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How do choices of transitional justice mechanisms affect human rights and democracy?

The paradox of the Colombian conflict is that, contrary to other countries that try to get out of a long non-international armed conflict, Colombia's democracy is comparable to that of its Latin American neighbors. It also has very sophisticated laws (at least on paper), and Constitutional Court and Supreme Court jurisprudence that, in some cases, spearheads issues of human rights. During the last 10 years, its economic growth has been among the best in Latin America, and it will likely soon join the OECD.

Paradoxically, these developments coincided with thirty years of armed conflict (only to mention the most intense part of the conflict) with, especially in rural areas, an armed conflict which has made Colombia the country with the second largest population of internally displaced persons (7,7 million) in the world,² the largest number of union leaders and human rights defenders murdered,³ and the second highest number children killed by land mines.⁴

It is a country, where, according to the analysis by the Office of the Prosecutor of the International Criminal Court ("OtP") since November 2002, crimes against humanity, such as homicide, forcible transfer, and sexual violence have been committed by paramilitary, guerilla groups or State actors.⁵ It is also a country of profound societal polarization--with two worlds, whose people do not speak with each other and even often hate each other, reflecting both the cause, and the effects of, the conflict.

The September/November 2016 agreement between FARC and the State ("the peace agreement") was a remarkable step towards ending the war in Colombia and rebuilding society.

¹ The opinions expressed in this article are the author's own and do not necessarily reflect the views of the FIDH.

² Global Trends: Forced Displacement in 2016, UNCHR, June 19, 2017, <http://www.unhcr.org/news/stories/2017/6/5941561f4/forced-displacement-worldwide-its-highest-decades.html>.

³ Global Rights Index since 2014, International Trade Union Confederation <http://www.ituc-csi.org/spip.php?page=recherche&recherche=global+rights++index>; Also, between 2002 and 2012 the Colombian trade union CUT evaluates that 775 trade unionists have been killed in Colombia, see CUT Colombia, La Corte Penal Internacional debe investigar la violencia antisindical en Colombia como crimen de lesa humanidad, <http://cut.org.co/la-corte-penal-internacional-debe-investigar-la-violencia-antisindical-en-colombia-como-crimen-de-lesa-humanidad/>. On human rights defenders, see International Federation for Human Rights, the annual reports of the Observatory for the Protection of Human Rights Defenders since 1999, https://www.fidh.org/en/issues/human-rights-defenders/archives-human-rights-defenders/annual-reports/?debut_articles=8#pagination_articles

⁴ Annual factsheets of the international campaign to ban landmines, The International Campaign to Ban Landmines, Nov. 2014, http://www.the-monitor.org/media/1713762/MinesERWandChildren_factsheet_2014.pdf, http://www.the-monitor.org/media/2152129/2015_Mines-and-Children_Monitor_factsheet.pdf, <http://www.the-monitor.org/media/984218/The-Impact-of-Mines-ERW-on-Children.pdf>.

⁵ OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, SITUATION IN COLOMBIA: INTERIM REPORT, 10-47 (Nov. 2012), <https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>

In Colombia, the main human rights challenge is to be able to end violence in the regions most affected by the conflict, and the main challenge for democracy is to build social cohesion, breaking the dichotomy between a Colombia at peace and one at war.

In a discussion bogged down for decades by polarization, the choice of the points of the peace agreement,⁶ even if sometimes linked to mechanisms insufficiently efficient, has sent an important joint message on the question of how to build lasting peace and structurally improve the human rights situation in Colombia. Those points are:

- Agrarian reform
- Guarantees to political opposition and participation of former guerillas in politics
- An integral system of truth, justice, reparation and non-recurrence (“SIVJNR”) as stated in the accord's point on the victims of conflict
- Combating the illicit drug problem by combining judicial action against organized crime with a public health approach for consumers and viable sustainable economic alternatives for crop growers
- State action against paramilitary/criminal organizations
- Guerrilla demobilization and reintegration into society

The challenge when deciding which transitional justice mechanisms to set, in particular with respect to guarantees of non-recurrence, is to find a balance between the too-wide, and therefore unimplementable, to-do list, and the necessity of taking into account the global picture of the conflict in order to address the structural causes of it.

Three key paradigm shifts compared with historical Colombian public policies are included in the guarantees of non-recurrence of the peace agreement.⁷ If efficiently implemented, they could very significantly impact human rights and democracy in Colombia: 1. The agrarian reform, which is the first point of the agreement and sets some mechanisms that seek to counter balance the profound inequality in land ownership in Colombia; 2. Out of a population of 49 million inhabitants, the recognition and role given to the 8 million victims of the conflict through the SIVJNR (it comprises a truth commission, a unit to search for the disappeared, a special criminal jurisdiction for peace (“JEP”), and reparations) 3. The recognition that the guerrilla demobilization is not enough to end the humanitarian crisis of Colombia. I will focus on this last point.

Putting an end to the conflict with the FARC through negotiations will certainly reduce the human rights violations due to FARC, especially homicides, kidnappings, forced recruitment, and the use of land mines. However, the effective demobilization of the FARC guerilla troops will not be enough to solve the humanitarian crisis in Colombia. Indeed, the war during these last 25 years was basically played out between guerillas and paramilitaries in cahoots with the army.

⁶ See an English summary of the peace Agreement at:
<http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/summary-of-colombias-peace-agreement.pdf>

⁷ These shifts had been initiated with the Law on victims and land restitution (*Ley de Víctimas y Restitución de Tierras*, Law 1448) passed on June 10, 2011. See generally Colombia: The Victims and Land Restitution Law: An Amnesty International analysis, Amnesty International, April 17, 2012, <http://www.refworld.org/pdfile/4f99029f2.pdf>.

That is why should be welcome the fact that consideration is being given to the demobilization of the guerrillas and also to the dismantling of paramilitaries/organized crime—as well as to the fight against drug trafficking, a primary source of funding for violence.

The demobilization of the FARC guerilla is an opportunity for the State to strengthen its institutions and its presence in some of the regions which were more or less abandoned and had organized themselves around the guerillas. Not to let paramilitaries and drug traffickers get a foothold in these areas, where they can go back to the drug road, used or protected by the guerillas, is an immediate challenge which will define the presence of the rule of law throughout the country. The risk is that Colombia will become another Mexico with crimes against humanity being committed—but this time by organized crime in collusion with the public forces in the context of drug trafficking. The elephant in the room of the peace agreement is the army. Army personnel who have committed crimes against humanity and war crimes can benefit from lower sentences if they collaborate with the Special Jurisdiction for Peace.⁸ However, there is absolutely nothing in the peace agreement about the very-needed reform of the army.

What is the right balance between flexibility and accountability in transitional justice processes?

The notion of transitional justice, which has come about during the last thirty years, recognizes the need, during periods of transition, to employ measures beyond criminal law when dealing with serious human rights violations committed during dictatorships or conflicts. Thus, the notion of transitional justice includes the importance of truth regarding conflict and crimes, victim reparation, and measures aimed at guaranteeing the non-recurrence of crimes committed as mechanisms of reconstruction, the rebuilding of trust, and reconciliation. Emphasizing the difficulty of negotiating a transition or a peace accord without including a certain degree of impunity for those responsible for serious human rights violations, or even complete impunity, begs the question: when it is not politically or practically feasible to hold perpetrators of human rights violations criminally accountable, is it acceptable to settle for alternative--more limited--forms of accountability for the sake of advancing the objectives of truth and reconciliation?

Now, after the establishment of the system stemming from the Rome Statute, this question brings up the issue of the linkage between international criminal law and the notion of transitional justice. Transitional justice was initially a practical model focused on finding the truth, and was careful not to call itself a model, as Sandrine Lefranc⁹ has shown. Since the creation in 2012 of the position of U.N. Special Rapporteur on the promotion of truth, justice, reparation and the guarantees of non-recurrence, the Rapporteur has contributed through his reports to setting soft law regarding the notions which encompass transitional justice and relations among them (among truth, justice, reparation and guaranties of non-recurrence). On the other hand, the notion of transitional justice, in my opinion, is not recognized by human rights. It is noteworthy that the UN did not include in the Rapporteur's mandate name the word transitional justice. However human rights case-law does recognize as rights the right to truth, the right to reparation, guarantees of non-recurrence, and the obligation of States to prevent, investigate, and prosecute human rights violations.

⁸ Bill of Law on the Administration of Justice in the Special Jurisdiction for Peace (*Estatutaria de la Administración de Justicia en la Jurisdicción Especial para la Paz*), arts. 121–23, cr00.epimg.net/.../05/.../dcd9bf4455a2f0a059ffebf8c259b5a5.doc

⁹ See generally SANDRINE LEFRANC, *POLITIQUES DU PARDON*. (1st ed., 2002).

The possibility of renouncing the obligation to investigate, prosecute, and sanction those responsible for serious human rights violations is thus a much-debated issue.

For me, although there is no model or right balance, there are obligations in international law, namely under international criminal law and human rights standards, which states or transition negotiators must respect. They can be summarized as follows:

The perpetrators of crimes against humanity and war crimes must be investigated, prosecuted, and sanctioned. These crimes are imprescriptible. Amnesties may be possible for other crimes.

The peace agreement questions those obligations and their interlinkage. As we will see, parliamentarians and judges of the JEP will have to address and clarify some of those questions.

And how can transitional justice institutions and advocates in fraught political environments balance the needs of justice and the requirements of the Rome Statute against political realities?

What can human rights advocates and lawyers do to advance the goals of truth, justice, and reconciliation in such contexts?

In the context of the peace agreement with the FARC, there have clearly been three phases with different strategies to ensure some respect for the requirement of the Rome Statute: the peace negotiation period, the time of agreement validation and, finally, the implementation period.

The OtP played a direct role in these phases,¹⁰ writing to the Constitutional Court or intervening through conferences or via the media to explain the standards set by the international criminal law, publishing a press release once the peace agreement was reached. This interaction reflects its strategy of positive complementarity, i.e. a proactive policy of cooperation aimed at promoting national proceedings respectful of Rome Statute standards. This clearly had a positive effect. However, the challenge for the OtP will be to apply rigorously the criterion of article 17 of the Rome Statute and to be able, if it proves necessary, to open an investigation into Colombia (a country perennially under preliminary examination) despite the appearance of its strong judicial institutions.¹¹

The peace agreement between the State and the FARC is a difficult balancing act between Colombia's international obligations--especially international criminal law--and pressure from the FARC and from the military to ensure as much impunity as possible for international crimes committed by them. The State, through its role of negotiator, played an apparent role of protector of international criminal law standards. In fact, the trickiest questions were written in an ambiguous manner, leaving it up to the JEP's judges or the Congress to decide. Another strategy was to push international criminal law to its limit, for instance, on the question of sanctions; international criminal law has not developed a clear position on what is and what is not an effective sanction for crimes against humanity. The peace agreement provides for an escalation of sanctions; the first step being 5 to 8 years of restriction of residence and movements for those who help to provide the truth, thus giving importance to restorative justice,

¹⁰ See a copy of the public statements and letters available at <https://www.icc-cpi.int/colombia>

¹¹ JIMENA REYES, *Limites de la estrategia de complementariedad positiva de la oficina de la Fiscalia de la CPI en el caso colombiano, La Corte Penal Internacional y sus primeros 10 años: Un enfoque práctico*, 102 (2012).

then 8 years of imprisonment for those collaborating impartially or lately, and 20 years of imprisonment for those refusing to collaborate.¹²

More recently, members of Congress and of the government, in the context of the still-ongoing discussions on the law that will set the JEP, invoked a so-called margin for national appreciation to define the chain of command for members of the army--increasing the threshold compare with article 28 of the Rome Statute and, in fact, rendering it inoperative.¹³ Similarly, most political parties voted an article that will also render inoperative the possibility for civil individuals to be judged before the JEP for the financing of illegal armed groups.¹⁴

International NGOs have had different strategies. For example, one was very much present since the beginning of the negotiations, pointing out any risk for impunity. When the referendum on the peace agreement resulted—very marginally—in a ‘no’ vote, this organization was very unjustly criticized for having been instrumentalized by actors such as the political party of former president Uribe.¹⁵

My organization is a federation of local human rights NGOs. After some internal debate, we decided to contribute to the peace process via the group of New York, where one of the members of our board participated and to wait until the peace agreement was completely validated to intervene publicly in favor of the necessary respect of the Rome Statute standards. These was out of consideration for the impact that a peace agreement would have for human rights in Colombia.

Ultimately, in the JEP implementation stage, the independence of the judges will be fundamental to ensuring respect for Colombia’s obligations under international criminal law. Civil society will also have a key role of advocating for the respect of the requirement of the Rome Statute, including representing victims before the SIVJNR, ensuring that the stepwise mechanism, set out in the agreement, is implemented and that the legal standards set out in the Rome Statute are respected despite inappropriate definitions, and, finally, avoiding any polarization of the society by ensuring that the different parties are treated alike.

¹² Bill of Law on the Administration of Justice, *supra* note 8, arts. 121–23,

¹³ See If transitional justice cannot try businessmen or those in senior positions of responsibility, the International Criminal Court must, FIDH, March 23, 2017, <https://www.fidh.org/en/region/americas/colombia/if-transitional-justice-cannot-try-businessmen-or-those-in-senior>.

¹⁴ *Id.*