

Have the Colombian Government and the FARC learnt the lessons of the South African Truth and Reconciliation Commission as to the need to clearly define and prioritize the main goals of a truth commission?*

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1. Introduction to the Colombian Integrated System of Truth, Justice, Reparation and Non-Repetition

On November 12 2016, the Colombian Government and the Colombian Revolutionary Armed Forces-Popular Army (FARC), signed the Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace [“the Havana agreement”].¹ The Havana agreement entered into force on December 1 2016 after its approval by the Colombian Congress. It consists of six interconnected agreements on rural reform, political

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¹ Final Agreement to End the Conflict and Establish a Stable and Long-lasting Peace, Colombian Government.-FARC, Nov. 24, 2016, available at <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Documentos%20compartidos/24-11-2016NuevoAcuerdoFinal.pdf> [last visited 10 March 2017] [hereinafter “the Havana agreement”].

participation, disarmament and return to civilian life, illicit drugs, victims, and implementation and verification mechanisms that are to be read as an indissoluble whole.²

The Havana agreement on victims establishes an Integrated System of Truth, Justice, Reparation and Non-Repetition (ISTJRNR) with the following goals: (i) the fulfilment of victims' rights through judicial and non-judicial mechanisms; (ii) the accountability of those who directly or indirectly participated in the armed conflict and committed gross violations of human rights or grave breaches of International Humanitarian Law; (iii) the non-repetition of violence through the prevention of re-victimization, the promotion of Colombian society's rejection of armed conflict and its effects, the consolidation of the end of the armed conflict, and the prevention of new forms of violence; (iv) the adoption of territorial, group-based and gender-based approaches, by treating territories, vulnerable groups and populations and women according to their specific needs, in light of the specific ways in which violence affected them; (v) the provision of legal certainty to those who directly or indirectly participated in the armed conflict, as long as they comply with the conditions set up by the ISTJRNR (in particular, by the Special Jurisdiction for Peace); (vi) the strengthening of coexistence and reconciliation by building trust on the basis of the positive transformations that the peace agreement will generate in Colombian society and the opportunity to build a better future based on social justice, respect and tolerance; and (vii) the achievement of legitimacy as a result of fulfilling the expectations of the victims and the Colombian society at large, and complying with Colombia's obligations at the national and international levels.³

² *Id.* at 6.

³ *Id.* at 128, 129.

In order to achieve these goals, the ISTJRNR provides for the following judicial and non-judicial mechanisms: (i) amnesty and pardon for FARC members and special treatment for State agents; (ii) a truth commission (named “Commission for the Identification of the Truth, Coexistence and Non-Repetition”, CITCNR); (iii) a Special Jurisdiction for Peace; (iv) measures for victims’ comprehensive reparations; and (v) other measures, including a Special Unit for Finding Missing Persons and non-repetition guarantees.⁴ Furthermore, the agreement on victims within the Colombian Office of the Prosecutor created other judicial mechanisms, which are not in *stricto sensu* part of the ISTJRNR. Notably, the Havana agreement created the Special Unit for the Investigation and Dismantling of Criminal Organisations, in particular those that continued the activities of former paramilitary groups and their support networks.⁵

Given the complexity of the ISTJRNR, the present work focuses on the goals of its truth commission. In particular, it analyses to what extent the Colombian Government and the FARC have learned the need to clearly define and prioritize the CITCNR’s main goals from the South African Truth and Reconciliation Commission (TRC).

2. The TRC’s Central Role in the South African System of Transitional Justice and the Different Interpretations of its Goals

The South African system of transitional justice was comprised of two main transitional mechanisms: amnesty law and the TRC. Initially, the amnesty law and the TRC were going to be brought to Parliament in two different Acts. However, they were linked together in the 1995 *Promotion of National Unity and Reconciliation Act*. The system also

⁴ *Id.* at 129, 130.

⁵ *Id.* at 127.

included two additional elements referred to in the TRC's Final Report: (i) a prosecutorial policy to conduct criminal trials for gross violations of human rights committed during the apartheid regime which the TRC had not granted amnesty; and (ii) reparation programs for victims. The last two elements are less known because the South African government to a large extent did not implement the TRC's recommendations.

The TRC was comprised of three committees: (i) a committee on human rights violations (HRV Committee) that received all amnesty applications and testimonies; (ii) a committee on amnesty (Amnesty Committee) that decided, after all evidence had been heard, whether amnesty should be granted to the applicants; and (iii) a committee on reparation and rehabilitation (RR Committee). They were supported by an Investigation Unit. Only amnesty applications concerning gross human rights violations required a compulsory public hearing before the HRV Committee prior to the granting of amnesty- any other amnesty application could be decided by the Amnesty Committee without a public hearing.⁶

The procedure before the TRC started with the filing of an amnesty application that had to: (i) refer to specific individuals; (ii) describe specific acts or omissions committed within the above-mentioned time-frame and related to a political goal, for which the said individuals were responsible; and (iii) provide full disclosure of all circumstances concerning such acts or omissions. Afterwards, the HRV Committee conducted hearings in relation to gross violations of human rights, which started with the applicants' presentation of his/her evidence, which was subject to cross-examination by the victims and by anyone who was mentioned in the application (e.g. members of Security Armed Forces involved in

⁶ ANTJE DU BOIS-PEDAIN, TRANSITIONAL AMNESTY IN SOUTH AFRICA 39 (2007).

the crimes). The latter and the victims could also make presentations and submit additional evidence, which was subject to cross-examination by the applicant. There were no formal rules of admission and presentation of evidence, which provided for ample flexibility to those participating in the hearings. The HRV Committee also had investigative powers, which were rarely used.⁷

As a result of the requirements of the amnesty applications and the manner in which the HRV Committee conducted its hearings (which were based on the specific acts and omissions alleged by the applicants and the evidence introduced to prove them), Chapman & Ball highlight that the TRC's Final Report was unable to identify the indirect perpetrators with control over the crimes. Moreover, it did not deal with the acts and omissions of racial discrimination which amounted to crimes against humanity, nor it did address the organizational violence of the apartheid system as a whole.⁸

Nevertheless, TRC's supporters say that its main goal (to promote reconciliation) was achieved.⁹ For them, reconciliation is not an event, but a moral state of the population in a specific environment that allows the population to get involved in a democratic society. In their view, this was achieved because the TRC's investigative methodology facilitated those participating in the HRV Committee's hearings to communicate their experiences,

⁷ *Id.* at 181.

⁸ Audrey R. Chapman & Patrick Ball, *Levels of Truth: Macro-Truth and the TRC*, in TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA: DID THE TRC DELIVER? 143, 158–67. (Audrey R. Chapman A.R. & Hugo Van der Merwe eds., 2008) [hereinafter Chapman].

⁹ *See, e.g.*, DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS (1999); Stéphane Leman-Langlois & Clifford Shearing, *Transition, forgiveness and citizenship: the TRC and the social construction of forgiveness*, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 206, 227 (François du Bois & Antje Du Bois-Pedain, eds., 2008) [hereinafter Leman-Langlois]; ALEX BORAINÉ, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (2000) [hereinafter Borainé]; André Du Toit, *The moral foundations of the South African TRC: Truth as Acknowledgement and Justice and Recognition*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 122, 122 (Robert I. Rotberg & Dennis Thompson eds., 2000).

which was very helpful for the acknowledgement of the pain suffered by the South African society and the healing of the victims.¹⁰ Furthermore, the TRC not only produced a final report with a moral judgment against apartheid policies, but it also stressed that the South African government should implement a wide range of social programs.¹¹

As a consequence, whilst several scholars have criticized the TRC because they consider that its main goal was to provide a forensic truth on the general pattern of atrocities suffered by South African Society during the apartheid regime,¹² TRC's supporters claim that the TRC's main goal was to promote reconciliation. For the latter, the TRC's work was a first step in the right directions, which should have been followed by: (i) the implementation of the TRC's recommendations on social programmes; and (ii) the establishment of a proper prosecution policy.¹³

As Castillejo has pointed out, the investigation into the 1986 massacre of the *Gugulethu Seven* (in which seven young people were murdered in a township of Cape Town under the state of emergency declared by President Botha) is a paradigmatic example of the different approaches taken by TRC's critics and TRC's supporters.¹⁴ This case was especially sensitive because it involved the counter insurgency strategies of the South African Security Forces, which included infiltration into liberation movements. Although the murders were initially investigated by South African police in 1986 and 1987, the case was silenced until the hearings held by the HRV Committee in 1996, which changed over

¹⁰ See Leman-Langlois *supra* note 9 at 211 –22.

¹¹ See Roland Ames Cobián R. & Félix Reátegui, *Toward Systematic Social Transformation: Truth Commissions and Development*, in TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS 142, 143 (Pablo De Greiff & Roger Duthie eds., 2009); Boraine *supra* note 9 at 357-358.

¹² See Chapman *supra* note 8.

¹³ See Tutu *supra* note 9; Leman-Langlois *supra* note 9.

¹⁴ ALEJANDRO CASTILLEJO CUELLAR, ARCHIVOS DEL DOLOR: ENSAYOS SOBRE LA VIOLENCIA Y EL RECUERDO EN LA SUDÁFRICA CONTEMPORÁNEA 166 (2009).

time its approach to the manner in which the relevant facts had to be addressed by the victims in its hearings. It first undertook in 1996 an exercise of catharsis and gave a broad role to victims' narratives in its hearings. However, after 1996, the role of victims' narratives was notably limited, and the HRV Committee placed its emphasis on the presentation of forensic evidence. As a result, the hearings moved from a cathartic process to a data extraction exercise, offering to those participating in the hearings completely different experiences.¹⁵

3. The Commission for the Identification of the Truth, Coexistence and Non-Repetition in Colombia

The ISTJNR provides for a truth commission, which is officially referred to as the Commission for the Identification of the Truth, Coexistence and Non-Repetition (CITCNR), with three main goals. The CITCNR's first goal is to contribute to the clarification of what happened during the armed conflict in Colombia and to provide a comprehensive view of the complexity of the armed conflict to foster a shared understanding in society of its lesser-known aspects (such as the impact of the armed conflict in children, adolescents and women).¹⁶ To achieve this goal, the CITCNR will ensure that all persons participating in its proceedings receive a just, respectable and non-discriminatory treatment and have their rights respected.¹⁷ Moreover, the CITCNR will take the necessary measures to ensure the highest possible level of objectivity and impartiality in the development of its activities. Furthermore, it will adopt a methodology, which shall be made public, consisting of procedures to verify the quality of the information, including its reliability, and to identify any false information that may be given in bad faith to the CITCNR.¹⁸

The CITCNR's second goal is to promote and contribute to victims' recognition as both citizens who saw their rights violated, and political actors who are important for the

¹⁵ *See id.* at 178–83.

¹⁶ The Havana agreement, *supra* note 1 at 131.

¹⁷ *Id.* at 133.

¹⁸ *Id.*

transformation of Colombia. This also means acceptance of individual and collective responsibility by those who directly or indirectly participated in the conflict, and acknowledgment by the whole society of this legacy of violence as something deserving rejection that should not happen again.¹⁹

The CITCNR's third goal is to foster coexistence in the regions, understood as the establishment of a transformative environment for the peaceful resolution of the conflicts and the development of a culture of respect and tolerance in democracy. To achieve this goal, the CITCNR will: (i) foster dialogue among the actors involved; (ii) promote a culture of respect, tolerance, trust, cooperation, solidarity, social justice and equal opportunities for men and women; and (iii) contribute to build a peace based on truth and acceptance of a cruel past that must be overcome.²⁰

In order to achieve these goals, participation in the CITCNR to provide full disclosure of the crimes is required to obtain and maintain any of the benefits (amnesty, pardon or special treatment) provided for in Law 1820/2016.²¹ Furthermore, the CITCNR will make efforts to incentivise participation by former members of paramilitary groups who have been subject to measures of transitional justice outside the Havana agreement and the ISTJRNR.²²

The CITCNR will conduct its work according to a territorial approach, with a view to achieving a better understanding of the regional dynamics of the conflict.²³ The CITCNR will also conduct its work in a manner in which the different ways in which violence affected different groups in Colombia is highlighted, in the understanding that awareness of the specific ways in which the conflict reproduced historical mechanisms of discrimination is a fundamental first step towards a more just and inclusive society. Particular attention will be placed on specific forms of violence against women, children, adolescents, elderly, persons with disabilities, indigenous peoples, peasant communities, religious groups, political groups, opinion groups, afro-Colombian, Roma population, LGBTI population,

¹⁹ *Id.* at 131.

²⁰ *Id.*

²¹ *Id.* at 147. *See also* L. 1820/2016, December 30, 2016, DIARIO OFICIAL [D.O] Art. 13, 32 (Colom.).

²² The Havana agreement, *supra* note 1 at 170. These measures are contained in law 975/2005, the Justice and Peace Law, and law 1424/2010, the law on criminal liability of low and mid-level paramilitary members. *See* L. 975/2005, July 22, 2005, DIARIO OFICIAL [D.O] (Colom.); L. 1424/2010, Dec. 29, 2010, DIARIO OFICIAL [D.O] (Colom.).

²³ The Havana agreement, *supra* note 1 at 132.

displaced and exiled persons, human rights defenders, trade unionists, journalists, farmers, cattle breeders, traders and entrepreneurs, among others.²⁴

Given the ambitious goals attributed by the Havana agreement to the CITCNR, and the territorial and group perspectives that must direct its work, its three years mandate appears to be a rather short period of time to adequately fulfil its immense task in relation to a decades-long conflict that spread out over almost all thirty-two Colombian departments and victimized around 15% of the Colombian population.

Moreover, whilst the first CITCNR's goal seems to aim at providing a forensic truth on the general pattern of atrocities suffered by Colombian society during the armed conflict, the second CITCNR's goal appears to put the emphasis on the need to listen to victims' narratives as a way to recognize and empower them as citizens and political actors, which is also considered to be a form of reparation by the Havana agreement.²⁵ Neither the CITCNR's goal nor the CITCNR's territorial, group-based and gender-based approaches, solve the tension between the first two CITCNR's goals.

The Colombia Government and the FARC do not provide any specific guidance in the agreement as to how to address this tension, which, as seen above, was an essential issue in shaping the works of the South African TRC.²⁶ As a result, the Colombian CITCNR, as it happened with the South African TRC, will have to decide in the coming months as to whether its main goal is to provide a forensic truth of the general pattern of atrocities suffered by different groups within Colombian society during the armed conflict, or to promote reconciliation by listening to victims' narratives.

In doing so, the Colombian CITCNR, due to the public nature of its methodology, will have the advantage over the South African TRC of receiving external observations on how to address this tension.²⁷ Furthermore, given the fact that the CITCNR does not have the power to receive, nor to decide on, applications for amnesty, pardon and special treatment (the Havana agreement gives this power to the Special Jurisdiction for Peace), the CITCNR may be less focused on the specific acts or omissions included in amnesty applications (a

²⁴ *Id.*

²⁵ The Havana agreement, *supra* note 1 at 182.

²⁶ See Tutu *supra* note 9; Chapman *supra* note 8.

²⁷ The Havana agreement, *supra* note 1 at 133.

critic often made to the way in which the South African TRC conducted its hearings), and thus be in a better position to portray general pattern of atrocities (including those relating to discrimination on any ground prohibited by international law) and identify the indirect perpetrators with control over the crimes.

IV. Conclusion

The Colombian Government and the FARC have not learnt the lessons of the South African TRC as to the need to clearly define and prioritize the CITCNR's main goals. As a result, the CITCNR will be facing in the coming months the question of whether its main goal is to provide a forensic truth of the general pattern of atrocities suffered by different groups within Colombian society during the armed conflict, or to promote reconciliation by listening to victims' narratives.

Nevertheless, some of the features of the CITCNR, which the South African TRC did not have, may be important tools in addressing such issue. In particular, the public nature of the CITCNR's methodology and the fact that the CITCNR has no competence over applications for amnesty, pardon, and special treatment will be important factors for this purpose.