, and the communist government. The most important outcome of the negotiations, which initiated an entire wave of peaceful transitions bringing to power the former dissidents of ECE, was the communists’ concession to semi-free elections. As a result of Solidarity’s overwhelming victory, the first non-communist cabinet, headed by Tadeusz Mazowiecki, was appointed in 1989.<sup>30</sup>

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<sup>30</sup> The elections were “semi-free” in the sense that only the 35% quota was open for free contestation to non-PUWP members, whereas PUWP and its satellite organizations were guaranteed the remaining 65% of the seats. MPs who were elected in the 1989 from the Solidarity mandate were united in the Civic Parliamentarians Circle (OKP), which later broke up into multiple post-solidarity parties, some more liberal, like Democratic Union (UD) or the Liberal-Democratic Congress (KLD) and some of them more conservative, like Center Alliance (PC) or National-Christian Alliance, ZChN. For more details about the fragmentation of the

When it became apparent that due to a perverse mistake in institutional design, a government led by a PZPR prime minister could not be formed, some of the former communists became concerned about whether promises of amnesty would be kept.<sup>31</sup> Much to their surprise, the first post-Solidarity government “pulled its transitional justice punches”.<sup>32</sup> Both the military and the foreign service, another stronghold of secret police recruitment, remained intact after the transition. Although some screening and employment cuts took place, most of the army and security *nomenklatura* remained in office. Only security service operatives in the embassies and the Interior Ministry itself, who were particularly active in tracking down Solidarity representatives abroad, were fired. In 1992, a proposal to conduct a verification of communist army officers was put forward by Senator Zbigniew Romaszewski, who argued that army purges would serve as “a form of fending off enemy infiltration from outside, as the army is the single

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Polish party system and electoral law reform, see Kenneth Benoit and Jacqueline Hayden, “Institutional Change and Persistence. Origins and Evolution of Poland’s Electoral System 1989-2001”, *Journal of Politics* 66, 2 (2004), and Marek Kaminski and Monika Nalepa, “Learning to Manipulate Electoral Rules” in *Handbook of Electoral System Choice*, Colomer (ed.), Palgrave-Macmillan, 2004.

<sup>31</sup> The “mistake” was as follows. At the Roundtable, the communists wanted to secure 65% of the seats in the lower house for their own candidates and, in addition, hoped to win some of the 35% seats open for free contestation to non-party-members. However, part of the 65% was to be filled by candidates on the, so called, “national list” containing 33 names of famous communist candidates. A candidate from this list in order to “win” a seat in the legislature needed the support (expressed by not having his name crossed out) of at least 50% of the voters. Only two communists from the national list received the required support. To make things worse for the communists, the “Solidarity” candidates won the entire 35% quota open for free contestation. With 33 seats unfilled in the legislature, the communist coalition would hold only 62.2% seats instead of the planned 65%. While the leaders of Solidarity quickly agreed to have the electoral law amended so that the unfilled seats would be allotted to communist candidates. However, given that “Solidarity” won 99 out of 100 seats in the Senate, the majority of 65% would be able to select its own cabinet but would be unable to make any decision without the “Solidarity’s” consent. The crisis of legitimacy that emerged in the aftermath of the elections was irreversible. For details see Marek Kaminski, “How Communism Could Have Been Saved: Formal Analysis of Electoral Bargaining in Poland in 1989”, *Public Choice* 98: 83-109 (1999).

<sup>32</sup> Elster, *Closing the Books*.

most sensitive point of each country”. But members of the former opposition, especially the RT negotiators who were at that time cabinet members, advised against considering the proposal. President Lech Walesa, Solidarity’s leader, admitted publicly that he was “in favor of a reasonable exchange of senior staff in the army, as a much better idea than screening”. This policy was supported by ex-dissident members of the cabinet: at a meeting of the Sejm’s National Defense committee, Deputy Defense Minister Bronislaw Komorowski opposed the plan to vet army officers, claiming that:

[t]he ministry has no evidence of the purported disloyalty of army commanders and it sees no cause for suspicion. Implementing the Senate proposal would deprive the army of about 7,000 officers. From the point of view of the army and state defense, both the Senate’s bill and all the other proposals in the matter must be considered harmful, because they are bound to decimate the commanding staff. (Polish News Bulletin 1992)

When a lustration resolution was submitted in May 1992 by a group of 105 MPs, it was passed in the absence of members of the Democratic Union (UD), the party of premier Mazowiecki. UD members were the first to bring down the implementation of the resolution along with the cabinet who had attempted to implement it.

In 1992, when six proposals of lustration were submitted to the Sejm, the UD was the only party besides the post-communist SLD that did not sponsor any proposal. It also moved to reject the four harshest proposals and have the remaining two sent back for committee work. During those debates, as well as in 1993 when a special committee on lustration was created in the parliament, the UD vigorously opposed purges, arguing that most of the evidence was destroyed and the remaining files could have been fabricated.<sup>33</sup> Mazowiecki not only failed to apply collective responsibility to members of the military and police, but even went as far as to offer promotions to the existing personnel. The generals’ promotions were regarded as “spectacular” not only in terms of the number of officers to be promoted, but with regard to

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<sup>33</sup> See Nalepa, “Punish the Guilty” and Kaminski and Nalepa, “Judging Transitional Justice” for a discussion of the merits of this argument.



particular candidates. Seven generals were promoted to a higher rank, and twenty-two colonels (plus one from the Ministry of Internal Affairs) were promoted to generals (Lamentowicz interview, Rzeczpospolita). This allowed some military officers to become so confident that they denied their role in supporting the past regime, as expressed by one of the officers awarded promotion:

Our consciences and hands are clean. We have always served the country, and we remained faithful to our oath. Today, I can find no justification which would allow certain politicians to apply the principle of collective responsibility, to put us in an ambiguous situation, and to undermine our credibility. I look at the Defense Ministry's leadership that I am a part of from the professional point of view. One needs to spend many years in the service in order to become a general. During this period, an officer's competence, his ability to supervise very large teams and, first of all, his allegiance to Poland are subject to numerous trials. I have full confidence in the people whom I promote. I have met many of them during their training. I believe that it is unfair to attach double-meaning labels to many of them. At the same time, one could attach such labels to the majority of adult Poles, including the ardent supporters of decommunization. On the other hand, it would be a tragedy to destabilize the army, considering the complex international situation. I believe that, reason will win over a dogmatic approach to the screening issue. (General Tadeusz Wilecki, chief of the General Staff of the Polish Army, in interview with Zbigniew Lentowicz for Rzeczpospolita, 1990)

A lustration law that matched the extent of secret police infiltration was not implemented until 2007.

### **5.6.2. Hungary**

The Hungarian RT negotiations took place between June and September 1989 and essentially comprised two independent RTs: the opposition table (*Elenzeiki Kerekasztal*), EKA, at which the opposition forces

agreed on a common stance against the regime and the National Roundtable Talks which brought together three teams.<sup>34</sup>

The opposition team was created upon the invitation of the Independent Lawyers Forum and comprised eight opposition groups, among them the Hungarian Democratic Forum, MDF, the Alliance of Young Democrats (Fidesz) and the Alliance of Free Democrats (SzDSz), as well as a group of historic descendents of the parties present in the semi-democratic period of 1945-7, such as the Smallholders (FKgP), the Social Democratic Party and the Christian Democrats (KDNP). The opposition Roundtable was to a large extent a reaction of the various groups to the communists' attempts at conducting separate negotiations with each of the dissident groups, a strategy that obviously would have weakened the opposition's bargaining power. To increase unity among members of the opposition, EKA adopted unanimity as the rule for decision making. This voting rule was the only condition under which SzDSz agreed that EKA negotiate with the MSzMP, fearing that otherwise, the opponent would exploit their weaker position. The Alliance of Young Democrats (Fidesz) similarly agreed to talk with the MSzMP only as part of a united opposition.

The communist team consisted of lawyers from the Ministry of Justice, all of whom were members of the Hungarian Socialist Workers' Party (MSzMP). Additionally, a so-called "third side" was made up of organizations affiliated with the MSzMP, but technically not part of it. The existence of an official forum of debate among the numerous opposition groups did not mean that the communist leaders all represented a unified position. In contrast to communist party in Poland, the MSzMP was more pluralist and involved numerous reformist circles. The most influential one was led by Imre Pozgay, famous for his close affiliation with the MDF. It is plausible that the reform communists, such as Pozgay, who were in close contact with the opposition groups, inflated and exploited the divisions within the ruling camp to extract concessions from the opposition. They would present the communist hardliners as willing to call off RT negotiations if the reformists

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<sup>34</sup> Andras Bozoki. *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy. Analysis and Documents*, CEU Press, Budapest, 2002.

failed to gain some benefits for the outgoing regime, such as a presidential appointment or election date early enough to avoid flat defeat. The KDNP and MDF either believed the communist reformers or simply acted as their advocates on the floor of EKA. They supported the idea of direct presidential elections preceding the general parliamentary elections that would ensure that Pozgay got the presidential position. In response to MDF's and KDNP's proposal, the more radical opposition groups, such as Fidesz and SzDSz, undertook steps to ensure EKA's tough stance to extract concessions from the communists.

Most interviewees indicated that young parties, such as Fidesz, were less infiltrated than the historical parties, such as the Smallholders and KDNP. The MDF was registered as an association as early as 1987, after having declared itself to be a neutral group. Its members had decent careers in Kadar's communist state. These factors made the MDF party particularly suspect of links to the secret police. Ivan Szabo, a former MDF MP, has been quoted as saying that the reason MDF blocked the SzDSz's lustration proposals between 1990 and 1994 was that lustration would make the government lose its majority support in parliament, so extensive was its infiltration. It was rumoured that the MDF was the most infiltrated party. On the other hand, the communist party was long believed to have escaped infiltration, since its members felt obligated to provide communist authorities with the information they required even without signing an official contract of any sort.

In the aftermath of the roundtable negotiations, when the first non-communist cabinet was being formed in Hungary, out-going communist Prime Minister, Miklos Nemeth, handed to the new Prime Minister, Jozsef Antall of MDF, a list of former secret police collaborators from opposition parties. A majority of my elite respondents suggested that, according to Nemeth's list, Antall's MDF was the most infiltrated party among the opposition parties. They found it hardly surprising that the first lustration proposal was scrapped by combined votes of members of the ruling coalition, MDF, the Smallholders (FKgP) and the Christian Democrats (KDNP).<sup>35</sup> A very popular ru-

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<sup>35</sup> The proposal itself was submitted by two opposition MPs from SzDSz, Gabor Demszky and Peter Hack. Work on the bill was prompted by a scandalous revelation, which later came to be known as the "Danubegate affair". A former secret

mour in Hungary was that Prime Minister Antall used files on his coalition partners, Istvan Csurka and Peter Torgyan, to secure their support for his policies. Media sources report also that Antall selectively released dossiers damaging ex-communists' reputation prior to the 1994 elections to prevent the Hungarian Socialist Party (MSzP) from winning.

Early in 1994, it became apparent that MSzP would win elections anyway. At that time, the MDF, along with its coalition partners, who a few years earlier had opposed any TJ legislation, passed a very harsh lustration law. It covered not only politicians, but also reached the media, as well as legal and academic circles – a total of 12,000 people. To ensure that the law would affect the post-communists, the definition of a lustrable offence also included receiving summarized periodic reports from the secret political police. Thus, anyone who had held a cabinet post in one of the pre-transition communist governments would be prevented from holding office. MDF was hoping that a lustration law would lessen the communist success in the upcoming elections. Also, since Antall was about to lose exclusive access to the secret files stored in the Interior Ministry, he preferred that the post-communist leader who was to replace him in the post of prime minister would not have that same access, but rather that the contents of the files be overseen by a screening agency, independent of the government. The harshness of the law, however, backfired when the Constitutional Court ruled it illegal in December 1994. The decision came after the MSzP had won an absolute majority in parliament. As a result, Hungary waited until 2001 for a workable lustration law.

In an important sense, the phenomenon of delayed lustrations serves as a very direct application of the SC model. It is plausible that

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police officer, Mayor Vegvari, contacted the SzDSz headquarters in January 1990, only three months prior to the scheduled first democratic elections, with information that the secret police was still infiltrating the roundtable opposition (EKA). After the elections, every deputy was under suspicion for ties with the III/3. The purpose of the Demszky–Hack law was to put an end to rumours being spread in the newly elected parliament about ties of former opposition MPs to the secret police collaborator network. Lustration would end these rumours by appointing a public body to verify them.

the dissident opposition was unaware of who among its members collaborated with the secret police, because revealing this information to fellow dissidents was embarrassing. It is plausible that the communists had much better information about infiltration levels, since the secret police had worked for them. It is also plausible that exposing collaborators among parties that originated in former dissident groups is more damaging to these groups than exposing collaboration of the former communists. After all, they would have been supporting their preferred political system. In a sense, one would almost expect communists to serve as secret informers. It is rather the usefulness of communist collaborators that is problematic. If the secret police wanted to contain anti-communist dissidence, infiltrating dissident groups with informers was a much more advisable route. Finally, it is very difficult to pass lustration selectively, so that its effects extend only to some parties, but not others. Once the law is passed, it applies to all parties although it is more damaging to those who have more collaborators amongst their ranks. Infiltration is not distributed equally across post-transition parties and neither is information about this infiltration. Scenarios in which former dissident parties would benefit from lustration, since they have fewer collaborators than the communists, but in which the dissidents do not know this to be the case are possible. Outgoing communists carried an informational advantage that shielded them from transitional justice for many of the post-transition years. How portable is the TSI model beyond ECE? Can it help us understand how governments can make promises of amnesty credible to paramilitary fighters in the aftermath of civil war?

### **5.7. Implications for Colombia**

The key insight from the SC model is that the potential infiltration of elites who deliver promises of amnesty makes these promises credible and provides fighters with incentives to surrender arms. For promises of amnesty to be credible, according to the SC model, the following conditions must be met:

- a. The governments should be suspecting that members of their elites have incriminating links, but should be uncertain as to where precisely these links are.

- b. The fighters should be in a position to reveal this information if the government were to renege on its promise of amnesty.

Alternatively to (a), the government could have a suspicion of who is infiltrated, but find it impossible to simply purge these members from governmental elites and be free of infiltration. The key is that lack of information about infiltration on the delivering side (the government) is equivalent to having that information but not being able to act upon it.<sup>36</sup>

The meaning of (b) is that the fighters must have access to information about the government's infiltration and should have an incentive to disclose it. If embarrassing the government with exposing its links to human rights violations would further compromise the fighters, they lack incentives for revealing the secret. However if, as a result of revealing these secrets to the public, the fighters would shed part of the responsibility for human rights violations and, by weakening the political position of governmental officials, they would increase the popular support of their politicians, they have the necessary incentives to make amnesty promises credible.

These observations are particularly important in the light of recent events in Colombia. Similarly to the South African TRC, the JPL has provoked criticism for its leniency towards perpetrators from international human rights organizations, local NGOs and even the office of the UNCHR. There are also problematic aspects associated with monitoring what constitutes a full disclosure of assets and the truth. Specifically, demobilizing fighters were expected to hand-over of all ill-gotten assets, including land, to the National Reparation Fund and to disclose their involvement in crimes as well as knowledge of paramilitary structures and financing sources. However, it is not clear how well

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<sup>36</sup> It is possible that instead of purging, the government wants to protect those who have been severely implicated because it fears being associated with infiltrations if they were to be made public. If infiltration is extensive, extensive purges could be impossible. Revealing infiltration to the public could significantly disrupt the work of a government (Pablo Kalmanovitz, personal communication).

equipped the National Prosecutorial Office is to confirm that no truth or assets have been withheld by a surrendering paramilitary.<sup>37</sup>

In other words, paramilitaries may be demobilizing and avoiding harsh sentencing without providing their side of the bargain. Although, this is disconcerting from the point of view of justice, an optimistic observer would note that perhaps because of lenient treatment, the paramilitary forces have been demobilizing in impressively large numbers (more than 31,600 AUC members by October 2006, according to an International Crisis Group Policy Briefing of October of 2006). The numbers are so impressive that it is not clear if the government will be able to provide them with benefits promised to induce their demobilization. Among the benefits are a stipend and professional training, all of which are part of the re-immersion into society process.

If the fighters anticipate difficulties with keeping the terms of amnesty, the SC model predicts that they would start revealing information that is embarrassing to governmental elites. Indeed, the summer of 2007, unveiled serious revelations disclosed by Salvatore Mancuso, a top paramilitary commander. Mancuso had been testifying under the terms of the JPL since the fall of 2006. In May 2007 he revealed that over and above 17,000 armed fighters, the paramilitary controlled a network of more than 10,000 collaborators among the civilian population, linking some of these to the ruling elites. Mancuso also helped the JPL prosecution draw a map of massacres committed by AUC forces. However, his testimony has also implicated two ministers from President Uribe's cabinet (Washington Post, 22 May 2007). Following Mancuso, another paramilitary leader, Ivan Laverde Zapata (one of Mancuso's men in the province of Norte de Santander) revealed 380 murders and promised to deliver on 2,000 more. In his testimony, Za-

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<sup>37</sup> *El Tiempo* reported that one of the former paramilitary commanders, José Gregorio Mangones, former leader of the "William Rivas" AUC front (known as "Carlos Tijeras") when testifying under the JPL denied having enough assets to compensate victims. He claimed that his only possession was an SUV. This testimony is hard to reconcile with the fact that for his service under the AUC, he had been receiving a very high monthly salary (*El Tiempo*, 22 August 2007).

pata also gave information on government officials who had been cooperating with the paramilitaries.<sup>38</sup>

Eventually, the police seized a computer that belonged to one of the paramilitary chiefs, which led to another breakout of revelations. By June 2007 charges against 14 current members and seven former members of Congress, the head of the secret police as well as many mayors and governors had been issued. In light of the SC model, the recent events help understand why paramilitaries were disarming so eagerly. Their infiltration of governmental elites provided them with sufficient insurance that the terms of amnesty would be met.

An important caveat to note here is that although the implementation of the JPL was not what the paramilitaries had anticipated, this was not necessarily due to ill will on the side of the Uribe government. In May 2006, the Constitutional Court ruling put stringent conditions on the paramilitaries surrendering arms under the JPL, or stringent enough to make unlikely an agreement had they been proposed at the beginning.<sup>39</sup> Furthermore, in July 2007, the Constitutional Court ruled unconstitutional the part of the JPL which automatically qualified any crime preceded with an order as a political crime. The Court justified its decision by arguing that in allowing such crimes to fall under the JPL, the law was promoting confusion between common crimes and political crimes (*El Tiempo*, 26 July 2007). In response to the Court's decision, Uribe's government issued a statement severely criticizing the ruling, which led to a deepening of the conflict between the two

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<sup>38</sup> The following month however, another paramilitary leader (Fernando Sanchez a.k.a. "El Tumaco") who had offered key information to a Justice and Peace prosecutor was assassinated just as he was going to tell of his block's activity and of collaboration with government officials (according Eduardo Cifuentes, another JPL applicant; see *El Tiempo*, 11 September 2007). This may have led to more caution in naming collaborators.

<sup>39</sup> The court ruled that "reparation to victims not be limited to ill-gotten assets held by ex-paramilitaries, that all members of a paramilitary unit be held responsible for crimes committed by members of that block, that prison terms under the JPL be no less than 5 years (with time served in detention centers not counting towards the sentence and that all JPL benefits be forfeited if the ex-paramilitary under consideration fails to confess the whole truth" (International Crisis Group, October 2006).



branches of government. Ostensibly, the rulings had put the Colombian executive in the difficult position of appearing to have reneged on promises given to the AUC during negotiations.

Even without the Constitutional Court throwing logs under Uribe's feet, there was little room for relaxing the tight conditions of the agreement. For instance, Vicente Castaño, a prominent paramilitary leader, left the negotiation table after he sensed that the terms were getting tougher. As the Court ruling made full disclosure of truth mandatory for taking advantage of the JPL benefits, many paramilitaries reversed their decisions to disarm, disarmed only partially, or joined newly forming military groups. These actions were reinforced by further criticism against the leniency of the JPL from foreign human rights activists, the EU and to some extent the US. Thus, the decision of some of the paramilitary leaders to start revealing linkages between the paramilitary human rights violations and the government could be motivated by these external factors.

It is important to note here that the revelation of infiltration is part of an equilibrium strategy for the demobilized paramilitary. There are, however, also other important insurance mechanisms in play, which deserve some discussion here, because of their compatibility with the events that took place in Colombia since the JPL went into force. I discuss them in the final section. Before I do that, however, I would like to address what may seem to be a critical problem with SC's application to Colombia, namely, that contrary to the model's assumptions, those who had contacts with paramilitaries may have been unable to hide this embarrassing information from the top echelons of the executive. The fact that most contacts took place in relatively remote settings may have made secrecy somewhat easier. Note however, that even if in Colombia the prevailing levels of uncertainty regarding infiltration were different than in ECE, it is true that the Colombian government knew that the levels of infiltration were fairly high (for instance, that  $i = 3$ ). The equilibrium of a game thus modified would have the Government's action of "Honor". This prediction fits squarely with the Uribe administration's efforts to revert the JPL to the original version agreed to with AUC in 2003.

### 5.8. Alternative Explanations<sup>40</sup>

As the example of Vicente Castaño above suggests, not all paramilitary leaders participated in the negotiations with the government to the very end.<sup>41</sup> Other AUC members negotiated, partially disarmed, but still preserved links with illegal armed organizations; some to this day maintain loyal lieutenants ready to follow orders. This is a quite important feature that sets Colombia and ECE apart. In Poland and Hungary, dissident groups who did not participate in the roundtable negotiations, did accept, at least in 1989, the outcome of the RT, which was gradual democratization.<sup>42</sup> This cannot be said for Colombia. First, the two remaining major groups of armed illegal combatants – the FARC and ENL – did not participate in the negotiations.<sup>43</sup> Second, the AUC did not surrender single-handedly, but rather declared willingness to initiate a process of gradual demobilization.

The implication for the SC model is that the fighters preserved an exit option for themselves. At any given time, they are in a position to threaten or to actually use violence, should the government fail to keep its side of the bargain. International NGOs suspect that a large number of weapons were not surrendered after the negotiations. This is supported by the OAS verifying mission's finding that a little over 18,000 weapons were surrendered by December 2006, on average one per two demobilizing combatants! Since the demobilization was an

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<sup>40</sup> This section relies heavily on research and comments from Pablo Kalmanovitz.

<sup>41</sup> Castaño participated but pulled off when Uribe ordered that paramilitary commanders be put in temporary seclusion. However, Pablo Kalmanovitz notes in the introduction to this volume that paramilitaries were well represented at the negotiation table, perhaps even more than they should have been, as the representation included even regular drug traffickers.

<sup>42</sup> Even in Hungary, where FiDeSz and SzDSz propagated a referendum to decide upon the mode of electing the President, they did so to prevent the communist representative from winning this office, not to sabotage the outcome of the roundtable talks altogether. The referendum was an attempt to get more out of the roundtable deal than had been initially agreed to; see Bozoki, *Roundtable Talks of 1989*.

<sup>43</sup> Efforts to negotiate the demobilization process of the ELN and FARC have been made, but are still in very early stages, although international organizations, such as the OEA (Organization for American States) are optimistic (OEA/Ser.G 2007).

ongoing process, paramilitaries from certain groups could observe its credibility and implementation over time and update their beliefs about how likely the JPL was to be implemented as expected. While the incentives of big drug money and other criminal activities remained more or less stable, prospects of a lenient JPL became grimmer. Hence the paramilitaries' decision against demobilization. The creation of new military units can be reflective of these decisions, especially since after the demobilizations the AUC lost its original structure.

Some recent actions of the Uribe administration could weaken this alternative explanation, however. Two top paramilitary chiefs ("Don Berna" and "Macaco") who had been present at the negotiations have been scheduled for extradition to the US, after it was confirmed that they kept their criminal activities ongoing from jail (*El Tiempo*, 26 July 2007). In August, one of the paramilitaries who had accompanied Castaño in his escape from prison (pseudonym "HH") was also put on the list of inmates awaiting extradition.<sup>44</sup> This may send a strong signal to other paramilitaries' chiefs. Even though the paramilitary commanders may have thought they could continue their operations from jail, the executive has been trying to use the threat of extradition to ensure that they keep their side of the bargain.

Unfortunately, it is also reasonable to expect further violence, both between the new armed groups and the military (as the new groups' relationship with the military may not be as collaborative or symbiotic as it was in the past) and towards other illegally armed groups (over control of drug-trafficking routes surrendered by demobilizing AUC units). Moreover, it can be expected that the competition for power within the ranks of emerging or reappearing paramilitary groups will be fierce, as lower echelons of the paramilitary begin competing for leadership after their leaders have surrendered arms. There is increasing alarm in the National Reintegration Program about demobilized low-level troops who are being recruited into new criminal/semi-paramilitary organizations. While the nature and power of these groups

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<sup>44</sup> It has also recently been rumoured that Vicente Castaño has been murdered for his obstruction of the negotiations process – another fact weakening the strength of this alternative explanation (Pablo Kalmanovitz, personal communication).

is not yet clear, it is possible they will gradually take over the control AUC had. Due to lack of information about their organization and chain of command they may present an even stronger threat to peace in Colombia.<sup>45</sup>

The decision of Salvatore Mancuso to disclose links between paramilitaries and the government could also be interpreted as an effort to comply with the Constitutional Court's restrictions on the applicability of JPL benefits. Since the Court ordered that a paramilitary's failure to disclose the full truth is sufficient grounds to lose the JPL benefits, Mancuso could have been using the ruling as an excuse to punish or caution the government; or even more simply, as a way to cover his back. Since the Constitutional Court failed to elucidate fully the grounds for losing the benefits,<sup>46</sup> Mancuso and others who decided to confess may have been using the opportunity created in the law.<sup>47</sup> However, according to JPL, a former combatant must "describe the circumstances of time, manner, and place in which they have participated in the criminal acts committed on occasion of their membership". There is no obligation to disclose sources of political support or finance. Truth-elucidation requirements are narrow. As the recent events seem to show, infiltrated elites were hoping to reap the benefits of a lenient law, to a no lesser degree than the paramilitary leaders.

Finally, after the incentive structure for demobilizing was altered in the process of implementing it, one could interpret the disclosure of infiltration as an example of, literally, a prisoners' dilemma situation. Some AUC members' refraining to demobilize has created distrust and enmity among paramilitary leaders. What one might expect in this situation is a race to the bottom, in which all parties who had partici-

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<sup>45</sup> It should be noted however that the OEA mission has been collecting information about these groups (OEA/Ser.G. 2007).

<sup>46</sup> Kalmanovitz in Section 1.2.2. of the introduction to this volume mention that there are some gaps in the ruling. But it is clear that if a significant omission in a confession is found *ex post*, all benefits are lost.

<sup>47</sup> In the original version of the law, a discovery that disclosure was less than full would result in a revaluation of the particular case, but not in necessarily in a loss of benefits.

pated in human rights violations (both on the paramilitary and on the government side) would be engaging in mutual defections.<sup>48</sup>

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<sup>48</sup> This interpretation, however, is not consistent with the fact that the government has allowed demobilized paramilitaries to communicate and coordinate in jail; for instance, they are allowed to use cell phones in jail. Para-commanders may communicate and coordinate, and may have external allies, but they have a very hard time trusting each other. It is mafia dynamics. One should note that the AUC is an umbrella organization, not very tightly put together, and disputes among chiefs have not been rare. A key source of instability is secret negotiations with the DEA: there is a constant underlying risk of defection and direct plea bargaining with the US authorities; each commander knows too much about everybody else.



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## **The Peace Process with the Paramilitaries in Colombia: Sustainability, Proportionality and the Allocation of Guilt**

**Francisco Gutiérrez\***

### **6.1. Introduction: Give War a Chance?**

This chapter discusses a frequently disregarded aspect of negotiated settlements: the crisis of the proportionality of justice, and the need of establishing a “correct” public allocation and distribution of guilt. I will claim that allocating and distributing guilt “correctly” may be a necessary condition for achieving long term, sustainable, peace.

By long term peace I mean the presence of a set of conditions that facilitate the arrival to a strategically stable equilibrium, in which no relevant existing actor has either the reasons or the means to quit the accord, and the barriers to the entry of new armed challengers are very high. By negotiated settlement I understand any solution of a macro-social dispute through means different than the military victory of one of the parts. At a certain level of generality, all of these agreements (ends of civil wars, regime transitions, etc.) face similar problems, and I believe that the distribution and allocation of guilt is one of them.

The problem can be formulated in more operational terms. “How to achieve peace” and “how to make it sustainable” are two distinct questions, and for the practical politician they generally appear in se-

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quential form. So their main concern is striking a deal, not building the conditions that make it defensible in the long run. In particular, the public explanation of the advantages of peace and the allocation and distribution of guilt cannot be neglected. Such allocation is critical for sustainability, precisely because of the typical characteristics of peace pacts (which almost always entail the mutual pardon of the bulk of the crimes committed in the course of the conflict, and more generally a crisis of the principle of proportionality of justice).

Rarely do politicians ask themselves if an agreement will last; it is already sufficiently difficult to arrive to one. Since the prize is so big, and the task so hard, peacemakers are essentially presentists. They are prepared to incur in heavy future costs tomorrow to achieve tangible positive results today. There are several analytical and strategic motives for behaving in such a way. The most malicious departure point would be that there is hardly a reasonable manner of holding pro-peace politicians that were successful at time 1 responsible for disgraces that appear in time 2; the line of causality is too blurred, as generally there are too many intermediate events. In the other direction, the blooming literature about “spoilers” singles out political leaders that fail to put their bets on peace, magnifying risks, difficulties, and future costs.<sup>1</sup> That there is no shortage of spoilers, and that they behave precisely in that fashion, is beyond dispute. What the reflection about spoilers frequently lacks is the awareness of the fact that, regarding peace, feasibility and sustainability can be in dynamical tension.

Actually, I would claim that the Colombian history is a good case study to try to understand such tension. According to Aguilera, we have had more than 50 peace agreements in our republican history, very few of which have been sustainable.<sup>2</sup> A revision of the accords that have been arrived at throughout our baroque pacifist trajectory suggests that it is not rare to find situations in which precisely the as-

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<sup>1</sup> *Challenges to Peacebuilding: Managing Spoilers During Conflict Resolution*, edited by Edward Newman and Oliver Richmond, United Nations University Press, New York, 2006. Stephen John Stedman, “Spoiler Problems in Peace Processes”, *International Security*, Vol. 22, No. 2 (Autumn, 1997).

<sup>2</sup> Aguilera, Mario, “Amnistías e indultos, siglos XIX y XX”, *Credencial Historia*, Mayo de 2001.



pects that made an agreement feasible caused it to be hardly sustainable. If this appears in a particularly strong form in Colombia, it is not an oddity: according to quantitative evidence, for countries that have suffered a civil war the probability of a relapse is high.<sup>3</sup> My hunch is that one of the reasons for which this is the case is that frequently the negotiated arrangement did not solve well past problems, or created new ones, so significant that they gave origin to a new wave of violence.

Put otherwise, contrary to standard interpretations, there is sufficient evidence to claim that the problem of Colombia is not the intolerance or belligerence of its political elites, but their perception of time.<sup>4</sup> They disregard completely the issue of sustainability, focusing on feasibility. Sometimes this happens because they have no margin of manoeuvre.<sup>5</sup> Sometimes, it is related to strategic behaviour. Indeed, arriving at negotiated peace and/or shared government is a form of self-binding – but not always a genuine concession. There are three types of self-binder. “Constitutional agents”;<sup>6</sup> “pseudo-constitutional-agents” (who claim to restrict themselves but in fact are restricting others, as in Elster’s self-criticism);<sup>7</sup> and “cunning self-binders” (who in effect limit themselves, but do so only to exclude from their feasible set actions that they do not want to perform). The last category is particularly important because in politics modal logic behaves in an odd manner: wanting and being able to are linked (in a non linear fashion). In situations in which a suboptimal arrangement is arrived at, a cunning self-

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<sup>3</sup> Sambanis, Nicholas, Doyle Michael, “Building Peace: Challenges and strategies after Civil War”, The World Bank Group, 1999.

<sup>4</sup> Be it because of high discount rates or hyperbolic discount.

<sup>5</sup> I believe this is the case of the National Front, which I have analyzed in “Organized crime and the political system in Colombia (1978-1998)”, in Welna Christopher and Gustavo Gallón (eds.), *Peace, Democracy, and Human Rights in Colombia*, Notre Dame University Press, 2007, pp. 267-308; *¿Lo que el viento se llevó? Democracia y partidos en Colombia* (Editorial Norma, Bogotá, 2007).

<sup>6</sup> Jon Elster, *Ulysses unbound: studies in rationality, precommitment, and constraints*, Cambridge University Press, 2000.

<sup>7</sup> Elster, *Ulysses Unbound*.

binder can claim that there was no better solution within the feasible set.

A good part of the tension between feasibility and sustainability resides in the fact that there is no costless peace. Among the many costs associated with peace the following deserve to be highlighted:

- *Wrong calculation of limiting conditions.* Thanks to a favourable environment (for example, international support), or simply attrition, political agents and social groups can have a genuine will to peace, and calculate at some moment that their bargaining minimum is, say,  $X$ . However, when  $X$  is implemented, they discover that the only way to survive (defend vital interests, maintain cohesion as a relatively unitary actor, etc.) is to achieve  $X+$ . In other words, after striking the deal they find themselves bellow the “threshold of intolerability”.<sup>8</sup> This is neither rare nor attributable only to lack of technical expertise, although such factor can loom large over the heads of the negotiators – some examples of which will be presented bellow. Increasingly, peace accords involve very intricate arrangements and trade offs, and typically their real meaning is not captured by the leadership of all the parties, let alone combatants and constituencies, when they are formulated in an abstract or specialized, for example legal, language. When implemented, though, their meaning becomes painfully visible. In other terms, agreements over nice sounding general principles can be easier than the hard discussions about the small print. As Heine famously said, “the Devil is in the details”.
- *Impunity.* There are several types of impunity involved in peace making. Indeed, this is a generalized phenomenon, both in time and in space.<sup>9</sup> There are several types of impunity. First, there is individual impunity; thousands of hideous criminals and of people who incurred in morally repulsive behaviour go unscathed. Second, there is political impunity; organizations whose tag is associated in certain regions, or even countrywide, with horrid

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<sup>8</sup> David Apter, “Political violence in analytical perspective”, in Apter D. (editor), *The legitimization of violence*, New York University Press, 1997, p. 25.

<sup>9</sup> Elster, *Ulysses Unbound*.

crimes can continue to act. Third, social impunity; groups that enjoyed privileges, abused other groups or hosted wrong behaviours continue to maintain a privileged position. For example, in Colombia cattle ranchers heavily funded paramilitaries and collaborated with them.<sup>10</sup>

- *Limited reparation.* Given the nature and dimension of the social wrongs caused in a macro-dispute, there is a deep asymmetry between them and reparation. Peacemakers and negotiators need to go beyond retributive justice, but their constituencies will not necessarily want or be able to do so. There are also strategic bounds. Almost by definition, when a negotiated solution is arrived at, all the parties involved have the sufficient clout to demand for them and their members access to certain goods, from which numerous victims might be excluded. For example, the press has claimed in Colombia that the reinserted members of the paramilitary receive an allowance that is several times higher than the stipend transferred to internally displaced people.<sup>11</sup> Furthermore, societies can have objective limits (fiscal, but also symbolic and human) to repair.
- *Modalities of consociationalism.* War and corruption feedback into each other through several easily identifiable mechanisms. The link between both is historically established, highlighted by classical thinkers,<sup>12</sup> and recently retrieved, with mixed results, by the literature about the political economy of civil wars.<sup>13</sup> The fact that negotiated agreements can also produce strongly suboptimal governance arrangements is much less stressed, but is crucial to adequately capture the tension between feasibility and sustain-

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<sup>10</sup> Carlos Medina Gallego, “Autodefensas, paramilitares y narcotráfico. Origen, desarrollo y consolidación. El caso de Puerto Boyacá”, Documentos Periodísticos, Bogotá, 1990. Mauricio Romero, *Paramilitares y autodefensas, 1982-2003* Iepri-Planeta, Bogotá, 2003.

<sup>11</sup> Rafael Pardo, “Desde el jardín. ¿Más plata para los reinsertados?”, *Revista Semana*, 28 July 2006.

<sup>12</sup> Machiavelli, *The Prince*.

<sup>13</sup> See for example Paul Collier, “Rebellion as a Quasi-Criminal Activity”, *Journal of Conflict Resolution* 44, no. 6 (2000).

ability. Peace does – sometimes very powerfully – create pro-corruption niches and processes. First, criminals, warlords and politicians can enter into regional alliances that imply mutual protection, which thus burdens with prohibitive costs the act of denouncing corruption. Protected with such a powerful shield, political barons create domains that are highly inaccessible to the law and to democratic accountability, especially if they can count with the complicity, or at least the passivity, of officials at the national level. Second, these alliances create rents.<sup>14</sup>

- *Credibility.* Peace-making gestures do not always have the desired effect. Signalling in the midst of a conflict is indeed a complicated system. As frequently happens, Schelling has flagged the problem with utmost clarity: “If one reaches the point where concession is advisable, he has to recognize two effects: it puts him closer to his opponent’s position, and it affects his opponent’s estimate of his firmness. Concession not only may be construed as capitulation, it may mark a prior commitment as a fraud, and make the adversary sceptical of any new pretence of commitment. One, therefore, needs an “excuse” for accommodating his opponent, preferably a rationalized interpretation of the original commitment, one that is persuasive to the adversary himself”.<sup>15</sup> Actually, this syndrome and other related ones appear once and again in the Colombian context. According to many analysts, as soon as the FARC starts a peace process it engages in a big scale offensive, to be able to speak from a position of force (for example, in February 2007, president Pastrana pronounced a speech announcing close of peace talks, because although an agreement had been signed, the FARC perpetrated 117

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<sup>14</sup> For analyses in this vein, see Jack Snyder, *From voting to violence. Democratization and nationalist conflict*, W.W. Norton and Company, 2000; Francisco Gutierrez and Mauricio Barón, “Re-stating the State: paramilitary territorial control and political order in Colombia”, Crisis States Programme, DESTIN-London School of Economics, Working Paper no. 66, 2005. Available at [www.crisisstates.com/publications/wp/WP1/wp66.htm](http://www.crisisstates.com/publications/wp/WP1/wp66.htm).

<sup>15</sup> Thomas Schelling, *The strategy of conflict* (Harvard University Press, 2003), p. 34.

terrorist attacks in one single month).<sup>16</sup> The offensive, in turn, weakens critically the political support to the process.<sup>17</sup>

- *The Arendt dilemma.* Hannah Arendt once stated that the two main characteristics of a good society were the capacity of enforcing contracts and the ability of forgiving.<sup>18</sup> She did not say, though, that both “core characteristics” could be in dynamical tension. A negotiated settlement of a macro-dispute is, indeed, a form of public pedagogy in the art of forgiving. But it is also a public lesson in the advantages of criminal behaviour. It ostensibly shows that thousands, perhaps hundreds of thousands, can indulge in delinquent and morally repulsive behaviours and get away with it. Not only a general demoralization, but also a weakening of the principle of proportionality associated to the basic sense and practice of justice can ensue.
- *Indivisibility.* It may be the case that the dispute that caused the conflict – or that arose in the midst of it – is indivisible. Typically, conflicts around identity tend to have this character.<sup>19</sup> When one of the parties aspires to *all* the pie – for example, the totality of political power – the result is identical. According to the greed theorists, political claimants may use their discourse to mask the aspiration of extracting rents from exportable agricultural production, but when this production is illegal, and no joint extraction arrangement is possible, greedy fighters behave as if they were identity- or ideology-driven.<sup>20</sup> During the 1980s, the hopes of initiating negotiations between the Colombian govern-

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<sup>16</sup> Andrés Pastrana, “Discurso mediante el cual se anuncia la ruptura de los diálogos de paz”, 20 February 2002. Available at: [http://www.Solidaritat.ub.edu/observatori/esp/colombia/marco.htm?pagina=./documentos/proceso.htm&marco=frame\\_1.htm#pastrana](http://www.Solidaritat.ub.edu/observatori/esp/colombia/marco.htm?pagina=./documentos/proceso.htm&marco=frame_1.htm#pastrana).

<sup>17</sup> Of course, in this example it is feasibility, and not necessarily sustainability, which is affected.

<sup>18</sup> Hannah Arendt, *The Human Condition*.

<sup>19</sup> Frances Stewart, “Crisis Prevention: Tackling Horizontal Inequalities”, *Oxford Development Studies*, 28:3 (2000).

<sup>20</sup> Because extraction becomes an indivisible good; see Snyder, *From voting to violence*.

ment and the ELN – a Castroist guerrilla that settled for nothing less than full-fledged socialism – were near to null. The paramilitaries arrived at an agreement with the government, but have maintained their rackets and *narco* export outfits, a situation that has pushed the country into a situation of semi-permanent scandal.

The existence of indivisible goods flags another source of strain for peace processes. Suppose that both parties are able to agree over common goals, and arrive at an enforceable agreement. It may happen that the aims that the former adversaries share cannot be achieved simultaneously. I believe that something of this sort took place during the National Front (1958-1974) in Colombia. The NF was many things, among them a peace process, and its architects set three categories of objectives: pacification, democratization and social reform. However, the institutional designs crafted to arrive to pacification – which necessarily involved offering strong guarantees to relevant political minorities – obstructed and/or distorted the program of social reform, as it allowed relatively small coalitions to block any significant advance.<sup>21</sup> Mutually contradictory desirable objectives are especially important to analyze in the context of peace-making in countries that suffer from very high levels of inequality. Is so called “structural change” a precondition for sustainable peace?<sup>22</sup> This has been a point of view staunchly held by various actors – among them the FARC and other guerrilla groups – in Colombia. But then the question is how to force the Colombian socio-economic elites, which have not been defeated militarily, into an agreement. If an attainable subset of reforms is not specified, or if nothing short of a full takeover by the guerrilla is

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<sup>21</sup> Gutiérrez, *¿Lo que el Viento se llevó?* Naturally, majorities also could have behaved according to the principle of “cunning impotency”, claiming that they were hampered by institutionally protected minorities whose activity was producing precisely the outcome that they (the majorities) desired.

<sup>22</sup> According to some definitions, extreme inequality in itself involves violence. I will disregard this and concentrate on the more conventional understanding (“rough or injurious physical force, action, or treatment”, or some similar variant).

satisfactory, then such a question simply has no answer.<sup>23</sup> Here it appears in very clear form that burdening peace agreements with excessively high demands sacrifices feasibility (and can also be a strategic gambit of actors that do not aspire to peace but do not want to pay the price of admitting it openly).

At the same time, the notion that consensus has a material base – according to Przeworski’s expression – and that this is a necessary condition for sustainable peace should not be taken lightly. Practically all the protagonists of the National Front – who have been wrongly accused of adamantly ignoring social reform – were acutely aware of the need to deflate the enormous levels of inequality that the country exhibited already then, and claimed that without doing so neither peace nor democracy would be sustainable or genuine.<sup>24</sup> In political terms, then, the problem is how to push forward reforms in a context in which each of the relevant parties in the conflict has a *de facto* veto power.

*Pace* the header of this section, that sustainability and feasibility are in dynamical tension is of course not sufficient reason for giving war a chance. However, it does underscore the fact that peace is a costly, complex, risky operation of social change, and that generally states arrive to settlements not when they can, but when they must. Whenever the state gives up the imposition of the monopoly of legitimate violence, it is signalling that it is too weak to do so, either materially or politically. In the Colombian case, the datum that there has not been practically a single year in the last decades without an ongoing peace process is a symptom of chronic weakness, which is taken by all of the protagonists of the conflict as a fact of life, to which they adjust their beliefs and mutual expectations.

The tension between feasibility and sustainability appears quite clearly in the Colombian paramilitary reinsertion (PR) process started in 2002-2003. Among the many puzzles that it offers to the analyst, one of the most intriguing is the following. Regarding the (inevitable)

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<sup>23</sup> In the course of many peace processes, the FARC has procrastinated when urged to tell which reforms would be enough to decide them to come back to civil life.

<sup>24</sup> See for example Carlos Lleras, *Crónica de mi propia vida*, Vol. VII, Stamatato editors, Bogotá, 1983.

trade-off between justice and peace, the PR seems to be way above international standards. The leaders of the groups have been taken to justice, are in the process of confessing, and the majority of them will go to jail for a certain (short) period; others have been (and will be) extradited. Actually, even part of the second level leadership has also been taken to justice. In the majority of other negotiations, this simply does not happen.<sup>25</sup> On the other hand, both nationally and internationally the PR has been a source of unending political conflict and malaise, and has chronically lacked legitimacy. Is this a typical case of spoilers taking the upper hand, or is there something else?

My basic answer is the following. Every peace process creates two intimately related problems, crisis of proportionality and allocation of guilt. By establishing relatively high standards (in comparison to other processes elsewhere, but also longitudinally) in the trade-off between peace and impunity, the government thought it was assuring the PR. In particular, it tried to make it unassailable through a symmetry argument: the paramilitary is not worse than the guerrillas. Contrary to past processes, we are not conceding here anything near the full impunity (plus access to political participation) that the guerrillas enjoyed in past processes. The argument makes a point that cannot be avoided, but at the same time (independently of the correction of its premises) it misses several specificities of the PR. Among those specificities, the main one is the very strong link between the paramilitary and intra-systemic forces (several orders of magnitudes higher than whatever kind of networking the guerrilla has been able to build), and consequently the lack of clarity about the type of rapport between the actors that are negotiating. Are the state and the paramilitary friends or foes?<sup>26</sup> Depending on the answer, we are living in two completely different universes. In other terms, the symmetry theory loses the crucial relational aspect of the discussion.

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<sup>25</sup> Elster, *Ulysses Unbound*. Actually, even when the offender has been defeated politically and militarily, trying him might be tortuous. The best example is Argentina.

<sup>26</sup> My own answer is something in between.



Peace is a marvellous opportunity for any conflict-ridden society. At the same time, it entails the public recognition – and official endorsement – of a crisis of justice, expressed in the lack of proportionality, the acceptance of many force relations as the building blocks of the new polity, etc. The trade off is worthwhile, as long as the state:

- Recognizes some political mandate in the irregular group that the state itself has not been able to express;<sup>27</sup> and/or:
- Recognizes its military weakness to deal with it.

In one or the other case, not all major offenders can be taken to the tribunals.<sup>28</sup> This public celebration and entrenchment of powerful offenders is morally repulsive, and offers a clearly dangerous message to society (“if you are violent and or criminal and have enough clout you can get away with it”). Peace, as a higher good, frequently overrides the concern over these issues, but it is destabilized by them. Spoilers, groups that are driven by vengeance, and potential new armed challengers, all of them are bolstered by such message. To guarantee sustainability, this inevitable side-effect of peace agreements has to be dealt with effectively. Thus, it is indispensable to develop credible pacifist discourses, in particular discourses about justice and peace. My simple claim in this chapter is that in the PR this has not happened, and that the price to be paid by the whole of society will be dear.

The discussion below is ordered in the following manner. In section 6.2 I present a (necessarily unelaborated) sketch of antecedents: the Colombian peace experience, and in particular the PR, with its advantages and shortcomings. In section 6.3, I discuss pacifist discourses in the Colombian context. Section 6.4 evaluates the limits and shortcomings of the governmental discourse. The conclusions synthesize

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<sup>27</sup> Of which there is a rich tradition in the country, associated to the legal figure of political criminal. Iván Orozco, *Combatientes, guerreros y terroristas. Guerra y derecho en Colombia*, Editorial Temis, Bogotá, 1992.

<sup>28</sup> Increasingly, international variables play a key role here, but in this paper I will not take them into account. Colombia is signatory of the Rome Statute, but with a seven year suspension clause for war crimes. According to such proviso, for Colombia the Treaty only starts to operate in 2009 as regards war crimes.

and explain why the PR – despite its relatively high standards in some regards – has been so weak politically.

A comment about the exposition style is due. I do not aspire here to be systematic. I present some basic ideas in a very informal manner, and illustrate them with the PR, using the ideas to evaluate the PR, and the PR to specify some points that appear to be interesting. In a sense, this chapter is a protracted vicious circle. Necessarily, I resort to other Colombian experiences, especially the National Front, which is an extremely rich – and as yet unexplored – source of reflections about the wherewithal and limitations of peace discourses and arrangements.<sup>29</sup> From time to time, I also exemplify a point with events taken from other cases. I frequently recur to simple, schematic accounts, of complex matters, to be able to stick to the basic ideas. As always, a price is paid for this.

## 6.2. Antecedents

Using the terminology introduced above, at the end of the 1990s Colombia's problems regarding peace could be put in the following manner:

- a. In Colombia, starting peace processes is not particularly difficult. Several guerrillas returned to civil life: the M-19, the EPL, an important sector of the ELN (the *Corriente de Renovación Socialista*), and at least two cohorts of paramilitary groups (a first cut just before the constitutional assembly of 1991, and the much bigger PR that started in 2002). Other results of peace negotiations are the reinsertion of other minor groups and the creation of a political branch of the FARC. There has not been a single year in the last three decades without ongoing negotiations.<sup>30</sup> Very

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<sup>29</sup> A consociational arrangement stemming from an accord between the country's main political parties, which functioned between 1958 and 1974.

<sup>30</sup> The FARC's behaviour might be a function of its military skills. There is some indirect evidence that this is the case. For example, the process in which they went farther – accepting to stop kidnappings and creating a political party, which was eventually eliminated – could have coincided with their worst military moment, at least in terms of casualty ratios.

small groups, both guerrillas and paramilitaries, have been able to negotiate their return to civilian life, even in the face of ostensible military, financial, and social weakness.

- b. These negotiations have not always ended well. Some outcomes actually were disastrous, and have acted throughout the period as negative precedents. The political branch of the FARC, the *Unión Patriótica*, was massacred. The EPL – under its new guise, *Esperanza, Paz y Libertad* – suffered the same fate, this time at the hands of the FARC. The two governments that engaged in more ambitious negotiations – Belisario Betancur (1982-1986) and Andrés Pastrana (1998-2002) – ended in disarray, completely discredited and hounded by accusations of having given out the country to the guerrillas. Nonetheless, rational politicians keep on betting in favour of peace. One reason may be circular preferences: citizens desire peace, so vote gatherers follow them, but the costs of pushing forward the process are so high that in the middle of the path all of them (first the citizens, then the politicians) change heart. Another, simpler, reason is that occasionally negotiations have ended quite well.<sup>31</sup> Two main groups were able to extricate themselves from the dynamics of targeting and marginalization: the M-19 and the *Corriente de Renovación Socialista*. The former participated successfully in politics after its reinsertion, and after disintegrating because of internal squabbles, lent the new civilian left some of its best leaders. The latter led a more modest life, but many of its cadres have played a meaningful role in public life. The M-19 and the *Corriente* indeed suffered grievous losses in their process of reinsertion – in the first case the assassination of its caudillo, and presidential candidate, Carlos Pizarro – but held fast to its pacifist intentions.
- c. This story of (limited and blood stained, but genuine) feasibility has one exception: the FARC. Despite creating a political expression, the FARC never really relinquished armed struggle and has used diverse negotiation scenarios to push forward its main

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<sup>31</sup> I believe that both explanations hold.

strategic concerns, not to arrive to a definite settlement of the conflict.<sup>32</sup> Even today it argues in favour of linking peace to structural (socio-economic) reform, which explains why, despite all the confidence building measures made in the Pastrana years, negotiations did not advance a single step. Additionally, there is the negative precedent of the *Unión Patriótica* (UP). The UP was created as a political branch of the FARC but with the recrudescence of the conflict it was targeted as the civilian wing of the guerrilla. In the last years, the FARC – which, as many other pro-Soviet groups in the world, abided by electoral participation and open politics – decided to launch new, clandestine, political expressions. Such encroachment further complicates new pacifist endeavours with the FARC.

- d. Naturally, the permanence of the FARC is a problem not only for feasibility, but also for sustainability, for many reasons. First, as elsewhere, there is a strong association between ongoing civil conflict and massacres, politicides, and violence against civilians in general.<sup>33</sup> In an environment characterized by violence and instability, groups coming from the armed left can be the object of hatred by state agents, victims, vigilantes, and paramilitaries. Second, there is a historical, and logical, sequence: the paramilitaries appeared as an armed response of narcos, agrarian elites, and criminalized state agents against the guerrilla and some of their most shocking offences, particularly kidnapping.<sup>34</sup> If the FARC remains in business, new entrants – in the form of post-PR paramilitaries – will find civilians and officers ready to support them. Third, more obliquely, the permanence of the FARC

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<sup>32</sup> See for example Jacobo Arenas, *Cese el fuego: Una historia política de las FARC*, Editorial Oveja Negra, Bogotá, 1985. This duality brutally increased the vulnerability of the *Unión Patriótica* members.

<sup>33</sup> Mathew Krain, “State sponsored mass murder. The onset of genocides and politicides”, *Journal of Conflict Resolution* vol. 41 no. 3 (1997).

<sup>34</sup> Certainly, already in the 1960s big landowners routinely had their hit men to deal with social conflicts and protests (see for example Cristina Escobar, “Clientelismo y ciudadanía. Los límites de las reformas democráticas en el departamento de Sucre” *Revista Análisis Político*, No. 47, Septiembre/Noviembre 2002). But there is a qualitative difference between this phenomenon and paramilitarism.

is a symptom that some of the basic causes – be them political or “only” available rents – of the conflict remain.

- e. The involved parties interpret differently the text and spirit of the agreements. Sometimes, this is a result of technical difficulties. During the reinsertion of the urban militias in Medellín (1994), the rebel leaders were not clear on what they could demand, or even on what they did really want.<sup>35</sup> Government officials had to help them elicit preferences. In other cases, both parties reach the accord because they expect that parts of it will not be enforced. Highly criminalized actors accept to be processed and jailed, and surrender themselves to justice, but experience has shown – in past processes and in the present one as well – that they continue their criminal activities.<sup>36</sup> They simply expect that the state will tolerate this (on which they are partially right).
- f. More substantially, the governments invest all their political capital in achieving peace, and after that they do not have the pull – sometimes they also lack the will – to limit the anti-peace activities of their own partisans in the regions. If the paramilitary groups appeared as a result of a regional rebellion against the pacifist center, Colombia has suffered more generally from a lack of grip of the center over bellicose regional elites.<sup>37</sup> Peace is proclaimed above but not necessarily upheld by sub-national actors, and the center lacks the resources – or will – to guarantee a long-term control of the pacifist course of action.
- g. Peace accords have not precluded the operation of other illegal groups. The reasons for this are easy to understand. First, several parties participate in the Colombian war. It is true that from the 1990s there was a certain centralization of the conflict, with the

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<sup>35</sup> Romero, *Paramilitares y Autodefensas*.

<sup>36</sup> Fabio Sánchez, Ana María Díaz, Michel Fornisano, “Conflicto, violencia y actividad criminal en Colombia: un análisis espacial”, 2003. Available at: <http://ideas.repec.org/p/col/000118/002185.html>.

<sup>37</sup> Mauricio Romero, “La Desmovilización de los Paramilitares y Autodefensas: Riesgosa, Controvertida y Necesaria. Síntesis 2004”, in *Anuario Social, Político y Económico*, Universidad Nacional, IEPRI-FESCOL, Bogotá, 2005.

reincorporation and/or extinction of several insurgencies and the creation of the AUC. But the AUC broke down, and the vanishing of some guerrillas simply meant that they were replaced by the FARC or by the AUC in the majority of regions. In 2002, the paramilitary federation broke down, in the thick of an orgy of internal feuds. Second, the paramilitaries lack a clear chain of command. In particular, when the chiefs are jailed the second level generally supplants it, robbing its territorial control and economic networks. Peace has operated in Colombia step by step, with the state reaching agreements with each group, while other opportunistically try to make profit from the vacuum left in each reinsertion.

In this context, the PR shows some continuities and discontinuities with past agreements. There are both similarities and differences between the paramilitary and the insurgencies. The paramilitary started their activity by the early 1980s, though, inevitably, they had some antecessors. The first groups were basically anti-subversive coalitions of rural elites, narcotraffickers, and members of the armed forces.<sup>38</sup> Along with the scale of their violent activity, their interrelation and connections with state agents grew increasingly dense. Despite the fact that several government officials highlighted the existence of the problem, the groups remained practically untouched – and many a times openly supported – by the security apparatus of the state until the mid-1990s. The following were their main characteristics, relevant to this chapter:

- *Massacres.* Of all the actors of the Colombian conflict, the only one that picked up massacres as its central war strategy was the paramilitary. Indisputably, the guerrilla also massacres routinely. Actually, during a certain period the FARC increased systematically its participation in this type of offence (see Table 2). However, only the paramilitary adopted it strategically. There are not generally accepted figures, but even according to the army – the source according to which the paramilitary's share in authorship

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<sup>38</sup> Romero, *Paramilitares y Autodefensas*; Gutiérrez and Barón, “Re-stating the State”.

of massacres is lower – they are the main culprit. It must be said that the strategy seemed to work. Occasionally, the paramilitary obtained spectacular political results with a massacre spree, both regionally and nationally. At least once, a massacre offensive was specifically conceived as a way to force the government into negotiations with the paramilitary (29 April 2001).

Year	Number of massacres	Number of victims
1993	37	172
1994	63	310
1995	135	720
1996	141	731
1997	110	554
1998	144	769
1999	163	939
2000	198	1203
2001	152	519
2002	152	903

**Table 2:** Massacres by the FARC (Source: *Departamento Nacional de Planeación, Colombia*).

- *Gory manipulation of bodies – dead or alive.* During Colombia’s past wave of civilian conflict, all groups indulged in manipulations of the body of the victim. Homicide was linked with the ritualization of pain and destruction.<sup>39</sup> The entry of the guerrillas implied a change in the “murderous signature” of illegal groups,

<sup>39</sup> See for example María Victoria Uribe, *Matar, rematar y contramatar: las masacres de la violencia en el Tolima (1948-1964)*, P. Imprenta, CINEP, 1990. Germán Guzmán, Eduardo Umaña, Orlando Fals Borda, *La violencia en Colombia: Historia de un proceso social*, Iqueima, Bogotá, 1962.

because their behaviour was guided by a much more instrumental and technical ideology-mentality. The paramilitary brought back a type of violence that seemed to belong to the past<sup>40</sup> — with all the horrid consequences (for example claims, which have not been refuted, that some of the victims were dismembered alive).

- *Selective incentives.* One of the main differences between the guerrillas and the paramilitary is that the latter offers (sometimes substantial) selective economic incentives both to their commanders and to their rank and file. Contrary to standard *homo economicus* assumptions, this weakened the paramilitary organizations and triggered all sort of centrifugal tendencies.<sup>41</sup> It also produced a rapid advancement within the organization of *narcos* that trafficked for their own benefit.
- *Interaction with the state.* Until 1995, there was no record of a paramilitary killed in combat or jailed – not a single one. Intelligence reports by the government in the late 1980s found evidences of widespread support – active, or at least benevolent neutrality – within both agrarian elites and the security agencies in some regions.<sup>42</sup> Ongoing journalistic publications corroborated this, suggesting that the connections of the state and the paramilitary had flourished in the last decades.<sup>43</sup> However, with growing international pressure, the Colombian armed forces

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<sup>40</sup> This appears to have an explanation. Since the focus of the paramilitary strategy is to “remove the water from the fish”, i.e., intimidating and dispersing populations that are considered accomplices of the guerrilla, it is extremely important to establish a reputation of brutality and limitless violence. Field work and other evidence shows that, after the punitive expeditions are over, though violence remains high, the most extreme and bizarre practices diminish, and mass violence is replaced by selective attacks.

<sup>41</sup> Francisco Gutiérrez, “Criminal rebels? A discussion of war and criminality from the Colombian experience”, *Politics and Society*, vol. 32 no. 2 (2004).

<sup>42</sup> See for example Gutiérrez and Barón, “Re-stating the State” in Gonzalo Sánchez and Ricardo Peñaranda (editors), *Pasado y presente de la violencia en Colombia*, La Carreta Editors, Medellín, 2007.

<sup>43</sup> Gutiérrez and Barón, “Re-stating the State”.



started to harass some of the paramilitary groups, sometimes in quite murky circumstances. Still, by the end of the Pastrana administration (1998-2002), the paramilitaries were able to twist the arm of the state, blocking the intent of the president to launch a demilitarized zone with the ELN.<sup>44</sup> By then, as posterior evidence has shown, the penetration of the political system and of the administrative apparatus by the paramilitaries and the narco-paramilitaries was widespread.<sup>45</sup>

- *Semi-pacific fiefdoms.* Thanks to the dense networks that link it with the state, the regional economic elites, and the political system, the Colombian paramilitary has been able to build municipal and regional fiefdoms over which they maintain a tight control. If at first the typical action of the paramilitary was the punitive expedition, with its corresponding orgy of murder, after evicting the guerrilla and establishing a firm control, they created diverse forms of governance in which violence was only one tool among many.

The paramilitaries, which had started and spread throughout the country as regional undertakings inspired in a basic blueprint offered by a few canonical experiences, was integrated in 1997, after several efforts, into a federation, the *Autodefensas Unidas de Colombia* (AUC). The AUC – under the leadership of the Castaño brothers – was supposed to be an anti-subversive army, a unitary actor with an ideology, a clear line of command and a keen sense of discipline – the basic notion being that, in order to defeat the FARC, its best practices should be imitated.<sup>46</sup> However, the AUC only survived five years, and disintegrated in 2002, under the weight of the centrifugal dynamics triggered by the combination of the access to drug rents and an organizational design that offered economic selective incentives to commanders and fighters. Despite the efforts of centralization, led by Carlos

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<sup>44</sup> Omar Gutiérrez, “La oposición regional a las negociaciones con el ELN”, *Revista Análisis Político* 52 (2004).

<sup>45</sup> Colombia has a Congress of 262 members. In the recent scandal, already near 40 of these (and counting) are being processed for deals with the paramilitaries.

<sup>46</sup> Gutiérrez and Barón, “Re-stating the State”.

Castaño – efforts that generated several bloody internecine hassles<sup>47</sup> – each regional commander increasingly won a wider autonomy, not to speak about the resistance of small pockets of the provincial agrarian rich that, with their armed groups, opposed the presence of “aliens” in their own territory. The centrifugal drive was reinforced by the massive entry of narco-traffickers in the leadership of the federation.

Indeed, paramilitarism has always been intimately associated with the drug economy,<sup>48</sup> but between the late 1990s and the beginning of the new century the proverbial qualitative change took place: the *narcos* became not a partner but the dominant actor of the paramilitary undertaking. It has been claimed, without a definite proof, that a couple of fronts were sold to *narcos* for millions of dollars. In some regions – notably the department of Antioquia, but there are a handful of other examples – paramilitarism split around a basic issue: the attitude towards drug trafficking. For one group (the Bloque Metro), *narco* rents were a defensible source of funding, but they should be considered only a means to an end, which is to fund the anti-subversive war. For another group (the Bloque Cacique Nutibara) no restrictions concerning the capture of narco rents were tolerable. The dispute degenerated in open armed conflict, in the course of which the Bloque Metro, together with its commander, was wiped away. Similarly, other pro-army structure factions were thwacked in a very short period. Between 2000 and 2002, there was a de facto military victory of the faction with the strongest *narco* leanings over the rest of the paramilitary groups, a fact that later was to be simultaneously officialised and symbolized by the assassination of Carlos Castaño by his brother Vicente.<sup>49</sup> It was this

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<sup>47</sup> It is difficult to quantify, but it is not absurd to think that more people have been killed in the paramilitary internecine conflicts than in the combats between the paramilitary and the guerrillas.

<sup>48</sup> As is shown in detail in Gutiérrez and Barón, “Re-stating the State”.

<sup>49</sup> It must be stressed that there is no evidence whatsoever that would allow one to claim that the less *narco* wing was less murderous than the victors. What the two tendencies were disputing was the social insertion of the group, its relation to the state (and the United States), and its future in a possible reinsertion process, a possibility that was already seriously on the table in the second half of the 1990s. Carlos Castaño himself was planning a reincorporation in great style, in which he would play a leading political role, for which he needed at least the tolerance of

already highly narcotized paramilitarism which, during the Pastrana government, was able to build a broad social base, twist the arm of the state to block the peace process with the ELN, and destabilize the negotiations with the FARC.

In 2002, Álvaro Uribe won the presidential elections by a landslide. As governor of the “hot” Antioquia department between 1994 and 1997, he was regularly accused of taking decisions that favoured the paramilitary (including the legalization of security cooperatives that hosted them). In 2002, Uribe launched negotiations with the Bloque Cacique Nutibara of Antioquia, which in practice worked as a pilot for the national process. Participation in it, according to the government, was possible only if the paramilitary surrendered to justice and stopped their criminal activity. Redistribution of assets has appeared occasionally as an additional key condition. Certainly, this is considered in the judicial dealings of the PR, but it also has a political dimension.

PR has lasted from 2002-3 until today. The process with the paramilitaries was received in the country as a mixed blessing. Though it still has to be definitely proved, and there are many contentious technical points pending, it has been asserted that the pact deflated the rates of both lethal and non-lethal violence. In effect, some available time series suggest that both rates have fallen systematically in the previous years, a reasonable enough outcome when taking into account that the paramilitary were the group that committed most massacres, etc.<sup>50</sup> The political reading of this is also open to discussion.<sup>51</sup> Kidnapping rates

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the United States (Mauricio Aranguren, *Mi confesión: Carlos Castaño revela sus secretos*, Oveja Negra, Bogotá, 2001). That he held talks with officials of some US agencies about delicate issues is an established fact.

<sup>50</sup> On the other hand, since these are not representative, but only convenience samples, standard statistical inference should not be drawn (in regard to this, see Patrick Ball’s work). Advanced statistical techniques based on the systematic matching of different time series (more than two) can arrive to a completely different conclusion than exercises based on only one source.

<sup>51</sup> Homicidal rates can fall because the state has taken control, or because the illegal group has established its authority firmly in the given region. Lack of competition generally entails a less violent environment.

shrank substantially; in contrast to homicides, I think that in this regard there are no grounds for reasonable doubt. Thousands of combatants have deposed their arms, and a substantial portion of them is heading for a fresh start in life. Even more outstanding – at least from a comparative perspective – is that:

- a. PR has been submitted to constitutional and judicial control. For example, the original Justice and Peace Law, the milestone of the PR, was more lenient with the paramilitary than the final, definitive version, which was adjusted by the Constitutional Court. Critically, the conditions to obtain benefits – only if they tell the whole truth – were toughened.
- b. The paramilitary leadership is in jail, it is being tried, is confessing publicly, and after a short period of public discussions, the victims have been guaranteed a certain access to the confession audiences.
- c. Certain amount of asset redistribution is in process.<sup>52</sup> As of now, however, the public disclosure of goods by the paramilitary is not mandatory.
- d. The volume of confessions is so large that indeed society has been unable to assimilate them. These confessions have allowed investigators to find mass graves, and to return the bodies to the families of victims.

This is not a meagre result. Compared with peace processes both elsewhere and in the Colombian past, it is difficult to find other examples in which the leadership, the middle level, and an important part of the political support of the group that returns to legality are being processed and jailed. No impartial observer would claim that presently the paramilitary are better off than in, say, 1998. Indeed, the conditions – judicial and otherwise – of the leaders have gradually worsened, and there is evidence of widespread discomfort among them. Probably their first calculation was that the PR was going to be an easy ride, and many of them were crafting plans to go into politics and business, but now their prospects are bleak.

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<sup>52</sup> It is difficult to assess its magnitude. My hunch is that until now it is very modest.

At the same time:

- a. The leadership and rank and file continue their criminal activity. The expectations of an immediate banishment of paramilitarism were not realistic. All political sense of the accord was linked to the suspension of illegal activities by the paramilitary. Uribe has emphasized from the beginning that, contrary to the processes of his predecessors, now the state was demanding an immediate subjection to the rule of law by the group with which it was negotiating. Actually, since the very beginning the paramilitary signalled publicly that it was unable or unwilling to restrict itself. Uribe's delegates were in talks with the Bloque Cacique Nutibara while it was whacking its adversaries from the Bloque Metro. Despite the desperate cries from the Metro leadership, the government did not intervene, actually did not even acknowledge the existence of the problem. While the PR was in progress, a huge purge took place within the paramilitaries, the consequence of which was the elimination of the last factions that had qualms relative to drug trafficking.
- b. Trade unionism is still a high-risk job – half of the assassinations of the trade unionists in the world take place in Colombia – although in other fronts (e.g., journalism) the climate has improved.<sup>53</sup> But in general, the tool of selective homicide against opponents is still generously utilized. It has not been proved that internal displacement has declined.<sup>54</sup>
- c. The paramilitaries have rarely shown clear signs of repentance.<sup>55</sup> Especially at the beginning of the process, they actually indulged in the ostentatious parading of their power, which scandalized broad sectors of public opinion. Since they kept on committing

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<sup>53</sup> Mark Knoester, “War in Colombia”, *Social Justice* Vol. 25 (1998).

<sup>54</sup> There is a dispute between NGOs and the government about figures. The former claim that displacement has actually increased, the latter believes it has fallen substantially.

<sup>55</sup> After Castaño was assassinated, Salvatore Mancuso became the main leader. He cried in a public audience but there was some consensus about the fact that these were, as they say, crocodile tears.

crimes, and transacting with politicians, entrepreneurs, and racketeers, they have lost prestige very fast.

- d. This is related with a (rather metaphysical) question about the nature of the paramilitary offences. The reader should remember that in Colombia, contrary to many countries, the legal figure of political crime exists. So there is a classificatory problem: who is a political criminal? In particular, can the status of political delinquent be bestowed upon the paramilitary? The issue has been debated in congress and in the press, with inconclusive results. Slowly but surely, given the high levels of narcotization of today's paramilitary, the verdict has tilted towards a negative answer. But the discussion remains in latent form, and several times the government, directly or through friendly congress members, has tried to re-open it.<sup>56</sup>
- e. The PR revealed the immense extension of the links between paramilitarism and the state. The governmental defence has been that those links did not start in 2002, and cannot be offered as proof against the PR. On the contrary: one of the main objectives of the PR is precisely to dismount those links. The other side of the coin is that the overwhelming majority of the politicians that have been seriously accused of having accepted paramilitary support (backing force or money) belong to the governmental coalition – it makes quite a substantial, and growing, portion of it.<sup>57</sup> For example, the congressional leaders of four of the main parties that support the president (*Alas Equipo Colombia*, *Colombia Viva*, *Convergencia Ciudadana*, *Colombia Democrática*) are now in prison. New captures are expected.

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<sup>56</sup> Rafael Pardo, *Fin del paramilitarismo ¿Es posible su desmonte?*, Ediciones B, 2007.

<sup>57</sup> More than 40 congress members. In the face of this, the president encouraged its parliamentary block to vote his bills “while you remain out of jail”.

### 6.3. Pacificist Discourses and the Specificities of the Colombian Situation

#### 6.3.1. What is Happening?

Presently, the Colombian situation is rather bizarre regarding peace:

- a. Despite all its shortcomings and trade-offs, it is difficult to dispute the fact that the PR is much more astringent with war offenders than previous ones, or than others that have taken place elsewhere and have been enthusiastically accepted by the international community.
- b. The process lacks political legitimacy, both nationally and internationally. This assertion needs to be qualified. It is true that the president has captured, with astonishing stability, very high levels of citizen support for more than six years. On the other hand, for key audiences of pundits, advocates, experts and social movements, and international interlocutors,<sup>58</sup> the PR is at best confusing, and there are clear signs that a pessimistic evaluation of the whole process is starting to prevail.<sup>59</sup>

What is happening? The PR seems to be losing the legitimacy battle. The main problems it faces are the following:

- a. *Inseparability*. In negotiated macro-conflict, there is a separability scale. Can guilt be allocated on one specific sector (highly separable)? Or does it affect the whole of the society? For example, Poland and South Africa seem to be very near the separability end of the spectrum. In Poland, the dominant discourse considered the communists in reality as a distinct group, in essence unrelated to the Polish society. Teresa Toranska's classic of journalism – whose title, *Oni*, “Them”, is already quite revealing – is an effort to rediscover how those aliens live and think. Society was innocent; the regime (or for the most radical factions of Solidarity, the communists, “*oni*”) was guilty. Something similar

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<sup>58</sup> Whose approval or at least benevolent indifference is necessary.

<sup>59</sup> For example, the October 2007 evaluation of the generally very benevolent OAS is quite harsh.

took place in South Africa. The universally acknowledged malevolence of the apartheid facilitated this favorable allocation of culpability. Colombia, instead, is near the non-separability end of the spectrum, both because of historical precedents and by the very nature of its conflict. Regarding precedents, the previous wave of confrontation, *La Violencia*, engaged broad sectors of the Colombian population, and culminated in the peace agreements of the National Front, with the canonical conclusion of Laureano Gómez – one of the heads of the Conservative Party, and not by chance perhaps the main instigator of *La Violencia* – “All of us are guilty”. The present Colombian conflict is particularly messy. There is not a single caste that can be singled out as the promoter of social wrongs. The regime is a democracy – not a very pure, or aesthetically appealing democracy, but a democracy after all (or something that falls near that). The predominant discourse is one of “community in guilt”.<sup>60</sup>

- b. *Friend or foe?* During the National Front, relevant factions within both parties opposed the peaceful outcome on grounds of the horrible previous ten years, punctuated by mutual atrocities. The famous response of Carlos Lleras Restrepo – a statesman who argued in favour of the pact, despite having taken strong positions during the conflict – was that peace is agreed not with friends, but with adversaries. This assertion has two readings. On the one hand, if the actors were not enemies, they could manage their differences through standard institutional channels.<sup>61</sup> On the other hand, the typical trade offs that characterize peacemaking – mutual absolutions for atrocities, etc. – become a big scale operation of complicity if they are performed between friends. If two allies engage in mutual forgiveness of their crimes, this might

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<sup>60</sup> Fernando Cubides, “La violencia en Colombia, Junio de 1962: Glosas de un lector de hoy”, *Revista Colombiana de Sociología* vol. 4 no. 1 (1999), pp. 34-42. For a much clearer analysis see Eduardo Posada Carbó *¿Guerra civil? El lenguaje del conflicto en Colombia*, Alfaomega Colombiana, 2001.

<sup>61</sup> When *La Violencia* started the country was still democratic.



appear as a “peace against society”, to paraphrase Daniel Pécaut’s phrase about the nature of the Colombian war.<sup>62</sup>

- c. So one of the main issues of the PR is the relation between the state and the paramilitaries. This has a structural dimension (which includes the problem of what to do with the agencies more deeply penetrated by illegal groups), but also a more politically operational one. When the president and his political supporters are considering whether to pass a bill to alleviate the burden of the politicians jailed because of their links with the paramilitaries, are the former abetting the cause of peace or simply promoting their own cause? When the government claims it cannot press further the paramilitary, is it acting like a cunning impotent, claiming that it cannot, when in reality it does not want?<sup>63</sup> The lack of clarity about the true status of the protagonists has permanently sapped the political support out from the process.
- d. *De-criminalization?* As said above, the paramilitary is a highly criminalized network. One of the principles of the Uribe administration is to push forward with the utmost energy the war on drugs, and be implacable enforcing extradition. At the same time, the peace with the paramilitary involves a *de facto* forbearance of drug trafficking.<sup>64</sup> Furthermore, a political peace agreement is only possible *vis-à-vis* a political actor. I already observed above that, despite oblique governmental attempts, conceding “political status” to the paramilitary has been impossible. But then: in which sense are they political? How can the government of the war on drugs dialogue with them, and tolerate their ongoing criminal activity?<sup>65</sup>

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<sup>62</sup> Daniel Pécaut, *Guerra contra la sociedad*, Espasa-Planeta, Bogota, 2001.

<sup>63</sup> As will be seen in the conclusions, these are *not* rhetorical questions – there can be a genuine debate about them.

<sup>64</sup> This is not new. See Hernando Gómez, “El tamaño del narcotráfico y su impacto económico”, *Economía Colombiana*, no. 226-227 (1990).

<sup>65</sup> Once again, at least some of these questions are not rhetorical. My own conviction is that Colombian paramilitarism has a clear political substance, but the discussion goes way beyond the scope of this paper.

In other words, this is a peace agreement that goes beyond international standards, and has produced tangible positive effects. But it takes place in a context in which separability is a tangible issue, and it is ambiguous in at least two basic senses – is the negotiation between enemies and friends? Is it between the government and criminals, or between the government and a political force?

### 6.3.2. Functions of Pacifist Discourses

The government has not offered a sound pacifist diagnosis to support the PR. Pacifist diagnoses are oriented to explain why the war took place, who indulged in violence and why, and which are the viable alternatives. Viable pacifist diagnoses have a clearly instrumental dimension, but have to match at least approximately the available information.<sup>66</sup> What are they supposed to do? At least:

- a. *Attribution.* There are different modalities of attribution: moral, judicial, and sociological. Factual and judicial attribution involves finding who did what to whom, and translating this into the terms of some (reasonably proportional) judicial mechanism. The difference between this operation and what actually happens can be interpreted as the quantum of forgiveness of the given society. Moral attribution is related to the explanation of why the conflict started. It must be noted that a key step when launching an organized challenge to the state is to produce a believable (at least for the group) moral attribution. For example, during *La Violencia* the followers of Laureano Gómez asserted that violence was a product of electoral fraud, a version that came to be adopted by major social and political actors, including Laureano's adversaries. During peace accords, it is frequent to ascribe guilt to an impersonal entity – a regime, a kind of behaviour – to prevent both attacks on signatories of the accord, and the spread of dynamics of vengeance. In this sense, creating a pacifist moral attribution usually involves a major argumentative shift. Lastly,

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<sup>66</sup> In the social sciences, the reasoning proceeds from the diagnoses to the alternatives; in the pacifist discourse the reasoning proceeds from the alternatives to the diagnoses.

we have sociological attribution. The moral attribution refers to persons, natural or juridical. The sociological attribution refers to structures, institutional designs, and social dynamics. In Colombia, symptomatically, sociological attribution has been preferred to moral or juridical attribution; the imputation of specific responsibility in peace processes has been difficult or impossible.

- b. *Evaluation.* Each peace process has an (implicit or explicit) yardstick to measure the severity of offences committed during the conflict. The metric of the process does not necessarily (or only rarely?) coincide with either the norms held by the population or with the extant legality. In this regard, there are deep inconsistencies that as yet have not been probed. For example, in Colombia there has been a protracted discussion – once again, sometimes implicit, others explicit – about the way in which kidnapping compares with other crimes. Since each armed group has – viewed from an aggregated perspective – its own violent signature, this is a very important variable to compare different processes.<sup>67</sup> All this boils down to the discussion of what kind of offence is worse – which shows that evaluation is not only used to compare processes or armed groups. For example, in Colombia it has been frequently debated what is worse, if committing the typical crimes of members of an illegal armed group, or supporting them (via funding, information, etc). The most frequently issued point of view – shored up by journalists, government officials, and members of the judiciary – is that supporting is worse because at least members of the armed groups are incurring in some risk to attain their objectives.<sup>68</sup>
- c. *Distribution.* Who should carry the heaviest burden in the process of reconciliation and reparation? What is the role of the vic-

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<sup>67</sup> The guerrillas abduct more than the paramilitary, but the latter incur more frequently in massacres. As said in the note above, this does not imply that the guerrillas do not massacre (they do, and actually have gradually increased this type of offence, as shown in Table 2) or that the paramilitaries do not kidnap.

<sup>68</sup> It should not be forgotten that this has been precisely the justification of the paramilitary and the guerrillas to target civilians. Note that here moral and legal assessments are at odds.

tims in all the process? Clearly, if this role is not carefully laid down then victims are the ideal candidates for spoiler. During the conversations with the guerrillas in the 1980s and 1990s, government officials basically disregarded the victims (for example of kidnapping), some of which drifted towards the extreme right and played easily the role of antagonists of the process.

- d. *Motivation*. Why were the crimes, and/or the errors, committed? A first categorization, a deep-seated notion shared by peoples of all backgrounds and walks of life, is the greed or grievance dichotomy.<sup>69</sup> Actors that are political, and generous, behave better and kill less and are more likely to be absolved for their offences.<sup>70</sup> Elsewhere I have suggested that such dichotomy is flawed in many senses,<sup>71</sup> but it still seems to be a cultural operator taken very seriously.

#### **6.4. The Governmental Discourse and its Limits**

Now let us see what kind of pacifist discourse the government has developed.

##### **6.4.1. What Has not Been Clarified**

- a. *PR and previous processes*. A point that has been permanently stressed is the favourable contrast that the present process makes with previous ones. This has three dimensions: a normative one (“now finally we are dealing with victims, we are not guaranteeing total impunity”, etc.); a strategic one (some of the main critics of the PR are members of the opposition, but they themselves, claim governmental officials, have taken advantage of excessively generous agreements; some of the main crimes committed in the immediate past have not been punished, etc.); and a time-horizons one (critics of today’s PR, who generally

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<sup>69</sup> Proposed by Collier, but for me it is clear that Collier is picking here a very broad form of common sense.

<sup>70</sup> Jeremy Weinstein, *Inside rebellion. The politics of insurgent violence*, Cambridge University Press, 2006.

<sup>71</sup> Gutierrez, “Criminal Rebels?”.

demand more stringent standards, are destroying the possibilities of peace with the guerrilla tomorrow).

- b. *The paramilitaries and the guerrilla.* This latter argument is based on another canonical classificatory problem: in which sense are the guerrillas and the paramilitaries different? From an institutional, mechanistic point of view,<sup>72</sup> it is possible to exhibit very crucial differences, which make it completely incorrect to collapse them into a single category like, say, “warlords” or “narcotraffickers”. Be this as it may, the moral identification of insurgents and counterinsurgents is a given of the Colombian public opinion. Actually, the disrepute of the guerrilla among the population – as reflected by opinion polls – is even worse than that of the paramilitaries. Why then should the rules for the guerrilla be different than those for the paramilitaries? I believe that here the government and its defenders make a valuable point, but forget a crucial aspect. In reality, the comparative moral evaluation of guerrillas and paramilitary is inconsequential here. What matters is the type of conflict: are the paramilitary friends or foes of the Colombian state? The answer, in the optimistic version, is ambiguous. In contrast, regarding the guerrillas, it is conclusive. Instead of addressing the issue squarely, the government has resorted to a legal trick, according to which those who intend to attack *or* replace the state belong to the same category.
- c. *The timing of spoilers.* Be this as it may, in terms of time horizons the debate has developed in an intriguing fashion. The opposition appears in the role of present and future spoiler, insisting on high standards today, but – in the governmental version – precisely because of that, it is jeopardizing accords with other actors in the future. The government appears in the role of a retrospective spoiler, aspersing desultory remarks about past proc-

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<sup>72</sup> Normatively, though, it may be the case that both are so above the reasonable threshold of transgression that they cannot be set apart.

esses, opening old wounds, and asking for the revision of already terminated reinsertions.<sup>73</sup>

- d. At any rate, there is an implicit political admission of the government that there is not a perfect symmetry between the paramilitary and the guerrillas, as it has hastened to initiate negotiations with the latter. In particular, it tried to balance the lack of legitimacy of the PR by opening a process with the ELN (which has proved to be extremely tortuous).
- e. *The paramilitary and the criminals.* The government has not understood that the comparison of paramilitary and guerrillas is relational (friend or foe), not only normative. Another complication with which it has had to deal with is the greed and grievance dichotomy. Are the paramilitaries in an anti-subversive war, or are they simply pursuing their personal enrichment? The question is consequential. The case against greed is clear-cut. Covetous fighters have at least three damning characteristics. First, they will go on fighting while war is profitable. In fact, the majority of them discovers their entrepreneurial skills, and enrich themselves, thanks to war. Oskar Schindler is a one-in-a-million exception. Second, they will use force to expropriate the weakest and most vulnerable sectors in society. This is precisely what the paramilitaries have done with land in the last decades, evicting between two and four million peasants, producing a *de facto* inverse agrarian reform of immense proportions.<sup>74</sup> Third, they have no kind of normative constraint, so they can indulge in whatever gross crime to attain their means.

Elsewhere I have argued that this perspective should be nuanced. In the Colombian context, it would not be unreasonable to claim that it

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<sup>73</sup> This was the defensive reaction against former members of the M-19 who denounced that the paramilitaries were violating the PR rules of the game. The president and his staff retorted that the M-19 peace had required neither peace nor truth – which is rigorously correct – and pledged for re-initiating the debate about the alliance between M-19 and *narcos* during the takeover of the Palace of Justice (1985).

<sup>74</sup> There is wide variance in the figures, depending on the source.

was the strictly greedy character of the paramilitaries which allowed a relatively expeditious accord and reincorporation and reincorporation proceeding. The paramilitaries clearly had the expectation of sacrificing part of their wealth and power, without losing all but overcoming the high risks associated with war waging. I do not believe that it can be argued that it is essentially wrong to negotiate in these terms with such an actor. But the double standards of the PR, which express themselves in two mutually contradictory violations of proportionality, are untenable:

- On the one hand, the offer of steep reductions of sentences to greedy actors, on the grounds that presently they are (among other things) peace builders.
- On the other hand, maintaining the threat of extraditing the paramilitaries if, and only if, they have incurred in drug trafficking.<sup>75</sup> But why should drug trafficking be considered a worse offence than massacres? Obviously, this only makes sense if there is an implicit theory of motivations behind: the worse violence of all is greedy violence (as opposed to: the worst violence of all is risk-free, cowardly, violence). On the other hand, brutal transgressions (like wiping away the less narcotized blocks and leaders during the conversations with the government) did not deserve even a comment.
- But this theory of motivations goes against the very act of negotiating with the narco-paramilitaries. This blatant contradiction is not a nuance for academics; people of all walks of life captured it rapidly. For example, common prisoners in Bogotá launched a protest, asking why big offenders, like the paramilitary, had access to reduced sentences and they did not. The government did not yield. Had it bought into the greedy theory of guilt (in which common crime, even if mild, is unforgivable, while political crime, even if serious, is not)? A couple of months later, however, members of congress jailed because of their collaboration with the paramilitaries started a more discreet, but also more ef-

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<sup>75</sup> This threat is only made effective by will of the president. Pardo, “Desde el jardín”.

fective, offensive to get the same legal treatment as paramilitaries. Some of them actually declared formally belonging to the organization. By castigating more severely politicians than members, was the government adhering to the risk theory of guilt? No, because it signaled very, very prudently, that it considered with sympathy such initiatives. Apparently, the political *is* superior. But then why hasn't the government argued clearly in favour of the political status of the paramilitary, and why does it ignore its common delinquency actions?

In sum, it appears that instead of a building a discourse that restores proportionality, the government is accommodating to strong and contradictory political pressures, on the one hand by the United States, and on the other by the paramilitary themselves (who obviously have blackmailing power) and other national forces. This further feeds the deep ambiguity of the PR, which appears to broad and significant sectors as an accord between friends (or accomplices), and as a form of accommodating criminality.

#### **6.4.2. What is Missing**

But additionally this accommodation to criminality can be read in rather sinister terms: as a way of appeasing the criminals, because if they finally decided to talk the state representatives would be in hot water. This reading, unfortunately, is increasingly credible.

In a word, the PR has suffered from an acute political deprivation. To overcome it, the president and government officials have advanced a symmetry theory, asking why what is conceded to the guerrillas should not be bestowed to the paramilitary. The question does not have an easy answer, and every morally aware analyst (and citizen) should take it seriously. But it misses the main point: the relational aspect. The government has failed to show that the PR is not a bargain between *amigos*, in which one has state power and the other blackmailing power. In these circumstances, the PR has at least the following critical shortcomings:

- a. *Scaling of social wrongs.* Form the point of view of the violation of proportionality and production of viable compensations, the



PR has been extremely vulnerable. *If* the allocation of guilt is, directly and publicly, the result of pressures on the government, the pedagogic message is that retribution depends on force. But the more the force, the bigger the capacity to destroy. Thus, the magnitude of the offence appears to be strictly related to the forgiveness of the state. As a female member of an urban militia once said, “in Colombia you have to be rich or you have to be dangerous”.<sup>76</sup> This message appears to be transparent, as said above, to common delinquents, politicians, political and social leaders, etc. This undermines sustainability, opening the doors to new violent actors and practices.

- b. This is reinforced by other violations of proportionality that have not been acknowledged publicly (for example, the fact that displaced people’s allowances are lower than those of the reinserted paramilitary combatants).
- c. The definition about the political substance of the paramilitary. This has not only rhetorical importance – which of course should not be underestimated – but also very practical consequences. In the overwhelming majority of peace processes – both in Colombia and abroad – a substantial part of the solution of the conflict is to guarantee to each of the parts a portion of political power. In the last decades in Colombia typically the group that returned to civilian life became a political party.<sup>77</sup> This is *not* possible in the case of the paramilitaries – though some of its leaders explicitly aspired to that solution. First, the paramilitaries already wield huge political power, way beyond its democratic support. Second, the political sectors that accompany them tend also to be well represented; cattle ranchers and – if one wants to be flippant – *narcos* have historically had comfortable access to political power. Third, the government has shied away from openly promoting the concession of political status to the paramilitary. All

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<sup>76</sup> Alonso Salazar, *No nacimos pa’ semilla*, Corporación Región, Medellín, 1990. The paramilitaries combine both sources of power: they are rich *and* dangerous.

<sup>77</sup> Or, if the group was small, an NGO.

in all, for the judiciary the main task today is to exclude the paramilitary from the political system, not to include it.

- d. For a country that has had so many (unsustainable) peace processes, a key issue is the construction of a point *O*, that is, a starting point after which transgressions associated to the conflict are not committed (or committed only marginally). In reality, these processes tend to culminate in a constitutional accord.<sup>78</sup> The paramilitaries were actually heading, along with their allies in congress, towards a “re-foundation of the country”, a clandestine pact that, when revealed, produced a huge scandal. In the other direction, the government has tolerated huge violations of the basic rules of the game by the paramilitaries, and when these are made public it has reacted criticizing harshly the media and the opposition. There are already a score of examples about this. While at the beginning of the PR several (rather credulous) analysts hurried to speak about post-conflict and made their best effort to sell the hope of the termination of the Colombian ordeal to the international community, the country was only starting another round of negotiations about the real status of the paramilitaries, and the conflict associated to this phenomenon was far, far away from finished – not to mention the FARC and the new paramilitary groups that are being created. This process lacked a point zero.
- e. The definition and role of the victims. The symmetry theory is advanced to proclaim the superiority of the PR over other processes. This leaves the victims in the role of spoilers.<sup>79</sup> Naturally, it can happen that people that were victimized in the past spoil the possibilities of an agreement, if they orient themselves one-sidedly towards the redress of wrongs. However, the difference between the PR and past processes is that presently victims pertain to the voiceless sectors of the society. Their incorporation

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<sup>78</sup> Stephen Holmes, “Precommitment and the paradox of Democracy” in Elster and Slagstad (editors), *Constitutionalism and Democracy*, Cambridge University Press, 1993.

<sup>79</sup> Stephen Stedman, “Spoiler Problems in Peace Processes”.

appears to be both desirable and possible, but it has been forsaken.<sup>80</sup>

- f. Ironically enough, the PR – charged as it has been of being benevolent with the paramilitaries – lacks a “stopping instruction”. Nobody knows where the punishment stops. Given the nature of the paramilitary groups, their high level of criminalization, and the fact that committing massacres was for them a basic strategic tenet, it is clear that thousands of these fighters incurred in horrible atrocities. But the country lacks the financial and human resources to try them all. Additionally, if one of the main problems of a sustainable settlement is to establish a workable *and* reasonable trade-off between peace and proportional justice, then the question of where the punishment must stop is crucial. Actually, this is important even in the face of an overwhelming military victory. Nazi Germany counted with widespread civilian collaboration.<sup>81</sup> In Colombia, inseparability problems – due to extended paramilitary power and networking – makes it indispensable to have some kind of stopping instruction. By losing completely the specificity of the PR – be it because of malice or conviction – the government has allowed it to operate in such political weakness that at the end all the involved actors are worse off.

## 6.5. Conclusions

Peace discourses must be credible, palatable to different audiences, and reasonable. This is a high order. No wonder the international community, observers, and advocates try by all means *not* to overburden peace processes with unreasonable demands. At the same time, in a country

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<sup>80</sup> The passivity of the government in this regard is illustrated by one event: the assassination of a social leader of the victims by the paramilitary when the process was already quite advanced (7 February 2007). There was no official reaction (see Ernesto Tamara, “Los paramilitares deciden la agenda política colombiana” 2007, on file with the author).

<sup>81</sup> It is not necessary to buy Goldhagen’s rather strident argument to agree with this point (Daniel Jonah Goldhagen, *Hitler’s willing executioners*, Alfred A. Knopf, New York, 1997); see for example Christopher Browning, *Ordinary Men*, Harper Collins, New York, 2001.

like Colombia, where feasibility and sustainability are so clearly – and tragically – separated, it makes sense to flag critical issues in extant accords that can generate new violent conflict in the near future.

The main shortcoming of the governmental discourse throughout the PR is that it has concentrated in a symmetry hypothesis, the premises of which are doubtful, and the substance of which does not address two critical problems. First, these are powerful actors, already with political sway, and a very broad network with a broad palette of state agencies and actors. When negotiating with them, is the state recognizing that they express some interest or voice not present previously in the political system? But then which, cattle ranchers? They have historically enjoyed over-representation. Drugtraffickers? The government emphatically denies wanting to empower them (and cannot do otherwise). Alternatively: when negotiating with paramilitaries, is the state recognizing some fundamental military weakness? This is not too credible, as the paramilitaries were hardly combated until 1995, and even afterwards the behaviour of the security apparatus towards it was clearly lenient.

On which grounds, then, is the negotiation based? This translates into the key question: are we speaking about friends or foes? As said above, this is not in the least a rhetorical question. On the one hand, the idea that the Colombian paramilitary is simply a tool of the state is an over-simplification. On the other, the government is right when it argues that, due to the process, the paramilitary power has been exposed and started to show breaches. The problem did not start with the PR; the PR has offered some solutions. But by ignoring the huge problem of the relational content of the negotiation, the government has been unable to present a credible and acceptable discourse that helps cope with the proportionality crisis that any peace agreement causes, let alone one with the specifics of the PR. This has strong historical precedents. During the National Front, the country's two main political parties made a peace agreement, but were also harried by the spectre of the "peace between friends" criticism. Their inability to solve it was a factor that deeply destabilized the pact. However, the National Front

accord is – from this point of view<sup>82</sup> – actually more defensible. The parties had less margin of manoeuvre – both were too powerful to impose a solution over the other, and they had fought each other alright. There are a lot of examples of strategic use of the peace discourse to bind the other during the National Front – for example, excluding non Liberal or Conservative actors from the political system – but all in all a case can be made about the need to arrive to a consociational formula in that situation. The PR, instead, is ridden by events of self-serving weakness by the state and its representatives.

This has increased all the costs associated to peace negotiations: impunity has not received a political solution (nobody knows really what should be pardoned and what not), regional consociationalisms between socio economic elites and paramilitary groups have persisted (a *de facto* co-government in its most corrupt expression), the tension between forgiveness and recidivism is at its peak, and there are several issues of indivisibility (the main one being that there is no possibility of creating a joint-extraction solution of the main rent that feeds war, coca).<sup>83</sup> And the tension between peace and the implementation of necessary reforms (for example, agrarian) has appeared very strongly.<sup>84</sup>

The conditions for sustainability are still not there.

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<sup>82</sup> Note that regarding impunity, the PR is much better.

<sup>83</sup> Snyder, *From voting to violence*.

<sup>84</sup> The politicians linked to the paramilitaries have continued promoting, this time in congress, an inverted agrarian reform: legalization of lands taken by violent means, and transference of properties to the very rich. It appears that the agrarian elites have very strong presence in the governmental coalition. This is also different from the National Front, where the situation was somewhat more balanced.



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## One National War, Multiple Local Orders: An Inquiry into the Unit of Analysis of War and Post-War Interventions\*

Ana Arjona\*\*

### 7.1. Introduction<sup>1</sup>

Countries that are either in the midst of a civil war or in its aftermath are the focus of different types of interventions aiming at promoting peace, justice, reconciliation and reconstruction. Most discussions of the virtues and shortcomings of these interventions tend to assume – albeit not explicitly – that the country is the appropriate unit of analysis for this debate. However, war may take a different form across local territories, unleashing strikingly different dynamics. Local communities are thus prone to live very different *wars* – and very different lives – throughout the territory where the war goes on. Since legal instruments, international peace keeping operations, and policies and programs do not operate in a vacuum, this variation is consequential

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<sup>1</sup> I would like to thank Laia Balcells, Pablo Kalmanovitz, Jonah Schulhofer-Wohl, and the participants at the Workshop on Peace Keeping Operations organized by the Folke Bernadotte Academy at Georgetown in October 2007 for their comments. Many thanks go to Ana M. Zuluaga for outstanding research assistance in my fieldwork in Colombia, and Andres Clavijo, Carlos Hernández, and Laura Otalora for their help with the survey data.

for both their normative validity and eventual success. Disaggregating the analysis beyond the country is thus essential for identifying the conditions under which a given intervention is both justified and likely to be effective.

In this chapter I aim to plea for such disaggregation. My argument is twofold. First, I argue that civil war is seldom as chaotic as we tend to think. While violence exists and a myriad of conducts become risky, anarchy seldom reigns in war zones. On the contrary, in most areas some form of order emerges. When an armed group has control over a territory, it usually engages in some form of rule over its population. Unless civilians are willing to resist – and have the capacity to do so – a new organization of local affairs emerges. While the previous order is in a sense overthrown, it is not replaced by anarchy but, rather, by a new form of order. When studying alternative attempts to bring about peace and reconstruct a war-torn country, it is important to take into account not only the destructive facet of war, but also its capacity to create a new organization of social, political, and economic matters.

The second part of my argument points to the variation of that new order. Armed groups can approach their role as rulers in different ways, from limiting their intervention to the maintenance of public order, to becoming a local government that deals with every aspect of civilians' lives. Likewise, local inhabitants can resist the new ruler, obey its commands, or endorse it. Due to this variation in the behaviour of both actors, the new social orders that emerge – to which I refer as local orders – can vary greatly along several dimensions. In consequence, the context in which interventions operate both during and after the war may differ substantially across the national territory.

Taking for granted that the country is the adequate unit of analysis for assessing the validity and effects of interventions can lead to three types of problems. First, we can make unrealistic assumptions by thinking that the war is homogenous, when in fact great variation exists across the national territory. Second, we can make an erroneous assessment of the situation of civilians, the ways in which the war affected them, and their needs. And third, we can rely on a poor analysis of the likely effects of alternative interventions by ignoring the variation in the contexts where they are applied. In so far as an intervention



aims at outcomes that depend on civilian behaviour – such as reconciliation between community members, prevention of violence, obedience to law, or political participation – the particular situation of the community where the intervention takes place can be a major determinant of its success.

My aim in this chapter is to present micro-level evidence of this variation by showing how the new orders that emerge during the war differ across local communities in Colombia. I intend to show that treating the country as the unquestioned unit of analysis leads us to overlook key differences in the way in which the war unfolds at the local level, and the ways in which it transforms civilian life.

I proceed as follows. I start with a brief theoretical discussion of the existence of order in war zones, and the emergence of different local orders across territories (Section 7.2). I then explore the variation across local orders in the Colombian case along four dimensions: the ruler; the domain of rule; the enforcement mechanisms; and the relation of the population to the ruling groups (Section 7.3). I conclude by arguing that the existence of different local orders is likely to affect both the validity and success of interventions. This implies that disaggregating the unit of analysis can improve our assessment of the different normative implications that specific interventions may have across the national territory, as well as our understanding of the diverse effects that a given intervention may have depending on where it is implemented (Section 7.4).

## **7.2. The Existence of Local Orders in Civil War**

Civil war is usually equated with chaos and destruction. Yet, in the areas where the war is fought life often goes on in an *ordered* way. To be sure, violence may be present as well as fear and oppression. But some standards of behaviour emerge, which people learn to identify and follow. The pre-war *modus vivendi* is no longer valid, but it is not replaced by anarchy. Rather, a new order emerges, in which civilian affairs are regulated in a stable fashion – even if it includes violence, and uncertainty is larger than in peacetime.

In spite of its apparent counterintuitive character, the existence of order in war zones makes sense theoretically. In most contemporary civil wars, frontlines are absent and the fight is more about gaining territorial control than defeating a rival army in successive battles. This condition – often described as irregular warfare – has direct implications on the ways in which armed groups relate to civilian populations.<sup>2</sup> When the survival and success of armed groups depend on territorial control, civilian collaboration becomes crucial. Civilians can provide the armed groups with a wide range of valuable resources and endowments, including information, food, shelter, and labour force. Without these resources, armed groups can hardly survive, let alone maintain territorial control. Mao’s metaphor of civilian populations as the water in which the rebels can swim depicts the situation perfectly – as does the counterinsurgency strategy of “draining the water”, which means taking civilian collaboration away from the rebels in order to weaken them.<sup>3</sup>

Because civilian collaboration is so essential for armed groups, they have a clear incentive to behave in ways that render it. But collaboration is a complex matter. It may involve only a few occasional actions, or a long list of daily activities; and these behaviours can entail either mere obedience or endorsement – each of which is the outcome of a different set of motivations and beliefs. Given this heterogeneity, while violence may be an effective deterrent for the transgression of certain rules, it cannot bring about the different forms of collaboration that an armed group needs. In particular, it cannot secure behaviours that are difficult to monitor (such as the provision of information),<sup>4</sup> and only under certain circumstances it leads to acts of endorsement.

If violence cannot bring about the different instances of collaboration that armed groups need from civilians, what is the alternative? Creating a new social order offers great advantages. To begin with,

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<sup>2</sup> Stathis Kalyvas, *The Logic of Violence in Civil War*, Cambridge University Press, 2006.

<sup>3</sup> Mao Zedong, *On guerrilla warfare*, Anchor Press, 1978.

<sup>4</sup> Elisabeth Wood, *Insurgent Collective Action and Civil War in El Salvador*, Cambridge University Press, 2003.

order, as opposed to anarchy, increases the group's capacity to monitor both locals and outsiders. More importantly, by creating a new social order the group is able to influence civilians' lives in ways that may, through different mechanisms, translate into obedience and endorsement. In addition, this influence may be exploited to shape local affairs in ways that favour the group in economic or political terms. By establishing a new social order, the group may also put into practice its ideological beliefs at the local level. Undertaking land redistribution or forbidding the practice of a certain religion would be instances of such change.

Given its advantages, armed groups strive to establish a new social order in the localities that they aim to control. How they do this, and the extent to which they succeed is, however, a function of their endowments (both material and ideological), and the context in which they attempt to gain control and collaboration. As local communities differ in both their willingness to welcome a new ruler and their capacity to resist it, an armed group may attempt to create order by opting for any of four different strategies.

The first, to which I refer as *coercion*, consists of the exclusive use of violence and the absence of rule – that is, coercion without establishing norms or institutions that regulate civilian behaviours. The second entails limiting its intervention to the sphere of public order. Under this rule, which I call *minimal*, the group only regulates the use of violence and the provision of information to the enemy side, while abstaining from intervention in other civilian affairs. This strategy aims to secure the basic requisites for territorial control – a monopoly over the use of violence, and the prevention of defection to the enemy side,<sup>5</sup> while avoiding governing civilian matters. The third strategy consists of ruling civilian affairs beyond violence and defection, although not in an overt way. Under this form of rule, that I call *indirect*, the group infiltrates existing organizations by allying with, or mobilizing, a sector of the community. By gaining access to organizations and networks, the group is able to rule over certain domains of local life, without openly taking over power. Finally, an armed group may opt for

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<sup>5</sup> Kalyvas, *The Logic of Violence*.

becoming a *de facto* ruler who governs civilian matters in a broad and explicit sense. Under this strategy, several aspects of public and even private life can be subjected to regulation, such as public goods; the system of justice; the practice of religion; personal appearance; and freedom of speech. I refer to this type of rule as *comprehensive*.

Civilians, on the other hand, can react to the presence of the group in any of three ways: fleeing, resisting or collaborating – which in turn may entail a wide array of behaviours. Obviously, these decisions do not take place at the same point in time, and individuals may change their mind throughout the conflict. For example, early supporters may turn into displaced persons, and joiners of one group may later on support the rival side. The fact that civilians are forced by the new circumstances to flee, join, resist or collaborate, has led many to label those who stay as supporters of the ruling armed group. Yet, a better understanding of the dynamics that are unleashed by the presence of these organizations shows that collaborating with combatants may entail not only staying alive, but also being able to interact with others in different dimensions that allow life to go on. To be sure, both rebel and paramilitary groups are sometimes able to render sympathies, loyalty, and support. Yet, not every act of collaboration entails favourable emotions and beliefs towards the group.

Even though variation in individual behaviour exists within almost all communities, they translate into observable outcomes at the aggregate level: communities may flee together (either in response to an order by one of the warring sides, or by choice); accept the group's rule (either with or without actually endorsing it); or oppose it.<sup>6</sup>

The different combinations of armed groups' and civilians' behaviours lead to distinct local social orders (hereafter local orders)

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<sup>6</sup> Both armed groups' and civilians' choices in the midst of civil war are the outcome of a complex process where several factors and mechanisms intervene. I address this variation elsewhere (Ana Arjona, "The Creation of Local Order in Civil War: Armed Groups' and Civilians' Behaviors in Civil War", paper presented at the Comparative Politics Workshop at Yale University, 4 November 2007; and "Grupos Armados, Comunidades y Órdenes Locales: Un Enfoque Interrelacional", in Fernan Gonzalez (editor), *Hacia la Reconstrucción del País*, Antropos, forthcoming.

where life is organized on the basis of a particular set of standards. The existence of multiple local orders implies that even within the same region, civilian populations may deal with very different forms of war. Whereas in some cases the group is nothing but a violent invader that victimizes and harasses the population, in others civilians interact with it as their ruler. Yet, combatants can also become a powerful actor that shapes local affairs from the shadows, or behave as a policing apparatus within strict limits. The changes that these new orders bring about not only involve modifications of rules and rulership, but also complex transformations of locals' beliefs, emotions, habits, and actual behaviour. These transformations are a key aspect of how civilians experience both the conflict and its aftermath and, as such, should be taken into account in our study of war and post-war intervention.

### **7.3. Local Orders in the Colombian Conflict: Evidence of Variation**

In this section I present empirical evidence to illustrate the kind of variation that can exist across local orders within a civil war. I focus on three dimensions of local governance in war zones: first, the allocation of the capacity to rule (or the sources of rule); second, the scope of the system – that is, the types of civilian affairs that are regulated; third, the system of rule enforcement; and fourth, the way in which local populations relate to the ruling armed groups.

I rely on a preliminary analysis of both quantitative and qualitative evidence on the ongoing armed conflict in Colombia. This evidence comes from different stages of my fieldwork. First, a survey with ex-combatants and civilians that I conducted with Stathis Kalyvas in 2005 and 2006, where we interviewed 830 ex-guerrilla and ex-paramilitary fighters and 565 civilians.<sup>7</sup> I focus on ex-members of the

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<sup>7</sup> Ex-combatants were interviewed in three cities, although they came from 30 of the 33 departments of Colombia. The sample of ex-paramilitaries includes both deserters and collectively demobilized combatants. The sample of ex-guerrillas includes only deserters; hence, generalizations from these results require careful examination. For details of this survey see Arjona and Kalyvas, "Report of a Survey with Demobilized Combatants in Colombia", unpublished document (2007). The survey with civilians was conducted in fifteen municipalities where we inter-

guerrilla groups FARC and ELN, and the paramilitary factions Catatumbo Bloc and Cordoba Bloc because 74% of the respondents belonged to these groups.<sup>8</sup> Second, a collection of qualitative and quantitative evidence on local orders in fifteen municipalities.<sup>9</sup> Third, interviews with mid-level commanders and rank soldiers of the guerrilla groups FARC, EPL, ELN, M-19 and several paramilitary factions that I conducted between 2004 and 2007. And finally, six case-studies, three in the department of Cundinamarca (in the central part of the country), and three in the department of Córdoba (in the north-western part of the country).<sup>10</sup> Following a standard practice in anthropology, I do not use the real names of these localities, nor of the municipalities where they are located.

### 7.3.1. The Allocation of the Capacity to Rule

In a context of war, variation in the distribution of power is to be expected across the national territory. This is especially the case in an irregular war where the territory tends to be fragmented, allowing the

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viewed randomly-selected persons between ages 18 and 30, both in urban centres and rural areas.

<sup>8</sup> *The Revolutionary Armed Forces of Colombia* (FARC) and the *National Liberation Army* (ELN) are the two major left-wing guerrilla groups that are still fighting in Colombia. The *Catatumbo Bloc* and *Cordoba Bloc* are two of the factions that were united under the right-wing umbrella organization *United Self-defense Forces of Colombia* (AUC). These factions are usually referred to as *paramilitaries*.

<sup>9</sup> This work was complementary to the survey with civilians conducted in 2006. Through semi-structured interviews, we gathered evidence on several dimensions of local life in municipalities where guerrillas, paramilitary groups, or both were present. The quantitative data I include in this piece come from responses to close-ended questions asked to the interviewees.

<sup>10</sup> The purpose of presenting this information is not to test any argument or theoretical claim. Rather, I aim to provide evidence that simply helps us assess the great variation that exists across localities within war zones on different dimensions of life. My goal is also to show, through several types of data gathered with different methods, that even though the ways in which life goes on within a context of war is quite complex, it displays patterns that can be systematically theorized and researched. More importantly, with this descriptive information I aim to plea for more attention to local dynamics in studies of war and post-war intervention.

warring sides to have full control over certain territories.<sup>11</sup> The survey responses of ex-combatants and civilians to the question “who ruled in your locality” support this view (Table 1). The results suggest that the state does not own the monopoly over the capacity to rule civilian populations – something that should be expected from a country facing an armed conflict. A commander of either a paramilitary or a guerrilla group is perceived to be the local ruler by about half of the ex-combatants and about a third of the civilians interviewed in war zones. State authorities are more likely to be perceived as rulers by former members of paramilitary organizations than by either ex-guerrillas or civilians. The data also suggest that persons who join guerrilla groups are more likely to come from areas where a guerrilla group acts as the *de facto* ruler, while the opposite is true for those who join the paramilitaries. Unpacking the rule of armed groups is thus essential for understanding the context in which civilians make choices during the war – such as enlisting as full time combatant – and presumably also in its aftermath.

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<sup>11</sup> Kalyvas, *The Logic of Violence*.

Respondent <sup>12</sup>	Who ruled your locality?				
	A guer- rilla comman- der	A para- military comman- der	State or local author- ities	Non-state persons <sup>13</sup>	Delinquent organiza- tions <sup>14</sup>
Ex-FARC	73%	4%	22%	3%	0%
Ex-ELN	63%	6%	19%	9%	3%
Ex-Catatumbo	19%	31%	34%	3%	0%
Ex-Cordoba	7%	28%	53%	0%	2%
Civilians	16%	21%	24%	0%	10%

**Table 1:** Sources of rule at the local level.<sup>15</sup>

There is also variation in the extent to which other actors are influential within areas controlled by guerrilla or paramilitary groups. Table 2 below summarizes survey responses of ex-combatants and civilians to the question “How important were each of the following persons in your locality?” This table suggests some remarkable patterns. First, the distribution of power within localities in war zones is complex in all cases: no matter who is perceived by the population to be the *de facto* ruler, other actors influence somehow local affairs.

<sup>12</sup> Responses from ex-combatants are presented by first armed group membership in some tables and by last group membership in others. The reason is that some questions were asked about the first group they joined, while others were asked about the group from which they demobilized. Given that about 30% of all respondents fought in more than one group, this difference matters (this includes persons who moved both across and within paramilitary or guerrilla organizations). This table presents respondents by their first-group-membership.

<sup>13</sup> This category includes respondents who said that a priest, “the rich”, or other non-state and non-illegal actor ruled the locality.

<sup>14</sup> This category includes respondents who said that a member of gangs (*pandillas*), drug cartels, or other delinquent organizations ruled their localities.

<sup>15</sup> This data comes from the survey with ex-combatants and the survey with civilians. Ex-combatants were asked “Who ruled in your locality where you lived one year prior to joining”? Civilians were asked “Who ruled your locality when you were [15, 20, and 25] years old?”.



Second, the priest is perceived to be a very influential person among ex-combatants of both sides as well as civilians, even when they thought a commander of one of these organizations ruled the locality. Even in areas under state control, the priest is perceived to be as influential as the mayor. The importance of religious authorities in spite of the dispute over population control among the warring sides may be of particular importance for the implementation of certain local interventions, both during and after the war. Third, the saliency of community leaders is also worth noting. In some cases these may be leaders who are able to keep their authority in spite of (and even against) the presence of armed actors, while in others they may only be able to do so by collaborating – in the behavioural, not attitudinal sense discussed before – with the group. Each scenario may have different implications on the social fabric and capacity for self-governance in the post-conflict period. Fourth, the mayor is a very important actor for half the persons who say that a guerrilla commander ruled the locality, and for about 60% of those who think of a paramilitary commander as the local ruler. This result points to a type of armed group rule that somehow incorporates – rather than eliminates or neutralizes – local authorities.

Very important persons in your locality	Who ruled your locality?				
	A guerilla commander	A paramilitary commander	State or local authorities	Non-state persons	Delinquent organizations
A priest	56%	65%	68%	61%	88%
The mayor	51%	63%	69%	36%	63%
The rich	45%	60%	53%	50%	75%
A community leader	59%	53%	56%	46%	50%
A paramilitary commander	15%	63%	28%	14%	38%
A guerrilla commander	63%	13%	16%	14%	13%

**Table 2:** Sources of rule and influential actors at the local level.<sup>16</sup>

Several facts seem to underlie this multiplicity of powers. First, because the different actors that constitute local communities can react in a variety of ways to the group's rule, different configurations of power can emerge in areas under control of the same group – hence, some variation should be expected. Second, as I argued before, armed groups may opt for different strategies towards civilians in areas under their control. When the group opts for either *minimal* or *indirect rule*, it leaves space for other sources of authority to govern. In some cases, the group may perceive that local structures of governance are so embedded in the community that ruling without them would be unfeasible. In others, such structures may be instrumental to the group: why not use an already established institution if it can be put to work for the organization? Finally, even when armed groups lack full military control over a territory, they can penetrate a community and regulate some conducts of its members. Shantytowns and poor neighbourhoods in big

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<sup>16</sup> The data on ex-combatants come from the survey with demobilized fighters conducted in 2005. Data on civilians come from the survey with civilians conducted in 2006.

cities often display this mix of rebel governance and state presence. In these circumstances, governance can be expected to be fragmented, and different actors may rule over distinct spheres of society.

Due to these different possibilities, local authorities that existed before the group arrived – be they public functionaries, religious or traditional authorities, or local leaders – may be: eliminated; overthrown by the armed group by capturing the democratic process; co-opted; oppressed; or respected. Different structures of local authority imply different ways in which the armed actor exerts power, shaping the relation between the ruler and the ruled. The implications on local life are far-reaching.

Under *elimination*, the group kills, expulses, or simply neutralizes existing authorities and establishes an all-together new system of rule by capturing the spaces where such authorities used to govern the population. The village of Librea, one of my case-studies in Cundinamarca, illustrates this case. Local leaders (mostly supporters of the Liberal party) who opposed the FARC were killed or expelled. Once the former leadership was out of the way, the group established its own system of governance by placing its cadres to serve as presidents of the Communal Action Association (CAA). A woman recounts that, “everyone looked for the commander to solve private disputes and to find the way out to a problem – be it a debt, a son that did not want to obey his parents or a conflict with a neighbour. The commander became the one everyone turned to”.

Leaders can also be deprived of their role by an armed group that *captures the democratic process*. In this case, the armed group manipulates the elections and the designation of public officers in order to place its cadres in important positions of local government. The town of Argel, one of my case-studies in Córdoba, illustrates well this situation: from the *Procurador* (local official of the Internal Affairs Office) to the council members, to the local police station, the local government was in the hands of the *Brown Bloc* of the paramilitaries.<sup>17</sup> It was

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<sup>17</sup> I do not include the names of the fronts or blocs of the guerrilla and paramilitary organizations in order to avoid the identification of the villages where the interviewees agreed to talk with me under anonymity.

clear to most inhabitants that in order to be part of the local government, being with the paramilitaries was a must, as the testimony of a local worker suggests: “Every position in the public administration had to be approved by [the paramilitaries]. And everyone who disagreed with them was expelled from the region”. In addition, several interviewees reported that candidates that were not associated with the armed group were usually approached by combatants and informed about the conditions under which they were allowed to run, as well as the terms they would need to agree with in order to rule if elected. In interviews conducted outside of my case areas, descriptions of similar instances were recurrent under different warring sides. A local of a town in the department of Meta described the situation as follows: “The mayor and council members were members of the community chosen directly by the FARC. In a meeting, the group decided who should run as candidate, and who would win”.

According to the media, the capture of the democratic process has taken place in several localities across the Colombian territory. An article of the Colombian Magazine *Semana* states that public servants of the Electoral Office in different municipalities were coerced in order to manipulate the count of votes. In some localities where the majority of the inhabitants did not vote in the past, turnout was very high, close to 100%.<sup>18</sup>

Ex-combatants’ responses to the question “Did you know of cases when the mayor was an ally of the group before becoming mayor?” suggest that elections are a common means for the group to rule local communities, as about a third of them report that this did happen (Table 3). One possibility is that civilians’ capacity to elect their representatives is suppressed by the armed group in either subtle or direct ways; it can also be that the results of the elections are manipulated as mentioned above. In this case, while democracy – in a minimalist sense – still seems to exist, its essence has vanished. Politicians in the locality can still play with the jargon, symbolism, and discourse of legitimacy that characterize democratic processes, but its foundation is lacking. Another possibility is that the community truly supports the

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<sup>18</sup> “Cómo se hizo el fraude” [“How the fraud was done”], *Semana*, 8 April 2006.

armed group and, hence, freely elects its ally. While the outcome could be labelled as democratic, it raises questions about the ways in which different types of institutions operate in a context where an illegal actor is massively supported by the citizenry as its ruler. Another phenomenon that can underlie this result is that the elites use their capacity to mobilize electoral support towards a candidate that is allied with an armed group. In this case, “politics as usual” would be the mechanism through which armed groups transform the distribution of power at the local level, as well as the ends for which it is used.

A case of *co-opted authorities* is such where leaders decide to support the group or at least work for it. The motivations for this kind of alliance may vary. In some cases ideological support drives leaders to work side by side with combatants. In others, leaders seek individual benefits such as keeping their posts, or defending the advantages that these entail. Even though openly admitting to have willingly supported armed groups is risky for visible leaders, the fact was clear in conversations with locals in different areas. In the village of Lluvias, another case-study in Cundinamarca, one of the leaders who served as president of the CAA for decades said he supported the FARC for ideological reasons, and ruled side by side with them. His decisions as president of the CAA were always in accordance with the rules established by the FARC. He would also take the concerns and problems of the community to the commander of the *100th Front*, who would act as the maximum authority to solve them. A young local leader of the village of Permia, a case-area in Córdoba, sadly described how one by one his friends, who had worked with him in favour of their community for years, ended up supporting the paramilitaries: “They have kids now, and I don’t blame them. It is very difficult to say ‘no’ when they offer you a motorcycle or a large payment when you know you are not likely to be able to do anything against them anyways. Plus, we will hardly ever have [those things] in our lives. They [the paramilitaries] knew that, so they harassed all the youths with leadership skills, offering them power and money. Fear is also carefully manipulated”. A local leader interviewed in the Department of Meta described the situation in his town as follows: “[T]he local government has always been very influenced by the armed groups. This is because it is in their benefit to be friends with the groups. It is either voluntary (receiving money and

security) or forced upon them (the killings, the kidnappings). The majority of the council members that have not been willing to collaborate have been killed”.

Authorities are *repressed* when the armed group simply commands them to obey their orders without them having agreed to share their rule with them. Mayors, local council members, and even representatives of national-level institutions like the police or the Attorney General’s Office can be forced to work under the direction of the armed group. To a greater or lesser extent, this seems to be a common situation across war zones in Colombia. The mayor of Hadria, the third case-study in Cundinamarca, was always forced to “go up” the mountains in order to discuss different issues of the municipality with the commander of the *100th Front* of the FARC. Even though some mayors were perceived by the local population to be outspoken supporters of the group, others who did not support it were still accountable to the commander, and had to follow his orders at least to some extent. According to a former public official of this town, sometimes the authorities would explicitly and openly refer civilians to the commander to solve their private disputes instead of turning to a local court or the police: “sometimes you would go to see [the *procurador*] and he would tell you to talk directly to the commander, up in their camp”. The percentage of ex-combatants who say that certain rules were imposed on mayors to perform their duties suggest that this situation is quite common (Table 3). According to about half the ex-guerrillas and a fourth of the ex-paramilitaries, mayors of localities where an armed group is permanently present have to serve their duty under a particular arrangement with it.

	The group imposed rules that the mayor needed to follow in his/her service	The group agreed with the mayor on what to spend the municipal budget on	The mayor was an ally of the group before becoming mayor
Ex-Farc	57%	42%	37%
Ex –Eln	53%	49%	27%
Ex-Catatumbo	25%	12%	17%
Ex-Córdoba	26%	14%	20%

**Table 3.** Relation between armed groups and local mayors.<sup>19</sup>

It is worth noting that this evidence does not imply that mayors, local leaders, or any other local authority who inhabits an area where one of the warring sides has ruled actually supports that group. They may have had to adjust to shifts in control and coercion, and obey the rules imposed by the strongest actor; some may not have collaborated in any way with the group's struggle and still preserve their authority; and some may have resisted or rejected their rule either through a successful collective organization of resistance, or in more subtle ways, when the “weapons of the weak”, to use Scott's term, make their way.<sup>20</sup> It is also possible that, as illustrated by the parapolitics scandal in Colombia, local politicians not only support the armed group but also rely on their services for personal security, clientelism (in the sense of vote buying), and coercion of both voters and electoral officials to ensure favourable electoral results. As with other aspects of the evolution of politics in a context of armed group rule, there is great variation in the ways in which different types of local authorities behave. A closer examination to that variation would be needed in order to understand the implications of these outcomes for the communities.

<sup>19</sup> This data comes from the survey with demobilized fighters conducted in 2005.

<sup>20</sup> James Scott, *The Weapons of the Weak*, Yale University Press, 1985.

### **7.3.2. The Domain of Armed Groups' Rule**

Local orders also vary regarding the spheres of life that the armed group aims to regulate. A first evident difference exists between localities ruled in a minimal way, those ruled in a comprehensive way, and those ruled by indirect rule. Yet, both comprehensive and indirect rulers may choose to extend their regulation over different dimensions of locals' lives. It follows that the domain of rule may differ even if the same type of ruler governs both. The testimonies of civilians living in different areas illustrate this variation:

At first, the Elenos [combatants of the ELN] came in to replace the state. They set up norms; regulated the salaries and jobs at ECOPETROL; they were the owners of the gasoline cartel; they influenced the decisions of the local government; they were invited to all social events; organized the strikes in ECOPETROL, and with that they paralyzed half of the country. (Local inhabitant of the city of Barrancabermeja)

The [FARC] did not try to establish many norms. They asked that people solved their problems by turning to the chief [*Corregidor*], and only take serious matters to the [FARC] commander. They did not establish many norms... although they did have an influence but not on small matters of daily life. (Local inhabitant of a village in Cordoba)

I identify five dimensions of local life over which rebel and paramilitary groups may extend their rule in the areas where they are present in Colombia: the use of violence; the provision or regulation of public goods; private behaviour; civilian labour; and the resolution of private conflicts.

#### **7.3.2.1. The Use of Violence and the Provision of Information to the Enemy**

In a context of civil war, eradicating the use of force by non-combatants within a local territory can serve different ends. Above all, it is a means for defending sovereignty, as it makes the work of different types of challengers more difficult. It also increases social control,

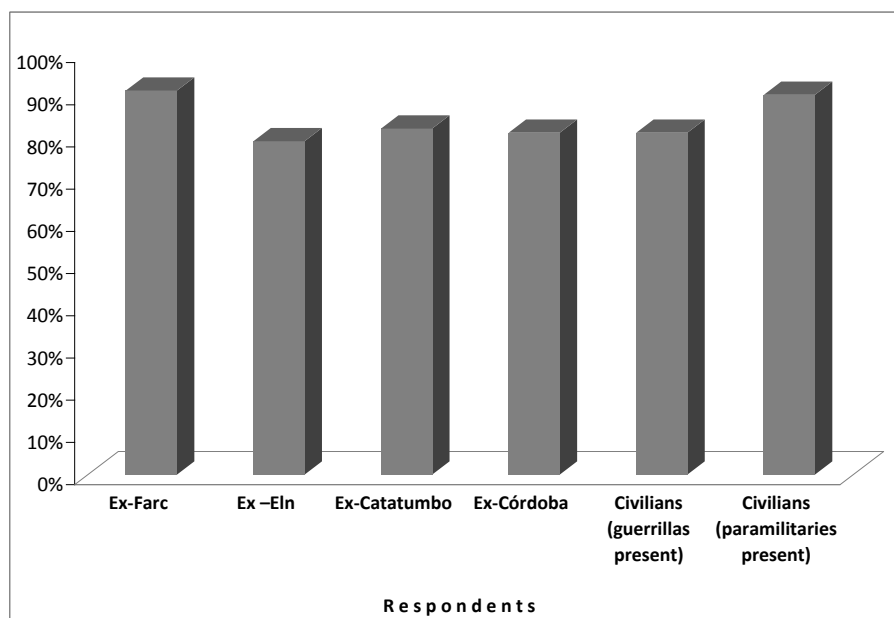


which makes ruling easier. In addition, regulating the use of violence can awaken sympathies: it all depends on *who* is getting killed or harmed. For example, by becoming the prosecutor of violent actors like thieves and rapists, the armed group can win the applause of some locals.<sup>21</sup> In numerous interviews that I conducted in my case-areas, civilians praised the capacity of both paramilitaries and guerrillas for keeping “those people, the criminals” away. Even several of my interviewees who resented the years under paramilitary rule in the town of Tellus, a case area in Cordoba, were quite assertive in their acknowledgement of the group’s capacity to completely stop all delinquency: “You could leave anything on the street, during the entire night, and no one would take it. They knew they would be dead the next morning. Girls could walk knowing they would not be abused. Now, since the demobilization, thieves are making their business again. And several girls have been raped. And nothing happens”.

Responses of both civilians and combatants to the survey suggest that, in fact, armed groups tend to rule over the use of violence almost everywhere they are present. As Graph 1 shows, according to about 85% of the ex-combatants and civilians who responded the surveys, all groups established norms to regulate the use of violence within their territory.

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<sup>21</sup> The “positive” effect of this type of violence on an armed group’s capacity to gain recognition among a local population has been recognized by several authors. See for example Fernando Cubides, Ana Cecilia Olaya and Carlos Miguel Ortiz, *Violencia y el Municipio Colombiano, 1980-1997*, Universidad Nacional de Colombia, 1998, and Michael Taussig, *Law in a Lawless Land: Diary of a Limpieza in Colombia*, New Press, 2003.



**Graph 1:** Persons who report regulation of violence by armed groups at the local level.<sup>22</sup>

### 7.3.2.2. The Provision or Regulation of Public Goods

Armed groups seeking to govern local populations have an interest in promoting the adequate provision of public goods. Both the organizations that seek territorial control as an instrument to power, and those that aim to work for the people during their struggle have an interest in making things work in the local areas where they are present. For, as mentioned earlier, efficient local governance may lead to collaboration and support through different mechanisms, and populations that enjoy better provisions of public goods are arguably in a better situation *cete-*

<sup>22</sup> This data comes from the survey with ex-combatants and civilians' responses to close-ended questions in semi-structured interviews. Ex-combatants responded to the question "Were rules about illegal conducts [by civilians] like stealing or rape established by your group in the locality where you fought?" Civilians responded to the question "Which norms do you remember the group [that was present in your locality] established regarding illegal conducts such as stealing or rape?" This question was asked to civilians about all the groups they reported being present in their localities since the 1970s.

*ris paribus*. There seems to be great variation both in the extent to which armed groups in Colombia are interested in public goods in a given locality, and in the strategies chosen to promote them. Sometimes public goods are regulated in formal ways – that is, through clear and enforced rules – while others they are taken care of via informal procedures.

The FARC, ELN, Catatumbo Bloc, and Cordoba Bloc seem to sporadically engage in both formal and informal regulation depending on the type of public good. While there is no evidence that they engage directly in the construction of schools or hospitals, pressuring local authorities to build them seems to be common in the areas they control. Both sides in the conflict also occasionally help a civilian in need to receive health services. Several interviewees in my case areas in Cordoba reported instances where the FARC helped wounded peasants by bringing in the nurse that worked with the organization; interviewees elsewhere said it was common for FARC commanders to find a vehicle and cash to take ill persons and pregnant women to nearby health centres – even when these facilities were located in areas considered to be controlled by the enemy. The accounts, however, always referred to a few cases, and seldom described these practices as systematic.

Other public goods like the construction and maintenance of roads are directly taken on by armed groups in some areas under their rule. They do this either by bringing in machinery or by “pulling strings” in the local administration. Several interviewees remembered instances when the FARC stole the municipality’s machinery in order to build a road or repair it. Sometimes combatants would “retain” (the FARC’s term for kidnapping) the operator of the machine during the days it took for the road to be built or improved. In some areas where the FARC had direct authority over the members of the council or the local administration, this was not necessary, as they would just order them to do the work. The paramilitaries, on the other hand, relied on their ties with the local administration, and usually managed to get local authorities to devote resources to this type of public expenditure. The importance of this type of public good is related to the direct use combatants make of it: roads are essential for any of the warring sides, especially if they engage in economic activities in the area (including

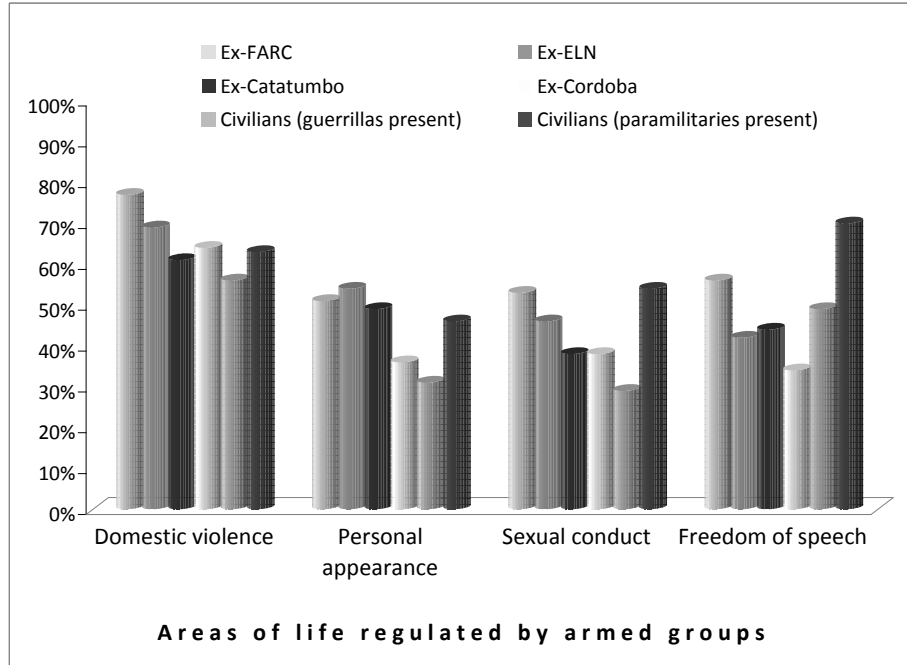
producing and selling illicit drugs). In addition, good roads make life much easier for locals; hence, keeping them in good shape may render sympathies. The level of variation seems to be high, as in some localities people do not remember any single instance of such involvement of an armed group in public infrastructure; yet, in others, everyone portrays combatants as effective guardians of roads and bridges.

A variety of public goods are also protected, or provided, by organizing the community and making collective action compulsory. The maintenance of rural tracks, for example, is mostly organized on the basis of collective work. In the village of Permia, in Córdoba, both the FARC in the 1990s and the paramilitaries in the early 2000s set the rule of “Saturday community work”: every Saturday all members of the community were expected to work on a local public good such as doing maintenance to the aqueduct or cleaning a track.

Another way in which armed groups engage in the provision or regulation of public goods is by protecting natural resources. This practice is particularly widespread among the FARC. According to one of my interviewees in the town of Hadria (Cundinamarca), “at least, what we have all gained with this is the re-emergence of the beautiful woods we used to have here. Both flora and fauna bloomed after years of strong regulations [by the FARC]... No one dared to cut or move a piece of wood without the approval of the commander”.

### **7.3.2.3. Private Behaviour**

Some armed groups limit their rule to public affairs while others attempt to influence locals’ personal behaviour, including public speech, sexual conduct and clothing. Rebel and paramilitary groups in Colombia seem to attempt to influence the moral code of conduct in many areas, although there is variation in its severity, as will be shown later when addressing differences in enforcement. The following graph shows ex-combatants and civilians’ responses to survey questions about whether the different groups regulated each of a set of dimensions of local life.



**Graph 2:** Respondents who report armed groups regulated each dimension of life.<sup>23</sup>

These results suggest that there are both similarities and differences across the localities in which respondents lived, in the case of civilians, and where they operated, in the case of ex-combatants. First, armed groups seem to converge as they all tend to establish at least some norms about private conducts in most, but not all, the areas where they are present. Second, some aspects of private life are more likely to be regulated than others. Domestic violence, for example, seems to be the matter that all armed groups are most interested in. According to several interviews I conducted in my case areas, both the FARC and the paramilitaries were quite vigilant of infidelities, and particularly strict about physical abuse of family members. These rules, however, were not established everywhere.

<sup>23</sup> This data comes from the survey with ex-combatants and responses to close-ended questions with civilians in the semi-structured interviews. Ex-combatants were asked whether the group in which they fought regulated each dimension of local life. Civilians were asked the same about the groups that were present in their localities.

Personal appearance was regulated by both sides of the conflict, according to about half of the respondents. In these cases, long hair and earrings in men were usually forbidden, and transgressors of this rule often faced physical punishments. In some areas it was prohibited that women wore short skirts. The percentage of respondents who say that this aspect of private behaviour was regulated is very similar across ex-combatants and civilians, with the exception of civilians living in areas where the guerrillas were present, who are less likely to report this type of regulation. Sexual conduct is also regulated in several ways. According to my interviews, homosexuality was forbidden and adultery would be punished most of the time, by both sides. Most interviewees also mention regulations for prostitution, although the ways in which it is pursued seem to vary across regions. It is worth noting that civilians and combatants seem to have different perceptions of the extent to which the different groups engaged in ruling these conducts.

Freedom of speech is also guarded by both sides in about half of the areas where they are present. According to different interviewees who lived under the rule of the FARC and, later on, the paramilitaries, sometimes there were no formal or explicit rules over what could be said and discussed and what could not. Yet, people knew there were some topics they should not comment on, and everyone was aware of the danger of sharing political views and opinions that somehow were against the ruling group. While ex-combatants of the FARC portray the organization to which they belonged as being more concerned about freedom of speech than the other groups, civilians describe the paramilitaries as being more repressive in this sense than the guerrilla groups.

These findings have important implications. While for some individuals interacting with an armed group entails paying taxes and obeying some norms on their involvement with other warring sides, others interact with combatants on a daily basis, and have an important part of their private life regulated by the group's norms. This variation is not only illustrative of the great differences in armed groups' behaviours across territories, but also of the diverse *modus vivendi* and quality of life that characterize war zones.

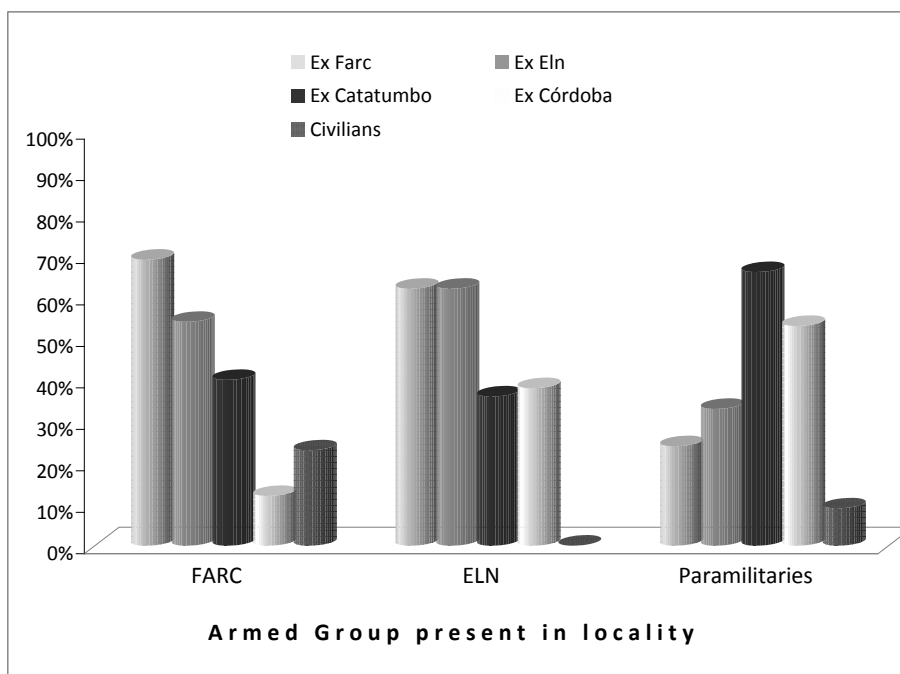
#### **7.3.2.4. Civilian Labour**

Both rebels and paramilitaries display attempts to regulate labour in some of the areas they control. It is common for fishermen not to be allowed by the FARC to fish with nets in high parts of the river so that fishermen down the river are not left without fish. But the regulation is not limited to natural resources. Taxi drivers affiliated with different companies in one of my case areas were only allowed to operate in certain days of the week by the paramilitaries in order to, they said, allow everyone to have their share of the market.

As is well known, armed groups intervene the job market also by taxing certain activities. The FARC in the town of Hadria (Cundinamarca) taxed for years the owners of large extensions of land, merchants, and big companies that sold their products in the area. At some point they started to tax also peasants who owned small farms. According to several interviewees in Tellus (Córdoba), the paramilitaries taxed every worker in town; from those selling coffee in carts on the street to taxi drivers to shop owners, they all had to pay.

#### **7.3.2.5. An Informal System of Conflict Resolution**

A key characteristic of rulers is that they not only monopolize the use of violence but also the right to take revenge. Without achieving this end, an aspiring ruler can hardly bring about order. References to rebel and paramilitary commanders engaged in solving private disputes were recurrent in my fieldwork. Responses from ex-combatants and civilians about the behaviour of the groups that were present in their localities in different areas of the country support this fact, as Graph 3 shows.



**Graph 3:** Respondents who report that the ruling armed group solved private conflicts among locals.<sup>24</sup>

At least some ex-combatants and some civilians recognize the role that each armed group played in solving private conflicts in their localities. Even among those who eventually joined the guerrillas, about a third say that the paramilitaries did engage in this type of practices; likewise, about the same percentage of ex-paramilitaries report that both FARC and ELN intervened in locals' disputes. Civilians are less likely to report this practice, but about a fourth say that the FARC did engage in this type of behaviour. The percentage is much lower among civilians living in areas where paramilitary groups were present. There seems to be wide variation within groups and across localities.

<sup>24</sup> This data comes from the survey with ex-combatants and the survey with civilians. Ex-combatants were asked whether the groups present in the locality where they lived one year prior to joining solved private conflicts among locals. Civilians were asked the same about the groups that were present in their localities.



The types of private conflicts for which these organizations act as a third-party in order to resolve them can be very different in nature. In the interviews I conducted with civilians, local leaders, and former mayors and council members, a wide range of conflicts and arrangements were mentioned as part of the “issues” that the armed group used to handle. According to several interviewees in rural areas, neighbours who had disputes over land borders usually solved these issues by talking to the commander of the ruling group (either the guerrilla or the paramilitary organization). In some cases civilians would talk with the representative of the group in the area (e.g. a militiaman), while sometimes they would directly seek the commander. Most of the time both parts in the dispute would follow the decision of the group as a sentence given by a recognized court.

Conflicts over the distribution of inheritances were also settled by talking to the commander of the ruling group. Once again, the commander’s decision would be taken as the final sentence. The popular name of FARC’s *100th Front* in one of my case areas is illustrative: it was called by many the *100th Court*. In the case of the guerrillas, the commander could also serve as the figure that conducted wedding ceremonies.

### **7.3.3. Rule Enforcement**

If armed groups care not only about formally stating their regulatory system but also about its effectiveness (that is, its actual observance), they need to engage in some form of rule enforcement.<sup>25</sup> Yet, variation in rule enforcement exists along several dimensions across localities where an armed group rules. I identify three key dimensions on which such variation exists: its domain, its severity, and its reliance on some form of “due process”.

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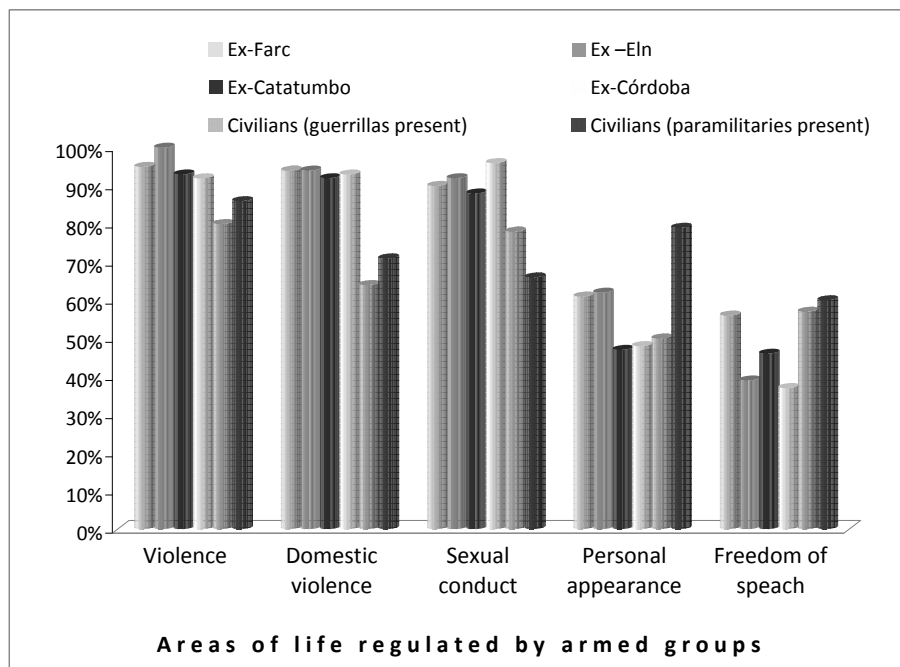
<sup>25</sup> The existence of regulation need not imply that mechanisms for enforcement are put at work. There may be cases in which an armed group officially establishes a rule only to appear as an organization that cares about a particular issue, or in order to use it in its discourse. In this case, enforcement may not be something the group is interested in investing any resources on.

### **7.3.3.1. Domain of Enforcement Mechanisms**

Regarding the domain of enforcement mechanisms, some armed groups intervene to enforce the obedience to all the rules they establish in the locality. For example, a minimal ruler may intervene to punish all unauthorized uses of violence, or the provision of resources to the enemy. Others, however, may only enforce part of their regulation. Graph 4 summarizes civilians' and ex-combatants' perception of whether punishment followed from disobedience to different norms that *were* established by armed groups present in their localities.

The Graph suggests that about the same portion of ex-combatants in all groups think that punishment was likely to be used for each type of transgression. Overall, civilians' responses coincide with those of the ex-combatants' regarding the enforcement of violence; however, civilians perceive enforcement of norms on domestic violence and sexual conduct to be less common than ex-combatants believe. The data also show variation within armed groups and across local territories, especially regarding the punishment of transgressions of norms on personal appearance and freedom of speech. At the same time, however, the results point to a striking convergence of armed organizations in this respect.

The importance that armed groups give to the enforcement of rules that are not directly linked to the military security is illustrative of the weight they give to preserving social order. Clearly, armed groups sometimes care not only about dominating – in military terms – a territory, but also about creating a particular type of order within it. The fact that these attempts can trigger different reactions among civilians adds to the depth of the variation in the way in which local societies live during the war.



**Graph 4:** Respondents who report that armed groups punished disobedience of rules.<sup>26</sup>

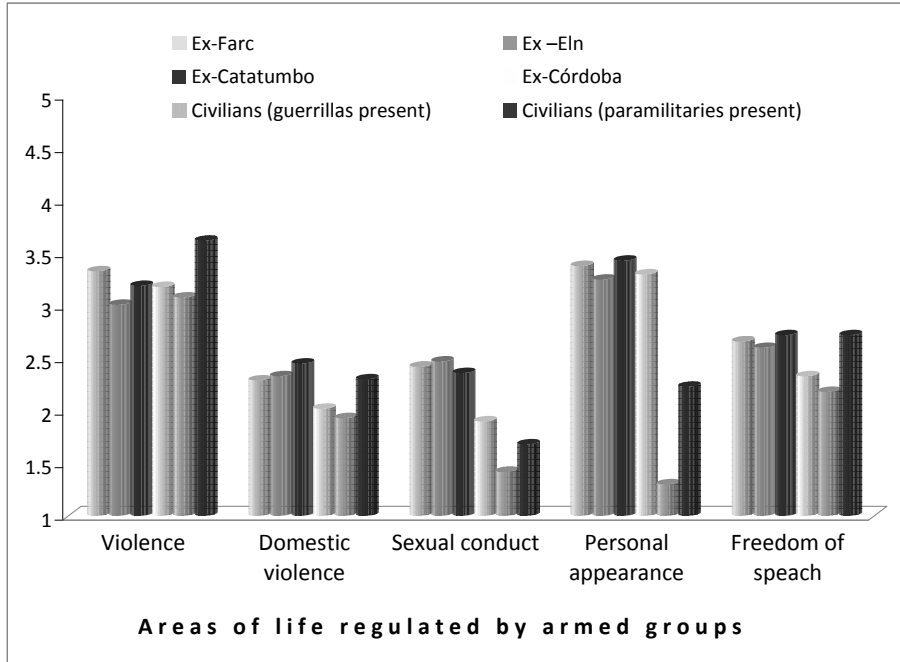
### 7.3.3.2. Severity of Rule Enforcement

Even though armed groups are violent organizations by definition, they do not resort to violence to the same extent, nor under the same circumstances. The forms of violence they use also vary (e.g., assassinations, massacres, torture and displacement). Yet, in terms of rule enforcement, the severity of punishment for the same misconduct seems to converge across guerrilla and paramilitary organizations in Colombia, according to both ex-combatants and civilians. Graph 5 shows an

<sup>26</sup> This data comes from the survey with ex-combatants and the responses to close-ended questions in the semi-structured interviews with civilians. Respondents were asked about the punishment that would follow from disobedience to each type of rule by the armed groups in which they fought (in the case of ex-combatants), or those present in their locality (in the case of civilians). Percentages are calculated on the basis of only those who report such rules being established by the group, not the entire sample of respondents.

index of severity of punishment where 0 means no punishment was used; 1 means there was no punishment but the person would receive a warning; 2 means the person would be punished lightly, for example by being fined or forced to do community work (such as sweeping the town square); 3 means the person would be physically punished (in less severe ways than torture or death, such as with lashes); 4 means the person would be expelled from the area or receive a more intense form of physical punishment (like mutilation); 5 means the person would be killed. The data are based only on responses of those who did say that there was some form of punishment for those who disobeyed each rule.

Interestingly, responses of both ex-combatants and civilians converge for each type of transgression, pointing to similar behaviours across armed organizations. It is worth noting that this result is not an artefact of civilians' and ex-combatants' definition of "severity", since this index is built based on the specific punishments that respondents reported were used, rather than on a subjective assessment of the severity of such punishments. Violent behaviours are, as expected, the conducts that receive the highest sanction; but personal appearance appears to be as serious. This puzzling result may be partially explained by the easiness with which certain physical appearances are taken to be accurate signs of ideological beliefs or behaviour.



**Graph 5:** Severity of punishment for disobedience by armed groups according to ex-combatants and civilians.<sup>27</sup>

While this graph suggests that on average the different armed groups rely on similarly severe punishments for the same type of disobedience, the variation within the groups is large. Table 4 shows the mean and standard deviation of the severity of punishment for each conduct by armed group, according to ex-combatants and civilians that lived in different localities where these groups were present. The data suggest that the same group sets up very different systems of rule enforcement depending on the place.

<sup>27</sup> This data comes from the survey with ex-combatants and semi-structured interviews with civilians. Respondents were asked about the kind of punishment that would follow from disobedience to each type of rule by the armed groups in which they fought (in the case of ex-combatants), or those present in their locality (in the case of civilians).

	Violence	Domestic violence	Sexual conduct	Personal appearance	Freedom of speech
<b>Farc</b>	3.33 (1.31)	2.29 (0.99)	2.42 (0.95)	3.38 (1.34)	2.66 (1.38)
<b>Ex –Eln</b>	3.01 (1.31)	2.33 (0.94)	2.47 (1.17)	3.25 (1.41)	2.6 (1.39)
<b>Ex-Catatumbo</b>	3.19 (1.28)	2.45 (0.93)	2.36 (0.77)	3.43 (1.12)	2.72 (1.28)
<b>Ex-Córdoba</b>	3.18 (1.33)	2.02 (0.82)	1.9 (0.52)	3.3 (1.15)	2.33 (1.14)
<b>Civilians (guerrilla present)</b>	3.08 (1.69)	1.93 (1.38)	1.42 (0.94)	1.3 (0.91)	2.18 (1.61)
<b>Civilians (paramilitaries present)</b>	3.62 (1.57)	2.3 (1.56)	1.68 (1.18)	2.23 (1.53)	1.61 (1.76)

**Table 4:** Severity of punishment for disobedience: means and standard deviations.<sup>28</sup>

### 7.3.3.3. Reliance on “Due Process”

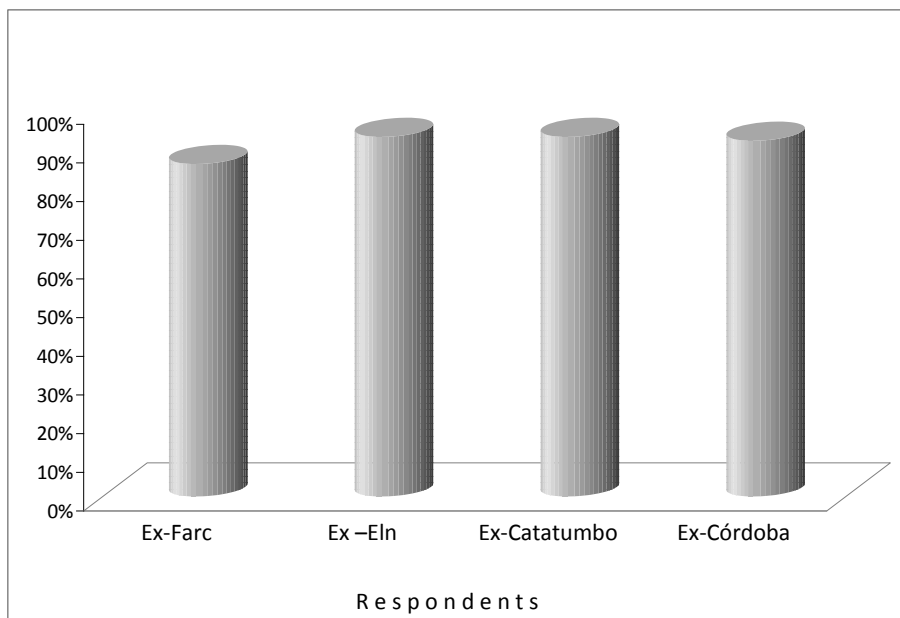
Another aspect of the efficacy of the enforcement mechanisms in a local order is the extent to which it relies on a careful examination of proofs. As Kalyvas has shown,<sup>29</sup> in civil war civilians denounce others to the warring sides quite often. From the perspective of the group, in a context where neighbours, relatives, enemies, and rivals can denounce each other to a ruler who has the capacity to expulse or kill, having procedures for assessing the reliability of denunciations is important. Variation in this regard was particularly stark in my case-areas. Not only were different communities under the rule of one same armed group exposed to different procedures leading to the punishment of a

<sup>28</sup> This data comes from the survey with ex-combatants and semi-structured interviews with civilians (see Graph 5). Means are given first, and standard deviations in parenthesis.

<sup>29</sup> Kalyvas, *The Logic of Violence*.

civilian that was accused of some misconduct; there were also cases where the same group would follow different procedures in the same locality at different times. As with other aspects of the behaviour of the groups, both the stage of the group's conquest of that particular locality, and who the commander in charge was seem to have had an important effect on this variation. Both ex-FARC and ex-paramilitary medium-level commanders that I interviewed said that whether the commander in charge had political training made a key difference. According to them, commanders who understand the importance of the political and social work with the communities would put a big effort in avoiding punishing the wrong person. In the words of a former political commander of the FARC, "[t]hose who are military cadres, who did not receive strong political training, tend to be less aware of the negative implications that such a system of punishment may have".

Graph 6 shows ex-combatants' responses to the question "Would you say that in general an investigation takes place before the group attacks or threatens a civilian who is suspect of a transgression?" According to survey respondents, all groups seem to care about verifying accusations in most of the areas where they are present, although not everywhere. Civilians are thus ruled by clear and strict forms that are usually enforced. According to my interviewees in different areas of the country, once a group believes a person could have collaborated with the enemy, it is very difficult for her to be allowed to stay in the area and not be somehow harassed, or killed, by combatants. Less serious transgressions may be forgiven.



**Graph 6:** An investigation was conducted before attacking or threatening a civilian suspect.<sup>30</sup>

#### **7.3.4. Local Populations' Perception of the Rule Established by Armed Groups**

In the first section of this chapter I mentioned that civilians may react in different ways to the behaviours of armed groups in their territories. Because the use of coercion makes obedience likely, it triggers the belief that every interaction between civilians and combatants is determined by the coercive power of the latter. While it is definitely true that armed groups' use of violence allow them to dominate and coerce civilians, the interaction between them is more complex. Resistance is an option, although only certain local populations are capable of overcoming the organizational challenges and the fear that such response creates. The opposite, endorsement, is also possible when a population finds itself to be better off after the group arrives to its territory, and such perception of improvement leads to positive beliefs about the

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<sup>30</sup> This data comes from the survey with ex-combatants and civilians' responses to close-ended questions in semi-structured interviews.



group, or benign emotions towards it. Endorsement may also follow from genuine synchrony between the group's discourse and the ideology or interests of civilians. Obedience is also possible; it may be an outcome of a mix of motivations, including endorsement, fear, respect, and private interest.

The ways in which local communities responded to the presence of the different warring sides in my case areas differ greatly, even though they were geographically close to each other. In some cases my interviewees described the early arrival of the FARC as a time of peace and social cohesion. A woman of the village of Permia remembered that stage positively: "they were very good to us. They helped us improve the tracks and organize our labour to help each other. They did not abuse us. That started later". Yet, in other neighbouring areas civilians described the rule of this group as a form of dictatorship. A leader of the village of Placo put it in these terms: "At the beginning they tried to rule over everything. They came to our meetings. They told us what we could do, where we could go, and when. We could not let this happen. We had been our own rulers for years". To others, as in the town of Agilis, the FARC were for a long time a military organization that only attacked them sporadically, but never ruled in their territory. To most locals, this group was only a threat of violence.

Similarly, those who interacted with the paramilitaries describe their experiences in very different ways. In the villages of Zama and Librea in Cundinamarca, residents say that the paramilitaries only were present in the area to kill. "They never established rules around here [...] They didn't engage in any form of interaction with us. They only went after those who they thought collaborated with the guerrillas. They killed a lot of people. And when the FARC combatants and their militiamen had either left or been killed, the paramilitaries left too. They stayed in the town, but they didn't come back here [to the fields]". In the town of Tellus in Córdoba, the paramilitaries also started their presence with massacres and killings, which most people resented. However, they soon became the de facto rulers and through time many welcomed them. In particular, several interviewees mention that almost everyone celebrated the end of delinquency: "[With the

paramilitaries], there was zero delinquency. Most locals thanked them for ordering things in this place”.

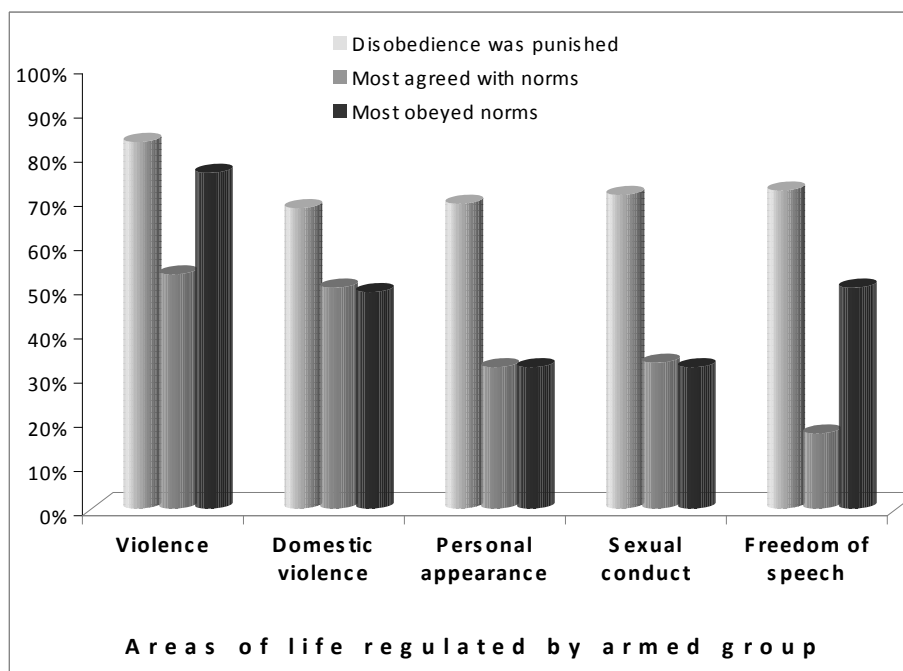
This variation is both a response to the specific strategy that armed groups opt for in a given locality, and the characteristics of the population – in particular its structure of authority. Given the ruling aspirations of armed groups, the quality of existing ruling institutions play a key role in shaping civilians’ perceptions of, and response to, the attempts of these organizations to bring about a new social order. The community’s actual capacity to resist also determines the way in which their interaction with combatants unfolds.<sup>31</sup>

Turning to how civilians respond to specific norms, the links between agreement with the norms, punishment for disobedience, and actual obedience are not straightforward. Graph 7, below, show the results of questions asked to civilians about how often would a group punish disobedience of each of a set of rules; whether they believed most people in the community agreed with those rules; and whether people obeyed those rules most of the time.

The results point to several issues. First, there is variation in the three dimensions across cases, as responses are far from 0% and 100%. Second, the expected correlation between enforcement and obedience, on the one hand, and agreement with the norm and obedience, on the other, is not clear-cut. The most obeyed rules are those regarding violent acts and freedom of speech – the behaviours that are under strict surveillance of armed groups. However, locals seem less likely to follow other norms if they disagree with them, as agreement with the rule co-varies nicely with obedience to rules on personal appearance, sexual conduct and domestic violence, while enforcement is almost constant. The particular configuration of a group’s rule in each local order seems to shape both the extent to, and the reasons why, civilians follow the norms that these organizations set up.

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<sup>31</sup> I propose a theoretical account of this variation elsewhere (Arjona, “Grupos Armados, Comunidades y Órdenes Locales”).



**Graph 7:** Enforcement of, agreement with, and obedience to different types of rules (by type of rule) according to civilians.<sup>32</sup>

Because following a norm may be the outcome of different motivations, similar levels of obedience may underlie very different perceptions of the rules (and the ruler) among the local population. Since an armed group may become the ruler of a particular population through different paths, obedience to its rules may follow from very different motivations. In areas where the group imposed some form of rule without the population agreeing, the relation that civilians may have with the rules they are supposed to follow are qualitatively different from that of locals who endorse the organization and recognize it as a source of authority. Even when the rules are the same, people’s relation with those rules can vary greatly. Exploring this variation is important not only to have a better understanding of how civilians relate

<sup>32</sup> This data comes from the semi-structured interviews with civilians. The graph shows the percentage of respondents who said that each norm was obeyed always or almost always.

with armed groups in these areas, but also in order to explore the transformation of both the institutional apparatus that works during the war, and the implications on civilians' habits, beliefs, and motivations for abiding, changing, or opposing existing norms.

#### **7.4. Conclusion: Implications for Studying War and Post-War Intervention**

The different debates surrounding war settlement and post-conflict intervention involve two lines of research. One, of a normative character, requires us to look at the moral criteria on which an intervention should be designed. The tension between deontological and consequentialist arguments is crucial in this debate since the requirements of principles like peace and justice often go in opposite directions, as several authors in this book stress. The second line of research, of a positive character, entails assessing the actual consequences of alternative interventions and instruments. Both approaches require some diagnosis of the situation of civilians and combatants when a specific model of intervention is to be selected and implemented. On the one hand, in order to identify the requisites for justice we need to have some diagnosis of the phenomena that occurred during the war. On the other, to assess the possible consequences of different interventions, we need to be able to understand the context in which such measures would take place; only then can we attempt to analyze the odds of success and failure of alternative options. Furthermore, in order to identify and respond to the challenges that war-torn societies face, we need to take into account the actual circumstances in which the population finds itself at the end of the war. Without such assessment prioritizing needs and identifying areas for improvement requires high doses of guessing, or imputing to the history of the entire country what we know about some parts of it. Hence, disaggregating the unit of analysis of interventions may be an important step towards a better assessment of, and response to, conflict and post-conflict situations.

In this chapter, I relied on micro-level data on the Colombian case in order to illustrate differences in the manner in which local societies experience the war across the national territory. This evidence suggests that the ways in which life goes on in areas where armed

groups are present often involve clear and well grounded standards of behaviour. Even though the pre-war organization of local societies is disrupted, it is not replaced by anarchy; rather, a new order emerges. By focusing on local governance in Colombian war zones, I showed that this order varies across localities in the allocation of the capacity to rule (that is, the set of actors or institutions that rule civilian affairs in some way); their domain (that is, the spheres of civilians' lives that are regulated); and their system of enforcement. According to both ex-combatants and civilians, the FARC, the ELN, and two paramilitary groups, Catatumbo Bloc and Cordoba Bloc, set up a system of governance in most of the areas where they have a sustained presence. Yet, this system varies across local societies as armed groups can approach their role of rulers in a variety of ways. In spite of this intra-group variation, the patterns are strikingly similar across the four armed organizations. This similarity points to the parallel needs that irregular war brings about the parties involved, and the different contexts in which they strive to meet them. Civilians, on their part, also have different reactions to the rule of armed groups. In particular, they may endorse it, obey it, or oppose it. Furthermore, they display different levels of obedience, as well as different levels of agreement with the norms that these organizations establish. The factors that underlie this variation involve complex mechanisms that entail the transformation of motivations, preferences, and beliefs.

As with any regime, the specific characteristics of these local orders have far-reaching consequences on their inhabitants. They determine the set of forbidden behaviours and individual rights; the actor or agency that they seek for solving their conflicts; the persons and organizations they have to obey; the existence of channels to communicate with those who command them; and the availability of procedures to defend them selves when accused of some misconduct. Even their private life – how they dress, what their sexual choices are – can be subjected to strict regulation. The existence of variation in local order implies that the way in which civilian populations experience the war across the national territory can be immensely different.

I contend that taking this variation into account is not only relevant for our assessment of the situation of civilian populations during

the war; it is also essential for understanding the consequences of war on civilians' behaviour as well as on the organization of local societies in the post-conflict period. Regarding individual behaviour, we tend to focus on victimization – for obvious reasons. While I agree that this is the most important aspect of civilian involvement in the war from a policy perspective, other phenomena that take place during the war can also affect civilians in profound ways that demand attention. I showed that the inhabitants of war zones often live under a regulatory system that establishes rights and obligations, sets punishments for disobedience, and defines the channels of communication between the ruler and the ruled. This experience is important in and of itself as it is a major determinant of people's lives. But it is also important for its consequences. First, civilians make choices during the war that impact phenomena that demand attention, such as enlisting in armed organizations, fleeing or allying with one of the warring sides; if we aim to understand these behaviours, we need to explore the context in which civilians' decisions are made. Second, the particular local order of a given community can have long-lasting consequences on its members. Different kinds of institutions, including state agencies and traditional practices, can be deeply transformed by the regulatory system that operates during the war. If fostering trust on the state, recovering the authority of traditional institutions, or promoting community cohesion are among the challenges that post-war societies face, understanding the ways in which the war transformed social and political organization is a necessary step. Ignoring that war takes a different form across local territories, and that civilians can live under completely different regimes, can lead us to overlook important ways in which the war shapes individuals' beliefs, the norms of their communities, and their relation with different state and non-state institutions.

Given these differences in how local societies are regulated during the war, it is likely that the greatest challenges and opportunities for peace, reconciliation and reconstruction vary from place to place. Identifying priorities requires us to acknowledge that while some areas were physically devastated, in others the infrastructure may be untouched but local institutions were completely eroded. While the principal challenge for reconciliation in one community is the acceptance of ex-combatants among civilians, in another ex-combatants can be

respected and admired, but the displaced persons who want to return are likely to be ostracized. Likewise, even though state agencies can preserve their aura of legitimacy among some populations, in others they may be seen with distrust and lacking authority.

The actual consequences of alternative interventions can also be expected to vary depending on the case. Legal instruments, international interventions, and local policies do not operate in a vacuum. If the context in which such measures operate vary, what works well in some areas of a country may not succeed in others. To be sure, some interventions may operate at the level of the central state, high-level politicians, and the leaders of armed groups. However, there may be reactions at the local level that have the capacity to affect the overall outcome. Amnesty – which is a national-level instrument aimed at achieving peace and reconciliation – can be successful in achieving just that in the areas where the armed groups were seen as saviours, legitimate representatives of the people, or at least benevolent rulers. However, for those who experienced the war in an area where an armed group imposed a new local order based on coercion alone, amnestying ex-combatants can fuel hate, indignation, and a negative attitude towards the peace process. Even if amnesty is chosen based on principles and expectations about its aggregate effects, acknowledging that it may have pervasive effects on some local populations can be fruitful. On the one hand, it can allow us to better understand local-level reactions like riots, public demonstrations against the return of ex-combatants to a given location, or sabotages to local policies oriented towards the reintegration of former fighters. On the other hand, it may allow governments to identify key areas of the country where it may be important to rely on additional interventions for fostering peace and reconciliation. The same applies to the prosecution of the leaders of these organizations. While in some areas victims may see in trials and punishments the national recognition of their suffering and the arrival of justice, inhabitants of localities that endorsed the group and welcomed its rule may oppose them. It is not uncommon to find civilians with deep feelings of gratitude and reciprocity towards both guerrillas and paramilitaries, even if for each of them one could count hundreds of victims that cry for justice. While prosecution, punishment, and the demand of truth should not be stopped or mitigated

due to the existence of areas of the country that do not approve of them, acknowledging the reactions these instruments may unravel is important within a post-conflict reconstruction agenda.

In the case of legal and policy instruments that do imply a direct intervention in local communities as opposed to at the level of the country, the importance of the existence of diverse local orders is more direct: the outcome is likely to depend on the local circumstances under which they are implemented. For example, promoting the return of ex-combatants to their hometowns requires a solid understanding of the different contexts in which such policy would operate even within the same region. The outcome can vary depending not only on the level of victimization by that group, but also on the type of relations that emerged between civilians and combatants during the war. Rebuilding the rule of law can also require different measures depending on the case. For example, areas where an armed group co-opted public institutions and put them to work for them may require a complex process for legitimizing the state again, and building trust on its institutions. In these areas people may feel incapable of even denouncing to state authorities different kinds of victimization and irregularities, let alone participate in the democratic processes. This case would be very different from one where public servants preserved their authority, and whose legitimacy was not put into question by locals. For this reason, local policies and programs that somehow depend on local governments for their instrumentalization can produce outstanding dissimilar results depending on the status of the local government in the locality. The effect may be more pronounced in decentralized systems than in centralized ones, as in the former case most policies would require the direct involvement of local authorities.

To conclude, disaggregating the unit of analysis seems to be a necessary step towards a deeper understanding of the contexts in which alternative interventions operate both during and after the war. By focusing on the “country” we ignore the multiplicity of local orders that emerge within any civil war. This variation in the way in which the war unfolds across the national territory is relevant for some of the key questions on promoting conflict termination and post-conflict reconstruction. This line of research certainly demands a sound theoretical



analysis of the implications of different local orders on individual behaviour and institutional development, as well as a systematic treatment of empirical evidence. The avenues for future research are vast. And the implications of finding answers promise to be far-reaching.



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## Revenge or Reconciliation: Theory and Method of Emotions in the Context of Colombia's Peace Process

Roger Petersen and Sarah Zukerman Daly\*

### 8.1. Introduction

This chapter seeks to address a few common sense propositions relating to societies seeking post-violence reconciliation:

- First, human beings naturally and strongly react if they become victims of violence. This reaction may take many forms, but most essentially, individuals experience the emotion of anger.
- Second, when anger dominates an individual's life, cognitive processes become distorted and, perhaps most crucially, preferences change and the individual may become obsessed with vengeance.
- Third, communities and societies filled with individuals saturated with anger and the desire for revenge will find it difficult to achieve "reconciliation". The term reconciliation needs to take on different meanings in different societies. Reconciliation will mean something different in South Africa's post-apartheid society than it will in Colombia. However, in all cases a minimum requirement for reconciliation is that individuals do not wish to commit violence against their neighbours or continually punish

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former opponents. States emerging from violence require integration of former combatants, a strong sense of the rule of law, government legitimacy and citizen participation in government institutions. If a substantial proportion of the population is driven by anger and vengeance, all of these goals will be difficult to achieve.

Given these three points, a few conclusions follow. At a fundamental level, reconciliation requires the diminishment of anger. To a considerable extent, justice is related to the emotion of anger and justice is achieved when victims' anger at perpetrators' crimes greatly recedes. When anger recedes to a sufficiently low level, society as a whole, as well as the victims, can get on with a "normal" life. Some peace activists, political leaders and scholars concentrate on creating positive psychological phenomena such as hope and forgiveness.<sup>1</sup> Certainly, these are worthy goals, but the complexity of such phenomena is daunting and often impossible to achieve in the short and medium term. In the beginning stages of a process of reconciliation it may be more useful and realistic to strive for the absence of negative phenomena rather than the creation of positive ones. It may be better to strive for the absence of anger, or in other terms, indifference.

Across the world today, many processes of transitional justice are unfolding. In most of these cases, the actors employ concepts of emotion. However, the assumptions behind these conceptions are seldom made explicit nor are emotions treated as causal mechanisms. In response, this article defines emotions, particularly the emotion of anger, and specifies their effects. It then incorporates these well-defined emotional causal mechanisms into an analysis of the reconciliation process in Colombia. Currently, there are implicit assumptions about how emotions affect the implementation of punishment, reparations, and truth within the application of Colombia's Justice and Peace Law. Here, we make those assumptions explicit, discuss how they can be used to formulate hypotheses, and propose a research design for testing the hypotheses underpinning the Law.

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<sup>1</sup> See, for example, Desmond Tutu, *No Future without Forgiveness*, Doubleday, New York, 1999.

## 8.2. A Brief Description of the Colombian Situation

Over the past four decades, the Colombian conflict has touched every region of the country. In the past 20 years alone, violence has taken the lives of at least 70,000 people, internally-displaced 3.5 million, and tortured, “disappeared”, and kidnapped tens of thousands.<sup>2</sup> This violence has been committed by a variety of groups, not only by guerrillas, urban militias, criminals, and narco-traffickers, but also paramilitary groups with at least tacit linkages to the military. Between 1997-2005, the paramilitaries alone killed 9,354 individuals, tortured 990, disappeared 1,694 and displaced a large fraction of the internally displaced persons.<sup>3</sup>

These national level numbers are staggering, but they do not provide a sense of the regional and local realities of violence. Vicious cycles of violence are clearly subject to strong regional variation in Colombia. This variation reflects differences in the armed groups’ governance strategies and their degree of territorial control. As Arjona describes, in Ovejas, paramilitaries maintained order through massacres and terror while in Cereté, the ELN established order through peaceful governance.<sup>4</sup> We thus observe significant differences in levels of killing across space and time, with violence following the migration of the paramilitaries and guerrillas across Colombia’s territory.

Repeated violence across a long period of time develops its own local life. This was especially true of an earlier period of Colombian history, referred to as “*La Violencia*” (1948-1958), a period in which Conservatives and Liberals killed each other in deadly, and often local, spirals. As Robin Kirk summarizes,

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<sup>2</sup> CINEP, *Deuda con la Humanidad: Paramilitares del Estado en Colombia 1988-2003*, CINEP, Bogotá, 2004, and CINEP, *Revista Noche y Niebla*, No. 30 (2004) and No. 31 (2005). Amnesty International, “Colombia: The Paramilitaries in Medellín: Demobilization or Legalization?” (2005).

<sup>3</sup> *Ibid.*

<sup>4</sup> Ana María Arjona, “Legal Orders in Civil Wars: a Local-Level Perspective”, presentation for the Conference *Peace and Accountability in Transitions from Armed Conflict*, 15-16 June 2007, Bogotá, Colombia.

These were not crimes between strangers, but acts of astonishing violence between people who had known each other their whole lives. Called “*La Violencia*”, the struggle that rapidly consumed Colombia, was personal. Grand political fortunes were at stake, but so too were simmering land disputes, municipal rivalries, indiscretions, ambitions, and the affairs of the heart and gonads. Most of the killers were town men or of peasant stock, immersed in a world little different than that of their parents, grandparents, or even great-grandparents. So were the victims. The people who killed often knew their victims well, had known them since childhood, and had even been play-mates, friends, family or neighbors.

Once blood had been shed, it was answered with more blood, in a spiral that devoured whole families. Vengeance is a theme that runs deep and true through Colombian history, the “scorpion in the breast”, to quote Colombian novelist Jose Eustacio Rivera, that “stabs at any instant with its stinger”. People killed to pay back other killings, to even the score left by Gaitan’s death, the War of a Thousand Days a half century earlier, the loss of land, of pride, of control. Often, killers left notes claiming responsibility for atrocities, ensuring that survivors were clear on their authorship.<sup>5</sup>

These local dynamics reappear in recent examples and data. León 2005 tells the story of Barrancabermeja, a typical Colombian

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<sup>5</sup> Robin Kirk, *More Terrible than Death: Massacres, Drugs, and America’s War in Colombia*, Public Affairs, New York, 2003, p. 25. In this work, Kirk argues passionately against seeing Colombia’s violence as resulting from a specific national “culture of violence”. Our position is that anger and the desire for revenge is a natural part of human nature and is found across a wide set of cases and time. For instance, the Law of Talion and innumerable instances of revenge in literature and religion (Medea, Oresteia, Hamlet, Tess, Cain’s killing of Abel, God’s expulsion of Adam and Eve, “an eye for an eye”) and in politics (in Corsica, the Balkans, Sudan, feudal Japan and the southern United States) attest to the power and universality of the desire for vengeance. See, for example, Roger V. Gould, “Revenge as Sanction and Solidarity Display: An Analysis of Vendettas in Nineteenth-Century Corsica”, *American Sociological Review* 65(5): 682-704.

town that has suffered waves of killing and counter-killing.<sup>6</sup> First it became an “incubator” of the ELN guerrillas in the 1980s that infiltrated the lower-class neighbourhoods, local politics, and the unions. In response to this “dangerous” symbiotic relationship between the ELN and the local population came brutal police repression at levels incommensurate to the scale of the strikes and protests. Indiscriminate repression in turn drove angry civilians into the arms of the ELN and FARC who consolidated control over the region. Then, in 2001, the paramilitaries stormed Barranca, killing hundreds as they seized control over the territory and punished, in waves of reprisals, all civilians suspected of sympathizing with the guerrillas.<sup>7</sup>

In each round of offensives, there are fatalities and displacement that generate a new population of victims experiencing the emotion of anger. Some of these are impelled to take their desire for revenge and justice into their own hands. Figures can also be broken down by localities or groups. In Medellín, 25% of those joining the paramilitary *Bloque Cacique Nutibara* did so for reasons of personal revenge related to the death of a loved one. Another 25% joined due to external threats. Only 23% joined for economic reasons.<sup>8</sup>

Cognizant of the need to break these vicious cycles of killing, the Colombian government has embarked on a process of demobilization and reconciliation. This process is founded on law number 975, better known as the Justice and Peace Law. The law calls for a three-pronged process of truth, reparations, and punishment. On truth, individuals must make a full and honest confession of their actions in order to receive the full benefits and leniency of the law. On reparations, a newly-created court establishes both monetary and symbolic compensation. Furthermore, this court calls both individuals and collectives to account. For example, the Court ruled that reparations to victims must not be limited to the illicit assets held by ex-paramilitaries; all mem-

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<sup>6</sup> Juanita León, *País de Plomo: Crónicas de Guerra*, Aguilar, Bogotá, 2005.

<sup>7</sup> 403 homicides were reported in Barranca in 2001.

<sup>8</sup> Gustavo Villegas, Director of the Peace and Reconciliation Program, Office of the Mayor, Medellín, in untitled chapter in Cynthia J. Arnson, *The Peace Process in Colombia with the Autodefensas Unidas de Colombia-AUC*, Woodrow Wilson International Center for Scholars, Washington, D.C., 2005, pp. 31-32.

bers of the same paramilitary bloc (unit) are to be held responsible for crimes committed by members of that bloc and will be liable for reparations.

While truth and reparations are highly significant innovations in this reconciliation process, punishment is central. First, it represents a complete reversal of past policy. In the past, combatant leaders were enticed into laying down their arms with offers of amnesty. The Betancur administration set a norm when it offered unconditional amnesty and pardon to guerrillas in 1982. In the proceeding years, the norm in Colombia became a cycle of conflict followed by amnesty, then reinsertion, then conflict again.<sup>9</sup> Today, Colombian political leaders emphasize that there can be no impunity.<sup>10</sup> Reconciliation demands punishment. Colombian leaders have tied their hands on this issue by allying with international human rights organizations. Michael Fruhling, the Director of the United Nations Office of the High Commissioner for Human Rights in Bogotá, writes,

In order to overcome an internal armed conflict like the one in Colombia, impunity must not be reproduced or accepted. Impunity has been and still is one of the biggest problems Colombia faces, and undermines and distorts the very principles of a democratic state aspiring to the rule of law.<sup>11</sup>

Why have Colombians come around to the position that punishment is necessary to break cycles of violence? While some of the an-

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<sup>9</sup> For an overview of negotiations, see Marc Chernick, "Negotiating Peace and Multiple Forms of Violence: The Protracted Search for a Settlement to the Armed Conflicts in Colombia", in Cynthia J. Arnson, ed., *Comparative Peace Processes in Latin America*, Stanford University Press, 1999. Law 35, operative 1981-1986, was the law of "olvido y perdón en pro de la paz" (Law of forgetting and forgiveness in favour of peace).

<sup>10</sup> In practice, many criticize the Justice and Peace Law as amnesty. See Fédération Internationale des Ligues des Droits de l'Homme (FIDH), "Colombia: La Desmovilización Paramilitar, En los Caminos de la Corte Penal Internacional," 481 (2007).

<sup>11</sup> Michael Fruhling, Director, Office of the United Nations High Commissioner for Human Rights, Bogotá, in Cynthia J. Arnson, *The Peace Process in Colombia with the Autodefensas Unidas de Colombia-AUC*, p. 69.



swer has to do with creating the conditions for future deterrence, the impulse toward punishment seems more based on an intuitive understanding that punishment, the diminishment of anger, and justice are all inextricably linked. The following sections attempt to draw out this intuition by unpacking the roles of emotion, anger and punishment.

### 8.3. Defining Emotion in General Terms<sup>12</sup>

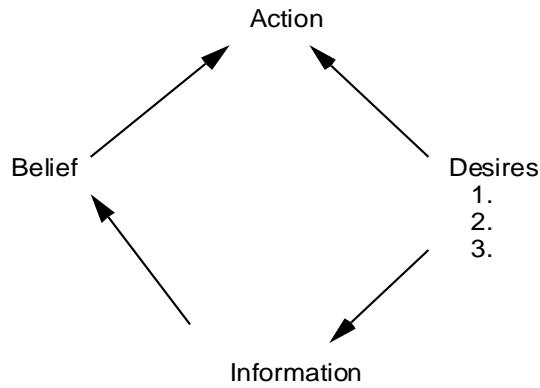
Emotions are commonly defined and differentiated by five characteristics: arousal, expression, feeling, cognitive antecedent and action tendency. The latter two, cognitive antecedent (belief) and action tendency (an urge toward a specific type of action), are most relevant here. To oversimplify, emotions often proceed from cognitions or beliefs about events or objects. Following many socially oriented theorists, emotion can be conceptualized as “thought that becomes embodied because of the intensity with which it is laced with personal self-relevancy”.<sup>13</sup> As Ortony *et al.* write: “Our claims about the structure of individual emotions are always along the lines that if an individual conceptualizes a situation in a certain kind of way, then the potential for a particular type of emotion exists”.<sup>14</sup>

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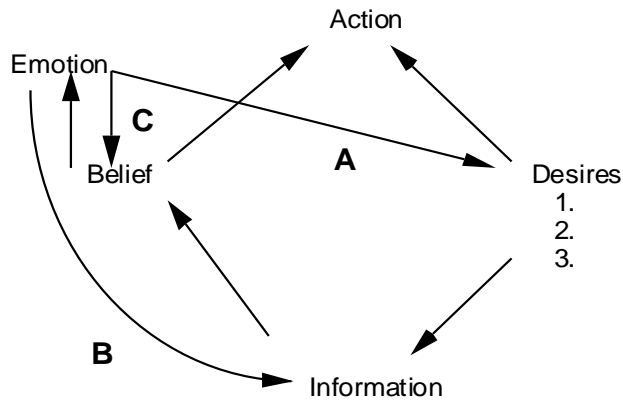
<sup>12</sup> Much of this section is taken from Roger Petersen, “Justicia, Rabia, Castigo y Reconciliación”, in Freddy Cante y Luisa Ortiz, *Umbrales de Reconciliación, Perspectivas de Acción Política Noviolenta*, Universidad del Rosario, Bogotá, 2006.

<sup>13</sup> This quote is from the discussion of emotion and cognition found in David D. Franks and Viktor Gecas, “Current Issues in Emotion Studies”, in David D. Franks and Viktor Gecas, eds., *Social Perspectives on Emotion: A Research Annual*, JAI Press, Greenwich, CT, 1992, p. 8. Claire Armon-Jones points out that while emotion is dependent upon cognition, cognitions do not constitute emotion because the same belief could produce two different emotions. See Claire Armon-Jones, “The Thesis of Constructionism”, in Rom Harre, ed., *The Social Construction of Emotions*, Basil Blackwell, New York, 1986, pp. 41-42.

<sup>14</sup> This statement mirrors that of Ortony, Clore, and Collins, *The Cognitive Structure of Emotions*, Cambridge University Press, 1988, p. 2.



**Figure 1:** Action Cycle with No Reference to Emotion.



**Figure 2:** Action Cycle Illustrating Three Possible Effects of Emotion.

In Figure 1, desires lead to information collection that in turn leads to beliefs and ultimately to action. In Figure 2, belief also leads to emotion. For example, a belief about threats can lead to the emotion of fear. A belief about status inconsistency can lead to the emotion of resentment. A belief about the lack of worth of an object or individual can lead to the emotion of contempt.

Three general effects of emotion may follow, marked as A, B, and C effects in Figure 2. First, and most fundamentally, emotions are mechanisms that heighten the saliency of a particular concern. They act as a “switch” among a set of basic desires (A effect). Individuals may value safety, money, vengeance and other goals, but emotion

compels the individual to act on one of these desires above all others.<sup>15</sup> This effect may shape preferences lexicographically or it may operate by shaping the indifference curves among specific preferences.<sup>16</sup> Emotion creates an urgency to act on a particular desire; the value of future pay-offs on other preferences is discounted; particular issues become obsessions.

Second, once in place emotions can produce a feedback effect on information collection (B effect). Emotions lead to seeking of emotion-congruent information. For example, individuals under the influence of fear may come to obsess about the chances of catastrophe. They may concentrate only on information stressing danger and ignore information about the lack of threat. In turn, distorted information may produce skewed beliefs.

Third, emotions can directly influence belief formation (C effect).<sup>17</sup> Emotions can be seen as “internal evidence” and beliefs will be changed to conform to this evidence. Even with accurate and undistorted information, emotion can affect beliefs. The same individual with the same information may develop one belief under the sway of one emotion and a different belief under the influence of a different emotion.<sup>18</sup> Furthermore, the style of belief formation may change under the grip of emotion. As William Riker has pointed out, rational individuals may operate according to several different sorts of strate-

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<sup>15</sup> The implications of this short paragraph are sweeping, especially in terms of the theoretical debates about the relationship between emotion and rationality. The most influential work on the instrumental value of emotion in selecting among desires is probably Antonio Damasio’s *Descartes’ Error: Emotion, Reason, and the Human Brain*, Quill, New York, 1994.

<sup>16</sup> See Jon Elster, “Emotions and Economic Theory”, *Journal of Economic Literature* 36 (1998).

<sup>17</sup> For a discussion of the ways in which emotions affect beliefs, see the essays in Nico H Frijda, Antony S.R. Manstead, and Sacha Bem, eds. *Emotions and Beliefs: How Feelings Influence Thoughts*, Cambridge University Press, 2000.

<sup>18</sup> Also, the complete lack of emotion certainly affects information and belief formation. See the work of Damasio and others with brain-damaged patients who have lost their capacity for emotion.

gies (“sincere”, “avoid the worst”, “average value”, “sophisticated”).<sup>19</sup> For example, it is likely that emotions such as fear can influence a switch in method of belief formation, perhaps to an “avoid the worst” strategy.

#### **8.4. Specific Emotions**

Through a combination of A, B, and C effects, specific emotions compel individuals toward specific actions (action tendency). Emotions relevant to violent conflict can be defined according to cognitive antecedent and action tendency:

*Contempt:* cognition that a group is inherently defective; action tendency toward avoidance.

*Hatred:* cognition that an object or group is both inherently defective and dangerous; action tendency to physically eliminate the presence of that group.

*Resentment:* cognition that one’s group is located in an unwarranted subordinate position on a status hierarchy; the action tendency is to take actions to reduce the status position of groups in a superior status position.

*Guilt:* cognition that one has performed a bad action; the action tendency is to seek atonement.

*Shame:* cognition that one’s own character is defective; the action tendency is toward shrinking away or isolation.

*Indignation:* cognition that an actor has committed a blameworthy action against someone else. The action tendency is to shun that actor.

While emotions can be defined by their cognitive antecedents and action tendencies, they can be further defined by whether the cognition is based on an event or situation or focused on an object. The

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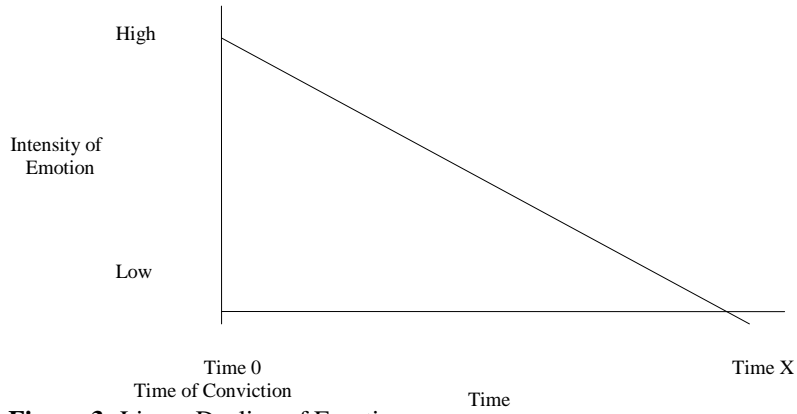
<sup>19</sup> William H. Riker, *The Art of Political Manipulation*, Yale University Press, New Haven, 1986, p. 26.

key point here is that emotions based on events are more likely to have a half-life than those based on the qualities of an object. That is, event-based emotions are likely to fade with time. For example, I may experience indignation when I see a friend commit a blameworthy action against another friend. Under the sway of indignation, I may avoid contact with the perpetrator for a time, but if he or she is a friend the emotion may fade over time and I may feel inclined to renew the relationship. On the other hand, I may come to hate an acquaintance. I may believe that there is something inherently evil about this person. In this case, it is the nature of the person at the root of the action rather than simply an action of the person. Hatred is unlikely to fade with time. Even after a period of years, the cognition about the person's defective nature remains, as does the accompanying emotion.<sup>20</sup>

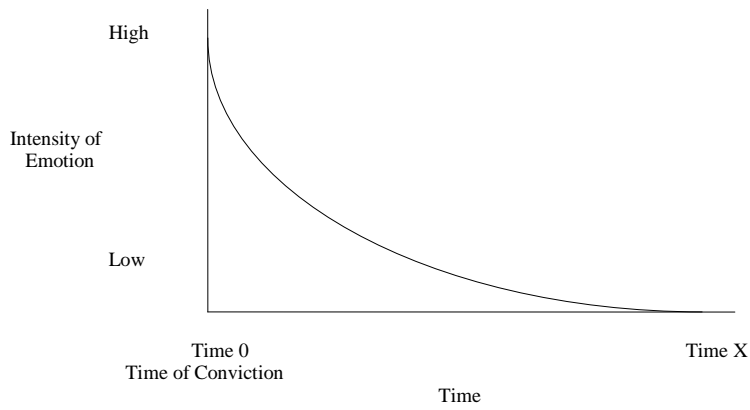
How might emotions fade over time? It is possible to draw curves representing possible half-life functions of anger. Currently, social scientists possess little research that allows us to draw such functions; however, some conjectures are possible. Figures 3-5 represent different emotion curves. The vertical axis represents the intensity of the emotion and the horizontal axis represents time. In Figure 3, the intensity of the emotion declines in a linear fashion over time. Figure 4 illustrates a situation of exponential decay in which the emotion is initially high but then decays rapidly. Figure 5 represents an inverse exponential relationship in which anger remains high for a long period and then declines at increasing rates.

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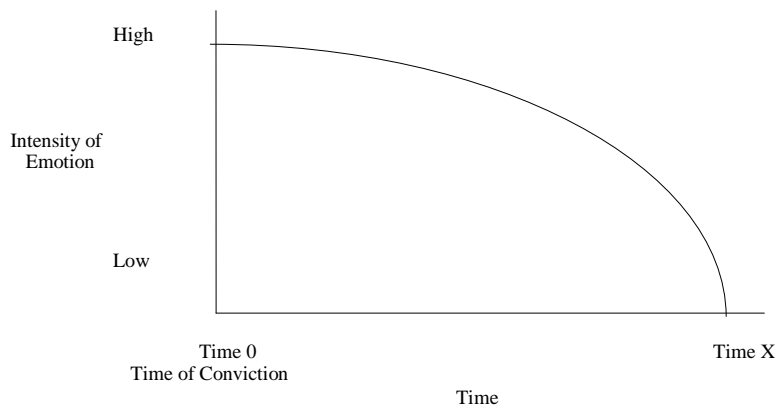
<sup>20</sup> For the emotions already discussed, fear and resentment are event/situation-based while hatred and contempt are object-based. Guilt concerns one's own bad action while shame involves a cognition of one's own inherently bad quality.



**Figure 3:** Linear Decline of Emotion.



**Figure 4:** Exponential Decay of Emotion.



**Figure 5:** Inverse Exponential Decay of Emotion.

## 8.5. The Emotion of Anger

The focus in this chapter is on anger. What is the cognitive antecedent and action tendency of this emotion?

*Anger:* cognition that an individual or group has committed a bad action against one's self or group; action tendency toward punishing that group.

Along the lines of Figure 2, the emotion of anger is further defined by specific A, B, and C effects. On A effects, anger heightens desire for punishment against a specific actor. Under the influence of anger, individuals become "intuitive prosecutors".<sup>21</sup> That is, individuals tend to specify a perpetrator and then seek retribution. For B effects, under anger, information is distorted in predictable ways. The angry person lowers the threshold for attributing harmful intent. They blame humans, not the situation.<sup>22</sup> Angry subjects also tend to engage more in stereotyping.<sup>23</sup> Once under the influence of anger, individuals "perceive new events and objects in ways that are consistent with the original cognitive-appraisal dimensions of the emotion".<sup>24</sup> Importantly, concerning C effects, anger shapes the way individuals form beliefs. Under the influence of anger, individuals lower risk estimates and are more willing to engage in risky behaviour.<sup>25</sup> In sum, anger heightens

<sup>21</sup> J.H. Goldberg, J.S. Lerner, and P.E. Tetlock, "Rage and Reason: The Psychology of the Intuitive Prosecutor", *European Journal of Social Psychology*, 29 (1999).

<sup>22</sup> D. Keltner, P. Ellsworth, K. Edwards, "Beyond Simple Pessimism: Effects of Sadness and Anger on Social Perception", *Journal of Personality and Social Psychology*, 64 (1993). Keltner, Ellsworth and Edwards studied angry subjects compared to sad subjects asking both groups to interpret agency in an ambiguous event. Sad subjects assigned blame to the situation, angry ones to the actors.

<sup>23</sup> G. Bodenhausen, L. Sheperd, G. Kramer, "Negative Affect and Social Judgment – the Differential Impact of Anger and Sadness", *European Journal of Social Psychology* 24 (1994).

<sup>24</sup> J.S. Lerner and D. Keltner, "Beyond Valence: Toward a Model of Emotion-Specific Influences on Judgment and Choice", *Cognition and Emotion* 14 (2000).

<sup>25</sup> J.S. Lerner and D. Keltner, "Fear, Anger, and Risk", *Journal of Personality and Social Psychology* 81 (2001); Gallagher and Clore, "Effects of Fear and Anger on Judgments of Risk and Evaluations of Blame", paper presented at the Midwestern Psychological Association (May 1985); H. Mano, "Risk-taking, Framing Effects, and Affect", *Organizational Behavior and Human Decision Processes* (1994); J.

desire for punishment against a specific actor, creates a downgrading of risk, increases prejudice and blame, as well as selective memory.<sup>26</sup>

Given these features, it is logical to assume that anger will be problematic for reconciliation in Colombia. Killings and massacres undoubtedly produce the cognition that an individual has committed a bad action against one's group. According to the theory of emotion outlined above, there should be an action tendency, if not an obsession, to engage in punishment. Under anger, individuals may engage in stereotyping and blame larger groups rather than individuals. Given the need to punish someone, anger could be predicted to drive punitive behaviour against targets whose guilt is unclear. Anger may impel individuals to consider revenge and, through the effect of lowering risk estimates, anger may propel individuals to take matters into their own hands. Crucially, under the spell of anger, punishment-driven individuals will not be able to let go of the past. In short, high levels of anger are expected to be a severe problem for reconciliation, hence the need for a justice that can reduce anger.

As defined here, anger is an event-based emotion. As an event-based emotion, it is likely to have a half-life, that is, it is likely to fade over time. Anger may erode at the rate represented by Figure 5. This figure suggests that the emotional intensity of anger remains high for many years and then declines at an accelerating rate. The corresponding interpretation is that individuals are angry about killings and crimes for several years but then come to a realization, either consciously or unconsciously, that life must go on, that it is time to "forget and/or forgive". Whether the emotion of anger really operates in this way is an empirical question that is addressed in later sections.

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S. Lerner, R. M. Gonzalez, D. A. Small, B. Fischhoff, "Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment", *Psychological Science* 14 (2003). Lerner *et al.* also found significant gender differences with men more prone to anger and women more likely to experience fear.

<sup>26</sup> John Newhagen, "Anger, Fear and Disgust: Effects on Approach-avoidance and Memory", *Journal of Broadcasting and Electronic Media* 42 (1998). Newhagen found that images producing anger were remembered better than those inducing fear, which in turn were remembered better than those creating disgust.



### 8.6. Punishment as the Mitigation of Anger: General Features

In Colombia, the state punishes perpetrators on behalf of victims; the state becomes avenger. For victims, vengeance serves several purposes. First, violence creates an inequality between victim and perpetrator. The state's vengeance acts to equalize this unbalanced power relationship. The victim is no longer the inferior one, the one to whom things can be done, the helpless and the object of someone's arbitrary action. Vengeance also creates a sense of one's power and control. Closely linked to power equalization is the restoration of threatened or damaged social prestige or self-esteem. Atrocities often attack a victim's very sense of personal value and identity and vengeance enables the victim to reassert him/herself. One's identity, in some cases, is so intimately linked to the esteem of a group that offences against the group will also evoke strong desires for revenge and will give revenge much of its emotional force.<sup>27</sup> Revenge also takes away the prospect of the perpetrator leading a happy life while one suffers. So the victim, through vengeance, accrues the benefit of taking away the offender's gains. The victim gets "even in suffering". Last, for family/friends of victims, revenge is a means to make their close-ones' deaths meaningful, to keep faith with the dead, and to honour their memory. Revenge further serves to assign responsibility and thereby "relieve the moral ambiguity and guilt survivors often feel". Finally, victims also use revenge to externalize their grief and bring closure.<sup>28</sup>

The state's policy of punishment can be seen in terms of a process connected to Figure 2. In a first cycle, atrocities and violence create the cognition of anger: an individual or group has committed a bad action against one's self or group. The resulting emotion of anger

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<sup>27</sup> See Nico Frijda, "The Lex Talionis: On Vengeance", in *Emotions: Essays on Emotion Theory*, Stephanie van Goozen, Nanne van de Poll, and Joe A. Sergeant (eds.), Lawrence Erlbaum, Hillsdale NJ, 1994; Henri Tajfel and John C. Turner, "An Integrative Theory of Intergroup Conflict" in S. Worchel and W.G. Austin (eds.), *The Social Psychology of Intergroup Relations*, Brooks-Cole, Monterey, CA, 1979, pp. 33-37.

<sup>28</sup> Brandon Hamber and Richard A. Wilson, "Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies", *Journal of Human Rights* 1 (2002).

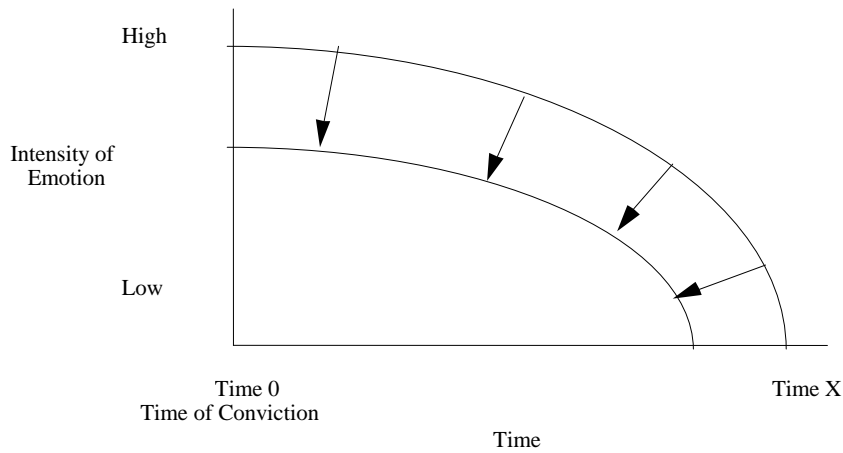
greatly elevates a desire for retaliation, shapes information collection, and belief formation. In effect, the state's actions create another turn of the cycle and add new information and beliefs. After a conviction of the perpetrators, the victim now holds the belief that an individual or group has committed a bad action against one's self or group and that the state has put the perpetrator in prison.

This new set of cognitions produces a lower intensity of the emotion of anger and its A, B and C effects. In turn, the victim engages less in blaming and stereotyping. Victims are more likely to accurately assess the risks involved in retaliation and more soberly consider the costs of taking matters into their own hands. Victims may become less obsessed with the past and more future oriented. In short, punishment and the passage of time create a diminishment of anger.

The nature of the erosion of the emotion is uncertain but Figures 3-5 suggest some possibilities. For instance, punishment may change the values on the vertical axis. See Figure 6 and assume time 0 represents the date of conviction of the perpetrator. Knowing that the perpetrator will certainly be punished, the victim's anger drops immediately. Then the intensity of the emotion may decline according to the same function. The overall result, in this conception, is both a lower overall level of anger and a shorter lifespan of the emotion.

A second possible effect of punishment would be shaping the horizontal axis, or the amount of time needed for the decay of anger. Time erodes anger. But how much time? If the perpetrator is punished, then anger may fade in five years rather than ten. Then the curve might look like Figure 7 in the appendix. While the original intensity might remain high even at the time of conviction, the rate of decay accelerates.

Third, time of decay might remain the same, but punishment might change the shape of the curve. With convictions, the nature of anger's half-life might switch from Figure 5 to Figure 4 or Figure 3.



**Figure 6:** A Possible Effect of Punishment on the Intensity of Anger.

### 8.7. Hypotheses

In the current state of knowledge, social scientists simply do not possess a firm grasp of the relationship between punishment, time and the erosion of anger. The discussion above and figures in the appendix help identify a set of variables and suggest possible causal relationships among those variables. The dependent variable here is the intensity of anger. The primary independent variables are the level of punishment, the passage of time and the level of atrocity. Further hypotheses can be linked to the other elements of the reconciliation law – truth and reparations.

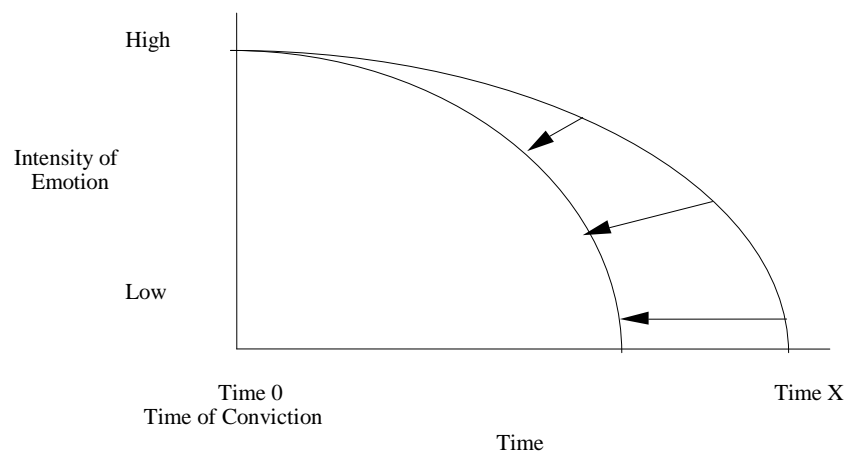
*Hypothesis 1:* Higher levels of atrocity and violence will produce higher levels of anger.

*Hypothesis 2:* (General Form): A significant level of punishment combined with the passage of time will reduce the level of anger.

*Sub-hypotheses:*

(2A) From the time of conviction, the decline of anger will be linear (Figure 3).

- (2B) From the time of conviction, the decline of anger will be exponential (Figure 4).
- (2C) From the time of conviction, the decline of anger will be reverse exponential (Figure 5).
- (2D) At the time of conviction, the level of anger will drop precipitously and then decline according to one of the functions in 1A-1C (Figure 6).
- (2E) A significant level of punishment will not produce an immediate drop in the level of anger, but will reduce the total life of anger (Figure 7).



**Figure 7:** Possible Effects of Punishment on Time Effects of Anger.

*Hypothesis 3:* If reparations are added to punishment, anger will erode at an enhanced or accelerated rate.

**Causal Logic:** Reparations are another form of punishment, in monetary terms rather than in prison time. There is a direct element of vengeance also, as resources are taken directly away from the perpetrator and given to the victim. This process bolsters the sense of equalization of victim and perpetrator. Material reparations can “open space for bereavement, addressing trauma,

and ritualizing symbolic closure... can [further] concretize a traumatic event and re-attribute responsibility”.<sup>29</sup>

*Hypothesis 4:* If perpetrators confess to their crimes, if there is the addition of “truth” to punishment, anger will erode at an enhanced or accelerated rate.

**Causal Logic:** In the transitional justice literature, it is hypothesized that truth-telling enhances the mitigating effect of “justice” on anger. It does so by constructing a common story of the past, honouring victims, breaking impunity, facilitating punishment of the guilty, and preventing the atrocities’ repetition. It is important to note that, for those who wish to know the truth, knowledge of the offender’s identity and motivations impacts levels of anger not via the ability to know whom to punish, but through a different mechanism: by altering the information available to the victim. Learning the perpetrators’ motives and circumstances can un-do the distorting effects of anger on information and beliefs; that is, by individualizing the perpetrator and showing his/her humanity, truth confessions can enable the victim to overcome stereotypes brought on by anger. If anger impels the victim to increase his/her prejudices and assignment of blame, remember selectively, and desire revenge then truth, by providing new information, can alter the victim’s cognition that the perpetrator committed a bad action against him/her. It thereby enables the victim to understand and forgive: the act of removing the attribution of harmful intent from the offenders.<sup>30</sup> In these ways, truth reduces anger.

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<sup>29</sup> Brandon Hamber and Richard A. Wilson, “Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies”, *Journal of Human Rights* 1 (2002).

<sup>30</sup> More generally, some political figures have posited that only with truth can there be true forgiveness which in turn may reduce anger. This relationship between truth and forgiveness has been a central issue in the reconciliation process in South Africa. See James L. Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided nation?*, New York: Russell Sage Foundation, 2004. Gibson’s work shows that the acceptance of a common narrative of apartheid created positive effects concerning the legitimacy of the post-apartheid government and the accep-

## **8.8. Justice, Anger, Punishment and Reconciliation**

The question becomes whether these hypotheses can be realistically tested in a case like Colombia. To our knowledge, no one has attempted to do so. A minimum requirement is that each of the variables – level of anger, level of atrocity, level of punishment, passage of time, reparations and truth-telling – be operationalized in a realistic and reliable way. This section addresses each variable in turn, covering general definition, practical implementation (such as the possible use of surveys and quasi-experimental designs), related factors that might qualify hypothesized effects or suggest new sub-hypotheses, and problems such as indeterminacy. The approach assumes a five-year study and sufficient logistical support.

### **8.8.1. Dependent Variable: Measurement of Anger**

The first task is to find a valid and reliable measure of anger. Levels of anger, however, prove difficult to measure; instruments are highly subjective and yield inconsistent results on repeated trials.<sup>31</sup> To overcome these measurement problems, we propose to proxy anger with measures of its four observable behaviours (recall A, B, C effects above). One, anger triggers vengeful actions and thus, the desire for revenge (a variable more amenable to measurement) should correlate closely with levels of anger. Two, under the influence of anger, individuals are likely to resort to risky behaviour in the pursuit of vengeance, a tendency discernible in some guerrilla and paramilitary combatants. Three, victims suffering from anger should engage in stereotyping, blaming not the individual perpetrator, but also the perpetrator's group

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tance of the rule of law. The role of forgiveness in reconciliation has been emphasized by the former Mayor of Bogotá, Antanas Mockus; he concentrates on the relationships among the emotions of guilt and shame, but implies that pardon also reduces anger (see his contribution to this volume).

<sup>31</sup> See, for example, Christopher Eckhardt and Bradley Norlander, "The Assessment of Anger and Hostility: A Critical Review", *Aggression and Violent Behavior* 9, 1 (2004) and William E. Snell Jr., Scott Gum, Roger L. Shuck, Jo A. Mosley, and Tamara L. Kite, "The Clinical Anger Scale: Preliminary Reliability and Validity", *Journal of Clinical Psychology* 51, 2 (1995).

writ large. Four and closely related, victims, under the emotion of anger, should assign harmful intent to the perpetrators.

To capture these observable manifestations of anger, we propose a survey of civilian victims, civilian non-victims,<sup>32</sup> and demobilized paramilitaries and guerrillas. The survey instrument will collect data on (a) individuals' opinions of their perpetrators and the perpetrators' groups; (b) the motives they assign to their offenders and whom they blame for the violations; (c) their evaluations of different tools of reconciliation (confession of crimes, compensation of victims, immunity for perpetrators); and (d) whether they desire revenge, what intensity of revenge (a public apology, prison sentence, death), and against whom they desire revenge (the individual directly responsible for the violation; the leaders of the armed group; or all group members). Last, the questionnaire will ask under what conditions the respondents would seek to take justice into their own hands. We will then employ factor analysis to generate a composite measure of anger intensity.

If the assumption underlying transitional justice systems – that victims feel anger towards their perpetrators and seek revenge – is correct, we would expect to observe higher levels of anger among victims than non-victims. Including non-affected civilians in the sample thus offers a control group, enabling us to compare victims' anger to the average Colombian's while controlling for structural variables such as age, location, gender, socio-economic status, extent/type of exposure to violence, and education.<sup>33</sup> Of course in a society plagued by extreme atrocity for over forty years, the issue of determining who is and is not

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<sup>32</sup> For non-victims, questions will be phrased as hypothetical scenarios.

<sup>33</sup> Levels of anger and notions of justice may vary on these variables. For example, in a recent survey conducted by the International Center for Transitional Justice, women, more-educated, younger individuals and residents of Bogotá and the Atlantic region were much more in favour of punishing all members of the armed groups whereas men, less educated, older persons and residents of western regions believed that only leaders should be punished (International Center for Transitional Justice (ICTJ), “*Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación*” (2006), p. 28).

a victim proves problematic; the conflict has affected nearly every individual, if not directly, than certainly indirectly.<sup>34</sup>

Meanwhile, surveying ex-combatants who self-reportedly joined an armed group out of vengeance would serve to provide information about the extreme value of revenge – taking it into your own hands – and about how anger affects risk aversion. Excluding these individuals would produce a truncated measure of victims’ anger with higher levels of anger being selected out of the study, generating bias. As mentioned earlier, Colombian government reports indicate that 25% of demobilized paramilitaries claim that the “desire to avenge the death of a family member” motivated them to join the ranks of their armed group. This generates a sample of roughly 8.800 demobilized individuals.<sup>35</sup> Here we are treating ex-combatant respondents as former victims. If we also treat them as present offenders, we gain an often-ignored point of view of the transitional justice process: that of the perpetrators. In this way, the survey could estimate the likelihood of the process generating counter-productive emotions within the perpetrator population: resentment, anger, and shame. Realizing this survey

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<sup>34</sup> The ICTJ 2006 survey defined an individual as a “victim” if the person or any member of his/her direct family had been a victim of kidnapping, extortion, displacement, assassination, threat of death, torture, forced disappearance or rape (by an illegal armed group). However, these categories did not match people’s self-reported classification as victims of the armed conflict. 44% of those which were not affected directly by the actions of armed groups (categorized by the ICTJ as non-victims), believed themselves to be victims (due to the social effects of the conflict: poverty and unemployment and the psychological effects: fear and uncertainty) and 5% of those categorized as victims did not identify themselves as such. Thus establishing victim and non-victim categories is challenging and merits great attention. We propose to use the ICTJ coding because the indirect (social and psychological) effects of war are unlikely to elicit the same emotions of anger as the direct ones.

<sup>35</sup> This assumes the Medellín paramilitaries are representative of the population of paramilitaries in their motives. Total figures are generated from *Policía Nacional de Colombia*, “Informe Control y Seguimiento Desmovilizados”, February 2007. However, there arise recall and reliability issues with using self-reported motives for joining. Many joined years ago and may not remember their initial motives accurately. Moreover, joining for revenge may seem a more noble reason than entering the armed group because it offered the highest remuneration.



requires three populations of inference: (1) Colombian victims of the armed conflict; (2) Colombian non-victims; and (3) Colombian revenge-motivated ex-combatants. We will discuss each of these briefly in turn. First, we hope to interview 400 randomly selected victims from a target population of victims registered with the *Comisión Nacional de Reparación y Reconciliación* (CNR).<sup>36</sup> Second, we would like to survey 400 persons not directly affected by the conflict. The target population here is all non-victim civilians in Colombia. For these interviews, we hope to find an organization that conducts nationally-representative surveys (most likely for a different and unrelated purpose) and have our questions added to their survey. Accordingly, in this case, the organization will dictate the sampling design. Last, the target population of ex-combatants will be the demobilized paramilitaries and guerrillas with whom the Colombian Reintegration Program has contact. We will randomly select 200 from the list of ex-combatants who stated in their initial interview with the Reintegration Program that the desire for vengeance motivated their recruitment into their armed faction.

### **8.8.2. Independent Variable 1: Level of Atrocity**

Every violation of human rights is heinous and it may be that the extremity of the violation has no impact on victims' levels of anger and on reconciliation. However, this merits testing. To measure level of atrocity, we propose a variable that takes into account the scale and scope of the violation. This variable would be an ordinal scale based on the judicial system's punishment for each type of offence.<sup>37</sup> Crimes punished with a fine would fall at one end of the spectrum of atrocities while those receiving life sentences or the death penalty would occupy the other end.

Beyond this simple measure of type of violence, several other factors may qualify the relationship between level of atrocity and level

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<sup>36</sup> If this list cannot be made available to us for reasons of security/anonymity of victims, we will also seek the assistance of other human rights organizations such as Amnesty International and Comisión de Juristas.

<sup>37</sup> Displacement, torture, kidnapping, assassination, rape, threat of death, extortion, etc.

of anger. Duration of violence, for example, may matter insofar as people become tired of war and desire peace at the cost of justice and revenge. The capacity for anger may be less after a long struggle than a short one. The size of the locality may be another related influence on the desire to punish. Individuals who reside in small towns (where the majority of violence has taken place) prove more likely to favour pardoning the guerrillas and paramilitaries than combating or trying them.<sup>38</sup> The covertness, geographic spread, and death count of an atrocity may also affect levels of anger by facilitating collective anger and action. An overt massacre of 30 people from one village leaves in its wake a concentrated community of affected individuals who are conscious of their shared victimization. This affords to the victims the capacity to collectively mobilize for revenge.<sup>39</sup>

Furthermore, the identity of the perpetrator may impact victims' emotions. For example, victims may respond differently when the violence is perpetrated by a stranger (a paramilitary or guerrilla recruited from one place and active in another) than by a fellow community member (an armed individual active in his/her town of origin). Causality points in two different directions. On the one hand, Harvard Professor Kimberly Theidon expresses that anger is higher when people are victimized by armed actors from their own towns. Zuckerman Daly 2010 finds that anger is reduced when the perpetrator is deemed part of the in-group – the community – and when the violence is justified by the motive of protecting that community.<sup>40</sup> These perpetrators, who patrolled their home communities, never lost ties to their communities. According to Colombian journalist, Juanita León, this facilitates reintegration and reconciliation. The survey questionnaire, interviews of Colombian experts, and case studies of localities varying on the origins

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<sup>38</sup> International Center for Transitional Justice, “*Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación*” (2006), p. 32.

<sup>39</sup> We see a variant of this dynamic in the case of the rise of paramilitaries; regional elite (including the Castaño brothers) became conscious of their common victimization – they were all victims of the left-wing guerrillas. In response, they united to organize self-defence (counterinsurgency) militias driven, in part, by revenge.

<sup>40</sup> Sarah Zuckerman Daly, “Bankruptcy, Guns or Campaigns: Explaining Armed Organizations' Post-War Trajectories,” PhD Dissertation, MIT, 2010.

of the perpetrators could afford us leverage on these issues. Specifically, we could compare victims' sentiments towards (1) local ex-combatants – those who committed atrocities in their towns of origin and (2) non-local ones – those who carried out the violence in other territories.

### **8.8.3. Independent Variable 2: Level of Punishment**

We hypothesize that punishment may decrease the intensity of victims' anger, reduce the amount of time needed for the decay of anger or change the shape of the curve. The “punishment” variable can first be divided into two basic categories: cases in which no punishment occurred (acquittals) versus cases in which punishment was meted out. Then within the latter cases, variation in the level of punishment can be examined.

The first task is to interview victims whose perpetrators have been sentenced to prison and those whose perpetrators have been acquitted, controlling for initial level of anger. To do so, a before/after case design would be required, wherein we interview a random sample of victims whose offenders are awaiting trial. Presumably, some perpetrators would be acquitted, others convicted with varying sentences. We would then interview the victims soon after the verdicts have been released, comparing the control and treatment (perpetrators receive sanctions) groups to plot the victims' anger curves over time. This would provide a quasi-experiment to study the effects of punishment on the intensity of anger. It would also permit us to test if the degree of punishment impacts victims' emotions. To measure the level of punishment, we could appeal to the scale used by the Colombian justice system, which should accurately reflect the population's conception of justice. We could then use inter-coder reliability tests of a random sample of civilians to verify this punishment proxy.

Measuring “punishment” in Colombia is problematic because the lenient sentences proposed by the new law might produce multiple effects. Perceptions about what constitutes “appropriate” versus “overly lenient” punishment may vary across individuals. For instance, many individuals may feel that the maximum prison sentence in the new law – eight years – is incommensurate with many of the atrocities

committed. The cognition that the perpetrator has received an “easy” punishment”, that he or she has basically avoided proper sanction, may be worse than the belief that a perpetrator has simply escaped the grasp of the justice system. Furthermore, alongside sanctions, we must also consider perks. Ex-combatants receive a host of benefits: salaries, health care, psychological aid, education, etc.<sup>41</sup> The cognition that “an atrocity was committed and the perpetrator not only got away with it but received benefits” is the basis of heightened anger, not its decline.<sup>42</sup>

Additionally, while the ex-combatants are consulted on the transitional justice system, victims are not adequately asked or involved in the process. The trade-off here between peace and justice is one common to communities undergoing transitional justice. On the one hand, absent desirable benefits, combatants have little incentive to sign up for peace and remain demobilized. On the other hand, that perpetrators receive more ‘goodies’ than victims is both unfair and potentially destabilizing if, through the emotional mechanism of continued anger, victims retaliate.

#### **8.8.4. Independent Variable 3: Time**

In the discussion above, the focus has been on the effect of punishment on anger. Therefore, the beginning point is the date of conviction and time would be measured in months since conviction.

In this formulation, the hypothesis is that punishment *plus* time reduces anger. An alternative is that punishment *and* time reduces anger. In the latter, it is not only time since conviction that is important but also time since atrocity. Consider two cases, one in which the atrocity occurred fifteen years before conviction and one in which the atrocity occurred three years before conviction. It seems logical to be-

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<sup>41</sup> Pilar Lozano, “Las Víctimas son Seres Generosos: Entrevista Eduardo Pizarro Presidente de la Comisión Nacional de Reparación y Reconciliación en Colombia”, *Diario El Pais*, 17 June 2007.

<sup>42</sup> Personal Interview of Sarah Zukerman Daly with respondents at *El Programa de Atención Complementaria a la Población Reincorporada* and *la Personería de Bogotá*, DC Rafael Uribe, Colombia, July 2006.

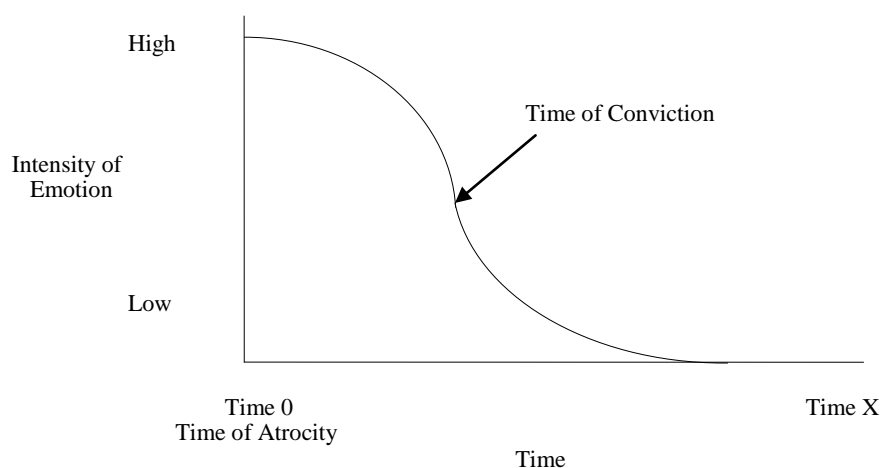
lieve that the corrosive effects of time on anger may have already lowered the anger level in the first case. In this case, we could simply analyze time between atrocity and conviction as a variable that affects the level of anger at time of conviction. The analysis becomes more complicated if time since atrocity also affects the decline of anger in the post conviction phase. It is possible that not only the level of anger at time of conviction would differ in the two cases above, but also the post-conviction function. One could also imagine that anger declines according to one function with time without punishment (perhaps the inverse exponential function of Figure 5) and another function with time after punishment (perhaps the exponential function of Figure 4). Figure 8 represents such a possibility.

Colombia provides rich variation on the variable “time since atrocity” as the violence has migrated over the country’s territory and the conflict has lasted 42 years. We propose to conduct in-depth interviews in geographic regions that differ on when violence affected the area: recently, 5 years ago, 10 years ago, etc. For example, it may be fruitful to compare regions with little violence in 1985, but high levels in 2000 (e.g., Norte de Santander and Putumayo) with places that experienced the opposite – a large number of killings in 1985, but a relatively low one in 2000 (e.g., Boyacá, Vichada, and Guainía). Alternatively, we might compare locations of massacres in order to keep the level of atrocity constant and increase the accuracy of recall by focusing on a particular incident and moment in time. For instance, we could compare ‘Honduras and La Negra’ (Urabá, Antioquia, 1988), ‘Pueblo Bello’ (Turbo, Antioquia, 1990), ‘Mapiripán’ (Meta, 1997), ‘Naya’ (Buenos Aires, Cauca, 2001), and ‘Bahía Portete’ (La Guajira, 2004).<sup>43</sup> We suggest these research designs because they would also enable us to plot anger’s half-life beyond the five-year period of this

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<sup>43</sup> *Colombia Nunca Más. Crímenes de Lesa Humanidad*, Proyecto Nunca Más, Bogotá, 2000, cited in Amnesty International, “Colombia: The Paramilitaries in Medellín: Demobilization or Legalization?” (2005).

study's longitudinal survey. This would prove especially helpful if anger depreciates slowly.<sup>44</sup>



**Figure 8:** Decline of Anger after Conviction

As a variable, “time” produces challenges and opportunities. The literature offers conflicting hypotheses with respect to time. On the one hand, “time heals”. And anger in particular is characterized by its relatively short duration; it “tends to spend itself quickly”.<sup>45</sup> The example given is the post-WWII trials in which those who were tried later generally received milder sentences even when the crimes were similar. On the other hand, Hamber and Wilson argue that, “desire for vengeance may spread out over years if the thirst remains unquenched”.<sup>46</sup> People still desire revenge, reparations or recognition for events that occurred decades ago: e.g., the Holocaust, slavery.

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<sup>44</sup> An alternative research approach would include in the survey questionnaire: “length of time since the violent event”. This design, however, would not guarantee variation in the factor of interest: length of time since the violence.

<sup>45</sup> Nico Frijda, *The Emotions*, Cambridge University Press, Cambridge, 1986, p. 43.

<sup>46</sup> Brandon Hamber and Richard A. Wilson, “Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies”, *Journal of Human Rights* 1 (2002).

### 8.8.5. Independent Variable 4: Level of Reparations

The methods to repair harm done to victims are numerous. Harm can be defined narrowly to include only material harm – possessions taken – or broadly to also include moral and mental harm. Accordingly, compensation may be limited to money and the return of lands or may be expanded to include rehabilitation, medical and psychological treatment, official apologies, monuments to victims, and guarantees of no repetition. To capture the extent of reparations, we propose to use the scale put forth by the Colombian CNRR.

Initial evidence from Colombia points to the unanimity of support for victim compensation (89% of the population). Interestingly, as the means of reparation, Colombians favour monuments to honour victims, money, and official apologies much less than they do education, creation of jobs, and medical attention.<sup>47</sup> To test the effect of reparations on the intensity and duration of anger, we can exploit the fact that the CNRR has only very slowly granted reparations. As a result, only some victims have received the “treatment effect” of reparations.<sup>48</sup>

The timing of reparations is a complicating factor. Variation in the extent to which victims embrace material reparations may prove a function of timing. Hamber and Wilson argue that when granted before the survivor is psychologically ready, the reparations “can be expected to leave the survivor feeling dissatisfied”. This is likely to occur when,

the national process of moving forward and making amends is not coinciding with the individual process. [In this case,] the survivors see the governments as trying to close the chapter on the past prematurely and leaving se-

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<sup>47</sup> These victims also valued a) that perpetrators help locate kidnapped and disappeared persons and b) that they return all the goods, money and property to the victims’ families significantly more than they valued c) that offenders pay with prison terms, and d) that they publicly confess the whole truth or ask formal forgiveness from the victims and their communities.

<sup>48</sup> The Commission has prioritized first granting reparations to places which suffered the worst massacres and to vulnerable populations (children, indigenous, afro-Colombians, the most impoverished, and female heads of household).

crets hidden ... survivors feel that reparations are being used to buy their silence and put a stop to them continuing a quest for truth and justice.<sup>49</sup>

It follows that we should analyze reparations in interaction with the time since the atrocity.

As with punishment, the “reparations” variable might work to reduce anger in some cases but increase it in others. Reparations may magnify punishment’s attenuating impact on anger only if victims do not perceive the reparations as blood money. If conceived as “blood money”, equating human life with a fixed, often relatively low, sum, reparations may induce the emotion of humiliation rather than forgiveness.<sup>50</sup>

#### **8.8.6. Independent Variable 5: Level of Truth**

Following the Truth and Reconciliation Commission of South Africa, the Colombian process puts emphasis on perpetrators admitting to their crimes. Article 5 of the regulatory decree states that demobilized combatants must confess their crimes in order to become eligible for reduced sentences.<sup>51</sup> How can we measure “truth” and test its effect on

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<sup>49</sup> Brandon Hamber and Richard A. Wilson, “Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies”, *Journal of Human Rights* 1 (2002).

<sup>50</sup> Consider the situation of the United States in Iraq. During the present conflict, if US forces kill an innocent Iraqi civilian, they pay the family a maximum of \$2,500 dollars in compensation for “wrongful death”. This amount is the same as when an automobile has been destroyed. The family is left to consider that the life of their family member was equivalent to that of a car. In this case, the reparation is degrading.

<sup>51</sup> There are some clear trade-offs between the search for truth and justice. Recently, the International Court Tribunal for Yugoslavia brought up Milošević on 66 counts of genocide, crimes against humanity, and war crimes. Prosecutors wished to set up an objective and comprehensive historical record of Milošević’s crimes. The process was so massive and complicated that the defendant died before he could be convicted and punished. Without Milošević’s conviction, the case against other accused individuals will be more difficult to make. Depending on one’s view of the significance and nature of anger, it may be better to sacrifice telling some of the story, limit the truth-telling, in order to mete out quicker justice that in turn might quell anger. Colombian officials appear to have considered



anger? Capturing “truth’s completeness” is obviously impossible except in retrospect (and even then, only an unreliable measure is feasible). We propose to instead operationalize the concept of truth by treating any confession of the crime (date, violation type, location, victims, motives, or perpetrator’s identity) as an increase in the level of truth. Truth is deemed complete when all of these facts are known and corroborated, partial when any of these facts are missing, etc. Rather than just longitudinally comparing victims before and after they learn a piece of the truth, we suggest also cross-sectionally comparing victims whose perpetrators have confessed to their crimes with those who have not.

Clearly, additional factors may be at work here. The level and credibility of the confessed truth may matter. If deemed incomplete or false, truth-telling is unlikely to have the predicted effects. Even if comprehensive, perpetrators’ confessions may still prevent reconciliation. The 2006 ICTJ survey shows that 55% of Colombian victims prefer not to know the truth (compared with 35% of non-victims). 48% hold this preference because they believe that knowing the truth is unlikely to “help at all”; 28% because they do not want to relive the horrors or think about the past; 10% because they do not want a partial truth and doubt that the full truth will be revealed; and 14% because they fear that knowing the truth will increase their vulnerability to retaliation by their perpetrators. These results suggest that truth-telling may either have no effect on or could even enhance anger by preventing victims from putting the past behind them. Additionally, these survey findings indicate that truth-telling can also increase other emotions such as fear.

The responses of victims that did wish to learn the truth, however, point to opposite mechanisms. Some 95% of these respondents wanted to know the truth in order to be able to understand and quickly pardon or in order to achieve personal peace (72% and 23% respectively).<sup>52</sup> Only 5% reported desiring the truth in order to know whom

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this issue. In Colombia, criminal prosecutions must not take longer than sixty days.

<sup>52</sup> Note that 13% wished to learn the truth only about the reasons for the violation, not the perpetrator’s identity.

to hate or to be able to carry out revenge.<sup>53</sup> These statistics taken together suggest an ambiguous relationship between truth and anger, a relationship that may differ across individuals. Our survey will seek to probe this heterogeneity of preferences across victims.

Up until now, we have discussed truth at the individual level of analysis: the effects of an individual perpetrator confessing the truth to an individual victim. The reconciliation literature, however, underscores the importance of collective truth, of a nation collectively learning the truth of its violent past. This scholarship places a premium on public confessions and processes that guarantee “never again”, assure that future generations learn an accurate history, and recognize the suffering of the victims of the armed conflict. While some Colombians recognize the value of a collective memory, 51% of the Colombian population state that they are against having the truth be made publicly and 43% do not consider it important to know what happened in Colombia with respect to the armed conflict.<sup>54</sup>

#### **8.8.7. Case Selection**

The longitudinal surveys and quasi-experiments described above would hopefully yield valid measurements of anger and its potential mitigators: punishment, truth, reparations, nature of atrocity and time. These data would facilitate a quantitative analysis of the effect of transitional justice on anger and desire for revenge. However, a quantitative analysis is likely insufficient given the measurement challenges, interaction between independent variables, and ambiguous causality described above. Accordingly, we advocate for a multi-method approach. In addition to the surveys, we propose to conduct in-depth case studies of localities which vary on several dimensions: (a) extremity of atrocities; (b) time since atrocities; (c) identity of perpetrators (local or not); (d) state presence and provision of security (level of current insecurity and fear); (e) concentration of demobilized perpetrators; and (f) local history of the armed conflict. In addition, we will try to choose

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<sup>53</sup> ICTJ, *Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación*, 2006, pp. 37-39.

<sup>54</sup> *Ibid*, p. 40.

communities that vary in the extent to which the principal perpetrators of violence in the community have been punished, confessed the truth, or granted reparations to victims.

### **8.9. Concluding Issues**

The preceding pages have developed a theory and outlined a research agenda to study the relationship among anger, punishment and time. The goal has been on trying to study the importance of emotion on the process of reconciliation. In our theoretical framework illustrated in Figure 2, our approach incorporates both cognition and specific emotions that follow from them. Along both of these elements, there is more to be said.

First, beliefs about what is possible and impossible shape the formation and intensity of emotions. Anger and notions of anger-attenuating justice may be a product of what victims deem feasible and these notions may change over time. For example, “at first, a victim requests her son’s remains and perceive this to fulfil justice. When she has received the remains, she wants to know who killed her son, then she requires that the perpetrator come speak with her so she can ask him why he killed her son. Finally, she wants him to pay for killing her son”.<sup>55</sup> As the possibility frontier shifted out, the measures able to mitigate her anger and satisfy justice also shifted. Currently, many victims in Colombia recognize that the paramilitaries maintain extensive power and that they have infiltrated the legal, police and political systems. They therefore “do not trust that anything real would happen, ever. So they don’t even request reparation, truth, etc”.<sup>56</sup> This, however, may change.

Second, in the course of a long, deadly and unresolved conflict, many powerful emotions besides anger will be at play. The emotion of fear is perhaps foremost among these emotions. Fear for one’s life exists in Colombia irrespective of the transitional justice process. Transi-

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<sup>55</sup> Personal interview of Sarah Zukerman Daly with Kimberly Theidon, Harvard University, March 2007.

<sup>56</sup> Personal Interview of Sarah Zukerman Daly with Juanita León, Harvard University, January 2007.

tional justice may magnify this sense of insecurity. Victims fear repeated war (that is, the paramilitaries' return to arms) and more specifically, re-retribution by the original offenders (that they will repeat the offence). As the paramilitaries were not militarily defeated, they maintain the ability to re-ignite violence, which casts a shadow over the transitional justice process. In addition, the prospect for peace with the guerrillas is dependent, in part, on the process with the paramilitaries and the extent to which revenge and punishments are absent. Some 58% of Colombians are sceptical of a solution to the conflict and, of those that think the conflict will be resolved, they, on average, estimate that it will take 14 years to achieve a solution. The most optimistic say 9 years.<sup>57</sup> The war is not over and so levels of fear remain high. If both fear and anger are present, the net effect on behaviour and the action tendency is indeterminate.<sup>58</sup> Over time, as the security situation improves and the spectrum of possibilities for truth and justice expand, victim's emotions and expectation may change.<sup>59</sup>

As the process of punishment and reconciliation unfolds, the emotions of guilt and shame will certainly come into play. Recall the definitions of these emotions from above: guilt is cognition that one has performed a bad action; the action tendency is to seek atonement. Shame is the cognition that one's own character is defective; the action tendency is toward shrinking away or isolation. The Justice and Peace Law seeks to establish perpetrators' guilt rather than to heighten their shame. The Colombian state would rather have perpetrators voluntarily atone for their crimes and willingly participate in the reparations process than have them slink away from society in total. The law allows for reincorporation into society of most perpetrators. Victims may have a different view than the Colombian state, however. For many victims, the perpetrator's crimes have in fact established a defective character. For many victims, the process should indeed be about creating shame.

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<sup>57</sup> ICTJ, *Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación*, 2006, p. 6.

<sup>58</sup> Jon Elster, *Alchemies of the Mind: Rationality and the Emotions*, Cambridge University Press, Cambridge, UK, 1999, p. 251.

<sup>59</sup> Personal interview of Sarah Zukerman Daly with Kimberly Theidon, Harvard University, March 2007.

The emotions of perpetrators also have to be considered on this issue. Murderers and criminals may not feel the emotion of guilt and experience the motivation to atone for their previous crimes. In Colombia, many paramilitaries do not seem to feel guilt. Instead, feel that they should be thanked for “saving the country” from the insurgents.

Some might hold that the entire framework above is suspect because the most powerful emotion is hatred, not anger. Recall the definition of hatred above: hatred is the cognition that an object or group is both inherently defective and dangerous with action tendency to physically eliminate the presence of that group. The main point here is that hatred, in comparison with anger, is an object-based emotion with no half-life. If victims come to believe that the intrinsic worth and character of the perpetrator is defective, rather than just the perpetrator’s actions, the emotion is not likely to fade. Every time they see the perpetrator, the intense emotion of hate will arise. The victim cannot “forget” or “forgive”. Under the sway of hatred, victims will always desire to eliminate the perpetrator, either in terms of isolation and ostracism, or in some cases even through physical elimination. Correspondingly, if the perpetrator knows that the victim is full of hate there are few incentives to trust the reconciliation process. Truth and punishment may diminish anger, but may not erode hatred. The Justice and Peace Law is betting that the underlying emotional context of the process is one of anger and not hate.

Hatred would not seem to generally fit the Colombian case. Hatred requires categorization of an object as “evil”. It is difficult to make such a categorization when the perpetrators and victims share ethnicity, religion, socioeconomic class, and locality.<sup>60</sup> It is difficult to see the other as defective when they so much resemble one’s own self and family. Furthermore, in Colombia as the same foot soldiers are recycled through the paramilitaries, guerrillas and military and allegiances

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<sup>60</sup> Ethnicity is rarely considered in analyses of the Colombian conflict because ethnicity is generally deemed a non-salient cleavage in Latin America and minorities constitute a small fraction of the Colombian population. However, while Afro-Colombians and indigenous minorities comprise only 5% of the population their proportions vary substantially across the country – from 0.09% in Santander to 88% in Choco. Census data from República de Colombia, 1993.

are fluid. For instance, Wolman Sepúlveda was an EPL guerrilla who later joined the ELN guerrillas and finally became a paramilitary.<sup>61</sup> This lack of differentiation generates a certain level of sympathizing rather than blaming perpetrators of violence. To a certain degree, not to be overestimated, victims understand that, for the paramilitaries and guerrillas, violence is their job in an economic environment that offers few alternatives. Therefore, in some respects, the line between victim and perpetrator is blurred – both are deemed victims of an incessant war in which children grow up believing violence to be natural with employment options limited to paramilitary, guerrilla or military service. For example, the ICTJ 2006 survey found that Colombian victims from smaller towns and with less education were much more likely to also consider the guerrillas and paramilitaries “victims” of the conflict.<sup>62</sup>

In Colombia, it would seem that the focus is on actions, and therefore anger, rather than any conception of inherent negative qualities, the cognitive basis of hatred. Theidon writes, “it is clear that the civilian population has ideas regarding the severity of the crime and the corresponding punishment; within the calculations used in these assessment figures, they consider both the rank of the ex-combatant and the degree of “*conciencia*” (consciousness or free will) that he could exercise in the heat of combat and the sense of guilt [he has] – and that others attribute to [him]”.<sup>63</sup> Clearly, the cognition behind “*conciencia*” focuses on an action committed under certain circumstances rather than an action driven by the inherent negative qualities of the individual.

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<sup>61</sup> For a brief biography of Wolman see Juanita León, *País de Plomo: Crónicas de Guerra*, Aguilar, Bogotá, 2005, p. 70.

<sup>62</sup> ICTJ, *Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación y Reconciliación*, 2006, p. 29.

<sup>63</sup> Kimberly Theidon, “Transitional Subjects? The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia”, *International Journal of Transitional Justice* vol. 1, no. 1 (2007). Available at: [http://www.wcfia.harvard.edu/misc/publications/centerpiece/spr06\\_vol20\\_no2/feature\\_theidon.html](http://www.wcfia.harvard.edu/misc/publications/centerpiece/spr06_vol20_no2/feature_theidon.html).

This leads into our final point. Initial evidence suggests that victims and non-victims are both highly and equally disposed to reconcile with their aggressors: some 74% of Colombians consider themselves to be so disposed. Some 47% of victims and 56% of non-victims would accept their aggressors as neighbours; 64% of both groups would offer work or accept to work with their perpetrators post-conflict. However, only 31% (27% of victims, 32.5% of non-victims) agreed that members of the armed groups should be allowed to participate in politics and, if elected, govern and only 34% believe that ex-combatants be allowed to join the Colombian armed forces.<sup>64</sup> Given these initial findings, it seems that possibilities for reconciliation in Colombia are present, but, given the history and scope of the violence, that the road to reconciliation will be complicated and long. The emotions that naturally follow from killings and atrocities will be part of the process. Punishment, the diminishment of anger, and justice are linked. However, the relationship among these three elements is not straightforward. The story is not quite so simple largely because the emotion of anger is not so simple. There are forces that diminish and transform anger in post-violent periods as well as those that sustain it. This article is an attempt to understand those forces and bring the study of these key emotions into the realm of social science and, ultimately, into the realm of violence-torn societies.

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<sup>64</sup> ICTJ, *Percepciones y Opiniones de los Colombianos sobre Justicia, Verdad, Reparación, y Reconciliación* (2006), pp. 58-62.





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## **The Positive Role of International Law in Peace Negotiations: Implementing Transitional Justice in Afghanistan and Uganda**

**Marieke Wierda\***

The tensions between legal obligations such as those assumed under the Rome Statute of the International Criminal Court, and the successful conclusion of a mediated solution to conflict may be more apparent than the positive consequences. For instance, the Lord's Resistance Army (LRA) is currently engaged in negotiations with the Government of Uganda, mediated by the Government of South Sudan at Juba. The negotiations seek to mediate an end to a conflict that has lasted 20 years and has forced 1.5 million inhabitants of Northern Uganda into International Displaced Persons (IDPs) camps. LRA leaders have repeatedly stated their readiness to go back to war if the arrest warrants that were issued against five of their senior leaders by the International Criminal Court (ICC) in October 2005 are not lifted.<sup>1</sup>

The positive impact of legal obligations may be less apparent. Nonetheless, this chapter will argue that such positive impacts do exist.

Throughout this chapter, transitional justice refers to measures taken to address a legacy of human rights violations. Such measures may include the pursuit of criminal justice; truth seeking; reparations;

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<sup>1</sup> Stuart Ramsay, "African Rebel Army is 'Ready for War'", Sky News, World News. 25 May 2007. Available at <http://news.sky.com/skynews/article/0,,30200-1267249,00.html>.

institutional reform (including non-repetition). The legal framework for transitional justice is found in different fields of law, including international humanitarian law, international criminal law, international human rights law and also domestic criminal law.<sup>2</sup> Most significantly, the Rome Statute of ICC requires the prosecution of core crimes on behalf of State Parties; if they do not act, the jurisdiction of the Court is activated. This chapter will not provide a detailed discussion of the extent of the various legal obligations; a full discussion of these can be found in other chapters in this volume and elsewhere.

How can international legal norms assist mediators in their task in ongoing conflicts? It is suggested that current international legal obligations in respect of transitional justice assists in three particular ways:

1. Legal obligations enable mediators to advance a *pragmatic argument* that the acceptability of the agreement, both local and international, is important to the sustainability of a peaceful solution to conflict and that justice enhances the legitimacy of any final arrangement.
2. Legal obligations have *practical consequences* for ongoing negotiations, particularly after the emergence of international prosecutors. These practical consequences will be illustrated by the case study of Uganda.
3. Legal obligations give mediators, and the international community, a *principled or normative framework* by which to measure the legitimacy of peace agreements.

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<sup>2</sup> For recent writings of the extent of legal obligations in transitional justice, see Kai Ambos, “The Legal Framework of Transitional Justice”; and Christine Bell, “The New Law of Transitional Justice”, both prepared for the Conference on Building a Future on Peace and Justice at Nuremberg, 25-27 June 2007, available at <http://www.peace-justice-conference.info/>.

### 9.1. Pragmatic Links Between Justice, Legitimacy and Long-Term Sustainability of Peace Agreements

An argument that is often advanced by human rights activists and other justice actors is that there is a link between justice and the sustainability of peace agreements, or phrased differently, that there cannot be peace without justice. Proponents of this view argue that blanket amnesties are likely to lead to a re-emergence of hostilities, and cite the Sierra Leonean Lome Peace Agreement of 1999 and the subsequent re-emergence of hostilities as an example. However, empirical evidence is still lacking, and it is certainly possible to point to a number of situations where there was an absence of formal justice measures without re-emergence of conflict.<sup>3</sup> On the other hand, it may at least be possible to argue that the inclusion, or absence, of justice provisions is an indicator of the sustainability of a peace agreement, and that the legitimacy of peace agreements depend at least in part on whether they are seen as a fair and just solution to conflict.

An example of this argument may be found in Afghanistan. The Bonn Agreement concluded in December 2001 did not, of course, involve the Taliban, neither was it a peace agreement as such. Nonetheless, while the Bonn discussions and the subsequent Emergency Loya Jirga were not truly inclusive, there was a window of opportunity for peace in Afghanistan which had not existed since the original eruption of conflict during the Saur Revolution in 1978. Many Afghans suffered terribly under its various cycles, including the communist rule and Russian invasion; the *mujahideen* period that followed, and under the Taliban. Estimates of atrocities in Afghanistan far outweigh those of many other conflicts.

The Bonn Agreement aimed at providing a framework for peacebuilding in the new Afghanistan. Interestingly, a provision for amnesty for the *mujahideen* was avoided through the interventions and argu-

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<sup>3</sup> Examples offered often include Angola and Mozambique. See for instance Victor Igneja, *Gamba Spirits and the Hommes Aperti: Socio-Cultural Approaches to Deal with Legacies of the Civil War in Gorongosa, Mozambique*, submitted to Nuremberg Conference, 25-27 June 2007.

ments posed by Lakhdar Brahimi on behalf of the UN.<sup>4</sup> At the same time, there was no explicit reference to accountability for past crimes in the Bonn Agreement.<sup>5</sup>

However, the political framework established through the Bonn Agreement gave a platform to the *mujahideen* of the Northern Alliance, legitimizing them through their involvement.<sup>6</sup> It is well-known inside and outside of Afghanistan that many of these leaders are personally responsible for gross human rights violations committed particularly by different groups against each other during the four years before the Taliban came to power (1992-1996).<sup>7</sup> The pseudo-anarchical state of Afghanistan during this period and the extensive indiscriminate killings of civilians enabled the quick rise of the Taliban, and accounts for their early popular appeal based on restoring law and order.

The Northern Alliance fought the Taliban on behalf of the US after September 11, being mainly responsible for ground operations to complement the US air campaign in Operation Enduring Freedom. Their reward was being ushered into high positions in government. In particular, General Fahim, part of Ahmed Shah Massood's Jamiat-i-Islami faction from Panshjr, occupied Kabul immediately after the fall

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<sup>4</sup> Barnett Rubin, "Transitional Justice and Human Rights in Afghanistan", *International Affairs*, 79, 3 (2003), p. 571.

<sup>5</sup> The Bonn Agreement merely stated that Afghanistan shall act in accordance with its legal duties under international humanitarian and human rights law. United Nations, *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, 5 December 2001 s. 5 Art. 2. See also Ahmed Nadery, "Peace or Justice: Transitional Justice in Afghanistan", *International Journal of Transitional Justice*, vol. 1 no. 1 (2007), p. 174.

<sup>6</sup> Patricia Gossman, *Truth, Justice and Stability in Afghanistan. Transitional Justice in the Twenty-first Century*, New York: Cambridge University Press, 2006, p. 264.

<sup>7</sup> Human Rights Watch, "Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity", 7 July 2005. Available at <http://hrw.org/reports/2005/afghanistan0605/>. See also Afghan Justice Project, *Casting Shadows: War Crimes and Crimes against Humanity 1978-2001*, 2005. There was also an OHCHR Mapping Project Report on violations during Afghanistan's war but it has not been released publicly.

of the Taliban.<sup>8</sup> Fahim occupied the Ministry of Defence, allowing his military faction to function *de facto* as a national army. While Fahim was subsequently removed from that office, he is now in Afghanistan's Upper House of Parliament, the Meshrano Jirga.

At first, ordinary Afghans spoke out bravely on the issue of accountability for past crimes. Famously, during the first Emergency Loya Jirga, a woman took the floor to speak about the crimes of the *mujahideen*, but she was silenced and subsequently threatened.<sup>9</sup> In 2005 the Afghan Independent Human Rights Commission published a report voicing the views of up to 6,000 Afghans throughout the country. Many favoured the pursuit of justice *vis-à-vis* currently entrenched warlords, expressing a desire to either bring them to justice or vet them from their current positions. Most people believed that there is an integral link between justice and security: 76% of respondents said that bringing war criminals to justice would increase rather than decrease security.<sup>10</sup> Most wanted to see trials within two years.<sup>11</sup> The government made some attempts through enacting an Action Plan on Peace, Justice and Reconciliation, but it, along with the international community, engaged in a politics of accommodation and argued that the warlords were needed to prevent a power vacuum.

Instead, in Afghanistan the conflict has become progressively worse, particularly over the last two years. The international community did not invest sufficiently in the Bonn framework – for instance, far less money was invested in Afghanistan's justice sector than in Kosovo or Timor. The US relentlessly pursued a military strategy that often contradicted the need to bolster Karzai's government. With the warlords in power, no security and little peace dividend, the legitimacy

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<sup>8</sup> Human Rights Watch, *Afghanistan's Bonn Agreement One Year Later: A Catalog of Missed Opportunities*, 5 December 2002 (<http://hrw.org/backgrounder/asia/afghanistan/bonn1yr-bck.htm>).

<sup>9</sup> Human Rights Watch, *Afghanistan's Warlords Still Call the Shots*, 24 December 2003 ([http://hrw.org/english/docs/2003/12/24/afghan6908\\_txt.htm](http://hrw.org/english/docs/2003/12/24/afghan6908_txt.htm)).

<sup>10</sup> Afghan Independent Human Rights Commission, *A Call for Justice: A National Consultation on past Human Rights Violations in Afghanistan*, 29 January 2005, p. 17. Available at: [http://www.aihrc.org.af/rep\\_Eng\\_29\\_01\\_05.htm](http://www.aihrc.org.af/rep_Eng_29_01_05.htm).

<sup>11</sup> *Ibid.*, p. 20.

of the government quickly eroded and the Taliban was able to re-emerge in force and enjoy some measure of popular support. In the meantime, the warlords became ever more entrenched and difficult to challenge. Many were elected to Parliament and subsequently used their positions to grant themselves a blanket amnesty in “the interests of reconciliation” in February of this year.

The case of Afghanistan may serve to illustrate a link between the current violence and the endorsement of a framework for peace-building that gave legitimacy to undeserving candidates, that inadequately emphasized accountability for past crimes or a historical reflection, and that was built on political expediency.<sup>12</sup>

The UN has said that 50% of conflicts relapse into war. The situation in Afghanistan today should give room for pause to mediators. With the benefit of hindsight, Afghanistan today may be a case for arguing that a more pro-active stance to legal obligations should have been taken both at Bonn and subsequently. The enforcement of legal obligations in Afghanistan, at least in terms of serving as an argument for excluding certain actors from high political positions, could have bolstered the legitimacy of the government and the sustainability of the peace. At the time of the Bonn Agreement, this would have enabled negotiators to argue that provisions respecting legal obligations are necessary to ensure the longer-term legitimacy, both internationally and domestically, of the Agreement.

## **9.2. Practical Consequences of Legal Obligations and the Rise of an International Prosecutor**

To discuss the practical consequences of legal obligations on ongoing negotiations – in general and also, in particular, in the rise of the international prosecutor – it is appropriate to revert to the example of Northern Uganda. The conflict between the LRA and the Ugandan Government has raged since 1987. The consequences for the civilian population have been dreadful, with over 1.5 million people languishing in IDP camps in the North. The LRA sustains itself mainly through a campaign of terror and forced abduction, most notably of children

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<sup>12</sup> There is no suggestion that this was the only factor, but it was a factor.

and young people. Their targets have mainly been civilians, including in particular its own tribe, the Acholi, and their crimes have been very cruel, including hacking people to death and facial mutilations.<sup>13</sup> In the past, their political agenda has been unclear, and their leader, Joseph Kony, has often cloaked himself in a spiritualist aura. While the LRA may be the main responsible, the Government has also contributed greatly to the suffering of the population through its IDP policies and attacks by the Uganda People's Defence Force (UPDF), the Ugandan army, against perceived collaborators and people in the camps.<sup>14</sup>

The Government response has been to pursue a military offensive against the LRA, which has on occasions penetrated deep into Sudan, and to simultaneously pursue peace talks. There were several failed attempts of political dialogue in 1994 and 2004, most notably under the auspices of Betty Bigombe. In December of 2003, the Government of Uganda referred the situation to the ICC, and the ICC announced the opening of an investigation in January of 2004.<sup>15</sup> In October of 2005, the ICC made public its arrest warrants against five LRA senior leaders. Meanwhile, in late 2005, the LRA relocated from the territory of South Sudan to Garamba National Park in the Democratic Republic of Congo. This pre-empted a new initiative to mediate the conflict, commenced in the summer of 2006 and facilitated by Riek Machar, President of South Sudan. There are a number of direct practical consequences flowing from the arrest warrants on the peace process.

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<sup>13</sup> See Refugee Law Project, *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda*, Working Paper No. 11, Kampala: Refugee Law Project, Faculty of Law, Makerere University, 2004, at p. 23.

<sup>14</sup> Human Rights Watch, *Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda*, September 2005, Vol. 17, No. 12 (A).

<sup>15</sup> See International Criminal Court Press Release: *President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC*, The Hague, 29 January 2004 ([http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord\\_s%20resistance%20army%20\\_lra\\_%20to%20the%20icc?lan=en-GB](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB)); and "Statement by the Chief Prosecutor on the Uganda Arrest Warrants", The Hague, 14 October 2005.

First, the ICC warrants are widely believed to have helped to bring the LRA to the negotiating table. It is interesting to note that although the ICC involvement has met with great opposition in the North, because many felt that it may thwart the chance to achieve a peaceful solution to the conflict, many agree that the arrest warrants of the senior LRA leaders contributed to pushing them to the negotiating table. Recent population-based data in fact suggests that 63.8% of those who have heard about the ICC felt that it had contributed directly to bringing the LRA to the table.<sup>16</sup>

Secondly, in the Ugandan context, the arrest warrants have provided the opportunity for persons not accused of atrocities to bring their perspectives to the negotiation table and act as a “buffer” *vis-à-vis* the senior commanders. There can be no doubt that LRA commanders feel under immense pressure by the ICC – as well as by having been labelled a terrorist organization – as is reflected in their frequent comments in the media.<sup>17</sup> As a result of the warrants, senior LRA leaders have chosen not to go to Juba, as they fear arrest in South Sudan. Some consider it a disadvantage that senior LRA commanders are not themselves able to attend the talks, because it is more difficult to build bonds and trust between these commanders and government delegates (although there is direct communication by telephone).<sup>18</sup> The counter-argument is that the LRA delegation, comprised largely of Acholi diaspora and others with an indirect link to the conflict and not themselves accused of atrocities, provides a useful buffer, as some senior commanders have on occasion taken very hard-line positions.

Thirdly, the ICC arrest warrants maintain pressure on the LRA to continue the peace process, as the LRA hopes to eliminate the issue of the warrants in the peace process. The LRA has repeatedly stated that it will not sign an agreement unless the issue of the arrest warrants is

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<sup>16</sup> Berkeley-Tulane Initiative on Vulnerable Populations and the International Center for Transitional Justice, “Research Note on Attitudes about Peace and Justice in Northern Uganda”, August 2006.

<sup>17</sup> Stuart Ramsay, Sky News, 25 May 2007.

<sup>18</sup> International Crisis Group, “Northern Uganda: Seizing the Opportunity for Peace”, Africa Report No. 124, April 2007.



addressed.<sup>19</sup> This has put mediators and others in a position to argue that accountability is a necessary part of the process, and that it needs to be addressed at the national level in order to challenge the jurisdiction of the ICC on grounds of complementarity. This may be a way of resolving the deadlock, and is clearly a very practical matter.

As a result of the coming into force of the Rome Statute and the legal obligations it entails, mediators themselves may be more inclined to explore accountability options in response to demands from the parties. In the absence of the ICC and the tangible obligations it has placed in Uganda, the debate at Juba perhaps would not have moved as easily from purely political considerations to legal ones. Now, accountability and reconciliation is Agenda Item 3 of the talks, and the Government and the LRA have already concluded one Agreement on the issue.

This leads into complex territory in terms of what national measures may be considered as adequate in the light of the coming into force of the Rome Statute. Many commentators agree that blanket amnesties are to be avoided as they give rise to impunity.<sup>20</sup> There are various provisions in the Rome Statute which allow a current investigation to be put on hold, including Article 17(19) (complementarity), Article 16 (Security Council deferral), and Article 53 (which allows the Prosecutor to discontinue an investigation or prosecution in “the interests of justice”).<sup>21</sup> The first of these contemplates investigations and prosecutions, whereas the latter options provide tools for deviating from the ordinary course of full investigations and prosecutions provided for in the Rome Statute in exceptional circumstances. From an accountability perspective, the first option should be seen as preferable.

In this respect, many have considered whether an arrangement similar to that of South Africa, where the Truth and Reconciliation

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<sup>19</sup> Xinhua General News Service, “Uganda’s top rebel agrees to handle ICC indictment within Juba peace talks”, December 20, 2006.

<sup>20</sup> See United Nations Commission on Human Rights “Report of the Independent Expert to Update the Set of Principles to Combat Impunity” (Diane Orentlicher), E/CN.4/2005/102, February 2005.

<sup>21</sup> Rome Statute of the International Criminal Court.

Commission granted amnesty to individuals if they disclosed their involvement in crimes deemed of a political nature, would withstand a complementarity challenge in a particular case. Experts disagree on this issue. The Rome Statute through its preamble seems to clearly express a preference for the exercise of criminal jurisdiction to fight impunity.<sup>22</sup> In cases where amnesty is granted by a State Party for crimes within the jurisdiction of the Court, there at least would have been a strong legal case for admissibility on grounds of unwillingness genuinely to investigate or prosecute.

At Juba, an offer of full-fledged amnesty is not currently on the table. Instead, there has been a robust debate on justice and the form it should take, which is probably in no small part due to the existence of the ICC. This stands in stark contrast with the Comprehensive Peace Agreements in Sudan, where the issue of accountability was quickly discarded. At Juba, delegates held a specialized workshop to prepare themselves on the issue.<sup>23</sup>

Much of the early debate in Uganda centred on the question whether traditional justice mechanisms could form an alternative to the ICC and whether the international community ought to recognize traditional justice as a valid approach. The ceremony of Mato Oput or bitter root, among the Acholi, the group most affected by the conflict, was central to this debate, strongly promoted by religious and cultural leaders. But recently there has been more reflection on the topic, and while traditional justice still has support, many recognize that traditional justice alone would not be sufficient in dealing with senior LRA leaders.<sup>24</sup>

On 29 June 2007, the Government of Uganda and the LRA signed an Agreement on Accountability and Reconciliation at Juba in South Sudan. Importantly, the agreement sets a general framework for

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<sup>22</sup> “Recalling that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.”

<sup>23</sup> Comprehensive Peace Agreements. Government of the Republic of Sudan and the Sudan People’s Liberation Movement/Army, 31 December 2004.

<sup>24</sup> See for example Refugee Law Project and Human Rights Focus, “Not a Crime to Talk: Give Peace a Chance in Northern Uganda”, Press Statement, Kampala, 24 July 2006.

moving forward on the national level, specifically stating that “formal criminal and civil justice measures shall be applied to any individual who is alleged to have committed serious crimes or human rights violations in the course of the conflict”.<sup>25</sup> For non-state actors (that is, the LRA), the agreement specifies that a regime of alternative penalties will be introduced, and that these shall take into account the gravity of the crimes but also the need for reconciliation.<sup>26</sup>

The parties also committed to conduct nationwide consultations on the mechanisms of accountability and reconciliation.<sup>27</sup> The goal of this process is to identify the most appropriate combination of mechanisms under the Principles laid out in the Agreement. In August 2007, the government delegation launched the consultation process with a meeting with local, national and international civil society actors, religious and traditional leaders, and the representatives of victims and the affected populations.

The discussion on what the full exercise of complementarity may entail has only just begun and is in part technical. For instance, one question is whether crimes against humanity or war crimes can be charged under Ugandan law, as the Ugandans have not yet implemented the Rome Statute into domestic law. No LRA crimes have been the subject of a serious national investigation to date, as there already exists a comprehensive amnesty law (which was part of a democratic process).<sup>28</sup> As for crimes by the UPDF, they are subject to courts martial, but these have fallen short of fairness standards.

The issue of sentencing, of course, is highly sensitive as well. In the context of Juba, Human Rights Watch published a paper arguing for proportional sentencing and pointed to the fact that the average

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<sup>25</sup> Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement, Juba, Sudan, 29 June 2007, Section 4.1.

<sup>26</sup> *Ibid.*, sections 5.2, 6.3.

<sup>27</sup> *Ibid.*, section 2.4.

<sup>28</sup> See the Amnesty Act 2000.

sentence at ICTY has been 16 years.<sup>29</sup> While it is easy to agree in principle on the need of proportionality in sentencing, in practice lengthy prison terms will deprive the process of any meaningful incentives. In any case, punishment and its various forms may be subject to cultural relativism. After all, for IDPs in the camps in Northern Uganda, sitting in a prison cell in The Hague may be seen more as reward than as punishment. Punishment needs to be meaningful for victims. In this respect, the Colombian Peace and Justice Law, as revised by the Constitutional Court, may provide some inspiration to Uganda as it seeks the rights of victims to truth, justice and reparations into a single legal framework, and as it seeks to develop approaches to sentencing within a conflict situation.<sup>30</sup>

In any event, the new Agreement on Accountability and Reconciliation in Uganda allows the peace process to continue, without the ICC being identified as the spoiler, and it also enables Ugandans to have a debate about accountability and what it should entail at a national level. The process remains in a delicate state. If it succeeds, which is by no means a given, the process of implementing the provisions of the Agreement could have great significance for Uganda in coming to terms with its past. In this respect, the process should be seen as preferable to a deferral by the Security Council under Article 16 of the Rome Statute, as suggested by some actors such as the International Crisis Group.<sup>31</sup> Approaching the Council now to defer the prosecutions of senior LRA leaders would remove valuable pressure from the LRA.

The decision in the Agreement to mandate consultations in affected areas on accountability and reconciliation is also an unusual and a progressive step in resolving dilemmas of peace and justice. While some research has been conducted among victim populations and their opinions about accountability, including them more formally in the

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<sup>29</sup> Human Rights Watch Briefing Paper, “The June 29 Agreement on Accountability and Reconciliation and the Need for Adequate Penalties for the Most Serious Crimes”, number 4, July 2007.

<sup>30</sup> See Ley 975 de 2005, El Congreso de Colombia, Diario Oficial No. 45.980.

<sup>31</sup> International Crisis Group, 26 April 2007.

peace process through consultations with the parties themselves could be very significant and potentially precedent-setting.<sup>32</sup> It may be particularly interesting to ask people what they view as appropriate sanctions to LRA leaders. Such views may also be relevant in the event that the Prosecutor seek to approach the Pre-Trial Chamber under Article 53 of the Statute (a scenario currently considered unlikely).

If Uganda seeks to invoke complementarity, this should not necessarily be seen as a setback for the young ICC. In fact, the experience in Uganda can be viewed as a success for the ICC, even if the senior leaders of the LRA are never tried in The Hague. After all, the Rome Statute is about a system rather than about a Court, and the ICC arrest warrants may be responsible for ensuring an agreement that is far more robust on accountability than may otherwise have been the case. This should be seen as a credit both to the Court and to the Rome Statute. It is hoped that the Rome Statute and the legal obligations it entails may have a similar impact in different situations.

### **9.3. Legal Principles as a Normative Source to Evaluate Peace Agreements**

Finally, it has been argued that a transitional justice framework can help mediators in setting out principles that ought to be reflected in peace agreements. In so far as mediators are inclined to adhere to these principles they gain extra weight or legitimacy. For instance, in recent years UN mediators have not been permitted to endorse peace agreements containing amnesties. However, there is also a negative consequence. The prohibition of amnesties by the UN may lead parties to seek mediation by organizations or entities with less rigid standards.

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<sup>32</sup> See Justice and Reconciliation Project, “The Cooling of Hearts: Community Truth-Telling and Reconciliation in Acholi-land”, Special Report, May 2007. See also United Nations Office of the High Commissioner for Human Rights, 2007, “Making Peace our Own: Victims’ Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda”; Berkeley-Tulane Initiative on Vulnerable Populations and the International Center for Transitional Justice, “Research Note on Attitudes about Peace and Justice in Northern Uganda”, August 2007.

Nonetheless, as legal principles gain force, they may help in differentiating between “good” and “bad” agreements, not just in terms of impunity, but also in terms of properly balancing provisions of Disarmament, Demobilization and Reintegration (DDR) and reparations for victims; allowing for truth commissions – rather than the merely *pro forma* inclusion of commissions in DRC and Burundi – or strong human rights commissions such as Afghanistan’s; restoring the rule of law and giving it adequate priority; adding considerations of justice to regulations of power-sharing; and incorporating justice elements into security sector reform. For instance, in Uganda the Agreement also makes reference to the need of effective legal representation; reparations for victims; victim participation in accountability processes; the special needs of women and children; and the need of an analysis of the conflict’s root causes. The question of how an agreement is reached, rather than whether it is reached, may also gain increased importance.

In conclusion, it may be appropriate to quote the words of the Secretary General in his seminal report on Transitional Justice and the Rule of Law in Conflict and Post-Conflict Societies:

Justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another. The question, then, can never be whether to pursue justice and accountability, but rather when and how.<sup>33</sup>

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<sup>33</sup> UN Doc. S/2004/616, 3 August 2004, at paragraph 21.

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## International Politics and International Criminal Justice

Florence Hartman \*

Are justice and peace so difficult to combine? Is justice a hindrance to peace? Since international tribunals to prosecute persons accused of genocide and war crimes in the former Yugoslavia and Rwanda were established in 1993 and 1994 respectively, the response to these questions seems much more complex than it was usually perceived. The examples provided by the Balkan wars offer new avenues for such a discussion. The ICTY, the International Criminal Tribunal for the former Yugoslavia, was the first international criminal court ever established since Nuremberg and Tokyo. Moreover, the ICTY was the first international criminal court established prior to a peace agreement. In 1993, war was raging throughout Bosnia and Herzegovina.

### 10.1. The Creation of the ICTY

The ICTY was created by UN Security Council resolution 808 dated 22 February 1993 and established by resolution 827 of 25 May 1993. The ICTY is a body of the UN whose mandate is to prosecute serious crimes committed during the wars in the former Yugoslavia: grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. It can try only individuals, not organizations or governments. A year later, the UN Security Council established a sister court for Rwanda (ICTR), created after the end of 100 days of genocide against the Tutsis and moderate Hutus.

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The war in the Balkans started in 1991 and lasted until 2001. The Yugoslav wars were a series of violent conflicts – bitter ethnic conflicts between different peoples of the multiethnic former Yugoslav State, mostly between Serbs on the one side and Croats, Bosniaks (Bosnian Muslims) or Albanians on the other, but also between Bosniaks and Croats in the Republic of Bosnia and Herzegovina, and Macedonians and Albanians in the Republic of Macedonia.

These wars were the bloodiest conflicts on European soil since the end of World War II. From the beginning, they were characterized by widespread killings, ethnic cleansing, deportation, mass rapes, torture, inhuman detention and treatment, and campaigns of terror against civilians during the siege of cities such as Vukovar in Croatia or Sarajevo in Bosnia and Herzegovina. After a ten day war in Slovenia, and a few months of bloody war in Croatia in 1991, the conflict moved to Bosnia and Herzegovina in the spring of 1992. The ICTY was established as a response to the growing number of violations of international humanitarian law, but it had no impact on the field.

The widespread killings and deportation continued in Bosnia and Herzegovina with the same intensity. The political act establishing a tribunal in order to shift from impunity to accountability has proven to be an insufficient deterrent to stop the commission of war crimes. Justice cannot stop the war. It does not and cannot replace political actions in that respect, for the simple reason that the role of justice is not to act but to judge and punish crimes.

At the beginning, war criminals had good reasons not to fear justice. After being established, the ICTY was not much more than a Potemkin court. It had no budget to start functioning. It was mainly conceived as a public relations device and as a potentially useful policy tool that would deflect public criticism that the major powers did not do enough to halt the bloodshed there. The leading countries wanted to avoid military action and therefore they created the Tribunal. The thinking in Washington was that even if only low-level perpetrators in the Balkans were tried, the Tribunal's existence and its indictments would be sufficient to avoid criticism. Madeleine Albright, then the US Ambassador at the UN, admitted several years later (in December 2002, during her testimony at the ICTY in the case of Biljana Plavšić)



that, “it was easy enough to take the first vote at the UNSC in February 1993 to get the tribunal created but nobody believed that it would work. They said that there would never be indictees, and then they said that there would never be any trials, and then they said there would never be any convictions and there would never be any sentencing”.

International political leaders miscalculated the importance of having created the first international law enforcement body. The first ICTY judges and prosecutors, appointed at the end of 1993 and early 1994, had no intention to wait and see. They succeeded to find donors who by mid-1994 gave the court the means to start its first investigations and cases. Despite several indictments already issued by the beginning of 1995, justice was still no deterrent and the crimes continued until the last days of war in Bosnia and Herzegovina.

In the meantime, the international community repeatedly but unsuccessfully attempted to stop the war by additional actions – mainly diplomatic, while deploying thousands of peacekeepers under the UN flag, heavily armed international soldiers with no mandate to use force. They quickly became powerless witnesses – from a distance – of a multitude of crimes. Numerous cease-fire agreements were signed – and breached again and again when one of the sides felt it was to its advantage. Various peace plans were drafted, but until 1995 all of them were rejected by the warring factions in Bosnia and Herzegovina.

## **10.2. Incentives for Peace in the Bosnian Context**

During the first months of the war, the Serb forces had taken over and forcibly removed the non-Serb population from over 60% of the territory of Bosnia and Herzegovina. Their goal was to achieve the partitioning of Bosnia and Herzegovina, and to create out of it a new Serb State that would be linked to the neighbouring Republic of Serbia. International diplomats opposed their plan, but Serbs responded by refusing all peace initiatives. Two years later, the great powers agreed to have a loose Bosnian State within its international borders, but divided into two largely autonomous entities. In 1994, under US auspices, a peace agreement was signed between the warring Bosnian Croats and the Bosnian Muslims. Under this “Washington Agreement” a common entity was created on the combined territory held by the Croats and Bosniaks. The international community wanted the Bosniak-Croat entity to be established on 51% of the territory, as together the two ethnic groups were representing over 60% of the pre-war population of Bosnia and Herzegovina. Serbs were then offered to keep 49% of the territory although they represented 32% of the pre-war population.

The Serb side had committed most of the offences: over 60% of the crimes in the whole former Yugoslavia, including Bosnia and Herzegovina, the four other parties being responsible for the remaining 40%. Although most of the leaders due to join the peace negotiations were clearly and personally liable for planning, ordering or aiding and abetting the worst crimes perpetrated in Bosnia, the threat of justice represented by the ICTY did not keep the warring parties and their leaders from coming to the negotiation table. The reason was quite simple: the Serbs were winning the war but could not benefit from their victory if it was not confirmed by a peace settlement with the consent of the Western powers.

For the Serbs, the incentive for peace was therefore the recognition of most of the war results: they would be entitled to keep only 49%, as compared to the 60% of the territory they had seized in areas inhabited by a majority of non-Serbs prior to the serious ethnic cleansing conducted systematically and in a widespread manner for more than three years by various Serb forces. Let me quote Slobodan

Milošević, the head of neighbouring Serbia at the time, who masterminded these wars in order to create a large Serb State on the ruins of Tito's multiethnic Yugoslavia. During a meeting at the highest level in Belgrade in January 1995 he said,

if there had not been military victory, the international community would have never proposed that the territory of Bosnia-Herzegovina be divided fifty-fifty, which in history has never been a territory on which there is a Serb state.

### **10.3. Amnesties and Indictments as Tools of Negotiation**

Although the Serbs knew that they would have to give up around 10% of the territory they held, just a few months before joining the negotiation table they decided to take more land. They wanted to make sure that they would get at the peace talks a compact and homogenous territory. Instead of negotiating, they felt they would be much better off seizing the territory they wanted for strategic reasons. In July 1995, their army – led by general Mladić – overran the enclaves of Srebrenica and Žepa. Located in Eastern Bosnia, not far from the border with Serbia, the two enclaves were inhabited by Bosnian Muslims, local inhabitants but also survivors of the several waves of ethnic cleansing that took place in Eastern Bosnia since April 1992. In the spring of 1993, Srebrenica and Žepa were declared UN “Safe Areas”, which meant that they should be free from any armed attack or any other hostile act. For the Serbs, the two enclaves looked misplaced in the middle of an ethnically cleansed area under their control. In the summer of 1995, the UN failed to deter decisive Serb attacks against Srebrenica and Žepa. After the fall of Srebrenica on 11 July 2005, Mladić's forces separated men from women and elderly. Eight thousand Muslim males, from 12 to over 60 years of age, were executed during the following three-four days. For the ICTY and the International Court of Justice, Srebrenica was qualified in several judgements as genocide.

Mladić, the Bosnian Serb political leader Radovan Karadžić, and their mentors in Belgrade – Slobodan Milošević in the first place – expected to be immune to justice in exchange for the forthcoming peace. Preliminary discussions between the Serb side and international

mediators were going on at the time of the Srebrenica massacre. It has therefore to be taken into account that those who ordered this horrendous, large-scale crime or shared the intent to commit it were convinced that they would not be held accountable, as they were the main actors in the peace process. Milošević and the Bosnian Serb leadership exploited to their own advantage the bargaining power of the international diplomats who used to offer impunity in exchange for peace. We may say that, on the eve of the negotiation, the usual incentive for peace turned to be an incentive for additional crimes.

In 1995, the international community had no experience in combining peace and justice. Impunity was still the main instrument for international diplomacy to push forward peace negotiations. Most of the Security Council's permanent members considered the Tribunal a potential impediment to a negotiated peace settlement. In principle, the leading powers assisting the peace building efforts in the Balkans – the United States, the United Kingdom, France, Germany and Russia – were not able to offer impunity for peace. The existence of the ICTY excluded theoretically such a bargaining option.

Shortly after the July 1995 Srebrenica massacre, Mladić and Karadžić were indicted for genocide and crimes against humanity with relation to offences committed earlier in the war. The ICTY Office of the Prosecutor immediately launched an investigation related to Srebrenica against both indictees. The United States and European governments initially thought an indictment of Mladić and Karadžić might interfere with the prospects for peace. They expressed concern at the possibility that a legal institution could decide with its indictments who would be able to join peace negotiations. They even contemplated bringing Karadžić and Mladić to the negotiation table despite the indictments. "I am certain that the international community would accept Mladić's signature on any peace plan", said Milošević to the Serb leadership a month after Srebrenica. At that time Milošević was right. Even the UN Secretary General, Boutros Boutros Ghali made a strong protest to the ICTY Prosecutor, Richard Goldstone, at a meeting in New York, saying that the indictment would jeopardize any chance for peace. But later on, it appeared to international mediators that the indictment would be a useful tool in their efforts to isolate offending

leaders diplomatically. Karadžić and Mladić were eventually not invited to the peace talks that took place in Dayton, Ohio, from 1-21 November 1995. Milošević represented them, and decided instead of them.

The ICTY as a legal institution played no role in the war settlement in Bosnia and Herzegovina. During the Dayton peace negotiations, the issue of war criminals and their arrest was seen as a “deal breaker”. Diplomats were afraid of the constraints the ICTY could impose on the peace settlement. They did not want to see their space of political manoeuvre limited by the international court, so they simply opposed putting on the agenda any issue related to the war crimes tribunal, including the arrest of war criminals after the end of the war. While both processes – legal and peace – were legitimate, international mediators failed to find a way to combine them and chose to give primacy to the peace process.

On 16 November 1995, while the peace negotiations were still under way, the ICTY issued a second indictment against Karadžić and Mladić for genocide in Srebrenica. Major powers present in Dayton reacted negatively. Russia sent immediately an envoy to the ICTY Chief Prosecutor, the South African Richard Goldstone, in order to request the withdrawal of the indictment. Goldstone refused. A few days later that same month, a peace agreement was concluded in Dayton.

On paper, the parties were offered no legal incentives to push the peace negotiations forward or to guarantee peace implementation. The Dayton Peace Agreement did recognize the ICTY and requested full cooperation in accordance with the ICTY Statute and the UN Security Council resolutions that made such cooperation an international legal obligation. But there was no additional reference to justice in the final document. Many observers feared therefore that this would be a peace settlement to the detriment of justice, particularly because the final document provides that persons indicted for war crimes are excluded from political life. The capture of war criminals under ICTY arrest warrants was not mentioned as an absolute necessity.

While Slobodan Milošević was largely perceived by the major powers as responsible for the crimes committed by his Bosnian Serbs

allies – described since the beginning of the war by many Western leaders as a war criminal. By signing the Dayton Peace Agreement he suddenly became a peace maker. Some 60,000 NATO soldiers were to be deployed in Bosnia and Herzegovina to secure peace, at that time the largest NATO operation ever put in place. The United States and the Europeans did not want to put their personnel at risk. Milošević was therefore asked to use his influence on the Bosnian Serbs to get the peace accord implemented and to ensure the security of NATO troops.

The ICTY was excluded from the peace negotiations as the “law” could not be instrumental in facilitating negotiations, absent a legal basis to offer impunity to the main peace actors. In order to push the peace settlement, the major powers circumvented discretely the law and its constraints with regard to the major peace actors. After the end of the war, the major powers refused – in the name of security and stability – to take all necessary measures to ensure a full shift from impunity to accountability. Until mid-1998, NATO troops in Bosnia and Herzegovina refused to act upon ICTY arrest warrants, and the growing numbers of indictees were not brought to justice for some time. Moreover, several mediations took place in order to get Karadžić and Mladić out of politics and influence, rather than to have them surrender to The Hague. Until 1997, both *génocidaires* were walking freely in Bosnia and Herzegovina in front of the nose of NATO troops without being captured, despite the repeated requests for justice by numerous actors such as the ICTY leadership, movements of victims, and local and international human rights organizations. In the following years, Mladić and Karadžić became less visible, but Mladić has not yet been brought to justice.

Officially, no impunity was offered in Dayton to the leaders of the negotiating parties. But Milošević was not even considered as a potential suspect by the Tribunal’s leadership until he started a new war in 1999, in the predominantly Albanian province of Kosovo. Out of a total of 161 ICTY accused, a majority was indicted for crimes in Bosnia and Herzegovina. Most of them were Serbs, but there were also a number of Croats and Bosniaks. Apart from Mladić, they were all eventually transferred to The Hague. Nevertheless, in Dayton, and be-

hind closed doors, some arrangements and deals contrary to the law were obviously discussed with those on whom the success of peace depended.

#### **10.4. The Milošević Case: Indicting an Incumbent Head of State**

Having an international criminal court that, at the time of the peace settlement, had a mandate to prosecute those responsible for the most horrendous violations of international law, was no impediment to peace despite the fears of diplomacy. The existence of this legal institution prevented any formal amnesty. For international mediators involved in the peace process, it was a completely new situation. They had no experience with how to promote justice while pressing for peace, and they were very sceptical of the extent to which peace and justice could work together. With the Rome Statute establishing the International Criminal Court, international actors engaged in peace processes are now often confronted with similar situations to that faced in 1995 in Dayton. However, they still feel quite uneasy with regard to the potential impact of ICC arrest warrants against local warlords on the peace process in Sudan and Uganda.

We can learn and draw inspiration from another case study from the Balkans. In 1998, Milošević – the “1995-peacemaker” who had already fomented two wars – started a new war in Kosovo. Following an unsuccessful attempt to halt the war and push a peace settlement, Western powers decided to use force. NATO’s bombings against Serbia started on 23 March 1999, with no effect on the massive atrocities committed by the troops of Milošević against Kosovo’s Albanians. Two months later, while NATO’s bombing campaign was still ongoing, Louise Arbour from Canada, then ICTY Prosecutor, issued an indictment against Milošević for crimes against humanity in Kosovo, mainly for systematically emptying towns and villages of their Albanian inhabitants, either by forcing them to flee or through executions. Milošević became the first head of state to be indicted by an international tribunal.

While the United States and the European governments initially thought an indictment against Milošević might be a useful tool in their efforts to demonize the Serbian leader, to isolate him diplomatically, to

strengthen the hand of his domestic rivals, and to fortify the international political will to use force, they later feared that it might interfere with the prospects of peace. Moscow and Washington tried but failed to convince Louise Arbour to wait before handing down the indictment. Their thinking was that the indictment came at the worst possible moment, when Milošević was about to step back and agree to the withdrawal of his forces from Kosovo and to the deployment of NATO peace forces to secure the area. They were particularly afraid of not having an interlocutor with whom to negotiate peace, but also of having Milošević defying NATO in such a way that they would need to send troops and force him to capitulate – something they wanted to avoid at almost any cost. They were furious that justice was blind to the extent that it risked prolonging the suffering of two million Albanians, in addition to the 10,000 who had already been executed.

Shortly after being indicted, Milošević decided to agree to all conditions he had previously rejected. Diplomats found a simple way to avoid signing with an accused head of state. Instead of Milošević, the Kumanovo war settlement was signed between NATO representatives and the Serbian military leadership. On the day she made public the indictment against Milošević and four other senior Serbian officials, Louise Arbour said that, “no credible, lasting peace can be built upon impunity and injustice. The refusal to bring war criminals to account would be an affront to those who obey the law, and a betrayal of those who rely on it for their life and security”. She was right. Milošević was ordering crimes in Kosovo with the belief that he would never be held accountable, that he could finish the job in Kosovo and negotiate his impunity in exchange for peace, as he did earlier in Bosnia and Herzegovina. In the fall of 2001, Carla Del Ponte of Switzerland, the new ICTY Prosecutor, handed down Milošević’s indictment for genocide and crimes against humanity in Bosnia and Herzegovina and in Croatia, just a few months after he had been arrested and transferred to The Hague.

The indictment of a head of state was no impediment to peace. It was quite the opposite. Milošević was not afraid to be isolated diplomatically, but to be bypassed by the major powers in their way to a peace agreement. Milošević would lose much of his power by not be-



ing the main interlocutor of the West any more. He was therefore in a hurry to agree to a peace settlement even if that meant losing control over Kosovo. After the war, Kosovo was formally still a part of Serbia, but in practice the Serbian government had no say or practical influence over the affairs of the province that later became independent. Milošević had no interest in continuing the war and being defeated by NATO in Belgrade. His main goal was to stay in power and to escape justice. Sixteen months later, in October 2000, he was defeated by his own people and had to step down from power after thirteen years. Then Milošević made a deal with his successor, Vojislav Koštunica, and his army to be immune from justice. The Serbian Prime minister, Zoran Djindjic, had other plans. On 28 June 2001, he ordered the arrest of the former Serbian president and handed him over to the ICTY.

### **10.5. Justice as an Instrument of Peace Consolidation**

Justice cannot replace the diplomatic, economic, and military tools that are key instruments to stop wars. But justice can be one additional instrument in the hands of international or local actors engaged in peace processes because it is one of the most efficient tools in peace consolidation. Justice indeed contributes to overcoming the terrible past and to assist post-conflict societies in envisaging the future and benefiting fully from economic incentives, reconstruction, reintegration, etc.

There is no lasting peace without justice. Reconciliation cannot be based on injustice and impunity, on lies and denial. Seeing justice done is not only in the interest of victims and domestic and international human rights activists, it is not only for idealists, but is the best investment in the future. For that reason justice should be seen by realists and pragmatics as in their best interest. An unresolved past, a past that has not been purged from injustice, can only lead to new cycles of violence, to new wars.

While this may seem obvious to many, justice is however still perceived by some as a hindrance to political action and as an obstacle that makes the job of diplomats more difficult. The difficulty is not only to bring the belligerent parties to the negotiation table, but also in the post-conflict period when justice may prosecute actors still influential on the political scene for war crimes. Justice is then seen as a cause

of instability in the fragile post-war stages. It may be so in some cases, but primarily because we often observe a lack of political support for the processes of justice. Post-conflict actions or mechanisms for the implementation of peace agreements often neglect the fundamental role of justice in building peace, trust and reconciliation. After a civil war or an ethnic conflict, political actors, domestic and international, often believe that to forget is to forgive, and are keen to pass over the past in silence with the pretext that doing otherwise is painful or too difficult. This is often the case because persons involved in war crimes are still holding political positions. Nevertheless, it is very important to educate and explain to the public the role of justice in establishing the facts, in acknowledging the suffering of the victims, and in uncovering individual responsibility rather than holding a group collectively responsible for mass murders.

#### **10.6. Removing Impunity from the Negotiation Toolbox**

To put it simply and rather abruptly, there are two ways to solve the so-called dichotomy between the constraints of law and the constraints of peace: either you drop the law, which was the case for centuries, or you combine the two, which is the new and extraordinarily exciting challenge ahead of us. I would rather suggest combining both. Justice in general – whether international or domestic, in its retributive and non-retributive forms – will not be perceived as an impediment to peace settlements and peace implementation if it is not an option any longer or when there is no alternative to accountability.

Many would say that this is idealistic or naïve. It is first of all a question of political will, as it was when the Geneva Conventions were drafted. After the terrible slaughter of World War I and the Holocaust during World War II, our predecessors were wise enough to establish and subscribe to legal principles in order to protect humanity from barbarity. The Cold War prevented their implementation. Despite the “never again” commitment there were further terrible slaughters in the Soviet Union, Cambodia, China and elsewhere, that were left unpunished. And despite the body of international humanitarian law that is binding on all parties worldwide; the establishment of the first international law enforcement bodies; the ICC that henceforth should safe-

guard and enforce the world legal heritage; and new initiatives to protect vulnerable populations, such as the instrument for the protection of all persons from enforced disappearance – despite all these steps, amnesties are still not prohibited. They still appear in peace processes as we saw in Afghanistan and Ivory Coast.

Obviously time is needed to change people's mentality and to reach the point when there will be no alternative to justice. Some will say that warlords will then continue war without an end, extending the suffering of civilian populations. Diplomats have been using this argument since the 1990's, since the ICTY – conceived primarily as a threat – became a difficult reality for them to handle. But has anyone demonstrated up until now that impunity for warlords makes wars shorter and less inhuman?

Alternatively, one can argue that by having no alternative but to face justice, those fomenting wars and ordering or committing atrocities will try to escape and hide rather than continuing the fighting. Their subordinates may start weighing the risks of committing crimes if they have no prospect to escape justice. And others may estimate that peace is the only way to avoid spending the rest of life in prison. In many cases, especially in ethnic conflicts, crimes are not the consequences of war, but its primary goal. While such widespread violations of law would not be tolerated or could not be justified in time of peace, war changes the values and the rules, and somehow makes mass killings possible. If it were universally admitted that war is no excuse for massive violations of the law, domestic and international, then war would probably not be used so often as a pretext for achieving illegal goals. I deeply believe that changing people's mentality regarding impunity can pay off. When impunity is no longer a key to peace, *then* justice will start to operate as a deterrent to crimes and war.



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## Arrest and Surrender under the ICC Statute: A Contextual Reading

Carsten Stahn\*

### 11.1. Introduction

Arrest and transfer of persons is of fundamental importance for the management of international justice. Arrest and surrender is to some extent a measurement factor of the effectiveness of a system of justice, its deterrent effect and its impact on victims. Most people would regard surrender as the ultimate sign that justice is “seen to be done”. In addition, arrest and surrender are important factors in shaping peace processes and approaches towards justice in situations of transition from conflict to peace.

The first dimension, the strategic importance of enforcement for the functioning of international justice, is widely known and acknowledged.<sup>1</sup> It has generated a rich imagery. Antonio Cassese, the first

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<sup>1</sup> For a survey of the law on cooperation, see Goran Sluiter, *International Criminal Adjudication and the Collection of Evidence: Obligations of States*, Antwerp, 2002; Susan Lamb, “The Powers of Arrest of the International Criminal Tribunal for the Former Yugoslavia”, *British Yearbook of International Law*, Vol. 70 (1999), p. 165; Bert Swart, “Arrest and Surrender”, in Antonio Cassese, Paola Gaeta and John Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Oxford University Press, 2002, p. 1639; Annalisa Ciampi, “The Obligation to Cooperate”, in Antonio Cassese, Paola Gaeta and John Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Oxford University Press, 2002, p. 1607; Rod Rastan, “Testing Co-Operation: The International Criminal Court and National Authorities”, *Leiden Journal of International Law*, Vol. 21 (2008), p. 431; Alexander Zahar and Goran Sluiter, *International Criminal Law*, Oxford, 2007, pp. 456-476.

President of the International Criminal Tribunal for Yugoslavia (ICTY), compared the tribunal to a “giant without arms and legs”, who needs artificial limbs (that is, state authorities) to walk.<sup>2</sup> The International Criminal Court (ICC) introduced the concept of a dual pillar structure, in order to emphasize the inherent link between judicial activity and enforcement. President Philippe Kirsch characterized the Rome system of justice as a framework that relies on the judicial pillar (represented by the Court itself) and the enforcement pillar (cooperation and support by states and international organizations), in order to gain and sustain credibility.<sup>3</sup> ICC Prosecutor Luis Moreno-Ocampo resorted to the idea of a “responsibility to enforce” in the area of arrests, arguing that states that “do not actively support the Court” in carrying out arrests “are actively undermining it”.<sup>4</sup>

However, the contextual and policy implications of arrest and transfer to international tribunals (e.g., their role and impact on bargaining) have traditionally received less attention.<sup>5</sup> There is, in particular, hardly any analysis of benefits and weaknesses of the ICC system

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<sup>2</sup> See Antonio Cassese, “On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law”, *European Journal of International Law*, Vol. 9 (1998), p. 13.

<sup>3</sup> See Philippe Kirsch, Address to the United Nations Assembly, 1 November 2007, p. 4, at [http://www.icc-cpi.int/NR/rdonlyres/754F8043-22DB-4D78-9F8C-67EFBFC4736A/278573/PK\\_20071101\\_ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/754F8043-22DB-4D78-9F8C-67EFBFC4736A/278573/PK_20071101_ENG.pdf) (“The Court itself is the judicial pillar. It is the responsibility of the Court to continue to maintain its credibility as an independent and impartial judicial institution through its strict adherence to the Rome Statute. The other pillar of the Rome Statute – the enforcement pillar – has been reserved to States and, by extension, international organizations. The Court requires support and cooperation in many areas, in particular the arrest and surrender of suspects and the protection of victims and witnesses”).

<sup>4</sup> See Luis Moreno Ocampo, “Building a Future on Peace and Justice”, Nuremberg, 24/25 June 2007, at [http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO\\_nuremberg\\_20070625\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/4E466EDB-2B38-4BAF-AF5F-005461711149/143825/LMO_nuremberg_20070625_English.pdf).

<sup>5</sup> For some general analysis, see Paul R. Williams, “The Role of Justice in Peace Negotiations”, in Cherif M. Bassiouni, *Post-Conflict Justice*, Transnational Pub., Ardsley, NY, 2002; Jack Synder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice”, *International Security*, Vol. 28 (2003/2004); James D. Fearon, “Bargaining, Enforcement and International Cooperation”, *International Organization*, Vol. 52 (1998).

of arrest and transfer in situations of transition.<sup>6</sup> The existing legal scholarship appears to be dominated by certain perceptions that deserve critical scrutiny. It is often too easily assumed that arrests are an impediment to peace in situations of ongoing conflict.<sup>7</sup> It is further taken for granted that robust enforcement powers are desirable *per se* and a fundamental pre-condition for better and effective justice.

This essay seeks to test some of these assumptions. It revisits the role and impact of arrest and transfer on bargaining and conceptions of justice in light of the Court's features, rationales and first practice.

This analysis is divided in two parts. The essay starts (Section 11.2) with an overview of the general features of the arrest and surrender scheme of the Rome Statute. The second part analyses how this scheme operates in situations of transition (Section 11.3). It revisits the assumption that arrest is an obstacle to or a destabilizing factor in transitions from conflict to peace. It further explores the systemic benefits and potential disadvantages of transfers of persons to an international jurisdiction in situations of transition.

## **11.2. Arrest and Surrender Under the Rome Statute in Context**

The system of arrest and transfer under the ICC Statute is unique. It combines elements of the enforcement powers of the *ad hoc* tribunals with traces of classical extradition law. The ICC system has been criticised by international lawyers for its weaknesses and loopholes, in particular its “regression to the inter-State model of cooperation” in the execution and enforcement of arrests and the scope of state discretion

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<sup>6</sup> For a focus on the *ad hoc* tribunals, see Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and State Cooperation*, Cambridge University Press, 2008. On the nexus of the ICC to transitional justice, see Carsten Stahn, “The Geometry of Transitional Justice”, *Leiden Journal of International Law*, Vol. 18 (2005), p. 425.

<sup>7</sup> See Katherine Southwick, “Investigating War in Northern Uganda: Dilemmas for the International Criminal Court”, *Yale Journal of International Affairs*, Vol. 1 (2005), p. 113; Mahnoush Arsanjani and Michael Reisman, “The Law-In-Action of the International Criminal Court”, *American Journal of International Law*, Vol. 99 (2005), p. 392.

in the context of competing requests (ICC Statute, Article 90).<sup>8</sup> This criticism has become common ground in the vocabulary of international courts and tribunals and legal discourse, which has emphasised the need for (centralised) law enforcement.

However, relatively little analysis has been devoted to the strengths of the Statute, and its potential benefits. The Rome Statute reduces the possibility to invoke arbitrary grounds for postponement and refusal of requests of cooperation. It reinforces the protection of the rights of individuals in arrest proceedings in the custodial state. Moreover, it leaves some room and flexibility to make choices regarding the determination of the proper forum of justice. Such flexibility may be a particular asset in situations of transition where vertical top-down approaches are easily perceived as instruments of international oppression.<sup>9</sup>

### 11.2.1. Models of Cooperation

What are the features of the ICC system? In order to understand the benefits and weaknesses of the system of arrest and transfer under the Statute, it is necessary to take a closer look at contemporary models of cooperation.

In international law, cooperation regimes are usually theorised in terms of two categories: inter-state cooperation and cooperation with international jurisdictions. The features of these models have been developed by the ICTY Appeals Chamber in *Blaškić*. The Chamber distinguished two different approaches: (i) the classical “horizontal” relationship between equal sovereign states, in which arrest and transfer is based on “treaties of judicial cooperation or, if such treaties are not

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<sup>8</sup> See Swart, *supra* note 1, at 1702; *id.* “General Problems”, in Antonio Cassese, Paola Gaeta and John Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, p. 1595.

<sup>9</sup> Conflict theorists have traditionally advocated for negotiation and consent-based models of resolving conflict. See e.g., Roger Fisher, William Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In*, Penguin, New York, 1993.



available, on voluntary interstate cooperation”<sup>10</sup>; and (ii) a “vertical” relationship based on the supremacy of international jurisdiction and binding powers of cooperation.<sup>11</sup>

The ICC system is situated between these two models. It is a special multilateral treaty system, which contains vertical features, but maintains some elements of classical extradition schemes (e.g., operation of the rule of speciality, communication on the basis of “requests”, limited direct on-site powers of the Court, execution of requests by the relevant authorities of the requested State, recognition of certain grounds for the postponement or refusal of the execution of requests).<sup>12</sup> This system seeks to reconcile the primacy of domestic jurisdiction under the Rome Statute with the commitment and legal duty to prosecute crimes within the jurisdiction of the Court.<sup>13</sup> One of its major strengths is its capacity to combine dialogue among overlapping jurisdictions with incentives for compliance.

#### **11.2.1.1. Traditional Features of Extradition**

How do classical “horizontal” schemes operate? The law of extradition itself has undergone some important changes over the past decades. Traditional models of judicial cooperation and assistance are usually characterized by three features: (i) the predominance of reciprocity, (ii) the recognition of exceptions to extradition (grounds for refusal), and (iii) dispute settlement through third party determination.

Extradition is traditionally a bilateral regime, which operates on the basis of reciprocity. Extradition is typically tied to the requirement

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<sup>10</sup> See ICTY, Appeals Chamber, *Prosecutor v. Tihomir Blaškić, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997*, 29 October 1997, para. 47. Available at: <http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>.

<sup>11</sup> *Ibid.* paras. 47 and 54.

<sup>12</sup> See also Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *International Criminal Law and Procedure*, Cambridge University Press, 2007, p. 406.

<sup>13</sup> See paragraph 6 of the preamble of the ICC Statute.

of double criminality.<sup>14</sup> This means that a request for extradition is only granted if the conduct constituted a criminal offence according to the law of the requesting state and the requested state. Historically, the requested state has been entitled to invoke various exceptions to extradition, including the “political offence exception” (grounded, *inter alia*, on non-intervention in internal affairs); the “military offence” exception; constitutional prohibitions of the transfer of nationals and extradition in the case of death penalty or life imprisonment; sovereignty-related grounds for refusal (security, *ordre public*, etc.). Disputes over exceptions have been decided by an impartial third person upon request of one of the two sides.

Today, the scope of application of reciprocity and the discretion to invoke grounds of exception have been significantly reduced in the area of international crimes. Bilateral approaches and domestic exceptions are difficult to reconcile with the universal nature of such crimes. The crimes that fall within the jurisdiction of the ICC have been recognised by States Parties as crimes which “are of concern to the international community as whole”.<sup>15</sup> It has become considerably more difficult to deny extradition due to the gradual codification of core crimes and the crystallization of universal jurisdiction.

The impact of the rule of double criminality is limited by the customary nature of international crimes and obligations of states to criminalise conduct domestically. State obligations to investigate and prosecute limit the option of a domestic jurisdiction to deny extradition on the ground that a specific category of crime (e.g., crimes against humanity) has not been codified in the domestic legislation of the requesting state.<sup>16</sup> Statutes of limitations under domestic law have a limited impact and may not bar extradition.<sup>17</sup>

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<sup>14</sup> For a survey, see Swart, *supra* note 1, p. 1667; Cryer, Friman, Robinson and Wilmschurst, *supra* note 12, pp. 74-75.

<sup>15</sup> See paragraph 4 of the preamble of the ICC Statute and Article 1.

<sup>16</sup> See also Swart, *supra* note 1, at 1654.

<sup>17</sup> See Article III of the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. It is safe to assume statu-

The scope of application of exceptions has been considerably narrowed. The political offence exception<sup>18</sup> has been excluded for specific crimes, such as genocide, crimes against humanity, torture or war crimes.<sup>19</sup> Moreover, the duty to extradite or prosecute certain crimes places a higher burden on the requested state. It forces the state of the nationality of the offender to prosecute, when refusing to extradite its own nationals.

These developments suggest that the divergence between duties under the “horizontal” and the “vertical” model is slightly less pronounced than assumed.<sup>20</sup>

### **11.2.1.2. The “Vertical” Approach**

The idea of the “vertical” model emerged in the cooperation framework of the Chapter VII established *ad hoc* tribunals. It is directly linked to the concept of the primacy of international jurisdiction.

#### **11.2.1.2.1. Features**

Verticality is based on three features: (i) the absence of reciprocity, (ii) the scope of the state duty to cooperate, and (iii) the unilateral model of dispute settlement.

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tory limitations do not bar prosecution for genocide, crimes against humanity and torture. See Antonio Cassese, *International Criminal Law*, 2003, p. 319.

<sup>18</sup> This exception emerged in the 18<sup>th</sup> century. It is based on the presumed belief that the alleged political offender might be subjected to an unfair trial in his home country (e.g., due to resistance to anti-democratic political oppression). See generally Christine van der Wyngaert, *The Political Offence Exception to Extradition: The delicate problem of balancing the rights of the individual and the international public order*, Kluwer, 1980.

<sup>19</sup> See Article VII of the Genocide Convention and Article 1 of the Additional Protocol to European Convention on Extradition (crimes against humanity, graves breaches of the Geneva Conventions). See also ICTY, Appeals Chamber, *Prosecutor v. Furundžija*, 10 December 1998, para. 157 (torture “must not be excluded from extradition under any political offence exception”).

<sup>20</sup> Note that the European Arrest Warrant abolished the double criminality rule in the European context in relation to crimes within the jurisdiction of the Court. See Article 2 of the Framework decision on the European Arrest Warrant.

In the context of international courts and tribunals, cooperation is essentially a one-sided affair. International institutions are able but under no duty to provide cooperation to states. States, in turn, are subject to far-reaching duties of cooperation in light of the primacy of international jurisdiction. The grounds for refusal set out in inter-state cooperation are either inapplicable or considerably limited. Failure to criminalize crimes or the existence of domestic statutes of limitation has not been recognized as a ground to refuse cooperation. There is no exception with regard to transfer of nationals. The final say in disputes between the requesting side (international court) and the state is usually attributed to the former.

These features are best exemplified by the Statutes of the ICTY and the ICTR. Both tribunals were expressly vested with the power to issue binding orders (“States *shall co-operate* with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law”).<sup>21</sup> The Appeals Chamber of the ICTY argued that recourse to mandatory cooperation should be preceded by requests for voluntary cooperation as a matter of “sound policy”.<sup>22</sup> But this guideline was applied on a case-by-case basis and not interpreted as a strict legal condition to the issuing of binding orders.<sup>23</sup> The respective domestic jurisdictions were placed under a strict duty to cooperate (“States *shall comply* without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal.”). The Rules of Procedure and Evidence (RPE) made it clear that specified domestic impediments to transfer (e.g., national extradition provisions) are inapplicable to the tribunal. Rule 58 of the ICTY RPE clarified this point, stating that “[t]he obligations laid down in Article 29 of the Statute shall prevail over any legal im-

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<sup>21</sup> See Article 28 ICTR Statute, Article 29 ICTY Statute.

<sup>22</sup> See Appeals Chamber, *Prosecutor v. Blaškić*, Judgment, 29 October 1997, para. 31.

<sup>23</sup> See Roland Bank, “Cooperation with the International Criminal Tribunal for the Former Yugoslavia in the Production of Evidence”, *Max Planck Yearbook of United Nations Law*, Vol. 4 (2000), pp. 239-240.

pediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned”.

The objections to transfer remained limited. The Statute of both tribunals recognized the *ne bis in idem* exception.<sup>24</sup> But the Statutes excluded any discretion in the context of the treatment of competing requests for cooperation. Article 103 of the Charter required requested UN member States to give priority to the request by the tribunal in case of competing requests. Doubts as to the legality of a request did not provide a unilateral ground of refusal, but had to be invoked before the respective tribunal. The tribunals retained the power to decide on their merits, which is arguably one of the most powerful features of “verticality”, since it involves the idea of *Kompetenz-Kompetenz*.<sup>25</sup>

The tribunals further asserted the power to bypass the state and issue binding orders against individuals by virtue of their “verticality”, in cases where the authorities of the State or entity concerned have been requested to comply with a request for assistance”, but “prevent the Tribunal from fulfilling its functions”.<sup>26</sup>

Non-compliance with the duty to enforce was followed by the possibility of threats and sanctions. Rule 59 empowered the ICTY to notify the Security Council in case of failure to execute a warrant or transfer order. Rule 61 was introduced into the Rules of Procedure and

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<sup>24</sup> See Article 10 ICTY Statute (“A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted”).

<sup>25</sup> See Goran Sluiter, “State Cooperation with the ICC”, in R. Yepes-Enriquez (ed.), *Treaty Enforcement and International Cooperation in Criminal Matters*, 2002.

<sup>26</sup> See ICTY, Appeals Chamber, *Prosecutor v. Blaškić*, 29 October 1997, para. 55. The Appeals Chamber argued that “[i]t is [...] to be assumed that an inherent power to address itself directly to those individuals inures to the advantage of the International Tribunal. Were it not vested with such a power, the International Tribunal would be unable to guarantee a fair trial to persons accused of atrocities in the former Yugoslavia”.

Evidence, in order to endow the tribunal with the power to issue an international warrant of arrest to all States in case of failure to execute a warrant.

#### 11.2.1.2.2. (Re-)Assessment

This turn to “verticality” in cooperation is usually praised as progress by lawyers.<sup>27</sup> Verticality is typically associated with effectiveness, while horizontalism is perceived as weakness.<sup>28</sup> This narrative is, however, less evident from a compliance perspective. The results of the cooperation regime of the *ad hoc* tribunals are mixed. The record of indictment and cases indicates that the number of successful apprehensions of high-level perpetrators have increased statistically at the turn of the new millennium. However, enforcement has remained fragile and dictated by a contrast between will and obligation. There is, in particular, no linear correlation between assertion of authority and effective cooperation.<sup>29</sup>

It is difficult to show that the success rate of arrest and surrender may be attributed to the robust enforcement model of the ICTY. The rank of the indicted persons obviously played an important role in enforcement. Most of those tried in the earlier phase of the tribunal were mid-level perpetrators, whose surrender was less controversial politi-

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<sup>27</sup> See Bert Swart and Goran Sluiter, “The International Criminal Court and International Criminal Cooperation”, in Herman van Hebel *et al.*, *Reflections on the International Criminal Court*, 1999, p. 101. For a critical analysis, see Frederic Megret, “In Search of the ‘Vertical’: An Exploration of What Makes International Criminal Tribunals Different (and Why)”, in Carsten Stahn and Larissa van den Herik, *Future Perspectives on International Criminal Justice*, T.M.C. Asser Press, forthcoming 2009.

<sup>28</sup> See, e.g., Claus Kress, Kimberly Prost and Peter Wilkitzki, “On Part 9”, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> ed (2008), pp. 1507-1509. Part 9 is qualified as a “(weak) vertical cooperation regime” (p. 1507), while certain horizontal features are described as “shortcomings of Part 9 if judged from the ideal of effective cooperation” (p. 1509).

<sup>29</sup> For a tentative set of criteria defining compliance, see Steven D. Roper and Lilian A. Barria, “State Co-Operation and International Criminal Court Bargaining Influence in the Arrest and Surrender of Suspects”, *Leiden Journal of International Law*, Vol. 21 (2008).

cally.<sup>30</sup> This may explain the success of arrest in the early phase of the tribunal.

Another key factor was the proliferation of enforcement agents. The prospects of arrest increased significantly due to the growing involvement of international actors such as the NATO-led Stabilisation Force (SFOR) and UNTAES in enforcement activities.<sup>31</sup> Incentives for compliance were further enhanced by other costs-benefit assumptions. The move towards greater compliance was visibly guided by the prospect of permanent EU alignment and economic progression. This option influenced both governmental and societal attitude towards compliance.<sup>32</sup>

Vertical models as such have had only limited effect on compliance rates.<sup>33</sup> It does not come as a surprise that the ICTY itself has shifted its policy in the course of its activities. In later practice, it has come to rely less on the compulsory nature of cooperation obligations. This move is partially guided by the insight that “horizontal” models and equality-based dialogue may produce more sustainable results in the long term.<sup>34</sup>

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<sup>30</sup> See Theodor Meron, “Answering for War Crimes: Lessons from the Balkans”, *Foreign Affairs*, Vol. 76 (1997), pp. 2-8.

<sup>31</sup> The practice of the Security Council and NATO clarified that the mandate of both entities included powers of arrest. For an analysis, see Paola Gaeta, “Is NATO Authorized or Obligated to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?”, *European Journal of International Law*, Vol. 9 (1998).

<sup>32</sup> The EU made accession talks dependent on arrest of persons indicted by the ICTY. Serbian authorities adopted an action plan to arrest Mladić when the EU suspended discussions.

<sup>33</sup> See also Zahar and Sluiter, *supra* note 1, p. 461.

<sup>34</sup> This argument was presented by the Prosecution in *Blaškić*. The Prosecution argued that “as a matter of policy and in order to foster good relations with States, ... cooperative processes should wherever possible be used, ... they should be used first, and ... resort to mandatory compliance powers expressly given by Article 29(2) should be reserved for cases in which they are really necessary”. ICTY, Appeals Chamber, *Prosecutor v. Blaškić*, 29 October 1997, para. 31. See also Rastan, *supra* note 1, at 438.

A threat and supremacy driven approach towards cooperation is no catch-all formula.<sup>35</sup> The feasibility and success of a respective enforcement model cannot be assessed without taking into consideration the circumstances and nature of the underlying conflict. The very assumption that binding legal obligations and pressure from an international entity foster prospects of compliance by the custodial state is open to challenge. Assertions of coerciveness may create tensions between an international tribunal and a domestic jurisdiction. They may, in particular, harden the opposition by defiant regimes and deepen the gulf between the “international” (e.g., Security Council powers, alliance-driven military forces) and the “domestic” in situations of ongoing conflict.

These risks are particularly pronounced if justice is pursued without or against domestic consent. In such contexts, the means and timing of pressure are often dictated by international rather than domestic agendas. The targets of investigation and prosecution are chosen from outside, with limited local input and a specific vision of historical facts. Within the society, robust cooperation and hard legal action against the political or military elite are likely to be perceived as a quick, but unsatisfactory response to deeper social and political tensions of the respective entity. This may create novel frictions and “reverse” solidarity effects.

Existing cooperation regimes are mostly focused on compliance by governmental and public channels, rather than civil society. This limits their effectiveness and level of support,<sup>36</sup> in particular in fragile and divided societies. Sanctions attached to non-compliance may easily harden the situation of victims of crime.

It is thus desirable to combine threat-based models of cooperation with a range of flexible and “soft” compliance tools (e.g., dialogue, dispute settlement systems) that may help building societal con-

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<sup>35</sup> For a study of alternative compliance models in the field of cooperation, see Brett Frischmann, “A Dynamic Institutional Theory of International Law”, *Buffalo Law Review*, Vol. 51 (2003), pp. 679, 687-688.

<sup>36</sup> For a sanction-based approach, see Andrew T. Guzman, “A Compliance-Based Theory of International Law”, *California Law Review*, Vol. 90 (2002).



sent. Such tools are necessary in order to provide incentives for compliance and generate support.

### **11.2.2. The “Mixed” Legal Regime of the Rome Statute**

The Rome Statute differs from both the vertical regime and classical horizontal models. It is traditionally said to be “weaker” in legal terms than pure vertical models.<sup>37</sup> But this proclaimed “weakness” may be part of its strength. The ICC regime is, to some extent, more nuanced and receptive to long-term systemic change.<sup>38</sup>

#### **11.2.2.1. Particularities of the ICC System**

The most important difference of the ICC system to classical extradition schemes is its departure from bilateralism and reciprocity. The Rome Statute institutes a system of justice with a “collective responsibility to enforce”.<sup>39</sup> States Parties made a collective commitment under Part 9 of the Statute to cooperate with the Court “in its investigation and prosecution of crimes”. This shift is important from a psychological point of view. It reduces the “institutional veil” between the Court and domestic jurisdiction. Technically, non-compliance with a request for arrest and surrender is not merely non-respect of an obligation *vis-à-vis* an external entity, but a failure of that domestic entity to comply with its own pre-established institutional commitment. Externality is mitigated by the consent of the respective entity.<sup>40</sup>

On the other hand, the ICC system is less rigid than “vertical” models. The Statute clearly preserves the primacy of domestic jurisdic-

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<sup>37</sup> See above *supra* note 27.

<sup>38</sup> This feature is reflected in the language of the Statute. Article 102 uses the term “surrender” to distinguish cooperation with the ICC from extradition. The “distinct nature of the Court” is further explicitly recognized in Article 91 (2) (c).

<sup>39</sup> See generally Rod Rastan, “The responsibility to enforce – Connecting justice with unity”, in Carsten Stahn and Goran Sluiter, *The Emerging Practice of the International Criminal Court*, The Hague, 2009, 163.

<sup>40</sup> See Mark Ellis, “The International Criminal Court and Its Implications for Domestic Law and National Capacity-Building”, *Florida Journal of International Law*, Vol. 15 (2002), p. 232.

tion. This is visible not only on the jurisdictional level, but also at the level of cooperation.

The cooperation regime of the ICC shares some of the vertical features of the *ad hoc* tribunals. Cooperation is not tied to reciprocity. The system relies, in principle, on mandatory state cooperation by way of consent. Obligations derive generally from the fact that States agree in advance, either through treaty accession or *ad hoc* consent, to assume a duty of cooperation.<sup>41</sup> This is illustrated by the respective obligations to cooperate under Articles 86 (“general obligation to cooperate” by State Parties), 87 (5) (“request for cooperation to non-Party States”) and Article 89 (1) (obligation of States Parties to “comply with requests for arrest and surrender”). The Court may “upon request, cooperate with and provide assistance to a State” under Article 93 (10) of the Statute, but is not obliged to do so.

The Statute also makes it clear that Court has the final authority to adjudicate disputes over failures of compliance. This point is clarified by Article 87 (7), which vests the Court with the power to make findings on non-compliance. It is further reaffirmed by Article 59 (4) which deprives domestic authorities in the custodial State the right to “consider whether [a] warrant of arrest was properly issued in accordance with Article 58” of the Statute.

Nevertheless, the ICC system differs in a number of respects from classical verticalism. The most important difference to the *ad hoc* tribunals is that the ICC relies to a larger extent on coordination with domestic authorities. The obligation to cooperate is governed by two legal regimes: Part 9 of the Rome Statute and relevant “procedure[s] under [...] national law”.<sup>42</sup> The Court is entitled to “request” cooperation, but the execution of such requests depends on modalities under domestic law. Domestically implemented legislation usually deter-

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<sup>41</sup> See Article 86 (1) and Article 87 (5). One exception is a duty to cooperate by non-Party States on the basis of a Security Council Resolution. In such a scenario, a duty to cooperate may result directly from the UN Charter, as indicated in SC Resolution 1593 regarding the situation in Darfur.

<sup>42</sup> See Articles 88, 89 (1) and 93 (1).

mines the effect of such requests in the internal legal order of the requested entity.<sup>43</sup>

This “dualist” structure has important repercussions. It prevents the Court from issuing binding orders of cooperation to states or private individuals.<sup>44</sup> States cannot rely on the absence of domestic law to justify non-compliance.<sup>45</sup> But the effect of ICC requests depends on the extent to which States have complied with their statutory obligation under Article 88 to “ensure that there are procedures available under their national law for all of the forms of cooperation” under Part 9 of the Statute. Requests can only in very limited circumstances (e.g., “unavailability of any authority or any component of [a State’s] judicial system”<sup>46</sup>, non-compulsory measures of assistance)<sup>47</sup> be executed directly by the Court on the territory of a State Party.<sup>48</sup>

Secondly, the Rome Statute places greater emphasis on consensual problem-solving and consultation procedures in the area of cooperation. The Statute fails to recognize classical limitations and exceptions to arrest and surrender which are common in extradition law.<sup>49</sup> States are not entitled to refuse cooperation on the ground that the conduct does not constitute a criminal offence according to domestic law or that any statute of limitations would apply.<sup>50</sup> A State Party cannot refuse surrender for reasons related to the nature of the offence or the

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<sup>43</sup> See generally OTP, *Informal Expert Paper: Fact-finding and investigative functions of the Office of the Prosecutor, including international cooperation* (2003).

<sup>44</sup> See also Rastan, *supra* note 1, at 436.

<sup>45</sup> This provision takes into account Article 27 of the Vienna Convention on the Law of Treaties, which states that a “party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. See generally Ciampi, *supra* note 1, at 1621.

<sup>46</sup> See Article 57 (3) (d).

<sup>47</sup> See Article 99 (4).

<sup>48</sup> See on the need for such powers, Louise Arbour and Morten Bergsmo, “Conspicuous Absence of Jurisdictional Overreach”, in Herman van Hebel *et al.* (eds.), *Reflections on the International Criminal Court*, 1999, p. 137.

<sup>49</sup> See Swart, *supra* note 1, pp. 1682-1684.

<sup>50</sup> See Article 29, which regulates the non-applicability of statute of limitations to core crimes.

personal status of the person requested, such as the nationality exception or diplomatic status;<sup>51</sup> nor is it entitled to refuse surrender for the reason that the person requested enjoys immunity from prosecution according to its laws.<sup>52</sup> But the scope of cooperation is made contingent upon various qualifications such as consultation requirements or postponement clauses. The Statute provides for such consultation and interaction in areas such as:

- Protection of national security information (Article 72);
- Disclosure of third part information (Article 73);
- Concurrent proceedings for a different crime in the requested State (Article 89 (4));
- Competing requests for the surrender of a person (Article 90);
- Documents, statements or information necessary to meet the requirements for surrender in the requested State (Article 91 (2) (c) and (4));
- State or diplomatic immunity of a person or property of a third State (Article 98 (1));
- Obligations *vis-à-vis* third States under status-of-forces agreements (Article 98 (2)).

These specific requirements are complemented by a general dispute settlement procedure in relation to obstacles to cooperation. Article 97 introduces an obligation of means in relation to cooperation. It requires State Parties to “consult with the Court without delay” in relation to “problems which may impede or prevent the execution of the request”, including the inability to locate the person sought or the risk of breaching pre-existing treaty obligations. The open-ended nature of the clause (“*inter alia*”) leaves wide room for dialogue and interaction between the Court and domestic authorities.

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<sup>51</sup> See Article 27, which constitutes a waiver among States Parties and is *lex specialis* to Article 98 in this respect.

<sup>52</sup> Domestic laws are not binding on the Court and do not *per se* bar requests for arrest and surrender.

Both features, that is, the reliance on domestic enforcement procedures under Part 9 and the focus on specific and general dispute settlement procedures between the Court and the requested State deviate from pure vertical models.

#### 11.2.2.2. (Re-)Assessment

In contemporary legal discourse, this shift from verticalism to horizontalism has triggered divided reactions. It is portrayed as a compromise solution or as an impediment to the effectiveness of the Court.<sup>53</sup> This view merits some reconsideration in light of the circumstances in which the Court operates. Part 9 provides incentives for effective cooperation and reform in judicial assistance, rather than imposing strict top-down obligations. This approach may enjoy certain benefits from a systemic perspective. Decentralized cooperation may reduce the perception that justice is a delocalised and “external” affair, which is detached from the realities of the society in transition. Implication of domestic authorities in arrest and surrender may bestow a certain confidence in public authority and the State’s ability and willingness to enforce the law, something that is often lacking after conflict. Moreover, it may force domestic authorities to prioritize justice and reduce the perception that trials serve the “international” rather than the “domestic” interest. This incentive-based type of cooperation is more burdensome in the short term, but may ultimately be more sustainable in the long run.

This argument is reinforced by the close nexus between complementarity and cooperation under the Statute.<sup>54</sup> The Statute is geared towards long-term effects. The decision to join the ICC system marks a

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<sup>53</sup> See, e.g., Cryer, Friman, Robinson and Wilmschurst, *supra* note 12, at 406 (referring to the “weaknesses of the ICC cooperation regime, sometimes referred to as a middle ground between a vertical and a horizontal model”); critically also Bert Swart, “General Problems”, in Antonio Cassese, Paola Gaeta and John Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II, Oxford University Press, 2002, pp. 1595-1596.

<sup>54</sup> See generally on this link, Swart, *supra* note 1, at 1694.

special commitment by State Parties to accountability.<sup>55</sup> By ratifying the Statute, a State acknowledges that crimes within the jurisdiction of the Court shall be investigated or prosecuted either by a domestic jurisdiction<sup>56</sup> or by the Court itself.<sup>57</sup> This commitment has consequences for cooperation.

Ratification of the Statute grants the ICC an independent right of assessment over the situation and the choices made in the domestic context. The Court is, in particular, entitled to determine on its own motion whether it has jurisdiction over crimes committed, and whether proceedings before the Court are admissible.<sup>58</sup> This continuing assessment has repercussions for decisions on extradition. A state does not automatically exclude the competence of the Court by fostering proceedings in another jurisdiction or extraditing perpetrators to a third State. Such action remains under the scrutiny of the Court and the admissibility criteria for the respective case under Article 17 (2), including the requirement under Article 17 (2) (b) (no “unjustified delay in the proceedings which in the circumstances is inconsistent with the intent to bring the person to justice”).

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<sup>55</sup> See para. 4 of the preamble of the Statute: “affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”. This commitment cannot be simply revoked by a State for reasons of political opportunity. This is, *inter alia*, reflected in Article 127 (2), which states that even a withdrawal of the Statute “shall not affect any cooperation with the Court in connection with criminal investigations and prosecutions in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the day on which the withdrawal became effective”.

<sup>56</sup> See para. 6 of the preamble of the Statute (“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”). See also article 17 (1) (a) of the Statute (“The case is being investigated or prosecuted by a State”).

<sup>57</sup> See Article 17 (1)-(3).

<sup>58</sup> See Article 19, first and second sentence. This provision implies that a State party to the Statute cannot unilaterally limit or curtail the competences attributed to the Court.

Finally, the Court is not completely powerless in situations of domestic unwillingness or lack of arrest. Although the Court may be unable to get hold of the perpetrator, it may exercise pressure and proceed with the consolidation of charges and pre-trial. One of the instruments available to the Court is the option to confirm of charges in the absence of the person charged (Article 61 (2)), even prior to appearance at the Court. Confirmation of charges *in absentia* is not desirable in light of its largely symbolic character (Article 63 prohibits trial *in absentia*), its limited respect of rights of the defence and its uncertain procedural consequences (e.g., necessity of re-confirmation in case of actual arrest of the defendant). But it remains an *ultima ratio* option in cases where the person cannot be obtained and all reasonable steps have been taken to secure appearance before the Court.<sup>59</sup> It is arguably a more powerful tool than the Rule 61 proceedings in the context of the *ad hoc* tribunals, which lead to the issuance of an international warrant.

Both features challenge the theory that vertical cooperation is a *conditio sine qua non* for the operation of the ICC system.

### 11.3. The ICC Regime and Situations of Transition

From a systemic point of view, the operation of arrest and surrender appears to depend not so much on the nature (vertical/horizontal) of its cooperation regime, but rather its capacity to absorb the specificities of the environment in which it operates.

The practice of the Court has brought some surprise in this respect. Existing and earlier international tribunals have largely operated under circumstances where the armed conflict had more or less ended. The ICC, however, has been involved in situations of ongoing conflict, where crimes continue to be committed. In all of the first situations under investigation (the Democratic Republic of Congo, Uganda, Darfur and the Central African Republic), the Court operated in the context of ongoing violence.

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<sup>59</sup> See Article 61 (2) and Rules 123 (3) and 125. For a full discussion, see Ekaterina Trendafilova, “Fairness and Expediousness in the International Criminal Court’s pre-trial proceedings”, in Carsten Stahn and Goran Sluiter, *The Emerging Practice of the International Criminal Court*, The Hague, 2009, pp. 448-457.

This experience is likely to continue in the future. It is the result of several factors:

- The permanent jurisdiction of the Court, which implies that the Court is present when the facts are occurring.
- The broad territorial scope of the Court's jurisdiction.
- The open-ended nature of the first referrals.

This type of engagement creates specific challenges for arrest and surrender. The most imminent factor is the timing dilemma (i). The very issuance of a warrant of arrest raises issues relating to the mandate and criminal policy of the Court, including the limits of the roles of the Prosecutor and Chambers. It also causes special justification dilemmas (ii). A further challenge is the capacity of statutory procedures to accommodate the dynamics of peace processes and situations of transition, in which it is important to reconcile efficiency and rapid action with considerations of fairness and domestic priorities (iii). These three aspects shall be briefly analysed in the following.

### **11.3.1. Timing of Arrest and Surrender**

The timing of arrest and surrender is a strategic issue. The Statute provides flexibility to take into account policy considerations and impact assessments, but does not preclude ICC involvement in situations of ongoing violence.

The difficulties associated with this type of engagement have become apparent in the first practice of the Court. ICC involvement in conflict situations or ongoing peace processes challenges the traditional assumption that judicial intervention (including request for arrest and surrender) is a risk or an obstacle to peace and security. However, many of the modalities and alleged justifications for engagement (that is, link between a warrant of arrest and reduction of the level of violence, or its use as a prod to negotiations) are in need of further empirical and normative clarification.



### 11.3.1.1. The Statutory Division of Mandate

Arrest and surrender involve political analysis and policy assessments. International courts and tribunals frequently downplay this aspect because it exceeds the realm of judicial analysis. But it is a reality and a necessity in international criminal practice.<sup>60</sup> The Statute acknowledges that the timing of arrest and surrender requires strategy and policy-oriented decision-making. The application for arrest and surrender is widely left in the authority of the Office of the Prosecutor.<sup>61</sup>

The Pre-Trial Chamber is ill-equipped to assess the political feasibility of arrest and surrender. It is a judicial body, with limited insight into the investigation and the situation/actors on the ground. The Pre-Trial Chamber is vested with a supervisory role, which is dependent on the information and evidence of the Prosecutor at the arrest warrants stage. Its control is judicial. The Chamber is charged with the authority to issue a warrant of arrest or a summons to appear, “if it is satisfied that there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” (this is the “reasonable grounds test”).<sup>62</sup>

This mandate leaves little room for the assessment of the broader political feasibility or policy implications of the application. The scrutiny of the Chamber is confined to evidence and arrest-related necessity considerations arising in the context of the Prosecutor’s application, that is, the question whether “[t]he arrest of the person appears necessary” to “ensure the person’s appearance at trial”, to “ensure that person does not obstruct or endanger the investigation or the court proceedings”, or “to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court”.<sup>63</sup>

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<sup>60</sup> See Luc Côté, “Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law”, *Journal of International Criminal Justice*, Vol. 3 (2005).

<sup>61</sup> See Hector Olasolo, “The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?”, *International Criminal Law Review*, Vol. 3 (2003).

<sup>62</sup> See Article 58 (1).

<sup>63</sup> See Article 58 (1) (b) (iii).

The only type of judicial control over timing under Article 58 occurs *ex post*, that is, after the decision on the Prosecutor's application. The Chamber may take action to foster the implementation of its own decision(s). It may make findings in relation to the transmission of the warrant of arrest and request for arrest and surrender<sup>64</sup> and exercise scrutiny over their execution.<sup>65</sup>

The Office of the Prosecutor enjoys broader political discretion. This discretion is not expressly specified in the powers of the Office, but it is inherent in its functions and status as a party in proceedings. The Prosecutor is vested with the power to set arrest warrant proceedings in motion. Both the timing and the scope of alleged conduct (that is, crimes and facts) are determined by the application of the Prosecutor.<sup>66</sup> The Office of the Prosecutor has the exclusive authority to initiate arrest warrant proceedings. It decides when to file its application for a warrant of arrest. It further determines the scope of the application through its selection of evidence or other information submitted to the Chamber.<sup>67</sup>

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<sup>64</sup> See Rule 176.

<sup>65</sup> The Pre-Trial Chamber II asserted such power in its Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, 8 July 2005, pp. 6-7. "Considering that the main reason submitted by the Prosecutor in support of his request and further elaborated upon during the hearing held on the 16th day of June 2005 appears to be the Prosecutor's wish to exercise discretion as to the timing and manner of the disclosure of the Warrants, with a view to determining "the moment at which the disclosure is optimal"; Considering that, under the relevant provisions of the Statute and of the Rules, the necessity for the issuance of a warrant and for its transmission must be justified on the basis of circumstances and evidence existing at the time of the application, and is not dependant or conditional on future circumstances". Available at: [http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-02-04-01-05-1-US-Exp\\_English%20Decision,%208%20July%202005.pdf](http://www.iclklamberg.com/Caselaw/Uganda/Konyetal/PTCII/ICC-02-04-01-05-1-US-Exp_English%20Decision,%208%20July%202005.pdf).

<sup>66</sup> See Article 58 (2). See also Article 58 (4) which makes amendments of the warrant (i.e., modification or addition of crimes) dependent upon the Prosecutor's request.

<sup>67</sup> The Chamber must decide on the basis of the facts, summary of evidence or other information provided by the Prosecutor. See Article 58 (2).

The Statute places hardly any restrictions on the timing of arrest. This is illustrated by the systematic placement of Article 58. The provision is listed in Part 5 and following Article 53, which specifies criteria for the initiation of an investigation. The Prosecutor must have considered factors relating to the desirability of investigation or prosecution (“interests of justice”), before making the application for arrest. The wording of Article 53 (1) (c) and (2) (c) makes it clear that “interests of justice” do not necessarily coincide with “interests of peace” and that “interests of justice” shall only preclude investigation or prosecution in exceptional cases.<sup>68</sup>

The necessity test under Article 58 (1) (b) (iii) (“to prevent the person from continuing with the commission of [...] crime”) confirms the view that the Court may intervene in situations of ongoing conflict. It is not tied to any conditions of timing. The only possibility to bar the issuance of a warrant of arrest in a situation of ongoing violence or a peace process is a request for “deferral of investigation or prosecution” by the Security Council under Article 16,<sup>69</sup> or a challenge to admissibility or jurisdiction,<sup>70</sup> which obliges the Prosecutor to “suspend the

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<sup>68</sup> See also OTP, “Policy Paper on the Interests of Justice”, September 2007, at p. 9: “the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions. Bearing in mind the objectives of the Court to put an end to impunity and to ensure that the most serious crimes do not go unpunished, a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort. Various other options, besides deciding not to open an investigation or to stop proceedings, may be available. For example, considerations about potential adverse impact on security and crime prevention may be addressed by managing the profile of investigative activities and working with partners to ensure all possible security measures are in place, as was the case in Uganda”. For a criticism of a narrow interpretation of “interests of justice”, see Jens David Ohlin, “Peace, Security and Prosecutorial Discretion”, in Carsten Stahn and Goran Sluiter, *The Emerging Practice of the International Criminal Court*, The Hague, 2009.

<sup>69</sup> For a discussion of the problems of Article 16, see Carsten Stahn, “The Ambiguities of Security Council Resolution 1422 (2002)”, *European Journal of International Law*, Vol. 14 (2003).

<sup>70</sup> See Article 19 (2).

investigation until such time as the Court makes a determination in accordance with Article 17”.<sup>71</sup>

### **11.3.1.2. Statutory Practice: Whither some Conventional Wisdom?**

This broad scope of discretion concerning the timing of arrest and surrender contrasts with traditional thinking. Existing scholarship has been marked by a certain caution, if not scepticism towards arrest and surrender efforts in situations of ongoing conflict. Criminal charges are frequently viewed as an obstacle or disrupting factor in negotiated peace settlements.<sup>72</sup> It is argued that warrants of arrest may either prevent peace talks or provide obstacles to their completion and implementation.

This view is supported by different arguments. It is sometimes asserted that restraint is desirable because “[i]ntervening in an ongoing conflict makes the political ramifications of any investigations more acute”.<sup>73</sup> Proponents of this view emphasize that arrest of suspects in an ongoing conflict can foster the escalation of violence and restrict the ability of state institutions to secure cooperation.<sup>74</sup> Others allege that issues of arrest and surrender should be addressed as part of a peace settlement and following the cessation of hostilities,<sup>75</sup> since cooperation and compliance are likely to be more effective after the cessation of violence.<sup>76</sup> They contend that “the ICC [would] be more successful

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<sup>71</sup> See Article 19 (7).

<sup>72</sup> A typical example cited is the Dayton Peace Agreement.

<sup>73</sup> See Allison Danner, “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court”, *American Journal of International Law*, Vol. 97 (2003), p. 545.

<sup>74</sup> See Giulio Gallarotti and Arik Y. Preis, “Politics, International Justice, and the United States: Toward a Permanent International Criminal Court”, *UCLA Journal of International Law and Foreign Affairs*, Vol. 4 (1999).

<sup>75</sup> See Ken Rodman, “Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court”, *Leiden Journal of International Law*, Vol. 22 (forthcoming 2009).

<sup>76</sup> See Roper and Barria, *supra* note 29, p. 465.

in gaining the surrender of suspects after hostilities have ended”.<sup>77</sup> Others again express the fear that the credibility of the Court would be undermined if a warrant of arrest were to remain unexecuted for a prolonged period of time.<sup>78</sup>

This strict division between conflict and post-conflict/peacetime engagement is over-simplistic. It is based on a simplified vision of the peace v. justice dilemma, or a false balancing of rationales.

Intervention in situations of ongoing conflict makes the pursuit of justice more burdensome.<sup>79</sup> It is more difficult to conduct effective and objective investigations in such circumstances. On-going conflict hampers on-site access to witnesses, victims and evidence.<sup>80</sup> It is problematic to identify who is a reliable provider of information. The leaders who decide over war and peace are also often the principal authors of crimes. However, this does not mean that arrest and surrender should be discarded.

The plea for judicial deference is often based on a shaky assumption. It relies on a virtual trade-off of peace v. justice, which compares the benefit of “peace” with the “costs of action”. This approach is vulnerable since it is based on a comparison of un-equals and speculation. The very idea that (short-term) peace “outweighs” the costs of immediate justice is flawed. It assumes that the effects of peace can be measured. The balancing metaphor uses a trick in order to escape from this intractable empirical dilemma. It equates “peace” to “security”, in order to maintain the viability of balancing. Moreover, it ignores an

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<sup>77</sup> *Id.*

<sup>78</sup> See Hans-Peter Kaul, “Construction Site for More Justice, The International Criminal Court after Two Years”, *American Journal of International Law*, Vol. 99 (2005), p. 383.

<sup>79</sup> In the context of the first three situations under investigation, the OTP communicated approximately 100 requests for judicial assistance to states and international organisations. See OTP, Three Years Report, para. 88.

<sup>80</sup> It is impossible to conduct “fly in and fly out” investigations without ongoing field presence. Travelling to sites of ongoing violence may be an obstacle. For instance, the Court had field offices in DRC and Uganda and Chad, but not the Sudan. In the context of Darfur investigation, OTP collected statements during 70 missions in 17 countries. This prolonged the investigation.

important parameter, namely the price of the alternative. Inaction is often no viable alternative and may have its own “costs”. These “costs” are not properly taken into account in the act of balancing.

The balancing image is also flawed in terms of its juxtaposition of alternatives. In most cases, the key issue is not when to indict, but whom and how. The question is not whether to act or not, but mainly the sequencing and proper targeting of individuals. The debate about ICC action with respect to the situation in Darfur is paradigmatic in this sense.

When the ICC remained inactive over two years, it was criticized by prominent voices for its “exceedingly prudent attitude” in the situation in Darfur.<sup>81</sup> When the Prosecutor decided to target Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”),<sup>82</sup> hardly any protest was recorded. Criticisms of prosecutorial overreach<sup>83</sup> only emerged when the OTP began to target President Omar Hassan Al Bashir.<sup>84</sup>

Concerns relating to the publicity of such action may be attenuated by a simple technicality: greater secrecy. In cases of indictments against the political leadership of a government in power, it may be feasible to keep proceedings relating to a warrant of arrest under seal and to reveal the causes at the time of arrest. This technique has a double advantage. It keeps a *momentum* of surprise in arrest efforts, and it avoids public aversion to justice.

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<sup>81</sup> See Antonio Cassese, “Is The ICC Still Having Teething Problems?”, *Journal of International Criminal Justice*, Vol. 4 (2006), p. 438.

<sup>82</sup> See Pre-Trial Chamber I, *Warrant of arrest for Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, 1 May 2007, ICC-02/05-01/07-3; *Warrant of arrest for Ahmad Muhammad Harun (“Ahmad Harun”)*, 1 May 2007, ICC-02/05-01/07-2.

<sup>83</sup> See, e.g., Michael C. Dorf, “The Application for an ICC Warrant to Arrest Sudanese President Al Bashir on Charges of Genocide: An Important But Potentially Counterproductive Symbolic Gesture”, at <http://writ.lp.findlaw.com/dorf/20080716.html>.

<sup>84</sup> See OTP, “Public Redacted Version of Prosecution’s Application under Article 58 filed on 14 July 2008”, ICC-02/05-157.

Early judicial involvement in situations of conflict has certain measurable and immediate benefits. It contributes to the removal of “safe havens” . The Statute contains an important specification in this respect. Article 90 allows the Court to transmit a request for arrest and surrender not only to States Parties but also to “any State” on the territory of which that person may be found. This reduces travel options and asylum opportunities.

The issuance of a warrant further limits the possibility of public officials to invoke state immunity on foreign soil.<sup>85</sup> The Statute carves out an exception to classical head of state immunity, by virtue of a waiver of immunity among States Parties.<sup>86</sup> By accepting Articles 27 and 98 (1) of the Statute, States Parties agreed that the immunities of its representatives, including heads of States, do not bar ICC proceedings or arrest and surrender to the Court. This makes it considerably more risky for the political leadership to leave their country of residence on private or official travel.

### 11.3.2. Justification

The exercise of judicial powers in situations of transition raises sensitive policy implications. The case for arrest and surrender is thus often accompanied by additional justifications that are meant to strengthen the legitimacy of criminal accountability. These justifications pose certain conceptual and methodological dilemmas for international criminal justice.

Article 58 of the Statute itself is silent on the issue. It uses individualized criteria to justify the necessity of arrest. It links powers of

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<sup>85</sup> See ICJ, *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 14 February 2000, para. 61. For a discussion, see Paola Gaeta, “Official Capacity and Immunities”, in A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court*, Vol. 1, 2002, pp. 990 *et seq.*

<sup>86</sup> The consequences of this became evident in the arrest of former Congolese Vice-President Bemba. Bemba was arrested during a stay in Belgium. He could be surrendered to the Court on the basis of alleged crimes committed in the Central African Republic, due to applicability of Article 27.

arrest exclusively to circumstances relating to the perpetrator. Arrest is justified:

- “[t]o ensure that *the person* does not obstruct or endanger the investigation or the court proceedings”, or
- “to prevent *the person* from continuing with the commission of that crime or a related crime, which is within the jurisdiction of the Court and which arises out of the same circumstances”.

In practice, however, these arguments are often supported by broader policy claims. Justifications range from arguments of general deterrence to claims concerning reconciliation.<sup>87</sup> These justifications deserve critical scrutiny, both in factual terms and in terms of methodology.

#### **11.3.2.1. General Deterrence**

There is a tendency to combine the case for criminal charges with arguments of general deterrence. Charges have certain effects that go beyond specific deterrence. They have a certain alert function. A concise statement of facts and reference to crimes may draw the attention of States to atrocities that have not been the subject of public attention. Charges further have a certain inhibiting effect. They make it more costly and risky for groups in conflict situations to continue and pursue armed hostilities.

These effects are used to enhance the political legitimacy of prosecutorial strategies. In the context of the first situations of the ICC, the deterrence argument was used on several occasions. The Prosecutor defended the feasibility of ICC action in Ivory Coast on the basis of its preventive effect on hate crimes more generally. He made this link expressly in his Nuremberg address, where he noted:

[T]he beneficial impact of the ICC, the value of the law to prevent recurring violence is clear: deterrence has started to show its effect as in the case of Cote d’Ivoire, where

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<sup>87</sup> See generally Payam Akhavan, “Can International Justice Prevent Future Atrocities?”, *American Journal of International Law*, Vol. 85 (2001).



the prospect of prosecution of those using hate speech is deemed to have kept the main actors under some level of control.<sup>88</sup>

Deterrence was also invoked to support the political feasibility of action in the Ugandan context. ICC action was partially supported by the fact that warrants of arrest focus international attention on the crisis in Uganda and direct attention to specific categories of crimes (e.g., gender crimes). Later, this argument was extended to broader considerations of peace and security. It was argued that the warrants contributed to the process of peacemaking by forcing LRA leaders to move and negotiate terms of peace. This, in turn, arguably reduced the level of violence.<sup>89</sup>

Such deterrence arguments are open to various types of criticisms. Deterrence-based theories are based on a large number of hypotheticals. They operate on the assumption that actors in conflict make their decisions on the basis of a rational cost-benefit analysis. This assumption is often a fiction. Cost-benefit analysis may play a role in certain strategic decisions, but it does not necessarily shape the state of mind and decision-making process of perpetrators relating to the justification and execution of crime.<sup>90</sup>

Secondly, deterrence theories tend to rely on rather broad chains of causation. It is difficult to show that the threat of prosecution provides an incentive for the silencing of arms or the engagement in peace negotiations. There are often other intermediate factors that constitute more dominant causes for cessation of violence than the threat of criminal charges.

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<sup>88</sup> See “Building a Future on Peace and Justice”, *supra* note 4.

<sup>89</sup> See “Building a Future on Peace and Justice”, *supra* note 4: “arrest warrants have brought parties to the negotiating table; have contributed to focus national debates on accountability and to reducing crimes”. See also International Crisis Group, “Northern Uganda: Seizing the Opportunity for Peace”, Africa Report No. 124, 26 April 2007, p. 15.

<sup>90</sup> See also David Wippman, “Atrocities, Deterrence and the Limits of International Law”, *Fordham International Law Journal* (1999), p. 473.

The development of peace negotiations in Uganda illustrates the fragility of the deterrence argument. There has been a considerable shift in the assessment of the role of the warrants, which calls into question the coherence of the argument. When the peace negotiations were ongoing, deterrence was praised as one of the factors that prompted the engagement in negotiations. When the LRA refused to sign and abide by the accountability agreement, the argument was turned around. It was claimed that the very engagement in peace talks was mainly a pretext by the LRA and Joseph Kony to gain time and force to re-arm. If this is the case, it cannot be said that the warrants actually produced a meaningful deterrent effect in the first place.

#### **11.3.2.2. Incapacitation**

A second justification to defend the role of justice in situations of transition is “incapacitation”, that is, its capacity to de-legitimize extremist elements and ensure their removal from the national political process.<sup>91</sup> There is some evidence that the threat of arrest and surrender may contribute to the marginalisation of perpetrators or even render peace negotiations more even-handed. A prominent example is the original arrest warrant against Karadžić. The warrant was issued in the very early phase of the existence of the ICTY, in 1995. This move arguably prevented his participation in the negotiation of the terms of the Dayton Agreement.<sup>92</sup>

However, in many cases, it is difficult to establish a clear line of causation. The de-legitimization of political elites can rarely be ascribed to the impact of justice alone, nor does it occur on the spot. It is often a gradual process that is tied to a bundle of rationales.

This strategy had some impact in the context of the former Yugoslavia (Serbia, Bosnia and Herzegovina) due to the tight nexus between justice and socio-economic benefits. In other contexts, how-

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<sup>91</sup> See “Building a Future on Peace and Justice”, *supra* note 4: “[E]xposing the criminals and their horrendous crimes has contributed to weaken the support they were enjoying, to delegitimizing them and their practices such as conscription of children”.

<sup>92</sup> See Cassese, *supra* note 81, at 439.

ever, where this nexus was absent, it has been less successful. The Ugandan case is an example. The warrants of arrest against LRA leaders were partially motivated by the rationale to isolate the LRA command from its followers. Demobilization was further incentivized by the prospect of amnesty for lower perpetrators. Yet, accountability incentives alone were not strong enough to isolate the LRA leadership as broadly as anticipated.

### 11.3.2.3. Interests of Victims

It is also difficult to justify the pursuit of justice in situations of transition by general references to the interests of victims.<sup>93</sup> The notion of “victims” is often used as a common metaphor for an anonymous and fictitious group of persons who have in reality a wide range of divergent interests. The question as to whether prosecutorial action enjoys support is largely a question of perspective. The answer depends on the choice of interlocutors. The interests of immediate victims of crime do not necessarily coincide with the interests of the broader “victims of the situation”.<sup>94</sup> Both constituencies may, in fact, have conflicting prerogatives. Accountability is often a priority for the former, but of less immediate concern for the latter.

It is further contentious to assume that the direct “victims of the case” support the cause of international justice. This assumption is based on a rather generous collectivization of individual will. Investigations and prosecutions of international courts and tribunals typically focus on leadership accountability. Immediate victims of crime, however, often wish to see their neighbour tried, as much as they seek accountability for core leaders. The question as to why leadership accountability is to be given preference is typically not explained to them, nor made subject to their choice. This consideration is largely

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<sup>93</sup> For a discussion, see also Cryer, Friman, Robinson and Wilmschurst, *supra* note 12, pp. 21-23.

<sup>94</sup> Since the “Decision on the applications for participation in the proceedings of VPRS 1 – 6” of 17 January 2006, the Pre-Trial Chamber has recognized that “the Statute grants victims an independent voice and role in proceedings before the Court” (para. 51).

driven by motives of deterrence and incapacitation, rather than deference to victims' interests.<sup>95</sup>

#### 11.3.2.4. Challenges

Factors such as general deterrence, incapacitation and interests of victims may provide important policy incentives for the pursuit of justice in situations of transition. However, the way in which these motives are articulated requires further scrutiny. At present, the respective rationales are often invoked on an *ad hoc* basis and without an ascertainable method of analysis. There is very little assessment of the way in which factors such as deterrence, incapacitation or reconciliation can be measured, how they operate, and what impact and outcome they actually produce. Existing claims are often founded on a selective reading of facts or shaky causality assumptions.

It is rarely explored or explained: (i) whether and how it can be measured whether investigation or prosecution has a general deterrence effect on communities where conflicts have occurred, or on other communities; (ii) what factors contribute to "incapacitation", and how it can be assessed; (iii) whether and how prosecutions interrelate with the interests of the victims of perpetrators or those of the victims of the broader conflict; and (iv) what elements are necessary to communicate a sense of fairness to victims of crime.

One of the challenges of international criminal justice will be to develop methods, criteria (e.g., impact measurement criteria) and fact-findings tools (e.g., empirical data) that may help refine these theories and provide greater understanding of the assumptions that underlie their application.

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<sup>95</sup> See, for instance, the rationale invoked by Pre-Trial Chamber I to justify leadership accountability in its "gravity" decision. Pre-Trial Chamber I, Decision on the Prosecutor's application for a warrant of arrest, 10 February 2006, para. 54 ("In the Chamber's opinion, only by concentrating on this type of individual can the deterrent effects of the activities of the Court be maximised because other senior leaders in similar circumstances will know that solely by doing what can be done to prevent the systematic or large-scale commission of crimes within the jurisdiction of the Court can they be sure that they will not be prosecuted by the Court").

### **11.3.3. Cooperation and the Dynamics of Peace Processes and Situations of Transition**

To what extent and how does the ICC system of cooperation take into account the sensitivities of processes of transition? It would go beyond the framework of this contribution to present a comprehensive contextual analysis of the features of Part 9. However, the mixed and incentive-based system of cooperation of the Statute provides certain features that may help accommodate the dynamics of peace processes and situations of transition.

The cooperation regime of the Court has three characteristics that are essential in this context: It is sensitive to domestic proceedings and incorporates mechanisms to take into account domestic choices (flexibility); it devotes explicit attention to the protection of the rights of the suspect in proceedings of arrest and surrender (fairness); and it centralizes channels for enforcement (efficiency). Each of these features shall be briefly examined in the following.

#### **11.3.3.1. Flexibility**

International criminal courts and tribunals are frequently criticized for their detachment from the territory where crimes occurred and their limited contribution to restorative justice. Their main deficits from a transitional justice point of view are their limited ability to engage with the interests and priorities of domestic stakeholders and their modest contribution to local justice and capacity-building.<sup>96</sup>

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<sup>96</sup> See, e.g., the U.S. position on international criminal justice: “[I]n the United States’ view, local institutions are the preferred avenue for dispensing justice. Solutions that empower local institutions of criminal justice also inspire local ownership of results. We believe that fostering domestic institutions is central to the promotion and development of the rule of law. In appropriate circumstances, however, international tribunals can supply the resources or technical capacity that local courts may lack; they can provide legitimacy and fairness where local institutions are inchoate or mistrusted; and most important, they can provide the political will to carry out justice where that will is absent, or insufficient, at the domestic level. But it is critically important that we rely on local criminal-justice institutions where they are available and up to the task, and, where they are not,

The Rome Statute mitigates these criticisms. It provides incentives for domestic justice, but it reconciles the primacy of domestic justice with international monitoring and supervisory powers under the complementarity regime.<sup>97</sup> This approach is echoed in Part 9 of the Statute. The cooperation regime offers flexibility to take into account domestic proceedings or challenges to admissibility in the context of cooperation. The requested state may challenge the obligation to execute a request for arrest and surrender on various grounds. However, the ultimate decision as to whether the title for arrest, that is, the warrant itself, remains in effect, resides with the Court itself.<sup>98</sup>

#### **11.3.3.1.1. Arrest and Surrender and Domestic Investigations and Prosecutions**

The Statutes of the ICTY and the ICTR did not allow a requested State to refuse arrest and surrender on the basis of domestic investigations or prosecutions. Articles 9 and 10 of the Statute of the ICTY and Articles 8 and 9 of the Statute of the ICTR made it clear that it is for the respective tribunal to decide whether or not a person should be investigated and prosecuted by it.<sup>99</sup> The primacy of the tribunals in cases of concurrent jurisdiction and the vertical features of cooperation gave limited weight to domestic proceedings. Domestic investigations or prosecutions did not automatically bar the exercise of jurisdiction by the tribunals or the obligation to cooperate.

The Rome Statute adopts a more nuanced approach. The Court retains the final authority to rule on the merits of admissibility challenges and the title for arrest and surrender.<sup>100</sup> But the requested State may bring forward various challenges to cooperation and postpone the

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that we work to develop those institutions”. See John B. Bellinger, “U.S. Perspectives on International Criminal Justice”, November 2008, at [http://www.amicc.org/docs/Bellinger\\_11\\_14\\_2008.pdf](http://www.amicc.org/docs/Bellinger_11_14_2008.pdf).

<sup>97</sup> See Article 17 (2) of the Rome Statute.

<sup>98</sup> See Article 19 (9) and Article 58 (4) of the Rome Statute.

<sup>99</sup> See Swart, *supra* note 1, p. 1670.

<sup>100</sup> See Article 19 (1).

execution of a request for arrest and surrender in specific circumstances. The Statute expressly addresses three scenarios:

- Individuals and States Parties may challenge jurisdiction and admissibility before the Court under Articles 18 and 19. Article 95 regulates the consequences of such a challenge on cooperation. It allows the requested State to postpone the execution of a request for surrender by the Court under such circumstances. Execution may be barred, until the Court makes a determination on admissibility.
- Article 89 (2) addresses conflicts arising from a possible *ne bis in idem* challenge (that is, the prohibition to be tried and punished more than once for the same conduct or crime<sup>101</sup>) before domestic courts by the person whose arrest is sought.<sup>102</sup> Article 89 (2) specifies that such conflicts shall be solved by consultation when a challenge is brought before a domestic Court. The requested State may postpone the execution of a request for surrender by the Court pending an admissibility ruling by the ICC.<sup>103</sup>
- Article 94 provides flexibility to take into account ongoing domestic investigations or prosecutions in the context of cooperation. According to Article 89 (2) and Article 95, a State cannot refuse to execute a request for arrest and surrender in relation to circumstances related to that case, once the Court has decided that the case is admissible before it.<sup>104</sup> But Article 94 (1) allows a

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<sup>101</sup> See generally Christine van den Wyngaert and Tom Ongena, “*Ne bis in idem* principle, including the issue of amnesty”, in Antonio Cassese, Paola Gaeta and John Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, 2002.

<sup>102</sup> The principle of *ne bis in idem* forms part of the admissibility assessment under Article 17 (1) (c). See Article 17 (1) (c) in conjunction with Article 20.

<sup>103</sup> But it must, *a contrario*, proceed with the execution of the request when the Court has determined that the case is admissible. See Article 89 (2), second sentence.

<sup>104</sup> This principle is logical, since such a decision implies a judgment that “States have shown themselves unwilling or unable genuinely to prosecute or punish the person requested”. See Swart, *supra* note 1, p. 1685.

State to postpone the execution of a request if its immediate execution “would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates”. This clause provides the domestic jurisdiction with an opportunity to continue and terminate investigations or prosecutions in relation to other incidents or charges.<sup>105</sup>

These postponement provisions are complemented by the general consultation clause under Article 97, which obliges (“shall”) a State Party to “consult with the Court without delay” in case of problems relating to the execution of requests.<sup>106</sup>

These provisions reflect important policy choices towards cooperation. They adjust the required duty of cooperation to the principle of the primacy of domestic jurisdiction and its dispute settlement system. The Court retains the authority to decide on the title and cause for arrest and surrender, but obligations relating to the execution of requests for cooperation are tied to domestic justice efforts and choices. Moreover, disputes are to be settled primarily through consultation and problem-solving, rather than through vertical lines of authority.

Both features, that is, the receptiveness of the Statute to domestic justice and its dialogue-based approach towards dispute settlement, embody a “cooperative” approach towards compliance. This vision is important in situations of transition. It mitigates some of the classical criticisms associated with international criminal justice, for it provides incentives to target accountability via a bottom-up, rather a top-down approach; it addresses admissibility conflicts through techniques of coordination and temporal deference; and it generates a sense of equality that is conducive to sustainable cooperation.

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<sup>105</sup> Postponement is linked to a time limit. It “shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State”. See Article 94 (1), second sentence.

<sup>106</sup> For a survey, see Claus Kress and Kimberley Prost, “On Article 97”, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> ed., 2008.



### 11.3.3.1.2. Impact of “Ordinary Crime” Prosecution

The Statute also provides potentially more leeway than the *ad hoc* tribunals for deference to domestic prosecution in relation to “ordinary crime” prosecution. The Statute of the ICTY and the ICTR granted limited effect to decisions of domestic courts under the *ne bis in idem* rule. Article 10 (2) ICTY and Article 9 (2) ICTY allowed the possibility of re-trial before the tribunals in two cases, namely if:

(a) the act for which [the perpetrator] was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

This provision displays a certain caution towards “ordinary crime” prosecution at the domestic level. It entrusts the tribunals the power to re-try a perpetrator before the tribunals for conduct that is adjudicated at the domestic level under the label of a domestic crime. Technically, a person tried for manslaughter or murder domestically can thus be re-tried before the tribunals for crimes against humanity, war crimes or genocide.<sup>107</sup>

The Rome Statute provides wider flexibility to accept the effect of domestic proceedings. Article 20 (3) of the Statute does not contain an express “ordinary crime” exception, following the example of Article 10 (2) (a) ICTY or Article 9 (2) (a) ICTR. It merely regulates the possibility of re-trial in cases in which proceedings in the other Court,

(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court”, or (b) were “not conducted independently or impartially in accordance with the norms of due process recognized by international law” and inconsistent with “an intent to bring the person concerned to justice.

This omission implies that domestic prosecution of perpetrators for ordinary crime may fall short of ICC scrutiny and retrial, as long as

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<sup>107</sup> See also van den Wyngaert and Ongena, *supra* note 101, p. 719.

it does not reach the threshold of Article 20 (3) (a) or (b).<sup>108</sup> The main criterion to be assessed by the Court is whether the respective ordinary crime prosecution covers “conduct *also* proscribed under article 6, 7 or 8”, that is, conduct proscribed by the ICC core crimes.<sup>109</sup> Domestic jurisdictions may thus pursue prosecution under the label of ordinary crimes without fear of re-trial, if the offences charged domestically are based on “essential elements” of crimes listed under article 6, 7 or 8, or at least not substantially different from them.<sup>110</sup>

This flexibility has important consequences for the choice and timing of domestic justice formulas in situations of transition. It facilitates timely action to counter accountability. In many States Parties and situation countries immediate pursuit of justice continues to be hampered by a lack of implementing legislation of the core crimes under the jurisdiction of the ICC.<sup>111</sup> The option of “ordinary crime prosecution” reduces this dilemma. It allows domestic jurisdictions to start proceedings on the basis of existing penal codes and legislation, rather than having to await the adoption of complex and detailed legislation on all core crimes. It makes it also more difficult for domestic authorities to justify inaction. The possibility to try domestically increases the pressure on the respective constituency to engage with accountability.

### 11.3.3.1.3. Fairness

Fairness to suspects is as important as proper timing of accountability. Human rights and fair trial protections require special attention in situations of transitions, since they may restore faith and legitimacy in legal authority and public institutions. The ICC system of arrest sur-

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<sup>108</sup> *Ibid.*, p. 725.

<sup>109</sup> For a comprehensive discussion, see Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law*, Martinus Nijhoff, 2008, pp. 288-293.

<sup>110</sup> See also Immi Tallgren and Astrid Reisinger Coracini, “On Article 20”, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> ed., 2008, p. 692, fn. 129.

<sup>111</sup> For a survey, see Amnesty International, *The International Criminal Court: The Failure of States to Enact Effective Implementing Legislation*, 1 September 2004, AI Index: IOR 40/019/2004.

render makes special efforts to promote fairness and protection of the suspect.

Articles 86 to 89 do not allow a State to refuse of surrender on the ground that basic individual rights of the person may be infringed in proceedings *before* the ICC. The drafters of the Statute construed surrender obligations on the basis of the assumption that individual persons do not have to fear violations of their basic rights by the ICC itself, due to the importance accorded to human rights and fair trial guarantees under the Statute.<sup>112</sup> However, the Statute provides significant protection to the individual in the pre-trial phase, and in arrest proceedings in particular.<sup>113</sup>

The Statute contains an explicit codification of rights of the suspect during criminal investigations in Article 55. This “mini-human rights convention” plays an important role in relation to treatment of suspects at the domestic level. It must be respected by State authorities<sup>114</sup> and is applicable to state agents in the execution of requests under Part 9 of the Statute, e.g., the questioning of persons by national authorities.<sup>115</sup> It therefore enhances the protection of individuals during ICC investigations at the national level *vis-à-vis* ICC Prosecutors and state authorities assisting the Court in its investigations (e.g., in relation to coercion, duress and threat).<sup>116</sup>

The Statute also codifies the protection of persons in the context of arrest proceedings. In the statutory instruments of international criminal tribunals, the protection of persons in arrest proceedings by national authorities has traditionally received little attention. The Rules of Procedure and Evidence of the ICTY and the ICTR, for instance, contain a minimalist clause, which states:

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<sup>112</sup> See, e.g., Article 21 (3) and Article 67 of the Statute.

<sup>113</sup> See generally Goran Sluiter, “Human Rights Protection in the Pre-Trial Phase”, in Carsten Stahn and Goran Sluiter, *The Emerging Practice of the International Criminal Court*, The Hague, 2009.

<sup>114</sup> See Christopher Hall, “On Article 55”, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> ed., 2008, pp. 1092-1093.

<sup>115</sup> See Article 55 (2) and Rule 111 (2).

<sup>116</sup> Hall, *supra* note 114, p. 1094.

The Registrar shall instruct the person or authorities to which a warrant is transmitted that at the time of arrest the indictment and the statement of the rights of the accused be read to the accused in a language that he or she understands and that the accused be cautioned in that language that the accused has the right to remain silent, and that any statement he or she makes shall be recorded and may be used in evidence.<sup>117</sup>

Article 59 of the Statute addresses this issue in considerably more detail. It identifies three considerations which ought (“shall”) to be taken into account by national authorities in arrest proceedings. Article 59 (2) provides:

A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- (a) The warrant applies to that person;
- (b) The person has been arrested in accordance with the proper process; and
- (c) The person’s rights have been respected.

National authorities become therefore to some extent “guardians” of the lawfulness of arrest.<sup>118</sup> They are mandated by the Statute to examine whether arrest has been carried in accordance with due process standards and whether the rights of the suspect have been respected. This determination is not limited to rights guaranteed under national law, but must extend to rights under international law, such as the rights afforded under Article 55. This is not clear from the wording, but follows from the object and purpose of the provision.<sup>119</sup> The words “in accordance with the law of that State” in Article 59 (2) can-

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<sup>117</sup> See Rule 55 (E).

<sup>118</sup> For a discussion, see also Mohamed El Zeidy, “Critical Thoughts on Article 59”, *Journal of International Criminal Justice*, Vol. 4 (2006), pp. 448-465.

<sup>119</sup> For a similar argument, see Sluiter, *supra* note 113, p. 474, and Christopher Hall, “On Article 59”, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2<sup>nd</sup> ed., 2008, p. 1150.

not be understood as a restriction to the substantive rights guaranteed to the person under Statute. Such an interpretation would conflict with Article 55 and Article 21 (3), which states that the “application and interpretation” of the Statute “must be consistent with internationally recognized human rights”. The statutory framework of arrest and surrender may thus force domestic authorities to pay particular attention to the protection of suspects and to apply these protections in accordance with the high standards set by the Statute.

This aspect is particularly important from a contextual point of view. Adherence to statutory norms and standards breaks the veil between the “international” and the “domestic”. It counters the perception that international law and legal standards are abstract concepts that operate outside the realm of domestic jurisdiction. Moreover, it has a certain behavioural effect for future conduct. It identifies benchmarks and guidelines for domestic practice, which may have fallen into disarray in conflict.

### **11.3.3.2. Efficiency**

Arrest and surrender under the ICC Statute is, at the same time, driven by efficiency considerations. The Statute maintains a certain centralization of enforcement, in order to avoid duplication of litigation and lengthy combats over competencies. This concern is reflected in a number of provisions, ranging from the duty of State Parties to identify a channel of communication with the Court,<sup>120</sup> and limitations of formal requirements to surrender in the requested State,<sup>121</sup> to the regulation of organizing principles for the treatment of competing requests.<sup>122</sup>

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<sup>120</sup> See, e.g., Rule 177.

<sup>121</sup> According to Article 91 (2) (c), supporting material required by the requested for the surrender process to the Court “should, if possible, be less burdensome” than in the context of extradition.

<sup>122</sup> States have to notify the Court of a competing request. If the competing request comes from another State Party, the request from the Court enjoys priority when the case has been declared admissible (Article 90 (2)). When the competing request comes from a non-party State, the requested State shall give priority to the request from the Court, if the requested State has no obligation under interna-

The interplay between fairness and efficiency creates certain tensions in the relationship between the Court and domestic authorities. This conflict is particularly visible in the context of arrest proceedings. Article 59 balances the competencies of the ICC and domestic courts. It empowers domestic courts, but it reserves specific powers to the Court. Domestic courts are not entitled to review a warrant of arrest by the Court. This power is exclusively reserved to the ICC by Article 59 (4), which states: “It shall not be open to competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b)”. Rule 117 (3) further clarifies that the arrested person shall bring any challenge as to the issuance of the warrant directly to the Pre-Trial Chamber.<sup>123</sup>

This principle is defensible from the point of view of efficiency and judicial independence of the Court. It centralizes the possibility of the individual to challenge the issuance of a warrant of arrest to the Court,<sup>124</sup> but it creates a curious situation from a human rights perspective. It appears to imply that a suspect cannot formally challenge the legality of a warrant of arrest until arrest and detention in the custodial state.<sup>125</sup>

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tional law to comply with the competing request (Article 90 (4)). If there is an obligation towards the non-party State, Article 90 ultimately leaves it to the requested State to choose between the requests. The requested State shall take into account relevant factors, such as the respective dates of the requests, the interests of the requesting State and the possibility of subsequent surrender to the Court (Article 90 (6)).

<sup>123</sup> Rule 117 (3) states: “A challenge as to whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 (a) and (b), shall be made in writing to the Pre-Trial Chamber. The application shall set out the basis for the challenge. After having obtained the views of the Prosecutor, the Pre-Trial Chamber shall decide on the application without delay”.

<sup>124</sup> See also Article 58 (4).

<sup>125</sup> The possibility to make a challenge under Rule 117 (3) is linked to “[d]etention in the custodial state”. The wording of Article 19 (2) (a) provides that challenges to jurisdiction and admissibility may be made by “[a]n accused or a person for whom a warrant of arrest or a summons to appear *has* been issued under Article 58” (emphasis added).

Secondly, Article 59 (3) fails to set out clearly what a domestic court can do if it comes to the conclusion that the rights of the suspect have been violated in arrest proceedings. In national criminal proceedings, the competent authority can usually order the final release of the person. The Statute, however, limits the scope of action of domestic authorities. Article 59 (4) obliges domestic authorities to ensure that “the custodial State can fulfil its duty to surrender the person to the Court”. This appears to imply that a violation of the rights of the suspect does not serve as an impediment to surrender as such,<sup>126</sup> but must be raised as a bar to proceedings before the ICC (e.g. under the “abuse of process” doctrine or Article 69 (7)). This is in line with the *male captus, bene detentus* doctrine,<sup>127</sup> but limits the trust in domestic courts.

Domestic authorities can only order “interim release”. Under the Statutes of the ICTY and the ICTR this power was exclusively reserved to the tribunals. The Rome Statute vests domestic authorities with the power to rule on “interim release pending surrender”. However, it creates a rather convoluted procedure to reconcile the competing responsibilities of domestic authorities and the Pre-Trial Chamber:

- Domestic authorities must balance various normative criteria set by the Statute in their decision-making process (“gravity of the alleged crimes”, urgent and exceptional circumstances to justify interim release”).<sup>128</sup>
- They must notify the Pre-Trial Chamber of any request and await its recommendations.<sup>129</sup>

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<sup>126</sup> See also Hall, *supra* note 119, p. 1152.

<sup>127</sup> See, e.g., ICTY *Milošević*, Decision on Preliminary Motions, November 8, 2001. “[I]f there is an abuse of process, it does not lead to a lack of jurisdiction on the part of the International Tribunal; what it raises is the question whether, assuming jurisdiction, the International Tribunal should exercise its discretion to refuse to try the accused if there has been an egregious breach of the rights of the accused”.

<sup>128</sup> See Article 59 (4).

<sup>129</sup> See Article 59 (5).

- Upon receipt of these recommendations, they must decide which value they attribute to these recommendations (“shall give full consideration”).<sup>130</sup>
- Finally, after the decision on interim release is made, they may be requested to provide periodic reports on interim release to the Chamber.<sup>131</sup>

This procedure is visibly a compromise formula to balance competing interests. One may easily predict the various difficulties it may cause in terms of fairness and expeditiousness. The division of competencies may delay proceedings and create a “ping-pong” effect between institutions. There is risk that the protection of the suspect may actually fall between the wheels, since no jurisdiction will be inclined to take on blame relating to the conduct of the other.<sup>132</sup>

#### 11.4. Conclusions

This essay has sought to demonstrate that the provisions of the cooperation regime of the Statute cannot be properly understood in isolation of their context. One of the core features of the work of the ICC is its close nexus to situations of transition from conflict to peace. This situational environment and the link of the ICC to transitional justice pose special challenges for the assessment and application of the system of arrest and surrender. They require a vision of the needs and tensions arising in societies in transition and a basic understanding of the impact of the ICC on domestic societies.

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<sup>130</sup> *Id.*

<sup>131</sup> See Article 59 (6).

<sup>132</sup> These risks have become apparent in the Lubanga case. In this context, Pre-Trial Chamber I held that the abuse of process doctrine does not exclude ICC jurisdiction, if there is no concerted action between domestic authorities and the ICC in relation to mistreatment. See Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute, 3 October 2006, p. 10. This interpretation was confirmed by the Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a), 14 December 2006, para. 42.



At present, this perspective is underdeveloped in legal and judicial analysis. Competencies and powers are interpreted and assessed based on a case-specific or Court-focused vision of proceedings. This methodology is unsatisfactory. The systemic challenges of the Court cannot be resolved by a black letter approach to law or analogies to other institutions. Many of the merits and weaknesses of the Statute and the value judgments inherent in it become evident only when they are analysed in light of the circumstances in which they come into play. This requires a broader understanding of the impacts and implications of statutory choices, and a critical reflection of their rationales.

A contextual reading of arrest and surrender under the ICC Statute may provide, at least, three benefits. It may, first of all, contribute to the correction of certain misperceptions. It encourages a more nuanced understanding of “effectiveness”. Features that are traditionally interpreted as weaknesses may actually appear to be strengths in an environment of transition.

Secondly, it provides incentives to re-consider the justifications for judicial engagement in conflict environments. In contemporary practice, rationales such as deterrence, incapacitation and restorative justice are often invoked on the basis of shaky policy foundations and speculative assumptions. A stronger focus on impact assessment and the development of measurement criteria and empirical research will provide a more reliable basis for such justifications.

Finally, a contextual understanding of arrest and surrender provides a fresh perspective on the rationale and interpretation of certain statutory provisions. In the context of the Rome Conference, norms and provisions were drafted primarily from the perspective of the Court and State interests. A contextual reading sheds a different light on interpretative choices offered by certain norms, such as the scope of “ordinary crime” prosecution under Article 20 (3) or the impact of human rights in arrest proceedings under Article 59.

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## Uses and Abuses of Transitional Justice in Colombia

Maria Paula Saffon and Rodrigo Uprimny\*

For many centuries, transitions from war to peace or from authoritarianism to democracy have been almost entirely shaped by politics. The political need of putting an end to violence fully determined the legal solutions adopted to bring about a transition. Thus, law was not seen as a real limit to the politics of transition, but rather as an instrument to fulfil its goals.

This situation has changed in the last decades. The boom of humanitarian consciousness and the recent evolution of international and national human rights standards have imposed the necessity of protecting the rights of victims of atrocities committed in the regime prior to the transition.<sup>1</sup> This explains the fact that the use of transitional justice

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<sup>1</sup> See, among others, Joinet, L., 1997, United Nations, Human Rights Commission, 49th period of sessions. *Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. L. Joinet pursuant to Sub-Commission decision 1996/119*, Doc. E/CN.4/Sub.2/1997/20/Rev.1; Orentlicher, D., 2004, United Nations, Human Rights Commission, 60th period of sessions, *Independent Study on best Practices, including Recommendations, to assist States in Strengthening their Domestic Capacity to combat all Aspects of Impunity*, Doc. E/CN.4/2004/88. For a thorough analysis of these standards, see Botero, C. and Restrepo, E., 2006, “Estándares internacionales y procesos de transición en Colombia” [“International standards and processes of transition in Colombia”], in Uprimny, R., Botero, C., Restrepo, E. and Saffon, M.P., *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia* [Transitional justice without transition? Truth, justice and reparations for Colombia], *DeJuSticia*, Bogota, 2006.

language has become ineludible in transitional contexts. Indeed, as the term itself shows, transitional justice aims at bringing justice into transitions, that is, at framing the politics of transitions within certain legal standards, particularly those regarding victims' rights to truth, justice and reparations.<sup>2</sup>

However, the question still remains of whether transitional justice legal standards actually work as effective normative limits to the political options available for bringing about a transition. This is so because the use of a certain discourse – such as that of transitional justice – does not necessarily imply a transformation in praxis; it may merely consist in a rhetorical turn with symbolic or legitimizing effects. That is why it is important to carefully analyze if the language of transitional justice may serve different interests, and particularly if it may be used not only for promoting transformative effects, but also for perpetuating the *status quo*.<sup>3</sup> And that is why it is also important to inquire if the recent recurrent use of transitional justice implies the rule of law over politics at least in certain matters, or if politics still fully shape legal formulas in contexts of transition.

The purpose of this article is to tackle the former issues. From a conceptual perspective, it seeks to reflect on the relation between law and politics, and particularly between legal standards containing vic-

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<sup>2</sup> This does not mean that transitional justice aspires to make law fully conquer or rule over transitional politics, since it is thought of as a special type of justice determined and limited by the political dynamics of transitional times. In that way, although the definition of transitional justice is far from being unanimously accepted and is the object of intense debates, it is widely admitted that transitional justice consists in a set of mechanisms or processes aimed at achieving equilibrium between the legal imperative of justice for victims and the political need of peace.

<sup>3</sup> For the categories of transformative or emancipatory effects, on the one hand, and perpetuating or legitimizing effects, on the other hand, see, among many others, Santos de Sousa, B., *La globalización del derecho* [*The globalization of law*], Universidad Nacional de Colombia and ILSA, Bogotá, 1998; Kennedy, D., *Libertad y restricción en la decisión judicial. El debate con la Teoría Crítica del Derecho (CLS)* [*Freedom and restriction in judicial decision. The debate with the Critical Legal Theory (CLT)*], Diego Eduardo López (ed.), Siglo del Hombre Editores, Bogotá, 1999.

tims' rights on the one hand, and political dynamics that underlie and determine the results of a given transition – especially a negotiated transition – on the other hand. To do so, the article will use the Colombian case as an illustration of this relation, by focusing on the role that transitional justice mechanisms – and especially the recognition of victims' rights – play in current political peace negotiations between the Colombian government and paramilitary groups. From this starting point, the article will attempt to reach some conclusions that might be extended to the analysis of other situations.

The article is divided into three main sections. The first section consists in a brief characterization of the Colombian case, with the purpose of showing why it is relevant for a conceptual analysis like the one that is intended. The characterization puts special emphasis on the complexities derived from using transitional justice language and mechanisms in contexts where a full or complete transition is not taking place. The second section of the article attempts to study the role of transitional justice – and particularly of the recognition of victims' rights – in negotiated transitions, through the analysis of two variables: (i) the different possible uses – manipulative or democratic – of the transitional justice discourse, depending on the different interests it may serve, and (ii) the relation that exists between justice and peace. Although the analysis of these two variables is made from a conceptual perspective, the Colombian case is constantly referred to because it is used as an illustration of the complexities of more abstract reflections. The third and last section of the article draws some final remarks on the importance of making a cautious use of the discourse of transitional justice in the Colombian context, which may be extended to the study of other situations.

### **12.1. The Colombian Case: Transitional Justice Without Transition?<sup>4</sup>**

The current situation in Colombia is quite useful to analyze the relation between transitional justice legal standards and the politics of transi-

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<sup>4</sup> This is the title of a book of which the authors of this paper are co-authors (Uprimny, Botero, Restrepo and Saffon, *op. cit.*).

tions – particularly negotiated transitions. Indeed, as we will show, the Colombian case is characterized by a paradoxical situation: the transitional justice language is recurrently used, in spite of the fact that the country is in the midst of an ongoing conflict. This situation renders the complexities of the relation between political dynamics and legal standards on victims' rights remarkably acute. That is why it is a relevant case for the analysis of such relation.

In what follows, we will briefly refer to the key traits of the Colombian armed conflict that render it complex, and we will then develop the argument according to which, although the country is in the middle of such a conflict, the transitional justice language is persistently used.

### 12.1.1. Complexity of the Colombian Conflict

The Colombian internal armed conflict is very complex.<sup>5</sup> This is due not only to its specific traits, but also to the elements that characterize the context in which it takes place.

There are several traits of the Colombian conflict itself that render it complex. First, it is one of the longest armed conflicts in the world.<sup>6</sup> The most cautious analysts point at 1964 as its contemporary origin,<sup>7</sup> since this was the year in which the Colombian Revolutionary

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<sup>5</sup> For a study of the complexities of the Colombian conflict and the difficulties of its characterization, see IEPRI (ed.), *Nuestra guerra sin nombre. Transformaciones del conflicto en Colombia* [*Our war with no name. Transformations of the conflict in Colombia*], Norma, Bogota, 2006.

<sup>6</sup> Along with the Palestinian-Israel and the India-Pakistan conflicts. On this, see Colombian National Commission for Reparations and Reconciliation (CNRR for its Spanish initials), *Hoja de Ruta* [*Road Map*], 2006, available at [www.cnrr.org.co/hoja\\_de\\_ruta.htm](http://www.cnrr.org.co/hoja_de_ruta.htm).

<sup>7</sup> The CNRR has used this date to identify the universe of victims of the Colombian conflict in a preliminary way. Thus, it has stated that it considers as victims “*all those persons or groups of persons who, in reason or with occasion of the internal armed conflict that the country lives since 1964 have suffered individual or collective damages occasioned by actions or omissions, which violate rights contained in dispositions of the Colombian Political Constitution, International Human Rights Law, International Humanitarian Law and International Criminal Law, and which constitute an infraction against the national criminal law*” (our

Armed Forces (FARC for its Spanish initials) – the strongest guerrilla group in the country – took arms. However, many other analysts point at the period of violence between the liberal and conservative political parties in the 1940s as the origin of the conflict as we know it nowadays.<sup>8</sup> Be it as it may, the Colombian conflict has gone on for at least forty years, and that certainly makes the finding of a negotiated durable peace a quite difficult task.

A second element of complexity is the fact that the conflict is not between two factions – as conflicts often are – but includes various violent actors. Thus, there have been several subversive guerrilla groups that have openly confronted the State's authority on the national territory.<sup>9</sup> Today, only two of those groups are still active, and one of them, the Army of National Liberation (ELN for its Spanish initials), is currently at the first stages of a peace negotiation with the government, still with uncertain results. However, FARC, the other group, has not shown any serious desire of holding peace negotiations with the government, and in the last years has continued and even incremented the commission of atrocities against civil society, which particularly include kidnappings and assassinations.

But guerrilla groups and the official army are not the only actors of the conflict. Since the 1980s, right-wing paramilitary groups appeared motivated by the need to combat guerrilla groups in a stronger

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translation). CNRR, *Fundamentos Filosóficos y Operativos. Definiciones estratégicas de la Comisión Nacional de Reparación y Reconciliación [Philosophical and Operational Foundations. Strategic Definitions of the National Commission for Reparations and Reconciliation]*, 2006, available at: [www.cnrr.org.co/cd/pdf/Definiciones\\_estratergicas.pdf](http://www.cnrr.org.co/cd/pdf/Definiciones_estratergicas.pdf). This definition of the universe of victims created a great deal of controversy when the CNRR first suggested it.

<sup>8</sup> Gonzalo Sánchez has argued that, although it has had different cycles and logics, the Colombian conflict is only one. See Sánchez, G. and Peñaranda, R., *Pasado y presente de la violencia en Colombia [Past and present of violence in Colombia]*, IEPRI-CEREC, Bogota, 1991.

<sup>9</sup> Apart from FARC and ELN, which still exist and confront the State, several other guerrilla groups have existed in Colombia and have demobilized, such as the April 19 Movement (M-19 for its Spanish initials), the Popular Liberation Army (EPL for its Spanish initials) and the indigenous guerrilla group Quintín Lame, among others.

way. They rapidly expanded in terms of both number of members and power.<sup>10</sup> To do so, they held strong ties with economic elites, and established strong relations of tolerance, collaboration and complicity with State agents, which not only include members of the public force,<sup>11</sup> but also agents of intelligence, local politicians, national Congressmen.<sup>12</sup> Paramilitaries committed heinous crimes against civilians, especially including massacres and forced disappearances. In 2002, almost all paramilitary groups that constitute the confederation of United Self-Defense of Colombia (AUC for its Spanish initials) negotiated a peace agreement with the Government, which has produced the demobilization of over 30,000 paramilitaries, and the commencement of trials against almost 3,000 of them.<sup>13</sup> However, for various reasons, the nature of these groups makes it more difficult to find formulas for assuring that peace negotiations will effectively guarantee the dismount of their power structures and non-recurrence of atrocities.

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<sup>10</sup> On their quantitative or numeric expansion, see Romero, M., *Paramilitares y autodefensas. 1982-2003* [*Paramilitaries and auto-defenses. 1998-2003*], IEPRI-Planeta, Bogota, 2003. On paramilitaries' political and economic expansion, see Duncan, G., *Los señores de la guerra: de paramilitares, mafiosos y autodefensas en Colombia* [*The warlords: of paramilitaries, mafia and self-defenses*], Planeta, Bogota, 2006. See also Saffon, M.P., 2006, *Poder paramilitar y debilidad institucional. El paramilitarismo en Colombia: un caso complejo de incumplimiento de normas* [*Paramilitary power and institutional weakness. Paramilitarism in Colombia: a complex case of disobedience to law*], Los Andes University, Bogota, MA thesis, 2006.

<sup>11</sup> On this see the five cases that have been decided by the Inter-American Court of Human Rights against the Colombian State, regarding atrocities committed by paramilitaries with the collaboration or omission of agents of the public force. Inter-American Court of Human Rights, *Case of the massacre of 19 merchants v. Colombia*, Ruling of 5 July 2004, series C No. 109; *Case of the massacre of Mapiripán v. Colombia*, Ruling of 15 September 2005, series C No. 134; *Case of the massacre of Pueblo Bello*, Ruling of 31 January 2006, series C No. 140; *Caso of the massacres of Ituango v. Colombia*, Ruling of 1 July 2006, series C No. 149; *Caso of the massacre of La Rochela v. Colombia*, Ruling of 11 May 2007, series C No. 163.

<sup>12</sup> See Duncan, *op. cit.*; Saffon, *op. cit.*

<sup>13</sup> The legal framework for these events has been laws 782 of 2002 and 975 of 2005, as well as their governmental decrees.

On the one hand, paramilitary groups are pro-systemic, not anti-systemic actors.<sup>14</sup> They never intended to overthrow the Government or to defeat the Colombian army, but rather to support their struggle against guerrilla groups through illegal means. Moreover, for many years the State did not persecute them, and even benefited from their support.<sup>15</sup> On the other hand, paramilitary groups are not organized hierarchically and do not have a united or centralized mandate, but rather function as semi-autonomous cells of a nodal structure.<sup>16</sup> Finally, due to their ways of operating, paramilitaries built strong economic and power structures, through both their financing power – obtained from drug traffic and a strong concentration of land – and their collusion with State agents.<sup>17</sup> Thus, they do not derive their power as much from weapons as they do from these power structures. All these traits of paramilitary groups suggest that peace and the guarantee of non-recurrence of atrocities cannot be assured merely by a demobilization process. Indeed, on its own, such a process might allow for power structures to remain intact, and even to become stronger in virtue of a legalization process.

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<sup>14</sup> For this distinction see Múnera, L., “Proceso de paz con actores armados ilegales y parasistémicos (los paramilitares y las políticas de reconciliación en Colombia)” [“Peace process with illegal and para-systemic armed actors (paramilitaries and reconciliation policies in Colombia)”], *Revista Pensamiento Jurídico* No. 17 (2006).

<sup>15</sup> For an analysis of the Colombian legal framework, on the base of which many paramilitary groups were created, see Inter-American Court of Human Rights, *Case of the massacre of 19 merchants v. Colombia*, Ruling of 5 July 2004, series C No. 109; *Case of the massacre of Mapiripán v. Colombia*, Ruling of 15 September 2005, series C No. 134; *Case of the massacre of Pueblo Bello*, Ruling of 31 January 2006, series C No. 140; *Caso of the massacres of Ituango v. Colombia*, Ruling of 1 July 2006, series C No. 149; *Caso of the massacre of La Rochela v. Colombia*, Ruling of 11 May 2007, series C No. 163.

<sup>16</sup> On this see Alonso, M., Giraldo, J., y Alonso, D., “Medellín: El complejo camino de la competencia armada” [“Medellin: The complex way of armed competition”], in *Diálogo Mayor. Memoria colectiva, reparación, justicia y democracia: el conflicto colombiano y la paz a la luz de experiencias internacionales* [Major Dialogue. Collective memory, reparations, justice and democracy: the Colombian conflict and peace in the light of international experiences], Universidad del Rosario, Bogotá, 2005.

<sup>17</sup> Duncan, *op. cit.*



Besides the previously mentioned actors, it is impossible to ignore that drug trafficking has been a central protagonist in the Colombian armed conflict.<sup>18</sup> Drug lords sustain complex relations with armed groups, which vary from financing their activities to becoming more directly involved in them, to the point of becoming their most visible leaders in some cases. In any case, drug trafficking constitutes a key element for explaining why the conflict tends to go on and on, since it works as an almost unlimited source of financing.

A third element of complexity of the Colombian conflict can be found in the nature of the conflict itself. Because of its protracted character and its multiple and heterogeneous actors, its logic is not easy to grasp. There is a strong discussion among analysts regarding the way the conflict should be defined. Some argue it is a civil war; others talk about a terrorist threat; one could also think of it as a war against society. That is why the title of a recent book is very suggestive, when it refers to it as a *war with no name*.<sup>19</sup>

A fourth element of complexity of the Colombian conflict is the magnitude and harsh situation of victims of atrocities. There are around three million victims of forced internal displacement,<sup>20</sup> who have also often been victims of other crimes or threats, and who have lost their lands and belongings. The situation of forcibly displaced people constitutes a true humanitarian tragedy, since victims of the conflict tend to be one of the most vulnerable and marginal sectors of

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<sup>18</sup> López, A., “Narcotráfico, ilegalidad y conflicto en Colombia” [“Drug-traffic, illegality and conflict in Colombia”], in IEPRI (ed.), *op. cit.*

<sup>19</sup> IEPRI (ed.), *op. cit.*

<sup>20</sup> Official sources talk about a little more than two million forcibly displaced persons in the country. See Acción Social, *Estadísticas de la población desplazada* [Statistics of displaced population], available at: [www.accionsocial.gov.co/contenido/contenido.aspx?catID=383&conID=556](http://www.accionsocial.gov.co/contenido/contenido.aspx?catID=383&conID=556). This is, however, a figure that only takes into account the number of persons who are officially registered in the government’s Displaced Population Only Register, and thus excludes displaced people who have not been able to register. That is why other sources, such as the United Nations High Commissioner for Refugees, talk about around three million forcibly displaced people. See UNHCR, 2006, *Global Trends Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, June, 2007, available at: [www.unhcr.org/statistics.html](http://www.unhcr.org/statistics.html).

society, not only because of the sufferings they were submitted to, but also because of the socioeconomic situation to which those sufferings have pushed them to. Besides the forcedly displaced population, there are also thousands of victims of other atrocious crimes, including homicides, forced disappearances, sexual violence, social intolerance, extortive kidnappings, massacres, arbitrary detentions, among others.<sup>21</sup> In general, victims in Colombia pertained to the least favourable sectors of society even before the commission of atrocities.<sup>22</sup>

Apart from the previously traits inherent to the Colombian conflict, there are some elements that belong to the context in which it takes place and that render it even more complex. The first element has to do with the deep influence that the international community in general, and the United States in particular, have on Colombian politics. This influence has led to the internationalization of the Colombian conflict, which has become more and more evident as time goes by. The international community's concern with the humanitarian crisis in Colombia, and especially the United States' interest in the policy against drug trafficking have shaped to a great extent both the dynam-

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<sup>21</sup> For some preliminary calculations of the total amount of victims in Colombia and the cost of their reparation, see González, C., "Prólogo" in *Las cifras del conflicto [The figures of conflict]*, INDEPAZ, Bogotá, 2007; Richards, M., *Quantification of the financial resources required to repair victims of the Colombian conflict in accordance with the Justice and Peace Law*, CERAC, Bogotá, 2007.

<sup>22</sup> This is so, perhaps with the exception of some victims of extortive kidnapping. In this, the Colombian situation is similar to that of Guatemala – where the majority of victims belonged to Mayan ethnic groups – and Peru – where the majority of victims were rural – and very different to that of Argentina and Chile where victims were mostly from the middle classes. In previous articles, we have argued that the socioeconomic status of victims is very important for determining the nature reparations should have, and particularly for establishing whether they should have a transformative potential rather than a mere restitutive one. See Uprimny, R. and Saffon, M.P., "Plan Nacional de Desarrollo y reparaciones. Propuesta de un programa nacional masivo de reparaciones administrativas para las víctimas de crímenes atroces en el marco del conflicto armado" ["National Development Plan and reparations. Proposal of a national massive program of administrative reparations for victims of atrocious crimes in the frame of the armed conflict"], CODHES, Bogota, 2007.

ics of the conflict and the legal treatment given to armed actors that decide to demobilize.

In fact, given that Colombian armed groups are heavily involved in drug trafficking, the United States has strongly increased its participation in the Colombian conflict in the last ten years, especially through the so called “Plan Colombia”. Moreover, many paramilitary demobilized leaders have been indicted for drug smuggling and requested in extradition by the US government. Although the Colombian government made it clear that it would not make them effective as long as the paramilitaries continued in the demobilization process, those requests of extradition have played a key role in the peace negotiations between the former and the latter. Indeed, while the paramilitaries have seen them as an incentive for achieving a demobilization agreement, the government has used them as a threat in case they do not abide to the agreement.<sup>23</sup>

The second element of complexity of the context in which the Colombian conflict takes place consists in the ambiguous nature of the political regime. In spite of the persistence of the armed conflict and the seriousness of the human rights abuses therein produced, Colombian institutions have managed to maintain important democratic features. For instance, civilian elections are regularly held – even if increasingly interfered by illegal armed groups – and the judicial system keeps a very important degree of independence and manages to control some abuses of power.<sup>24</sup> Thus, it is possible to identify the political regime as a *dangerous democracy in danger*, which is very risky for its

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<sup>23</sup> On this, see the interesting analysis made in the introduction to this volume by Pablo Kalmanovitz.

<sup>24</sup> This is so except for judges who inhabit zones of armed conflict, where armed actors intervene in their decision-making either by directly deciding the cases of their competence, or by threatening them. For a brief reference to this phenomenon, which is in the course of being thoroughly analyzed in a research project conducted by Mauricio Garcia Villegas at DeJuSticia, see Uprimny, R., “Entre el protagonismo, la precariedad y las amenazas: las paradojas de la judicatura” [“Among protagonism, precariousness and threats: paradoxes of judicature”] in Leal, F. (ed.), *En la Encrucijada, Colombia siglo XXI [In the crossroads, Colombia XXI century]*, Norma, Bogota, 2006.

inhabitants, but at the same time is threatened by illegal powerful actors.

The third and final element of the context that renders the conflict even more complex has to do with the profound polarization of the Colombian society. This polarization brings about a tendency to criticize more severely or to only criticize the violence produced by one of the sides of the conflict – depending on the side of the political spectrum in which the critic is. As a consequence of this tendency, there is a lack of a general minimal agreement on the wrongness of gross human rights violations committed by the armed actors, which seems essential for finding a long-lasting peace. One very recent event exemplifies this situation.

Some judicial decisions, the mass media and the confessions of perpetrators have revealed the cruelty of the methods used by paramilitaries to forcibly disappear, torture, murder and hide the remains of their victims,<sup>25</sup> as well as the complicity of the army, many local politicians, Congressmen and close collaborators of President Uribe with paramilitarism.<sup>26</sup> In spite of this, as a recent poll shows, many people do not fully reject the atrocities committed by paramilitaries, nor the strong ties existing between them and State agents. According to that poll, the knowledge of the cruel ways in which paramilitaries committed atrocities against civilians did not affect the positive perception people had of them in 38% of the cases, and increased such positive perception in 9% of the cases. Moreover, 73% of the population believes the government should make a stronger effort to fight guerrilla groups than paramilitary groups, and 47% of the population thinks guerrilla groups are more responsible of the violence in the country than the rest of armed actors.<sup>27</sup>

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<sup>25</sup> See “Juicio histórico a paramilitares” [“Historical trial against paramilitaries”], *El Tiempo*, 23 April 2007.

<sup>26</sup> See, among many other press references, “Para-políticos” [“Para-politicians”] and “El ventilador de Mancuso” [“Mancuso’s fan”], *Revista Semana*, 19 May 2007.

<sup>27</sup> “La gran encuesta de la parapolítica” [“The grand poll of parapolitics”], *Revista Semana*, 5 May 2007.

### **12.1.2. The Use of Transitional Justice in the Midst of an Ongoing Conflict**

As we showed in the previous section, in spite of the massive demobilization of paramilitaries that has taken place in the last years, the Colombian internal armed conflict is still far from ending. On the one hand, the armed conflict with guerrilla groups, and particularly with the FARC movement, has continued and has even intensified in the last years. A peace agreement with this guerrilla group does not seem like a real possibility in the short term. On the other hand, it is highly doubtful that the process of demobilization of paramilitaries will bring about the dismantlement of their power structures. Thus, the guarantee of non-recurrence and the sustainability of peace with paramilitaries are at risk.

In that context, it is not accurate to talk about a transition from war to peace in Colombia. A full or global transition is not taking place, since recent negotiations have not included all armed actors. Furthermore, it is possible to say that not even a fragmentary or partial transition is taking place regarding paramilitary groups because, even if their members have surrendered their weapons, their economic and political organizations seem to remain intact.

Nevertheless, in the last years everyone has been talking about transitional justice in Colombia. Indeed, most actors involved in the political discussion on how to face atrocities committed by paramilitaries explicitly promote the use of transitional justice language and mechanisms, or at least implicitly use the logic and categories of transitional justice to analyze the Colombian situation. The generalized use of transitional justice is not only paradoxical for the obvious reason that it is taking place in the midst of an ongoing conflict and with no clear signs of a transition. What seems most paradoxical about this situation is the fact that, at first, none of the actors used or intended to use the transitional justice language; however, for very different reasons, they all ended up adopting it.

That is undoubtedly the case of the government and paramilitary leaders themselves, who at the first stages of the process vigorously rejected the application of criminal justice to atrocities committed by

paramilitaries, but who soon began to use the discourse of transitional justice and to admit the necessity of a minimum degree of punishment that it implies. In fact, when the discussion on the legal framework for the demobilization of paramilitarism began taking place, paramilitary leaders emphatically said that they would not spend a single day in prison.<sup>28</sup> On its turn, the government defended the importance of peace and reconciliation, by invoking the restorative justice paradigm – supported, among many others, by Desmond Tutu in South Africa’s transition – as the most adequate framework for the negotiations with paramilitaries. As a result, the first bill proposed by government to Congress in 2003, entitled the *Alternative Penalties Law*,<sup>29</sup> consisted in a concession of legal pardons to all armed actors who accepted to demobilize, and was based on the restorative idea that criminal punishment did not contribute and could even become an obstacle for achieving reconciliation.<sup>30</sup>

However, the bill was rapidly withdrawn from Congress, as a result of the harsh criticisms it received from different sectors, and particularly from international and local human rights organizations, victims’ organizations and some political groups. These sectors claimed that the bill consisted in an impunity law, since it aimed at being applied to all armed actors – including those who had committed gross human rights violations and international humanitarian law infractions – and its benefits were not conditioned to the effective satisfaction of victims’ rights. The government soon replaced the bill by what later became law 975 of 2005, commonly known as the *Justice and Peace Law*.

This new bill implied an important change in the discourse of the government, which passed from one of absolute rejection of criminal

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<sup>28</sup> Declaration of Salvatore Mancuso, paramilitary leader and spokesman at the time, at an audience in Congress. See “Vinieron, hablaron y se fueron. Armando Neira relata en exclusiva para SEMANA.COM los detalles de la polémica visita de los paramilitares al Congreso” [“They came, spoke and left. Armando Neira narrates in an exclusive for SEMANA.COM the details of the polemic visit of paramilitaries to Congress”], *Semana.com*, 29 July 2005.

<sup>29</sup> In Spanish, *Ley de Alternatividad Penal*.

<sup>30</sup> See *Gaceta del Congreso* [*Congress Journal*], No. 436 of 2003.

punishment and total silence on victims' rights to an admission of the importance of achieving equilibrium between peace needs and justice requirements. This was translated in the law explicitly recognizing victims' rights, imposing a very lenient criminal punishment (not higher than eight years and not lower than five, regardless of the quantity and grossness of the atrocities) for demobilized actors who had committed atrocities, and requiring from them minimal duties related to truth and reparations.<sup>31</sup> Although this new legal proposal altered the initial conditions under which paramilitaries decided to demobilize, they never openly contested or rejected the text. Moreover, when the Constitutional Court reviewed the constitutionality of the law, paramilitary leaders defended its original text and treated it as a promise that should not be broken.<sup>32</sup> In that way, the change of discourse can also be attributed to paramilitary leaders, who passed from claiming that they would not remain in jail for even one day, to accepting the possibility of a reduced criminal punishment.

The previously described change of discourse does not mean that the initial approach and objectives of both the government and paramilitaries changed in any other way than semantically. As many NGOs and a minority of Congressmen claimed, the bill proposed by the government and finally approved by Congress did not contain the necessary mechanisms for assuring that victims' rights therein recognized would be adequately protected.<sup>33</sup> In that way, the Justice and Peace Law was criticized as a more subtle and disguised form of impunity and, for that reason, its passing was contested in Congress and its con-

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<sup>31</sup> Regarding truth, the law required the demobilized to confess the crimes in which they had participated, but did not establish that incomplete or false confessions would imply the loss of criminal benefits. Regarding reparations, the law required that the demobilized only surrendered the illegally obtained assets they still possessed, thus allowing them to keep most of their assets either by laundering or legalizing them, or by transferring them to third parties.

<sup>32</sup> On this, *see* the introduction to this volume by Pablo Kalmanovitz.

<sup>33</sup> For a detailed analysis of the flaws of the law concerning the protection of victims' rights, *see* Uprimny, R. and Saffon, M.P., "La ley de 'justicia y paz': ¿una garantía de justicia y paz y de no repetición de las atrocidades?" ["The 'justice and peace' law: a guarantee of justice and peace and of non-recurrence of atrocities?], in Uprimny, R., Restrepo, E., Botero, C., Saffon, M.P., *op. cit.*

stitutionality was challenged before the Constitutional Court immediately after its issuance.<sup>34</sup>

The strategy used by human rights and victims organizations for contesting the Justice and Peace Law before both Congress and the Constitutional Court also implied a turn in their discourse. Indeed, the organizations that opposed the law used the logic and categories of transitional justice in important ways to challenge it. This use of transitional justice implies a tension with the idea, defended by most of these organizations, according to which there is neither a transition nor a transitional context in Colombia.<sup>35</sup> Moreover, the use of transitional justice logic and categories by these organizations contrasts with the maximalist rights-based approach that these organizations adopted at the first stages of the political discussion on the legal framework, according to which victims' rights should be protected without any constraint – the political need of achieving peace notwithstanding.<sup>36</sup>

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<sup>34</sup> According to the Colombian 1991 Constitution (Art. 241), any citizen can challenge a law before the Constitutional Court through a “public action of unconstitutionality”. In deciding these actions, the Court exercises its power of judicial review by abstractly revising the constitutionality of the law. Its decisions have *erga omnes* effects, which means that the declaration of unconstitutionality of a certain disposition immediately implies that the disposition is expelled from the legal order, while the declaration of constitutionality of a disposition in principle excludes the possibility of the Court revising its constitutionality again.

<sup>35</sup> On this, see Cepeda, I., 2007, Conference for the panel “Fundamentos éticos y políticos para la reconstrucción del país” [Ethical and political foundations for the country's reconstruction], presented at the seminar *Reconstrucción de Colombia* [Colombia's reconstruction], organized by Planeta Paz, DeJuSticia, CODHES, Fundación Manuel Cepeda Vargas and Unijus, Bogotá, August 2007. This tension remains and, in our point of view, it seems more and more inevitable. Indeed, although it is not clear at all that a transition is taking place in Colombia, the use of the transitional justice discourse has become unavoidable and, as we will discuss in the following section, it appears to offer important elements for the defence of victims' rights and for the empowerment of their organizations.

<sup>36</sup> This initial position is reflected in a bill, presented by Senator Piedad Córdoba as another alternative to the Justice and Peace bill, which intended to “dictate legal dispositions on Truth, Justice, Reparations, Prevention, Publicity and Memory for the submitting of paramilitary groups that initiate dialogs with the government”.



During the discussion of the bills, these organizations moved to a less radical position, which admitted that a negotiated settlement could imply a specific legal formula capable of responding to the political need of achieving peace, but which anyhow stressed the importance of adequately protecting victims' rights and of assuring the guarantee of non-recurrence. In that way, although rejecting the existence of a transition in Colombia, human rights and victims organizations made use of the core principle of transitional justice, which – as we have already mentioned – consists in the importance of finding equilibrium between the requirements of peace and justice.

For that reason, these organizations supported the alternative bill promoted by some Congressmen, which also admitted the possibility of a reduced criminal punishment, but required that it be proportional to the crimes committed, and also that it only be conceded if each beneficiary confessed all crimes in which he or she had participated and integrally repaired his or her victims.<sup>37</sup> Once this bill was defeated by the Justice and Peace Law, human rights and victims' organizations also used the transitional justice logic and categories to challenge the constitutionality of the law before the Constitutional Court, essentially arguing that it flagrantly violated victims' rights to truth, justice and reparations, and consequently did not search for or achieve any equilibrium between peace and justice.<sup>38</sup>

In 2006, the Colombian Constitutional Court issued ruling C-370 of 2006, the most important of a series of rulings concerning the con-

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<sup>37</sup> The alternative bill was promoted by Congressmen Rafael Pardo, Gina Parody, Rodrigo Rivera, Luis Fernando Velasco, Carlos Gaviria and Germán Navas, and intended to “dictate dispositions for guaranteeing the rights to truth, justice and reparations of victims of human rights violations and of the Colombian society in processes of reconciliation with illegal armed groups”. Among other issues, this alternative bill included the perpetrators' duty to repair their victims with both legal and illegal assets, and the State's duty to repair in case of insufficient assets or impossibility to individualize the perpetrator.

<sup>38</sup> Ruling C-370 of 2006 of the Constitutional Court contains a summary of the arguments of the organizations that presented the first action of unconstitutionality against the law.

stitutionality of different dispositions of the Justice and Peace Law.<sup>39</sup> In this ruling, the Court explicitly established that the law was based on the core principle of transitional justice, according to which it is essential to achieve equilibrium between the political need of peace and the legal imperative of protecting victims' rights. For that reason, the Court ruled that the general idea of the law according to which a reduced criminal punishment could be justified in order to achieve peace was acceptable. Nonetheless, the Court found that such a reduction of punishment should be accompanied with adequate mechanisms aimed at sufficiently protecting victims' rights, in the absence of which these rights were disproportionately affected and the principle of transitional justice was broken. According to the Court, this happened with several dispositions of the Justice and Peace Law, which did not contain enough guarantees for the satisfaction of victims' rights, and which therefore violated international and constitutional legal standards on the subject.<sup>40</sup> As a consequence, the Court declared the unconstitutionality of some of these dispositions,<sup>41</sup> as well as of some of their interpretations.<sup>42</sup>

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<sup>39</sup> Apart from ruling C-370 of 2006, the Constitutional Court has issued the following rulings on the constitutionality of the Justice and Peace Law: rulings C-127 of 2006, C-319 of 2006, C-455 of 2006, C-531 of 2006, C-575 of 2006, C-650 of 2006, C-670 of 2006, C-719 of 2006, C-080 of 2007.

<sup>40</sup> This was the case of the dispositions regarding the perpetrator's duty to confess and to repair to which we referred previously, among many others.

<sup>41</sup> This was the case of the disposition that established that the time passed in the peace negotiations' zone by the paramilitaries could be subtracted from the already very lenient punishment (from 5 to 8 years) that would be imposed to perpetrators of atrocious crimes. According to the Court, this disposition was unconstitutional as it implied a disproportionate affectation of victims' right to justice, and the rupture of the transitional justice principle of equilibrium between peace and justice.

<sup>42</sup> For instance, in the case of the Justice and Peace law's disposition according to which perpetrators had the obligation to confess the crimes in which they had participated, the Court declared its constitutionality, under the condition that it was interpreted in such a way that the confession had to be true and complete and that, if these requirements were not complied with, the perpetrator would lose the criminal benefit of a reduced punishment in any stage of the process. In the case of the law's dispositions regarding the perpetrator's duty to repair victims, the

As the previous description shows, the different political actors who struggled to define the content of the legal framework for the negotiations with the paramilitaries ended up using the transitional justice language and categories. In particular, all these actors' discourses coincide in two basic ideas of transitional justice: (i) the principle according to which it is necessary to find equilibrium between peace and justice; (ii) the recognition of the binding character and the applicability of victims' rights to truth, justice and reparations. However, this coincidence was not the result of a general agreement or consensus among the different actors on the convenience of using the transitional justice language. Rather, it happened in spite of the fact that none of these actors was interested in or willing to use the transitional justice categories and language at the first stages of the discussion.

How can such an unwilling coincidence be explained? Was the change in the government's and paramilitaries' discourse a mere rhetorical strategy, aimed at producing legitimizing effects? Or was it rather the result of legal standards on victims' rights operating as normative limits to political options available for peace negotiations? As we will see in the following section, both these questions can receive a partially affirmative answer because they correspond to two different ways of understanding the role played by transitional justice in peace negotiations – that is, the discursive and the normative role of transitional justice in such contexts.

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Court declared them constitutional under the condition that such duty was understood as implying the surrendering of all assets, including those legally obtained, as well as those passed on unto others as a means for evading responsibility. Moreover, the Court established that perpetrators' duty to repair was not restricted to their victims, but could cover the victims of the group to which they belonged, and who could not be repaired by their direct victimizer either because he or she had not been identified, or did not have enough assets to integrally repair his or her victims. Finally, the Court declared that the State maintained a subsidiary responsibility regarding reparations, which implied that in the absence of sufficient assets provided by perpetrators to repair their victims, the State would have to provide the remaining assets needed for integral reparations.

## **12.2. The Role of Transitional Justice in Peace Negotiations**

In this Section, we attempt to analyze conceptually the role that transitional justice plays in peace negotiations. We believe this is an important reflection, as it may shed light on the complex relation that exists between law and politics in such contexts. Moreover, this reflection may be useful for explaining concrete cases – like the current Colombian situation – in which different actors with different and even opposing interests use the transitional justice discourse. In order to accomplish that purpose, we will use two analytical variables, which seem appropriate and useful to understand the role played by transitional justice in peace negotiations.

The first variable looks at transitional justice as a discourse, and aims at inquiring about the way in which such discourse is used, depending on the interests it serves. The use of this variable is based on two main presuppositions. On the one hand, the variable implies that there is not a univocal use, but rather various possible uses, of transitional justice language and mechanisms. Thus, the variable is based on the idea that the content of transitional justice is ambiguous or flexible, in such a way that it may be interpreted – and even manipulated – in different ways. On the other hand, the use of this variable implies that the different ways in which the discourse of transitional justice is interpreted and subsequently used depend on the interests of the actors who use it. And, given that these interests are different and may even be contradictory, the variable also implies that actors who use the transitional justice discourse struggle or compete for its meaning and content, and that the imposition of certain meaning as the dominant or hegemonic one is the result of an unequal distribution of power among actors.

The second variable through which the role played by transitional justice in peace negotiations can be analyzed looks at the relation between peace and justice, which is at the base of any conception of transitional justice. As we have mentioned before, this relation refers to the more abstract relation between politics and law and, in the case of peace negotiations, it consists in the relation between the political dynamics of the negotiations and the legal standards on victims' rights. The use of this variable has the purpose of analyzing the differ-

ent ways in which this relation between peace and justice, or between politics (negotiations) and law (legal standards) can be understood or interpreted. Thus, the variable is based on the presupposition that there is, in fact, some kind of distinction between law and politics, the existence of which allows for an analysis of the relation between both of them. This presupposition implies refusing the idea that law in general, and transitional justice legal standards in particular, are only discourses, whose nature cannot be distinguished in any way from that of politics. Therefore, by using this variable, one is assuming that, although transitional justice may function as a discourse that can be used politically, it is not reduced to such discursive component, but also has a normative dimension. This assumption entails the idea that transitional legal standards have some degree of hardness, which allows them to function as a believable threat, and which accounts for their normative or imperative nature. It is precisely this nature that which lets them be distinguished from politics to some extent.

After having announced their basic content as well as the presuppositions on which they are based, in the following lines we will put these two analytical variables at work. For each of these variables, we will develop some conceptual reflections, and we will use the Colombian case as an illustration of them.

### **12.2.1. Uses of the Transitional Justice Discourse**

It is possible to identify at least two uses of the transitional justice discourse, which depend on the different interests it may serve: the manipulative use and the democratic use of transitional justice.

The first consists in the use of the discourse of transitional justice, and particularly of victims' rights, with the main purpose of hiding impunity. It is a manipulative use, in the sense that it adopts the language of transitional justice as a mere rhetorical instrument, through which no material or practical transformation is done, but an important symbolic effect is obtained.<sup>43</sup> This symbolic effect consists in the le-

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<sup>43</sup> On the symbolic or legitimizing effect of discourse in general see, for all, Bourdieu, P., "Las formas de capital" ["The forms of capital"] in *Poder, derecho y clases sociales* [Power, law and social classes], Desclée de Brower, Bilbao,

gitation of the formulas for dealing with past atrocities that result from the political dynamics of peace negotiations, and which generally aim at impunity as the easiest way to achieve a negotiated peace. Such formulas are designed and agreed to regardless of victims' rights, and are thus fully shaped by politics. Nonetheless, when they are presented as transitional justice mechanisms, they appear as constrained by and even submitted to the legal standards that contain those rights.

In that way, the transitional justice discourse is manipulated in order to legitimize those impunity formulas, and thus, to perpetuate the unequal power relations between perpetrators – who continue benefiting from them – and victims – whose rights are left unprotected.<sup>44</sup> When this happens, the use of the discourse of transitional justice is not only manipulative, but also oppressive.

The second possible use of the transitional justice discourse is characterized by its democratic or emancipatory nature. Indeed, in sharp contrast with the former, this use of transitional justice has the purpose of struggling against impunity. Given that transitional justice mechanisms, and especially victims' rights to truth, justice and reparations, are conceived as tools for achieving that purpose,<sup>45</sup> the democ-

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2001, p. 134. On the symbolic efficacy of law in particular, see García Villegas, M., *La eficacia simbólica del derecho* [*The symbolic efficacy of law*], Ediciones Uniandes, Bogotá, 1994; Bourdieu, P., *La fuerza del derecho* [*The force of law*], Uniandes, Bogotá, 2000.

<sup>44</sup> On the unequal power relations that exist between victims and perpetrators, see Gómez-Müller, A., "Olvido, ideología y memoria" ["Oblivion, ideology and memory"], Conference presented at the seminar *Reconstrucción de Colombia* [*Colombia's reconstruction*], *op. cit.*

<sup>45</sup> In fact, the recent international recognition of truth, justice and reparations as subjective rights of victims of atrocities is best understood if it is seen as a response to the human rights' and victims' movements enduring struggle against impunity. Without a doubt, Latin America has been one of the most important settings for these developments. Thus, the struggle of Chilean and Argentinean human rights' and victims' movements against the impunity of crimes committed by authoritarian regimes led to the first international recognitions of victims' rights by the Inter-American Commission of Human Rights. In the eighties, these recognitions brought as a result friendly settlements between governments and victims. A more recent example is found in Peru, where the human rights' and victims' movements struggle against impunity, and particularly against amnesty

ratic use of such discourse consists precisely in claiming the effective application of its mechanisms. Therefore, it aims at transcending the mere rhetorical content of transitional justice, in order to make it instrumentally – and not only symbolically – efficacious.<sup>46</sup> Thus, the democratic use of the discourse of transitional justice takes its content seriously; to do so, it interprets it as having an actual normative or legally binding dimension that may work as a constraint to the formulas for dealing with the past, which result from the political dynamics of peace negotiations.

This is a democratic use of transitional justice because it seeks to preclude impunity through the materialization of victims' rights and, in so doing, it aims at the recognition and effective protection of human rights in contexts where these rights have been massively and systematically violated. Moreover, the process of using the transitional justice discourse in this manner is, in itself, not only democratic but also emancipatory, as it brings about the empowerment of victims of human rights violations. This empowerment is crucial for achieving a transformation of the asymmetric power relations between victims and perpetrators, since it helps re-build victims' identity as moral and political subjects with rights, identity which is often lost as a consequence of their subjection to gross human rights violations.

Both of the previously described ways of using the transitional justice discourse can be found in the current Colombian situation. In fact, the existence of these two possible uses of the discourse helps explain, to some extent, the paradoxical fact that, in a context where no transition is taking place, most political actors use the language of transitional justice, in spite of having radically different and even contradictory interests and purposes. In Colombia, in the context of peace negotiations between the government and paramilitaries, the transi-

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laws, brought about the famous decision of the Inter-American Human Rights Court on the case *Barrios Altos*, in which victims' rights were explicitly recognized as directly applicable human rights, and amnesty laws were declared to be contrary to them. Inter-American Human Rights Court, *Barrios Altos Case*, Ruling of 14 March 2001, Series C No. 75.

<sup>46</sup> For this distinction, see García Villegas, *op. cit.*

tional justice discourse is used both as a means to hide impunity and as an instrument for struggling against impunity.

The manipulative use of transitional justice is essentially done by the government and paramilitary leaders, but it is also widely supported by the majority of civil society. It consists in utilizing a generous rhetoric on truth, justice and reparations, in order to hide and legitimize partial processes of impunity. The most prominent illustrations of this manipulative use of transitional justice can be found in the original text of the Justice and Peace Law, and in the regulatory decrees of this law issued by the government after the Constitutional Court ruled on the constitutionality of the law.

As we mentioned in the previous section of this chapter, the bill of what later became the Justice and Peace Law was presented by the government to Congress after the failure of its first proposal of a legal framework for dealing with the atrocities of demobilized paramilitaries. The fact that the previous bill did not contain one single reference to transitional justice mechanisms and particularly to victims' rights, along with the fact that the switch to the transitional justice discourse was sudden and could be made without any resistance on the part of paramilitaries, work as important indications of the merely rhetorical nature of that switch.

Be it as it may, the original text of the Justice and Peace Law is a clear example of a manipulative use of transitional justice. Indeed, although the law's declarations regarding the principles of truth, justice and reparations were very generous, it did not contain adequate institutional mechanisms to sufficiently materialize them.<sup>47</sup> Thus, it was a law that was widely recognized as generous in the protection of vic-

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<sup>47</sup> As we mentioned earlier in this text, some of the main flaws of the Justice and Peace law in protecting victims rights had to do with (i) the admission of the possibility of subtracting from the already very lenient punishment of demobilized armed actors the time paramilitaries spent in the zone where they negotiated peace with the government; (ii) the fact that incomplete or false confessions by paramilitaries did not imply the loss of criminal benefits, (iii) and the restriction of the duty to repair only to illegally obtained assets still possessed by paramilitaries.



tims' rights,<sup>48</sup> but whose application would inexorably lead to the lack of protection of those rights. This is perhaps why paramilitary leaders never criticized the Justice and Peace Law and, on the contrary, defended its text as a binding commitment acquired by the State when the Constitutional Court declared the unconstitutionality and the conditioned constitutionality of many of its dispositions in ruling C-370 of 2006.<sup>49</sup>

As a response to the strong reactions of paramilitaries to the Court's decision – including the threat of abandoning the peace process, which some leaders like Vicente Castaño put into practice – the government has made several attempts to go against the ruling through the issuance of regulatory decrees.<sup>50</sup> Without a doubt, these decrees constitute the most evident illustration of the manipulative use of transitional justice by the government, moved by the pressure of paramilitaries. Indeed, through them, the government has tried to go back to the

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<sup>48</sup> One of the best examples of this recognition is the remark supposedly made by Moreno-Campo – Chief Prosecutor of the International Criminal Court – to Eduardo Pizarro – President of the Colombian National Commission for Reparations and Reconciliation (CNRR for its Spanish initials) – according to which the Colombian Justice and Peace law is the first experience in the world of an attempt to achieve peace by applying justice. Pizarro frequently quotes this remark both in public conferences and in his newspaper articles. See, for instance, Pizarro, E., 2006, Conference with occasion of the International Colloquium *Reparaciones a las víctimas en Colombia y Perú: Retos y perspectivas* [*Reparations for Victims in Colombia and Peru: Challenges and Perspectives*], Alianza Francesa, Bogota, December 2006, available at: [www.pucp.edu.pe/idehpucp/images/docs/ponencia%20de%20eduardo%20pizarro.doc](http://www.pucp.edu.pe/idehpucp/images/docs/ponencia%20de%20eduardo%20pizarro.doc).

<sup>49</sup> On this, see the introduction to this volume by Pablo Kalmanovitz.

<sup>50</sup> This is particularly the case of governmental decrees 3391 and 4436 of 2006. Among many other issues, through these decrees, the government went against the decision of the Constitutional Court of declaring unconstitutional the possibility of subtracting the time passed by paramilitaries in the peace negotiations zone from the criminal punishment to be applied to their atrocities, as well as the definition of the conformation of and participation in paramilitary groups as sedition – i.e., a political offense, susceptible of being amnestied. In both cases, in order to maintain the unconstitutional dispositions alive, the government argued that, in virtue of the principle of favourability, the Court's decision should only be applied to those paramilitaries who demobilized after such decision, in spite of the fact that almost all paramilitaries demobilized before.

original text of the Justice and Peace Law, that is, to the stage of the process in which transitional justice, and particularly victims' rights, worked as tools for legitimizing partial processes of impunity, and not as effectively applicable legal norms – like the decision of the Court has required them to.

Put together, the previous events could be interpreted in the following way: peace negotiations between the government and paramilitary leaders – the concrete content of which was never known because they were kept secret – favoured a legal strategy of evasion of retributive justice, through the use of the categories of restorative justice, and particularly of the notions of reconciliation, pardon and forgiveness. However, due to the fact that this strategy soon encountered important political and legal resistances, peace negotiations chose the manipulation of the transitional justice discourse as a new strategy for achieving the same objective of impunity. This strategy began by promoting a legal text whose rhetoric was favourable to victims' rights, but whose implementation would admit the continuity of partial processes of impunity. And, once that text was questioned and transformed by the Constitutional Court, the strategy became one of evading its application, through the use (or rather the abuse) of the government's power to regulate laws.

Certainly, it is difficult to prove or even to put this interpretation to test, for the only ones who know the strategies or formulas agreed on in peace negotiations were the negotiators themselves. Nevertheless, it seems like a quite plausible interpretation, not only because the events that were previously narrated perfectly fit into it, but also because it helps explain the fact that, in spite of all the changes suffered by the legal framework – many of which have evidently affected paramilitaries – paramilitary leaders have not broken and probably will not break peace negotiations.

Regardless of the admission of this interpretation, the truth is that there is plenty of evidence that proves the manipulative use of transitional justice by the government and paramilitaries. Moreover, this appears to be the dominant or hegemonic use of transitional justice in the Colombian political context, not only because of the actual power of its actors, but also because they have managed to successfully put it

into practice, and the majority of civil society has implicitly agreed to it. Indeed, except for a very small minority, public opinion has not been particularly critical of the way the government has developed peace negotiations with paramilitaries. On the contrary, as a recent poll shows, in spite of the fact that 38% of the population believes the President of the Republic held illegal agreements with paramilitaries, 75% of the population perceives his work in a favourable way. Furthermore, there does not seem to be a generalized perception of the need to punish paramilitaries. Thus, as the same poll shows, for 25% of the population the existence of paramilitary groups is justified, for 33% of the population it is necessary for combating guerrilla groups, and for 32% of the population the State should not struggle against paramilitarism.<sup>51</sup>

However, the discourse of transitional justice has not only been used in a manipulative way in Colombia. It is also possible to identify democratic uses of transitional justice, which have been promoted by a minority but which, nonetheless, have produced very important effects. Human rights organizations, victims' movements, the Constitutional Court, the Supreme Court of Justice and the Inter-American Court of Human Rights mainly compose the minority that has used the transitional justice discourse in a democratic way. This use has consisted in taking victims' rights and the guarantee of non-recurrence seriously, in order to combat impunity. In that way, it has been a struggle for the real efficacy of the legal content of transitional justice and against its mere legitimizing effects. The most notorious examples of this democratic use of transitional justice can be found in the diverse attacks of both the political discourse and the legal framework defended by the government regarding the demobilization process, in the use of such legal framework in emancipatory ways by both victims and judges, and in the production of community or "from-below"<sup>52</sup> proposals of

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<sup>51</sup> "La gran encuesta de la parapolítica" ["The grand poll of parapolitics"], *op. cit.*

<sup>52</sup> The concept "from below" refers to a theoretical proposal according to which sociological and sociolegal analyses should include the perspective of local communities and members of civil society that lack power. According to this proposal, traditional analyses fall short because they do not consider these actors' points of view and initiatives as relevant objects of study and, thus, focus in official institutions and members of the elite, that is, in actors and initiatives "from

mechanisms for the satisfaction of victims' rights and for assuring the non-recurrence of atrocities.

Throughout the process of demobilization, human rights organizations and victims' movements have criticized the political discourse defended by the government in very articulated ways. A good example of such an attack is offered by the struggle in which these organizations have endeavoured against the notion of reconciliation, widely used (and abused) by the government, and by other social sectors such as the church and demobilized paramilitaries. The government persistently uses this notion as a justification of the convenience of applying the restorative justice paradigm to the Colombian situation,<sup>53</sup> which implies the exclusion of legal formulas containing retributive justice and the establishment of strong links between victims and perpetrators.<sup>54</sup> To do so, the government defines the notion of reconciliation in a maximalist or fundamentalist way, according to which reconciliation requires that citizens establish strong links of solidarity and sympathy among them, and particularly that victims forgive their perpetrators and are willing to create links of the kind with them.

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above". Authors who defend this proposal tend to establish a correspondence between hegemonic perspectives and from-above actors, as well as between contra-hegemonic perspectives and from-below actors. See, among others, Santos de Sousa, B. *op. cit.*; Santos de Sousa, B. and Rodríguez, C. (eds.), *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge University Press, 2005; Rajagopal, B., *International Law from Below. Development, Social Movements and Third World Resistance*, Cambridge University Press, 2003.

<sup>53</sup> For a critique of the use of restorative justice as the dominant paradigm of transitional justice in general, and of the Colombian situation in particular, see Uprimny, R. and Saffon, M.P., "Transitional Justice, Restorative Justice and Reconciliation. Some Insights from the Colombian Case", available at [www.global.wisc.edu/reconciliation/](http://www.global.wisc.edu/reconciliation/).

<sup>54</sup> Based on a restorative perspective, the government has defended very problematic legal formulas. Thus, as we previously mentioned, it proposed the *Alternative Penalties* bill, which excluded criminal punishment of demobilized actors even if they had committed atrocious crimes. More recently, through regulatory decree 3391 of 2006, the government created "productive projects", in which victims are to work with perpetrators, share the profit of the work with them, and conceive such profit as reparation.

Human rights organizations and victims' movements have harshly criticized this notion for imposing forced forms of reconciliation, which go against victims' rights to justice, freedom and dignity, and which seem anti-democratic. Indeed, if reconciliation is understood in such a *thick* way,<sup>55</sup> all those who do not agree with it may be seen as an obstacle to reconciliation and peace. In the particular case of victims, although the decision to forgive corresponds exclusively to the moral – not the legal – ground, this vision of reconciliation leaves them no choice but agreeing to forgive their perpetrators, although this forced forgiveness may violate their rights and even create resentments that may become an obstacle to peace. That is why human rights organizations and victims' movements have proposed alternative interpretations of reconciliation, which may be compatible with democracy and with victims' rights, particularly by always guaranteeing the right to dissent and not to forgive. According to these interpretations, in order to socially reconcile, forgiveness is not necessary; it suffices to assure the recognition of all members of the polity – including former enemies – as co-citizens.

The critique of the government's notion of reconciliation and the defence of this alternative interpretation have had significant democratic effects. On the one hand, they have recognized and defended the possibility of not forgiving perpetrators and of dissenting as valid options that do not necessarily go against peace and reconciliation. By doing so, the critique of the government's notion of reconciliation and the defence of an alternative interpretation have implied an empowerment of victims. On the other hand, this democratic use of transitional justice and of victims' rights has been turned into a political and legal attack of the legal dispositions that contain the criticized notion of rec-

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<sup>55</sup> Based on a restorative perspective, the government has defended very problematic legal formulas. Thus, as we previously mentioned, it proposed the *Alternative Penalties* bill, which excluded criminal punishment of demobilized actors even if they had committed atrocious crimes. More recently, through regulatory decree 3391 of 2006, the government created "productive projects", in which victims are to work with perpetrators, share the profit of the work with them, and conceive such profit as reparation.

onciliation.<sup>56</sup> Although many of these attacks have not yet produced effects, a good first example of their success is offered by the withdrawal of the *Alternative Penalties* bill.

The notion of reconciliation has not been the only target of human rights organizations' and victims' movements' political and legal attacks. These organizations and movements have closely followed the discussion and proposals of legal formulas for dealing with paramilitaries' atrocities, and have criticized them whenever they go against victims' rights or put the guarantee of non-recurrence at risk. The most notable example of these efforts is the legal battle that these organizations and movements have eagerly engaged against the original text of the Justice and Peace Law. Thoroughly scrutinizing the text and identifying its flaws in victims' rights protection, they have presented multiple actions against the constitutionality of its dispositions before the Constitutional Court, which essentially argue in favour of an effective protection of victims' rights and against the rupture of the equilibrium between justice and peace.<sup>57</sup>

The attack of these organizations and movements against the law has not have completely successful effects, if one takes into account that the Constitutional Court did not concede their initial request, according to which its whole text should be declared unconstitutional.<sup>58</sup> However, this attack has had quite successful effects, as it has brought

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<sup>56</sup> Such is the case of the *Alternative Penalties* bill – which was politically attacked in Congress – of decree 3391 of 2006, the legality and constitutionality of which have been challenged before the State's Council by the Colombian Commission of Jurists and many other organizations, and of the dispositions of the Peace and Justice Law that refer to the notion of reconciliation, the constitutionality of which have also been challenged before the Constitutional Court by many non-governmental organizations.

<sup>57</sup> A summary of each of the actions of unconstitutionality presented against the Justice and Peace law can be found in the Court's rulings that such actions have prompted. See Constitutional Court, rulings C-127 of 2006, C-319 of 2006, C-370 of 2006, the C-455 of 2006, C-531 of 2006, C-575 of 2006, C-650 of 2006, C-670 of 2006, C-719 of 2006, C-080 of 2007.

<sup>58</sup> For the arguments that supported this request, see Constitutional Court, ruling C-370 of 2006, which includes a summary of the first action of unconstitutionality presented against the law.

about the declaration of unconstitutionality of many dispositions of the law that disproportionately affected victims' rights.<sup>59</sup> The declarations of unconstitutionality made by the Constitutional Court constitute, in themselves, another democratic use of the transitional justice discourse. Indeed, as we mentioned earlier in this chapter, they are based on the transitional justice principle that establishes the need of equilibrium between peace and justice, which implies that victims' rights can be restricted but not disproportionately sacrificed in the sake of peace. In that way, the Court's rulings have aimed at effectively protecting victims' rights and at restricting legal formulas that conduce to impunity.

The Constitutional Court has not been the sole State institution that has used the transitional justice language and mechanisms in a democratic way. Another important example (although not the only one at the national level)<sup>60</sup> is offered by the courageous task in which the Supreme Court of Justice has recently been engaged of prosecuting Congressmen who have engaged in collusion with paramilitary groups, which so far has produced the detention of over ten Congressmen. This task is essential for combating impunity and guaranteeing non-recurrence of atrocities because it aids in the dismantling of paramilitary political power structures and in the purge of official institutions.

Along with the Constitutional and the Supreme Courts' examples, it is important to recognize the important democratic use of transitional justice made by another tribunal, although this time of a supra-national nature: the Inter-American Court of Human Rights. Through its five rulings against the Colombian State regarding massacres committed by paramilitaries with the omission and/or complicity of State agents,<sup>61</sup> the Inter-American Court has undertaken an active role in

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<sup>59</sup> See Constitutional Court, rulings C-127 of 2006, C-319 of 2006, C-370 of 2006, the C-455 of 2006, C-531 of 2006, C-575 of 2006, C-650 of 2006, C-670 of 2006, C-719 of 2006, C-080 of 2007.

<sup>60</sup> Control organs such as the National Controller's Office (Procuraduría General de la Nación) have also acted in favour of the effective application of victims' rights.

<sup>61</sup> Inter-American Court of Human Rights, *Case of the massacre of 19 merchants v. Colombia*, Ruling of 5 July 2004, series C No. 109; *Case of the massacre of Mapiripán v. Colombia*, Ruling of 15 September 2005, series C No. 134; *Case of*

elucidating the truth about paramilitarism in general, and of collusion with State agents in particular. The elucidation of the truth of such phenomena is essential for realizing not only the rights to truth, justice and reparations of victims that have addressed the Court,<sup>62</sup> but also for realizing the collective right of the Colombian society as a whole to know the truth about past atrocities.<sup>63</sup> Thus, it constitutes a fundamental way of using victims' rights in a democratic way.

But the elucidation of truth of the paramilitary phenomenon has not been the only way in which the Inter-American Court has engaged in a democratic use of transitional justice. In the case of *La Rochela* massacre, its most recent ruling on Colombian Paramilitarism, the Court expressly referred to the current legal framework used in Colombia to address wrongdoings committed by paramilitarism. The Court did not engage in a detailed analysis of such framework – as it had been requested by claimants – but it did say that although equilibrium between justice and peace could be sought, it could not be used as a means of producing impunity *de facto*. In that way, the Inter-American Court imposed a clear limit to the Colombian State's attempts to achieve peace with paramilitaries: the impossibility of bringing about impunity through the application of apparently acceptable legal standards on victims rights. In so doing, the Inter-American Court used the transitional justice discourse in a democratic way.

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*the massacre of Pueblo Bello*, Ruling of 31 January 2006, series C No. 140; *Caso of the massacres of Ituango v. Colombia*, Ruling of 1 July 2006, series C No. 149; *Caso of the massacre of La Rochela v. Colombia*, Ruling of 11 May 2007, series C No. 163.

<sup>62</sup> Indeed, through the elucidation of the truth of omission and/or collusion of State agents regarding atrocities committed by paramilitaries, the Inter-American Court of Human Rights has been able to establish a doctrine according to which a State can be internationally responsible for the action of third parties. This is how it has managed to condemn the Colombian State to pay reparations to victims of massacres committed by paramilitaries. *See id.*

<sup>63</sup> For an analysis of the rulings of the Inter-American Court of Human Rights as a mechanism for constructing a narrative of past atrocities in Colombia, *see* Saffon, M.P. and Uprimny, R., "Las masacres de Ituango contra Colombia: Una sentencia de desarrollo incremental" ["The massacres of Ituango against Colombia: A ruling of incremental development"], Universidad Iberoamericana, Mexico, in press, 2007.



The previous examples show that “from-above”<sup>64</sup> agents, including State and supra-State institutions, can also engage in a democratic use of transitional justice. Thus, these examples are useful to question the stance according to which emancipatory practices only come from below.<sup>65</sup> However, it is true that most of the democratic or emancipatory practices in general, and the democratic uses of transitional justice in particular, do come from below.

Apart from the already mentioned examples, a remarkable illustration of such uses can be found in the community-based initiatives and proposals on how to protect the rights of victims to truth, justice and reparations, and to assure the guarantee of non-recurrence. To only mention one of many initiatives of the sort,<sup>66</sup> a good example of this can be found in the proposal presented to Congress by the National Movement of Victims of State Crimes, which consists in a constitutional amendment in order to explicitly include truth, justice, reparations and the guarantee of non-recurrence as fundamental rights, and to establish some mechanisms for the applicability of this guarantee.<sup>67</sup> This initiative constitutes a clear democratic use of transitional justice, as it insists in the direct applicability and fundamental character of victims’ rights, as well as in the importance of guaranteeing the sustainability of peace. However, it is far from being successful because it has not found support of any kind in Congress.

In conclusion, the manipulative use of transitional justice as an instrument of impunity predominates in Colombia. As a result, law, and particularly legal standards on victims’ rights, seems to be dominated by political dynamics. That is why transitional justice’s potentiality of working as a social transformation tool should not be overesti-

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<sup>64</sup> For this concept *see supra* note 52.

<sup>65</sup> We believe this is the stance of Boaventura de Sousa Santos. *See* Santos de Sousa, *op. cit.*

<sup>66</sup> For another illustrative example of a from-below initiative on truth and reconciliation, *see* Díaz, C., “Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia” (forthcoming).

<sup>67</sup> Such mechanisms include the constitutional prohibition of any delegation of the State’s power to use weapons to civilians, and the realization of purges within the State’s public force.

mated. In particular, one should be sceptical towards the possibility of achieving a full transformation of the hegemonic use of the discourse of transitional justice and, thus, of establishing legal constraints to the politics of peace negotiations. However, we do believe it is crucial to recognize the value of democratic uses of transitional justice. Although these uses are done by a minority of society and remain marginal in terms of the changes they produce in the peace negotiations' framework, they have produced very important effects.

Indeed, for the very first time in Colombia, victims' rights are at the centre of all political and legal discussions regarding the question of how to deal with past atrocities. This has also resulted in the recognition of victims as a relevant political actor with whom issues regarding this question should be discussed. As innocuous as this may seem, it constitutes a radical change in Colombian political dynamics, where the perspective, needs and interests of victims had never before been taken into account. Moreover, this change has contributed to the empowerment of victims, to the strengthening of their movements, and to the establishment of important transnational networks with international NGOs, which are all essential elements for achieving the transformation of unequal power relations between victims and perpetrators. Finally, the democratic uses of transitional justice have also produced some concrete results in the reform of the legal framework for dealing with atrocities. Although these results are minor if compared with the general tendency to use transitional justice in a manipulative way, they constitute small victories, which seem very important in the midst of such an adverse context for the protection of victims' rights.

### **12.2.2. The Relation Between Peace and Justice**

The second analytical variable through which the role played by transitional justice in peace negotiations can be studied focuses on the ways in which the relation between the values of peace and justice, or between the political dynamics of peace negotiations (politics) and transitional justice legal standards (law) can be interpreted. In our concept, apart from the traditional vision of this relation, which sees in it an inevitable tension between peace and justice, there is an alternative and complementary vision, according to which transitional justice legal

standards may work as virtuous restrictions that shape the political dynamics of peace negotiations.

The traditional vision of the relation between justice and peace identifies an inevitable tension between both values. According to this vision, peace and justice are objectives that pull in different – and often contradictory – directions and, for that reason, the means for achieving one or the other tend to be opposed, at least in the short term. Thus, while impunity is an important tool for achieving peace because it offers an attractive reason for perpetrators of atrocities to find a negotiated solution to conflict, the imposition of retributive justice and the protection of victims' rights are central for achieving justice. In that sense, impunity is seen as an obstacle for realizing the value of justice and, inversely, the protection of victims' rights may be seen as an obstacle for realizing the value of peace. As a consequence, at least in the short term, the adoption of any transitional justice formula necessarily implies a partial sacrifice of either peace or justice, and this conclusion is seen as the inevitable *tragedy* of transitional justice.

Although the existence of a tension between peace and justice is undeniable, there is an alternative vision of the relation between these two values, which complements – instead of excluding – the one previously described. According to this complementary vision, the relation between peace and justice can be understood not only in terms of a tension, but also in terms of a virtuous relation. This latter conception consists in admitting that legal standards on victims' rights might function, not as obstacles to peace negotiations, but rather as virtuous restrictions capable of channelling such negotiations. The admission of this possibility is based on the assumption that legal standards on victims' rights constitute a minimum but inescapable legal imperative, which is perceived as having a hard or non-negotiable core and, in that way, as constituting a credible threat.

In a certain sense, if they are clear and seem very difficult to manipulate or to circumvent, legal constraints might reduce uncertainty and diminish the spectrum of possible outputs of a peace settlement, making it easy to reach a more acceptable commitment between the interests of antagonistic actors, particularly armed actors and victims. In fact, if legal standards on victims' rights are thus conceived, by vir-

tue of them, actors of peace negotiations may end up changing their initial political stances towards less radical positions, which may come closer or even coincide with those of actors with initially opposing interests and expectations. Thus, legal standards on victims' rights would work not as obstacles to peace, but rather as virtuous restrictions that channel peace negotiations, by restricting the available political options for framing them, and by bringing conflicting interests and expectations of different actors closer – even to the point of generating consensual spaces among them.

Monika Nalepa has used a similar reasoning for explaining the passing of lustration laws in post-communist Eastern European countries like Poland and Hungary.<sup>68</sup> In those countries, post-communists themselves promoted the enactment of such laws while they were still in power, even though it was them and their supporters who would be punished by lustration measures. According to Nalepa, the promotion of these laws can be explained as a “preemptive move”, aimed at preventing the enactment of more severe laws by future anti-communist governments. Indeed, given that post-communists envisaged that they would lose power to the hands of anti-communists and knew that lustration laws would be passed anyway, they opted for promoting more lenient laws than those that would have been promoted by their antagonists.

In that way, the fact that lustration laws were perceived as inescapable and constituted a real threat for post-communists produced a change in the expectations of these actors and, consequently, in the political stance they took. Indeed, having the certainty that lustration laws would be passed inevitably, they could no longer maintain a position according to which those laws were inadmissible. Thus, they decided to defend a less harsh punishment formula, which was, on its turn, admitted by anti-communists as an admissible solution. That is how a consensual space among antagonistic actors was created.

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<sup>68</sup> Nalepa, M., 2003, “Suffer a Scratch to Avoid a Blow? When Post-Communists Hurt Themselves: A Model of Transitional Justice Legislation” (unpublished manuscript, Department of Political Science, Columbia University), cited in Elster, J., 2004, *Closing the Books. Transitional Justice in Historical Perspective*, Cambridge University Press, 2004, pp. 258-260.

Such a consensual space could not have existed had the threat of lustration not been real. Thus, it is the normative strength of transitional justice legal standards – the need to lustrate in the case of Eastern Europe; the requirement of satisfying victims’ rights to a minimum degree in the case of Colombia – which allows for the interests and expectations of antagonistic actors to move closer. In the absence of the normative strength of legal standards, each actor has wholly different interests and expectations. As a result, a context of polarization, in which the possibility of an encounter of visions is inexistent, is very likely to happen. In contrast, when legal standards are perceived as normative constraints, they might be able to change the expectations of antagonistic actors in such a way that they come closer. This move might lead to the creation of a consensual space in which, although actors maintain different interests, their visions might encounter one and another.

We could try to stylize the argument in the following way. When transitional justice legal standards are not perceived as normative constraints, maximalist stances prevail among antagonistic actors. Indeed, all actors conceive their point of view is justified by principles and, thus, they are not willing to cede. In contrast, when actors perceive those legal standards as normative constraints, they might move to more flexible stances, in which they cede in their principles to some extent and, as a result, they move closer to their antagonists’ stance, even to the point of sharing a consensual space with them. For instance, when antagonistic actors are perpetrators and victims – as is the case in Colombia – in the absence of the perception of legal standards as inescapable constraints, their visions shall be completely different and separated, as a result of being maximalist. Thus, while perpetrators will think of themselves in terms of a heroic memory – in the case of paramilitaries, a memory of salvation of the country against guerrillas – and will then believe that forgive and forget are the only ways of recognizing their heroic participation in conflict, victims will think that the full application of legal standards on victims’ rights is the only way of dignifying them – peace negotiations notwithstanding. These maximalist stances imply polarization, as the encounter of visions of antagonistic actors does not seem plausible.

In contrast, if perpetrators perceive such legal standards as inescapable legal constraints, the possibility of receiving a full amnesty might be excluded from their range of expectations. In that way, perpetrators might enter the range of victims' expectations, as a result of accepting that their rights must be protected to some extent. On their turn, seeing that it is now possible to achieve agreements with perpetrators regarding the ways of satisfying their rights, victims could also move away from their maximalist vision and accept that their rights might be limited to some extent. In both cases, actors would then move from a principialistic stance to a less radical and more committed one. In so doing, they would enter a consensual space, in which plenty of different options for achieving an agreement between actors exist. These different options might be thought of as a spectrum of possibilities for satisfying victims' rights in the context of a peace negotiation, which might be closer or further away from the interests of one actor or the other.

The former could be schematically structured in the following Table:

1	Forgive and forget (maximalism).
2	Rhetorical acceptance of the need to protect victims' rights, but exclusion of the possibility of actually doing so.
3	Admission of the possibility of minimally satisfying truth and reparations, but exclusion of the possibility of punitive justice
4	Admission of a minimum degree of punitive justice, along with a minimum satisfaction of truth and reparations
5	A minimum degree of punitive justice, along with a full satisfaction of truth and reparations
6	Admission of some degree of restriction of victims' rights, which does not implied their disproportionate affectation
7	Claim of full protection of victims' rights, but consideration of the existence of a context of negotiations
8	Full application of victims' rights, peace negotiations not withstanding (maximalism)

**Table 1:** Actors' perception of the requirements of justice.

As we can see, while rows 1 and 8 are poles in which the visions of antagonistic actors do not encounter at all, rows 2 through 7 imply that encounter and constitute different possibilities of materializing an agreement, some being closer to the interests of perpetrators, and others to the interests of victims. However different, all these possibilities contained in rows 2 to 7 imply an encounter of perpetrators' and victims' visions; therefore, they are the result of legal standards acting as virtuous restrictions, that is, as constraints capable of bringing antagonistic visions closer.

Both of the previous ways of interpreting the relation between peace and justice, or between political peace negotiations and transitional justice legal standards, are useful for understanding the current Colombian situation. On the one hand, the interpretation according to which there exists an unsolvable tension between the values of peace and justice seems especially accurate in a context in which armed actors who demobilize were not subjected by the State but voluntarily decided to negotiate peace. In such a context, these actors will most certainly condition peace to impunity or, at least, to a non-retributive imposition of justice. Therefore, there will exist an inevitable tension in the pursuance of both peace and justice, at least in the short term.

That is why this interpretation of the relation between peace and justice is frequently used in Colombia as an explanatory tool of the country's situation. Applying the analytical variable that was developed in the previous section of this chapter, the use of this interpretation may have both a manipulative and a democratic character. In one of its uses, the inevitable tension between peace and justice serves as an argument for privileging the former over the latter, at least in the first stages of the process. Many analysts and political actors use this argument whenever they defend ideas such as the necessity of achieving peace before endeavouring in the application of justice, the nature of victims' rights as obstacles to peace and reconciliation, and the convenience of making victims' rights flexible for the sake of peace.<sup>69</sup>

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<sup>69</sup> A good example of this is the *Alternative Penalties* bill, originally presented by government to Congress as a proposal of the legal framework for dealing with atrocities committed by paramilitaries. The following paragraph made part of the

The interpretation of the relation between peace and justice as one of inevitable tension has also been used in a democratic way in Colombia. Indeed, by admitting the existence of the tension, but also by reminding of the importance of finding equilibrium between the values in conflict, many have argued that peace cannot be used as an excuse to violate victims' rights. Moreover, they have also argued that the tension between peace and justice often exists only in the short term, because justice is actually not an obstacle, but rather seems extremely relevant, for achieving a durable and sustainable peace.<sup>70</sup>

On the other hand, the interpretation of the relation between peace and justice according to which the latter may function as a virtuous restriction of the former is useful to understand the paradoxical use of the transitional justice discourse by most Colombian actors. In fact, this situation can be explained not only by the different uses that may be given to such discourse, but also by the discourse's normative power and, thus, by transitional justice's legal standards' potentiality to restrict the political options available for achieving a negotiated peace. It is then possible to argue that the government's and paramilitaries' sudden switch to the language of transitional justice through the defence of the Justice and Peace Law was not just the result of the manipulative use of the discourse by those actors, but also a reaction to realizing that there exists a minimum and inescapable legal imperative regarding the protection of victims' rights. The perception of this minimum imperative as inescapable may have been the result of the pressure of international and national human rights organizations and

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defence that the government made of the bill in Congress: "The legislative proposal is oriented towards a restorative conception that goes beyond the identification of punishment with revenge, which characterizes a discourse in which the main concern is to react against the delinquent with a similar pain to that which he or she produced on the victim and, only as a second concern, to search for non recurrence (prevention) and victims' reparation. It is important to take into account that, in doing justice, law aims at reparation and not at revenge. In face of evidence that prison, as the only response to crime, has failed in many occasions in its purpose to achieve resocialization of delinquents, contemporary criminal law has advanced in the issue of alternative sanctions" (authors' translation). *Gaceta del Congreso [Congress Journal]*, No. 436 of 2003.

<sup>70</sup> For this line of reasoning, see Uprimny, Botero, Restrepo and Saffon, *op. cit.*



of victims' movements. It may have also been the result of the current legal international environment – often invoked by human rights organizations – and particularly of the imminent risk of intervention of the International Criminal Court, or of any other judicial system by virtue of the principle of universal jurisdiction if justice is not adequately guaranteed.<sup>71</sup>

Be this as it may, the conception of legal standards on victims' rights as containing a hard core from which political actors cannot subtract when negotiating peace might have functioned as a virtuous restriction. Indeed, it is possible to suggest that the switch to the transitional justice discourse of the government and paramilitaries was a result of their knowing that a minimal protection of victims' rights was mandatory and could not be negotiated; in consequence, they preferred to introduce a lenient criminal punishment (such as the Justice and Peace Law's) rather than face the risk of more severe future laws. According to this interpretation, this switch brought the interests and expectations of the government and paramilitaries closer to those of victims, and allowed for the existence of a minimal consensual space among them. Such consensual space could be found in all actors accepting the impossibility of violating victims' rights for the sake of peace, and in victims' rights passing to the centre of political discussions.

Applying Table 1 to the Colombian situation, one could conclude that the paramilitaries' and government's switch to the transitional justice discourse got them out of row 1, that is, out of the vision according to which the only admissible formula was forgive and forget. By admitting (at least rhetorically) the necessity of protecting victims' rights, they moved closer to victims' expectations and, thus, made the latter believe that agreements were possible. As a result, victims also moved out of row 8 and to a less radical stance, according to which a context of peace negotiations could bring about less-protective con-

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<sup>71</sup> On the possibilities of the International Criminal Court's intervention and of the application of the universal jurisdiction principle, *see* Botero and Restrepo, *op. cit.*

figurations of the protection of their rights. This has meant the entry of both actors to a consensual space constituted by the recognition of the impossibility of totally violating victims' rights, represented by rows 2 through 7. Key changes of legal standards have produced moves in actors' expectations from one row to another. However, such changes have not forestalled the manipulative uses of transitional justice and victims' rights. Thus, the government and paramilitaries have attempted to stay in the first rows, which imply a rhetorical but not a real acceptance of the applicability of victims' rights, even after key changes in the legal framework like the Constitutional Court's decision to modify the Justice and Peace Law. As we mentioned before, they have done so through the use of governmental decrees, which go against the Court's decisions.

### **12.3. Final Remarks: Towards a Cautious Use of the Transitional Justice Discourse in Colombia**

In this chapter, we argued that the language and mechanisms of transitional justice could be used in manipulative ways, that is, as a rhetorical tool in order to hide impunity. We showed that this is the dominant use of transitional justice in Colombia, done by the government and paramilitary leaders, but also implicitly supported by the majority of civil society. However, we also argued that the discourse of transitional justice could be used in democratic ways, that is, as an instrument for struggling against impunity and effectively applying victims' rights. We showed that this has been a marginal but all the same very important use of transitional justice in Colombia, done by human rights organizations, victims' movements, the Constitutional Court, the Supreme Court of Justice and the Inter-American Court of Human Rights. Moreover, we argued that, in some circumstances, transitional justice could function not only as a discourse, but also as virtuous restrictions that, instead of being an obstacle to peace, may channel the political dynamics of peace negotiations and, as a result, bring the interests and expectations of antagonistic actors closer. We also showed that this interpretation could be useful to explain the sudden switch to transitional justice discourse of the government and the paramilitaries, and the consequent existence of a consensus on the imperative force of

minimum hardcore legal standards, accepted by them and also by victims and human rights organizations.

A question necessarily rises from the previous conclusions: should the discourse of transitional justice be used in a context like Colombia? Some scholars and grass root leaders are very sceptical and even fearful of this language, as they think it will always lead to a manipulative use.<sup>72</sup> The Colombian political scene shows that this fear is partially well founded, as the manipulative use of transitional justice as an instrument to hide and legitimize impunity is dominant. Besides, there are additional reasons for having reticence towards the use of transitional justice in the country. On the one hand, the use of such discourse may create aggravated distortions. Indeed, given the absence of an even fragmentary transition, the use of transitional justice may be perceived as a justification of a permanent special and privileged regime for leniently dealing with atrocities of powerful actors. This perception would be easily derived from the fact that, while demobilized paramilitaries who have committed innumerable atrocities are given lenient punishment, the small-scale criminality is being submitted to all the rigor of criminal law. Certainly, this contrast may accentuate inequity problems and the feeling of impunity, which characterize ordinary processes of transitional justice.<sup>73</sup>

On the other hand, the use of the language of transitional justice in the Colombian context may contribute to guaranteeing recurrence instead of non-recurrence of atrocities. In fact, even if transitional justice mechanisms were adequately – that is, democratically and not manipulatively – used, the power structures of paramilitarism might not be disarticulated anyhow. This is so because, when dealing with pro-systemic actors, it does not seem enough to guarantee truth, justice and reparations. Specific mechanisms for assuring that their political and economic power structures will be effectively dismantled are nec-

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<sup>72</sup> See, for instance, Cepeda, *op. cit.*

<sup>73</sup> On the feeling of impunity, see, for instance, Hamber, B., “Dealing with the Past: Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland”, *Fordham International Law Journal*, No. 26 (2003), pp. 1074-94.

essary for guaranteeing non-recurrence of atrocities.<sup>74</sup> In the absence of such mechanisms, impunity may end up being legitimized and victims' claims silenced.

Finally, the use of the discourse of transitional justice in Colombia may lead to precarious analyses of the situation. Indeed, if no transition is taking place, it seems difficult to talk about equilibrium between peace and justice. Therefore, it seems difficult to justify restrictions to the full protection of victims' rights in the sake of peace.

The previous ideas are strong arguments for rejecting the use of transitional justice in Colombia. However, there are also good arguments for defending the use of such discourse in the country. On the one hand, as we argued in this chapter, there exists a democratic use of transitional justice, which can have and has actually had very important political and legal effects in the Colombian context. Such use of transitional justice has brought victims' rights at the centre of any discussion on how to deal with atrocities. As a result, it has generated the recognition of victims as political subjects whose points of view are relevant, and has thus contributed to their empowerment. Furthermore, the democratic use of transitional justice has produced the admission of the idea that the search for peace cannot annul victims' rights, and the practical effect of certain adjustments to the legal framework, aimed at avoiding a disproportionate affectation of those rights. Additionally, the democratic use of transitional justice has generated very valuable from-below proposals on how to protect victims' rights.

On the other hand, as we also argued in this chapter, transitional justice legal standards might operate as virtuous restrictions that chan-

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<sup>74</sup> Some examples of mechanisms of the sort are purges or lustration laws applied to institutions where collusion with paramilitaries has been generalized, such as the armed forces; the active prosecution of all public servers who have colluded with paramilitaries; the reform of laws and institutions that permitted the creation of paramilitarism and its power structures, such as laws admitting the delegation of the use of weapons on civilians (which are seen as the origin of paramilitarism), laws establishing weak controls on political elections (which have allowed for them to be manipulated by armed actors), or laws privileging formal over real property and possession (which have allowed armed actors to bring about a *legalized* agrarian counter-reform), among many others.

nel negotiation processes and that, in so doing, normatively shape such processes, and bring opposing interests and expectations of actors closer. Without a doubt, the functioning of legal standards on victims' rights as virtuous restrictions favours democratic consolidation in the long run.

Finally, despite its flaws, the use of transitional justice language seems unavoidable in the Colombian context. In fact, even a precarious transition like the one generated by negotiations with paramilitaries has the dilemma of peace versus justice at its core. In the current situation, it is impossible to ignore or to leave aside this dilemma, which constitutes the basic principle of transitional justice. Besides, the use of the discourse of transitional justice ensures that victims' rights will be at the center of discussions regarding peace negotiations. Although this does not assure that such rights will be adequately protected, it is certainly a contribution to the empowerment of victims, since it guarantees that their rights will not be absent or made invisible in those discussions. Moreover, the use of the discourse of transitional justice opens the possibility of learning from the stock of knowledge and the practical experiences associated with transitional justice approaches.

The inevitability and the democratic potential of transitional justice are very powerful reasons for not rejecting the use of this discourse in Colombia. However, we believe that only a cautious and not naïve use of transitional justice should be promoted. By this we mean, first, that it is extremely important to be aware that there are uses and abuses of transitional justice ideas and proposals, and to identify them in order to potentialize their democratic virtues and to minimize their manipulative risks. Given that the latter seem to dominate the political discussion in Colombia, it is crucial to always be aware of the possible manipulation of transitional justice and, when identified, to openly criticize it. Moreover, it is also vital to encourage the democratic use of transitional justice, as well as to defend it against attacks. Indeed, this use of transitional justice has very important democratic effects and does not necessarily constitute an obstacle to peace, but may even contribute to it through the imposition of virtuous restrictions to political negotiations. However, it is important to always bear in mind that, although very important, the effects of this use of transitional justice

remain limited, as they are confronted to a manipulative use of such discourse that dominates the political scene.

Second, a cautious and not naïve use of transitional justice implies defending the existence of a minimum but non-negotiable content of legal standards on victims' rights, as virtuous restrictions that do not impose obstacles to peace negotiations, but that rather channel them. Indeed, the idea of such hardcore of legal standards may be perceived as a believable threat by actors of peace negotiations who, as a result, may move to less radical positions and towards more consensual spaces, in which the impossibility of annulling victims' rights for the sake of peace and the need to satisfy these rights to some extent are admitted by all actors.

Third, a cautious and not naïve use of transitional justice in Colombia implies avoiding a potential shortcoming of a standard application of that approach to peace negotiations with pro-systemic or friendly-State armed actors. As we mentioned in this chapter, the differences between these actors and anti-systemic or enemies-of-the-State actors (such as guerrilla groups) are important. For instance, when the latter surrenders their weapons, they give up almost all their power; in contrast, a paramilitary organization can surrender its weapons, but nonetheless retain most of its power, among other things, because this power is linked to collusion with State authorities. For that reason, in negotiation processes with pro-systemic actors, it is important to apply specific and more drastic measures of non-recurrence than those usually applied by transitional justice formulas.

Moreover, the differences between pro-systemic and anti-systemic actors are important for identifying the way in which the official political regime allowed for atrocities to be committed and, thus, for proposing institutional reforms aimed at impeding them in the future. Indeed, as Michael Fehrer has noted, the stigmatization of the former regime is fundamental for guaranteeing non-recurrence of atrocities in a transition. Through it, it is possible to assign responsibility not only to individual actors, but also to political projects.<sup>75</sup> In the

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<sup>75</sup> Fehrer argues that, in the absence of stigmatization of the prior regime, atrocities committed in countries where the State is not yet fully consolidated can be ex-

case of Colombian paramilitarism, this would imply exposing and stigmatizing the different levels of omission and collusion of State agents with paramilitaries, which implied the absence of effective persecution of the latter and the corruption of the former, and which therefore allowed for atrocities to be committed. The stigmatization of these links between paramilitary groups and the State should bring about specific reform proposals aimed at giving a radical end to them and at impeding them to reappear in the future.

Last but not least, a cautious and not naïve use of transitional justice in a context in which a transition is not taking place demands a thorough reconsideration of the conceptual framework and of usual recommendations of transitional justice, in order to understand how they should be applied to ongoing conflicts or partial negotiations with some armed actors. One example shows this: Truth Commissions are a somewhat standard recommended instrument for fostering the right to truth in a transition from war to peace; however, it is not clear at all that a Truth Commission could adequately operate in an ongoing conflict like the Colombian, due to the acute security problems of victims and the possibility of bringing about fragmentary or incomplete versions of the truth, among other problems.

The reconsideration of the way in which the conceptual framework and usual recommendations of transitional justice operate in the midst of an ongoing conflict is also important for avoiding manipulative uses of such framework. For instance, although reconciliation is certainly a key concept in the discourse of transitional justice, it must be thought of in the light of the particularities of the Colombian con-

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plained as the result of conflicts in pre-democratic regimes, rather than a result of undemocratic or authoritarian regimes. These explanations are problematic, as they exclude “nascent democracies” – such as Colombia and many other countries of the global south – from the requirement of applying the Rule of Law to perpetrators of atrocities. Indeed, atrocities are interpreted as the product of a stage of civil strife among factions, prior to the consolidation of the state and the Rule of Law. Thus, reconciliation can be thought of as a civilizing process, as a cultural leap from barbarianism to the consolidation of a democratic regime. See Fehrer, M., “Terms of Reconciliation” in Hesse, C. and Post, R. (eds.), *Human Rights in Political Transitions. Gettysburg to Bosnia*, Zone Books, New York, 1999.

text. Thus, while in some contexts – such as the South African transition – it might have been defined in a thick or maximalist way, which implies closeness between victims and perpetrators, this does not seem like a good idea in Colombia. Given the asymmetrical power relations between victims and perpetrators, and given many victims' rejection of the idea of forgiveness, a democratic notion of reconciliation seems much more appropriate for the Colombian context.



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## Forgiveness, its Pedagogical Balance and Transition in Colombia\*

Antanas Mockus\*\*

### 13.1. Introduction

Without a doubt, Colombia has managed to shift in a few years from a public discussion of the conflict that was centred on justifications – particularly on what were called its “objective causes” – and on mutual attribution of responsibility for the beginning of hostilities and their degradation to a discussion about victims and perpetrators and their possible types, and then to a discussion about transitional justice. The intensity of this discussion is all the more paradoxical when one realizes that the peace attained so far is partial at best. This premature discussion about transition, and particularly about its conditions and benefits, has successfully displaced the discussion about “which of the wars was fairer”.

What should be the role of forgiveness<sup>1</sup> in Colombia’s transitional process? Even though forgiving and asking for forgiveness cannot fully replace truth, reparation for victims, justice – nor the institutional reform needed to prevent a relapse into violence – it cannot be

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\* An earlier version of this chapter was published in a Colombian theological magazine, see Antanas Mockus “¿Para qué el perdón?” in *Theologica Xaveriana* 141 (2002), pp. 47-60. Translation by Mateo Reyes.

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<sup>1</sup> [Translator’s note: The terms “forgiveness” and “pardon” will be used to translate the Spanish term “*perdón*”. Subsequent analysis will make clear that the term “forgiveness” corresponds more closely to the notions of moral and cultural pardon, whereas the term “pardon” is normally used in the context of legal pardon, as in amnesty.]

seen as a mere complement to these either. The paradox is that while transitional justice emphasizes the necessity of indulgence to attain peace, and offers a wide range of measures intended to make that peace sustainable (which may include forgiving and asking for forgiveness), international courts have evolved in the direction of avoiding the worst cases of impunity in a way that reduces the space for forgiveness.

In fact, Colombia is attempting to make a transition from a multi-party conflict (State, FARC, ELN and paramilitaries) to peace within the framework of a productive tension between international law and transitional justice: international law as exemplified by the Treaty of Rome that created the International Criminal Court, ratified by Colombia in 2002, and transitional justice as illustrated in Colombian legislation by the Justice and Peace Law, passed in Congress in 2005, drastically transformed by a Constitutional Court ruling in 2006 and further modified by a recent Supreme Court ruling (July 2007) which rejected the applicability of the legal type of sedition.<sup>2</sup> Today, crimes against humanity cannot be legally pardoned, and the obligations of truth and reparation for the victims cannot be eluded. At the same time, transitional justice makes conscious exceptions and concessions in order to facilitate peace in order to defend the rights of possible future victims. In this context, are there any spaces left for processes of forgiveness, and what would these spaces be?

The central thesis of this article is that forgiveness is possible but difficult and demanding. The more strictly its conditions are fulfilled, the larger its benefits. Even if they do not affect what is achieved in terms of justice, truth and reparation, inter-subjective acts of asking and granting forgiveness, as well as subjective acts of unilateral forgiveness, can contribute to transitions such as the one that has begun in Colombia.

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<sup>2</sup> This ruling has weakened the symmetry that the current peace process with the so-called paramilitaries would have built for eventual peace processes with the FARC and the ELN. The Justice and Peace Law in fact applies to all groups and it specifies that any subsequent more favourable legislation, if passed, would apply to all who have availed themselves to it in the past.

In Section 13.2 I propose a characterization of forgiveness and a reconstruction of its constituting conditions. The possibility of forgiveness as an interpersonal process is based on a series of assumptions that I will explain. However, not everything that we normally call forgiveness meets these conditions. This is why in Section 13.3 I examine cases of imperfect forgiveness, including forgiveness that is granted without a previous request of forgiveness, or apology. On the other hand, as the transgressed norms that can give rise to processes of forgiveness come in three types, legal, moral and cultural, in Section 13.4 I will distinguish between three kinds of forgiveness (legal, moral and cultural), depending on their effects over possible sanctions: suspension or suppression of legal sanctions (typically prison or fines), relief from guilt, or relief from social rejection and its corresponding shame. In Section 13.5 I outline a few considerations about the difficulties and possibilities associated with forgiveness when there is a marked divorce between law, morality and culture, that is, where illegal behaviours are morally and culturally approved or legal obligations have lost moral and cultural support. In such contexts there may be cases of legal forgiveness (pardon) that are not at the same time cases of moral or cultural forgiveness. Peace agreements in Colombia during the twentieth century would fall under this category, having been insufficiently accompanied by integral processes of forgiveness. These peace agreements, and the current situation in which there seems to be moral and cultural forgiveness granted by many Colombians to the paramilitaries, are the topic of Section 13.6. Section 13.7 considers what Colombia could learn as a society by including forgiveness as part of its process of transformation. In the context of a process of reconciliation, the capacity that forgiveness has to repair broken norms would translate into the rebuilding of trust in institutions and among people. Finally, in Section 13.8 I consider how forgiveness can accompany a transitional justice process – whether as a complement or as a central axis in its social understanding and assimilation.

### **13.2. The Nature of Forgiveness**

Forgiveness is governed by some conditions or “constituting rules”. We can try to make explicit these conditions, the presence of which we

consider indispensable for there to be forgiveness (at least in its original sense).

- a. *Condition of affront.* In order for person A to forgive person B, it is necessary for person B to have offended or caused some harm or damage to A, or to have refrained from doing something good to A (it suffices for A and B to share this conviction).
- b. *Condition of responsibility.* The offended party (A) must be able to believe that the offender (B) could have avoided causing that harm (that is, the offender had a choice, and was free to cause the affront or harm).
- c. *Condition of free request, risk and preference.* The offender must ask for forgiveness acknowledging that he or she acted inappropriately and must submit to the possibility of not being forgiven by the offended party (this possibility must be less preferable than receiving forgiveness).
- d. *Condition of free generosity.* The offended party must accede, willingly and free of coercion, and not in exchange for something (here lies the “excessive” nature of forgiveness), to consider and accept this request. Forgiving means giving more than is due. From the origin itself of the word, to forgive means to give doubly, excessively.
- e. *Condition of reparation.*<sup>3</sup> The offended and the offender must both feel that through this sequence of free acts (requesting and accepting), in some way the affront and the relationship between them have been repaired (this may include some material reparation, but it goes further). By answering affirmatively to a request of forgiveness, the offended party considers the offender to deserve the application of a rule of reciprocity.<sup>4</sup>

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<sup>3</sup> It could be argued that this condition is automatically fulfilled if the previous four are fulfilled, but perhaps not reciprocally. One could imagine successful cases of unilateral forgiveness (see below).

<sup>4</sup> There is a social norm of reciprocity according to which it is not correct to deny forgiveness to one who asks for it genuinely. This is especially valid for cultural norms such as avoiding bodily contact between strangers (think of the degree to

- f. *Condition of normative consequences.* Reparation as I understand it includes the commitment to refrain from equal or similar affronts, harm or oversight. This means that there is an acknowledgement of the normative background shared by the offended and the offender – forgiveness reinstates the validity of a norm originally transgressed by the affront, harm or omission.
- g. *Condition of restoration of identity.* Forgiveness restores and enriches the identities of the offended and the offender as good people; by having asked for forgiveness and by having granted it, and by having restored the shared normative horizon, they see their condition as moral subjects restored or improved.<sup>5</sup>

Let us take a more careful look at some aspects of forgiveness as outlined by these conditions. Asking for forgiveness for something one is not responsible for, simply because the other attributes responsibility to us, is taking part in a simulation of forgiveness. A constituent condition of forgiveness is that the forgiven party has acknowledged and taken responsibility for his affront, or at least that the one who forgives can presume such responsibility.

The condition of responsibility allows us to make a clear distinction between asking for forgiveness and offering explanations; I do not have to ask for forgiveness for something that was out of my hands to do or to prevent, but I can explain the circumstances that show precisely that the events escaped my responsibility.

In order that forgiveness be an act of generosity – as it is – forgiving must be something that someone, another human being, can either do or not do for the person who asks. Consequently, asking for forgiveness is placing oneself fully in the hands of the other person, acknowledging his or her freedom and accepting the other as a moral subject and as an agent capable of generosity. It means to take the other person as free and capable of goodness. It is not hard to understand why it is often so difficult to ask for forgiveness, since there is a

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which in supermarkets in the U.S. any accidental brush is accompanied by a “sorry”).

<sup>5</sup> The last three conditions (5, 6 and 7) make forgiveness conducive to the restoration of the relationship.

risk of being refused, and the person who asks forgiveness is in a radical situation of dependency on the other person's good will.

Forgiving is generally an altruistic gesture. An altruistic action is not calculated to produce reciprocity, and this is precisely why it does produce it. Asking for forgiveness and forgiving predispose the other person to do the same thing. But the risk of non-reciprocity seems essential.

One must be able to count on forgiveness as a *possibility* but not with certainty, not as something one can expect and count upon ahead of time. Nonetheless, this *ex ante* lack of certainty, necessary as it is, is becoming increasingly limited by what some have called the progressive colonization of daily life by legal regulations, and by the increasing development of supranational legal regulation. These developments in the legal sphere tend to impose external restrictions on forgiveness, and also to broaden the sphere of rights that cannot be waived. On the one hand, these developments tend to prevent, at least in those cases where there are collective goods that have been affected or threatened, the waiving of legal sanctions. On the other hand, they can sometimes make forgiveness a possibility – if with limitations – guaranteed in advance (right to clemency).<sup>6</sup> If the risk of not being

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<sup>6</sup> In discussions among the founding fathers of the United States constitutional order, there are two arguments for defending the right to grant pardons: (1) the practical argument of achieving peace at the cost of there being some measure of impunity, and (2) the possibility of correcting a judicial error due to the fallibility of judges and the law's imperfections in capturing the nuances of cases. I am grateful to Pablo Kalmanovitz for pointing out to me this discussion in a personal communication. As he said, "in the Federalist Paper #74 there is a discussion about the presidential power to grant pardons which may offer interesting elements for developing an analysis of legal pardons. There are two arguments for granting the executive such power, one is a moral argument, and the other is an argument from prudence. The moral argument is that the application of punishment by legal institutions tends to omit morally relevant components of particular individual cases, and thus may be excessively severe. Pardon would be a corrective measure for the moral blindness of legal institutions, something close to what in the Anglo-Saxon tradition is called *equity* (which responds to what may be seen as an essential lack of alignment between law and morality). The argument from prudence refers to rebellions and consists in the familiar imperative of restoring peace and public order. The first argument suggests a way in which legal

forgiven disappeared completely, and also if the asker of forgiveness is not at liberty to refrain from asking (that is, if he or she is forced to ask), its nature of excessive gift, of magnanimity, is lost – then there is no forgiveness. Perhaps this is why even in those cases in which the law stipulates the right to ask for forgiveness, and the right to forgive, this does not constitute a “right to forgiveness”. *There is no right to forgiveness.*

The constituting conditions allow us to understand better the benefits of forgiveness. What they basically capture is that forgiving an affront, harm or oversight restores the validity of a norm, or helps to repair an agreement, and it allows the forgiven person to recover her standing in the eyes of the offended and third parties as a “good person”, or as a responsible moral subject. Thus, the risky nature of asking for forgiveness and the excessive nature of forgiving are justified by their contribution to the sustainable restoration of norms, identities and relationships.

Asking for and receiving forgiveness benefit both parties. He or she who forgives frees him or herself from resentment. Forgiveness begins to re-establish the relationship, and it cures the forgiven person of fear of punishment and revenge. Also – and perhaps more importantly – it helps the forgiven person to overcome feelings of guilt and shame. In this sense, forgiveness is based on retribution.<sup>7</sup>

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pardons can in fact contribute to the divorce between law and morality; if the law is perceived as excessively severe, then the undersupply of forgiveness can lead to a loss of legitimacy; conversely, the oversupply of forgiveness would cause a lack of credibility in the law, and an effectiveness deficit. In the second case there may be similar effects”.

<sup>7</sup> According to Hannah Arendt, punishment and forgiveness have in common the fact that both attempt to put an end to something that otherwise could continue indefinitely (see Lino Latilla Calderón, “Análisis de la significación política de los conceptos de perdón y promesa en Hannah Arendt [Analysis of the political significance of the notions of forgiveness and promise in Hannah Arendt]” in *Utopía y Praxis Latinoamericana* 35, 2006). Jon Elster condenses Kant when he writes that, “retribution is a way of acknowledging the actor as a moral subject” (Jon Elster, *Closing the Books*, Cambridge, 2004, p. 272). Under ideal circumstances, pardon would have a similar role.

What if one has asked for forgiveness and was not forgiven? Feelings of guilt and shame are possibly attenuated; at least one did one's part in the process and it could be said that part of the sanction has been met. It could also happen that, if empathy with the offended party is high, being notified of their forgiveness can intensify guilt and shame (this can be transitory or permanent).

That forgiving provides benefits cannot be emphasized enough. Forgiveness cures the forgiver of resentment and bitterness. This is why unilateral forgiveness is possible, and also why forgiveness can have an effect even in cases in which it is not communicated to the forgiven party.

All this seems to indicate *prima facie* that both parties, the asker and the forgiver, can re-evaluate in good faith the request of forgiveness due for example to new information about the facts or the intentions. However, in order to do this, strong arguments need to be presented, and even then it is worth making a distinction: what has been forgiven remains forgiven, and the discussion is open only in regard to what has been discovered. Normally there is no forgiveness that extends indefinitely (new events are not automatically forgiven); one must face the new facts. This is why one can say that forgiveness requires truth.

To sum up, in order for there to be full forgiveness there must have been an affront and a relationship in need of repair, an agreement about a responsibility acknowledged by both parties, a request of forgiveness that includes incurring the risk of failure – asking for forgiveness and not being forgiven – and a free decision by the offended party that allows for the affront and the relationship to be deemed repaired. Also, there must be a tacit or explicit commitment of non-repetition of the behaviour for which forgiveness was requested, that is, an adhesion to the normative background on the basis of which the behaviour can be recognized as an affront, harm or omission.<sup>8</sup> Thus, apart from re-establishing or reasserting a shared criterion of judgment, forgiveness

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<sup>8</sup> Given the complexity of the conditions and the unavoidable sequence of actions it involves, one may foresee the existence and the richness of *atonement rituals* associated to forgiveness.



repairs and enriches identities; the one forgiven recovers his identity as a good human being, and also both the forgiver and the forgiven share the virtue of mutual generosity for having taken the road of forgiveness.

The constituent conditions aim to describe in simple terms a know-how that allows us to exclude “deformed” or “weakened” versions of forgiveness, and to recognize “fully achieved” forgiveness. In what follows I will consider some derivative meanings, particularly unilateral forgiveness, communicated and not, which constitute two “moral” variations of the original full forgiveness.

### **13.3. Imperfect Forgiveness: How Necessary Are the Constituting Conditions?**

The constituting conditions help us to understand the enormous strength of forgiveness as an alternative form of justice, as a way to repair relationships, and as a way to rebuild the collective and social adhesion to norms. These conditions also help us to understand the fragility of processes of forgiveness; in fact, failure to meet one of these conditions is sufficient to produce a failed, weakened, or innocuous form of forgiveness.

If the *condition of affront* is not met, there is no reason to request or to grant forgiveness. There is nothing to forgive. Consensus about the existence of an affront is itself a demanding starting point.

If the *condition of responsibility* is not met, forgiveness becomes trivial, as when someone asks for forgiveness for having pushed somebody unintentionally and without having been able to avoid it.<sup>9</sup>

If the *condition of free request, risk and preference* is not met, the instance of forgiveness becomes unilateral generosity, and it does not guarantee that the forgiven party acknowledges its fault or adheres

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<sup>9</sup> Or as someone who apologizes for an imperfect command of a language or for not being sufficiently aware of the rules of protocol; apologizing for not following the rules exactly and apologizing for breaking a cultural norm without feeling that any moral obligation has been broken are two cases of purely ritual forgiveness.

to a normative criterion from which that fault is seen as a fault. Without that condition, the offended party can forgive but that forgiveness becomes “merely moral” and lacks a binding nature. Moreover, to forgive one who has not asked for forgiveness, or demanding a guarantee that forgiveness will be granted before it is requested, eliminates the risk associated with such request. Conversely, to be forced to ask for forgiveness is especially humiliating and it tends to cause falsehood and resentment.

If the *condition of free generosity* is not met, for example when forgiveness is a mere formality or when it has been forced from outside, the forgiver may claim that in her heart of hearts, she has not forgiven, or that her forgiveness was not sincere. This entails violating the necessary freedom for the social norm of reciprocity to operate. Forgiving by force is also humiliating and produces falsehood and resentment.

If the *condition of reparation* is not met, the feeling of debt or of a mistreated relationship remains, or at the very least there is still uncertainty about whether the debt has been settled and the relationship restored. Forgiveness without reparation is incomplete, imperfect, and ambiguous in its consequences. In the event of facing the physical impossibility to repair the damage, reparation by a third party – not as a right but as a free act of generosity – can do some good. Undoubtedly there is a tension between reparation as a free, spontaneous and gracious gesture, and reparation as a right. We could be facing a case where the transforming potential of an altruistic action is undermined by turning this action into something that is requested.

If the *condition of normative consequences* is not met, then one of the most important functions of forgiveness fails to operate: clarifying the norm, re-establishing the agreement, and in this way reducing uncertainty and restoring the predictable nature of reciprocal behaviour, which is a key factor for interpersonal trust.

If the *condition of restoration of identity* is not met, then it is as if the loss of the identity of “good person” was upheld before oneself and the other, when perhaps the greatest motivation for taking the risk

of asking for forgiveness is to escape this loss, which derives from the fault or omission.

Consider some examples of deformed forgiveness. A is forced to ask B for forgiveness, or B is forced to grant forgiveness not in conscience but by social pressure or threat. Or both parties act voluntarily, in full conscience, but are perceived by others as acting moved by threats or other means alien to conscience and to normative social pressure (for note that there can be social pressures not centred on social or cultural regulation – norms, conventions, etc. – but on interests). The interpersonal relationship may have been improved but the norm is weakened.

In relation to unilateral forgiveness, it provides the forgiver with the benefit of overcoming resentment and bitterness. It also has the *potential* to restore the relationship, identities and consensus about the validity of the norm transgressed, but it does not guarantee such effects, which are assured by the type of forgiveness that encompasses the moral and cultural dimensions and meets all the constituting conditions. The table below compares full forgiveness with two variations of unilateral forgiveness, that which is communicated to the forgiven person (and eventually to third parties), and that which is not (private forgiveness).

Constituent conditions for forgiveness	As interpersonal process	As individual action	
		Communicated unilateral forgiveness	Non-communicated unilateral forgiveness
Condition of grievance	Yes	Arguable	Unclear
Condition of responsibility	Yes	Arguable	Unclear
Condition of free request and preference	Yes	No	No
Condition of free generosity	Yes	Yes	Yes
Condition of reparation	Yes	?	?
Condition of normative consequences	Yes	?	?
Condition of restoration of identity	Yes	?	?

**Table 1.**

Purely moral, unilateral forgiveness seems to increase its excessive nature, the “grace” of forgiveness, but it breaks the interpersonal rite, its conditions and eventually its restorative power. To forgive one who has not asked forgiveness undermines the ritual effectiveness of forgiveness. In cultural forgiveness the rite of forgiveness is central (particularly saying the right words in the right time and context). On the other hand, since unilateral moral forgiveness does not presuppose a sequence of interactions, is it closer to a mental state that supervenes without a mediating decision, or is it an action that results from a decision? At the very least, when forgiveness is communicated to the offender or to third parties, there must be a decision to communicate it.

To summarize, to forgive unilaterally, or to offer unilateral forgiveness (conditioned or not) entails consequences that cannot be ignored; it potentially weakens several aspects of forgiveness, some of which are crucial, such as repairing a relationship or restoring norms and identities. However, unilateral forgiveness can, even unintention-

ally, have beneficial effects on the interaction between offender and offended.

### **13.4. Three Kinds of Forgiveness: Legal, Moral and Cultural**

#### **13.4.1. Law, Morality, and Culture: Three Regulatory Systems**

Legal norms are typically written. They have defined temporal and spatial validity; fixed, previously defined instances and procedures for their application; and a range of sanctions foreseen in advance and also procedures to apply and appeal them. Informal norms may come from society as a whole or from a social group (social norms or cultural rules) or they may be self-imposed by people (moral norms).

Obedience to social norms produces admiration, social recognition, trust and/or good reputation; disobeying them produces social rejection and censorship, which tend to produce shame and then mistrust and bad reputation.

Obedience to moral norms is born out of a sense of duty and the self imposed demand to be consistent with one's own principles; although it may produce self-gratification out of self-admiration, one does not obey in order to achieve gratification, this is a by-product. Disobedience to moral norms tends to produce guilt, and since it can be foreseen, fear of guilt can have a preventive effect.

The separation between law, morality and culture is a historical fact. Some key landmarks along the path of this differentiation took place in Ancient Greece (Socrates, for example, drank hemlock to maintain his simultaneous obedience to the legal norms of Athens, his city, and the personal, moral norms that demanded that he continue his philosophical inquiry; the cynics clearly placed their morality above the cultural conventions of their city and their age), and others in modern times (with its clear affirmation of individual autonomy and its commitment to democratic principles to modify the law; also with the liberal principle that one can demand of another person, as a recognized legal subject, only to abide by valid law).

Norms that when violated give rise to the process of forgiveness are of three kinds: legal, moral and cultural. It does not matter if in

some cases the same behaviour is forbidden from different perspectives and with different consequences (such as “thou shalt not kill”), which illustrates an extreme case of harmony between law, morality and culture. This harmony can be defined more weakly as a lack of moral and cultural acceptance of illegal behaviours and the moral and cultural support of legal obligations.

Depending on the type of norm that has been violated, we distinguish between three kinds of forgiveness: legal forgiveness (L-pardon), moral forgiveness (M-pardon) and cultural forgiveness (C-pardon). Generally it would seem that in the same way as we distinguish between norms, it is possible to discern three roads to reparation, sanction and forgiveness. Forgiving a debt is at first sight an L-pardon, forgiving for not having given importance to the debt (which produces guilt) is an M-pardon, and asking for forgiveness to one’s friends and colleagues for having let them down by breaking the commitment to pay a debt (which produces shame) is asking for C-pardon. This is an example where all three pardons refer to the same behaviour. There are M-pardons (which restore a moral norm that is expressed or should be expressed as self-regulation, and the transgression of which causes guilt) that are not simultaneously C-pardons (in which a social norm that is expressed by mutual regulation through social censorship is restored, the transgression of which is followed by shame or fear of shame). There are also C-pardons that are not M-pardons, as when one apologizes for having brushed someone unintentionally and therefore without feelings of guilt (although one may feel some guilt for being inattentive). There are C-pardons that are at the same time M-pardons, when the norm restored is both moral and social (for example, following unfair public censure). Some simpler examples are: one asks for C-pardon and eventually obtains it for having violated rules of etiquette (which does not engender feelings of guilt, nor the risk of a legal sanction); a daughter forgives her mother unilaterally and in silence for not having been close during her infancy (this is an M-pardon that overcomes her own resentment<sup>10</sup>); a tax amnesty is an L-pardon.

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<sup>10</sup> As can be seen from this example, the possibility of forgiving unilaterally probably stems from the differentiation between law, morality and culture. Reasons for

As I said above, the sanction for the violation of a moral norm carries a self-imposed sanction: guilt. In this sense, M-pardon could be understood as forgiving oneself (or alleviating one's guilt). Nevertheless, the M-pardon we are interested in here is that of morally forgiving another, that is, not of sanctioning (through a moral judgment) someone who has violated a moral norm in order to avoid or alleviate the feeling of guilt that could come from such sanction. In this sense, moral pardon can be understood as a commitment not to "throw in the transgressor's face" the grievance, but rather to suspend the personal reproach and to disallow what has been forgiven to interfere in the relationship. Forgiving oneself is a derivative possibility that has become central with the catholic and modern assertion of a person's responsibility to herself.<sup>11</sup>

If one has removed all moral reproach through M-forgiveness from someone, can one still shame him before others or take part in a legal process against him? I think the answer is affirmative, for the independence between the three regulatory systems allows for it.

There are faults against oneself with very small, or not very visible, consequences for others (such as abusing food). These faults do not mobilize any social or legal norms. Whoever commits these faults feels guilt or is "indebted" to herself. The person can forgive herself, reducing reproach in exchange for a commitment to frugality in the future (a rule is restored and an identity is rebuilt).

Does one ask forgiveness to oneself? Does one place oneself in the hands of an internal judge with the power to forgive or not forgive? My intuition tells me that one does, even if everyday language shows that everyone understands what is to "forgive oneself", but the expres-

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unilateral forgiveness can be coming to a new understanding, an interest in restoring the relationship, or the wish to be free of resentment.

<sup>11</sup> Apologizing to a divinity or to a group seems to be a derivative possibility as well, which helps give a secular perspective to our approach. However, if the root of forgiveness were divine forgiveness or forgiveness by the collectivity, it would be easier to reconstruct the effect of forgiveness on the reparation of a broken norm.

sion “to ask oneself for forgiveness” forces the common use of language.

If *A* feels that he has committed an affront against *B* according to his moral norms, and *B* knows the facts but in the light of his moral norms (*B*'s), and of social and legal norms shared with *A*, *B* does not feel affronted, and *A* knows this, then *A* can ask and grant himself an M-pardon and thus mitigate his guilt. This is a legitimate form of M-pardon.

A similar situation where *B* was in fact affronted but did not realize it (for example he was unaware of the facts, and maybe had he known them he would not have taken offense) would produce a cynical M-pardon. (One example: someone responsible for a reckless act with lethal consequences repents, flagellates himself, and then forgives himself deep inside.) This would be a private “hand washing” without effects for the victim, like purchasing and consuming an anti-guilt pill.

If *B* feels that *A* feels guilt because he has affronted her, because he has harmed her by breaking a moral norm that *B* does not share (for example, not to tell white lies), *B* can deem it legitimate and fair to alleviate *A*'s guilt by forgiving him.

In cases of severe affronts, the mere possibility of asking for forgiveness implies either that the action was immoral from the start or an acknowledgement of immorality *a posteriori*. Improper behaviour is not morally neutral for the forgiver. There may have been a change in the moral evaluation of the action in question (following moral reasoning, for example) or a change with respect to legal or social norms. In some cases, forgiveness solves part of a divergence but another part may subsist and evolve through personal freedom (such as when each person chooses their adult religious or sexual preferences) or through argumentation (which does not necessarily lead to consensus) or through democratic law (which does impose a common rule).

Another extreme case of M-pardon is when for both the offender and the offended there has been a violation of shared legal and social norms (like “thou shalt not kill”) and the offended party decides to forgive internally but not to forgive in public, and lets justice take its course, even collaborating with it without bitterness or resentment.



Making an M-pardon public involves a good amount of C-pardon; the difference is that C-pardon is not unilateral, it implies the request of forgiveness. In this case, an M-pardon that is made public without trying to diminish legal or social sanctions can be an attempt to attenuate hostility and its risks. Whoever M-forgives unilaterally, privileges a relationship between moral subjects (separating it from other relationships) and gives up the attribution of moral blame. Since there are inalienable rights, and since homicide does not just harm an individual but also society as a whole, the relationship between legal subjects and cultural subjects cannot be resolved by an act of benevolence by the moral subject. In cases such as homicide, in contrast to, e.g., a standing debt or to simple theft, the victim cannot L-pardon. Under what conditions and within which limits can there be C-pardon, that is, can one invite society to share one's forgiveness and to forgive as well? Someone can M-forgive internally to alleviate his resentment but may consider C-pardon deeply harmful in terms of wider social learning. The boundaries between moral regulation among moral subjects, via reproach or blaming, and cultural regulation are not easy to establish: to stop reproaching or blaming a moral subject for one of his actions does not necessarily imply to stop censoring the behaviour or to shame any person who has engaged in it or could engage in it.<sup>12</sup>

One type of forgiveness can have effects over the other regulatory systems, and thus open the door for new possibilities of forgiveness. Let me introduce two examples of the effects of processes of forgiveness on regulation:

*Example 1: Asking forgiveness for attempting legally to prevent unionization*

If I ask for forgiveness, I align my morality with the morality of those who promote or defend unionizing. If my justification for my attempt to prevent unionization is that my behaviour was in line with what is culturally accepted, I have the choice to adjust my morality and face single-handedly the conflict between my new morality and my

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<sup>12</sup> If we go along with James Guilligan's conclusions, it is far from convenient to increase shame and reduce guilt. M-pardon makes a society more dependent on shaming, and this leads to more violence than guilt.

original cultural regulation, or maybe try to transform my original cultural regulation (by spreading, for example, my perspective change in the social spheres that I frequent, in specialized public debates, or in the media).

I suggest that an M-adjustment can lead to a C-adjustment and both can lead to an L-adjustment, for example by passing a law that is more favourable to unionization. With a strong democratic culture on board, L-pardon should integrate all three regulatory systems. We have not yet explored to what extent a strong democratic culture could and should grant legal pardon the force of cultural and moral forgiveness.<sup>13</sup>

*Example 2: Guilt or shame for having risked absurdly one's life*

Does one have the right to act with serious imprudence? "I do as I please with my life" is a common M-justification for risky behaviour. There are social circles that celebrate the taste for risk, that is, circles where taking risks is C-valid. However, it seems clear that taking high risks may have a negative effect on people who are psychologically close to oneself, and it may damage one's future selves.<sup>14</sup>

It is easy to imagine a high-risk athlete retiring. Would he ask for forgiveness? It is more difficult to imagine the same attitude at the group level. Rather, accidents tend to induce collective and public manifestations of loyalty to the practitioners of a high-risk activity.

Whoever becomes member of a criminal organization sacrifices decades of his life by joining illegal activities. Can one imagine that drug traffickers, paramilitaries and guerrillas ask their families, the communities affected, and society as a whole for forgiveness for absurdly risking their own lives? By asking forgiveness for having put their own lives at excessive risk, and by forgiving them, both sides would consolidate a consensus around the principle that life is sacred.

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<sup>13</sup> Should we welcome the criminal who has served his sentence with open arms? Or, just as we keep his criminal record, should society maintain expressions of social censorship? Should these expressions diminish as a function of the transgressor's good behaviour? Must the ex-convict perform notable contributions to be fully accepted?

<sup>14</sup> See Derek Parfit, *Reasons and Persons*, Oxford University Press, 1984.

Asking one's family, community and society forgiveness for taking excessive risks in one's own life would help make more visible how valuable that life is for others. It would help to consolidate, from a different angle, the principle "Thou shall not kill".

### **13.5. Implications of Forgiveness in the Divorce Between Law, Morality and Culture**

Let us turn now to a highly simplified version of three types of society in conflict. In the first, there are tensions between what the law requires and what some people's moral judgment dictates, or what various cultural traditions consider acceptable, but these tensions feed the democratic debate and produce legal, cultural and moral change; legal transgressions are kept at a very low level and are frequently rejected morally and culturally, and legal obligations are generally supported by morality and culture. In other words, there is harmony between law, morality and culture. In the second type, there are whole areas of behaviour where what is culturally accepted takes primacy over what is legal. Here, behaviours and agreements that are against the law are frequently made. In other words, there is a divorce between law, morality and culture but it is maintained within limits that prevent violence; turning to violence is exceptional and is rejected by the majority. In the third, the divorce between law, morality and culture is worsened by the systematic use of violence to preserve or systematically induce constellations of inter-dependent illegal behaviours.

#### **13.5.1. Forgiveness in Societies with Some Tension Between Law, Morality and Culture**

Even in highly pacified societies where the great majority of behaviours comply with the law, there are tensions between the three regulatory systems. These tensions are solved in various ways: there are areas in which the law does not interfere, under the premise that there are large areas of human conduct (for example the sexual preferences of adults) exclusively regulated by morality and culture (or even only by morality, considering barriers to social censorship); and there are areas where the law ceases to regulate because the other regulatory systems are sufficiently effective and convergent (for example the prohibition

to spit on the street). In addition, democratic processes (e.g., public deliberation, or the formation of organizations and procedures to change the law) allow for discussion and changes in the law while the law is applied; they also allow efforts to change the law in order to reduce or to extend areas in which society as a whole accepts the existence of cultural or moral pluralism.

Different tensions are thus the source of simultaneous and coordinated change in the three regulatory systems. Basically, four simultaneous processes are possible: abidance by and “conscientious” application of the current law; questioning such application; questioning the norm itself (that is, whether the particular law is just or not); and questioning cultural or moral norms that run against the law. We speak of tensions here precisely because these processes do not undermine the effectiveness of regulation, particularly of legal regulation. Tensions propel change without putting into question the validity or the relevance of the three regulatory systems. Instead, these have complementary and co-determined dynamics.

Here the independence between social pardon (public), moral pardon (private) and legal pardon (public, granted by specialized authorities with an express mandate, and following regulated processes) tends to be an interesting source of change (legislative change, or change in shared criteria, or change in personal morality).<sup>15</sup>

In a democratic society, like the one here described, those areas not regulated by the law are the ones that would benefit most from a culture of “good forgiveness”, characterized by a confluence between the willingness to forgive and private and public rigor in matters of forgiveness. Forgiveness would lead to perfecting the moral and cultural regulations.

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<sup>15</sup> Consider: “I M-pardon you, even though I am not willing to C-pardon you yet (particularly because you have not accepted taking the risk of asking for forgiveness) and I would like to L-pardon you, but this would force me to discuss publicly if we would all be willing to forgive in the future, or to consider the possibility of forgiving similar actions”.

### 13.5.2. Forgiveness When There is Divorce Between Law, Morality and Culture

As I said earlier, there is divorce between law, morality and culture when moral and cultural regulations become autonomous to the point of neutralizing and threatening certain realms of legal regulation. In these practical realms, informal regulation that authorizes or even mandates illegal behaviour takes primacy.<sup>16</sup>

Where there is divorce between law, morality and culture it is quite possible to find an abundance of agreements contrary to the law (agreements to evade taxes, agreements to carry out acts of corruption). This situation is significantly aggravated when agreements to break the law and other illegal behaviours are “protected” or induced through the use or threat of violence.

Here, more than a setting propitious for forgiveness, there tends to be generalized indulgence, resignation, or even a form of negative social capital – by having jointly participated in illegal actions, and by deriving joint benefits, there arises interpersonal or inter-group solidarity, so there are relations of complicity but also the possibility of mutual extortion.<sup>17</sup>

When there is divorce between law, morality and culture, relationships begin to be regulated by one or two of the three systems. Cultural regulation becomes crucial and tends to “informally” define the limits that separate what is acceptable from what is not. If this is the case, forgiveness, and particularly what we have called C-forgiveness, comes undoubtedly to the forefront. The lighter the weight of the law,

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<sup>16</sup> A boy in the Colombian province of Chocó captured this aspect of illegality very well in a drawing submitted to the first *Goodbye to Cheating* contest, sponsored by Mexico’s *Fondo de Cultura Económica* and the Colombian Education and Culture Ministries: “You cheat once, and then that cheating leads you to another one, and you end up trapped in a labyrinth of cheating” (accompanied by the drawing of a labyrinth).

<sup>17</sup> A reading of *Crimes and signs. Cracking the codes of the underworld* by Diego Gambetta (Princeton University Press, 2008) has suggested the ambivalence of complicity relationships built around criminal activity. The criminal needs to be sure that his partner really is a criminal, but if he is an authentic, accredited criminal, it is not logical or easy to trust him.

the greater legal impunity there is, and then the role played by social norms becomes all the more crucial, as crucial as the non-legal mechanisms available to maintain and protect such social norms. The rule of law is in large part replaced by the rule of custom, and the imperfections of the rule of custom are resolved by means of forgiveness.

However, when there is divorce between law, morality and culture, legal impunity can be compensated by “codes of honour” (often arbitrary and violent) within which there can be room for forgiveness (C-pardon), which is applied in a strongly discretionary manner. Within a context of culturally accepted illegality, M-pardon (such as the unilateral pardon we referred to previously) or C-pardon (which follows culturally imposed rituals) easily turns into a commitment (or the ratification of a commitment) to avoid the law: “I forgive you” becomes “I will not sue you, I will not become a civil party, I will not even approach the attorney’s office or the law to find out about the progress of the investigation or legal proceedings against you”. Where there is cultural tolerance of illegality, forgiveness can mean passivity, complicity with legal impunity or resignation. One illustration of this point of view can be found in the dynamics of forgiveness associated to domestic violence. Forgiving is, in many cases, avoiding or postponing the intervention of a third party.

### **13.5.3. Forgiveness When There is Divorce Between Law, Morality and Culture Underpinned by Violence**

Where there is cultural tolerance of illegality, reinforced by intimidation through violence, forgiveness (and sometimes unilateral forgiveness) can be the most comfortable path to a “normalization” of relationships, which means no more and no less than the acceptance of the rules of the game imposed by violence. Often times the victim, by forgiving unilaterally, does practically the only thing that it was in her power to do. To forgive can quite simply mean to prevent and avoid the dynamics of retaliation. It can be an attempt to contain the desire for revenge or to avoid a total feeling of powerlessness. Where there is no law, forgiveness can be a ritual and cognitive resource through which the weaker party re-establishes a certain normative order.

*When there is violence*, it becomes the central element around which forgiveness is organized: *one asks for forgiveness for the violence used; one grants or withholds forgiveness for violence suffered*. Everything else becomes secondary. Rather recently, international law (and in some cases domestic law) has introduced the requirement of *reparation to victims*. Criminal law, with all its emphasis on punishment and exemplary retribution, includes today more than ever the civil law, with its emphasis on restoration of the *status quo ante* (or the closest possible status) and on economic compensation as a means to this end. Conditions of violent divorce between law, morality and culture generate not only violence; in Colombia, for example, there have been enormous changes in land ownership. Economic damages associated with violence receive today larger attention.

But the basic reason why violence is so problematic is that it is impossible to restore life. To the extent that priority is given to the supreme good of life, violence should be seen as something intolerable, something around which society must build an implacable taboo. Thus, given the irreversibility of violence, it is not enough to ask for forgiveness, it is not enough to submit oneself to the risk of non-forgiveness, nor is it enough to restore the validity of the norm (the “never again, not myself and not others”). It is not enough to restore respect for the victim’s human dignity either. The legally mandated material and moral reparations, which establish the primacy of the law, are also not enough. Violence is the sacrilege of our times. This is why asking and granting forgiveness are not enough in this case.

Humanity understands that the handling of serious human rights violations linked to premeditated and planned violence by organized groups (as in the case of massacres), or violence that is virtually present (for example in extortions based on life threats carried out by these groups), or mixed forms of violence (as with systematically planned and executed kidnappings) cannot be left to practical considerations or local interpretations.

### **13.6. Some Aspects of Forgiveness Related to the Internal Conflict in Colombia**

Granting L-pardon but not C-pardon and even less M-pardon seems to have been the Colombian solution in most of the eleven peace negotiations concluded in the 20th century, all of which practically repeat the same article granting pardon and amnesty.<sup>18</sup> Perhaps the lack of ritualization of forgiveness prevented the neutralization of the over-ritualization of violence.<sup>19</sup>

The excessive distance between L-pardon on the one hand and M-pardon and C-pardon on the other undermines the legitimacy of L-pardon, because L-pardon is seen as an arrangement between “those at the top” that is fulfilled in a very different way when applied to lower levels of the illegal organizations and its sympathizers, privileging commanders and mistreating the rank and file. Transitional justice implies (almost) by definition a lot of L-pardon; but if L-pardon is not accompanied by C- and M-pardon, reconciliation can be very partial and whatever peace achieved is unstable.

Conversely, those results achieved more recently have led to a measure of social indulgence (C-pardon) and moral tolerance (M-pardon or even the absence of perceived seriousness of these faults) towards the paramilitaries. The citizens’ despair of violence, the effectiveness of the paramilitaries, and the failure of the peace attempts at *El Caguán* have led many people to M-approve and C-approve the actions of paramilitaries. There has been some degree of L-pardon but for a majority in society (or a large part of it) this L-pardon is not suf-

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<sup>18</sup> Medófilo Medina, Efraín Sánchez (editors), *Tiempos de paz. Acuerdos en Colombia, 1902-1994*, Alcaldía Mayor de Bogotá, IDCT, Bogotá, 2003.

<sup>19</sup> See María Victoria Uribe, *Matar, rematar y contramatar*, CINEP, Bogotá, 1990. More recently, in May 2007, some paramilitaries acknowledged having dismembered living persons as part of their training.



ficiently generous. That majority has granted greater C-pardon and M-pardon than L-pardon.<sup>20</sup>

In its first bill before Congress, the government offered a very wide L-pardon, which was later narrowed down following strong pressure, both national and international. Finally the government accepted, with some reluctance, a reduced definition of L-pardon that was mandated by the Colombian Constitutional Court; the Court's ruling closed further options in the future, but it protected those who had opted for taking advantage of the law before the ruling. The media (particularly the printed press) has undertaken a broad revelation of particularly gruesome aspects of paramilitary actions. These revelations are deeply ambivalent in that they have two possible consequences, which are mutually contradictory. Having endorsed the L-pardon, we begin to recognize *ex post* its scope and content. The partial L-pardon together with these revelations leads some of us to C-indignation and M-pardon, and others to C-pardon and M-indignation. The most obvious result is a mixed situation: those who L-pardon do not M-pardon, but they channel their indignation through legal means; they do not C-pardon either. The victims themselves, for whom it is clearly more difficult to forgive, have split, and many of them are attempting to limit L-pardons, but accept them as one accepts a bargaining chip. The result is that practically nobody forgives in every sense, and nobody refrains from forgiving in at least one of the senses. This allows the government to emphasize what it has in common with each position.

In principle, given the evolution of international humanitarian law (IHL) and given Colombia's signature of the treaty that established the International Criminal Court (ICC), it is no longer possible in our country to L-pardon crimes against humanity, and it will not be possi-

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<sup>20</sup> Perhaps the paramilitaries' greatest political achievement in the past ten years is to have polarized Colombian society into a majority that supports c-pardon and m-pardon to them but supports a relative legal severity regarding the commanders; this majority deems correct to think and say that l-pardons, especially the ones contemplated in the original transitional law, was excessive, but now, after the Court adjustments, the dose is fine. The paramilitaries have been more concerned with c-pardon than with the other two, since this is the condition for constituting their political project.

ble to pardon war crimes after 2009. However, transitional justice, as defined by the Justice and Peace Law and by a previous law with its regulatory decree, proposes full L-pardon for small crimes and partial L-pardon for two types of atrocities already mentioned. Can there be M- and C-pardon for these crimes? Is it convenient that there is, in addition to a clear reduction on L-punishment? The answer is yes, but one must acknowledge the size of the challenge involved.

The transitional process can benefit greatly from a full forgiveness in the form of C-pardon and M-pardon, even if these cannot include traditional legal amnesty. We are part of humanity; international agreements signed by Colombia represent commitments that can be evaded for some time but not indefinitely. There is no longer room for L-forgiving the most serious crimes, that is, crimes against humanity and war crimes. Recent developments in international law limit the national right to forgiveness. More precisely, they introduce a separation between criminal responsibility for crimes against humanity and processes of cultural forgiveness, which are in my opinion useful and perhaps necessary for reconciliation, even if this is understood in its minimalist sense as passing from anger and hatred to indifference. The question now is whether M-pardon, and especially C-pardon, can accompany L-punishment. The trend here is the same as in the case of the reduction of L-punishment: an increasing conditioning of forgiveness to reparation and the disclosure of truth. In abstract terms, one may suggest the following sequence: asking for forgiveness must be associated with a disclosure of truth, and forgiveness can only take place after all efforts to establish truth and to achieve reparation have been exhausted, and this should ideally occur when the only pending matter is a retributive sentence.

IHL, the ICC and, in Colombia, the Justice and Peace Law seem to have put an end to the legal pardon of crimes against humanity. However, the UN Security Council and the ICC Prosecutor can temporarily suspend an ICC prosecution. Even though the word “pardon” is not mentioned, one may imagine that a very successful process of forgiveness could be respected by the Court (successful due to its pacifying effects and its pedagogical balance; thus successful in fulfilling its constituting conditions). Under current circumstances, only a very co-

ordinated process involving the three types of pardon, and including all parties in the conflict, would be internationally defensible.

### **13.7. The Pedagogical Balance of Forgiveness as Part of a Transition**

Theoretically, the same final dose of truth, justice and reparation can result from partial pardon, indulgence (or impunity) calculated to be accepted, indulgence (or impunity) negotiated between the parties, or from the unpredictable adjustment introduced by the courts to any of the options above. Even though these options may apparently arrive at the same point, there are variations between their respective meanings, and their pedagogical balance – the lessons that have been internalized by society, individuals and groups who once turned to irregular means and who were allowed to employ them by their social or cultural environment (which has played a key role in encouraging or dissuading them).

At first sight, maximizing the pedagogical legacy seems to compete with the will to make peace. Peace is so desirable that negative lessons do not matter. However, experience shows that cycles of court reviews – unpredictable in their timing and depth – by both national and international courts or by governments of different orientation, progressively correct these lessons.

What is the additional or different pedagogical balance if the parties take the road of forgiveness and reconciliation? Part of the pedagogical balance of a successful process of forgiveness is that of regaining trust in norms and institutions. The most important thing that forgiveness attempts to repair is the broken norm, *just as atonement rituals do*.<sup>21</sup> Pablo de Greiff has highlighted the importance of asking forgiveness in processes of national reconciliation, which are interpreted

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<sup>21</sup> One could think, moreover, that if there is sufficient learning of “never again”, and a basic level of respect among subjects is established, then forgiveness would facilitate a broad flow of truth, and would provide a context of “confession” outside the judicial sphere. Forgiveness demands reparation, but not impossible or superhuman reparation. Lastly, forgiveness helps to decrease retribution.

as processes for the *reestablishment of trust* in institutions and people, which are for de Greiff processes of overcoming resentment.<sup>22</sup>

Margaret Walker develops and applies to transitions the concept of resentment introduced by P.D. Strawson.<sup>23</sup> This is a specific type of anger reaction by which the aggressor is attributed “responsibility for the defeat, or the threat of defeat, of *normative expectations* (...responds to perceived *threats to expectations based on norms* that are presumed shared, to the boundaries that offer protection against harm or affront, and that are usually both deeply moral and institutionalized (even if ineffectively) by legal means)”. Resentment arises from the fact that the aggressor freely chooses to destroy trust in shared norms. One can resent the weakening of existing norms even without being a victim of the illegal act. “In this sense, the insecurity of others is mine as well. Breaching impersonal norms puts everyone at risk”.<sup>24</sup> Loss of confidence in the basic limits induces generalized demoralization and resentment.

De Greiff asks about the contribution of apologies to processes of reconciliation, understood as overcoming resentment (not only the victims’ but the generalized resentment for the rupture or threat to basic norms of coexistence). The definition of apology used by de Greiff is explicitly minimalist. “It would suggest that something is an apology if and only if it accepts responsibility and expresses regret”.<sup>25</sup> De

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<sup>22</sup> Pablo de Greiff, “The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted” in Mark Gibney, Rhoda E. Howard-Hassmann, Jean-Marc Coicaud and Niklaus Steiner (eds.), *The Age of Apology: The West Confronts its Past*, University of Pennsylvania Press, 2007.

<sup>23</sup> Margaret Walker, “Damages to Trust”, quoted by De Greiff in “The Role of Apologies”. For Strawson, see “Freedom and Resentment” in his *Studies in the Philosophy of Thought and Action*, Oxford University Press, 1968.

<sup>24</sup> De Greiff, “The Role of Apologies”.

<sup>25</sup> De Greiff points out that other authors who follow this criterion are Nicholas Tavuchis, *Mea Culpa. A Sociology of Apology and Reconciliation*, Stanford University Press, 1991, p. 36; Lee Taft, “Apology Subverted: The Commodification of Apology”, *Yale Law Journal* 109 (2000); Deborah L. Levi, “The Role of Apology in Mediation”, *N.Y.U. Law Review* 72 (1997).

Greiff conceives of apologies as essentially pro-norms, or norm affirming. Thus,

[i]t can be said that the reaffirmation of the validity of the (breached or threatened) norms can be expected to allay resentment, and in this way, to contribute to reconciliation [... The law] can help generate trust between citizens by stabilizing expectations and thus diminishing the risks of trusting others. Similarly, law helps generate trust in institutions (including the institutions of law themselves) by accumulating a record of reliably solving conflicts.<sup>26</sup>

Nicholas Tavuchis presents a similar conception of the social function of apologies:

Genuine apologies [...] may be taken as the symbolic foci of secular remedial rituals that serve to recall and reaffirm allegiance to codes of behavior and belief whose integrity has been tested and challenged by transgression, whether knowingly or unwittingly. An apology thus speaks to an act that cannot be undone but that cannot go unnoticed without compromising the current and future relationship of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed.<sup>27</sup>

De Greiff acknowledges, however, that the affirmation of norms through apologies is far from what is required to rebuild civic trust after violence (trust between citizens and of citizens to institutions). Rebuilding this trust requires in his opinion concrete actions that produce truth, justice, reparations and institutional reform. But also decisive for reconciliation is a change of attitude derived of the acceptance of responsibility and repentance inherent in asking for forgiveness. By accepting responsibility and expressing regret, those who now deserve trust (institutions and individuals) manage to inspire it in those who had lost it.

---

<sup>26</sup> De Greiff, “The Role of Apologies”.

<sup>27</sup> Nicholas Tavuchis, *Mea Culpa*, p. 13.

Could forgiveness damage the pedagogical balance of transitional justice? Must there be processes that combine individual and collective elements when asking for forgiveness and granting it? Or must each victim decide on her own, by facing each perpetrator alone or in a non-public dialogue? In order to address these questions I can only suggest one criterion: the contribution of forgiveness will be proportional to the extent to which its constituting conditions are satisfied; to the degree that such forgiveness is far from “imperfection”; to the degree to which the restoration of the moral rule is articulated consistently with the restoration of the social norm; and to the extent to which forgiveness integrates respect for the basic limits to the three regulatory classes, legal, moral and cultural. There is room for forgiveness, but it is not easy.

### **13.8. Forgiveness in Colombia: Is it Supplementary or Central to the Transition Process?**

In *Destiny Colombia* (1997), a sequence of workshops conducted under the guidance of the international expert Adam Kahane, 42 representatives of the Colombian political spectrum, including spokespersons for extremist forces, reached a consensus on four possible scenarios for the next sixteen years in Colombia. The first scenario described relative passivity *vis-à-vis* the conflict; the second predicted with some precision the peace process led by president Pastrana; the third foresaw the failure of such process, and then the path taken under the two Uribe administrations, including a “timely constitutional reform” that allowed for reelection; the fourth scenario saw a way out that was acknowledged as more difficult and slower, based on peaceful expressions of an organized and mobilized civil society. It is very telling that none of these scenarios mentions the word “pardon” or its derivatives.

Asking for forgiveness and forgiving require nowadays in Colombia a series of unconditional leaps of faith that probably none of the actors are willing to take. Two distinct possibilities remain. *First*, there is the possibility of using forgiveness as a form of therapy complementary to internal political-legal and external political-legal processes, the former urging for peace earlier than later (in a sense, at any price), the latter guided by the internal and international pedagogical

balance: humanity has reached consensus on a number of concepts and institutions aimed at avoiding impunity for the most serious crimes. This is a useful if secondary use of forgiveness. It is like trying to correct through forgiveness, in the last moment, the imperfections of a judicial process that is irreparably plagued with limitations.

*Second*, there is the possibility of reversing the terms: to judge that in Colombia there has long been a disposition to forgive (as long as it serves to stop the horror we have gone through over the past decades) and that we want to do it above everything else. “Peace is a right and a duty”, says our Constitution. Since we are part of humanity – in ways that are also expressed in the importance given by the Constitution to international treaties signed by Colombia – our forgiveness does not allow us to evade a series of obligations. We must take into account the world and its present transition towards a reduction of impunity for the most serious crimes; the time when history was written by the winners to their benefit is over. By taking the most universal restrictions into account in its pardons, Colombia can give an example.

Now forgiving has become more difficult: your adversary’s barbarism is no longer an excuse for your own barbarism. As a victim you have rights. But having been a victim does not exempt you from the responsibility you may have as perpetrator. One must confess and one must pay – in both senses: punishment and reparations. Forgiveness surrounded by truth and justice would set a landmark in the history of Colombia and the world.

As a start, it may be a good idea to come together in asking humanity for forgiveness for all the things we Colombians have done to each other, for not having done enough to prevent the propagation of the “anything goes” rationale, and for all the times in which we could have collaborated with justice or acted to protect the rights of others but we failed. By assuming the process inclusively, we do not intend to make everyone’s responsibility equal: there are national and international laws to help us distinguish the substantive from the incidental.





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