



# CONTESTED TRANSITIONS:

*Dilemmas of Transitional Justice in Colombia  
and Comparative Experience*



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Office Bogotá, D.C., Colombia

Carrera 5 No. 67-01

Telephone: +571 3450046

[www.ictj.org](http://www.ictj.org)

Contested Transitions:

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## Acknowledgments

With the financial support of the Ministry of Foreign Relations of Norway, the International Center for Transitional Justice Colombia Program is pleased to present this volume. This book is the final product of a year-long process of dialogue and written reflection to study the challenges arising where the measures and discourse of transitional justice are employed outside of the originally intended contexts, such as in situations of ongoing armed conflict. With this project the ICTJ seeks to enrich the literature on the implementation of transitional justice tools in general and to draw lessons for the Colombian case in particular.

The project has counted on the assistance of numerous individuals. First and foremost, our appreciation goes to María Cristina Rivera, Communications Director for ICTJ-Colombia, whose dedication to the project and to the edition of the Spanish publication is reflected in the quality of the English edition as well.

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A key component of the written reflection component of this project has been to ensure that these studies and analyses are available for both Spanish-speaking and English-speaking audiences through high-quality translations. Making contemporary and expert analysis of the Colombian case available in English, as well as foreign case studies available for the Colombian audience is a vital contribution for the exercise of comparative reflection and commentary. For this, we appreciate the dedication of the translators that worked on the chapters of this collection: Andrés Samuel Roth, Jorge Amaya, Diego Bolívar, Gwen Burnyeat, Viviana Bolívar, Edward Helbein, Melody Gonzalez, Charlie Roberts, and Jorge Torres. The translations were also submitted for technical review with ICTJ-Colombia staff. For valuable assistance in this crucial process of edition we thank Catalina Uprimny and Estefanie Robertson, as well as our interns Ludwig Ureel and Maya Ibars.

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Michael Reed Hurtado  
Director, ICTJ Colombia

Amanda Lyons  
Researcher, ICTJ Colombia

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## Contributor Biographies

**Gabriel Arias** is an associate with the International Center for Transitional Justice (ICTJ) Colombia Program. He is a lawyer with post-graduate concentrations in agency and constitutional law. Gabriel has more than twenty years of experience in human rights and international humanitarian law with non-governmental organizations, the Office of the Ombudsperson (*Defensoría del Pueblo*), and as a consultant for the United Nations High Commissioner on Human Rights.

**Iván Cepeda Castro** is a human rights defender, spokesperson for the National Movement of Victims of State Crimes (MOVICE), director of the Manuel Cepeda Vargas Foundation, and member of Colombian Men and Women for Peace. He was elected in 2010 to the Colombian House of Representatives. For the last fifteen years, his work has been dedicated to advocating for the rights of victims to truth, justice, and reparation in cases of crimes against humanity and genocide in Colombia. He holds a degree in philosophy from Sofia University, in Bulgaria and a DEA (equivalent to M. Phil.) in human rights from the Catholic University of Lyon, in France. He is a researcher and consultant in human rights and international humanitarian law. For years he was a columnist in the newspaper *El Espectador*. In December 2008, Iván co-authored with Jorge Roja a book on the history of paramilitarism in Córdoba and El Ubérrimo, the presidential ranch, entitled *A las puertas de El Ubérrimo* (At the Doors of *Ubérrimo*). He is also the co-author and editor of *Las perlas uribistas* (2010) (The Uribe Pearls), *Duelo, memoria, reparación* (1998) (Hurt, Memory, and Reparation), and *La memoria frente a los crímenes de lesa humanidad* (1996) (Memory and Crimes Against Humanity).

**Benjamín Cuéllar** holds degrees in jurisprudence and social sciences from the University of El Salvador, and in political science and public administration in the National Autonomous University of Mexico. He worked in social mobilization and defense of human rights in El Salvador between 1972 and 1983. In 1984 he founded the Fray Francisco de Vitoria Human Rights Center in Mexico and served as the Executive Secretary until 1991. In January 1992 he returned to El Salvador to direct the José Simeón Cañas Human Rights Institute of the Centro-American University (IDHUCA), a position he currently holds. He is on the board of directors of CEJIL (Center for Justice and International Law), based in Washington, D.C., and was the organization's Vice-President from 1998-2002. Benjamín heads the El Salvador Independent Monitoring Group (GMIES), which promotes human rights in *maquiladoras* (cross-border assembly factories). Under his direction, the IDUHCA received an honorable mention for the French Medal for Human Rights in 2002, and the Human Rights Award from the Valencia, Spain section of the International Bar Association (IBA).

**Camila de Gamboa Tapias** is Director of the Democracy and Justice research project of the Public Law Research Group and Director of the doctorate program in law at the University of Rosario, in Bogotá, Colombia, where she also obtained her law degree. She also earned an MA and PhD in philosophy from Binghamton University (SUNY), and was a Fulbright scholar. Her research areas include democracy, transitional justice, moral sentiments, and the relationship between morality, politics, and law. She has written numerous articles on transitional justice and political philosophy. She is the editor of the special edition of *Revista de Estudios Socio-jurídicos*: “Justicia transicional: memoria colectiva, reparación, justicia y democracia”, and of the book *Justicia transicional: teoría y praxis*, edited by the Universidad of Rosario and the *Colección Debates Democráticos* (Collection of Democratic Debates).

**Leonardo Filippini** earned his law degree with honors at the University of Buenos Aires. He also holds an MA in law from the University of Palermo, in Argentina, and received his LLM at Yale Law School, where he is currently a JSD candidate. He has also taught at the Universities of Palermo and San Andres, and is currently a researcher for the ICTJ in Argentina. His professional and academic interests are international law, criminal law, and human rights law. He has been a consultant for various international and national organizations, and has served as *Relator Letrado* (law clerk) in the Supreme Court of Justice of the Buenos Aires province and Coordinator of the Institutional Reform Area of the Center of Legal and Social Studies (CELS). Leonardo has also been a part of a variety of interdisciplinary research teams, and was the director of the study *El Estado Frente a la Protesta Social, Siglo XXI* (The State and Social Protest: 21<sup>st</sup> Century).

**Felipe Gómez Isa** is Professor of Public International Law at the University of Deusto, in Spain, and Researcher for the Pedro Arrupe Human Rights Institute, where he serves as Director of the European Master in Human Rights and Democratization. He has participated in the United Nations Working Group for the elaboration of an Optional Protocol to CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) (New York, 1998 and 1999), and has been a visiting professor in several universities in Europe and Latin America. His books include *La Declaración Universal de los Derechos Humanos* (The Universal Declaration of Human Rights) (1998); *El derecho al desarrollo como derecho humano en el ámbito jurídico internacional* (The Right to Development as Human Right in International Law) (1999); *El Caso Awas Tingni contra Nicaragua: Nuevos horizontes para los derechos humanos de los pueblos indígenas* (The Case of *Awas Tigni* vs. Nicaragua: New Horizons for Indigenous Rights) (2003); *Privatisation and Human Rights in the Age of Globalisation* (Co-editor with Koen de Feyter, 2005); *El derecho a la memoria* (The Right to Memory) (Director, 2006), *Colombia en su laberinto: Una mirada*



*al conflicto* (Colombia in its labyrinth: A Look at the Conflict) (Director, 2008); and *International Human Rights Law in a Global Context* (Co-editor with Koen de Feyter, 2009).

**Patricia Gossman** is an independent consultant on human rights and rule of law issues in South Asia, particularly focused on Afghanistan. She holds a PhD from the University of Chicago. She is currently a consultant to the United States Institute for Peace (USIP) and the ICTJ on documentation and transitional justice issues in Afghanistan. In 2008-2009 she was a USIP grantee for a book she is completing on the tension between transitional justice and stability in post-2001 Afghanistan. She has conducted research for a variety of NGOs, as well as the UN, on transitional justice, judicial reform, and disarmament issues. In 2001 she established the Afghanistan Justice Project to document past war crimes in Afghanistan. Prior to that she was Senior Researcher on South Asia at Human Rights Watch. She has recently relocated to the Washington, D.C. area from Istanbul.

**Johanna Herman** is a research fellow at the Centre on Human Rights in Conflict ([www.uel.ac.uk/chrc](http://www.uel.ac.uk/chrc)). She received her MA in international affairs from Columbia University, with a concentration in human rights. She holds a BA in social and political sciences from Fitzwilliam College, Cambridge University. She has worked in various capacities for UN-HABITAT (the United Nations Human Settlements Program) and the UNDP (United Nations Development Program) in Japan, Afghanistan, and New York. Her research interests include peace-building, transitional justice, and human rights. She is co-author of *War, Conflict and Human Rights: Theory and Practice* (Routledge, 2009) and co-editor of *Surviving Field Research: Working in Violent and Difficult Situations* (Routledge, 2009).

**Bogdan Ivanišević** is a Belgrade-based consultant to the ICTJ former Yugoslavia Program, a position he has held since November 2006. He received his LLM from the American University–Washington College of Law. Prior to that, he was a researcher on the former Yugoslavia for Human Rights Watch from 1999 to 2006, and Program and Analysis Director at the Humanitarian Law Center, a leading human rights group in Serbia from 1997 to 1998. He has also conducted research for the Prosecutor’s Office of the International Criminal Tribunal for the Former Yugoslavia (ICTY) through the War Crimes Research Center at the Center for Human Rights and Humanitarian Law of the American University–Washington College of Law (1996).

**Delphine Lecombe** is a PhD candidate in political science, with a focus on Latin America at the Paris Institute of Political Studies (or, Sciences-Po). She studies the mobilization of state and international social actors around transitional

justice in Colombia. She holds an MA in comparative politics from Sciences Po and wrote her thesis on the Colombian National Reparation and Reconciliation Commission (*Comisión Nacional de Reparación y Reconciliación*, CNRR). Through her doctorate program, she has taught classes at Sciences Po, and was invited in 2009 by the Externado University of Colombia, in Bogotá, to work as a professor and researcher. She also worked for three months with the ICTJ in Bogotá. In July 2009, she presented “Trust and distrust about the diffusion of transitional justice in Colombia,” at the World Congress of the International Political Science Association, held in Santiago de Chile. She has published two articles in France on the CNRR.

**Amanda Lyons** is a legal advisor and researcher with the ICTJ in Colombia. She received her JD *magna cum laude* from the University of Minnesota, with a concentration in international human rights law, and holds a BA in sociology from the University of Notre Dame. Amanda taught Legal Research and Writing at the University of Minnesota and served as Managing Editor for the *Minnesota Journal of International Law*. She has research and advocacy experience in international criminal law, asylum law, Guantánamo detainee defense, and children’s rights, and has worked with human rights organizations in the United States, Brazil, and Colombia.

**Olga Martin-Ortega** is Senior Research Fellow at the Centre on Human Rights in Conflict, at the University of East London in the United Kingdom. She received her PhD in international human rights law at the University of Jaén, Spain. She holds a law degree from the University of Sevilla, Spain. Her research interests include business and human rights, post-conflict reconstruction and transitional justice. She is author of the monograph “Empresas Multinacionales y Derechos Humanos en Derecho Internacional” (Bosch, 2008). She is co-author of *War, Conflict and Human Rights: Theory and Practice* (Routledge, 2009) and co-editor of *Surviving Field Research: Working in Violent and Difficult Situations* (Routledge, 2009).

**Fionnuala D. Ni Aoláin** is concurrently a professor of law at the University of Minnesota Law School and at the University of Ulster’s Transitional Justice Institute, which she co-founded and is Associate Director. She holds an LLB and PhD in law from Queen’s University Law Faculty, and an LLM from Columbia Law School. She has previously researched at Harvard Law School and taught at Columbia Law School, School of International and Public Affairs at Columbia University, Hebrew University in Jerusalem, Israel, and Princeton University. Her teaching and research interests lie in the fields of international law, human rights law, national security law, and feminist legal theory. She was a representative of the ICTY Prosecutor at the domestic war crimes trials in Bosnia, worked as

United Nations Special Expert on promoting gender equality in times of conflict and peace-making, and was a member of the Irish Human Rights Commission, the Executive Committee for the Belfast-based Committee on the Administration of Justice, and the Irish Council for Civil Liberties.

**Rigoberto Ochoa** is a Honduran lawyer with a specialty in human rights, who earned his degrees at the Complutense University in Madrid, Spain. He has previously served as Coordinator of Legal Services for the Committee for the Defense of Human Rights in Honduras (CODEH). He worked for the United Nations with the Mission in Guatemala (MINUGUA). He is the former Director of the Democracy and Human Rights in Central America Regional Project, of Honduras and the European Union. He has been a consultant in the areas of justice, human rights, and security with several international agencies, including the UN Office of Projects Services, Inter-American Institute of Human Rights, UNDP, and Due Process Legal Foundation. Rigoberto was also actively involved in the civil society groups which worked to approve the process Law on Transparency and Access to Public Information, as well as the Law on the Superior Tribunal of Accounts in Honduras. He has published in the areas of justice and human rights, and his articles have appeared in several international collections.

**Catherine O'Rourke** is a lecturer in human rights and the International Law and Gender Research Coordinator at the Transitional Justice Institute, University of Ulster, Northern Ireland. She holds law degrees from the Queen's University, Belfast and University of Ulster, and an MA in gender from the London School of Economics. Her doctoral work examined feminist engagement with, and gendered outcomes of, transitional justice in Chile, Northern Ireland, and Colombia, with particular reference to the legal treatment of violence against women and the legal regulation of women's reproductive lives. While conducting this work, she was a visiting researcher at American University School of International Studies in Washington DC, and the law schools of University Diego Portales in Santiago, Chile and University of the Andes in Bogotá, Colombia. She is currently working on the publication of this research as a monograph.

**Michael Otim** is the Head of Office for the ICTJ Uganda Program. He holds a BA in economics from Makerere University in Kampala and an MA in business administration from Gulu University. For more than eight years he was the Director and Program Coordinator for Gulu District NGO Forum (GDNF) in Northern Uganda. While at GDNF, Michael co-founded the Justice and Reconciliation Project. He also participated in the peace negotiations in Juba, South Sudan between the Lord's Resistance Army (LRA) and the Government of Uganda as the Secretary to the Cultural and Religious Leaders' delegation. Michael is currently serving as the Minister for Rehabilitation of the Ker Kwaro Acholi, the traditional leadership

of the Acholi. He has advised and participated in a number of major advocacy efforts, including the report “Hidden War: Forgotten People” (2003, HURIPPEC), the documentary “Uganda Rising”, as well as a 2005 delegation of cultural and religious leaders to the International Criminal Court to discuss the situation in Northern Uganda.

**Michael Reed Hurtado** is the director of the ICTJ Colombia Program. He received his JD from the University of Minnesota and a Bachelor’s Degree in Journalism and a BA in Latin American Studies from the University of Texas. As a human right lawyer, he has worked with a variety of intergovernmental and non-governmental organizations in the Americas, Europe, Asia, and Africa. He was a protection officer for the UNHCR (United Nations High Commissioner for Refugees) in Colombia, an advisor on criminal and penitentiary matters for the UNHCHR (United Nations High Commissioner on Human Rights), and advisor on forced displacement for the Under-Secretary-General for humanitarian affairs for the United Nations mission to Afghanistan. Michael is a professor of the sociology of violence and he has published works in the areas of Central American gangs, prisons, administration of criminal justice, freedom of expression, homicidal violence, violence against women, economic, social and cultural rights, humanitarian action, and armed actors and humanitarian dialogue.

**Tatiana Rincón Covelli** holds a law degree from the Externado University of Colombia, an MA in logic, history and philosophy of science from the Distance Learning University of Madrid, Spain, and a PhD in law, with a focus on fundamental rights, from the University of Carlos III in Madrid. She is a professor with the undergraduate and doctoral programs in law at the University of Rosario, in Bogotá, Colombia, and teaches contemporary theories of justice. Formerly, she taught contemporary political philosophy, legal ethics, human rights fundamentals, the history of human rights, and contemporary critical thought at the University of Rosario, the University of the Andes, in Bogotá, the Cano Human Rights Institute in Madrid, and the University of Carlos III, respectively. She has written on human rights, transitional justice, moral philosophy and political philosophy.

**Howard Varney** is a member of the Johannesburg Bar and is Senior Consultant with the ICTJ. As a consultant for the ICTJ, he has assisted with the development of transitional justice initiatives in several countries in Africa, Asia and Europe. His legal practice includes human rights, constitutional and administrative law litigation. In the early 1990s Varney was an attorney with the Legal Resources Centre in Durban where he represented victims of political violence in public interest litigation, judicial inquests and commissions of inquiry. In the mid-1990s he led an independent criminal investigation in South Africa into state-sponsored hit squad activity. Varney was the Chief Investigator for

the Sierra Leone Truth & Reconciliation Commission. He has also worked with the South African Truth & Reconciliation Commission and the Commission for Reception, Truth and Reconciliation in East Timor.

**Marieke Wierda** is the Director of the Criminal Justice Program at ICTJ. She joined ICTJ in 2001 and has worked on Uganda since 2005. A Dutch-national born and raised in the Republic of Yemen, Marieke Wierda earned an LLB at the University of Edinburgh in Scotland and an LLM at New York University, specializing in international law and human rights. She has worked with the United Nations, notably as an associate legal officer for the International Criminal Tribunal for the former Yugoslavia (ICTY) from 1997 to 2000. Since joining ICTJ, she has worked on criminal justice issues in a wide variety of countries, including in particular Sierra Leone, Lebanon, Afghanistan, and Uganda. She has authored a number of publications, including a book on international criminal evidence, co-authored with Judge Richard May of the ICTY. She also co-edited a book entitled *Building a Future on Peace and Justice* (2009), with Kai Ambos and Judith Large.



## Introduction

# For a Just Transition in Colombia

*Amanda Lyons*

Transitional justice or “justice in transition” originally referred to exactly that: efforts to pursue justice in what is essentially a purely political transitional process. In many of the cornerstone cases, transitional justice came into the picture in response to, and importantly, after, a major political transformation was agreed. Transitional justice evolved as a field seeking to check the transition with reference to considerations of justice. Louis Bickford, among others, has suggested that the term transitional justice is misleading, “as it more commonly refers to ‘justice during transition’ than to any form of modified or altered justice.”<sup>1</sup> The concept of “transition” in the term generally refers to significant political transformation and a rupture from the past: “When a society ‘turns over a new leaf’ or ‘gets a fresh start,’ mechanisms of transitional justice can help strengthen this process.”<sup>2</sup>

Today, however, the tools of transitional justice are increasingly called upon in situations where there is no defining moment of transition, no sense of a rupture with the past offering a new leaf or fresh start for the society.<sup>3</sup> In light of this, consideration of the role and relevance of a context of transition, or rather a lack of one, in the application of transitional justice measures has taken on new importance and urgency.<sup>4</sup> For many of us working in contexts that appear much closer to non-transitional than transitional, speaking of (and working *for*) transitional justice can provoke moments of existential crisis. There is the concern that in such cases the only relevance of “transitional” is to serve as a qualifier of “justice”—that in these scenarios reference to transitional justice can in fact lead to a modified or altered justice. In contrast with the origins of the field, there is a fear that the appropriation of transitional justice concepts in such contexts may be more effective for those aiming to lower human rights standards than for those seeking to defend them.

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<sup>1</sup> Louis Bickford, *Transitional Justice*, in *THE ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY* vol. 3, at 1045 (2004).

<sup>2</sup> *Id.* Bickford offers as examples of cases presenting key historical moments of transition: Chile (1990), Guatemala (1994), South Africa (1994), Poland (1997), Sierra Leone (1999), and East Timor (2001).

<sup>3</sup> *See, e.g.*, UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004).

<sup>4</sup> For an excellent look at the relevance and role of the word “transitional” in the emergence of the field of transitional justice, see Paige Arthur, *How Transitions Reshaped Human Rights*, 31 *HUMAN RIGHTS Q.* 321 (2009).

Colombia is a case in point. There is no transition like that which is considered or assumed in the conceptual basis of transitional justice or in several of the key transitional justice experiments that are relied on for comparative insight. Nonetheless, in Colombia the language of transitional justice is widely employed to frame competing policy interests and the standards or guidelines developed in the field of transitional justice are widely invoked to evaluate and orient different initiatives. What the Colombian case arguably presents then is an example of the recourse to transitional justice by analogy.<sup>5</sup>

The international legal landscape, and also domestic in many cases, that is relevant for negotiating transition is arguably much different today than it was at the time of the political processes that preceded the most referenced transitional justice experiments such as Chile, Argentina, and South Africa. There is an increasing consensus that blanket amnesties and pardons run the risk of violating states' duties to investigate, prosecute, and punish grave violations of human rights under the major universal and regional treaties. Universal jurisdiction, as well as the Rome Statute and International Criminal Court, also suggest that an amnesty offered by a state for international crimes will not necessarily guarantee individuals immunity from prosecution. Thus, the recourse to transitional justice language, considerations, and tools before there is a defined transition to peace as a means to address the exigencies of international justice is likely to become the norm and not the exception.

The Colombian case in particular has been presented to the domestic audience, as well as to foreign counterparts and the international community, as a new and improved brand of transitional justice suited to the evolving international landscape<sup>6</sup>—where the offer of full and broad impunity is no longer accepted as part of the toolbox for states negotiating transition and where the duty to guarantee victims' rights is firmly established in international (and in many cases domestic)

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<sup>5</sup> Pablo De Greiff explains that when the use of the term transitional justice is extended beyond the intended domain, it is typically done by analogy. See Pablo De Greiff, *Una concepción normativa de la justicia transicional*, in JUSTICIA Y PAZ, ¿CUÁL ES EL PRECIO QUE DEBEMOS PAGAR? (Alfredo Rangel ed., 2009). De Greiff notes that this does not necessarily imply that the use is illegitimate, but it does, however, require increased caution. In reference to classic transitional justice cases, he explains: “[T]he transitional justice measures that were implemented were designed to address a similar type of human rights violations, namely, those that resulted from the abuses of power by authoritarian states, and not for example, the type of generalized violence that sometimes accompanies the collapse or absence of institutions.” De Greiff poses that “the extension of the use of measures of transitional justice from the post-authoritarianism domain to the post-conflict domain also takes place by analogy, and therefore, is also the subject of controversy.” *Id.* The use of analogy to apply transitional justice measures and discourse to situations of ongoing conflict is arguably more tenuous and undoubtedly more controversial.

<sup>6</sup> For a recent example of the Colombian government's representation of the transitional justice in the country, see the submission of the Ministry of Foreign Relations on the occasion of the Rome Statute Review Conference, TRANSITIONAL JUSTICE IN COLOMBIA – THE JUSTICE AND PEACE LAW: AN EXPERIENCE IN TRUTH, JUSTICE AND REPARATION (June 2010), available at <http://www.icc-cpi.int/Menu/ASP/ReviewConference/Stocktaking/Stocktaking.htm>.



law. The inclusion of the Colombian case in the international field of transitional justice and its frequent citation as an example of domestic efforts to combat impunity mean that the importance of critical analysis of the use of transitional justice in Colombia today extends beyond its impact within the country.

This project of dialogue and study, of which this volume is the final product, has sought to stimulate reflection, grounded in case studies, on the effects, risks, and potential of extending the field of transitional justice to cases that do not present a key moment of political transition to peace or democracy and instead are defined by political continuity and ongoing conflict. To this end, this volume contains a collection of detailed, contemporary analyses of the Colombian case (Part I), as well as of relevant experiences and challenges from both transitional and non-transitional cases (Part II) in order to foster comparative reflection.

In order to provide a backdrop for the dilemmas of transitional justice that are explored in depth in this volume, this introduction will present the context in which transitional justice is being applied in Colombia. Transitional justice serves as a field of contention, and the uncertainty as to which objectives in which instances are most served by the recourse to transitional justice language and measures is a central focus of this project. The introduction concludes with a general outline of the collection and a summary of the main issues addressed by each chapter.

## **I. An Introduction to Transitional Justice in Colombia**

### **A. The Partiality of the Official Transitional Justice Project**

The odds of Colombia having one key or defining moment that demarcates the conflict as the past and begins a new page of history are not likely. The conflict is multi-actor: several independent left-wing guerrilla groups at war with the State, which has been backed in its counterinsurgency by numerous paramilitary blocs. There is no accepted date or event for defining when the conflict began, but the modern conflict is generally understood to span more than four decades. It is worth mentioning that the Uribe administration has assumed the position that there is no internal armed conflict, asserting instead that it is a situation of a democratic state confronting terrorist organizations.<sup>7</sup> Drug-trafficking has played a key role in financing and fueling the actors in the conflict and has independently led to massive violence, leading to discrepancies over the political nature of the conflict and the actors. These factors, among others, complicate the exercise of imagining what might warrant the declaration of a “post-conflict” Colombia.

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<sup>7</sup> Cf. U.N. High Commission for Human Rights Office in Colombia, *Sobre la importancia del principio humanitario de distinción en el conflicto armado interno* (On the importance of the humanitarian principle that distinguishes an internal armed conflict), June 30, 2010.

Colombia has had several peace processes with armed insurgent (guerilla) groups, which resulted in broad grants of full amnesty or pardon.<sup>8</sup> The two major guerillas groups—the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia*, or FARC) and the National Liberation Army (*Ejército de Liberación Nacional*, or ELN)—have been weakened through the military strategy of the Uribe administration, but remain active. While there have been individual demobilizations, there is currently no perspective of a negotiated peace with these groups.

In addition to a documented high-level of human rights abuses,<sup>9</sup> the State also continues to commit grave and systematic violations related to the ongoing armed conflict. An example that has recently gained important attention both domestically and abroad is the continued practice of a particular brand of extrajudicial executions referred to as “false positives.” The military has been known to kill civilians, generally from marginalized communities, and then dress them in guerilla fatigues in order to portray them as combat deaths.<sup>10</sup> Whereas in most key examples of transitional justice projects, the political violence committed by the State has been the central focus of the initiatives, in Colombia there is to date no mechanism that has been put forth to address the role of the State in the decades of conflict or to purge the armed forces or other public powers of actors responsible for past and ongoing violations.

The key moment or “transition” that forms the basis of the official transitional justice project in Colombia is the demobilization process that was carried out with paramilitary groups from 2002-2006. The Colombian government negotiated the demobilization of more than 30,000 individuals associated with various paramilitary groups brought together under the heading of the United Self-defense Forces of Colombia (*Autodefensas Unidas de Colombia*, or AUC).

This demobilization did not include all of the paramilitary blocs and a significant number of individuals that participated in the demobilization have

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<sup>8</sup> On this, see Camilo Bernal’s contribution for this project, included only in the Spanish edition, under the title *Excepcionalidad permanente. Un ensayo de comprensión histórica de la justicia penal de excepción y la justicia transicional en Colombia*.

<sup>9</sup> See, e.g., Cingranelli-Richards (Ciri) Human Rights Data Project, <http://ciri.binghamton.edu>.

<sup>10</sup> The UN Special Rapporteur on Extrajudicial Executions described this “well known phenomenon”:

The victim is lured under false pretenses by a “recruiter” to a remote location. There, the individual is killed soon after arrival by members of the military. The scene is then manipulated to make it appear as if the individual was legitimately killed in combat. The victim is commonly photographed wearing a guerilla uniform, and holding a gun or grenade. Victims are often buried anonymously in communal graves, and the killers are rewarded for the results they have achieved in the fight against the guerillas.

Press Release, Statement by Philip Alston, UN Special Rapporteur on Extrajudicial Executions, Mission to Colombia, June 8-18, 2009.

resumed or continued criminal actions.<sup>11</sup> Of the individuals that demobilized as paramilitaries, the executive branch has submitted approximately 3,500 to the new transitional justice legal mechanism, Law 975 of 2005 or the “Justice and Peace Law.”<sup>12</sup> The remaining more than 27,000 individuals that passed through the official demobilization processes were to be pardoned pursuant to a 2002 law implemented for that purpose.<sup>13</sup> Of this group, more than 10,000 improper amnesties or pardons were issued before the Supreme Court of Justice halted this practice in 2007.<sup>14</sup> The legal situations of the more than 17,000 demobilized, self-identified members of paramilitary groups that have neither been pardoned nor submitted to Justice and Peace remain unresolved.

Regarding this demobilization, the factor put forth as triggering the application of transitional justice in Colombia, the government asserts that there has been a “definitive dismantling of the illegal self defense structures [paramilitaries].”<sup>15</sup> Putting aside the deficiencies or failures of the actual demobilization, the most serious design flaw is that the demobilization of paramilitary groups—by nature parallel to the State—did not contemplate any transformation of the State or address in any way its role in dirty warfare. The suggestion that paramilitarism could be dismantled without touching the political, economic, and military structures that have fueled this phenomenon defies the widely known and documented reality of a history of State and elite complicity and active engagement with paramilitarism in the country.

The partiality, false delineations, and deficiencies of this process are reproduced in the official transitional justice framework. The Justice and Peace Law is limited by design (and much more in practice) to only a fraction of the conflict—to a fraction of the potential universe of perpetrators, a fraction of the victims, a fraction of the truth, and none of the ongoing context of continued violations and repression. While partiality is a reality of any attempt to address a context of mass atrocity, the specific nature of the partiality of the process with the paramilitaries appears to be serving the specific objective, heightened by the context of war, of avoiding discussion of State responsibility and assuaging demands for reform.

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<sup>11</sup> See, e.g., HUMAN RIGHTS WATCH, *PARAMILITARIES’ HEIRS: THE NEW FACE OF VIOLENCE IN COLOMBIA* (Feb. 3, 2010).

<sup>12</sup> The Justice and Peace Law, discussed at length in the chapters on Colombia in this volume, is a confessional criminal justice model that offers willing candidates significantly reduced sentences (five to eight years in prison) in exchange for satisfaction of several conditions, including cessation of criminal activity, full confession to past crimes, and submission of all personal assets for victim reparation.

<sup>13</sup> Law 782 of 2002.

<sup>14</sup> Supreme Court of Justice, Criminal Cassation Chamber, ruling of July 11, 2007, No. 26945, Speaker Magistrates Yesid Ramírez Bastidas and Julio E. Socha Salamanca.

<sup>15</sup> See, e.g., *TRANSITIONAL JUSTICE IN COLOMBIA*, *supra* note 6.

## B. Transitional Justice Initiatives Beyond the Official Project

The executive and legislative use of transitional justice does not constitute the totality of initiatives and stances that ought to be considered in an interrogation of the application of transitional justice in Colombia. Other actors, primarily the Courts and civil society, have actively embraced the language and knowledge-base of the field of transitional justice to contest the scope of the purported transition. On several occasions, actors other than the policy-makers behind the official transitional justice project have employed the measures and discourse of transitional justice to confront the legacy of past abuses by State actors and to provoke a transformation of current political and military bodies and structures—specifically what the official transitional justice project appears intent on avoiding. Judicial actors have contested and expanded the explicitly limited scope of the official transitional justice project by transferring information obtained through Justice and Peace proceedings to instigate investigations and prosecutions against current military and elected officials for ties to paramilitarism.

Considering the Courts as contentious actors outside the “official” transitional justice project is a result of the extreme polarization and power struggles between the executive branch and the judicial branch in Colombia. As is explored in a number of the contributions to this volume, the Courts have been a resilient and stubborn backstop, on many occasions significantly altering the course of the transitional justice policy the Uribe administration has sought to implement. The Constitutional Court made a broad swathe of substantive modifications to the text, design, and formula of the Justice and Peace Law.<sup>16</sup> The Criminal Cassation Chamber of the Supreme Court of Justice has been put in the position of reviewing and ruling on the constant procedural improvisations that have together shaped what the Justice and Peace process looks like in practice.<sup>17</sup> The Courts have imposed changes to the political project that have sought to bring the project in line with international and domestic standards of justice and victims’ rights. Such efforts on the part of the Courts have been in defiance of political will and the context of insecurity in which they are forced to operate.<sup>18</sup>

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<sup>16</sup> Constitutional Court, ruling C-370 of 2006, No. D-6032, May 18, 2006.

<sup>17</sup> For a thematically organized compilation of extracts from more than 300 rulings of the Criminal Chamber in relation to Justice and Peace up to October 2009, see *EL PROCESO PENAL DE JUSTICIA Y PAZ: COMPILACIÓN DE AUTOS DE LA SALA DE CASACIÓN PENAL DE LA CORTE SUPREMA DE JUSTICIA* (2009). The executive branch has also issued decrees seeking to regulate the Justice and Peace process. On this back-and-forth, see Camila de Gamboa’s chapter in this volume, *The Colombian Government’s Formulas for Peace with the AUC: An Interpretation from the Perspective of Political Realism*.

<sup>18</sup> See UN Special Rapporteur Gabriela Carina Knaul de Albuquerque e Silva, Report on the Independence of Judges and Lawyers, Mission to Colombia, U.N. Doc. A/HRC/14/26/Add.2 (Apr. 15, 2010).

Beyond its work in developing and expanding the normative content of the Justice and Peace Law, the Supreme Court of Justice has converted the Justice and Peace proceedings into a form of catalyst for investigating the ties of political and military leaders to paramilitary groups. Confessions from paramilitaries have been used as evidence in several important convictions against politicians and have led to investigations and convictions for what has been termed “*parapolitica*” or parapolitics. The parapolitics scandal that emerged out of these confessions led the Supreme Court to create a dedicated investigation process for the matter. Competency over investigations into current politicians was highly contentious. To date 93 congresspersons, 12 governors, and more than 200 municipal representatives have been criminally investigated by the judicial branch, either by the Criminal Cassation Chamber of the Supreme Court of Justice or the Prosecutor General’s Office.<sup>19</sup>

A crucial impulse behind much of the developments in the judicial system is Colombian civil society, the more obvious actor outside the “official” transitional justice project. Colombia has a robust and active civil society that has been valiantly advocating for truth, justice, reparations, and guarantees of non-repetition for decades, if only recently under such headings.<sup>20</sup> Particularly prominent in Colombia are documentation efforts and other projects of nonofficial truth-seeking and memory construction, which incorporate elements from the transitional justice “toolkit” and propose related objectives.

A particularly illustrative example taking place completely outside the official transitional justice project is the advocacy related to the 1985 siege of the Palace of Justice. On November 6, 1985 members of the M-19 guerrilla group violently invaded and took control of the Palace of Justice and over 300 hostages, in the hopes of holding the Supreme Court Justices hostage and forcing a political trial of then President Belisario Betancur. This led to a military operation to retake the Palace. The confrontation and standoff lasted twenty-seven hours, and remains one of the bloodiest events in Colombian history. Nearly one hundred people were killed and eleven individuals disappeared, several of whom are seen leaving the Palace alive in custody of the military on video footage. There is evidence of torture and execution-style killing, as well as indicators that the military had information regarding the planned invasion and allowed it to go forward in order to force a confrontation with the guerrillas. The events have been shrouded in controversy and impunity for many years.

There have been two major developments related to this case—the final report of an extrajudicial Truth Commission and the first criminal conviction. Both

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<sup>19</sup> For monitoring documents related to *parapolitica*, see the compilation of documents available at <http://www.verdadabierta.com>.

<sup>20</sup> This is not particular to Colombia. The field of transitional justice grouped together and reframed initiatives and principles that have a long history, mainly within the human right community. See Arthur, *supra* note 4.

are very recent as of this writing but reflect years of persistence and efforts on the part of the victims and the individuals and organizations that have accompanied them.

In 2005, an extrajudicial Truth Commission on the events of the siege of the Palace of Justice was created on the initiative of the Supreme Court, with the objectives of “constructing historical memory and contributing to the satisfaction of the victims’ and society’s right to truth.” The Truth Commission received technical assistance from the International Center for Transitional Justice and a broad outreach strategy was employed in order to solicit information from the victims, witnesses, and broader society. The Truth Commission released its comprehensive final report on December 17, 2009.<sup>21</sup>

The Palace of Justice siege is also an example of the important work being done to combat impunity and vindicate the victims’ and society’s rights to truth and justice via the ordinary criminal justice system. As the moment of this writing, Colombia is still reeling from the recent conviction of former Coronel Alfonso Plazas Vega for his responsibility, as leader of the military operation, in the forced disappearances of eleven individuals following the retaking of the Palace of Justice. The judge sentenced the retired coronel to thirty years in prison, the first conviction related to these events. Importantly, she remitted the case file ordering that the entirety of the military and police leadership of the time be investigated and requesting that the role of then President Belisario Betancur also be reexamined.

Nearly twenty-five years have passed between the events at hand and these developments. This delay is primarily a reflection of the tenacity of the opposition to such initiatives for truth and justice. Arguably, however, these developments today, in the midst of continued opposition and insecurity, also evidence some degree of opening or space in Colombia for such discussions and developments. The opposition, both from some official voices and sectors of public opinion, to the parapolitics investigations as well as the Palace of Justice initiatives reveals that this space is precarious. The radical polarization of the society and the influence of the context of ongoing conflict and insecurity are clear in the war logic present in the opposition. A significant part of voices condemning the efforts around the Palace of Justice siege to confront the past, to recognize the victims, to pursue justice, and to construct historical memory were framed in terms of a “legal war” being waged by the enemies of the State to persecute the heroes of the nation.<sup>22</sup> Notably, among such voices is the President of the Republic. Upon news of the conviction, President Uribe said: “It hurts, it’s very sad.” He stated publicly that a

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<sup>21</sup> The final report is available at the Truth Commission’s website, <http://www.verdadpalacio.org.co>.

<sup>22</sup> Retired General Harold Bedoya offered the comparison that it was like “convicting the liberator Simón Bolívar after he had given us our freedom.” *Uribe y militares analizan fallo contra Plazas Vega*, SEMANA, June 10, 2010.

legal reform is needed to prevent the disheartening of the military.<sup>23</sup> He called an exceptional meeting at the Presidential Palace with the military leadership and the Minister of Defense to analyze the conviction.

This reality of political continuity and ongoing conflict can lead to a situation where efforts to confront the past often either are or are perceived to be direct confrontations with current political and military power. Because there is continuity in the State and no rupture from the past, the current-day administration may identify more closely to past regimes, in part because of continuity in the policies, and assume a protectionist posture toward past State crimes as a measure of self-interest.<sup>24</sup> This dynamic is one of the key factors in considering how transitional justice policies and initiatives are contested and challenged in non-transitional contexts.

### **C. Peace v. Justice in a Context of Political Continuity and Ongoing Conflict**

At the heart of transitional justice is often said to be the tensions between the political necessities of securing peace and stability and the imperatives of pursuing justice and accountability. Transitional justice is seen as allowing for discussions and proposals that seek to balance and limit the tensions of the political need to protect a possibly fragile democracy or peace with clamors for justice and truth. While these goals are not inherently in opposition and in many cases are in fact complementary, the existence of tensions cannot be denied. In terms of the magnitude of these tensions and the relative ease of using them to justify retreats from standards of justice and victims' rights, the importance of the degree and nature of the "transition" and the difference between transitional and non-transitional or post-conflict and conflict societies cannot be understated.

The "peace versus justice" debate has been articulated in several ways in Colombia. In the beginning of the process of negotiations with the paramilitaries President Uribe for example said that "in a context of 30,000 terrorists, it must be understood that a definitive peace is the best justice for a nation in which several generations have never lived a single day without the occurrence of a terrorist

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<sup>23</sup> "We are going to have to think of a draft law in Colombia, a revision of the legal order, to avoid the disheartening of the Colombian Armed Forces. It is fine that the Armed Forces have to be effective and have to be transparent, that they have to totally recover the public order and absolutely respect human rights. But there is a big difference between that and mistreating the Armed Forces." Press Release, Office of the President of the Republic, *Yo tengo dolor por las Fuerzas Armadas de Colombia: Presidente Uribe*, June 10, 2010, <http://web.presidencia.gov.co/sp/2010/junio/10/01102010.html>.

<sup>24</sup> For example, upon the conviction of Plazas Vega for the Palace of Justice Seige, President Uribe justified his public pronouncements on the decision of the judiciary regarding events that took place nearly 25 years ago by asserting: "I must speak out. Why? Because as the President of the Republic, I am the Commander of the Armed Forces." *Id.*

act.”<sup>25</sup> However, it soon became clear that such a conception of justice would not be accepted on its face by the international community and domestic civil society in light of evolving and strengthening obligations regarding accountability and victims’ rights.

The Colombian government has become much more adept at speaking in terms of balancing the tensions between justice and peace. As Felipe Gómez Isa cites in his chapter in this book, the Uribe administration repeatedly explained that its formula would be “as much justice as possible, as much impunity as necessary.”<sup>26</sup> Most recently, the Colombian government described the objective of the Justice and Peace Law as seeking to achieve that “delicate balance between the desire for reconciliation of millions of Colombians and the requirements of local and international law.”<sup>27</sup>

Reflected in these representations is that pursuits of justice and legal standards are obstacles for resolving the conflict and reconciling the society. Those who, based on legal and moral arguments, assume contentious stances toward the government and the transitional justice formula it has put forward or confront political and military abuses of the past, are easily converted in the government’s representations into obstacles to attaining peace. With the extreme polarization characteristic of war, the government is quite successful in presenting the leap that if such advocates contest the government’s peace initiatives—whether demobilization of the paramilitaries or the military strategy against the guerillas—these activists necessarily favor the continuation of violence and are thus in alliance with guerillas, terrorists, or criminals. As Michael Reed describes in his contribution to this volume, both official spokespersons and paramilitary leaders have blamed “human rights fundamentalists” for challenges and setbacks in the progress toward peace.<sup>28</sup>

The challenges presented by political continuity and ongoing conflict condition to a significant extent the degree to which the scope and nature of a transitional justice policy can be democratically contested. This is one of the defining differences between situations of post-authoritarian transitions and other situations to which transitional justice may be extended, and one which raises questions as to the adequacy and consequences of applying transitional justice in situations of conflict.

The examples presented above however attest to the fact that despite the hostile and adverse context, pursuits of truth and justice have continued. There are examples to suggest that the arrival of transitional justice has created an opening and additional leverage for such long-standing efforts. The government has adopted the

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<sup>25</sup> Peter Slevin, *Colombian President Defends Amnesty for Paramilitary Troops*, WASH. POST, Oct. 1, 2003, at A17.

<sup>26</sup> See, for example, *El as bajo la manga de los Uribistas*, EL TIEMPO, Feb. 13, 2005.

<sup>27</sup> TRANSITIONAL JUSTICE IN COLOMBIA, *supra* note 6, at 2.

<sup>28</sup> See, in this volume, Michael Reed, *Transitional Justice Under Fire*.



language of transitional justice to pursue its policy objectives, but in doing so may have validated a discussion that it cannot possibly control exclusively. The Courts, civil society, and the victims are actively seeking to contest the scope and depth of the executive-led, political “transition” by embracing transitional justice despite the lack of transition in order to pursue what are seen as related objectives.

Transitional justice in Colombia is in some cases functioning as a field of contention where it is not only the degree and type of justice to be applied during the transition that is up for contention. To some extent, transitional justice language, best-practices, and measures are being adopted in order to fuel long-standing efforts to promote transformation. In this way, transitional justice may serve to contest not only the justice, but the transition.

## II. Transitional Justice as a Field of Contention

Recognizing that, whatever the transitional state of Colombia, it is distinct in several essential ways from other transitional justice cases is a simple task. We could simply classify Colombia as non-transitional by default and conclude that transitional justice has no place. However, the vital and most interesting question remains as to whether, despite the many and important differences, the recourse to transitional justice by analogy is useful for pursuing objectives associated with the field—objectives such as guaranteeing victims’ rights to truth, justice, reparation, and non-repetition; promoting a true and just reconciliation; consolidating democracy; and promoting the rule of law. The concerning corollary question is whether in such non-transitional contexts the adoption of transitional justice by analogy is equally or more effective for pursuing policies that undermine these objectives. Adding significant weight to the suggestion that these are the crucial questions is the fact that regardless of any conceptual inaccuracies, the language of transitional justice has undoubtedly been widely embraced by virtually all of the actors in the public debate in Colombia, and the instruments characteristic to the field are being proposed and implemented. In terms of the impact on the field of transitional justice, we must also then consider the effect such uses might have on how the concepts and instruments of transitional justice are understood, particularly if the trend in exporting the Colombian case is to disregard the fact that the application of transitional justice to Colombia may only be by quite tenuous analogy.

In considering the use of transitional justice in Colombia, Lisa Laplante and Kimberly Theidon (somewhat optimistically) refer to Colombia’s status as “pre-post-conflict.”<sup>29</sup> In addition to demonstrating the conceptual need to analogize in

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<sup>29</sup> Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz*, 28 MICH. J. INT’L L. 49, 51 (2006).

order to bring the Colombian case under a transitional justice rubric, this expression is in fact a helpful descriptive tool. It is quite suggestive of how transitional justice is being applied in Colombia, as well as other contexts of ongoing conflict.<sup>30</sup> Transitional justice is not being used exclusively or even primarily as a channel for inserting justice considerations during a transition; the field of transitional justice has been charged with establishing the foundations for transition—in effect, with carrying out the transition. The Ministry of Foreign Relations recently exemplified this logic: “The results of the experience of transitional justice are creating the perfect environment to end the violent cycle in Colombia.”<sup>31</sup>

Attributing to transitional justice the function of producing the transition in Colombia from conflict to peace is likely an inappropriate and unrealistic extension of the virtues of the field. However, given that transitional justice instruments and objectives are aimed at provoking a certain degree of transformation it is not unreasonable to expect that some change be produced. Nonetheless, for the time being, the change in Colombia remains to be seen; it may be impossible to define or to establish direct links to the measures that have been implemented. The conflict in Colombia is ongoing, and this collection seeks to explore the effect of this context on the development and potential impact of transitional justice.

A difference of transitional justice compared to the particular emphasis of the field of human rights or the fight against impunity is that transitional justice explores areas of social and political change that go beyond the exclusively legal focus<sup>32</sup>. While there are obvious overlaps and complements between all, a difference seems to be found in responses to the question: “why confront the past?” The field of transitional justice offers a more robust response to this question, which may offer greater political and social currency in policy debates. “Properly understood and implemented, transitional justice is as forward-looking as it is backward-looking.”<sup>33</sup> In addition to being grounded firmly on the legal obligations and moral imperatives to address a legacy of mass atrocity and repression, transitional justice as a field has been consolidating arguments, evidence, and experience regarding the cause-and-effect relationship that the degree and nature of justice for the past has with the future construction of democracy, peace, and rule of law.

By intervening in the use of transitional justice approaches or policies, actors can participate in what meaning is given to certain instruments and how that meaning is communicated to the society. In addition to serving as a possible vehicle to expand justice measures and contributing to maximizing their political and social transformative effects, the Colombian case suggests that there is

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<sup>30</sup> For example, in Chapter 16 of this book, *Afghanistan and the Challenge of Non-repetition of Violence*, Patricia Gossman refers to a “not-yet-post-conflict” setting.

<sup>31</sup> TRANSITIONAL JUSTICE IN COLOMBIA, *supra* note 6.

<sup>32</sup> See Arthur, *supra* note 4.

<sup>33</sup> Paul van Zyl, *Promoting Transitional Justice in Post-Conflict Societies*, in SECURITY GOVERNANCE IN POST-CONFLICT PEACEBUILDING 209 (Alan Bryden & Heiner Hanggi eds., 2005).

also the possibility that the recourse to transitional justice allows for a more democratically participative process as to the scope and nature of the transition itself. As asserted above, the official transitional justice project is explicitly limited to illegal armed groups. There was never an impulse or initiative on the part of the public powers negotiating the paramilitary demobilization to confront the legacy of the State's relationship to paramilitarism in the country—in fact quite the opposite is true.

Despite the intense self-protection impulse of the current government in putting forth a transitional justice project, transitional justice coming into play before the establishment of a political transformation has meant that the balancing discussions of transitional justice and the standards and guidelines associated with the field are being inserted into the contentious spaces where the scope of the expected or desired transformation are determined.

The Colombian government presents, and seeks approval for, the transitional justice “experience” of Colombia as a result of the novel and bold balance of interests that it has adopted. But what is clear is that the transitional justice experience in Colombia is a result of the project being wrestled from the exclusive control of the government. The presence of the international community in the process and the participation of domestic civil society are often cited to validate the democratic and transparent nature of the government's process. The boundaries of the transitions and justice in Colombia are highly contested and the way that competing objectives related to peace and justice are being resolved in Colombia is not a reflection of the official preference, but rather despite it. It is in this way that transitional justice may serve as a field of contention. This collection looks at in what instances, in what ways, and with what consequences the contentions present in the recourse to transitional justice language and measures, in both transitional and non-transitional contexts, has served particular objectives or interests more than others and to what extent the prevailing objectives are in accordance or not with those generally assigned to the field of transitional justice.

### **III. Dilemmas of Transitional Justice in Colombia and Comparative Experience**

The studies in the first part of this collection each analyze in depth certain “spaces of contention” in transitional justice in Colombia. The authors examine in detail how the different key players—including the Courts, the administration, civil society, the victims, and the perpetrators—have adopted transitional justice concepts or approaches and how such stances relate to their interests in the contention. The chapters examine what the consequences have been in terms of the shape transitional justice is taking in Colombia and what impact this might have more broadly.

The second part of this volume gathers analysis of foreign experiences with some of the broad questions that are raised by the application of transition justice in non-transitional contexts such as Colombia. The chapters look at contexts of post-authoritarian transition and post-conflict transition, as well as non-transitional cases. Based on their expertise as practitioners and researchers in a particular national context, the authors look at questions such as: the influence of international actors and standards of justice, the impact of transitional justice initiatives on the ordinary operation of domestic legal systems, the role of domestic judicial actors, and contexts of ongoing conflict and violence.

### ***Part I: Colombia***

In **Chapter 1**, Tatiana Rincón explores the complications posed by the partiality of the transitional justice framework through an analysis of key decisions in recent jurisprudence of the Supreme Court of Justice, one of the key actors in shaping transitional justice in Colombia. She notes that in Colombia there are two systems for prosecuting grave and systematic human rights violations that operate simultaneously—the ordinary criminal justice system and the limited, exceptional, “transitional” legal framework of Justice and Peace. Rincón focuses on how the Colombian High Courts have interpreted international law and legal decisions in their pronouncements on the content and design of the transitional justice framework in Colombia and the relationship of these developments with the ordinary criminal jurisdiction.

In **Chapter 2**, Camila de Gamboa analyzes the Uribe administration’s strategies for negotiating with the paramilitary groups starting in 2002, the efforts to design a transitional legal mechanism in this framework, and the administration’s responses to pushback from civil society and the judicial branch. De Gamboa finds such strategies are consistent with a broader tendency on the part of states to use political realism in efforts to reach a negotiated peace. She concludes by presenting a critique from a democratic perspective exposing the risk posed by such stances to efforts seeking to consolidate democracy.

In **Chapter 3**, Michael Reed looks at the conceptual manipulation being employed in order to perpetuate a state of denial in Colombia—particularly as to the gloss put on paramilitarism that constitutes the base of the purported transition. This manipulation has effectively distorted the facts of the Colombian conflict, the interests of the actors, and the standard to be applied to the transition. Reed argues that the Uribe administration’s application and use of transitional justice amounts to a “regime of denial” that has been largely successfully in rewriting the history of paramilitarism in Colombia and allaying the State’s responsibility in violations and perpetuation of the conflict. Throughout the entire process, the government has had shown no qualms about including narcotrafficking into the political-legal framework. Reed concludes that the result of the transitional justice experiment

so far has been a devaluation of human rights standards and the neutralization of civil society and the victims.

In **Chapter 4**, Fionnuala Ní Aoláin and Catherine O'Rourke explore gendered gaps of accountability for violence perpetrated by non-state actors in contexts of negotiated transitions and ongoing conflicts. The authors evaluate minimum humanitarian standards and imputed state liability as potential realms of action for more effectively securing accountability and non-repetition for violence suffered disproportionately by women.

In **Chapter 5**, Felipe Gómez Isa reviews the use of transitional justice discourse in Colombia, and after alerting to major risks, offers a defense of its value despite Colombia's non-transitional characteristics. The author notes the victims' increased presence as political actors, their role in challenging the official rhetoric and impulses, advances made in clarification of the truth, and the establishment of minimum guidelines that may be advantageous in future peace processes.

In **Chapter 6**, Delphine Lecombe explores the tensions experienced in Colombia—those inherent to the field of transitional justice and those originating from Colombia's context of ongoing conflict. As illustrations of how the definitions of transitional justice concepts and instruments are contested in Colombia, Lecombe analyzes the trajectory of the defeated draft Victims' Law, the design and functioning of the National Commission for Reparation and Reconciliation, and representations made during the 2009 International DDR Conference.

In **Chapter 7**, Iván Cepeda explores the conception of crimes against humanity and proposes a definition that more accurately encompasses the social processes and relationships that are both destroyed and reflected in their perpetration. In light of this expanded conception of the crime, concepts of justice and reconciliation can be more scrupulously evaluated. The author explains and contrasts the model of justice put forth by the government (reconciliation) and the model of justice advocated by the victims' organization MOVICE (democracy).

In **Chapter 8**, Gabriel Arias explores the role of civil society in the transitional framework in Colombia. Arias describes the solid history of traditional human rights civil society in Colombia and looks how the application of transitional justice has changed the course of certain segments of that society. The result has been a notable move away from civil society's important place as a counterweight to the excess of the hegemonic power of the State. The text concludes by commenting on the role of international cooperation agencies and the media in this dynamic.

## ***Part II: Comparative Experience***

In **Chapter 9**, Michael Otim and Marieke Wierda analyze the dynamics of the peace process in Uganda. The chapter looks particularly at the influence of ICC involvement in the unfolding of the negotiations and the content of the transitional justice framework that resulted. The authors explain how the nature of the conflict

and its consequences have shaped the varied positions and perceptions of the process. An over-emphasis on formal criminal justice measures at the expense of a more comprehensive strategy is one identifiable impact of ICC intervention and preparation for a potential complementarity challenge.

In **Chapter 10**, Olga Martín-Ortega and Johanna Herman explore and compare the current practices and impact of the hybrid tribunals in Bosnia and Herzegovina and Cambodia. This study considers the potential contributions of prosecutions and tribunals with both international and national elements for the fields of transitional justice, rule-of-law promotion, and peacebuilding. Through comparison, the authors evaluate whether the courts are maximizing their potential positive impact through capacity-building and outreach, as well as the obstacles faced in each situation.

In **Chapter 11**, Leonardo Filippini analyzes the relationship between international law and the political transition in Argentina. Filippini notes that the Argentine legal community is to a large extent quite “permeable” in terms of turning to and accepting domestic application of international law. Exceptions would include the tension around the notion of reconciliation and controversy over the recent reopening of prosecutions. However, international law and oversight bodies cannot be seen as having posed a threat to the political transition; criticism of this sort is actually directed more toward the domestic judicial actors that are driving the legal process. Filippini concludes that developments in international law and in foreign jurisdictions have served to reinforce domestic values and objectives of pursuing justice.

In **Chapter 12**, Howard Varney describes the tradeoff that was designed in South Africa in the hopes of promoting national reconciliation—the truth-for-amnesty incentive formula. This approach demanded a great sacrifice on the part of the victims in terms of their rights. This exceptional formula was explained by the exigencies of the political moment and depended on an obligation on the part of the State to match the incentive with the threat of effective prosecution of those that did not approach the Commission or were deemed ineligible. Varney analyzes the effect of the failure to follow-up on those perpetrators that did not go through the transitional justice process and explores the test of exceptional measures outside the limited context of a transition, particularly in light of the victims’ rights.

In **Chapter 13**, Bogdan Ivanisevic explores the relationship between two sets of criminal justice—transitional justice and regular (“ordinary”) criminal justice—in both Bosnia and Herzegovina and in Serbia. There have been some signs of a positive impact from the special initiatives to criminally prosecute crimes, such as increased professionalism and several important jurisprudential developments. Special prosecutorial mechanisms however are not a panacea to problems in the ordinary justice system and in fact there may in fact be quite limited influence from special mechanisms to the ordinary jurisdiction. The

impact has been the most evident where the international community was directly involved in broader judicial or legal reforms.

In **Chapter 14**, Rigoberto Ochoa analyzes the transition to democracy in Honduras and highlights the common threads between authoritarianism, transition, and electoral democracy. He explores in-depth the types of judicial reform that were enacted and the effects relative to the consolidation of democracy and the rule of law. Ochoa concludes by explaining how the deficiencies in the transition to democracy are reflected in current difficulties for guaranteeing non-repetition.

In **Chapter 15**, Benjamín Cuellar discusses the challenges of non-repetition in the case of El Salvador. Analyzing El Salvador's transitional justice initiatives in light of the Chicago Principles of Post-Conflict Justice, the short- and longer-term negative impact of a lack of political will and strong opposition to particular measures of transitional justice are explored. The chapter concludes by interrogating the correlation between a failure to adequately address the past with the consolidation of power and violence in El Salvador today.

In **Chapter 16**, Patricia Gossman discusses the challenges national and international actors have faced in trying to incorporate transitional justice measures in the context of ongoing conflict in Afghanistan. Gossman evaluates how the major political and military actors have responded to calls for reckoning with the country's legacy of atrocities and analyzes the interconnectedness of corruption, impunity, and conflict in a "not-yet-post-conflict" Afghanistan. The chapter concludes by highlighting the importance of far-reaching and comprehensive reforms, for which the principles that inform transitional justice are highly relevant.

## **Conclusion**

This collection seeks to offer expert analysis on contemporary questions of transitional justice in Colombia and a number of other countries in order to gain insight for Colombia in particular, and on the current field of transitional justice in general. Together this collection of studies consider the domestic effects and nuances of applying transitional justice by analogy, the potential impact on this extended application on the field of transitional justice, and comparative elements and challenges in both transitional and non-transitional contexts. This volume should serve as material for future reflection on and critique of the degree to which, upon which conditions, and to what effect we are able to draw comparisons and extend transitional justice to non-transitional contexts.





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**PART I:**  
**Colombia**

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## Chapter 1

# International Influence on Ordinary Jurisdiction and National Actors: Transitional Justice Processes in Contexts of Armed Conflict

*Tatiana Rincón*

Whether a transitional justice process exists in Colombia is not something that has been accepted peacefully because, among other reasons, the internal armed conflict persists and despite the demobilization of a significant number of paramilitaries, the paramilitary structures have not yet been deactivated or dismantled.<sup>1</sup> Without denying this reality, in this chapter I shall assume the existence of a transitional justice process based on the consideration made by the Colombian Constitutional Court in its ruling C-370 of 2006.<sup>2</sup> For the Constitutional Court, Law 975 of 2005 (Justice and Peace Law) regulates a transitional justice process.<sup>3</sup> The existence of such a process has also been reaffirmed judicially in several decisions issued by the Criminal Cassation Chamber of the Supreme Court of Justice (“Criminal

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<sup>1</sup> Regarding whether or not it is appropriate to speak of a transition from war to peace in Colombia, or even if it is appropriate to refer to a partial transition, see Rodrigo Uprimny & María Paula Saffon, *Usos y abusos de la justicia transicional en Colombia*, 4 Anuario de Derechos Humanos 165 (2008). Among authors who view the Colombian process as one of transitional justice, see KAI AMBOS, *EL MARCO JURÍDICO DE LA JUSTICIA DE TRANSICIÓN* 8 (2008). These authors believe that transitional justice is not limited to post-conflict situations or those involving regime change but that it also has relevance in situations of peace within an ongoing conflict and/or a formal democracy. With respect to the latter, the current Colombian situation is cited as the most important case.

<sup>2</sup> Constitutional Court, ruling C-370 of 2006, No. D-6032, May 18, 2006.

<sup>3</sup> Law 975 of 2005 provides for the reincorporation of members of organized illegal armed groups who effectively contribute to achieving national peace and makes other provisions for humanitarian accords. Article 1, which sets out the objective of this law, establishes that: “The purpose of this Law is to facilitate peace processes and the individual or collective reincorporation of members of illegal armed groups into civilian life, guaranteeing the victims’ rights to truth, justice, and reparation.” This Law provides the demobilized members of illegal armed groups that fulfill certain requirements (set out in Articles 10 and 11) the benefit of alternative sentences ranging from five to eight years imprisonment. In relation to the procedure for obtaining this benefit, the Criminal Cassation Chamber of the Supreme Court of Justice has stated the following:

[R]egarding the objectives of the investigation contemplated in Law 975 of 2005 and other regulatory decrees, in the first place, it is necessary to stress the objective of this transitional justice, which, in addition to facilitating peace processes and individual or collective reincorporation of members of illegal armed groups into civilian life, also includes guaranteeing the victims’ rights to truth, justice, and reparation.

Criminal Cassation Chamber, Supreme Court of Justice, ruling of Feb. 18, 2009, No. 30775, Speaker Magistrate Jorge Luis Quintero Milanés, at 18.

Chamber”), as the second-instance forum for judicial review under the Justice and Peace Law.<sup>4</sup>

Based on this assumption and in accordance with some of the questions suggested by the editors of this volume, my interest in this chapter is to analyze the way in which the highest domestic judicial bodies—particularly the Supreme Court of Justice—have incorporated international human rights standards and the findings of international bodies in their rulings related to the Justice and Peace process. I am specifically interested in the Supreme Court for a number of reasons. First, because it is the court of last resort for the special criminal proceedings provided for under the transitional justice process of the Justice and Peace Law. Second, because the Supreme Court has had to deal with problems related to implementing this special criminal process in the wake of the initial rulings by the Constitutional Court on the unconstitutionality of certain provisions of the Justice and Peace Law and the conditional validity of others. Third, the Court has consequently had the primary role of guaranteeing the protection of the rights of the victim and society in the unfolding of this special process. And finally, it is the court that has made the most progress toward conceptualizing the regulated special criminal proceedings as a transitional justice process.

However, to accept the existence of a transitional justice process in Colombia based on the rulings of its High Courts also implies assuming the particularities of the process. In terms of what I wish to address in this chapter, I consider it necessary to point out two. First, the transitional justice process, at least with respect to criminal investigations, is only being carried out in relation to one of the actors linked to the Colombian armed conflict, namely the paramilitaries.<sup>5</sup> Second, in addition to that limitation, not all of the paramilitaries are linked to the Justice and Peace process. This means that in terms of criminal proceedings in Colombia there are two processes for the investigation, trial, and punishment of grave human rights violations and breaches of international humanitarian law (IHL), which operate in a parallel manner. There is the process provided for in the Justice and Peace Law, a special transitional process; and also the process provided for in the Criminal Procedure Code, part of the ordinary criminal justice system, which is responsible for investigating, trying, and punishing grave human rights violations and breaches of IHL that do not fall under the jurisdiction of Justice and Peace.

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<sup>4</sup> Article 26 of Law 975, regarding recourses and appeals, provides for the following: “Appeal is possible for court orders deciding substantive issues during proceedings and against sentences. They are to be lodged during the same hearing in which the ruling is handed down, and a suspensory effect will be conceded before the Criminal Chamber of the Supreme Court of Justice.”

<sup>5</sup> Even though Law 975 of 2005 generically refers to “illegal armed groups” and a number of members of the guerrilla groups have demobilized individually, the reality is that Justice and Peace proceedings principally involve members of the paramilitary groups. Among other reasons, this is because it was with these groups—or a significant part of them—that the Colombian government negotiated the demobilization and submission to justice.

Thus, for my analysis here, I will also refer to certain recent Supreme Court rulings produced in the ordinary criminal jurisdiction in order to compare the way in which international standards are received in the two justice systems—Justice and Peace and ordinary criminal justice—in a transitional justice setting. This will demonstrate one aspect of the particular complexity of a transitional process in Colombia and reveal certain problems that may need special attention in transitional processes carried out in the midst of an armed conflict.

Part I of this chapter will briefly describe the way in which international human rights law, international humanitarian law, and international criminal law (I will refer to the set as “international human rights law” or “international law”) are received in domestic law in Colombia. In Part II, I will analyze the reception of international human rights law in three recent decisions by the Criminal Cassation Chamber of the Supreme Court of Justice relating to the special criminal proceedings carried out under the Justice and Peace Law, one of which is a related decision but from outside the Justice and Peace framework. Part III will offer an analysis of a recent decision from the Criminal Chamber in the ordinary jurisdiction, in which the central foundations of the ruling draw upon the jurisprudence of this same Chamber in the context of Justice and Peace.<sup>6</sup>

Before beginning to address these three points, I reiterate that the conceptual distinction to which I am referring—between *special criminal proceedings*, as transitional justice proceedings, and *ordinary criminal proceedings*—is a distinction established in the jurisprudence of the Colombian High Courts, and one I will assume for the purposes of this chapter.

## **I. Reception of International Human Rights Standards in Colombian Domestic Law**

International human rights law has been widely received in Colombian domestic law in recent years, with basis in Article 93 of the Colombian Political Constitution and the related constitutional doctrine developed by the Constitutional Court.<sup>7</sup> This reception has facilitated continuous adjustment of domestic law in

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<sup>6</sup> There are numerous rulings by the Criminal Cassation Chamber of the Supreme Court of Justice that would be worthwhile to analyze in terms of their relevance to this discussion. However, in the interest of brevity I shall limit myself to those I have mentioned.

<sup>7</sup> Article 93 of the Colombian Political Constitution establishes the following: “The international treaties and covenants ratified by Congress that recognize human rights and prohibit their limitation during states of emergency have supremacy in the domestic legal order. The rights and duties enshrined in this Charter shall be interpreted in accordance with international human rights treaties ratified by Colombia.” The Constitutional Court has stated, in relation to the constitutional doctrine, that this includes those rules and principles that, without formally appearing in the constitutional text, are used as parameters for constitutional review of the laws, because they have been legally integrated into the Constitution by diverse means

light of international human rights principles and standards, promoted not only by the Constitutional Court but also by the Council of State and the Supreme Court of Justice. It could be said in this regard that the incorporation of international human rights law into Colombian domestic norms is already a part of settled jurisprudence, at least at the level of the High Courts. To that extent, a reflection on the way that transitional justice entities are incorporating international standards and pronouncements into their rulings must take into account that the domestic reception of these standards and principles—both prior and in parallel to the special processes—has been an established practice of the ordinary jurisdiction bodies.

The relationship between the Colombian High Courts and international human rights law, international humanitarian law, and international criminal law has been developing and strengthening in the framework of domestic rulings that have been issued to protect and defend fundamental rights. In this vein, the Constitutional Court, in its ruling C-228 of 2002, developed a wide-ranging concept of victims' rights, which includes the rights to truth, justice, and reparation. With this the Court modified the restricted concept of victims' rights in criminal proceedings found in the Criminal Procedure Code at that time. In this decision, the Constitutional Court expressly referred to developments in the protection of the rights of crime victims both in international law as well as comparative law.<sup>8</sup>

Since this ruling, the Constitutional Court has consolidated and developed its jurisprudence on the rights of victims of crimes and of human rights violations, always reinforcing the link between domestic law and international law—whether human rights and/or international humanitarian law and/or international criminal law.<sup>9</sup> Similarly, a continuous conversation between the High Courts and

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and by mandate of the Constitution itself. They are therefore true principles and rules of constitutional value; that is, they are norms of constitutional stature, despite the fact that they may sometimes contain mechanisms of reform that are different from the rules of the constitutional text *stricto sensu*.

Constitutional Court, ruling C-225 of 1995, No. L.A.T.040, May 18, 1995, Speaker Magistrate Alejandro Martínez Caballero, at 43.

<sup>8</sup> Constitutional Court, ruling C-228 of 2002, Apr. 3, 2002, No. D-3672, Speaker Magistrates Manuel José Cepeda Espinosa & Eduardo Montealegre Lynett. The Constitutional Court had previously ruled on moving beyond the merely economic nature of the civil party in criminal proceedings. In this regard, see also Constitutional Court, ruling C-293 of 1995, July 6, 1995, No. D-810, Speaker Magistrate Carlos Gaviria Díaz; Constitutional Court, ruling C-163 of 2000, Feb. 23, 2000, No. D-2486, Speaker Magistrate Fabio Morón Díaz; Constitutional Court, ruling C-1149 of 2001, Oct. 31, 2001, No. D-3524, Speaker Magistrate Jaime Araujo Rentería.

<sup>9</sup> One expression of the consolidation and continuous development of the jurisprudence of the Colombian Constitutional Court in constant harmony with international law regarding the rights of victims of human rights violations is its jurisprudence with respect to the rights of the internally displaced population. This is particularly evident in ruling T-025 of January 22, 2004 and the various court orders supervising compliance with that ruling. Constitutional Court, ruling T-025 of 2004, Jan. 22, 2004, No. T-653010, Speaker Magistrate Manuel José Cepeda Espinosa. In ruling T-025, the Court declared the current state of internal forced displacement to be unconstitutional. Another expression of this process of consolidation and development in harmony with international

international bodies for human rights protection has favored and empowered the domestic reception of international standards. In this sense, rulings by the Inter-American Court of Human Rights have had particular influence on the reception of these standards.<sup>10</sup> Thus, when the courts (specifically, the Constitutional Court and the Supreme Court of Justice) have interpreted the domestic norms that govern the transitional justice process in light of or adjusted to international principles and standards, what they have done is bring to the transitional justice process a practice that they have been developing and that they continue to develop in relation to the non-transitional legal order.<sup>11</sup>

Ruling C-370 of 2006 of the Constitutional Court was the most significant internal adjustment of the Justice and Peace Law to accord with international principles and standards, at least at the regulatory level—which is not the same as the real effects that the Court’s decision has actually had on the practice of the

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law is the jurisprudence referring to the rights of victims in ordinary criminal proceedings. *See, e.g.*, Constitutional Court ruling C-454 of 2006, June 7, 2006, No. D-5978, Speaker Magistrate Jaime Córdoba Triviño.

<sup>10</sup> In this regard, see Council of State, Administrative Contentious Chamber, Third Section, ruling of Oct. 19, 2007, No. 29.273, Speaker Magistrate Enrique Gil Botero. In this ruling, the Council of State, following the jurisprudence of the Inter-American Court for Human Rights, made a distinction in relation to the right to reparation: on the one hand, cases involving damages deriving from human rights violations and, on the other, those regarding losses resulting from harm to properties or legal interests that do not relate to a person’s human rights. The Council of State considered that this distinction

will make it possible to determine within the framework of domestic law the effects of a pronouncement of an international body or tribunal that decides a case involving the State’s responsibility for human rights violations and, additionally, will serve to determine, in constitutional cases, the powers that the national judge has to put a stop to the threat to or violation of the corresponding right.

*Id.* at 22. In this same ruling, the Council of State introduced the doctrine of “international res judicata,” based on, among others, the following arguments:

[I]t may be affirmed without any hesitation that if there is an international ruling by the Inter-American Court of Human Rights against a State for the violation of one or more human rights, and within that proceeding a binding decision was adopted in relation to a settlement of damages on behalf of the victims and their relatives, at the domestic level the Contentious Administrative Jurisdiction—in the context of an ordinary proceeding for direct reparation—shall declare on its own or upon the petition of one of the parties international res judicata, because it is not viable that a domestic jurisdictional body ignore a ruling handed down within an international framework, particularly when the Inter-American Court generically defines the full responsibility of the State, and does not merely confine itself to the specific aspect of the damage.

*Id.*

<sup>11</sup> Again, in referring to a non-transitional legal order I am speaking of the set of norms that do not directly concern the process of transitional justice. In Colombia a particular practice has been taking shape of differentiating between the norms governing the transitional justice process, understood in a wide-ranging sense (criminal proceedings, civil or administrative proceedings for restitution of property, and other administrative proceedings), and the rest of the legal system. The Criminal Chamber of the Supreme Court of Justice refers, in this sense, to the “legal framework of transitional justice.”

various actors in the judicial system that are responsible for implementing this Law. This ruling is exemplary of the way in which the Colombian High Courts have tried to interpret transitional justice in general, and the Colombian transitional justice process in particular: in harmony with the demands of international standards.<sup>12</sup> As support for its decision, the Court invoked extensively the international human rights norms and jurisprudence that it considered pertinent and relevant to the legal problems that it had to resolve. This has been and continues to be common practice in relation to non-transitional jurisdiction.<sup>13</sup> The Constitutional Court's ruling also took into account its previous jurisprudence regarding victims' rights under the Criminal Procedure Code. In this way, the Court established a consistent jurisprudential line between decisions on non-transitional norms and decisions on the norms governing the transitional justice process. To date this jurisprudential continuity has been maintained. The significant advances that the Constitutional Court made in the above-mentioned ruling regarding protection for the rights of victims of human rights violations to truth, justice, reparation and non-repetition, based to a large extent on international norms, have been taken up repeatedly and extended to subsequent rulings on non-transitional legislation and the protection of fundamental rights.

The influence of international human rights law (including decisions by international bodies) on Colombian domestic law, and particularly in the judgments of its main judicial bodies, has today become a part of the Colombian legal reality. In this sense, it is not strange that the interpretation and application of the norms governing the transitional justice process also respond to that influence. What is noteworthy however, is the way in which this reception of international law has influenced the Supreme Court's developing conceptualization of the transitional criminal proceedings and its difference from the ordinary criminal procedure. Second point of note is how, despite this conceptual difference, the jurisprudence that is beginning to take shape in the Justice and Peace Process is starting to have an effect on judicial rulings issued in ordinary criminal proceedings.

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<sup>12</sup> Ruling C-370 of 2006 is the judgment that introduced the greatest number of essential modifications to Law 975 of 2005, by declaring certain provisions unconstitutional and by modifying other provisions in the process of upholding them. The Constitutional Court has to date issued fourteen rulings of constitutional control of this Law. These rulings are available on the Constitutional Court's website, <http://www.courtconstitucional.gov.co>.

<sup>13</sup> See, for example, Constitutional Court, ruling C-095 of 2007, Feb. 14, 2007, Nos. D-6341 & D-6350, Speaker Magistrate Marco Gerardo Monroy Cabra, in which the Court ruled on the constitutionality of a particular concept of prosecutorial discretion known as the "*principio de oportunidad*." In this ruling the Court prohibited the application of this prosecutorial discretion to crimes amounting to war crimes, crimes against humanity, or genocide under the Rome Statute and other international treaties to which Colombia is a signatory.



## II. The Supreme Court's Reception of International Human Rights Standards in Recent Rulings Related to the Justice and Peace Process

I will refer first to two rulings by the Criminal Cassation Chamber of the Supreme Court of Justice: the first issued on May 12, 2009, and the second on July 31, 2009.<sup>14</sup> These two rulings on the Justice and Peace Law reaffirmed the special nature of the criminal process regulated by the Justice and Peace Law—as a transitional justice law—and based on that factor the Criminal Chamber applied international human rights standards.<sup>15</sup> The question here, as I will try to demonstrate, is not so much the application of these standards, but rather their interpretation by the Criminal Chamber in the Justice and Peace process. Furthermore, the question arises as to whether the same interpretation of these standards should be applied in ordinary criminal proceedings dealing with grave human rights violations and breaches of international humanitarian law. I reiterate in relation to this second question the notion that there are two justice systems operating in parallel: a transitional criminal justice and the ordinary criminal justice.<sup>16</sup>

Additionally, I will refer to a recent ruling issued by the Criminal Chamber denying the extradition of Mr. Luis Edgar Medina Flórez, a demobilized paramilitary in the Justice and Peace Process.<sup>17</sup> In this opinion, the Criminal Chamber diverged from its previous jurisprudence, denying the extradition based on the Colombian State's international human rights commitments and particularly the implication of those commitments for the rights of the victims to truth and reparation in the Justice and Peace process.

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<sup>14</sup> Criminal Cassation Chamber, Supreme Court of Justice, ruling of May 12, 2009, No. 31150, Speaker Magistrate Augusto Ibáñez Guzmán; Criminal Cassation Chamber, Supreme Court of Justice, ruling of July 31, 2009, No. 31539, Speaker Magistrate Augusto Ibáñez Guzmán. For convenience, I will refer to these rulings by the date on which they were issued.

<sup>15</sup> For information on all of the rulings that the Criminal Cassation Chamber of the Supreme Court of Justice has issued in the context of Justice and Peace, see the *Índice temático: Ley de Justicia y Paz*, maintained by the Court itself and available at the Court's website: <http://190.24.134.121/webesj/Consulta>.

<sup>16</sup> I reiterate that the distinction between the two systems of justice is one that is reinforced in the jurisprudence of the Criminal Cassation Chamber of the Supreme Court of Justice, which expressly refers to “transitional justice” when it alludes to the special criminal process regulated by the Justice and Peace Law. This is based on the fact that the process of judicial clarification provided for in Law 975 of 2005 is not only a special criminal process inside a transitional justice process—the Law also presupposes the establishment of Justice and Peace Units in the Attorney General's Office, Justice and Peace Chambers in the various district courts, and the right of appeal to the Criminal Cassation Chamber of the Supreme Court of Justice.

<sup>17</sup> Criminal Cassation Chamber, Supreme Court of Justice, ruling of Aug. 19, 2009, No. 30451, Speaker Magistrate Yesid Ramírez Bastidas.

## A. The Justice and Peace Rulings of May 12, 2009 and July 31, 2009

### 1. Ruling of May 12, 2009

In this decision resolving several appeals motions, the Criminal Chamber clarified a number of points, of which I will highlight three. First, the Criminal Chamber reaffirmed a clear distinction between the process provided for in the Justice and Peace Law—a transitional justice law—and the ordinary criminal justice system. The Criminal Chamber stated the following:

The Chamber observes *ab initio* that the decision of the court *a quo* departs from the political-criminal structure and purposes of Law 975 of 2005. Because of the Law's unique nature it cannot be based on the legal requirements for the adversarial process in the Code of Criminal Procedure—Law 906 of 2004—except the provisions of article 62. This is because the right to truth, justice, and reparation demands that we follow the regulations specifically designed to promote the process of national reconciliation, as established in article 2, subsection 1, of Decree 3391 of 2006, which partially regulates that framework.<sup>18</sup>

This distinction is the key to understanding the Chamber's second clarification that I would like to highlight: the significance and role of the confession in the Justice and Peace process. According to the Criminal Chamber, the Justice and Peace process does not have an adversarial character because it is assumed that the demobilized person who submits to Law 975 of 2005 does so voluntarily. The law requires voluntary submission in order to obtain the benefit of alternative sentencing. Therefore, the significance of that person's confession is different from that of a confession in an ordinary criminal proceeding. For the Criminal Chamber, a confession in the Justice and Peace process has three characteristics: (1) it is a component of the truth, within the goal of reconciliation to which the Justice and Peace Law aspires; (2) it is a requirement provided for in the law in order to

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<sup>18</sup> Ruling of May 12, 2009, at 24-25. Decree 3391, art. 2(1) states the following:

Law 975 of 2005 enshrined a special criminal justice policy for restorative justice for the transition towards the achievement of a sustainable peace, through which it facilitates the demobilization and reinsertion of the illegal armed groups, cessation of the violence perpetrated by them and their illicit activities, the non-repetition of those crimes, and the recovery of institutional rule of law, guaranteeing the victims' rights to truth, justice, and reparation. To this effect, the integrated procedure established in this law includes an effective judicial procedure for investigation, trial, sanction, and offering of incentives to demobilized persons from the illegal armed groups, in which the victims have the opportunity to exercise their rights to know the truth about the circumstances in which the punishable acts took place and to obtain reparation for the damage suffered.

participate in the process; and (3) it is an evidentiary element to be assessed critically and according to rules of testimony. I will focus on the first of these aspects.

The confession is the backbone of the Justice and Peace process, which depends on the suspension of the presumption of innocence and of the guarantee against self-incrimination: whoever agrees to participate in the process accepts from the outset their membership in a criminal enterprise (an illegal armed group) and the commission of crimes pursuant to that membership during the period in which it lasted. In the words of the Criminal Chamber: “Under Law 906 of 2004 [Criminal Procedure Code] the prosecution has the burden of disproving the presumption of innocence, whereas in Law 975 of 2005, the renunciation of that guarantee is the starting point for preliminarily—but not exclusively—bringing the process (the truth) to fruition.”<sup>19</sup>

What then is the significance or role, under these conditions, of a confession in the Justice and Peace Process? It is an element of truth; however, it is not only an element of criminal procedural truth but essentially of historical truth. This is because that is the truth that the Justice and Peace process must guarantee pursuant to the international standards invoked and interpreted by the Criminal Chamber. In previous rulings, the Criminal Chamber had already referred to this goal of the transitional justice process. Its references to the guarantee of the right to truth have understood the concept of truth in a much broader sense than mere knowledge of the facts. For example, in a ruling issued on July 23, 2008, the Criminal Chamber stated:

[I]n the realm of Justice and Peace, *the truth* in addition to being the guiding principle and objective and a right of the victims and of society, becomes a duty of the State; an investigative responsibility for the public servants that are operators of this special and transitional justice; an assumption and obligation for those who submit to the procedure and benefits of Law 975 of 2005; and grounds for loss of the benefit of alternative sentencing if they were to omit or divide it.<sup>20</sup>

Regarding the scope of the right to know the truth, the Chamber stated in this same ruling that this right “transcends basic information regarding the acts and includes knowledge of the perpetrators, causes, ways, and motives of those acts, as well as the fact that they amount to human rights violations and breaches of international humanitarian law.”<sup>21</sup> In this way, the responsibility of the demobilized person that confesses in Justice and Peace refers to historical truth as well as the reconstruction of the collective memory:

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<sup>19</sup> Ruling of May 12, 2009, at 32.

<sup>20</sup> Criminal Cassation Chamber, Supreme Court of Justice, ruling of July 23, 2008, No. 30120, Speaker Magistrate Alfredo Gómez Quintero, at 25.

<sup>21</sup> *Id.* at 23.

As a component of truth, the confession tends to be characterized as one of the forms of reparation aimed at preventing collective memory from being forgotten, as established under principal 2 of Joinet's *Set of Principles for the Protection and Promotion of Human Rights through Action to Prevent Impunity*. The collective right to know the truth implies that society as a whole discover the truth about what happened along with the reasons and circumstances in which the crimes were committed; it emerges as a form of historical reconstruction, in that it shows how the legal system of a particular society seeks to build the future by redesigning the past and its relationship to it.

The reconstruction of collective memory is a responsibility for those who submit to the Justice and Peace Law, by virtue of their commitment to completely and truthfully confess the crimes committed within the armed apparatus of power, renouncing, with respect to what they have admitted, the procedural guarantee of the presumption of innocence. Their task is irreplaceable because in their narrative they are to make the victims visible, reconstruct the shared past, and project reconciliation based on what cannot be repeated.<sup>22</sup>

In that case, if the confession is the backbone of the Justice and Peace process and its essential significance is as an element of historical truth and reconstruction of collective memory, how can the process guarantee that it will in fact fulfill that role in a criminal investigation? While Justice and Peace is a special process, it is above all a criminal investigation proceeding and the confession, as an evidentiary element, must address potentially criminal acts, the victims of those acts, the places where they occurred, those who participated in them, and the manner in which they were committed. This is the minimum content to be expected in a full and truthful confession by demobilized individuals that submit to the Justice and Peace Law.

But how can each of these aspects be assembled into a historical truth that also examines the causes? For the Chamber, the nexus between the individual confession of a demobilized person and its character as an element of historical truth and collective memory is in the *modus operandi*: the *modus operandi* described in the individual confession must be projected onto the background of criminal patterns. These patterns are not given in the confession but must instead be previously established by the investigative authority (the Justice and Peace prosecutor), based on the context. In this way the confession can be validated as an element of historical truth and reconstruction of the collective memory based on patterns and contexts; it does not need to be contrasted with other elements of proof and does not require other validation criteria. Those contexts and patterns are sufficient for the application of "*sana crítica*" or

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<sup>22</sup> Ruling of May 12, 2009, at 30-31 (internal citations omitted).

logical deduction, the method for authenticating or validating evidence adopted in Colombian criminal law.

This brings us to the third clarification of the Criminal Chamber that I would like to highlight. Why are these contexts and patterns sufficient? They are sufficient because the confession is produced in a transitional process, which according to the Chamber must be guided by different evidentiary criteria—less formal and more flexible. The Justice and Peace process centers on investigations of grave, systematic, and massive human rights violations that were committed under conditions that make it impossible to use evidence and evidentiary criteria that would be proper in ordinary criminal proceedings; consequently other criteria must be applied. But how can these considerations and conclusions be supported? The Criminal Chamber looks to the evidentiary standards established by the Inter-American Court of Human Rights, as a court that investigates, *inter alia*, grave human rights violations. In the words of the Criminal Chamber:

It is illustrative, for the purpose of this ruling, to examine the Velásquez Rodríguez case, where the Inter-American Court of Human Rights ruled against the State of Honduras for the disappearance of its citizen, Manfredo Velásquez Rodríguez, emphasizing that this disappearance was part of a pattern of forced disappearances perpetrated by the Honduran military forces between 1981 and 1984; in other words, even without other elements of proof, the criminal pattern permitted the inference.

One observation regarding the lack of evidentiary records before the Inter-American Court of Human Rights proposes a way to examine the evidence taking into account the particularities found in cases of grave human rights violations, which without neglecting legality and due process has made it less formal and more flexible.

Undoubtedly, the complexity of reconstructing the facts due to the intensity of the conflict and the barbarity of the methods used in carrying out the crimes (chopping the victims' bodies into pieces, mass graves), along with the difficulties related to the passing of time in many cases, deficient civil records (births, deaths) in notary and commercial registries, constant movement of displaced communities, among so many other difficulties, make it necessary to examine the context and be more flexible about evidentiary thresholds, not only with respect to verifying the narrative of the person making the confession, but above all regarding the damage caused, which must be proven using methods appropriate for transitional justice.<sup>23</sup>

In this way the confession, projected onto criminal patterns, reconstructed and established through the use of context, serves to reaffirm the patterns—the

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<sup>23</sup> Ruling of May 12, 2009, at 37-38.

modus operandi is in fact an expression of those patterns. The confession validates itself and inscribes its narrative in a much wider horizon, a horizon that is at the same time history and memory.

We can therefore see that for the Criminal Chamber there is a substantial difference between the Justice and Peace process and the ordinary criminal process. This difference is evident in, among other aspects, the suspension of the presumption of innocence and of the guarantee against self-incrimination. Based on this suspension, the confession becomes an essential element of the historical truth and the reconstruction of collective memory—obligatory objectives of the Justice and Peace process according to international standards. The confession, understood in that sense, is validated as evidence according to less formal and more flexible criteria appropriate for a transitional justice process which, like the Inter-American Court of Human Rights, must deal with the investigation of grave, massive, and systematic human rights violations. It is in this way that the evidentiary criteria used by the Inter-American Court have been applied to the Justice and Peace Process.

Surely there are a number of questions that arise regarding this jurisprudential construction by the Colombian Criminal Cassation Chamber of the Supreme Court of Justice. In the conclusion to this subsection (Part III.C) I will suggest two. Could this jurisprudence be transferred to investigations into grave violations of human rights and IHL carried out in the ordinary criminal justice system? If by virtue of the principles of due process and the guarantees inherent to criminal proceedings this jurisprudence cannot be transferred to the ordinary criminal justice system, would that not result in unequal treatment in terms of clarification of the truth and reparation for the victims of situations that are just as grave and involve the same systematic and/or massive patterns? We must recall that in Colombia two justice systems for investigating grave, systematic, and massive violations of human rights and breaches of IHL operate simultaneously and in parallel.

## ***2. Ruling of July 31, 2009***

In the second ruling of interest here, the Criminal Chamber was to rule on several motions of appeal filed against the first sentence handed down by a Justice and Peace Tribunal. The Chamber ruled that there had been substantial irregularities in the procedure. Thus the Chamber did not rule on the motions of appeal but instead declared the partial nullity of the proceedings, sending the case back to the initial procedural stages. Beyond the declaration of nullity, most relevant to the Criminal Chamber's developing conceptualization of the transitional justice process are the arguments made to justify that decision and the way in which the Chamber invoked international human rights law and international humanitarian law. Below I will reconstruct the arguments in the following manner: (1) arguments directly linked to the declaration of nullity (what we could call the *ratio decidendi*

of the Criminal Chamber's pronouncement) and (2) general arguments, which refer to the logic of the Justice and Peace process.

In relation to the first set of arguments, the Criminal Chamber found that the formulation of charges and the sentence in the lower court had failed to include the offense of criminal conspiracy ("*concierto para delinquir*"). As a result of this omission, the declaration by the defendant Mr. Wilson Salazar Carrascal did not include accepting responsibility for having been part of an illegal organization and his entry into a criminal organization for illicit ends. In the view of the Chamber, criminal conspiracy is a substantive element of the Justice and Peace process and therefore a mandatory component in the indictment, the formulation/acceptance of charges, and the judgment awarding the benefit of alternative sentencing.<sup>24</sup> The omission of the crime of criminal conspiracy therefore constituted a cause for nullity.

The Criminal Chamber based this consideration on the criminal policy objectives provided for in the Justice and Peace Law itself, which "have to do with massive and systematic human rights violations, whose trial and verdict focus on the link to an illegal armed group"—a link that is captured in the crime of conspiracy and not under punishable conducts that are committed individually.<sup>25</sup> According to the Criminal Chamber, the investigation and trial of isolated conducts would not correspond to the Justice and Peace Process but rather to the ordinary justice system:

In the framework of the normative regulation of Law 975 of 2005, the attributed criminal activities involve phenomena characteristic of organized criminality, whose execution and consummation occur within the context of internal conspiring of each bloc or front. Based on this assumption, construction of the historical truth must start with clarifying the motives for which the illegal organization was set up, the chains of command, the group's criminal model, the power structure, the orders issued, the criminal plans made, the criminal actions that its members took to systematically achieve its objectives, the reasons for the victimization and the verification of individual and collective damages, in order to establish both the responsibility of the illegal armed group as well as that of the demobilized individual.<sup>26</sup>

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<sup>24</sup> The procedure regulated in the Justice and Peace Law provides for various phases: the *versión libre* (voluntary declaration) proceeding; the hearing to formulate the indictment (based on which the Justice and Peace prosecutor carries out his or her investigation and verification of the facts provided by the accused); the hearing to formulate (and accept) the charges; the public hearing to determine the comprehensive reparation; and the public hearing in which the sentence is handed down.

<sup>25</sup> Ruling of July 31, 2009, at 6.

<sup>26</sup> *Id.* at 4-5.

This is the framework and objective for investigation and trial in the Justice and Peace process—in other words, the transitional criminal process. According to the Chamber, the Justice and Peace mandate for constructing historical truth marks another important difference compared to the ordinary criminal proceedings: transitional Justice and Peace proceedings investigate massive and systematic human rights violations, whereas ordinary criminal proceedings investigate individual conduct. In the former, individual responsibility is essentially tied to the structure of the criminal enterprise and the systematic and generalized nature of its operations. In the latter, the person under investigation takes part in the proceedings merely as an individual.

In addition to these considerations and arguments, the Criminal Chamber took the opportunity of its ruling of July 31, 2009 to recall some of the guidelines already set forth regarding Justice and Peace proceedings. These guidelines include the duty of Justice and Peace prosecutors and magistrates to observe both internal regulations and those that are part of the constitutional doctrine, as well as the rulings handed down by international bodies “such as the Human Rights Committee, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights.”<sup>27</sup> Invoking this duty in relation to the transitional criminal process enabled the Criminal Chamber to suggest that, given the framework of this process and its objective for investigation and trial, the prosecutors and magistrates must apply the criminal classifications that guarantee criminal reproach of conduct perpetrated against the civilian population in the context of the armed conflict which could be characterized as criminal acts according to national or international law at the time that they were committed.<sup>28</sup> The Criminal Chamber suggested as an example the homicide of a protected person, which was categorized as a crime under domestic law only in 2000 but was contemplated as such in Common Article 3 of the four Geneva Conventions of 1949 and in Article 4 of Additional Protocol II of these Conventions (1979). The Criminal Chamber apparently used these guidelines to conclude that in Justice and Peace proceedings the judicial authorities should investigate and punish conducts

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<sup>27</sup> *Id.* at 17.

<sup>28</sup> The Criminal Chamber of the Supreme Court expressly referred to Article 15 of the International Covenant on Civil and Political Rights, which establishes the following:

1. No one shall be sentenced for actions or omissions that, at the time they were committed, were not crimes according to national or international law. Nor shall a penalty be imposed that is graver than what was applicable at the time when the crime was committed. If subsequent to the commission of the crime the law provides for the imposition of a lesser penalty, the criminal shall benefit from it.
2. Nothing in the provisions of this article shall prevent the trial court sentencing of a person for actions or omissions that, at the time they were committed, crimes according to the general principles of the law recognized by the international community.

International Covenant on Civil and Political Rights, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.



committed before they were criminalized under domestic law if they were already considered as crimes under international law at the time of commission.

Other guidelines reiterated by the Criminal Chamber in this ruling refer to actions by the prosecution. For the purpose of this analysis, the most relevant are those that guide the Justice and Peace prosecutors' methodological plan for investigation, which should guarantee that the investigation effectively contributes to the historical truth, in this case, in order to guarantee non-repetition. According to the Criminal Chamber, the working strategy of these prosecutors must be based on two minimum presumptions: "(i) that the Justice and Peace candidate is a confessed transgressor of the crime of aggravated criminal conspiracy and (ii) that his or her militancy was carried out during a specific timeframe and in specific places. The correlated study is to focus on the damages caused individually and collectively by the demobilized person."<sup>29</sup> According to the Criminal Chamber, following this strategy will lead the prosecution "to a truth that shall be judicially declared and subsequently disseminated and sanctioned, and based on this there will be catharsis in order to guarantee the non-repetition of this type of criminality."<sup>30</sup>

According to the jurisprudence established by the Criminal Chamber in this ruling along with what was previously stated, we have on one hand, that transitional criminal justice investigates crimes committed by organized power apparatuses (or criminal enterprises) and not individual crimes, and on the other, that this justice should guarantee criminal reproach of conducts that violate international human rights law and/or IHL if they were conducts codified by these international regulatory systems at the time of their commission, even when, at that time they were not criminalized under domestic law. The two questions that I posed above—regarding whether this jurisprudence can be transferred, and if not, whether this raises equality concerns—are also valid with regard to this jurisprudence. I will now turn to the conclusions that can be drawn regarding these questions.

### ***3. Reflections on this Justice and Peace Jurisprudence***

The first question that I pose is whether the Justice and Peace jurisprudence of the Criminal Cassation Chamber of the Supreme Court of Justice can be transferred to investigations of grave violations of human rights and breaches of IHL in the ordinary criminal justice system. Several considerations make this transfer seem dubious. First is the criteria for assessing the evidence, which are made more flexible and less formal and which, in particular, involve a confession and the evidence of patterns of criminality. Transference of these criteria to the ordinary

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<sup>29</sup> Ruling of July 31, 2009, at 21 (citing Criminal Cassation Chamber, Supreme Court of Justice, ruling of May 28, 2008, No. 29560, Speaker Magistrate Augusto Ibáñez Guzmán).

<sup>30</sup> *Id.*

criminal justice process would weaken the position of the accused in relation to the evidentiary power of the State, and the question is whether or not this would mean ignoring the principles of legal guarantees contained in the current accusatory criminal system.

A second consideration has to do with the investigation and trial of conduct that was not classified as a crime under domestic law at the time when it was committed but was codified under international law (such as the homicide of a protected person, as suggested by the Criminal Chamber). The transference of this jurisprudence to the ordinary criminal process could clash with the principle of legality that in the case of Colombia is expressly recognized in the Criminal Procedure Code.<sup>31</sup>

A final consideration has to do with the Criminal Chamber's statement about the investigation of criminal enterprises as the duty of the Justice and Peace authorities and the investigation of mere individual conduct as the competence of the ordinary criminal justice system. The question arises as to whether the investigation of criminal enterprises responsible for massive and systematic human rights violations is exclusively a matter for the transitional justice system and if the implication then is that the ordinary criminal justice system does not have the obligation to carry out investigations of that type.

I do not consider here the suspension of the presumption of innocence and the guarantee against self-incrimination, in light of the fact that in the Colombian transitional process this suspension is based on the demobilized individual's voluntary submission to transitional criminal justice and is a specific characteristic of this process.

If based on considerations relating to the right to due process with full guarantees in contexts of non-transitional ordinary criminal justice we determine that such jurisprudence cannot be transferred, another question (among others) arises—whether this results in unequal treatment in terms of clarification of the truth and reparation for the victims of acts that have the same gravity and also respond to systematic and/or massive patterns, thereby contravening the same international standards and principles invoked by the Criminal Chamber in order to apply different criteria in transitional criminal justice

It could be that this question, and the concerns expressed therein, would be irrelevant in post-transitional scenarios in which there is a presumed rupture with the past. In such scenarios, at least on the theoretical level it is expected that criminal justice will function, in a society that seeks once the transition has ended to strengthen democracy and human rights, guaranteeing the full range of due process rights. In a post-transitional society, it is assumed that transitional justice has responded to

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<sup>31</sup> Criminal Procedure Code (Law 906 of 2004), art. 6, para. 1 (“No one shall be investigated or tried except in accordance with the procedural laws in effect at the moment of the events and while observing the appropriate forms in each case.”).

the massive and systematic crimes of the past and that criminal justice can dedicate itself to addressing the criminality of contexts of peace and democracy.

However, the question is indeed significant and relevant in a case such as the Colombian one—where not only has the process of transition not finished but it is absolutely partial (assuming, as I am here, the premise of its existence). Additionally, many of the investigations and trials for grave, massive, and systematic human rights violations continue to be handled by the ordinary criminal justice system. The ordinary criminal justice system has competence not only over massive and systematic crimes committed in the past, by the armed groups that have not demobilized and by agents of the State, but also over massive and systematic crimes that continue to be carried out in the context of an armed conflict that has not ended.

How can or should these proceedings be carried out in parallel with transitional proceedings? Can the more flexible and less formal criteria for assessing evidence be transferred in order to facilitate the work of investigation or should the criteria of ordinary criminal proceedings be maintained despite the difficulty that this causes, in many cases, in terms of combating impunity? In Colombia, the *modus operandi* of those responsible for massive and systematic human rights violations includes eliminating or making it difficult to obtain evidence and terrorizing the population and the victims. This reality is present both in acts falling within the competence of the Justice and Peace authorities as well as those of the ordinary jurisdiction. How should these cases be treated? In the ordinary jurisdiction, how can a correct balance be achieved between on the one hand the fundamental rights of the defendant and on the other the victims' fundamental rights and society's right to know the truth?

And, in relation to conducts that were not classified as crimes at the time that they were committed, does this exempt the ordinary criminal justice system from investigating and prosecuting them? What implications does this exemption have regarding clarification of the truth and guaranteeing the rights of the victims of those conducts? How can unequal treatment be avoided in terms of criminal reproach for victims of the same type of conducts during the same time frame who, moreover, frequently know each other?

Finally, and in relation to the division of investigative tasks between transitional criminal justice and ordinary criminal justice, what does it mean to say, as the Criminal Chamber has, that the investigation of criminal enterprises is the duty of the Justice and Peace proceedings whereas the investigation of individual conducts corresponds to ordinary criminal justice proceedings? It could reasonably be assumed that, if the ordinary criminal justice system must continue carrying out many of the investigations and trials for grave, massive, and systematic human rights violations committed in the context of the armed conflict, it would also have to investigate criminal enterprises as well as shed light on the historical truth. Whether it is one set of processes and procedures or the other does

not in any way change the nature of the grave human rights violations or their systematic and/or widespread character; nor does it in any way change the rights that, in accordance with international human rights law, the victims of these types of violations as well as the society in which they take place have to the truth. That being the case, in a context such as Colombia, why should it be considered that the responsibility to investigate criminal enterprises and to guarantee construction of historical truth and reconstruction of the collective memory belongs only to transitional criminal processes?

I do not have answers to the questions that I pose here, but I pose them in order to expose the particular difficulties that transitional justice processes must address when they are carried out in the midst of ongoing armed conflicts that continue to produce grave, massive, and systematic violations of human rights and IHL. I do not think that the response is to say that in these cases we are not dealing with transitional processes—this answer is too easy and could be denying realities. Nor do I feel that the answer is to say that those grave, massive, and systematic violations of human rights must wait for new negotiations and other applicable transitional mechanisms in order to be investigated and tried in accordance with the standards that the Criminal Cassation Chamber of the Supreme Court of Justice applies to Justice and Peace proceedings. In addition to being a response that could end up validating unequal treatment for victims of the same type of human rights violations, it would be contrary to international human rights standards in the field of investigation of such violations.

The Inter-American Court ruling that is the background to the nucleus of the Criminal Chamber's jurisprudence that I have analyzed here was not a ruling to address transitional processes, but rather grave human rights violations.<sup>32</sup> In this sense, I see the Justice and Peace jurisprudence of the Criminal Chamber as demonstrating a different need—one that has to do with the way in which, in a context of active armed conflict, it can (and perhaps should) harmonize transitional and non-transitional mechanisms. In the case of criminal proceedings, this harmonization must take into account the way in which international human rights standards are applied in the different systems, transitional and non-transitional. Given that transitional criminal proceedings operate in a reality that is not completely transitional, they cannot operate in a compartmentalized fashion. They must take into account the links that bind them to the ordinary proceedings that continue to deal with the same type of human rights violations that they are investigating.

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<sup>32</sup> I am referring to the ruling by the Inter-American Court in the Case of the Rochela Massacre v. Colombia, Merits, Reparations and Costs, 2007 Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007). In more recent rulings, the Inter-American Court has reaffirmed its jurisprudence on the obligation of states to assess the systematic patterns that enabled the commission of grave human rights violations in their investigations, and to do so based on evidence and evidentiary criteria relevant to that requirement. *See, e.g.*, Case of Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, 2009 Inter-Am. Ct. H.R. (ser. C) No. 209 (Nov. 23, 2009).

## **B. The Criminal Cassation Chamber's Ruling on the Solicitation to Extradite Mr. Luis Edgar Medina Flórez**

On August 19, 2009, the Criminal Cassation Chamber of the Supreme Court of Justice issued an opinion denying the extradition to the United States of Mr. Luis Edgar Medina Flórez, a demobilized member of the paramilitary forces who had submitted to the procedure of Law 975 of 2005.<sup>33</sup> The arguments for denying the extradition were: “(i) it violates the spirit of Law 975 of 2005; (ii) it ignores the rights of the victims; (iii) it traumatizes the functioning of the administration of Colombian justice; and (iv) the gravity of the crimes committed by the citizen for which extradition is sought is less than that of the crimes for which he is accused in Colombia.”<sup>34</sup> I will refer to these four arguments because they are all based on the jurisprudence that both the Constitutional Court and the Supreme Court have been developing with regard to the meaning of transitional criminal justice and with respect to guaranteeing the rights to truth, justice, and reparation in that context. I will look more closely at the last argument because it is the one that refers most extensively to provisions of international law.

In relation to the first argument, the Criminal Chamber recalled that truth, justice and reparation are central tenets of the Justice and Peace Law, which “places particular importance on the rights of the victims.”<sup>35</sup> The Chamber therefore considered that both the Colombian government as well as the national and international community have an interest in seeing that the grave crimes committed by the paramilitary groups “are fully clarified and that the punitive consequences authorized by the laws are imposed.”<sup>36</sup> Otherwise, in the words of the Chamber, this would constitute a violation of “society’s right to clarify processes of macro-criminality that massively and systematically affect the human rights of the population, [which also] are constitutional rights.”<sup>37</sup> Therefore:

[W]hile the judicial authorities are authorized to carry out special proceedings provided for under Law 975, the demobilized persons who have submitted to this law have the obligation to confess to crimes committed, indictment hearings are being carried out, and the corresponding rulings are being issued, the judges and prosecutors have the unavoidable duty to make the principles of truth, justice and reparation prevail in the domestic code.<sup>38</sup>

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<sup>33</sup> In 2008, the Colombian Government extradited to the United States fifteen paramilitary leaders linked to Justice and Peace proceedings and in 2009 extradited more of these leaders. The Criminal Chamber issued opinions approving extradition in these cases.

<sup>34</sup> Ruling of Aug. 19, 2009, at 23.

<sup>35</sup> *Id.* at 24.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 25.

In relation to the second argument, the Criminal Chamber extensively cited the jurisprudence of the Constitutional Court on the rights of victims, including pronouncements related to exercise of these rights in proceedings in contexts and modalities of transitional justice. Pursuant to that jurisprudence, the Criminal Chamber stated the following

In the face of human rights violations, the State must guarantee the victims effective legal recourse that provides adequate results or answers; this amounts to saying, precisely, that a poor simulation of justice is not the same thing as doing justice. In other words, we consider justice done and an effective legal recourse offered only when those who have suffered the human rights violation, those who have been victims of crimes committed by the paramilitary groups, or their family members, obtain truth, justice, and reparation.<sup>39</sup>

For the Chamber, the experience of the earlier extraditions of paramilitaries has shown that it is not possible for them to continue confessing their crimes, thereby paralyzing knowledge of the truth and affecting the rights of the victims and of society to truth and non-repetition. Therefore, the Supreme Court could not accept

that in addition to the relative impunity that is imparted in the Justice and Peace proceedings, the truth also be undermined by impeding the demobilized individuals who have submitted to Law 975 from telling about the crimes committed and asking forgiveness from the victims and that, along with the authorities, providing guarantees of non-repetition as well as adequate reparations for the victims while respecting their dignity.<sup>40</sup>

In relation to the third argument, the Chamber considered, among other questions, that persons requested for extradition that have demobilized and are confessing the crimes committed personally or by their criminal organization “must conclude their declarations so that the Colombian justice system can issue the definitive pronouncements that are expected”<sup>41</sup> The Chamber also found it unacceptable that the peace process promoted by the national government aimed at demobilizing the paramilitaries “become subject to foreign governments and their goodwill in order to permit reconstruction of the truth for which Colombian society cries out so strongly.”<sup>42</sup>

Finally, and in relation to the last argument, the Criminal Chamber considered several arguments, each of which it supported with reference to international

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<sup>39</sup> Ruling of Aug. 19, 2009, at 31-32.

<sup>40</sup> *Id.* at 33.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 34.

human rights law and international criminal law. Thus, it concluded that due to the fact that paramilitaries linked to the special process enshrined in the Justice and Peace Law

have confessed at least to the crime of belonging to an armed group, which, when examined in light of the criminal objectives of the paramilitary groups amounts to a crime against humanity, there is no doubt that the gravity of drug trafficking pales in comparison with the crimes of genocide, homicide of a protected person, forced disappearance and displacement, torture and others, committed during recent decades by members of the demobilized paramilitary groups.<sup>43</sup>

The crimes committed by the paramilitaries are also crimes prosecuted by international criminal courts, which is not the case with drug trafficking—making drug-trafficking a crime of the second order in the judgment of the Criminal Chamber. Under such conditions, it is clear for the Chamber that to give precedence to domestic justice in relation to the type of crimes committed by the paramilitaries “shields the Colombian State from the possibility of intervention by the International Criminal Court.”<sup>44</sup> Or, to put it another way, as the Chamber itself manifested:

[A]uthorizing the extradition of a Colombian national required abroad for the crime of drug trafficking, knowing that this same person must also respond for the gravest crimes against humanity, constitutes a form of impunity that the above-mentioned International Court repudiates and which authorizes it to intervene in those states that sponsor such practices.<sup>45</sup>

To complete its arguments, the Criminal Chamber adopted the jurisprudence of the Inter-American Court regarding the obligation to investigate and try grave human rights violations that it had recently reiterated in a follow-up resolution on compliance with its ruling in the *Case of the Mapiripán Massacre v. Colombia*. In this resolution, the Inter-American Court stated that “in the decisions regarding the application of certain procedural concepts to one person, the accusation of serious human rights violations must prevail. The application of concepts like the extradition must not serve as a means to favor, foster or guarantee impunity.”<sup>46</sup>

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<sup>43</sup> *Id.* at 34-35 (internal citation omitted).

<sup>44</sup> Ruling of Aug. 19, 2009, at 36.

<sup>45</sup> *Id.* (internal citation omitted).

<sup>46</sup> *Case of the Mapiripán Massacre v. Colombia*, Monitoring Compliance with Judgment, 2009 Inter-Am. Ct. H.R. (ser. C) No. 122, para. 41 (July 8, 2009). In this same part, which is cited by the Criminal Chamber, the Inter-American Court also stated that:

[B]ased on the lack of agreement as to the judicial cooperation between the States that arranged such extradition, it falls upon Colombia to clarify the mechanisms, instruments and legal concepts that shall be applied to guarantee

This opinion—regarding an extradition request—includes several aspects developed by the Criminal Chamber in its jurisprudence on Justice and Peace proceedings mentioned above: the significance of these proceedings; the fundamental role that construction of the historical truth has in them; the responsibility that the paramilitaries in these proceedings have in relation to that construction; the guarantee of the victims’ rights in these proceedings; and the guarantee of society’s right to know the truth. In relation to all of these aspects, the Criminal Chamber follows the principles and standards of international human rights law very closely.

In addition to these aspects, another consideration merits special attention: the direct allusion to the International Criminal Court (ICC). In the view of the Criminal Chamber, the possibility exists that the ICC could intervene in the Colombian situation if its judicial proceedings fail to investigate, try, and punish the perpetrators and those responsible for crimes against humanity according to international standards. It could be concluded that when the Criminal Chamber makes these references to the ICC, it is demonstrating the significant weight that this Court has on its considerations and rulings on conduct that in its judgment amount to international crimes as contemplated in the Rome Statute. In this sense, the weight of the ICC would not be limited to rulings in relation to crimes that are today the competence of the transitional criminal justice system, but would rather extend to crimes that, given the particularity of the Colombian transitional process, continue to be under the jurisdiction of the ordinary criminal justice system. In the following section I will address this issue. It is worth asking whether the Criminal Chamber would issue a similar opinion in the case of a Colombian armed actor, whose extradition was requested and who was linked to an ordinary criminal investigation for grave, massive, and or systematic violations of human rights and/or IHL.

### **III. The Jurisprudence of the Criminal Chamber in Justice and Peace as a Basis for its Rulings in the Ordinary Criminal Jurisdiction**

I will refer here to one single ruling, which has enormous importance in relation to efforts to combat impunity for grave, massive and systematic human rights violations.

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that the extradited person will collaborate with the investigations into the facts of the instant case, as well as, if applicable, to guarantee the due process. The State must guarantee that the proceedings conducted outside Colombia will not interfere or hinder the investigations into the serious violations committed in the instant case or affect the rights of the victims recognized in the Judgment.



In its ruling of March 11, 2009,<sup>47</sup> the Criminal Chamber upheld the grounds for review invoked by the Procurator General's Office in relation to preclusion of the investigation of former Army General Rito Alejo del Río Rojas for his participation in grave human rights violations. With this ruling the Criminal Chamber overturned the Attorney General's resolution of March 9, 2004 that had decreed preclusion ceasing investigation and prosecution of the former general for the crimes of criminal conspiracy, embezzlement of army equipment, and corrupt practices by omission. The Chamber remanded the case to the Attorney General's Office for it to proceed with the investigation and prosecution.

In this ruling, the Criminal Chamber cited its jurisprudence in the context of Justice and Peace, as well as relevant declarations made by several paramilitaries during those proceedings. The central aspects of this ruling (including acceptance of the competence of the Procurator General's Office to bring the action) are based on this jurisprudence and on the conceptualization that the Criminal Chamber has established regarding the Justice and Peace process. In this Part, I will focus on just three of these central aspects. The first relates to classification of criminal conspiracy as a crime against humanity; the second refers to the rights of victims of human rights violations and, specifically, to the rights that they have in Justice and Peace proceedings; and the third is in relation to the facts used as evidence.

The Criminal Chamber, in the context of Justice and Peace, defined criminal conspiracy for paramilitary purposes as a crime against humanity. Among its various considerations for arriving at that definition, it stated:

Taking into account that the crimes committed by the demobilized paramilitaries include forced disappearance, forced displacement, torture, homicide for political reasons, etc., and because said punishable offenses are understood as being included within the classification of crimes against humanity, that assessment must be extended to the so-called *aggravated criminal conspiracy* in so far as the criminal agreement was made for these purposes.<sup>48</sup>

Having characterized criminal conspiracy for paramilitary purposes as a crime against humanity in its jurisprudence in the context of Justice and Peace, the Criminal Chamber stated the following in its ruling reviewing the resolution that had precluded the investigation of former General del Río:

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<sup>47</sup> Criminal Cassation Chamber, Supreme Court of Justice, ruling of Mar. 11, 2009, No. 30510, Speaker Magistrate Yesid Ramírez Bastidas.

<sup>48</sup> Criminal Cassation Chamber, Supreme Court of Justice, ruling of Apr. 10, 2008, No. 29472, Speaker Magistrate Yesid Ramírez Bastidas, at 18. The arguments given by the Criminal Chamber in this ruling are quite extensive. Here I limit myself to pointing out just one of its considerations.

In so far as the military officer on trial has presented his defense for a crime against humanity [that of criminal conspiracy], the immediate consequence for the domestic legal system consists in avoiding at all cost impunity for the crimes allegedly committed and thereby to show the international community that intervention by the international criminal justice system is not necessary because Colombia is able to try those responsible for such crimes and to impose the punitive consequences established under national criminal law.<sup>49</sup>

Of the above-mentioned considerations, it is worth stressing not only the commitment of the Criminal Chamber to the fight against impunity in cases of grave human rights violations but also its insistence once again on showing the international community—as in the case of denying extradition—that Colombian judges are complying with international standards and that, therefore, intervention by the ICC would not be necessary.

In relation to the rights of the victims, the Criminal Chamber referred extensively to the jurisprudence of the Constitutional Court, including its jurisprudence regarding transitional justice. The Chamber formulated a number of considerations on the State's obligation to guarantee that the victims have effective legal recourse that would provide adequate responses—that is, recourse that guarantees truth, justice, and reparation to those that have suffered human rights violations, or their family members. In this sense, the Chamber considered that in seeking to harmonize legal rigor with effecting material justice, it was

easy to see that there are higher reasons to permit the motion for review if impunity in a concrete action may end up violating the rights of the victims, by impeding through *res judicata* the realization of the constitutional objectives of the criminal process, as it affects the legitimate expectations of the victims of punishable conducts with regard to their rights to truth, justice, and reparation. By impeding review in a matter which involves the gravest crimes against humanity, an absurd jurisprudence would be erected in adoration of regulations for regulations' sake, form for form's sake, disregarding the supreme obligation imposed by the Constitution: to do justice avoiding impunity.<sup>50</sup>

Finally, and in relation to the facts that served as the basis to declare the appeal for review valid, the Criminal Chamber accepted as evidence the confessions made by several paramilitaries during Justice and Peace proceedings. In justifying its ruling, it emphasized, *inter alia*, the following:

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<sup>49</sup> Ruling of Mar. 11, 2009, at 36.

<sup>50</sup> *Id.* at 47.

The truth revealed by the demobilized paramilitaries in Justice and Peace must serve to impose their corresponding sentences, and where applicable, to investigate and convict all those persons who contributed to the activities of the paramilitary groups, which at the very least makes them responsible for the crime of *criminal conspiracy* for paramilitary purposes.

The spontaneous and free declarations made by the demobilized paramilitaries become a new element of evidence, to the extent that they are testimony regarding the incriminations that they make against third parties. They reveal new facts in as much as they shed light on events unknown to the judiciary and become relevant when establishing who accompanied the criminal actions by the paramilitaries and how they did so.<sup>51</sup>

According to the Criminal Chamber then, to the extent that the crimes committed by the paramilitaries constitute crimes against humanity, it is not possible for the jurisdiction to maintain itself at a distance from that reality “when new evidence and facts show that public servants used their positions to contribute by action and omission to the preparation and execution of crimes of that nature.”<sup>52</sup> Therefore:

The presentation of the facts, regulatory references, the declarations made by the demobilized persons to prosecutors during *versiones libres*, the judicial interventions made in the Justice and Peace proceedings, and the progress of those proceedings in accordance with what was stated by the plaintiff as well as by the representative of the *Ministerio Público* before this Court, are sufficient to find that the claims by the Procurator General’s Office satisfy the requirements to declare the grounds for review as justified.<sup>53</sup>

With this ruling, the Criminal Chamber cleared the way for the reopening of criminal investigations against former General Rito Alejo del Río. The enormous importance of this ruling is indisputable; however what is noteworthy is not so much the favorable response to the appeal for review but rather the arguments used. The ruling is based fundamentally on considerations relating to the Justice and Peace Law and on confessions made during the special proceedings regulated by that law. We must recall the structural importance that confessions have in these proceedings for the Criminal Chamber and the conditions in which such confessions are made. What happened in this case was on the one hand the adoption of the jurisprudence of the Criminal Chamber in the context of Justice

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<sup>51</sup> *Id.* at 48-49.

<sup>52</sup> *Id.* at 49.

<sup>53</sup> *Id.* at 50.

and Peace regarding the crime of criminal conspiracy for paramilitary purposes as a crime against humanity, and, on the other, the transference—and acceptance by the Chamber—of a number of the confessions made in transitional criminal justice proceedings to a proceeding in the ordinary criminal jurisdiction without new facts and/or evidence having been produced or made known in this proceeding. Former General del Río had been investigated by the ordinary criminal justice system and—according to the current regulatory design—cannot be investigated by the transitional justice system. However, the new evidence that incriminates him had been produced in the transitional justice system, and, therefore, he will be investigated based on the results of that system.

That being the scenario, I believe, in conclusion, that I am justified in insisting on my two questions about the relationship between the two justice systems and on the reflections that I have made regarding them. I add here two additional questions that I will simply pose: In terms of criminal investigations in Colombia, is an extension taking place of the objectives of transitional justice beyond the transitional criminal process expressly regulated in the Justice and Peace Law? Or, pursuant to the principles of consistency and coherence, is the Criminal Chamber of the Supreme Court of Justice in a process of homogenization of its jurisprudence and of a line of precedents? If this is the case, a consequent question would be: How does that homogenization modify the conceptualization and/or the principles of the ordinary criminal process as it has to date been understood? These types of questions bring up the topic of the relationship between transitional justice and the domestic legal order that emerges from the transition, with the particularity that, in a case such as Colombia, not only do these systems coexist but the non-transitional domestic legal order must continue to address grave, massive, and systematic violations of human rights and IHL.

## Chapter 2

# The Colombian Government's Formulas for Peace with the AUC: An Interpretation from the Perspective of Political Realism\*

Camila de Gamboa Tapias

This chapter is an analysis of the strategies or “formulas” employed by the Álvaro Uribe Vélez administration in order to achieve peace with the United Self-defense Forces of Colombia (*Autodefensas Unidas de Colombia* or AUC). The main objective of this chapter is to show that the government's formulas for peace can be interpreted as a strategy common to states that guide their political decisions based on political realism. I will explain how in comparative experience with transitional justice models, governments that engage in these processes have a tendency to use political realism as a successful formula to achieve peace. President Uribe Vélez's formulas for peace are in line with this tendency. This chapter aims to show the risks that assuming this posture in political negotiations with an armed group poses for a democracy.

The analysis focuses on three aspects of the formulas for peace used by the Uribe Vélez administration in relation to the AUC. In Part I, I will analyze the draft bill on alternative sentencing and the Justice and Peace Law (JPL) that the administration submitted to Congress. I will also examine the government's reactions when these formulas were criticized on democratic grounds by a variety of civil society groups and members of other branches of the government. Part II suggests that the version of the JPL approved by Congress and endorsed by the administration contained a great asymmetry between the treatment given to the members of the AUC and that given to victims. The analysis seeks to show that the JPL, as it was approved prior to the Constitutional Court ruling that significantly modified its contents, sought to strengthen the perpetrators in the process at the expense of those citizens who were the victims of the crimes

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committed by members of the AUC, whose position was much weaker. Finally, in Part III, I apply some of the most important postulates of political realism to evaluate the government's formulas for peace and critique them from a democratic perspective.

## **I. The Administration's Formulas for Peace Submitted to Congress and Its Reactions and Responses to Criticism**

It is impossible to make a direct analysis of the government's negotiations and agreements with the AUC because these proceedings were not public and the only people who took part in them were representatives of the government and the AUC. Therefore, an analysis of the possible interests of the government and of the AUC in the negotiations can only be made by evaluating the proposals put forth or supported by the administration before Congress and its responses to the criticism made of these proposals.

### **A. The Draft Bill on Alternative Sentencing and the Justice and Peace Law**

In the context of the negotiations with the paramilitaries, the Uribe Vélez administration needed a legal instrument that would encourage AUC members to demobilize completely. Law 782 of 2002, which the administration itself had presented in December 2002 and later modified through Decree 128 of 2003, made it possible to exonerate from criminal responsibility all individuals that demobilized individually or collectively from any armed group without holding any type of criminal trial, as long as prior to demobilization the individual was not the subject of judicial proceedings for crimes not subject to pardon or amnesty.<sup>1</sup> Nonetheless, there was a need to create a legal framework to facilitate the demobilization of AUC members who had committed the gravest crimes according to international law, including many of the leaders of the organization.

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<sup>1</sup> As Gustavo Gallón has pointed out, Decree 128 of 2003 has constitutional defects to the extent that Law 782 states that benefits cannot be awarded to those who "have committed" crimes not subject to pardon or amnesty. The decree is much broader and establishes the benefit for those who have not been "prosecuted or convicted" for these crimes, going beyond the scope of the initial law. In Colombia, according to Gallón "almost none of the paramilitaries (or the guerrillas) have been prosecuted or sentenced for those crimes because impunity in the country is very high and the identity of the majority of the combatants is unknown." This means that the majority of the combatants who have demobilized remain free and have been awarded judicial benefits for crimes eligible for pardon or amnesty, without being sure whether or not they committed war crimes or crimes against humanity, because pursuant to Decree 128, it is sufficient for these people not to have been prosecuted or sentenced prior to their demobilization. Gustavo Gallón, *La CNRR: "¿Dr. Jekyll o Mr. Hyde?"*, 17 REVISTA DE PENSAMIENTO JURÍDICO (Nov-Dec. 2006).

Thus, the Uribe Vélez administration presented to the Congress of the Republic draft legislation for Statutory Law 085 of 2003, better known as the draft law on alternative sentencing.<sup>2</sup> The draft bill aimed to rapidly achieve peace by awarding extraordinary legal benefits to individuals or groups excluded under Law 782 and effectively contribute to achieving national peace within the framework of formal negotiations with the Colombian government.<sup>3</sup>

In September 2003, the first legislative debate was held in Congress, and the administration, represented by the High Commissioner for Peace, defended the initiative. The administration claimed that the legal framework was necessary to encourage the definitive demobilization of the AUC. It also considered that the draft legislation fully satisfied international standards in the field of transitional justice because it guaranteed the victims' rights to truth, justice, and reparation and would satisfy the obligations required by international human rights law and international humanitarian law.<sup>4</sup> From the moment of the initial presentation of the draft bill there were criticisms from Congress members, diverse social sectors, and national and international organizations.

The criticisms from these democratic sectors can be summarized in two substantive categories. On one hand, some of the senators felt that the timing of the draft law was inopportune insofar as a legal framework was being created to enable the AUC members to demobilize without a prior negotiation between the government and the AUC. For some, this situation posed a risk that Congress might be forced to negotiate the terms of the law directly with the self-defense groups.<sup>5</sup> Second, there were criticisms that the draft legislation did not guarantee truth, justice, and reparation and that the regulatory framework did not adequately

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<sup>2</sup> See the excellent study on the enactment of the JPL published by the Fundación Social: NICOLAS PALAU, FUNDACIÓN SOCIAL, TRÁMITE DE LA LEY DE JUSTICIA Y PAZ, ELEMENTOS PARA EL CONTROL CIUDADANO AL EJERCICIO DEL PODER POLÍTICO (2006).

<sup>3</sup> The legal benefits of the draft legislation consisted in alternative sentences instead of prison, such as disqualification from public service or elected office; prohibition against bearing arms; prohibition against residing in certain places, etc. Such punishments do not fit the grave crimes committed. Additionally, the reparation mechanisms provided in the draft legislation—such as compensation, community service, collaboration in institutions dedicated to social work for the recovery of victims, to cite a few examples—were frankly ludicrous and totally disproportionate to the crimes committed. See articles 6 and 11 of the draft legislation, available in the Gaceta del Congreso 436 of 2003.

<sup>4</sup> TRÁMITE DE LA LEY DE JUSTICIA Y PAZ, *supra* note 2, at 24.

<sup>5</sup> Senators Antonio Navarro Wolff and Rafael Pardo objected to the timing in presenting the law. See TRÁMITE DE LA LEY DE JUSTICIA Y PAZ, *supra* note 2, at 26. It is important to point out that conversations with the AUC had begun in December 2002, when the Uribe Vélez administration created an Exploratory Commission for the peace process with the AUC. The mandate of this Commission was to formulate recommendations to the government to enable the self-defense groups to demobilize and reincorporate into civilian life. The Commission presented its recommendations, based upon which the government signed the Santa Fe de Ralito Agreement with the AUC. In this preliminary agreement, the AUC committed itself to completely demobilize before 2005 and not to continue its military actions. The government committed itself to create geographic zones where the AUC could remain in order to negotiate the agreements with the government for its demobilization and reinsertion into civilian life.

respect the international treaties on the protection of human rights that Colombia had ratified.<sup>6</sup>

In general, because of its generous benefits to members of the AUC, the draft bill on alternative sentencing seemed more like a proposal for impunity and forgetting so that AUC members could be rapidly incorporated into civilian life. In addition to sacrificing the victims' rights, society would not take responsibility for a past in which grave crimes had been committed—crimes which on many occasions had been directly or indirectly supported by many social sectors that benefited from the existence of the AUC. The administration and certain sectors of Congress made several attempts to save the draft bill on alternative sentencing by introducing modifications, but none of these substantially changed the underlying problems of the law. Ultimately the government decided to withdraw the draft bill.<sup>7</sup> One of the lessons learned by the Uribe Vélez administration with this proposal was the realization that the more democratic sectors of society and Congress were unwilling to award generous concessions to AUC members without the inclusion of the principles of truth, justice, and reparation. In other words, the democratic sectors of society rejected peace proposals based on impunity and forgetting.

More than eight months passed before another draft bill was presented to facilitate the demobilization of the AUC. During this time, however, certain events occurred in relation to the negotiation process that created a more favorable context for presenting new draft legislation. The most important in this regard was the formal initiation of negotiations between the Uribe Vélez administration and the AUC on June 15, 2004. Rather than the actual beginning of negotiations, this was instead their formalization.<sup>8</sup>

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<sup>6</sup> See observations and recommendations from the United Nations High Commissioner for Human Rights, August 28, 2003, and the speech by the High Commissioner in the Colombian Congress, in TRÁMITE DE LA LEY DE JUSTICIA Y PAZ, *supra* note 2, at 28. Also see the excellent study by Catalina Botero and Esteban Restrepo on the international standards that are applicable in contexts of transitional justice. Catalina Botero & Esteban Restrepo, *Estándares internacionales y procesos de transición en Colombia, in ¿JUSTICIA TRANSICIONAL SIN TRANSICIÓN? VERDAD, JUSTICIA Y REPARACIÓN PARA COLOMBIA* (DeJUSTICIA ed., 2006). See also Catalina Botero, *Derecho penal internacional y justicia de transición: ¿Estamos condenados a repetir incesantemente la historia trágica de la muerte y la doncella?*, in *JUSTICIA TRANSICIONAL: TEORÍA Y PRAXIS* (Camila de Gamboa ed., 2006).

<sup>7</sup> TRÁMITE DE LA LEY DE JUSTICIA Y PAZ, *supra* note 2, at 48-49.

<sup>8</sup> During this period of negotiations, the government and the AUC agreed that the latter would be heard and accompanied during the process by the Congress of the Republic. AUC leaders Salvatore Mancuso and Iván Roberto Duque (alias Ernesto Báez) spoke before Congress and justified their violent actions as a response to the guerrillas and to a weak state that had failed to protect its citizens. They also stated that they should make reparations for their crimes but that they did not have to be punished with imprisonment. The invitation to the AUC leaders to speak to Congress was sharply criticized by diverse social sectors such as victims' groups, members of Congress, the then United States ambassador in Colombia, and several U.S. Democrat senators, among others. The administration defended the invitation to the AUC leaders and criticized the international community's intransigent position of not supporting the process. See TRÁMITE DE LA LEY DE JUSTICIA Y PAZ, *supra* note 2, at 65-69.



In to Society Congress, nine draft bills were presented to create a legal framework for reinsertion of the AUC. However the debates in Congress focused particularly on two of these bills: one sponsored by Representatives Rafael Pardo and Gina Parody, and the other presented by Representatives Mario Uribe and Claudia Blum and supported by the Uribe Vélez administration.<sup>9</sup> The former generally complied with transitional justice normative standards. Although it awarded rather lenient criminal sentences, in exchange, it required the perpetrators to tell the whole truth about crimes committed in the past and sought to guarantee that they would provide comprehensive reparation to their victims. The draft legislation supported by the administration, as Rodrigo Uprimny and María Paula Saffon point out, was very generous in the declaration of principles of protecting the rights of the victims; however, the law did not include legal instruments to make these rights effective, so that in fact the draft bill sought a formula for peace that was not in keeping with demands for justice for the atrocious crimes committed by the AUC.<sup>10</sup> After much debate and effort to reconcile the interests of the two proposals, the legislation supported by the administration passed and became the Justice and Peace Law (Law 975 of 2005).

The Constitutional Court reviewed the constitutionality of the law by virtue of the lawsuits brought against the JPL by diverse organizations and citizens who claimed that the law did not guarantee the rights of the victims. The Constitutional Court's rulings<sup>11</sup> attempted not only to fulfill its duty to verify whether the JPL was in keeping with the Constitution but also to respond to the arguments of those who felt that it violated the victims' rights. Ruling C-370 of 2006 found that the JPL was constitutional; however it declared the unconstitutionality or conditioned constitutionality of certain provisions. The Court found that in the form in which it had been approved by Congress, the law did not adequately protect the rights of the victims. As affirmed by Uprimny and Saffon, the ruling sought to achieve a balance between the exigencies of peace and the requirements of justice. Thus, for the provisions in which the balance in favor of peace would be detrimental to justice, the Court's ruling and its modifications to the law sought to provide legal instruments that, although offering generous reductions of penalties to the armed actors, would at the same time seek to guarantee the victims' rights to truth and

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<sup>9</sup> The first draft bill also involved participation by Congress members Rodrigo Rivera, Luis Fernando Velasco, Carlos Gaviria, and Germán Navas. The second bill had the participation of Congressmembers Jose Renán Trujillo, Luis Humberto Gómez, Ciro Ramírez, Germán Vargas, Roberto Camacho, Armando Benedetti, José Luis Archila, Oscar Arboleda, Iván Díaz, and Germán Varón.

<sup>10</sup> Rodrigo Uprimny, María Paula Saffon, *¿Al fin ley de justicia y paz? La ley 975 del 2006 tras el fallo de la Corte Constitucional*, in *¿JUSTICIA TRANSICIONAL SIN TRANSICIÓN?*, *supra* note 6, at 204.

<sup>11</sup> In addition to the main pronouncement, Constitutional Court, ruling C-370 of 2006, No. D-6032, May 18, 2006, in numerous other rulings the Constitutional Court has reiterated its initial pronouncement and ruled on other aspects of the JPL.

reparation.<sup>12</sup> After the Constitutional Court's ruling, the JPL looked more like the draft legislation sponsored by Congress members Pardo and Parody which had not been approved by the Congress.

## **B. Responses and Reactions of the Administration to the Constitutional Court's Modifications to JPL**

In the wake of Constitutional Court ruling C-370, the administration has issued a series of decrees, some of which ignore the modifications introduced by the Constitutional Court's ruling. Although the objective here is not to offer a detailed analysis of those decrees, by way of example it can be shown how, through these decrees, the government has the intention to revive the JPL as it had originally been approved by Congress or to make it even more lenient.<sup>13</sup>

I will first discuss Decree 4760 of 2005, which was issued by the government after the JPL was enacted but before the Constitutional Court had ruled. Even though the JPL had great weaknesses that would prevent the victims from appropriately exercising their rights, instead of remedying these problems Decree 4760 created even more lenient conditions for the perpetrators. This decree, in addition to gravely violating victims' rights, ignored decisions made by lawmakers and thereby disregarded the balance of powers between the traditional branches of the liberal rule-of-law state.<sup>14</sup>

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<sup>12</sup> Rodrigo Uprimny & María Paula Saffon, *¿Al fin ley de justicia y paz? La ley 975 del 2006 tras el fallo de la Corte Constitucional, in ¿JUSTICIA TRANSICIONAL SIN TRANSICIÓN?, supra* note 6, at 205-06. The authors state that the Court not only focused its ruling on the rights of the victims but also considered other aspects of great relevance, such as declaring unconstitutional Article 70, which awarded reductions in sentences to all of the country's convicts, and Article 71, which considered that paramilitarism and guerrilla activities amounted to the political crime of sedition. *Id.* at 207. Although the ruling declared Article 71 unconstitutional due to defects of form, the Constitutional Court, to avoid hindering the negotiation process with the AUC, specified that the ruling did not have retroactive effects. This debate regarding the type of crimes committed by the AUC was particularly intense after the Supreme Court ruled that the acts of AUC members could not be considered as sedition but instead must be classified as criminal conspiracy. The Court reasoned that political crimes are carried out by those who rise up against the State and not by those who, like the AUC, were merely common criminals. More than 19,000 individuals who had demobilized under Decree 128 of 2002 had been freed based on their status as political criminals. However, in the wake of the Supreme Court ruling they would be considered common criminals who must be tried pursuant to Colombian criminal law. *See Los argumentos jurídicos y políticos para un cambio penal, la espina dorsal de la sedición*, EL ESPECTADOR, July 29–Aug. 4, 2007, at 3A. *See* ruling by the Criminal Cassation Chamber of the Supreme Court of Justice, ruling of July 11, 2007, No. 26945, Speaker Magistrates Yesid Ramírez Bastidas & Julio Enrique Soacha Salamanca.

<sup>13</sup> The government has issued around sixteen regulatory decrees for the JPL, including Decrees 4760 of 2005; 2898, 3391, 4417 and 4436 of 2006; and 315 and 423 of 2007.

<sup>14</sup> In analyzing Decree 4760 of 2005, I follow closely the criticisms formulated by the Colombian Commission of Jurists, as well as those made by Manuel Quinche. *See* CCJ, REGLAMENTANDO LA IMPUNIDAD A DOS MANOS: COMENTARIO AL DECRETO 4760 DE 2005 (Feb. 7, 2006); Manuel Quinche, *La degradación de los derechos de las víctimas dentro del proceso de negociación con los grupos paramilitares*, in JUSTICIA TRANSICIONAL: TEORÍA Y PRÁXIS, *supra* note 6.

First, the decree increased the possibility that the perpetrator would not confess the truth in the *versión libre* given to the prosecutor. One of the most consistent criticisms made by many sectors when the JPL was being debated in Congress had to do with the fact that there was no obligation in the law for perpetrators to fully and truthfully confess to all the crimes that they had committed as a condition for obtaining the legal benefits. Without this requirement, it was very difficult for the victims and for Colombians in general to find out about the crimes that the paramilitaries had committed in light of a high rate of impunity in the country that partially stems from the weakness of the judicial system. The requirement that the perpetrators confess their crimes in exchange for generous reductions in sentences was understood as a just retribution to society for their actions and allowed them to distance themselves from a violent past. Prior to the decree, as pointed out by the Colombian Commission of Jurists (CCJ), there was a possibility that the judges and prosecutors would interpret the law as requiring demobilized individuals to fully confess to their crimes; however, the decree explicitly requires the prosecutor to advise demobilized individuals that they have the right not to incriminate themselves or testify against their spouse, permanent companion, or family members.<sup>15</sup> The principle against self-incrimination is used in ordinary criminal proceedings as a guarantee that the accused avoid coercion to confess. However, this principle has no justification in a political process in which reduced sentences are being awarded in exchange for the confession of crimes committed as part of an illegal armed group.<sup>16</sup>

Second, Decree 4760 gives the Attorney General the power to apply a form of prosecutorial discretion (*principio de oportunidad*) so that an individual who appears as the owner or possessor of assets illegally acquired by the AUC will not be tried as a strawman.<sup>17</sup> The argument put forward was that this discretionary power would promote the return of those illicitly acquired assets. As suggested by the CCJ, if the idea of this principle of prosecutorial discretion was to protect strawmen who could not disobey orders from the demobilized individuals, it would have been better to apply the concept of abatement of ownership (*extinción de dominio*) in relation to the illegally acquired assets; thus exempting third parties from criminal responsibility. However, the strawmen did not always act under duress or threat, and therefore many individuals who were not exactly innocent would not be investigated.

Following the Constitutional Court rulings that sought to rectify the deficiencies in the JPL, the government issued various decrees to regulate the law. The government invited citizens to participate in the process via the Office of

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<sup>15</sup> See Decree 4760 of 2005, art. 5.

<sup>16</sup> See CCJ, *supra* note 14, at 3; Rodrigo Uprimny & María Paula Saffon, *¿Al fin ley de justicia y paz? La ley 975 del 2006 tras el fallo de la Corte Constitucional*, in *¿JUSTICIA TRANSICIONAL SIN TRANSICIÓN?*, *supra* note 6, at 162-63.

<sup>17</sup> See Decree 4760 of 2005, art. 13.

the President of the Republic website, as part of a democratic exercise—a rather questionable invitation in a developing country where not everyone has access to this medium and where there are other mechanisms for democratic participation that were not used by the government both when the draft bills for alternative sentencing were presented and during debate of the JPL. In some of the proposals, establishing paramilitary groups was converted into a crime of sedition and the presumed connection between the other crimes committed by the paramilitaries was eliminated. Some of the draft legislation proposed by the government sought to penalize victims who decided not to participate in the JPL process by charging them with the crimes of failing to report and hiding evidence.

The government’s proposals were harshly criticized by many social sectors and human rights defenders. The government finally issued Decree 3391 of 2006, which fortunately did not include any of the above-mentioned proposals but did contravene Constitutional Court ruling C-370. To cite some examples, the Court’s ruling established that the benefit of alternative sentences (five to eight years imprisonment) could not be lowered, and the sentence would have to be served in establishments with the same security as that of institutions administered by the National Penitentiary and Prison Institute and subject to ordinary regulations of penitentiary control. However, Decree 3391 modified various aspects of the Constitutional Court’s ruling. The decree revived JPL Article 31, which had been declared unconstitutional by the Court. This article had permitted the time that demobilized individuals had spent in the zones designated by the government for them to assemble during the negotiation process to be counted as part of their prison sentences. In the same way, the decree allowed for the creation of special prison facilities or the use of national military installations, which do not provide the same guarantees the Court attempted to ensure in its ruling.

There are also two substantive aspects of the decree worth analyzing here. The first has to do with the subject of reparation. The Court in its ruling found that when “the State is responsible—through action or omission—or when the resources of those responsible are insufficient to pay the cost of massive reparations, the State must assume the responsibility that this implies.”<sup>18</sup> However, Decree 3391 states in Article 18(5) that resources from the national budget shall be allocated only as a subsidy<sup>19</sup> and not in order to satisfy judicially decreed reparation. Resources from the national budget are instead to be used for other types of reparations and “without implying the State’s acceptance of subsidiary responsibility.” As the CCJ correctly establishes, this affirmation on the one hand eludes the historical responsibility that the Colombian State has had in the establishment of paramilitary groups, and on the other hand, eliminates the State’s

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<sup>18</sup> See Constitutional Court, ruling C-370 of 2006, §6.2.4.1.12.

<sup>19</sup> The concept of subsidiary (“*residual*”) responsibility was introduced by the Constitutional Court in ruling C-370.

subsidiary duty to respond when the perpetrators do not have sufficient resources to provide direct reparations.<sup>20</sup>

In conclusion, it is also important to stress that the decree introduces an element of restorative justice that was not part of the ruling. The decree stated that AUC members could create “productive projects with participation by victims and demobilized individuals that would allow their sentences to be reduced and also provide collectively reparations to the victims.”<sup>21</sup> The character of this initiative in and of itself creates many problems because it is difficult to understand what legitimacy there could possibly be in having former AUC members use their own resources—most likely illicitly acquired—to get the victims to take part in productive processes jointly with their victimizers and having these projects be considered a form of collective reparation for the crimes committed.

## II. Unequal Treatment of Victims and Victimizers in the JPL

One of the aims of using transitional justice to achieve an end to violence and a transition toward a stable, democratic peace is to ensure that the political decisions and legal instruments that are created for the transition are inspired by democratic principles of justice. The goal is to address profound asymmetries that existed between those citizens who were the victims of violence and the perpetrators that carried out this violence and benefited politically, economically, and socially from their privileged situation—whether in the context of a repressive system, such as in totalitarian or authoritarian leftist or rightist regimes, or in civil wars and armed conflicts, such as in the Colombian case. The purpose of this section of the analysis is to show that the JPL, as it was approved by Congress with the administration’s endorsement, was a transitional model that deepened the existing asymmetries between victims and victimizers. Despite the vicissitudes and complexities inherent to transitions toward peace, ideally a transitional model should be fair in relation to the victims and victimizers so that those asymmetries—or institutional and de facto inequalities—that arose in the past are effectively transformed through the transitional process. The victims’ rights should be recognized and the victims reestablished, or established for the

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<sup>20</sup> CCJ, *Decreto 3391 de 2006: modifica ley 975, incumple la sentencia C 370 e impide el ejercicio de los derechos de los derechos de las víctimas*, available at <http://acnur.org/pais/docs/1766.pdf>. Also see the ruling by the Inter-American Court of Human Rights, *Case of the Rochela Massacre v. Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007). In this ruling, the Court recounts the emergence of paramilitarism in Colombia and recognizes state support in the setting up of the self-defense groups.

<sup>21</sup> See Decree 3391 of 2006, arts. 13, 16 & 17. The JPL establishes that the CNRR (National Reconciliation and Reparations Commission) and the Fondo de Solidaridad de la Red Social (Solidarity Fund of the Social Network) can promote additional reparation measures, but it does not specify what type of measures.

first time, as citizens in a democracy on equal standing with the rest of society. Likewise, the process must ensure that the perpetrators lose the institutional and de facto power enjoyed in the past and that they pay their debts to the victims and to the political community.

I will analyze two interrelated aspects of the version of the JPL prior to the Court's ruling: the institutional weakness of the Colombian criminal system and the wide-ranging concessions awarded to the victimizers. Together these factors, at the end of the judicial process, would have strengthened the victimizers even more in relation to their victims. I will begin by briefly recounting the benefits awarded to the victimizers within the law in relation to the victims' rights to truth and reparation. I will then discuss the interaction with institutional weakness, the resulting denial of victims' rights in the Justice and Peace Process, and as a consequence, the injustice of the model defended by the Uribe Veléz administration.<sup>22</sup>

The JPL granted the perpetrators of grave human rights violations an alternative sentence of five to eight years, and initially also allowed that sentence to be reduced by as much as eighteen months for the time the perpetrators had spent in the zone of concentration reserved to carry out the negotiations between the leaders of the AUC and the government.<sup>23</sup> However, as mentioned, this alternative sentencing did not imply a full guarantee of the rights to truth and reparation that would ensure a balance between the sacrifices that the victims and society would have to make in relation to the legal benefits obtained by the perpetrators in the interests of political peace.

Thus, in terms of truth, the JPL would not have required a full and good-faith confession of all of the crimes committed; instead it would have been sufficient for the demobilized persons to give a *versión libre* narrating the facts. This broad concession to the demobilized individuals meant that the truth in the JPL process was being conditioned on the "good faith" of the demobilized person to tell the truth. Rather than appealing to the good faith of those giving *versiones libres*, in reality; the voluntary confession would remain subject to the rational calculation of the perpetrator, who would surely only confess to crimes for which ongoing judicial proceedings already existed or had culminated, or those for which they believed they could be investigated.

The JPL itself protected this rational calculation. First, it established a very short time period for the Attorney General's Office and the other judicial bodies to investigate the crimes committed by the demobilized individual (sixty days). Second, it established that if the members of the armed groups who had received the benefits of law 782 of 2002 or the JPL were later found to have committed crimes

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<sup>22</sup> See the chapter in this volume by Delphine Lecombe, *A Conflicted Peace: Epistemic Struggles around the Definition of Transitional Justice in Colombia*.

<sup>23</sup> See Law 975 of 2005, arts. 30 & 31.

as members of those groups and prior to their demobilization to which they did not confess, they would not lose the legal benefits if they accepted the new charges and proved that the omission had been unintentional—which would be very difficult to verify. As can be seen, the procedure that the JPL designed to require perpetrators to tell the truth within the judicial proceedings was not strict and therefore was not an effective legal incentive for perpetrators to confess their crimes.<sup>24</sup>

With regard to reparation, the JPL also awarded very generous concessions to the perpetrators by not imposing an obligation to provide comprehensive reparation to the victims. The law did not require demobilized individuals to fully reveal their assets in order to provide reparation; at the same time, reparation was limited to illegally acquired assets and did not include those acquired legally. It was also limited to assets that the demobilized individual had when the proceedings began and did not include those held by strawmen.

Likewise, the definition of victim was highly restricted because it was limited to victims of the illegal armed groups and did not include victims of State agents, and also only considered those who were directly harmed to be victims,<sup>25</sup> which was not in keeping with the definition of a victim in international law.<sup>26</sup> It also restricted participation of the victims to the reparation stage, excluding them from participation in the beginning of the proceedings. As Catalina Díaz has observed, the JPL offered two possibilities for victims to receive reparations judicially: the

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<sup>24</sup> As is well known, on May 13, 2008, the government by decree extradited to the United States fourteen of the AUC leaders who had been part of the JPL. The government has defended its position, stating that these leaders were extradited because they failed to comply with the conditions of the JPL in that they were not telling the truth and had not turned over assets to provide reparations to the victims. This decision has been harshly criticized by NGOs, international organizations, and victims' groups, because the extradition of these leaders has meant that the victims and society have been left without knowing the truth about the crimes, insofar as in the United States these perpetrators are being prosecuted for drug-trafficking crimes and not for the crimes against humanity that they committed in Colombia. Additionally, the extraditions have impeded efforts to determine the links that these AUC members had with Colombian politicians. The Prosecutor of the International Criminal Court, Luis Moreno Ocampo, in June of 2008 sent a letter to the Colombian government in which he requested information and asked "whether the extradition of the paramilitary leaders presented any obstacle to investigating these politicians." *CPI enviará fiscal para seguir caso de extraditados a EE.UU.*, *El Espectador*, Aug. 16, 2008. The Colombian government has said that the JPL process can be continued in the United States, but with the passing of time, the difficulties in carrying out the *versiones libres* of these AUC members who continue to be linked to the JPL are evident. Moreover, several of them have renounced their desire to continue with the process. See *Por ex-jefes de las AUC extraditados, peligran procesos de parapoltica*, *CaracolTV.com*, Mar. 14, 2009; *El primo condenado a siete años y medio de prisión*, *Verdad Abierta*, June 3, 2009; *Mancuso no confesará más*, *Verdad Abierta*, Sept. 30, 2009. Also, pursuant to the law, non-fulfillment of the conditions at any point in the process is supposed to result in the loss of the benefits awarded by the JPL and prosecution under the ordinary criminal jurisdiction. The government decree therefore disregards the content of the JPL.

<sup>25</sup> According to article 5 of the JPL, the spouse, permanent companion, and family members of the direct victim in the first degree of blood or civil kinship are also considered victims when the victims themselves have been killed or disappeared.

<sup>26</sup> See Rodrigo Uprimny & María Paula Saffon, *¿Al fin ley de justicia y paz? La ley 975 del 2006 tras el fallo de la Corte Constitucional*, in *¿JUSTICIA TRANSICIONAL SIN TRANSICIÓN?*, *supra* note 6, at 220.

first, in relation to proceedings that had already led to judgments or were still under investigation in the ordinary jurisdiction, in which the victim established standing as a civil party, and the second, as part of the judicial proceedings established by the JPL, as long as the victim could identify his or her victimizer or victimizers.<sup>27</sup> If the victim was unable to access these mechanisms then, according to the JPL, reparation remained subject to the creation of a Victims' Reparations Fund. The funding and reparations policies of the Fund would depend on the political will and contingencies of the government. Therefore, as Díaz affirms, in the field of reparation there would be a division between victims whose cases have been investigated by the judicial system and those unable to access the system.<sup>28</sup>

Therefore, the possibility of reparations was governed by external variables that would not depend on or be under the control of the victims, such as the greater or lesser effectiveness of the judicial system in having initiated proceedings against the demobilized individuals prior to the JPL; the capacity of the regulatory instruments of the JPL to identify the majority of the perpetrators; the existence of resources in the Reparations Fund; and again, the "good faith of the perpetrator" to fully confess to all illegally acquired assets in order to provide reparations.<sup>29</sup>

Regarding these profound asymmetries between the rights of the victims and the benefits for the demobilized individuals, the JPL must also be analyzed in the context of the profound weakness of the Colombian criminal justice system, which is generally characterized by inefficiency and high levels of impunity.<sup>30</sup> The JPL appears not to have taken into account this context of institutional weakness inherent in the Colombian criminal justice system, and in this sense the law also failed to establish mechanisms and procedures to respond to these problems. The

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<sup>27</sup> Catalina Díaz, *La reparación de las víctimas de la violencia política en Colombia: problemas y oportunidades*, in JUSTICIA TRANSICIONAL, *supra* note 6, at 524-26.

<sup>28</sup> *Id.*

<sup>29</sup> The government issued Decree 1290 of 2008, which created an individual reparations program through administrative action. This decree has been criticized because, even though it opened up the possibility of seeking reparation in a nonjudicial manner through the JPL, it is limited in terms of what an administrative reparation program should legitimately contain. For example the relevant perpetrators are understood to be only the illegal armed groups and not agents of the State. At the same time, the responsibility of the Colombian State is based on the principle of solidarity and not on a recognition that it has failed by action or omission to fulfill its obligation to protect citizens that are victims of political violence. Finally, it is a program that focuses on compensation and not on other elements that would be necessary to ensure comprehensive reparation. The same could be said of the draft victims' law, which was blocked by the administration's allies in Congress. Their objections to the law included that it was fiscally inconvenient. A main concern was that in the case of the victims of State agents, the law did not require proof of the responsibility of the State by means of a judicial ruling, as the administration allies had demanded. See María Victoria Duque, *El hundimiento de la ley de víctimas*, RAZÓN PÚBLICA, June 22, 2009; Rodrigo Uprimny, *Diez razones para apoyar al Estatuto para las Víctimas* (Feb. 23, 2009), <http://www.nuevoarcoiris.org.co/sac/?q=node/291>.

<sup>30</sup> See Rodrigo Uprimny, César Rodríguez, & Mauricio Villegas, *Las cifras de la justicia*, in ¿JUSTICIA PARA TODOS? SISTEMA JUDICIAL, DERECHOS SOCIALES Y DEMOCRACIA EN COLOMBIA 319 (Rodrigo Uprimny, César Rodríguez, & Mauricio Villegas eds., 2006).



JPL, as approved by Congress, was a law created for an extraordinary situation, due to the gravity and massive number of crimes that it aimed to address. This includes complex crimes carried out by organizations like the AUC that enjoyed great influence in the underworld, whose practices were accepted within certain sectors of society, and in some cases, acted with the connivance of certain State institutions.

However, the JPL was basically intended to be based on the infrastructure of the existing judicial system for ordinary situations. As the weakness of the institutional system was already evident in and of itself, to imagine that this same system could deal with the complex task mandated by the JPL constituted a grave impediment for achieving the goals of truth, justice, reparation, and guarantees of non-repetition, which the law claimed to satisfy. A report on the JPL by the International Crisis Group described these problems that already afflicted the system as well as Law 975, such as a lack of capacity in the criminal justice system's infrastructure; insufficient cooperation between the different state agencies that participate in the process; difficulties in effectively monitoring the demobilization and reinsertion of the members of the armed groups; lack of clarity regarding which governmental entity was to draw up the list of demobilized persons who could benefit from the JPL; how this list would be compiled and the means for verifying if individuals fulfilled the requirements; insufficient documentation and information on the grave crimes committed by the demobilized persons for sharing among the diverse state institutions participating in the process; scarce resources to protect ex-combatants, witnesses, victims, prosecutors, and judges; and the creation of a National Reparation and Reconciliation Commission assigned many duties but at the same time lacked the powers to fulfill them.<sup>31</sup>

It is necessary to add that there was also a huge asymmetry between the demobilized AUC members and the victims in terms of economic resources. This is because the former had resources and power stemming from their criminal actions, while the guarantees available to the majority of the victims within the process, because they belong to vulnerable groups with scarce economic resources, depend on the capacity of the State and its institutions to guarantee the legitimate defense of their rights. Additionally, the JPL established very short timeframes for the prosecutors of the Justice and Peace Unit to investigate whether or not the statements made by the demobilized persons during their *versiones libres* were true (sixty days). The number of officials in the Justice and Peace Unit were also far too few to deal with the magnitude of the investigations.<sup>32</sup>

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<sup>31</sup> INTERNATIONAL CRISIS GROUP, LATIN AMERICAN REPORT NO. 16, COLOMBIA: TOWARD PEACE AND JUSTICE? 8-14 (Mar. 14, 2006).

<sup>32</sup> Although certain state institutions have made great efforts over time to try to respond to the weaknesses of the JPL, the reality is that many of these obstacles persist and have been exploited by the demobilized persons, particularly the AUC leaders, as the written Colombian press has consistently reported and diverse human rights defender organizations have denounced.

As established at the beginning of this section, a model for transition is fair with regard to the victims and victimizers if the asymmetries or inequalities that have been generated due to the conflict are transformed—when the victims’ rights are recognized, and the victimizers lose the institutional or de facto powers that they enjoyed as an armed group. It also requires that both the victimizers and the social sectors that benefited from their actions pay their debts to the victims and to society. It is evident that the JPL, as it was approved by Congress, was a profoundly unjust law because rather than transforming these asymmetries between victims and victimizers, it has instead strengthened the position of the victimizers to the detriment of the rights of the victims.

It must be pointed out that many of the problems associated with institutional weakness and the lack of appropriate legal instruments to ensure that crimes are clarified, that victims’ rights are protected and guaranteed, and that the perpetrators’ power is lost persist despite the Constitutional Court ruling. Also, as analysts who have followed the demobilization and reinsertion of former AUC members have pointed out, it is easy to conclude that the criminal structures have not been dismantled and—as has been denounced by many national and international parties and organizations—these groups continue to control territories and commit crimes.<sup>33</sup> In the following section, I will analyze some of the concepts of political realism, elements that will serve to demonstrate that the strategy used by the Uribe Vélez administration with the AUC is more in line with the tenets of political realism than with a negotiation aimed at making a transition to a more democratic and inclusive society.

### **III. A Critique of Political Realism Based on Democratic Values and the Tendency to Continue to Use the Tools of Realism in Certain Models of Transitional Justice**

I do not intend here to make a strict analysis of political realism and its variations, nor to defend this theoretical stance, but rather to use some of its elements to show how this reading of the political aspects can help to understand the administration’s formulas for peace.<sup>34</sup> In this analysis I will take into account certain elements of political realism developed by Carl Schmitt and Hans J.

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<sup>33</sup> See Comisión Nacional de Reparación y Reconciliación, Informe No. 1, Disidentes, rearmados y emergentes: ¿Bandas criminales o tercera generación paramilitar? (Aug. 2007); OAS, Inter-American Commission on Human Rights, Follow-up on the Demobilization Process of the AUC in Colombia: Digest of published documents (2004-2007), OEA/Ser.L/V/II. CIDH/INF. 2/07 (2007); Corporación Nuevo Arco Iris, ¿El declive de la seguridad democrática? (2009).

<sup>34</sup> For those knowledgeable about political realism my exposition may seem too flexible or lacking in rigor; my intention here is to show how some of elements of *real politik* in order to explain the decisions of the Uribe Vélez government with respect to its peace policy.

Morgenthau,<sup>35</sup> two of the most influential authors of this school of thought. I am particularly interested in analyzing two of the concepts that they developed—Schmitt’s idea of the friend-enemy distinction and Morgenthau’s idea of the national interest—and in analyzing the consequences of adopting these postures in the political sphere.

One of the most important aspects of Schmitt’s theory is his concept of the friend-enemy politics; to introduce this concept I will follow closely the excellent study by Enrique Serrano Gómez.<sup>36</sup> Schmitt disagrees with the liberal vision of democracy because he thinks that, in this vision of the political realm the State is subordinated to the diverse groups that make up civil society. In this way, the State becomes an instrument at the service of the diverse private interests that compete amongst each other. According to Schmitt, given that the demands of these groups are different and in many cases contradictory, the State loses its sovereign power, and the conflict which it ought to control is aggravated.<sup>37</sup>

This State, which Schmitt refers to as the “total State,” ends up involved in affairs that have nothing to do with the political domain but rather other aspects of human thought and action that do not concern the State. Schmitt considers that the only way to avoid the State becoming subordinate to other aspects of human life is to clearly demarcate the political domain with respect to other diverse domains such as the moral, aesthetic, and economic. Schmitt considers that, just as these three aspects of human life have their own domains—in the moral domain the distinction between good and evil, in the aesthetic between the beautiful and the ugly, and in the economic between what is beneficial and what is detrimental or what is or is not profitable—the specific distinction of the political realm is that between friend and enemy.

According to Schmitt, this distinction is not a definition of the political sphere, but rather a criterion for autonomous distinction from the other domains.<sup>38</sup> “The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions.”<sup>39</sup> The political enemy is simply the stranger, the existentially different other, the transgressor of the public order. Schmitt distinguishes between the private adversary and the political enemy; only the latter

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<sup>35</sup> See e.g., HANS J. MORGENTHAU, *ESCRITOS SOBRE POLÍTICA INTERNACIONAL* (Esther Barbé trans., 2001) (English version: HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* (6th ed., 1985)); CARL SCHMITT, *EL CONCEPTO DE LO POLÍTICO* (1999) (English version: CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., 1996)); Carey B. Joynt & Sherman S. Hayden, *Moral and Politics: The Current Debate*, XXXI CAN. J. ECON. & POL. SCI. 354 (1955).

<sup>36</sup> ENRIQUE SERRANO GÓMEZ, *CONSENSO Y CONFLICTO: SCHMITT Y ARENDT* (2002).

<sup>37</sup> *Id.* at 21-22.

<sup>38</sup> SCHMITT, *supra* note 35, at 56-57.

<sup>39</sup> SCHMITT, *supra* note 35, at 57.

has the character of enemy.<sup>40</sup> In order to form the friend-enemy relationship in the political domain, two conditions must be met: first, the relationship must be of a public nature, and second, the conflict must have the possibility of leading to a war.

This idea of conflict, of wanting to eliminate the other, is a characteristic inherent to the political domain that will not be transformed, and in this sense the conflict reflects neither the goodness nor the evilness of human nature.<sup>41</sup> Human beings have no specific essence and, although they require a social order to survive, this order tends to change and depend on the result of the conflicts. Therefore, the limits between friends and enemies are also transformed and can be determined by family ties, ethnicity, a cultural or national tradition, or a combination of these elements; what is important is that identity reflects and implies an identity that is different from that of the enemy.<sup>42</sup>

As mentioned, for Schmitt the friend-enemy distinction is independent of the moral one, and it is not only independent of what is moral but precedes it, precisely because it is politics that establishes the moral criteria. Therefore, there is no universally valid moral order, rather it falls to the sovereign—the State—to establish in that order what is good and what is evil. Similarly, law is created by the State and what counts as law is what the State decides is valid within the nation.<sup>43</sup> In this sense, Schmitt has an antiuniversalist vision of morality and law; the validity of a moral and legal order corresponds to an act of power by the sovereign. In this perspective, the validity of politics and law are not based on the liberal theory of a set of basic moral principles that cannot be modified<sup>44</sup> and that must serve as a normative guide for developing political and legal principles.

In contrast to the liberal perspective, Schmitt's vision of power considers that friends are those that share the values and rules a determined context, whereas enemies reject this order. According to Schmitt, it is precisely the universalist version of morality that pretends to base itself on absolute and universal values, which makes rivals see each other as "absolute" enemies and as evil creatures against whom unrestricted violence may be employed. Schmitt considers the only way to avoid the unrestrained use of violence is when rivals understand that they are not the bearers of a universal truth, but rather of a point of view with a

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<sup>40</sup> SCHMITT, *supra* note 35, at 58. Enrique Serrano correctly states that the distinction between adversary and enemy in Schmitt can only be made with a prior distinction between the public and private spheres, which Schmitt rejects. As a result, it is not very clear what conditions make someone a public enemy or a friend. SERRANO GÓMEZ, *supra* note 36, at 23.

<sup>41</sup> SCHMITT, *supra* note 35, at 87-93.

<sup>42</sup> SERRANO GÓMEZ, *supra* note 36, at 27.

<sup>43</sup> SCHMITT, *supra* note 35, at 95.

<sup>44</sup> These moral principles are founded on the basic idea of liberalism that all human beings are equally free as moral agents and citizens. In liberal theory these moral principles have diverse names—natural rights, individual and political freedoms, human rights, etc.—according to the perspective that is assumed and the way it is justified.

different normative content. In this way, they go from being “absolute” to “just” enemies, a situation in which rivals are recognized as defenders of a different and concrete order without universal pretensions. Schmitt affirms that when rivals accept each other as just enemies, although conflict is inevitable, they recognize the right to declare war, to regulate it in order to impose limits on the violence, and also to declare peace or a truce.<sup>45</sup>

Given that conflict is inherent to humanity, within the State enmity must be limited in order to guarantee peace, security, and order. The State has the monopoly on power and therefore the power to use the right to war. This affords it the power to make decisions regarding the lives of its citizens—who should kill and die for the State and, if they become internal enemies, who could be killed by it. Schmitt thinks that generally in a normal State, total pacification is achieved through the monopoly on power. He believes that this same sovereign power, and not the citizen, is who determines who the enemies are and who the friends are, in order to prevent the citizens from converting their private adversaries into public enemies. Schmitt considers that the State is thus able to convert the people into a homogenous community of friends.<sup>46</sup>

Therefore the author does not believe in the liberal postulates of a pluralistic democracy, but rather in a democracy in which there is complete identification between those who govern and those governed the sovereign power of the State. In this conception, the sovereignty of the people coincides with that of the State. Clearly, those that are against the sovereign will of the State internally are dissidents and must be controlled and reduced to the status of criminals through the police state. If the enemy endangers the monopoly of the State, the conflict is decided through civil war. In general, Schmitt believes that domestically the State is capable of imposing order and pacifying society, whereas in relations among states there is pluralism (pluriverse) and consequently rivals and wars.<sup>47</sup>

Hans J. Morgenthau has elaborated a more contemporary vision of political realism that has served as a basis for guiding relationships between States, particularly for United States foreign policy. For the purposes of this section, I am more interested in his concept of national interest than his theory on international policy, and thus I will introduce several elements that support his vision of the political realm. Morgenthau believes that human beings are motivated to work in terms of their own interests, and that therefore the tendency to seek to control power is a characteristic inherent to human nature. Domestic policy is controlled by the State whereas international policy, as Morgenthau perceived it when he was writing, is anarchic and conducive to the uncontrolled exercise of power, as

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<sup>45</sup> SERRANO GÓMEZ, *supra* note 36, at 29 & 42.

<sup>46</sup> SCHMITT, *supra* note 35, at 75-79.

<sup>47</sup> SCHMITT, *supra* note 35; SERRANO GÓMEZ, *supra* note 36, at 30, 31 & 48.

occurs in the natural state. To change this situation requires moving towards an ideal model of political behavior: a rational foreign policy.<sup>48</sup>

Morgenthau criticizes liberalism for trying to use the same methods designed to achieve domestic pacification—including legal guarantees, judicial machinery, and economic transactions—and transferring them “as self-sufficient entities, lacking their original political functions, to the international sphere.”<sup>49</sup> Morgenthau affirms that a successful foreign policy depends on two conditions: that foreign policy be drafted by an elite and that this elite act in accordance with the logic of political power. Morgenthau understands political power as “a means to reach the nation’s goals.”<sup>50</sup> To do so, a nation must have material resources, among which he emphasizes the armed forces, and at the same time have the qualitative resources that constitute the human component of national power—in regard to the national character and morality, the quality of the government, and particularly the diplomacy.<sup>51</sup>

Morgenthau’s most important concept is his idea of the national interest, which he sees as an instrument of analysis and a rational guide for foreign policy.<sup>52</sup> This national interest is objective to the extent that all human beings act according to their interests. At the same time it is transcendent because there is a legitimate national interest that is above the infranational and supranational interests, as well as the interests of other nations. The national interest coincides with or rather *is* the interest of the State, and this interest varies according to the cultural and political medium. For Morgenthau just as for Schmitt, political and moral power constitute two different categories so that, according to Morgenthau, “ethics in the abstract judges action by its conformity with the moral law; political ethics judges action by its political consequences.”<sup>53</sup> Based on this description of the concepts of friend-enemy and national interest developed by Schmitt and Morgenthau respectively, I will next critique their theoretical perspectives and indicate the risks that stem from defending political realism in practice, in order to then proceed to analyze the Uribe Vélez administration’s formulas for peace with the AUC.

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<sup>48</sup> Esther Barbé, *Estudio preliminar*, in MORGENTHAU, *supra* note 35, at XXXIII.

<sup>49</sup> MORGENTHAU, *supra* note 35, at 21.

<sup>50</sup> MORGENTHAU, *supra* note 35, at 29.

<sup>51</sup> Esther Barbé, *Estudio preliminar*, in MORGENTHAU, *supra* note 35, at XXXIX. Morgenthau considers that diplomacy is the best method to preserve the peace; however, at the time when he writes, he considers that the conditions of world politics and of war do not permit states to renounce their war-making power and their sovereignty and transfer them to a higher authority. MORGENTHAU, *supra* note 35, at 560.

<sup>52</sup> As stated by Friedrich Meinecke, this dual character of the national interest as an analytical and political instrument is found in the early justifications for the theory of the modern State, in the reason of state doctrine, and in the beginning of modern democracy. Cited in Esther Barbé, *Estudio preliminar*, in MORGENTHAU, *supra* note 35, at XLI.

<sup>53</sup> MORGENTHAU, *supra* note 35, at 54.

## A. A Critique of Political Realism from the Standpoint of Democratic Values

In critiquing political realism, I shall present four general objections organized around the following themes: the anthropological pessimism of the position; the vision of democracy; power as an absolute value of the State; and the idea that political power creates moral doctrine and law.

First, the authors seem to have a vision of human beings as naturally competitive because in general they believe that, regardless of the social, historical, and political contexts inhabited by human beings, their principal interest is power. I think that rather than being able to categorically affirm that human beings are competitive by nature or not, studies of moral teachings since Plato and Aristotle and also of contemporary authors in diverse disciplines show that human behavior is influenced by factors such as family, culture, education, social context, and the type of political system to which individuals belong.<sup>54</sup>

Second, Schmitt and Morgenthau's vision of democratic systems is also biased because it reflects only one aspect of reality—that individuals are only interested in power—thus making it necessary to resort to a political model that, recognizing the struggles for power between individuals, is able to create a system to which all submit: the State. We could instead conclude that democratic societies, by promoting individualism and capitalist economic competition, have brought about the existence of extremely competitive behaviors, which in turn give rise to a calculated rationality that generates constant struggles for power in diverse spheres of private and public life. However, this is an aspect that I will not analyze here.<sup>55</sup>

Instead, I would like to point out that a democracy is not only characterized by a continuous struggle for power, but also as a space in which citizens can cooperate with one another. I agree with Joynt and Hayden in the sense both types of behavior are found in a democracy, and therefore to describe the citizens of a democratic system as essentially competitive is an arbitrary selection of facts that helps to theoretically justify the vision of political realism with respect to democracy but does not necessarily describe reality.<sup>56</sup> Their vision of power leads Schmitt and Morgenthau to defend a democratic system that brings about the destruction of the fundamental principles of liberalism.

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<sup>54</sup> See, e.g., CLAUDIA CARD, *THE UNNATURAL LOTTERY: CHARACTER AND MORAL LUCK* (1996); LAURENCE THOMAS, *VESSELS OF EVIL, AMERICAN SLAVERY AND THE HOLOCAUST* (1993); DIANA TIETJENS MEYERS, *SUBJECTION AND SUBJECTIVITY: PSYCHOANALYTIC FEMINISM AND MORAL PHILOSOPHY* (1994); SANDRA LEE BARTKY, *FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION* (1990).

<sup>55</sup> On the negative effects that an instrumental vision of liberalism can produce in a society, see Laurence Thomas, *supra* note 54; TZVETAN TODOROV, *HOPE AND MEMORY: LESSONS FROM THE TWENTIETH CENTURY* (2000).

<sup>56</sup> Joynt & Hayden, *supra* note 35, at 357.

This leads me to question a third aspect of their theory, which considers power as an absolute value held by the State. Karl Jaspers categorically states that: “power and force are indeed decisive realities in the human world, but they are not the only ones. To make them absolute is to remove all reliable links between men.”<sup>57</sup> Jaspers expressed this when evaluating the disastrous effect that National Socialism had on the Germans. The absolute power of a state over its citizens makes political action impossible. It prevents the recognition of pluralism and diversity, the building of the public sphere through dialogue and dissidence, and ultimately, the guarantees of a human community in which the dignity of all is the foundation and goal of the political system.

In contrast to the vision of Schmitt and Morgenthau, in a democratic political system power does not have absolute value; on the contrary, it is only legitimate when it guarantees the liberty and equality of the members of the society. In general, any traditional or contemporary liberal democratic vision is characterized by creating a set of instruments to avoid the arbitrary actions by the State against individuals.<sup>58</sup> The rights and guarantees of the citizens that are protected by the Constitution, the laws, and public institutions are above the powers of the State. In this sense, the State does not have absolute power but rather instrumental power, because its existence is only legitimate and justified to the extent that it guarantees and protects the rights of its citizens, fulfills its obligations, settles controversies, facilitates the ability of individuals to achieve their own life goals, and defends and promotes recognition of the most vulnerable groups in the society.

Schmitt and Morgenthau consider that the interest of the State is superior to that of its citizens, and consequently they view the citizens as mere instruments for fulfilling the ultimate purposes of the State rather than vice versa. In this perspective, the moral and political values of individuals must give way to the interests of the State depending on the contingent political context at the time. Therefore, the characteristic pluralism of a democratic system is eliminated in a completely altered version of democracy in which the interests of the government coincide with the interests of those who govern—in Schmitt through the community of friends and in Morgenthau through the national interest. It is not clear why individuals who, according to the authors, exclusively promote their own interests in the private sphere, would in the political sphere decide to cede them thinking exclusively the interests of the State, and believe that the State interests best promote the interests of the citizens. The only plausible explanation of conformity in reality—and not based on the anthropological pessimism of realism—is the existence of a totalitarian or authoritarian State, either left-wing

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<sup>57</sup> KARL JASPERS, *THE QUESTION OF GERMAN GUILT* 57 (1961).

<sup>58</sup> These controls include the balance of powers, the supremacy of the law over the power of those who govern, the political responsibility of state officials, and processes of democratic participation, among others.



or right-wing, that punishes those who dissent and promotes an ideology, which imposes a single idea of the good life through education and propaganda. This generally is not “the best” for all but instead promotes the interests of those who hold power based on an ideology, a religion, a race, or a class interest.

Fourth, political realism considers that the State defines morality and law. Although Schmitt and Morgenthau seem to assert that morality and politics occupy different aspects of human life, when defining the concepts of friend-enemy and national interest they both agree that there are no universal moral criteria, that good and evil is defined by the political power, and that they change according to historical circumstances. Thus friends, enemies, and national interest are contingent concepts and depend upon the interests of those who hold and support power. Therefore the criteria provided by the authors for guiding political actions ultimately do not provide any “objective” guidelines for political action, because this can take a wide variety of shapes according to the interests of those who hold power.<sup>59</sup>

On the other hand, the authors, particularly Schmitt, seem to be saying that their relativist concept of power makes it possible to see the other not as an “absolute” enemy to be eliminated, but rather as a “just” enemy, given that the other simply holds a contrary conviction. However, when power is given an absolute value, one group of interests has all of the means available to prevent the enemy from gaining access to control of the State, whether through police measures or armed warfare. Therefore, it is very unlikely that adversaries will impose limits and regulate the use of violence, war, and truce. In a context like the one imagined by the authors, the rationality applied at all times is that which makes use of all available resources to conserve or take power. The golden rule is to not make concessions to the enemy that could be used against you. The history of modern states is plagued by examples where not only totalitarian regimes but also democratic regimes inspired by political realism have used the most questionable instruments from a liberal perspective to “defeat their enemies.”<sup>60</sup>

To summarize, the criteria of friend-enemy and of national interest are not supported by normative ethical-political criteria that place precise limits on the use of power. The notions of friend-enemy and of national interest take on the most varied meanings depending on the social and historical contingencies and are justified to the extent to which they serve the interests of the community of friends or national interests.

In contrast, the ideal of a democratic system has very clear ethical-political foundations. Modern democracies adopt certain moral foundations based on the recognition of the moral and political equality of their members. These values are

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<sup>59</sup> Joynt & Hayden, *supra* note 35, at 357.

<sup>60</sup> The idea of proscribing certain types of conducts during war is based on its humanization; however, when the power of the State is defended as an absolute criterion that transcends the value of the members of the human community, violence and war have no limits beyond those necessary to achieve the State’s own interests.

reflected in their political institutions, legal system, and procedures for debate and political decision-making. Political power in a democracy is justified because it is viewed as the best system for guaranteeing the moral dignity of human beings. In a democratic community, the ends in and of themselves are the individuals, not the State and not even the political community as a whole. The different political decisions made by the State, either by public servants or by the citizens, have ethical-political restrictions: *Not everything that is politically possible in a democracy is ethically permissible if, in order to achieve the particular end, it is necessary to sacrifice or endanger the rights and liberties of groups or individuals. In the voluntaristic vision of political realism, this premise is inverted.*

As I stated at the beginning of this article, there is a tendency among governments in many countries that have led a transition to peace, to adopt tools of political realism.<sup>61</sup> In many cases, these political decisions are far removed from the principles that have been adopted in the theoretical discussion of transitional justice and in the discourse and norms of international human rights law. This tendency has a number of explanations that go beyond the scope of this text; I will discuss only a selection of these factors.

In the last three decades of the twentieth century, the models for transition from repressive regimes or from internal or international conflicts to democratic regimes were very flexible in terms of normative standards, and the international community accepted formulas that, today, in accordance with the development of transitional justice, would be unacceptable. By way of example, we could mention the process of transition in Spain in the 1970s, which was accompanied by a law of general amnesty that impeded trials for human rights violations committed by any of the parties during the Civil War and subsequently during the Franco dictatorship.<sup>62</sup> In the same way, in El Salvador in 1993, President Cristiani, the day before the public presentation of the report by the Truth Commission, which established personal and institutional responsibilities for both parties during the conflict, publicly stated his intention to approve an amnesty law, which remains in effect to this day.<sup>63</sup> These cases show how governments, armed actors, and

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<sup>61</sup> I thank Pablo de Greiff for pointing out that the formulas for peace employed by Uribe Vélez are just one example of a more general tendency to use realism in transitional justice.

<sup>62</sup> I thank Felipe Gómez Isa for the insight into this case provided during the second workshop for this project November 30-December 1 in Bogotá. Gómez explains how the transition in Spain led to a widespread forgetting of the victims of the civil war and of the Franco dictatorship, and that the recent movement to recover memory, led by the victims and their family members, culminated in a law of memory in 2007 in which the political class does not assume the most painful aspects of the past.

<sup>63</sup> Benjamín Cuellar Martínez, in his contribution to this volume entitled *Maybe Some Day*, points out how the Chapultepec Accords between the government and the FMLN recognized that the perpetrators of grave human rights violations from any sector should be punished by the courts of justice. Cuellar also describes that the results of the Commission were never sufficiently disseminated, which contributes to the current denial and distortion of the grave acts of violence that were committed before and during the armed conflict.

groups in power that are not interested in taking responsibility for the past can create transitional models that impede the pursuit of justice, truth, and reparations for citizens who have been victims of the violence, on many occasions invoking national interests of reconciliation and peace.

Today, with the development of normative and jurisprudential standards in the field of transitional justice, States must subject their decisions to such standards, particularly protection of the rights of the victims and guarantees that the atrocities of the past will not be repeated. However, the tendency to use the tools of political realism persists. In part, it could be argued that the contexts in which political decisions must be made in order to achieve peace are far from ideal, and therefore the real factual context is crucial in the transition from repressive governments, national, or international conflicts to peace. Most of the time, peace is not the fruit of military victory, but rather of negotiations between forces with dissimilar interests that do not lose and do not wish to lose their power structures through the peace accords. Frequently, governments are initiating democratic projects for the first time or after decades of undemocratic regimes; thus the institutions are very weak and there is no legacy of democratic culture. As a result, in order to maintain its power, it must form coalitions with groups that often verge on illegality or are clearly criminal organizations.<sup>64</sup>

It is evident that although this context imposes restrictions on the ideals that support transitional justice, these factual conditions cannot serve as an excuse for the transitional model to simply be an agreement among private interests that benefits those political and social sectors that in the past held power and that in the transitional model seek to continue exercising it. Precisely what transitional justice aims to do is to find a middle ground between forgetting and pursuing total accountability, a middle ground where it would be possible to guarantee a certain amount of justice, truth, and reparations for the victims and make drastic institutional transformations. That is why not every model of transitional justice is ethically and politically acceptable. A model that sacrifices or endangers the rights and freedoms of some groups or individuals, which generally means the victims or their survivors, is unacceptable. With these criticisms in mind, I will next analyze the Uribe Vélez administration's formulas for peace with the AUC from the standpoint of the tenets of political realism.

## **B. Government Formulas for Peace with the AUC from the Standpoint of Political Realism**

After analyzing the government's conduct—presenting the law on alternative sentences, endorsing draft legislation in Congress that did not respond

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<sup>64</sup> See in this book, the very convincing article by Patricia Gossman, entitled *Afghanistan and the Challenge of Non-repetition of Violence*.

to international standards for transitional justice, and introducing substantial changes to the Constitutional Court's ruling on the JPL—several questions arise: What is the government's real intention in its peace proposals with the AUC? why insist on maintaining the regulatory framework of the JPL as it was prior to the modifications introduced by the Constitutional Court, and even on making it more lenient? and finally, why concede such generous benefits to the perpetrators, in effect legitimizing through the judicial process the huge asymmetry between the perpetrators and their victims? In responding to these questions, the criteria of political realism enable us to make two types of interpretations: one of which gives the benefit of the doubt to the government and the other one more critical.

The benevolent interpretation of the formulas for peace with the AUC could be summed up in the following way: *The government thinks that to achieve peace, justice must be sacrificed—justice being understood as truth, justice and reparation.* This formula takes up one of the main tenets of political realism analyzed above, namely Morgenthau's concept of national interest, which defends the interest of the State as something that must be imposed above any infranational, supranational, or foreign interest. Based on this, we can affirm that the government believes that in Colombia the only way to achieve a transition towards a more stable society in which the illegitimate use of violence by the AUC would end, given the paramilitaries' economic, political, and moral power among certain social sectors, requires making wide-ranging and generous concessions to its members. The State recognizes the great power of the enemy that cannot be defeated by armed force and thus the national interest that is imposed in order to avoid continuing the war is that of sacrificing justice in pursuit of peace. Therefore, based on this reading of the conflict, if there are sacrifices that must be made, they must come from the political community in general and from the victims in specific.

This reading would explain why the government insists on preserving the initial parameters of the JPL approved in Congress through the regulatory decrees in which generous concessions are made to those that demobilized from the AUC, sacrificing the rights of the victims in order to achieve the primordial objective of the JPL—to achieve peace. This posture is also endorsed by various sectors of Colombian society. This view of the government is reflected in its discourse in diverse settings, in which it has said that the JPL is not a law of submission to justice, given that the AUC were not militarily defeated; that peace and national reconciliation require great sacrifices and that the standards of international law can be an obstacle for achieving them; and also that, for there to be peace, the victims of the conflict must be willing to offer a significant degree of forgiveness to their victimizers.<sup>65</sup>

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<sup>65</sup> This type of argument has been put forward in Congress by the administration and Congress members that defended the draft legislation. See TRÁMITE DE LA LEY DE JUSTICIA Y PAZ, *supra* note 2.

In contrast to the preceding reading of the government's formulas for peace, a less benevolent interpretation can also be made. This view could be summarized in the following way: *The guerrillas are the true enemy of peace and the AUC are a lesser evil.* In this sense, the government and many social sectors feel that the true enemies have been and continue to be the leftist armed movements, particularly the FARC. Therefore, these groups are the ones that really endanger the national interest and should therefore if possible, be militarily defeated by the State.<sup>66</sup> The AUC emerged simply due to the weakness of the State, which was incapable of guaranteeing security throughout its entire territory and particularly in the areas where the guerrilla had territorial control. Thus the AUC must not be seen as an enemy of the State and of society, because their interest is to protect the status quo; so rather than being treated as enemies, the AUC must be treated as a lesser evil. Thus, the relationship between the State and the AUC would not be, in terms of Schmitt, one of adversaries, and in this sense, the negotiating conditions are generous and more lenient.

## Conclusion

In conclusion, the government's formulas for peace with the AUC can be viewed as a strategy of a state that orients its peace policies inspired by political realism, as opposed to a model of transitional justice organized around equitable rights of the victims.

One question that emerges after making this analysis is whether the vision of political realism has any practical usefulness in a negotiation with an illegal armed group—in other words, in what sense is knowledge of political realism useful for a government. I do not intend to make an in-depth analysis of such a complex topic here, but it suffices to note that for a government in negotiations with an illegal armed group, political realism can be important to understand the logic used by these armed groups.— It would be ingenuous to think that because a government is negotiating peace with an armed group, the armed group in the course of the negotiations ceases to think in terms of a strategic logic and of force.

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The need for pardon was also expressed in the interviews initially given by Luis Carlos Restrepo to the written press in his role as the government's High Commissioner for Peace, as well as in speeches by the Vice-president of Colombia during the international congress on "Restorative Justice" sponsored by the Fundación Alvaralice in February 2003, and at the Regional Conference "The Legacy of the Truth: Impact of Transitional Justice on Building Democracy in Latin America" sponsored by ICTJ in June 2007. On these occasions Restrepo asserted that international standards in the field of transitional justice were an impediment to achieving peace.

<sup>66</sup> The majority of society, and with reason, holds a very negative view of the FARC, not just because of the feeling of having been deceived after the failure of the peace negotiations with the Andrés Pastrana government, but also because of its atrocious crimes against the defenseless civilian population and its absolute indolence regarding the citizens that it has kidnapped and kept.

However, being conscious of how armed actors act does not necessarily imply acting like them. Transitional justice provides sufficient tools to make the need for peace compatible with demands for justice. Rather than being an obstacle to achieving peace, transitional justice and its principles of the rights to truth, justice, and reparation, is a set of legal, political, and moral rules that serve to guarantee a stable transition from war to peace. Moreover, the Colombian case does not involve a State that is installing a democratic order for the first time—it is not a situation in which the country must begin from scratch and must make concessions that in other circumstances would probably be unacceptable. Although Colombian democracy is weak, there are nevertheless democratic institutions, some of which are quite solid. In this sense, the government does not act in its own name or in the name of the interests of part of society or even the majority; the government must act as the guarantor of democracy. In the present context of conflict, the regulatory framework and the political decisions that the government makes must be guided by democratic principles, in which there are guarantees for the perpetrators, but also guarantees that the victims will have their rights recognized and their citizenship reestablished under fair conditions.

The tools of transitional justice in Colombia should be the guarantee of a creation of stronger democratic institutions, where a break would be made with the violent past and the exercise of power by the AUC, transitioning to a situation in which human rights, trust in institutions, and trust in citizens are permanently established. In other words, transitional justice should be a process of democratic moral learning for the government, the armed actors, and all citizens; however, the formulas for peace of the Uribe Vélez government as analyzed in this article do not appear to be fulfilling this objective. Colombian society is once again failing to take advantage of the opportunity to make a drastic transformation from the past, thereby running the risk that the transition towards peace could end in failure.

## Chapter 3

# Transitional Justice under Fire: Five Reflections on the Colombian Case

*Michael Reed Hurtado\**

The application of transitional justice mechanisms in Colombia is controversial. Human rights organizations stress the incompatibility of applying tools designed for post-conflict situations to Colombia's ongoing conflict and repression. They also challenge the fact that the official transitional justice arrangement excludes any discussion of State responsibility or that of state agents. The legal mechanisms implemented to date under the guise of transitional justice refer specifically and only to members of illegal armed groups. Notwithstanding, some Colombian officials and public servants go so far as to fervently defend the official arrangement with the paramilitaries and proclaim it as a success, even seeking to extend its application to other illegal armed groups. Transitional justice in Colombia is under fire -- both because it is being applied in the midst of extreme violence and because its application is the source of ongoing contention.

As a contribution to the transitional justice debate, this chapter will offer five reflections on the application of the tools of transitional justice in Colombia. I will not analyze here the specific instruments and laws that have been implemented. I will instead focus on a set of more general reflections aimed at shedding light on the broader problems of conceptualization and implementation of transitional justice in Colombia, a context defined by war and drug trafficking. These are partial reflections and in no way seek to exhaust the realm of discussion.

For the purposes of this analysis, I will limit my comments to the official scheme known as Justice and Peace. I must emphasize that I limit my comments for the sake of argument and not because the arrangement actually demarcates the whole of the transitional justice field in Colombia. In fact, for decades, Colombian society has employed multiple and varied strategies to confront and contest the denial of atrocities. The fight against impunity and the pursuit of truth, justice, and reparation have an abundant and passionate history in the heart of Colombian civil society. It is likely that this history will be more determinative in the final outcome of transitional justice in Colombia than the official arrangement that is currently being applied. Nonetheless, given the prominence of the debate around

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\* I thank Camilo Bernal and Gabriel Arias for the never-ending discussions, which have helped me to articulate many of the arguments that I present in this chapter. I would also like to thank Catalina Uprimny for her review to an earlier version of this text in Spanish. The English version would have not been possible absent the corrections made to the translation by Amanda Lyons and a further review by Maya Ibars.

the Justice and Peace framework and the polarization generated by its application, this chapter will focus on the official arrangement and its implications.

## **I. An Initial Point for Clarification: Paramilitary Demobilization as a Government Strategy to Regain the Capacity for “Plausible Deniability”**

In generic terms, *paramilitary* refers to everything that takes place outside of regular military controls, but which fulfills military functions—in other words, it is auxiliary to the purposes of the military. The term is used to refer to a type of activity or structure that is undercover or parallel to the official conduct of affairs in the sphere of national security or public order and, thus, can be denied by the authorities.<sup>1</sup> One noted expression of paramilitary violence is the operation of death squads around the world.<sup>2</sup> Another is the extension of parallel armies, such as those that existed in Colombia in the 1990s and during the first decade of this century. Such armies are assigned covert functions during a dirty war, thereby avoiding a stain on the reputation of the military forces. The State need not support these groups; it must simply “look the other way” and guarantee their impunity.<sup>3</sup>

Undoubtedly, the term paramilitary can be used to categorize a wide range of activities and structures. This is true in the Colombian context, as well as in other situations of armed conflicts and repression. “Paramilitary” is a complex and dynamic analytical category. The broad range of this term is not a result of vagueness or conceptual confusion—it derives from the very essence of the phenomenon, which is by definition of a concealed and variable nature. Paramilitary operations are surreptitious and, thus, not always decipherable. The best form of paramilitarism (from the perspective of the state sponsors) is that which can be denied. A repressive parallel apparatus intended to be kept secret is of little use for maintaining the regime if it becomes a notorious and potentially embarrassing phenomenon.

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<sup>1</sup> This is exemplified by the doctrine of “*plausible deniability*,” coined by the U.S. intelligence services in the 1960s. It is an operation that permits the president to deny responsibility for covert operations by establishing informal and diluted structures and chains of command in the intelligence agencies.

<sup>2</sup> See generally BRUCE B. CAMPBELL & ARTHUR D. BRENNER, *DEATH SQUADS IN GLOBAL PERSPECTIVE: MURDER WITH DENIABILITY* (2000), which presents a comparative study on the use of death squads in order to be able to deny state responsibility in the exercise of violence; and *DEATH SQUAD: THE ANTHROPOLOGY OF STATE TERROR* (Jeffrey A. Sluka ed., 2000), which illustrates this phenomenon through case studies.

<sup>3</sup> JULIE MAZZEI, *DEATH SQUADS OR SELF-DEFENSE FORCES? HOW PARAMILITARY GROUPS EMERGE AND CHALLENGE DEMOCRACY IN LATIN AMERICA* (2009).



The paramilitary activity and structures in Colombia have been widely documented and analyzed in history, sociology, and political science literature,<sup>4</sup> as well as in case law, both national and international.<sup>5</sup> The complexity and diversity of these groups and the wide range of their activities have been evident since the early 1980s. By the end of that decade, the Colombian security services agency, the *Departamento Administrativo de Seguridad* (DAS), exposed the security forces' active delegation of security functions to paramilitary groups, the groups' links to drug trafficking interests, the confluence with local political interests (including the inclusion of paramilitary structures in municipal entities), and the fluidity of the paramilitary structures.<sup>6</sup>

Throughout the national territory, different types of paramilitary activity take place simultaneously, for example: the perpetration of selective homicides by death squads; massive campaigns of violence resulting in massacres and forced displacement; localized patrolling of cattle-ranching and agribusiness properties; processes of military expansion and occupation; the promotion of social and political action in isolated areas; investment and participation in economic activities (both legal and illegal); and the transformation and, in some cases, reduction of its armies.

Beginning in the mid 1990s, the Colombian government and the political and military elites (both local and national) made tremendous efforts to promote the thesis of the “third actor”<sup>7</sup>—in other words, to deny the paramilitary nature of the irregular groups and assimilate them as a third player in the conflict between the State and insurgent forces, completely distinct from State-led efforts in war and repression. In fact, official sources and certain authors have used the wide-

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<sup>4</sup> Some of the most interesting writings include: CARLOS MEDINA GALLEGO, *AUTODEFENSAS, PARAMILITARES Y NARCOTRÁFICO EN COLOMBIA* (1990); Francisco Gutiérrez & Mauricio Barón, *Estado, control territorial y orden político en Colombia. Notas para una economía política del paramilitarismo, 1978-2004*, in *NUESTRA GUERRA SIN NOMBRE: TRANSFORMACIONES DEL CONFLICTO EN COLOMBIA* 267 (Instituto de Estudios Políticos y Relaciones Internacionales ed., 2005); MAURICIO ROMERO, *PARAMILITARES Y AUTODEFENSAS, 1982-2003* (2003).

<sup>5</sup> In the domestic framework it is interesting to analyze the rulings by the Criminal Cassation Chamber of the Supreme Court of Justice in relation to the *parapolítica* scandal. See, e.g., Criminal Cassation Chamber, Supreme Court of Justice, ruling of Dec. 3, 2009, No. 374 (sentence against the ex-governor of Sucre, Salvador Arana Sus); Criminal Cassation Chamber, Supreme Court of Justice, ruling of Feb. 23, 2010, No. 56 (sentence against ex-senator Alvaro García Romero) On the international level see for example *Case Mapiripán Massacre v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); *Pueblo Bello v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006); *Ituango v. Colombia*, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006).

<sup>6</sup> See Departamento Administrativo de Seguridad (DAS), Dirección General de Inteligencia, *Información sobre el surgimiento de la autodefensa, suministrada por Diego Viafara Salinas*, Confidential, undated; DAS, *Organización de sicarios y narcotraficantes en el Magdalena Medio*, Confidential, July 20, 1988; DAS, *Información sobre Fidel Antonio Castaño Gil (a. Rambo) y los grupos de justicia privada en el Departamento de Córdoba*, Confidential, Apr. 4, 1990.

<sup>7</sup> *El tercer actor* (“The Third Actor”) is an official publication of the Colombian paramilitaries that was disseminated through the internet. It was previously available at <http://www.colombialibre.com> or at <http://www.aucolombia.org>.

ranging nature of the term paramilitary to argue that it is invalid as a nominative and explicatory category for the violence experienced in Colombia. They maintain that the term is imprecise and of no use in describing the structures and activities of the illegitimate armed groups that operate in the country, which they assert have had neither support nor acquiescence of the State. Authorities prefer the expression *autodefensa* (“self-defense group”) because it avoids contaminating the good name of the military forces by association and characterizes these groups as a private defense initiative in response to the guerrilla threat, with nothing official about them.

The fabrication of the “third player” provoked, *inter alia*, the creation (inspired and encouraged by national and regional personalities) of the *Autodefensas Unidas de Colombia* (United Self-defense Forces of Colombia or AUC). This was a conglomerate of four paramilitary groups that originally adopted a constitution on April 18, 1997, during the so-called First National Conference of Leaders and Commanders of Peasant Self-defense Groups, organized by the *Autodefensas Campesinas de Córdoba y Urabá* (Peasant Self-defense Groups of Córdoba and Urabá or ACCU).

Starting in the late 1990s, manifestations of paramilitarism began to employ the image of the AUC. Through mass media, especially the Internet, the AUC disseminated the impression of themselves as an autonomous and hierarchically structured entity. However, the reality was quite different: the AUC never were a homogenous entity nor did they ever encompass all the paramilitarism in the country. This was confirmed during the subsequent demobilization process of the 2000s, where the divisions and lack of control became evident. Multiple declarations by the AUC commanders themselves and by those who studied the process further confirmed the illusion of a unified paramilitary confederation<sup>8</sup>. For example, Salvatore Mancuso declared:

Carlos Castaño drafted the organic structure of the AUC and the ACCU, and a structure was set up with a general staff, but in reality this was never implemented and existed only in Carlos’ writings. A leadership body carries out planning, but in the AUC this never happened.<sup>9</sup>

The internal divisions and power struggles among and within the paramilitary groups are well known, and tainted the demobilization process. Both the so-called

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<sup>8</sup> See, for example, ALDO CÍVICO, *NO DIVULGAR HASTA QUE LOS IMPLICADOS ESTÉN MUERTOS: LAS GUERRAS DE “DOBLECERO”* (2009); ALFREDO SERRANO ZABALA, *PARACOS 202* (2009); FUNDACIÓN IDEAS PARA LA PAZ, *NEGOCIACIONES GOBIERNO NACIONAL, GRUPOS ILEGALES ARMADOS DE AUTODEFENSAS: RECUENTO CRONOLÓGICO BÁSICO DESDE MAYO DE 2002* (Apr. 25, 2004); LEÓN VALENCIA & EDUARDO PIZARRO L., *LEY DE JUSTICIA Y PAZ* (2009).

<sup>9</sup> Excerpt of the voluntary deposition (*versión libre*) given by Salvatore Mancuso Gómez on December 19, 2006, before the Justice and Peace Unit of the Attorney General’s Office in Medellín.

Elmer Cárdenas Bloc and the Central Bolívar Bloc were at the center of significant public scandals provoked by their desires to disassociate themselves from the ACCU and to position themselves as leaders and representatives of the varied groups. Other examples are those paramilitaries who declared that they were not part of the supposed federation and therefore never joined the demobilization process. Hector Buitrago Parada, also known as “Martín Llanos,” continues to lead a paramilitary group that has operated in Meta and Casanare for years. Other commanders also abandoned the process and returned to the underworld. For example, Pedro Oliverio Guerrero Castillo, better known as “Cuchillo,” acted as the representative of the paramilitaries of Meta and Guaviare during the demobilization process. After several of the demobilization ceremonies, Cuchillo reorganized the groups under his command; he is currently at large and continues to control the territory he has been controlling for a number of years.

Additionally, several paramilitary groups linked to local agribusiness sectors—such as those in the departments of Cesar, Magdalena, Cauca and Valle del Cauca—never even came to the negotiating table when paramilitaries first got together with the elected government. This is partly because these groups portray themselves as vital self-defense initiatives needed to protect private property against attack by insurgents or common criminals. But in practice, they operate as private justice and security bodies. These groups delegate power broadly to all their members who operate with a vast degree of discretion, in order to respond to shifts in local dynamics. . These armed structures operate under the radar; they patrol, control and administer justice at the local level, without any official control.

Notwithstanding this reality of unwieldy paramilitarism, the Uribe administration took advantage of the illusory concept of the AUC to declare the end of paramilitarism, without having to address structural issues linked to the phenomenon. They denied the inherent ties of the AUC phenomenon to political and military elites and, more generally, to State action. Uribe made his desire to negotiate with the paramilitaries clear from his first presidential campaign. Subsequently, through emissaries from the Catholic Church, in October of 2002 some paramilitary leaders accepted to reach an agreement with the government. The demobilization process then materialized through an exploratory phase that began in December of 2002 and the signing of the Santa Fe de Ralito Accord on July 15, 2003.

From November 2003 to August 2006, the country witnessed the officially entitled “*Proceso de paz con las autodefensas*” (Peace Process with the Self-defense Groups): 39 collective demobilization ceremonies, the presentation of 31,671 people, and the relinquishing of 18,051 arms.<sup>10</sup> Demobilized paramilitary

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<sup>10</sup> Statistics reported by the Office of the President of the Republic, Office of the High Commissioner for Peace. The diverse official reports show a slight difference in the numbers recorded. These numbers include the last demobilizations from the so-called Elmer Cárdenas Bloc.

leader Ernesto Báez accused the Colombian High Commissioner for Peace of having converted this process into “a rifle-counting arithmetic exercise.”<sup>11</sup>

Amidst illusions and lies, the country found itself immersed in “a peace process with the self-defense groups.” The core problem with this ostensible application of transitional justice peace-making is that in reality this does not have the elements of a peace process; instead, it is an inherently defective arrangement due to a lack of transparency and mutual accusations of betrayed agreements (between the government and the paramilitaries). Moreover, there are no signs in the day-to-day Colombian life that would indicate that Colombia is in a peace process. Violent activity by the paramilitary structures continues to be evident: hundreds of deaths attributable to these groups occurred during the demobilization and post-demobilization, and murders committed by these groups continue to be recorded daily.

The concept of the AUC was short-lived: from 1997-2003. Its creation and dismantling fulfilled and continues to fulfill a civic-military purpose that is of crucial importance to the Colombian government and security forces: to enable the denial of the collaboration between the paramilitaries and the military—the “plausible denial.”<sup>12</sup>

This formal declaration of the end of the AUC places Colombia in a state of total denial, both in relation to the phenomenon of paramilitarism as such and its implications for the exercise of power in the country.<sup>13</sup> The official discourse has been arranged so as to deepen the process of denial, using nominative concepts—such as self-defense group, criminal gangs, or seditious actors—to avoid any substantive discussion about the involvement of the State in the perpetration of crimes. The expressions of paramilitarism that were somehow accommodated in the notion of an AUC during the demobilization process are just some of the most notorious, but they do not amount to all of the paramilitary structures or activities present in the country. Along with the strategic reserves that stayed outside the AUC demobilization, there are diverse forms and factions of paramilitarism concentrated in rural zones and tied to the security services for agribusiness.

Unfortunately, because the political costs (and implications of failure) for the Uribe administration would be too high, it is unlikely there will be any official acceptance of continued paramilitary activity. This would imply, among other things, the ruin of the security strategy adopted by the Uribe administration at the beginning of its first term. Therefore, the government, along with political and

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<sup>11</sup> Letter from Iván Roberto Duque, alias Ernesto Báez, to Luis Carlos Restrepo, High Commissioner for Peace, Itagüí Prison (Dec. 28, 2006).

<sup>12</sup> See *supra* note 1. In relation to the paramilitary phenomenon, see CAMPBELL & BRENNER, *supra* note 2, which presents a comparative study of the use of death squads for the purpose of denying state responsibility in the exercise of violence.

<sup>13</sup> Stanley Cohen has worked extensively on the process of denial in atrocious regimes. See STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* (2001).

military elites, will continue to make every effort to conceal the continuation of paramilitary activities and the restructuring of supposedly demobilized groups. In this way, they seek to preserve the desired state of “plausible deniability.”

By not addressing paramilitarism head on, the demobilization process further weakened the already fragmented state power, formalized some of the powerful sectors behind paramilitarism (both at the local and national levels), gave drug trafficking a political character, and avoided facing the structural problem of State-perpetrated violence in Colombia. It also created a very unusual situation by implementing transitional justice mechanisms, albeit with limited scope and language. The official transitional justice mechanisms remain in place to confront paramilitarism, but cannot address its essence or confront its ties to State violence.

## **II. A Transactional Arrangement Gone Bad:<sup>14</sup> A Brief History of a Crooked Deal**

The official arrangement of transitional justice in Colombia did not emerge after open debate, negotiation or dialogue with society at large. Rather, it derives from a secret series of transactions between the Colombian government and the paramilitary groups. The irregular shape that the demobilization arrangement took reflects this ad-hoc formation, as it adopted a legal framework composed of differing criminal justice elements: Law 782 of 2002 (which grants *de facto* amnesties and provides pardons to the great majority of the demobilized combatants), and Law 975 of 2005 (known as the Justice and Peace Law, which was intended as a residual instrument to address the situation of those individuals that had outstanding criminal cases against them or that they were likely to face criminal charges for the commission of serious crimes during their membership to the illegal armed group). In short, the perpetrators thought that this combination of laws would allow for benign and speedy legal solutions to their problems after demobilization; likewise this framework appealed to the government who assumed it would be able to close the deal swiftly and turn the page of paramilitarism. Experience has shown that neither party was correct.

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<sup>14</sup> Transactional analysis is useful for its examination of the exchanges that took place in a determined context, how those transactions shaped the way that the social agents interacted and related to one another, and how these transactions took place. This approach makes it possible to focus on the negotiation process independent from the outcome of the negotiation, and to pinpoint how the dynamic framework of interaction and mutual involvement modifies both the result of the negotiation and the agents involved in the process. CHARLES TILLY, IDENTITIES, BOUNDARIES AND SOCIAL TIES 15 (2005). Tilly describes how the transactional approach, in contrast to systematic or outcome-based approaches, highlights the negotiation processes among individuals and groups instead of either anomalous situations that arise out of a determined context, or the incentives and opportunities available to individuals with violent tendencies.

Today, years after informal exchanges between the paramilitaries and the national government first began, the result of that initiative is undeniably distinct from what each party expected would occur. For example, the parties simply did not imagine that the situation in 2010 would look like this: more than 17,000 people awaiting application of an amnesty or a pardon to resolve their legal situation; five years without a single criminal sentence handed down under the Justice and Peace Law; some of those bearing the greatest responsibility extradited to the United States; thousands of paramilitaries killed; and more than a hundred politicians (at the national and local levels, belonging to the Uribe coalition) involved in criminal proceedings for having been part of the paramilitary conspiracy.

The transactional process between paramilitaries and the executive branch was marked by a lack of transparency and by constant crisis – the threat of pulling away from the negotiation was ever present and each of the parties threaten to tell the Colombian public what was in fact transpiring as a form of chastising the other player. . From the beginning of the exchanges between the government and the paramilitaries, all parties operated with deliberate concealment (a far cry from discretion). The official reports do not allow for examination of what was discussed, nor is it clear who confronted whom during the negotiations. For example, we have subsequently learned that drug-trafficking powers were behind the discussions, but we do not know exactly in which parts or to what extent.

Instability was evident in various crises. Examples of a few of the destabilizing events include the following: the assassination of Miguel Arroyave (alias “El Arcángel” or “El Hombre de los Líquidos”) in Meta; the appearance of known drug traffickers in the Santa Fé de Ralito zone, such as “Los Mellizos” or “Gordolindo”, after reportedly having bought an AUC franchise; the issuance of an arrest warrant for Diego Fernando Murillo (alias “Don Berna”), the pursuit, his resistance and subsequent surrender; the disappearance of Carlos Castaño and the subsequent disclosure of his alleged assassination; the escape of Vicente Castaño; the government’s initial rejection of presumed drug trafficker Juan Carlos Sierra (alias “El Tuso”) from Justice and Peace and his later inclusion as a paramilitary; and the assassination of Daniel Mejía (alias “Danielito”), who was presumably Murillo’s second in command.

The Justice and Peace Law, addressing the criminal matters of the demobilization, was issued two and a half years after demobilization negotiations with the paramilitaries had begun. This occurred despite the common sense warning against the inappropriateness of designing a legal framework for criminal surrender while concurrently negotiating demobilization. Revelations emerged of an agreement between the paramilitary leaders and several members of Congress and other politicians to “re-found” the State, signed on July 23, 2001. To date, we have news of fourteen pacts of this type in diverse regions of the country.<sup>15</sup>

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<sup>15</sup> See VALENCIA & PIZARRO, *supra* note 8, at 329-38 (describing the nature of each of the reported agreements).

These agreements cast serious doubt on how independently those members of the legislative branch acted when having to approve a legal framework that affected the paramilitaries' interests. In addition, the Criminal Chamber of the Supreme Court of Justice has carried out investigations on the ties of various politicians to paramilitarism. The Colombian Supreme Court has initiated criminal investigations against approximately eighty members of Congress for links to the paramilitary groups, and has sentenced over a dozen. At the very least, this reality raises serious questions as to the legitimacy of those Congress members that voted in favor of the Justice and Peace Law.

Operating in this situation of continuous crisis, the government and the paramilitaries were able to create an atmosphere that suggested, "anything can happen," thus plaguing the entire process with insecurity and irregularity. The gravest aspect of this context of instability was that the behind the scenes truth that each of the parties held regarding the negotiation became a means for pressure and coercion.

The accounts and accusations that are thrown around in relation to the content of the arrangement and the alleged unfulfilled promises expose the bitterness of the parties involved in the agreement. For example, a letter by confessed paramilitary Iván Roberto Duque (alias "Ernesto Báez") to Luis Carlos Restrepo, the High Commissioner for Peace, sent in late 2006 when the preliminary declarations in the context of the Justice and Peace Law were beginning, recalls that the executive branch and the paramilitaries negotiated ways to avoid having the Constitutional Court rule on the application of the Justice and Peace Law. The paramilitary spokesman reminds the high official that:

[T]he reasons that you gave us were perfectly clear: there was a need to anticipate the Constitutional Court ruling regarding Law 975 because there would undoubtedly be substantial modifications to the original text as approved by the Congress of the Republic.<sup>16</sup>

In the same letter, Báez reminds Restrepo of the unfulfilled promises and threatens to reveal the agreements if this situation was not corrected. He goes so far as to remind Restrepo that paramilitarism has not been dismantled and that not all of the leaders are in jail:

In this regard, I find myself forced to remind you that of the forty major leaders within the federated leadership of the AUC that you met, 19 are detained, which means that more than half of these senior commanders enjoy full freedom, including the historical co-founder of the AUC. The

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<sup>16</sup> Letter from Iván Roberto Duque, alias Ernesto Báez, *supra* note 11. A similar version of the negotiation is to be found in testimonies by another confessed paramilitary, Diego Rivera, of the Central Bolívar Bloc, in the framework of the discussion of the decrees regulating the law. See SERRANO ZABALA, *supra* nota 8, at 202 *et seq.*

same is true of more than 500 second-level commanders and around 1000 mid-ranking leaders. No one knows better than you that the misnamed emerging criminal gangs are simply paramilitary groups that have been reconstituted by many of the important leaders who fled as fugitives from the lack of fulfillment, the farce, and the destroyed dream of peace.<sup>17</sup>

The general response by the executive branch to this type of statement is simple: “Criminals cannot be believed.” This categorical view also dominates public opinion. Regardless of who deserves credibility, the issue that remains is that no light has been shed on the opacity and the underhanded deal that went down between the government and the paramilitaries.

Aggravating this situation, in May of 2008 and again in March of 2009, the Colombian government extradited several high-ranking paramilitary officers to the United States to face drug trafficking charges. The problem is that these individuals possess the definitive narrative about the organized power apparatus—namely these are the most well-known paramilitaries.<sup>18</sup> Their extradition for drug trafficking ignored the fact that these men were confessed paramilitaries and were under the authority of the Colombian justice system, and in several cases were even under coercive procedural and custodial measures. They all faced charges in the ordinary justice system and, to varying degrees, were collaborating with the confessional Justice and Peace process. However, the possibility of reconstructing and exposing the structure of the criminal apparatus and the *modus operandi* of paramilitarism at the highest hierarchical level was extradited together with the paramilitaries. All incentives for these individuals to collaborate with the Colombian justice system were eliminated. In fact, these extraditions have had a paralyzing effect on the Colombian justice system.<sup>19</sup>

The concealment is exacerbated by the extreme secrecy of the United States Department of Justice has applied to the status of these individuals in the US and the seal it has placed on what would regularly constitute public record. . Promises by both governments to establish channels for bilateral cooperation have not materialized and, despite declarations of goodwill, these extraditions are a *de facto* obstacle to investigations of systematic crimes perpetrated in Colombia.

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<sup>17</sup> Letter from Iván Roberto Duque, alias Ernesto Báez, *supra* note 11.

<sup>18</sup> Since September 2006 the government has extradited thirty paramilitaries, including twenty-two Justice and Peace defendants. In light of the information that they could have contributed in criminal proceedings, the extraditions of the following are particularly grave: Salvatore Mancuso; Rodrigo Tovar Pupo “Jorge 40”; Guillermo Pérez Alzate “Pablo Sevillano”; Hebert Ever Veloza García “H.H.”; Diego Murillo Bejarano “Don Berna”; Hernán Giraldo Serna “El Patrón”; Ramiro “Cuco” Vanoy Murillo; and Carlos Mario Jiménez “Macaco.”

<sup>19</sup> Of all those who were extradited, only three took part in voluntary depositions (*versiones libres*), and only one has been partially indicted. There has been minimal recorded procedural activity and at present, the cases are at a standstill.



The prosecution of organized crime and drug trafficking is undeniably a task that cannot be postponed, but it can be carried out without prejudicing or trumping the prosecution of crimes amounting to grave human rights violations.

The extradition of the paramilitaries was one of the final actions of the Colombian government that, according to the paramilitaries, violated all of the agreements that had been reached.<sup>20</sup> As an example, in September of 2009 Don Berna declared:

Many agreements were discussed and finally reached with the government of President Álvaro Uribe Vélez through then Peace Commissioner Luis Carlos Restrepo and Ex Minister Sabas Pretelt de la Vega; *agreements and commitments that the government has not only totally failed to uphold, but which it has systematically prevented from being revealed so as to prevent the entire country from really knowing what the government negotiated and agreed to*; or in other words, so that the entire world would never know the intimate details of the negotiation process with the Colombian government.<sup>21</sup>

The recorded reactions to and direct effects of the extraditions are illustrative of the unease and derailment of the process. Without taking position on one side or the other, the fact is that the extraditions have frozen the investigations in Colombia and buried the truth about paramilitarism even deeper.

With the passage of time, the dynamics of the negotiation process between the paramilitaries and the government are beginning to come to light, albeit obscured by a lack of transparency, hidden interests and conflicting versions of the truth. Although discretion is part of all negotiation processes, subsequently evaluating what took place should not be disguised under a blanket of “it’s better not to know,” which is the official attitude that confronts various efforts aimed at uncovering the truth today. In addition, the demobilization process continues to be severely disturbed by very high levels of violence against all of those involved in the negotiation, thus contributing to further concealment of the deal.

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<sup>20</sup> Rodrigo Tovar Pupo, alias Jorge 40, Open Letter to Mr. Eduardo Pizarro Leongómez, President of the National Reparation and Reconciliation Commission (Feb. 2009); Salvatore Mancuso Gomez, Letter addressed to the Criminal Cassation Chamber, Colombian Supreme Court of Justice, regarding the Justice and Peace Process, Warsaw, Virginia, Northern Neck Regional Jail (Aug. 25, 2009); Diego Fernando Murillo Bejarano, alias Don Berna, Letter addressed to the Criminal Cassation Chamber, Colombian Supreme Court of Justice, New York, Metropolitan Correctional Center (Sept. 17, 2009).

<sup>21</sup> Letter from Diego Fernando Murillo Bejarano, alias Don Berna, *supra* note 20 (emphasis in original).

### III. A Gloss on the Demobilization: The Colombian Drug Trafficking Route to Transitional Justice

One of the murkiest aspects of the negotiations with the paramilitary groups was the increasing inclusion of drug traffickers into its structures and the consideration of interests of the cartels in the agreement with the government. Although patently obvious, it is worth reiterating that drug trafficking permeated paramilitarism and paramilitarism permeated drug trafficking. This fact has significant repercussions in terms of how the process of demobilization and surrender of the paramilitaries is analyzed. It also has important repercussions in the application of transitional justice mechanisms: in Colombia such mechanisms were designed in part to “launder” crimes related to drug trafficking. The inclusion of drug trafficking in such arrangements is a question that is under-studied in transitional justice and is quite problematic.

Much of paramilitary activity focused and continues to focus on retaining and, in some cases, enlarging control over the various phases of drug trafficking in Colombia. For many years, the paramilitary structures have provided security in coca and poppy growing areas and have determined the conditions for transactions in zones of economic bonanza, including setting the purchase price for basic coca paste.

Since its very beginning, Colombian paramilitarism has mixed counterinsurgent objectives with economic interests, sometimes seamlessly and sometimes discordantly. Its undercover and complicit relationship with state agents has facilitated both private and public aims. Often, there are concurrent contradictions and coincidences between the motivations and interests of paramilitarism and those of its backers. These contradictions are inherent given the illicit and covert nature of paramilitarism. The expression of private interests is a characteristic of paramilitary forces throughout the world.<sup>22</sup> The ties of Colombian paramilitaries to private actors for profit adds complexity and layers to their structures and activities, it does not extinguish the para-institutional nature.

The AUC disarmament ceremonies did not alter the coca business’s need for security in Colombia, nor did they modify the *modus operandi* of many paramilitary groups. After the demobilization, paramilitary groups continue to control much of the drug business, including control over the crop, laboratories, and routes. This manifestation of paramilitarism may be one of the most extensive throughout the country.<sup>23</sup>

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<sup>22</sup> See as an illustration, Sunil Dasgupta, *Paramilitary Forces and Security Reorganization*, 12 GLOBAL SECURITY & COOPERATION Q. (2004); and Sunil Dasgupta, *Understanding Paramilitary Growth: Agency Relations in Military Organization*, Paper presented to the Conference on Curbing Human Rights Violations by Nonstate Armed Groups, Center of International Relations, Liu Institute for Global Issues, University of British Columbia, Vancouver, Nov. 13-15, 2003.

<sup>23</sup> A large number of groups are concentrated in the southeastern part of the country where coca growing, crystallization, and commercialization for Venezuela are concentrated. In this region,

Drug trafficking was an integral part, perhaps the determining factor, in the submission of the paramilitary groups. Before being extradited to the United States, Hernando Gómez Bustamante, known as “Rasguño” or “Don H”, a kingpin from northern Valle del Cauca, reported that in 2001 drug traffickers and paramilitaries met at El Vergel ranch in Cartago, Valle del Cauca, and negotiated a possible submission *en masse* to the U.S. justice system. He also spoke openly to news cameras of business dealings that his organization had carried out for years with the paramilitaries. For the drug traffickers, the paramilitary demobilization provided an opportunity to politicize their situation and gain leverage for a favorable judicial outcome in exchange for their surrender. .

An illustrative case is that of alias “El Tuso,” Juan Carlos Sierra Martínez, who persistently demanded of the government to be imprisoned along with the paramilitary leaders at the Prosocial Vacation Center in La Ceja, Antioquia. The majority of the paramilitary leaders did not wish to be detained, whereas El Tuso sought a ticket into the special holding facility. His interest was clear: to camouflage and categorize his drug trafficking activity within the framework of the illegal armed group in order to obtain an alternative (much lighter) sentence and to avoid extradition to the United States. The government effectively recognized him as a paramilitary commander in August 2006, after having pursued him for years as one of the country’s most wanted drug traffickers.<sup>24</sup>

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activity by multiple groups has been detected, including the following: paramilitaries led by Pedro Oliverio Guerrero Castillo (alias Cuchillo or Didier) in Mapiripán (Meta) and in the department of Guaviare; and several groups led by Daniel Rendón (alias Don Mario) with influence over routes towards Vichada. In the southwest of the country and in the Pacific region, the panorama is equally overwhelming. For example, in the department of Nariño, the structure called the Libertadores del Sur Bloc has continued operating under the same hierarchical structure and with massive presence in the territory. It has also expanded into parts of the department of Cauca, mainly in the municipalities of Argelia, Bolívar, Balboa, and Mercaderes. It has also taken control of the coastal municipalities of Guapi and Timbiquí (Cauca). The department of Valle del Cauca has also seen an increased paramilitary presence in the coca zones of the municipality of Buenaventura and a strengthening of two military drug-trafficking structures in northern Valle del Cauca through the integration of combatants from the Calima Bloc, known as Los Machos and Los Rastrojos. It is worth noting that there are several indications of alliances between Los Rastrojos under the command of Wilber Varela (alias Jabón) and the declared leader of the BCB, Carlos Mario Jiménez Naranjo (alias Javier Montañez or Macaco), a notorious mafia leader of the Eje Cafetero region. This alliance apparently facilitated the expansion of the paramilitary structure of Los Rastrojos to the departments of Putumayo, Nariño, and Cauca, and to the Pacific region of the Valle del Cauca. In the Magdalena Medio region, drug trafficking has in part moved towards the northeastern region of Antioquia. There are repeated reports of drug trafficking controlled by paramilitary structures located in Pueblito Mejía (Barranco de Loba municipality) and in Monterrey (Simití municipality). In southern Bolívar, the authorities of the department have reported the establishment of paramilitary structures connected to drug trafficking in the La Mojana region of the department of Sucre and in the rural zones of the Montecristo municipality (Bolívar), mainly tied to the activity of coca refiners who have set up operations in that region.

<sup>24</sup> El Tuso Sierra was subsequently extradited to the United States in May 2008; he continues to be a candidate under the Justice and Peace Law.

There are dozens of other cases of cartel leaders that were included as paramilitaries—undeniable given their notoriety. Notorious kingpins, known nationally by their pseudonyms, include: el Arcángel, Don Berna, los Mellizos Mejía Múnera, Macaco, Don Mario, Gordolindo, Cuco Vanoy, and Hernan Giraldo. Some have been linked to the drug trafficking business since the time of Pablo Escobar.

The government ceded to the pressure of including drug trafficking crimes in the confessional scheme of the Justice and Peace Law and lawmakers incorporated a formula that to date has sheltered this type of criminality under the lighter sentences available to paramilitaries. Article 10 of the Justice and Peace Law establishes that the benefit of the alternative sentence is available for:

the members of an illegal armed organized group who have been or may be indicted, charged, or sentenced as *perpetrators or participants in criminal acts committed during and due to their membership in those groups*, as long as they are on the list that the National Government forwards to the Attorney General's Office (*Fiscalía General de la Nación*) and satisfy [several conditions including] 10.5. *that the group was not organized for the purposes of drug trafficking or illicit enrichment.*<sup>25</sup>

The law could have been drafted differently to ensure that the transitional justice framework would not become a benign mechanism for drug traffickers' surrender to the criminal justice system.

The Justice and Peace Law, which is claimed to be a transitional justice mechanism, was designed with the drug traffickers in mind and in fact serves to mollify the criminal penalties applicable to them. Inclusion of drug trafficking-related crimes in the Justice and Peace system has been rather simple. Drug traffickers that confess smuggling activity assert the link with the paramilitary structure and they have satisfied the requirement of not having organized the group for “purposes of drug trafficking or illicit enrichment.” Standards have not been stringent in practice. In this way, even a consecrated *narco* (termed “pure-breed” in Spanish slang) can submit to the Justice and Peace special proceedings, testify to a few atrocities, tie his drug trafficking activity to the *autodefensas* (self-defense forces), and receive an alternative sentence of five to eight years. Using this mechanism, he will have “laundered” any pending matters with the justice system.

The arrangement is rather outlandish, but this dimension of the negotiation and of the Justice and Peace Law is a response to one of the most obvious characteristics of paramilitarism in the country over the past decades: drug trafficking. The inclusion of drug trafficking as a topic for discussion was one of the most

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<sup>25</sup> A similar clause is found in Article 11 of Law 975 of 2005, applicable in cases of individual demobilization. Italics added for emphasis.

frenzied (although surreptitious) topics in the negotiations and in the ratification of the Justice and Peace Law.

The crux of the matter is that these elements of the negotiation and application of the Justice and Peace Law were not debated or presented openly. The legal framework of Justice and Peace in effect included an intricate formula designed to make it difficult to exclude drug traffickers from its purview. The challenge of its adequate application is in the hands of the judicial operators; until now, action on this front has been limited.<sup>26</sup>

When considering compliance with the eligibility requirements established in Law 975 (Article 10), in the case of Uber Banquéz, alias “Juancho Dique” and Edwar Cobos Tellez, alias “Diego Vecino”, the Justice and Peace Chamber of the Superior Court of Bogotá determined:

**Drug trafficking and the creation of the bloc:** The group was not organized for drug trafficking or illicit enrichment. The Prosecution stated this during the hearing, adding that there is no evidence to determine that the Montes de María Bloc was created or was organized for the purposes of drug trafficking. *However, it is clear that this activity became the main source of financing for the group, an activity that was directly taken up by EDWAR COBOS TELLEZ, in that he was delegated by Salvatore Mancuso to collect the money deriving from the exit tax on the illegal drug, as well as to distribute 50% of this income to the fronts that would need the subsidy to cover their expenses and to send the other 50% to the Castaño house. The importance of drug trafficking in the Montes de María Bloc is indisputable: suffice it to note that approximately 75% of the expenses of each front was subsidized with this money. . . .*

*It is thus clear that drug trafficking was a determining factor for the diverse illegal armed groups, given that the earnings derived from this activity is what continues to fuel the internal armed struggle in Colombia. However, so far it has not been proven that the Montes de María Bloc under the command of COBOS TELLEZ and/or the Canal del Dique Front had been set up for the purpose of drugs trafficking or illicit enrichment.*

It cannot be ignored that EDWAR COBOS, in fulfilling one of his roles, managed the finances deriving from this illicit activity, to the point that the United States government has solicited his extradition. UBER

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<sup>26</sup> The two judicial decisions that have reviewed the legality of the charges against confessed paramilitaries involved in drug trafficking do not include an adequate analysis of such questions. See Superior Court of the Judicial District of Bogotá, Justice and Peace Chamber, File No. 110016000253200680281, Speaker Magistrate Uldi Teresa Jiménez López (Dec. 7, 2009) (case against Jorge Iván Laverde Zapata, for crimes of homicide and others); Superior Court of the Judicial District of Bogotá, Justice and Peace Chamber, File No. 110016000253200680077, Speaker Magistrate Uldi Teresa Jiménez López (Jan. 25, 2010) (case against Uber Enrique Banquez Martínez and Edwar Cobos Tellez for crimes of homicide and others).

BANQUEZ is also facing charges for drug trafficking. *However, the hypothesis demonstrated so far is that both the bloc as well as the front commanded by these defendants used drug trafficking to finance their illegal activities, without prejudice to what the prosecutor's office might be able to demonstrate in the future.*<sup>27</sup>

This line of reasoning shows the weakness with which the authorities approach the question and also reveals the complexity of reaching a conclusion to exclude one of the candidates from Justice and Peace because of their drug trafficking activity.

The transcendence of drug trafficking within the dynamic of the Colombian armed conflict is undeniable, and there must be a comprehensive response to its diverse manifestations. That response must be transparent inclusion of diverse perspectives, such as academia, civil society organizations, and State entities. This is a complex subject that has not been addressed by transitional justice in other contexts (and not because of a lack of necessity), and is especially crucial in Colombia.

The inclusion of drug trafficking in the official transitional justice arrangement, the implications for the administration of criminal justice, and its implications for future agreements are all vitally important topics for discussion. Moreover, such a discussion would help to shed light on the public reasoning and official motivations behind the decision to include drug traffickers as part of the demobilization scheme with the paramilitaries. Unless the discussion is tackled head on and with no reservations, the improper negotiations that formed the Justice and Peace Law in a hidden way will remain hidden.

#### **IV. An Accommodated Version of Transitional Justice: The Apogee of Denial<sup>28</sup>**

The end of the armed conflict in Colombia has been declared. It is difficult to ascertain how such a convoluted backdrop was fashioned, but the affirmation that Colombia is post-conflict and witnessing a peace process seems to have become established in the national mentality. To disagree with this assertion or recall that the armed conflict continues is interpreted as a dissident act against the authoritarian wisdom that invented the desired situation. Anyone diverging from the script will be eschewed.

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<sup>27</sup> Bogota, Justice and Peace Chamber, case against Uber Enrique Banquez Martínez and Edwar Cobos Tellez, at paras. 169, 171-72. Italics added for emphasis and internal citations omitted.

<sup>28</sup> This Part is based on a previous publication. See Camilo Bernal Sarmiento & Michael Reed Hurtado, *¿Justicia penal transicional? Negación, reconocimiento y castigo de las atrocidades perpetradas en Colombia*, 2 NUEVA DOCTRINA PENAL 363 (2007).

For some time we have been experiencing the effects of an intense use of *newspeak* in the best Orwellian style. Every day, in public discourse, in the press, and what is worse, in private spheres, correction of the language that is acceptable is part of national life. Just to give a few examples: war is no longer war, and the combatants are no longer combatants<sup>29</sup>. It is a bad sign, in any society, when certain words are prohibited or other words that do not reflect reality are officially promoted. It is a worse sign when there is an official effort to invent expressions and euphemisms to ensure that what is prohibited is not mentioned. Linguistic operations are not part of an extended hypocrisy, they are conscious and programmed operations aimed at changing the ways of remembering and thinking.

The conscious change in language seeks to modify the forms of conceptualizing and assuming reality. The selection of terminology is not neutral; it evokes meaning and instills a certain ideology. “If, as has been suggested, terminology is the inherently poetic moment of thought, terminological choices can never be neutral.”<sup>30</sup> Linguistic operations induce “selective amnesia . . . by eliminating certain elements of the past while preserving others. The past must conform to the present in order to establish a version of history (a master narrative) that legitimates current policy.”<sup>31</sup> This involves a carefully orchestrated mental deception to falsify the past and justify the present. This calculated forgetting leads to a state of denial in which acknowledgement of the atrocity is not socially accepted and injustice is perpetuated.

In diverse national contexts in which atrocities have occurred, such as Colombia, societies tend toward processes of denial of the atrocity. During times of war and postwar, “[w]hole societies slip into mass denial—with terrible consequences, especially for victims and survivors who find themselves literally dislocated from historical time.”<sup>32</sup> They are certain that something happened and that it happened to them, but no one seems to want to remember or acknowledge it.<sup>33</sup> There are multiple explanations that appear perfectly simple and dangerously internalized: “what happened, happened”; “it is better to start from scratch”; “we must turn the page”; “the past is uncomfortable, complicated, inconvenient”; “resentment leads nowhere”; “nothing happened to me”; “whatever happened to

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<sup>29</sup> The term “armed conflict” was officially proscribed by presidential order, and combatants can be referred to *narco* criminals (or variations thereof).

<sup>30</sup> GIORGIO AGAMBEN, *ESTADO DE EXCEPCIÓN: HOMO SACER* II 13 (2004).

<sup>31</sup> COHEN, *supra* note 13, at 243.

<sup>32</sup> COHEN, *supra* note 13, at 242.

<sup>33</sup> Cohen emphasized the distinction between knowledge and acknowledge, alluding to the work on historical memory recovery developed by Lawrence Weschler in regard to the dirty war in the Southern Cone and the importance placed on establishing an official truth. See LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURES* (1990). Responding to the question about the mysterious and powerful value of acknowledgment of the truth, he states that, “acknowledgement is what happens to knowledge when it becomes officially sanctioned and enters the public discourse.” COHEN, *supra* note 13, at 225.

them, happened to them for a reason”; or “it is better to forget”. The expressions are abundant.

The state of denial is more than a passive process of forgetting; it is the product of a complex psychological process, both individual and social<sup>34</sup>. It is a condition that is widespread and internalized to various degrees. One of its simplest, but also most common, manifestations is the internal processing of news about massive deaths or great human suffering: we see them, we are aware of them (for a while), and (unless they involve our daily business) within minutes we have excised them from our mental process.

Denial implies a conscious process, with individual and collective ramifications. In the personal realm, it involves a process of selection and perception, during which we decide whether or not to become aware of something. It is something like: “I don’t want to know about it, though I already do” or “I wish it would all go away.” The problem is that we do already know about it. In the collective sphere, it is a process that generates social amnesia; through mechanisms of forgetting, an entire society disconnects itself from the record of its undesirable past and ends up justifying certain actions or omissions by the society or the State. Denial can be the result of an intentional and organized official process or a cultural extrication that occurs when information disappears, when the uncomfortable knowledge is repressed.

Stanley Cohen has exhaustively addressed the state of denial and its relation to acknowledgment of atrocities and human suffering in complex political contexts.<sup>35</sup> Cohen proposed a characterization of denial based on five dimensions that are useful for illustrating the complexities hidden within the process of denial. Because they are on point and because they facilitate an interpretation of the social and political processes present in the Colombian case, I will briefly review the dimensions below.<sup>36</sup>

First, Cohen proposes classifying the denial based on its content: *literal denial*, *interpretative denial*, and *implicatory denial*. *Literal denial* is where “the fact or knowledge of the fact is denied.”<sup>37</sup> It involves a factual denial; for example, “there is no armed conflict.” In the case of *interpretative denial*, the facts are not denied, but they are given a different meaning than what is apparent. In such cases, what occurred is not denied but is instead given another name or the facts are reclassified under a different category. For example, one does not speak of “ethnic cleansing” but rather of “population exchange”; or instead of “paramilitarism” one speaks of “self-defense groups as a third actor.” Interpretative denial is fertile ground for the use of euphemisms and technical-administrative language inherent to routines. In

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<sup>34</sup> See COHEN, *supra* note 1, at 4-5.

<sup>35</sup> See COHEN, *supra* note 13, at 1-20.

<sup>36</sup> COHEN, *supra* note 13, at 7-20.

<sup>37</sup> COHEN, *supra* note 13, at 7.



*implicatory denial* neither the facts nor their conventional interpretation is denied. What is in play are the effects or implications (political, moral, psychological, etc.) that are conventionally derived. This category of denial directly denies the meaning and implications of certain facts. For example, the fact of mass rapes of women in Bosnia is not denied, but the psychosocial implications for that society and the imperative need to respond are denied. In the Colombian case, this manifestation is seen in the frequent denial of the effects of the victimization; the victimization itself is not denied, but its effects are minimized. Upon illustrating these three modalities, Cohen concludes that in order to realize the process of denial, human beings use cognition, emotion, morality, and action; in other words, denial is not an unconscious process.<sup>38</sup>

Second, Cohen determines that denial can be a *personal, official, or cultural process*. The *personal process* is the most extended and internalized, as mentioned at the beginning of this Part. In the case of *official denial*, the author stresses that it involves a collective and organized process in which the State makes it impossible or dangerous to acknowledge the reality of the past or the present. Official denial can also be carried out through more subtle means, above all when the denial is part of the State's ideological facade. In these cases the social conditions that gave rise to the atrocities joined with official denial strategies and generate a vicious circle of self-legitimization.<sup>39</sup> On the other hand, *cultural denial* refers to processes that are fueled by the personal and public (or officially constructed) spheres. These are very common processes of denial in which societies reach informal consensus regarding what can and should be remembered and acknowledged. This type of denial may be initiated by the State and then take on a life of its own. The media plays a particularly important role in such processes. Once appropriate language has been created in order to avoid certain topics (or to not think about the unthinkable), the mass media plays its part, sustaining pre-established language, images, and myths. The examples in the Colombian context are abundant; the most explicit and recurrent is the presentation of hundreds of extrajudicial executions of innocent civilians carried out by state agents as deaths in combat, promoted by an official incentive scale. These killings are popularly known euphemistically as "false positives." That type of denial, if left uncontested, can affect the ability of societies to identify the falsity of certain official discourses.

Third, Cohen distinguished between processes of *historical denial* and *contemporary denial*. *Historical denial* involves the elements of memory, forgetting, and repression. It can be the result of highly organized processes, of the passing of time, or of the porosity of collective knowledge.<sup>40</sup> It can also be the result of a cultural element that aligns itself to hide unseemly historic truths. *Contemporary*

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<sup>38</sup> COHEN, *supra* note 13, at 9.

<sup>39</sup> COHEN, *supra* note 13, at 10.

<sup>40</sup> COHEN, *supra* note 13, at 12.

*denial*, in addition to including complex processes of contradiction about the present (literal, interpretative, or implicatory denial), includes the inevitable filter of perception in the face of a growing body of information that plagues our daily life. For clearly practical reasons we have to block out certain types of information that make us uncomfortable. Despite these distinctions, Cohen stresses that the relationship between the present and the past should be seen as a continuum. Current euphemisms and myths serve to accommodate the past; similarly, reinterpretation of the past serves to illustrate the present. For instance, the denial of state involvement in the emergence of paramilitary groups is a form of historic denial that has profound consequences on how this phenomenon is understood today.

The fourth dimension of the denial process involves what Cohen calls the *triangle of atrocity*, which is made up of the victims, against whom the atrocity is committed; the perpetrators, who commit the atrocities; and the *bystanders*, who see and know what is going on.<sup>41</sup> Cohen emphasizes that these are not fixed roles and that in the cycle of violence an individual can play more than one of these roles. For Cohen, each person and group of people (according to their collective identity) will experience denial in a different way, according to their role in the triangle of atrocity. He points out that the bystanders are the largest group and generally involve relatively passive people who are more concerned with living their lives than making history.<sup>42</sup> However, previous national experiences show that the bystanders' interest or disinterest in surmounting the state of denial is a determining factor in the acknowledgement of the victims.

For more than four years, Colombian society has been the spectator of testimonies within the Justice and Peace confessional system about the perpetration of atrocities, and there is no sign of any significant social reaction. Every day dozens of paramilitaries testify before prosecutors declaring that they have murdered, that they were not investigated, that they continued to brutally murder, that they enjoyed the backing of the authorities, and that they felt justified, and no one says anything.

In December 2006, the media reported on the first voluntary depositions (*versiones libres*) by these dark assassins. The stories, full of intrigue and justifications, revealed the mystery around the murders and the public was captivated with a certain morbid curiosity. The shocking narratives of chainsaws, crematory ovens, and soccer games played with human heads were told nonchalantly. These declarations appeared on the front pages until late 2008. Now, for some reason, with very few exceptions, they are no longer reported by the press. Is it because people have become used to the declarations or tired of them? Could it be that society no longer cares?

Another element from the Colombian case illustrating the difference of perception between victims and non-victims is the dichotomy of opinions regarding

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<sup>41</sup> COHEN, *supra* note 13, at 14.

<sup>42</sup> COHEN, *supra* note 13, at 276.

the functioning of the justice system. According to a survey on the challenges of transitional justice in Colombia carried out by the *Fundación Social*, “whereas 71% of the affected rural population considers that the justice system is not doing anything to uncover the truth, 63% of the unaffected population feels that it is.”<sup>43</sup> The survey also indicates other reasons for concern about whether the country is fulfilling the expectations of victims, those who should be the subjects of the special truth, justice, and reparation policies. Everything seems to indicate that the victims’ perceptions are not as positive as the results that are officially publicized and which the majority of Colombians accept. For the moment, most of the Colombian population is passive about the atrocities and about doing anything to meet victims’ expectations.

Finally, Cohen emphasizes a *spatial dimension* of denial, both physical as well as symbolic. With this perspective he proposes that a person’s proximity to the atrocities, to the victims, or to a particular space will determine the degree of denial and the desire to overcome that state. This relatively intuitive category essentially means that there is a directly proportional connection between the degree of interest one has (personal or collective) in events and circumstances and the spatial proximity one had to the violence occurring. A large part of the violence in Colombia takes place in remote places; thus those spectators far removed perceive the possibility of their becoming victims as remote. The distance increases even further in symbolical ways when victims are differentiated through social constructions. For example, the lower the victim’s social status or the farther they are from “normal,” the easier it is to ignore their suffering and see their human condition as banal.

The brief review of these five categories provides elements for examining the state of denial in which Colombian society finds itself<sup>44</sup>. For the last thirty years (at least) and particularly during the last eight, Colombian society has been exposed to operations aimed at denying reality and the atrocities suffered by thousands of Colombians. The country is immersed in a long standing process of redefining the violence experienced. The effect of the state of denial is profound and increasingly internalized. Massacres, executions, disappearances, tortures, rapes, and mutilations, past and present, are denied. Victims, objectives, methods, techniques, and perpetrators, as well as justifications and cover-up mechanisms are not discussed. If the state of denial is not tackled, the country will experience peace in the true Orwellian sense: “War is peace. Freedom is slavery. Ignorance is strength.”<sup>45</sup>

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<sup>43</sup> FUNDACIÓN SOCIAL, ENCUESTA SOBRE LOS RETOS DE LA JUSTICIA TRANSICIONAL EN COLOMBIA. PERCEPCIONES OPINIONES Y EXPERIENCIAS 2008, at 188 (2009).

<sup>44</sup> Beyond what I describe here, there are many other processes of denial involving the literal, interpretative, and implicatory dimensions, as well as the corresponding personal, social, and cultural processes, in relation to both historical and contemporary situations.

<sup>45</sup> These are some of the party slogans written on the walls of the Ministry of Truth in Orwellian London. GEORGE ORWELL, 1984, Part 1, Ch. I (Penguin Group, 2003).

The state of denial in Colombia deepens with the passage of time and the multiple media messages that are bombarded, including news about the lifestyle of the rich and famous, advertising, the latest soap opera, or the current reality television show, contribute to the denial process<sup>46</sup>. The denial of atrocities is made easier by the abundance of media messages and constant leaps from one account or message to another. Acknowledgment of atrocities recedes to a lesser plane and victims become viewed by the Colombian public with boredom and skepticism.

In principle, the tools of transitional justice are designed and implemented to address regimes of denial. In Colombia, in light of the fact that a part of the process of denial stems from the government and that transitional justice mechanisms have been designed to avoid dealing with certain topics (such as the subject of State responsibility), the challenges facing the field of transitional justice are greater. Deconstructing the regime of denial and revealing the truth about the participation by state agents in perpetrating and covering up atrocities are pending and contested objectives.

Recall that the Justice and Peace process is explicitly and intentionally limited to the actions of the illegal armed groups. There is no room in the state's official truth-seeking mechanisms to look into atrocities perpetrated within the framework of the system. The rules of the truth-seeking game are designed to steer clear of any investigation into the state apparatus. Therefore, denial will continue to be a mechanism for evading responsibility. In the absence of a process of political transition (in which there would be a deep and real commitment to reveal the truth and acknowledge all atrocities), hiding links between the establishment and the paramilitary structures will continue to be part of the official regime of denial. Confronting this process of denial is one of the most intense challenges that the field of transitional justice faces in Colombia.

## **V. Transitional Justice Manipulated: The Path to Rights Devalued and Neutralized Victims**

What is done in the name of the victims is not necessarily what would benefit them the most. And precisely for that reason, much care must be taken when invoking their name and interests. In the name of the victims, punishments are made harsher, due process violations are justified, and acts of reconciliation and pardon are carried out without their consent.

The Justice and Peace Law is replete with rousing rhetoric about the rights to truth, justice, and reparation. However, the process of applying the law has not resulted in the materialization of basic core of these rights. On the contrary, it

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<sup>46</sup> Cohen also addresses the effects of modern media in the consolidation of the state of denial. See COHEN, *supra* note 13.

has generated lowered standards justified by arguments of pragmatism, necessity, or flexibility. In this framework, application of the Justice and Peace Law has given rise to mutation of the basic content of the victims' rights to truth, justice, and reparation. Concepts are replaced by a series of clichés, limited in their substantive content, which leads to a false sense of defending victims' rights.<sup>47</sup> The application of the law involves a sophisticated process of naming and redefinition of the victims' rights. In the words of one victim (referring to truth, justice, and reparation), "for us it is one thing and for the government it is another."

For example, in the one and only reparation hearing to date resulting from the establishment of criminal liability under the Justice and Peace scheme, the trial Chamber limited the available judicial reparation via standards of "administrative convenience", explicitly moving determinations of victims' rights from the judicial to the administrative realm. (This process is referred to as "*administrativization of rights*" in the Spanish language.) In the only Justice and Peace sentence issued, the court showed an inclination toward devaluing the rights of victims.<sup>48</sup> In this ruling, the Chamber accepted the reparation criteria adopted by the Council of State but reduced beneficiary payments by half and established a ceiling of fifty monthly minimum legal wages for moral damages for each affected family.<sup>49</sup> The Chamber justified the devaluation of existing civil liability standards based on pragmatic criteria related to economic realities.<sup>50</sup> The pragmatic argument, made in the abstract, is hardly justification for not following controlling legal norms on civil damages following criminal liability.<sup>51</sup> For the Justice and Peace Chamber to cut the amount of the award in half ignores the basic principle of legality and puts the victims in a situation of inequality and disadvantage in relation to other victims. The victims' right to obtain judicial reparations within the framework of the Justice and Peace Law is being unjustly conditioned on criteria of convenience rather than equality and access to justice.

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<sup>47</sup> Alessandro Baratta, in his analysis of criminal justice systems, captures the essence of this mental operation that ends up devaluing the content of rights. See Alessandro Baratta, *Política criminal: entre la política de seguridad y la política social*, in DELITO Y SEGURIDAD DE LOS HABITANTES 82 (Elias Carranza ed., 1997). Baratta stresses the role of ideology, which he defines as "a discursive construction of social facts that lends itself to a false awareness among the actors and the public." He goes on to say that "[i]deology operates by replacing concepts with clichés, or in other words with mental habits, corrupting the classifying calculation with hidden and surreptitious operations. That is why its form of operating becomes a principal instrument for legitimizing and reproducing the social reality." *Id.*

<sup>48</sup> Superior Court of the Judicial District of Bogotá, Justice and Peace Chamber, no. 11001600253200680526, Speaker Magistrate Eduardo Castellanos Rosso, (Mar. 19, 2009) (case against Wilson Salazar). This ruling was annulled by the Supreme Court on appeal. Supreme Court of Justice, Criminal Cassation Chamber, no. 31539, Speaker Magistrate Augusto Ibáñez (July 31, 2009). The reasons given by the Supreme Court in its ruling do not refer to the conclusions of the District Court in terms of damages; therefore, it may be assumed that its reasoning will be the same in future decisions.

<sup>49</sup> *Id.* para. 208.

<sup>50</sup> *Id.* para. 207.

<sup>51</sup> Código Penal (Criminal Code), Law 599 of 2000, art. 97.

Subjecting the right to just reparation to administrative convenience – and thus devaluing the content of the right – is further evidenced via the regulation and institutional practice of such administrative reparation determination. Through Decree 1290 of 2008, the government adopted “the program of individual reparation through administrative channels for the victims of organized illegal armed groups.”

First, this program establishes an equivalency between reparation and a reduced compensation payment. By concentrating all reparation measures into a monetary payment, the program’s design moves away from the real content of the right to reparation. Offering reparation in this way leaves out important symbolic aspects of paradigmatic transitional justice reparations and again allows the state to avoid acknowledging its official responsibility. It is problematic to promise reparations in a context of conflict and extreme poverty—as in the Colombian case—consisting of a mass payment of monetary sums without any sort of social support to the beneficiaries. International experience emphasizes that, “it is how individuals perceive that their suffering is being understood, accepted, and acknowledged in the social and political context that is one of the most important factors in determining how reparations will be sought and accepted.”<sup>52</sup> Reparations for victims in other countries under the frame of transitional justice involved slow, painful, and costly measures for the national government. Those governments that took on wide-scale reparations as a political program assumed, above all, recognition of all of the victims and of official responsibility for their victimization.<sup>53</sup> Reparations in Colombia must generate the necessary conditions for official recognition of victims and acknowledgement of responsibility, and the furtherance of social coexistence.

Great care must be taken with reparation processes, especially when dealing with the provision of sums of money to people with unmet basic needs. Payments must be made, but in such a way that guarantees dignity -- emphasizing the person’s autonomy, their self-determination. When a person receiving money is in a situation of need, the measures complementary to the compensation become even more important than they would be absent the influx of money.

Second, these reduced compensation payments are the same as those that the State is already obligated to pay as humanitarian aid, within the framework of Law 418 of 1997 and ensuing regime. Many of the victims are familiar with these payments; they commonly call them “payment for the dead.” Although many victims have applied for this payment and received it, they have never done so under the banner of reparation. Currently, the executive branch is equating

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<sup>52</sup> Brandon Hamber, *Narrowing the Micro and the Macro: A Psychological Perspective on Reparations in Societies in Transition*, in INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, THE HANDBOOK ON REPARATIONS 576 (2006).

<sup>53</sup> See generally Pablo De Greiff, *Justice and Reparations*, in THE HANDBOOK ON REPARATIONS, *supra* note 52.

humanitarian assistance provided in the past with the process of solidarity compensation that it began last year. In recent speeches, President Uribe stressed that *Acción Social* has already paid out millions of pesos to 39,000 victims of homicides.<sup>54</sup> These payments, which represent an important official effort, were likely useful to the victims who received them. But the payments were received as humanitarian assistance and not as reparations. In renaming these same payments as “reparations” what was previously done under the heading of humanitarian assistance, the government makes the process murkier and distorts its obligation to assist and mitigate the suffering of victims of the conflict.

In contexts of armed conflict such as Colombia’s, initiating a reparations program should go hand-in-hand with implementing other measures for prevention, protection, and humanitarian assistance for the victims. Mixing the reparation effort with the obligation to provide humanitarian assistance to the victims must be avoided at all cost. These are two types of very different state interventions: humanitarian assistance is temporary relief, whereas reparation must contribute to a process of individual and social reconstruction in the long term.

These two examples, the reduction of the amounts of compensation for damages through judicial channels and the equating of administrative reparation to old standards of humanitarian assistance, demonstrate the process of devaluing the victims’ rights. They illustrate the distance between what is officially offered and what the victims expect. As an example, a peasant leader from the Atlantic coast, in response to a question about his expectations with respect to the Justice and Peace Law, said: “While they speak of reparation and reconciliation, the displaced continue on their way, seeking their rights.”<sup>55</sup>

Finally, along with devaluing of the victims’ rights, official spokespersons from the executive branch and entities charged with reparation and reconciliation in Colombia attempt to neutralize the victims. On several occasions, the aim has been to transfer responsibility for the success (or failure) of a supposed reconciliation to the behavior of the victims. This transmission of guilt and responsibility has been evident in other contexts; in his early writings on denial, Cohen warned that the perpetrators, defenders of the regime, or ordinary citizens use neutralization techniques to ignore the victims’ suffering and demand that they behave in accordance with the imposed forgiveness.<sup>56</sup>

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<sup>54</sup> President Álvaro Uribe Vélez, Address commemorating the beginning of administrative reparations for victims of violence, Popayán, July 5, 2009; President Álvaro Uribe Vélez, Address at the awarding of settlements for victims of violence through administrative action, Montería, July 12, 2009. The speeches are available at the Website of the Office of the President, <http://web.presidencia.gov.co/especial/victimas/index.html>.

<sup>55</sup> Author interview, Sincelejo, Sucre (Apr. 12, 2007).

<sup>56</sup> See Stanley Cohen, *Human Rights and Crimes of the State: Culture of Denial*, in *CRIMINOLOGICAL PERSPECTIVES: A READER* 500 (John Muncie, Eugene McLaughlin, & Mary Langan eds., 2001).

National public opinion leads us to believe that society thinks that after the atrocious violence perpetrated against the victims, it is more important to focus on the supposed intolerance of the victims, who stubbornly refuse to forgive. This process not only minimizes the victims' suffering but also neutralizes the perpetrators' responsibility and leads to a cover-up of the past. This type of manifestation comes from diverse sectors that demand "good" behavior (understood as obedience to the objectives determined by the government) and attack freedom of expression and the exercise of denunciation.

At the beginning of his mandate as the Vice President's delegate to the National Reconciliation and Reparation Commission (*Comisión Nacional de Reconciliación y Reparación* – CNRR), Eduardo Pizarro wrote a newspaper column, ostensibly on tolerance in Uganda, expressing the view that the failure of the Colombian peace process lay in the hands of human rights "fundamentalists" who demanded *too much* justice.<sup>57</sup> Why does the president of the CNRR feel that he must discredit the work of human rights organizations that demand the application of basic legal standards associated with truth, justice, and reparation? His reference to fundamentalist is at best awkward and it is not clear that his only intention is to differentiate those who are object of his attack from relativists or revisionists. As his argument goes, he blames those he designates as "fundamentalists" for condemning the country to "perpetual war". This discourse of human rights fundamentalism was put forth by paramilitary commanders, only a few days before Pizarro's column, in an AUC editorial on the subject.<sup>58</sup> This similarity between the opinion of the president of the CNRR and the paramilitaries is, at the very least, undesirable.

In yet another instance of neutralization, Jaime Jaramillo Panesso, also a member of the CNRR, wrote in column in the *El Mundo* newspaper, that the goals of those victims' organizations who criticized paramilitary demobilization "are not reparation and reconciliation, but rather partisan affiliation and vindictive and sectarian agitation."<sup>59</sup> In contrast with these accusations against the victims' associations, in the same article he affirms that the CNRR's relations with what he calls the "National Movement of Demobilized Self-defense Groups" are "positive," "of mutual respect," comprise "levels of civic-mindedness and hope." He finished by proposing that it fall back upon the paramilitaries to determine the limits of "feasible reparation."

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<sup>57</sup> Eduardo Pizarro Leongómez, *El caso de Uganda renueva la discusión del tema de la justicia y la paz*, *EL TIEMPO*, July 17, 2006; Eduardo Pizarro Leongómez, *La ceguera del fundamentalismo*, *EL TIEMPO*, July 17, 2006.

<sup>58</sup> Commanders of the AUC, *Las 'víctimas de Estado': un capítulo más de la novela del fundamentalismo humanitario*, July 13, 2006, [http://www.colombialibre.net/detalle\\_col.php?banner=Editorial&id=15006](http://www.colombialibre.net/detalle_col.php?banner=Editorial&id=15006).

<sup>59</sup> Jaime Jaramillo Panesso, *La CNRR en marcha*, *EL MUNDO*, Aug. 13, 2006.



The opinions of these two members of the CNRR reflect an upside-down world: the paramilitaries of hope will determine what reparation they will give the victims of despair and the victims are to behave themselves and stop causing so much agitation.

The aforementioned examples illustrate a sad reality loudly and clearly: a process of neutralization is being carried out against the victims. If the true intention of the official transitional justice arrangement is to deal with paramilitarism, it must also deal with the reality of these processes of neutralization, justification, and normalization, and distance themselves from the clichés of “forgive and forget”. One more challenge of applying transitional justice tools in Colombia is giving the victims the central role they must occupy in determining the appropriate reparation measures and their implementation.

Colombia does not have the luxury of ignoring the victims and their demands. Elie Wiesel, a survivor of the Nazi concentration camps, upon receiving the Nobel Peace Prize in 1986, stated that “[w]hat all . . . victims need above all is to know that they are not alone; that we are not forgetting them, that when their voices are stifled we shall lend them ours, that while their freedom depends on ours, the quality of our freedom depends on theirs.”<sup>60</sup>

I hope this will create an opportunity to reflect: what place do the victims have in Colombian society and in the search for truth, justice, and reparation being implemented via the official transitional justice arrangement?

## **A Word in Conclusion: In a Somber Setting, Some Positive Signs**

Despite the dark context, there are some signs of positive developments, particularly deriving from public debates on paramilitary activities and structures (with varying degrees of openness) and the role that the victims (both as individual agents and in association) have assumed in order to demand respect for their rights.

First of all, the demands and claims of the victims now have greater visibility, due to concerted efforts of national movements, as well as local manifestations. Likewise, there is recognition of the work of social organizations and human rights organizations that for years have been denouncing paramilitarism in Colombia. Nor can we underestimate the significant support from the international community in validating the rights to truth, justice, and reparation, through official as well as unofficial initiatives.

Secondly, there have been local demonstrations rejecting the ties between the security forces and the paramilitaries. And even more importantly, criminal

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<sup>60</sup> ELIE WIESEL, NIGHT 20 (2006) (reproduction of the Nobel Peace Prize Acceptance Speech delivered by Elie Wiesel in Oslo on December 10, 1986).

proceedings started against politicians known to have backed paramilitarism. These steps forward have made it possible for the human rights advocates to begin to uncover the multiple levels of the paramilitary structure in Colombia and its links with the political and economic elites.

Lastly, the debates around the Justice and Peace Law have led to explicit recognition of the constitutional value of the victims' rights to truth, justice, and reparation, and to the incorporation of the victims' rights in the institutional agendas of the State, if not the realization of these rights just yet. However, the road ahead for transitional justice in Colombia is adverse, and will require facing the greatest challenges yet in order to achieve the desired goals: recognition of the victims and of their suffering, and containment of the regime of denial that has been installed.

## Chapter 4

# Gendered Transitional Justice and the Non-State Actor

*Fionnuala Ní Aoláin & Catherine O'Rourke*

To date, feminist interventions aimed at shaping the field and scope of transitional justice have concentrated on widening the range of harms visible in the process of societal transformation. To this end, activating international accountability and deepening domestic criminalization of sexual violence in times of conflict and societal repression was an early priority.<sup>1</sup> In a similar vein, the feminist agenda has also prioritized exploring the relationship of gender to truth-telling, to amnesty, and to peacemaking. More recently, efforts to engender reparations programs have brought light and heat to a range of harms experienced by women that were typically ignored in prior programs, including loss of the capacity to bear children or the costs of bearing children born of sexual violation.<sup>2</sup> There have been efforts to bring a range of non-physical harms, such as familial separation or forced nudity, within the universe of harms captured by transitional justice.<sup>3</sup> Increasing feminist attention to the category of socioeconomic harms and their disproportionate impact on women is also a feature of contemporary analysis.<sup>4</sup> Feminist critique has consistently focused on the tendency of legal categories to “privatize” such harms—to regard them as apolitical and unrelated to the acts of mass (political) violence for which transitional justice measures seek accountability—thus leaving a broad range of harms that are disproportionately experienced by women outside the purview of transitional justice. The identification of gender patterns in terms of which harms are visible to transitional justice and which are left untouched has been one of the central feminist contributions to the field.

By contrast, feminist interventions have assumed a remarkably narrow set of actors and institutions of responsibility. Many devices common to the transitional justice landscape—amnesty, truth-recovery, international criminal justice,

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<sup>1</sup> See KELLY DAWN ASKIN, *WAR CRIMES AGAINST WOMEN PROSECUTION IN INTERNATIONAL WAR CRIMES* (1997); Françoise Krill, *The Protection of Women in International Humanitarian Law*, 249 INT’L REV. RED CROSS 337 (1985).

<sup>2</sup> Ruth Rubio-Marin, *The Gender of Reparations in Transitional Societies*, in *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 63 (Ruth Rubio-Marin ed., 2009); see also Colleen Duggan, Claudia Paz y Paz Bailey & Julie Guillerot, *Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru*, 2 INT’L J. TRANSITIONAL JUST. 192, 200-01 (2008).

<sup>3</sup> Fionnuala Ní Aoláin, *Sex-Based Violence and the Holocaust: A Reevaluation of Harms and Rights in International Law*, 12 YALE J.L. & FEMINISM 43 (2000).

<sup>4</sup> Christine Chinkin, *The Protection of Economic, Social, and Cultural Rights Post-Conflict*, Paper for the Office of the High Commissioner on Human Rights’ Women’s Human Rights and Gender Unit (2008), available at <http://www2.ohchr.org/english/issues/women>.

reconstruction, rule-of-law reform, security-sector reform, and reparations—posit the state as the site and conduit of transition. In this typology, transitional justice is a process by which the state is rendered coherent and legitimate. Feminist interventions in the field of transitional justice have tended to assume the state; the state is seen as the locus for reform and the entity that is most capable of and necessary to delivering transformation for women. Examples of such interventions include advocacy for tougher measures of individual criminal accountability for sexual violence, gender analysis in truth commissions, policy prescriptions for reparations programs, and advocacy for prioritizing an end to gender harms in security-sector reform. We suggest that many of these interventions assume a functional state as the *sine qua non* for successful transition as measured by and for women.

We posit that this singular focus on the state can obscure a range of other important actors relevant to securing transition and may overestimate the extent to which the state is capable of delivering on feminist expectations. In the Colombian case and multiple other contexts, a state-centric focus of transitional justice fails to engage with the practical reality that the state may be fractured and divided and that non-state entities play as much of a role in ending and supporting conflict as does the state. In many contexts, including the Colombian, non-state actors may have “effective control” of territory, may exercise quasi/state-like functions, are recognized as having de facto autonomy, and are brought into peace negotiations and conflict-ending processes on that basis. The imposition of legal norms in such situations may depend on an inconsistent or downgraded matrix of state enforcement in competition or in parallel with appropriation of law or force norms by the non-state actor in their spheres of influence. So, prior to any transition one should not presume that the state has been capable of enforcing law in any meaningful way throughout its sovereign territory—quite the opposite may in fact be the case. We suggest that the quality and extent of state capacity to enforce legal norms prior to a transition and the degree and scope of control exercised by non-state actors are important underlying dimensions that underpin the difficulties in securing legal accountability in transitional contexts in general, and for women in particular. Specifically, in this chapter we assert that greater attention needs to be paid to securing and enforcing accountability mechanisms for gendered violations committed by non-state actors.

This chapter interrogates the framework provided by international law<sup>5</sup> for addressing the gendered violence of non-state actors and is intended as a constructive intervention for feminist efforts to enhance accountability for violence against women. In order to make the groundbreaking legal developments of the past two decades more meaningful for situations of ongoing violence we

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<sup>5</sup> Our focus therefore is on the nature of the Colombian State’s international legal commitments as opposed to the domestic criminalization of international law.

must pay greater attention to the limits of the state's reach and consider innovative solutions to better capture harms by non-state actors. To this end, we draw on the paradigmatic case of Colombia to illustrate the gaps in accountability that emerge with respect to violence against women and the non-state actor in armed conflict.

Part I will offer a brief introduction to the gendered gaps of negotiated transition with non-state actors and present the Colombian case as exemplary. In Part II we consider the general regime of accountability under international humanitarian law and focus on how commitments to minimum humanitarian standards might bring greater accountability measures for ongoing acts of violence against women perpetrated by guerrilla groups when the application of international humanitarian law is contested. Part III then deals with imputed state liability for the violence of non-state actors. We focus on the persistent violence of the non-state groups in internal armed conflict situations—particularly violence experienced disproportionately by women—and identify the attendant complexity of holding such groups and individuals accountable during transition. This section concludes by examining how the horizontal application of human rights obligations can be more effectively exploited to secure state accountability for multiple forms of violence against women within demilitarization zones.

## **I. Gendered Dimensions of Negotiated Transition**

For a more considered appreciation of the capacity and limitations of the state, it is important to focus on one foundational aspect of the liberal (democratic) state, and a vision that undergirds the “from” and “to” of many transitional contexts—namely the public/private distinction. The delineation of public and private harms in transitional justice discourse draws on a long genealogy of public and private spheres in liberal political discourse and is critical to the structuring of political transformation. This distinction has had important implications for the types of harms retrospectively identified in transitional justice accounting. In contexts where transitional justice is instituted in the midst of ongoing conflict, gendered distinctions around public and private harms are embedded in the political compromise that underpins transitional justice. The political compromise then shapes the legal and political arrangements that become embedded and normalized in steady-state transitional justice, as the state moves towards its “new” normal.

Transition is defined as a movement away from violence and toward (liberal) democratic statehood. However, the violence to be ended falls within a narrow range of public harms and transition is usually premised on the ending of public communal violence between (generally) male combatants.<sup>6</sup> Paradigmatically

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<sup>6</sup> See CYNTHIA COCKBURN, *THE SPACE BETWEEN US: NEGOTIATING GENDER AND NATIONAL IDENTITIES IN CONFLICT* (2003).

transitions have frequently been premised on the deal that is struck between the state and non-state actor(s). Peace deals and political compromises that precede transitional justice processes inevitably identify and privilege a particular set of actors, across both the state and non-state spectrum. The exigencies of ending violence often mean that the first test of peace negotiations will be the effectiveness of the process in getting the violent actors around a table and, secondly, party to an agreement. The very outsiders that were deeply involved in violent activities are rewarded by remaking the state and its structures in ways that bring non-state actors, whose support is deemed indispensable and must therefore be earned, into the mainstream. The violence of course invariably involves harms directed towards women. Hence, the “deal” is often a deal for boys and not for girls, as a matter both of substance and representation.

These two realities—the gendered categorization of public/private harms and the enduring influence of the non-state actor in transition—combine to create a particularly precarious security situation for women in contexts of limited or fractured state capacity. While the peace deal may transform relations between violent (generally male) actors, it will likely do very little to transform social relations within zones geographically and politically controlled by violent non-state actors. Further, the political compromise at the heart of the peace deal is based on a clear hierarchy of public over private harms.

Such observations suggest a need to interrogate the composition, capacity, and accountability of the state in transition. Given the enduring influence of the non-state actor, re-establishing the state’s monopoly on coercion is secured in practice by bringing the non-state actor within the state. The boundaries of the state are therefore negotiated and negotiable. The state’s malleable boundaries create accountability gaps as a matter of principle and practice in international law, which chiefly posits the state as the site and conduit of accountability. In general, across the two most relevant international legal frameworks in transitional settings—human rights law and international humanitarian law (IHL)<sup>7</sup>—there is a regulatory gap or at least a slimmer body of norms that apply to non-state actors than to state actors. In most functional societies, this accountability gap between the state and the non-state actor, while not irrelevant to the general efficiency of the rule of law (and with substantial consequences for women), does not create a massive lacuna in legal regulation. The same cannot be said of transitional societies. In these societies, precisely because the local rule of law may be compromised or degraded and enforcement of “ordinary” rules may be limited, international legal norms are frequently called upon to fill the gap.

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<sup>7</sup> We note that as Colombia ratified the Rome Statute in 2002, though exercising its discretion under article 124 of the Statute to postpone for seven years the jurisdiction of the Court over war crimes committed within the country. Consideration by the ICC may offer a substantive future route for violence against women to be considered.

Equally, the role and influence of the non-state actor (particularly with respect to the infliction of force) will be markedly higher. Thus the presence, centrality, and lack of capture of the actions of the non-state actor are enormously significant, and in our view under-appreciated.

The Colombian case is paradigmatic of such dilemmas and gaps. Six decades of multi-actor and multi-causal violence in Colombia set the backdrop to the contemporary process of transitional justice in the country. Multiple competing actors with both military capacity and political power, operating in parallel or in opposition to the State, have undermined any claim by the State to the monopoly on coercion. Strong regional variations in the country, in terms of wealth, ethnic profile, state presence, and conflict density further erode Colombian claims to statehood. In addition, state institutions are marked by high levels of corruption and low levels of popular confidence. Conflict violence has reinforced popular alienation from the State. The multiplicity of violent state and non-state actors poses particular challenges to securing accountability for violence against women, a form of violence that has traditionally eluded accountability even in settled states.

Colombia is also exemplary of the forms and limitations of scrutiny rendered by the international legal regime applicable to the domain of transitional justice. Colombia is party to the Geneva Conventions and Protocol II as well of nearly all core human rights' treaties. Regional human rights bodies frequently adjudicate on the applicability of human rights norms to the country and to the conflict. Colombia is therefore exemplary of the scrutiny rendered by the applicable international legal regimes relevant to the domain of transitional justice. The "capture" of these legal norms cut across the state/non-state distinction. The nature of the Colombian conflict and the state's international legal commitments make the Colombian case particularly relevant to assessing and addressing the sorts of accountability issues that emerge in a context of transition in which the armed non-state actor(s) has an enduring presence.

Below we discuss expanding and capitalizing on humanitarian law's capture of the non-state actor, the first of our two suggested areas for improvement.

## **II. Humanitarian Law Accountability and Minimum Humanitarian Standards: Capturing the Harms of the Non-state Actor**

The following section (A) describes the nature of international humanitarian law's (IHL) treatment of non-state actors committing gender harms and identifies current gaps in accountability. The second part of this analysis (B) presents three possible targets for feminist intervention.

## A. Diagnosis of the Gaps and Current State of IHL

The panorama outlined below reveals a myriad of harms committed against women by non-state actors in conflict situations. Although there is some foundation in IHL for capturing the harms committed by non-state actors and gendered harms, there are important gaps in the framework and norms. Additionally, both states and non-state actors demonstrate a reluctance to accept, or in practice a low level of commitment to, IHL standards. We will address each problem in turn.

### 1. Harms Suffered by Women in Conflict

It is generally understood that the experience of and fall-out from violent conflict is particularly extreme for many women.<sup>8</sup> There are numerous conflict harms that are suffered disproportionately or exclusively by women, including forced displacement, penetrative sexual violence, sexual mutilation, forced pregnancy, sexually transmitted diseases, sexual dysfunction, and loss of status, social ostracism, or cultural punishment as a result of a perceived loss of purity. Despite a broad swathe of research on the effects of conflict violence generally,<sup>9</sup> we have little good data on the attribution of responsibility for gender-based harms as between state and non-state forces in general, and even less information in the context of specific internal conflicts. We also have limited empirical data on whether different patterns of transgression manifest for women depending on whether it is a state or a non-state actor perpetrating the violence in question. Nonetheless, a broad sweep of journalistic, non-governmental, and anecdotal evidence confirms that women increasingly experience traumatic and widespread violations perpetrated by non-state actors across a wide variety of conflict types and locations.<sup>10</sup>

Particular characteristics of the Colombian conflict have created an acute crisis within the civilian population, specifically for women and girls.<sup>11</sup> Conflict in the country rarely involves direct confrontation between the different armed groups; rather these armed groups settle their scores by attacking civilians suspected of supporting the other side. Although men are the most common victims of summary

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<sup>8</sup> See generally THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION (Sheila Meintjes, Meredith Turshen & Anu Pillay eds., 2002).

<sup>9</sup> See, e.g., WOMEN IN AN INSECURE WORLD: VIOLENCE AGAINST WOMEN FACTS, FIGURES AND ANALYSIS (Marie Vlachova & Lea Bason eds., 2005).

<sup>10</sup> Secretary-General, *Report of the Secretary-General on Advancement of Women: In-depth study on All Forms of Violence against Women*, U.N. Doc. A/61/122/Add.1 (6 July 2006); Elizabeth Rehn & Ellen Johnson Sirleaf, UNIFEM, *Progress of the World's Women Series, Vol. 1, Women, War, Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace Building* (2002).

<sup>11</sup> UN Special Rapporteur on Violence against Women Radhika Coomaraswamy, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Submitted in Accordance with Commission on Human Rights Resolution 2001/49, Addendum: Mission to Colombia* (1-7 Nov. 2001), U.N. Doc. E/CN.4/2002/83/Add.3 (Mar. 11, 2002).



executions and massacres, violence against women, particularly sexual violence by armed groups, has become a common practice within the context of a slowly degrading conflict and a lack of respect for international humanitarian law.<sup>12</sup>

Abduction of women, detention in conditions of sexual slavery, and forced domestic labor, are characteristic of the treatment of women by paramilitary forces.<sup>13</sup> Survivors explain how paramilitaries arrive in a village, completely control and terrorize the population, and commit human rights abuses with total impunity.<sup>14</sup> Guerilla groups have carried out kidnappings, indiscriminate attacks that affect the civilian population, and arbitrary and deliberate killings of those they accuse of siding with their enemies. They are the principal perpetrators of abduction and forced recruitment of children, infringement of women's reproductive rights, and kidnapping for extortion purposes.<sup>15</sup> Many female combatants in both guerilla and paramilitary forces suffer sexual abuse and infringements of their reproductive rights. Forced contraception, sterilization, and abortion are particularly associated with guerilla groups.<sup>16</sup>

Both groups are responsible for forcible displacement of civilian communities. Colombia has the largest internally displaced population in the western hemisphere, currently estimated at over 3.5 million people. The majority of the displaced are female. These women and girls are subjected to manifold forms of violence. Internally displaced women are at much greater risk of sexual abuse, rape, and being forced into prostitution because of their particular social and economic vulnerability.<sup>17</sup>

## ***2. Humanitarian Law's Treatment of the Non-State Actor and Gender Harms***

In contrast to this myriad of violent harms perpetrated against Colombian women by non-state actors, there is a bias to the accountability dimensions of the international legal system whose norms and mechanism do not "catch" these harms. This is not a new observation, nor is it surprising. With its Westphalian roots, the international system was structured around the centrality of states and state actors with evident seepage to accountability. International legal norms, specifically in the field of human rights, give a clear treaty basis on which the contracting state can be held accountable for a wide variety of violations related

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<sup>12</sup> *Id.* at 2.

<sup>13</sup> *Id.* at 12.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 14.

<sup>16</sup> AMNESTY INTERNATIONAL, *BROKEN BODIES, SHATTERED MINDS: TORTURE AND ILL-TREATMENT OF WOMEN* 27-28 (2001). For example, Amnesty International reports that, out of a group of 65 girls who had left the guerrillas, all had had intrauterine devices inserted, some against their will and without being given information about the device. *Id.*

<sup>17</sup> *Id.* at 29.

to human dignity.<sup>18</sup> International humanitarian law also gives a clear basis for the enforcement of humanitarian norms through the grave breaches system, but it is broadly aimed at States Parties to the treaties.<sup>19</sup> As a result, mechanisms of accountability were primarily designed to capture the actions of state actors consistent with a traditional vertical notion of state responsibility under international law.<sup>20</sup> With the emergence of the non-state actor as a particular threat, most notably in the areas of terrorism, this gap is of increasing concern.

The Geneva Conventions of 1949 were primarily focused on the protection of civilians and *hors de combat*, viewing the state as the primary source of threat to the safety and integrity of such vulnerable groups.<sup>21</sup> By 1979, through the Additional Protocols to the Geneva Conventions, States agreed that certain non-state groups, specifically national liberation movements and similarly situated organizations could be included within the ambit of regulation by the laws of war.<sup>22</sup> However, these included groupings were essentially quasi/state-like or, operating in contexts (colonial or occupation) in which it was generally accepted that political shifts would herald a change in power to governments led by those same non-state groupings. Protocol II Additional to the Geneva Conventions of 1979 expands the accountability orbit by regulating a wider range of internal conflicts, but on more limited terms.<sup>23</sup> As a result humanitarian law has the capacity to directly

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<sup>18</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; European Convention on Human Rights, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143, *entered into force* July 18, 1978); African Charter on Human and Peoples' Rights, 1520 U.N.T.S. 217, *entered into force* Oct. 21, 1986.

<sup>19</sup> See Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783 (1995).

<sup>20</sup> See J. L. BRIERLY, *THE LAW OF NATIONS* 49-56 (6th ed., 1978).

<sup>21</sup> FRITZ KAHLSHOVEN & LIESBETH ZEGVELD, ICRC, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* (2001), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/p0793>.

<sup>22</sup> Protocol I Article 1 on the General principles and scope of application refers to those "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

<sup>23</sup> Protocol II Article 1(1) states that the Protocol applies to  
all armed conflicts which are not covered by Article 1 of [Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Article 1(2) notes that the Protocol "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

and indirectly hold some non-state actors to account. This is facilitated by the capacity of judicial bodies to utilize the threshold, organization, and membership criteria of humanitarian law, most often in tandem with the application of human rights norms to the actions of non-state actors that reach the legal threshold for the application of Protocol II.<sup>24</sup>

If humanitarian law were accepted as applicable by all parties in a conflict, there might be some general agreement between states and non-state actors on the norms that cannot be violated and mechanisms in play that would, in theory, address accountability.<sup>25</sup> This would create an agreed ethical and legal context in which breaches would be understood as legal violations potentially subject to sanction. As *The Roots of Behaviour in War*, an authoritative ICRC study, affirms, a core element of preventing violations of the laws of war is to focus more on legal norms rather than on underlying values.<sup>26</sup> So, a starting point for prevention and redress is advancing common agreement between combatants, whether state or non-state, on the applicability of agreed legal rules.

We endorse the principle that creating greater leverage requiring states to affirm the applicability of IHL is a sensible and important mechanism to this end. In tandem we also support greater efforts to encourage non-state groupings to adhere to the norms of the Geneva Conventions (Common Article 3), Protocol I and Protocol II when the conflicts fall within their legal thresholds. Significant buy-in by states, non-state groups, and international organizations of influence to utilize and reference these norms would be progress for the protection of civilians generally, and women specifically.

Despite some provisions, existing norms are not fully adequate to confront women's experiences of harm in internal conflict. In general, IHL's historical neglect of harms experienced by women points to deep and gendered biases in the construction of the law of war.<sup>27</sup> More recently, there has been significant norm augmentation.<sup>28</sup> However, the roots of such additions have been problematically

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<sup>24</sup> ICTY, Prosecutor v. Tadic, Case No. IT-97-1-A, Judgment 172-237 (July 15, 1999) (including inter alia an analysis of the status of conflict finding that the Common Article 3 was applicable to the conflict taking place in the Former Yugoslavia at the time of the violations in question).

<sup>25</sup> This speculation is largely theoretical in that few situations of internal armed conflict have applied such norms and little or no accountability has been sought in terms of either domestic or international legal process.

<sup>26</sup> ICRC, THE ROOTS OF BEHAVIOUR IN WAR: UNDERSTANDING AND PREVENTING IHL VIOLATIONS (2004).

<sup>27</sup> See Judith Gardham, *Women and Armed Conflict: The Response of International Humanitarian Law*, in LISTENING TO SILENCES: WOMEN AND ARMED CONFLICT 109-25 (Helen Durham & Tracey Gurd eds., 2005).

<sup>28</sup> See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc S/25704, at 36 (May 3, 1993); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, U.N. Doc. S/RES/955 (Nov. 6, 1994).

linked to the ongoing connection made between women's purity and honor.<sup>29</sup> As a result, the capture of violations (mostly sexual) exclude or ignore many gendered harms that women themselves might articulate as equally or more harmful.

Although IHL envisages a relatively broad range of actors being "caught" under its rubric, enforcement provisions are less encompassing. Additionally, substantial political and legal obstacles exist to the willingness of states and non-state actors to acknowledge the applicability of IHL norms and in practice buy-in to the standards. Below, we consider obstacles to the application of IHL generally and in the specific context of Colombia.

### *3. State Resistance to the Application of IHL and Consequences for Women*

States have long resisted the application of international humanitarian law norms to the regulation of ongoing internal armed conflicts.<sup>30</sup> States have long felt threatened by granting combatant status to persons who they feel are more appropriately categorized as criminals or terrorists. This has meant that attempts to expand humanitarian law's ambit to encompass non-state groupings has been met by a measure of ongoing hostility by states. Despite this, we suggest that there is room for improvement in compliance with existing norms.

These dynamics apply directly to the Colombian context, where the state has long-resisted the application of IHL. Given that the historic roots of the conflict<sup>31</sup> precede the negotiation of the Geneva Conventions, and more relevantly perhaps the Additional Protocols, the regulatory capacity of IHL has had little to say about (and/or has not deployed to address) the historic roots of conflict and to the methods and means of warfare deployed within it. In parallel with the practice of other states, Colombia has generally sought to eschew the application of humanitarian law, presumably on the basis that it would limit the scope of the State to treat insurgents and non-state actors as criminals under the ordinary legal

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<sup>29</sup> The 1977 Diplomatic Conference expanding the protections of the laws of war to enumerated internal conflicts evidenced preoccupation with the fertile and expectant woman. The Conference acknowledged that women had to be given "special protection" because of their "special situation"—including "pregnant women, maternity cases and women who were in charge of children of less than seven years of age or who accompanied them." The only notable movement in the article concerned with "measures in favor of women and children" was the inclusion of the phrase "special respect" for women rather than the term "honor." Also, under Article 75 of the Protocol I rape is included under the general heading of being a crime against "dignity" rather than a crime against "honor." This article also recognized the particular experience of forced prostitution by specifically including its prohibition. The Diplomatic Conference gave little of its attention to the physical violence experienced by women in war.

<sup>30</sup> Examples include: Britain in relation to Northern Ireland; Mexico in relation to the Chiapas region; Russia in relation to Chechnya; and Turkey in relation to the North-East of Turkey, where a large Kurdish population is located.

<sup>31</sup> The origins of the contemporary conflict are typically located in the civil war (*La Violencia*) of 1948 to 1964.

system. Despite the persistence of the conflict, and the intersection of emergency law and humanitarian law norms in the same period, the conflict has been largely immune to the influence and regulation of IHL.

Presidential peace initiatives in the early 1990s led to the ratification of Protocol II to the Geneva Conventions in 1995 as part of a larger scheme to recognize and address the political grievances of the guerrilla insurgents. In practice, the State's commitment to the application of Protocol II to the guerrilla groups has waxed and waned, in accordance with the faltering progress of successive peace initiatives. The Uribe administration insists that the conflict does not meet the threshold of violence required to engage Protocol II<sup>32</sup> (which is consistent with the practice of other states faced with internal insurgencies and/or non-state collective violence). Nonetheless, it is helpful that the treaty framework includes Protocol II. Recognition leaves space for interaction through the discourse provided by IHL norms on accountability and provides a normative frame of reference for the violations committed.

In terms of sex-based violence, the potential applicability of Protocol II is important. Protocol II includes in its provision of Fundamental Guarantees a prohibition on rape. Relevant also is that in December 1992, the International Committee for the Red Cross, declared that the provisions of Article 147 on grave breaches of the Geneva Conventions included rape.<sup>33</sup> This gives some point of regulatory entry to address the sexual violations experienced by women in Colombia through the legal prism of Protocol II.

However, state reluctance to concede the application of IHL means that a criminalization model is frequently applied (albeit with great tension) to the actions of the non-state actor. Such a model generally struggles to be effective given ongoing competition over territory, legitimacy, and control of political space. A criminalization model generally fails to create any political acceptance or accommodation of the genuine issues of political and territorial dispute that are at the heart of communal violence.

Moreover, in the Colombian case, the relative impotence of the criminal justice system in the face of endemic levels of violence against women is reflected in the staggering levels of impunity.<sup>34</sup> Even with the diminution in the levels of conflict violence in recent years, the criminal justice system has struggled to establish that it is fit-for-purpose for the prevention, investigation, prosecution, and punishment of violence against women. Local women's organizations continue to identify manifold and systemic shortcomings in the criminal justice system, ranging from attitudinal problems of staff who fail to acknowledge violence against women as

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<sup>32</sup> See generally Mikro Sossai, *The Internal Conflict in Colombia and the Fight Against Terrorism: UN Security Council Resolution 1465 (2003) and Further Developments*, 3 J. INT'L CRIM. JUST. 253 (2005).

<sup>33</sup> International Committee of the Red Cross, *Aide-mémoire on Provision of Article 147* (Dec. 1992).

<sup>34</sup> See generally Special Rapporteur: Mission to Colombia, *supra* note 11.

a serious social harm, and technical issues around the prosecutors' treatment and use of evidence of sexual violence.<sup>35</sup> Even if the criminal system were capable of addressing cases of violence against women efficiently, individual cases in ordinary jurisdiction would not necessarily serve to expose the systematic and structural characteristics of crimes against women committed as part of the conflict. Criminalization in this perspective functions to blur rather than highlight the need to address the causes of conflict by political negotiation.

Guerrilla groups have on several occasions acknowledged the application of IHL to the Colombian conflict. In 1995, the *Ejército de Liberación Nacional* (ELN) declared that it considered itself to be bound by the 1949 Geneva Conventions and Additional Protocol II,<sup>36</sup> around the same time that the *Fuerzas Armadas Revolucionarias de Colombia* (FARC-EP) made a similar commitment.<sup>37</sup> This acknowledgement reflects a pattern by some established national liberation movements to unilaterally affirm that they are bound by the minimum standards of the Geneva Conventions. Both the African National Congress and the Palestine Liberation Organization have made such declarations in the past.<sup>38</sup> The value of such affirmations does not lie in their formal legal effect because only states can sign the conventions and become parties. Nonetheless, there is significant symbolic value in gaining adherence by non-state actors. First, it may constitute a statement of combatant status and seek to belie their characterization as criminals or terrorists. At the very least, it may suggest that sufficient command and control capacity exists within a non-state organization to enforce the provisions of the Geneva Conventions and Additional Protocols. Second, at least in theory, it holds the non-state actor to a set of minimum obligations and suggests that there is agreement on what norms apply to the conduct of hostilities.

There is, of course, the danger that the apparent acquiescence by non-state actors to the relevance of IHL through minimum standards or even to the treaty provisions is not followed in practice. So for example, despite the FARC's position of unilateral compliance with IHL, a FARC spokesperson informed Human Rights Watch that FARC guerrillas "consider Protocol II and Common Article 3 [of the Geneva Conventions] 'open to interpretation.'"<sup>39</sup> Further, there is compelling

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<sup>35</sup> See, for example, CORPORACIÓN HUMANAS, SERIE ACCESO A LA JUSTICIA, LA SITUACIÓN DE LAS MUJERES VÍCTIMAS DE VIOLENCIAS DE GÉNERO EN EL SISTEMA PENAL ACUSATORIO (2008); CORPORACIÓN SISMA MUJER, ENTRE EL CONFLICTO ARMADO Y LAS REFORMAS A LA JUSTICIA, COLOMBIA 2001-2004 (2005).

<sup>36</sup> HUMAN RIGHTS WATCH, WAR WITHOUT QUARTER: COLOMBIA AND INTERNATIONAL HUMANITARIAN LAW (1998) (citing Letter from Manuel Pérez, released to the press on July 15, 1995).

<sup>37</sup> *Id.* See also FARC Rebels say 3 Americans 'Prisoners of War', CNN, Feb. 24, 2003, <http://www.cnn.com/2003/WORLD/americas/02/24/colombia.us.hostages.reut/index.html> (discussing FARC's official position that American hostages taken during the course of its conflict with the Colombian government are regarded as prisoners of war under international law).

<sup>38</sup> See generally Noelle Higgins, *The Application of International Humanitarian Law to Wars of National Liberation*, JOURNAL OF HUMANITARIAN ASSISTANCE (Apr. 2004), <http://www.jha.ac/articles/a132.pdf>.

<sup>39</sup> HUMAN RIGHTS WATCH, *supra* note 36.

evidence of routine non-compliance with IHL by the armed group.<sup>40</sup> The danger in the Colombian context, as in others, is that non-state actors who have not been involved in the negotiations of treaties limiting the methods and means of warfare, and whose operations and training are not systematically influenced by the need to respect IHL, may simply view professions of adherence to IHL norms as having political currency but no practical constraining effect.<sup>41</sup> Voluntary adherence may mean very little in terms of general accountability and have little or no meaningful effect on the behavior of the non-state actor. This requires close attention if we are, as this chapter suggests, to close the non-state accountability gap in situations of armed conflict as a means to better protect women's human rights.

## **B. Proposed Areas for Feminist Intervention**

In light of the current panorama described above, we now propose three potential areas for feminist interventions to improve the use of IHL norms to increase accountability for and protection from gendered harms: (1) advocacy for an expanded conception of the threshold of violence test that might reflect more accurately the reality of contemporary conflicts; (2) engagement with human rights bodies that draw on IHL rules in their human rights monitoring and adjudication; and (3) promoting the acceptance of minimum humanitarian standards for all actors.

### ***1. Defining the Subject of IHL: The Threshold of Violence Test***

Another related and controversial issue is the definition of subject in the field of humanitarian law. Humanitarian law requires a sufficient threshold of violence to be activated,<sup>42</sup> a control of territory requirement, and other measures of the degree of organization (command and control responsibility sufficient to disseminate international humanitarian law) sufficient to don the privilege of combatant (and also prisoner of war) status. When these thresholds tests were conceived, whether in the post-World War II period or the decolonization and Cold War context of the late 1970s, particular conceptions of conflict were in play. Concretely, the rules responded to the conflicts of the time. In many conflicts the

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<sup>40</sup> See generally HUMAN RIGHTS WATCH, *supra* note 36; HUMAN RIGHTS WATCH, BEYOND NEGOTIATION: INTERNATIONAL HUMANITARIAN LAW AND ITS APPLICATION TO THE CONDUCT OF THE FARC-EP (2001).

<sup>41</sup> See HUMAN RIGHTS WATCH, *supra* note 36.

<sup>42</sup> Protocol II, Article 1(1):

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 ... shall apply to all armed conflicts which are not covered by [Protocol I] . . . and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

splintering of internal conflict and the proliferation of armed groups mean that the threshold requirements of IHL are ill-fitted to the contemporary reality of violence and the disintegration of the state that has accompanied it. The requirements are also ill-equipped to address the forms of violence in which targeting women constitutes a specific method and means of warfare.

The proliferation of armed groups has characterized the Colombian conflict: innumerable and overlapping guerrilla, paramilitary “self-defense”, and narco-trafficking groups. It may be that the threshold of violence sufficient to activate humanitarian law application requires greater contemporary contextualization—for example multiple and splintered violent actors in sum rather than the measure of one group’s effect on overall violence.<sup>43</sup> Alternatively, the threshold of violence measure could be horizontally calibrated over time as a cumulative test, rather than a vertical test in which a conflict has to satisfy a threshold test at a particular pinpoint moment. With the violence experienced by women squarely to the fore, what “counts” as violence for the purpose of measuring the intensity of the conflict demands fundamental revision, specifically the inclusion of a range of acts currently considered to fall within the private sphere. Gendered violence needs to be counted as conflict-related or -caused violence. If this were to be the case, a fuller and deeper accounting of gendered violence would count into the assessment of what constitutes an armed conflict and—importantly—what constitutes the end of an armed conflict.

We note that, in a non-judicial context, a deeper accounting of gendered violence has found expression in the Colombian transitional justice process. The Historical Memory Group, a creation of the National Reparation and Reconciliation Commission established under the Justice and Peace Law, has been impressive in its willingness to use a gender perspective to challenge the very terms of its own investigation. Thus in its report on the massacres experienced by the town of Trujillo, the terms “before” and “after” the massacres are acknowledged to be misleading terms when one considers that gender-based violence pervades normal life in the town.<sup>44</sup> In the section dealing with the memories of women victim survivors, the report brings out women’s gender-specific experiences of violence and discrimination within families in the area, concluding that:

[M]any of the accounts that emerged about “before the massacre” and ordinary life demonstrate how the lives of women proceeded within practices of violent masculine domination. . . . For them, the “before” does not appear to have been an idyll of peace and respect for their rights in the domestic ambit.<sup>45</sup>

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<sup>43</sup> For a more detailed exposition of this position see FIONNUALA NÍ AOLÁIN, *THE POLITICS OF THE FORCE: CONFLICT MANAGEMENT AND STATE VIOLENCE IN NORTHERN IRELAND* (2000).

<sup>44</sup> COMISIÓN NACIONAL DE REPARACIÓN Y RECONCILIACIÓN, *GRUPO DE MEMORÍA HISTÓRICA, TRUJILLO: UNA TRAGEDIA QUE NO CESA 220* (2008).

<sup>45</sup> *Id.*



This section also highlights the role of the violence in determining relations between men and women and the negative constructions of masculinity and femininity in the community—the privileging of violent masculinity and “the profound devaluation of the feminine” in the violent context of Trujillo.<sup>46</sup>

Thus, in aspects of the transition less clearly determined by the imperatives of international law, an alternative narrative of understanding the violence—an understanding inclusive of women’s experiences—has found expression. The international legal framework must be challenged to include this type of probative accounting for gendered experience in order to more accurately define the violence to be included in accountability and reform efforts in the aftermath of conflict.

## ***2. IHL Monitoring and Enforcement by Regional Human Rights Bodies***

International and regional practice in relation to the applicability and effect of international humanitarian law norms on non-state actors is complex and challenging. The Inter-American system is generally recognized as being one of the most sophisticated human rights regimes with regard to its acceptance of the relevance of humanitarian law to the interpretation of human rights, as well as its judicial acceptance that in some of the countries in the region, humanitarian law rather than human rights may be the more fitting frame of reference.<sup>47</sup> Both the Inter-American Commission and Court have endeavored to negotiate the appropriate exercise of their human rights mandate within the context of the Colombian armed conflict. The Commission’s “bullish”<sup>48</sup> attempts to enforce international humanitarian legal norms in the 1990s were reined-in by the Court in the *Las Palmeras* decision, in which the Court admitted that neither it nor the Commission was competent to apply the Geneva Conventions.<sup>49</sup> Nevertheless, the Court held that both bodies are competent to draw on the Geneva Conventions whenever necessary to interpret a rule of American Convention.<sup>50</sup> The Court has reiterated this position several times in respect of the Colombian conflict.<sup>51</sup>

In this manner, the Court and Commission have been able to ensure a measure of indirect application of international humanitarian law to the Colombian conflict. However, this indirect application of IHL applies only to state acts and does not

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<sup>46</sup> *Id.* at 229-30.

<sup>47</sup> James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-first Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768 (2008).

<sup>48</sup> This is the categorization of the Commission’s approach in Lindsay Moir, *Decommissioned? International Humanitarian Law and the Inter-American Human Rights System*, 25 H.R.Q. 182, 205 (2003).

<sup>49</sup> *Las Palmeras v. Colombia*, Preliminary Objections, 2000 Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000).

<sup>50</sup> *Id.*

<sup>51</sup> *See, e.g., Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134, para. 155 (Sept. 15, 2005).

cover violations of humanitarian law by the non-state parties to the conflict. Accordingly, the Inter-American Commission decided in its Third Report on the Situation of Human Rights in Colombia (1999)<sup>52</sup> that it would not investigate or hear individual complaints concerning acts by armed opposition groups, for which the Colombian State is not responsible.

The approach of the Commission to its broader country reporting is notably distinct from its methodology for reviewing individual petitions. The Commission does apply IHL to armed opposition groups in its country reports. Country reporting has been framed by reference to IHL and human rights law for both state and non-state actors. Although this methodology does not suggest any degree of equality in accountability and responsibility between the entities under review, it is valuable for bringing light and public scrutiny to non-state actors. Clearly, however, these reports do not provide individuals with remedies against violations of humanitarian rules vis-à-vis these actors. The differentiated standing of the different actors reveals accountability gaps, including the extent to which there are fora in which violations can be directly litigated. Despite and in response to these limitations, we emphasize the importance of both horizontal accountability (see below) and the use of humanitarian law as a measure in assessing responsibilities in the country-reporting context.

### ***3. The Promise of Minimum Humanitarian Standards***

In the context of internal armed conflicts we are convinced that the body of legal norms best placed to encompass the existing accountability gap is humanitarian law. In our view, greater acceptance by states that Common Article 3 provides a minimum set of standards by which the actions of both state and non-state actors should adhere would be a considerable advance in general, and provide many positives for women who experience violence in situations of internal armed conflict. We appreciate that the explicit lack of recognition for gendered violations in Common Article 3 is a limitation. Nonetheless, its “minimum standards” approach and the capacity of interpretative application gives it potentially greater reach than any other agreed instrument. But given some of the regulatory difficulties that IHL has traditionally encountered we encourage thinking again about the contribution that minimum humanitarian codes might make, with a view to gendering such codes to avoid duplication of existing biases in domestic and international criminal law.

When states have been unwilling to apply treaty norms, and non-state actors have seen themselves as excluded from IHL treaty provisions, codes of conduct for states experiencing hostilities have been offered as a way forward to ensure

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<sup>52</sup> Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, doc. 9 rev. 1 (Feb. 26, 1999).

some minimal set of legal obligations are observed by all parties.<sup>53</sup> These codes are intended to sidestep the fraught political issues of conflict status and allow basic regulatory provisions to be deemed relevant by all parties to the conflict. We think that they deserve further and more detailed attention as a means to address normative rules and accountability, as well as to focus attention on the violations experienced by women as breaches of humanitarian norms. To that end, however, we also accept that such codes require substantive augmentation in order to avoid duplication of the problem of “under-capture” that we ascribe to international and domestic criminal law.

Practically, how would the codes be activated? Gasser makes three observations on the threshold that should be met in order to trigger their applicability: first, the degree of violence exceeds normal times; second, the violence is overt not covert; and third, the situation is characterized by general violations of the fundamental rights of the individual.<sup>54</sup> Meron, commenting on the suitability of a Humanitarian Declaration on Internal Strife emphasizes the characteristic of collective violence<sup>55</sup> as distinguishing internal disturbances and tensions from other violent situations.<sup>56</sup> In this sense, we believe such codes can address those multiple contexts (Colombia as representative) where the state does not concede or concedes only in part the applicability of humanitarian law, and where the domestic criminal law is inadequate to capture the nature of the harms and may be implicated in the broader dysfunction of the state’s institutions.

These codes can serve a number of useful purposes, and we think they may be an important tool for policy makers and governments in contexts where states accept in practice (de facto) but not in law (de jure) that a situation of armed

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<sup>53</sup> Hans Peter Gasser, *A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct*, 28 INT’L REV. OF THE RED CROSS 38 (1988). Gasser states that the aim of such rules is to reduce human suffering, the object of the code being both authorities and non-state actors alike.

<sup>54</sup> *Id.* at 41.

<sup>55</sup> The ICRC also echos this theme of “collective violence.” The President of the ICRC has stated:

The situation of the individual caught up in violence in a State, violence that ranges from simple internal tensions to more serious internal disturbances, is a cause of deep concern to the ICRC. A suggestion was made recently to draft a declaration of basic and inalienable rights applicable to cases of collective violence within the States, in situations that would not already be covered by humanitarian law.

Alexander Hay, *The ICRC and International Humanitarian Law*, 23 INT’L REV. OF THE RED CROSS 3, 9 (1984).

<sup>56</sup> Theodor Meron, *Towards a Humanitarian Declaration on Internal Strife*, 78 AM. J. INT’L L. 859 (1984). An important prescriptive element of these codes of conduct is that they lack one significant requirement of their armed conflict cousin. That is, no necessary degree of organization is required by third parties in order to activate the codes in question. The sole exception to this is the Turku/Abo Declaration which while prohibiting murder and violence to the person also provides that “whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved.” Turku/Abo Declaration of Minimum Humanitarian Standards, art. 7 (1990).

conflict exists. Again, drawing on the *Roots of War* study,<sup>57</sup> we endorse the position that normative reference points are critical to preventing the violation of humanitarian norms. Moreover, this study attests that in situations of armed conflict, violations of IHL involve “social and individual processes of moral disengagement” compounded by group conformity and obedience to authority.<sup>58</sup> Where formal application of IHL by all parties may prove elusive, agreement to normative standards may in itself (particularly where chains of command in organizations adopt and enforce) be a powerful deterrence tool. Second, a key element in preventing violations lies in ensuring that the bearers of weapons are properly trained. In the absence of agreed treaty rules, minimum standards may provide the backdrop to training. If codes are tied to strict and effective sanctions whether by the state or the non-state military structures, they potentially mitigate the use of violence against women as a method and means of warfare. Third, as the influence and value of soft law deepens, we should not underestimate the extent to which minimum standards may crystallize and become “hard” binding norms over time.

Even in the context of minimum standards, identification and agreement on the amount of violence required is crucial. There is no mathematical equation that sets a pre-agreed limit on the amount of acceptable violence in any particular state. Self-evidently, cultural practices and developmental and financial capacity make any such assessment subject to enormous disparities. An obvious starting point is a determination of the source(s) of violence. This requires collating and attributing the sources of violent behavior within each state. Often the starting point of assessment is the normal levels of criminal activity as measured by statistical indicators of violence within that state. Again we stress the evident bias in such collation that excludes “normal” levels of violence against women. Such structural deficiencies must be addressed in order to avoid humanitarian standards duplicating the exclusion of gendered harms. In addition, the matter becomes more complex as state discretion on what is termed criminal activity is exercised.

It is nonetheless significant that there is movement towards a definition of “internal disturbances and tensions” that would be sufficient to apply across a range of conflicts. In this context, we emphasize the importance of including the range and depth of violence experienced by women as part of the calculation. The danger is that narrow definitions, based on ever-present public/private distinctions, may mean that gendered presumptions are simply moved from one arena to another.

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<sup>57</sup> ICRC, *supra* note 26, at 4.

<sup>58</sup> ICRC, *supra* note 26, at 2.

### III. Imputed State Liability for the Violence of the Non-state Actor

The key issues addressed in this section focus on the means by which the actions of the non-state actor can be captured by the legal obligations taken on by the State under international law. The concept and practices of imputed state liability are critical to addressing the degree and capacity for state legal obligations to capture harms committed by the non-state entity. We assess these issues by focusing on violence against women through the prism of disarmament, demobilization, and reintegration (DDR) processes that almost invariably accompany the post-conflict process.

#### A. DDR, the Post-Conflict Process, and Gendered Outcomes

The Justice and Peace process has given rise to a set of problems in Colombia that are familiar to those who write and research more generally on violence against women as it manifests at the end of conflict. Processes of disarmament, demobilization, and reintegration of combatants are increasingly central to efforts to build sustainable peace in the aftermath of violent conflict.<sup>59</sup> Without ignoring the presence of women in combatant forces or the prominence of men in civilian populations, there is nevertheless an often unspoken gender piece to DDR: namely, that the process involves the reintegration of a largely male (former) combatant group into a disproportionately female civilian population. By and large, DDR processes are directed at societies in which there have been significant non-state sources of violence. The gender differential between returning and receiving communities means that, although DDR is officially concerned with ensuring the conditions that enable former combatants to cease violence and return to their communities of origin, DDR can also ignite a series of new challenges for women's security within the community.

In order to illustrate some of the "new" gender dynamics of violence that can accompany processes of DDR, it is instructive to draw on empirical research conducted by Colombian women's organizations examining the impact of DDR on the lives of women living in the rehabilitation and consolidation zones. Based on analysis of the short- and long-term impacts, such research has regarded the process of reintegration under the terms of the Justice and Peace Law as a threat

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<sup>59</sup> See, e.g., U.N. Dep't of Peacekeeping Operations, Lessons Learned Unit, *Disarmament, Demobilization and Reintegration of Ex-combatants in a Peacekeeping Environment: Principles and Guidelines* (2000); Mats R. Berdal, Int'l Inst. for Strategic Stud., ADELPHI Paper 303, *Disarmament and Demobilization after Civil Wars: Arms, Soldiers and the Termination of Armed Conflicts*, at 9 (1996); KIMBERLY MAHLING CLARK, USAID, *FOSTERING A FAREWELL TO ARMS: PRELIMINARY LESSONS LEARNED IN THE DEMOBILIZATION AND REINTEGRATION OF COMBATANTS* (1996); Mark Knight, *Guns, Camps and Cash: Disarmament, Demobilization and Reinsertion of Former Combatants in Transitions from War to Peace*, 41 J. PEACE RES. 499 (2004).

to the security of women. Early on in the DDR process, women's organizations monitoring the reintegration process in Tierralta, Córdoba identified an increase in levels of prostitution, sexually-transmitted diseases, and teenage pregnancy.<sup>60</sup> They noted alarming increases in levels of domestic violence, as relationships were forged or reignited between former combatants and members of the civilian population.<sup>61</sup> In this catalogue of harms we directly confront the material consequences of the public/private distinction in transitional justice. Teenage pregnancy, poor sexual health, and domestic violence fall within the sphere of private harms. Perceived as unrelated to the public violence of paramilitary groups, the proliferation of such harms against women does not inform political calculations of costs and benefits in the negotiation of demobilization. The broader problem is the evident disconnect between the planning of DDR programs—as well as the benchmarking of their success—and the lived experience of women in the receiving communities.<sup>62</sup>

Compounding the gendered gaps of a gender-blind DDR process is the weakened and fractured nature of the state operating in the backdrop to the non-state demobilization. In this telling, the lack of central state capacity to fundamentally affect the “on the ground” experience of DDR, means that our assumptions about the capacity of the state to control and prevent violence in the transitional context are significantly undermined. The weak state presence has meant that absolute impunity surrounds the violence experienced by women in the “post” conflict phase.

Equally, DDR does not mean the re-establishment of the state or the legitimacy of its institutions. This is demonstrated in part by the ongoing evidence of political influence by former paramilitaries going largely unchallenged. Returning combatants have displaced civilian population from paid work and political leadership within receiving communities.<sup>63</sup> Leaders of women's organizations have been targeted for paramilitary violence and assassination.<sup>64</sup> In the longer-term, the DDR process has been criticized by women's organizations for institutionalizing paramilitary influence and power within the demobilization zones, such as Villavicencio, southeast of Bogotá.<sup>65</sup> The disarmament process was highly partial and largely inadequate. Large numbers of the demobilized have returned to criminal activities. One influential women's organization concluded that the ongoing economic, political, and military

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<sup>60</sup> CORPORACIÓN HUMANAS, RIESGOS PARA LA SEGURIDAD DE LAS MUJERES EN PROCESOS DE REINSECCIÓN DE EXCOMBATIENTE: ESTUDIO SOBRE EL IMPACTO DE LA REINSECCIÓN PARAMILITAR EN LA VIDA Y SEGURIDAD DE LAS MUJERES EN LOS MUNICIPIOS DE MONTERÍA Y TIERRALTA DEPARTAMENTO DE CÓRDOBA 67 (2005).

<sup>61</sup> *Id.* at 73.

<sup>62</sup> Fionnuala Ní Aoláin, *Women, Security, and the Patriarchy of Internationalized Transitional Justice*, 31 HUM. RTS. Q. 1055 (2009).

<sup>63</sup> CORPORACIÓN HUMANAS, *supra* note 60, at 44.

<sup>64</sup> CORPORACIÓN HUMANAS, *supra* note 60, at 44.

<sup>65</sup> CORPORACIÓN HUMANAS, MUJERES ENTRE MAFIOSOS Y SEÑORES DE LA GUERRA: IMPACTO DEL PROCESO DE DESARME, DESMOVILIZACIÓN Y REINTEGRACIÓN EN LA VIDA Y SEGURIDAD DE LAS MUJERES EN COMUNIDADES EN PUGNA (2008).

influence of “demobilized” groups was perpetuating paramilitarism in the country, as young men aspire to the status and power of paramilitaries and young women aspire to be with them (a fact graphically illustrated by the alarming rates of teenage pregnancy in the area).<sup>66</sup> Criminal activities and the limitation of political expression fall more readily within the sphere of public harms in transitional justice. Evidence of public harms resulting from DDR poses challenges to transitional justice in Colombia, even on its own narrowly stated terms of ending the public violence of paramilitary groups.

These results require us to rethink the form and terms upon which DDR programs are negotiated, as well as the basis upon which they are deemed successful. But, more pertinently, they mandate thinking through the conundrum of legal responsibility for the failure of DDR and the locus of responsibility for the violence that continues against women in the aftermath of conflict. When the conflict is theoretically ended by the state, but the non-state actor continues to exercise violence, albeit now in the theoretically private sphere of violence against women and non-political criminality, where does legal responsibility lie?

## **B. The Non-state Conundrum and the Feminist Response**

The posture of many Colombian women’s organizations toward paramilitary forces reflects a more general posture of feminists towards non-state actors. The non-state actor is identified as masculine, and in the context of conflict and repression as portraying hyper-masculine traits,<sup>67</sup> as well as an inherent and unreformed patriarchy that negatively impacts on women. The non-state actor is viewed as unpredictable and unconstrained, and it is unclear to feminists (as it is to other theoretical approaches),<sup>68</sup> how the non-state actor is to be held accountable for his actions, specifically as they affect women. This lack of predictability and stability may explain feminist unwillingness to expend significant theory, policy, or advocacy attention to non-state entities.

Connectedly, any discussion of feminism and the non-state actor mandates acknowledging the theorizing and policy that has emerged from women’s engagement with national liberation movements. In parallel, the status of women within, and the relationship of feminism to, national liberation movements has seldom led to a direct feminist engagement with such entities.<sup>69</sup> In general

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<sup>66</sup> *Id.* at 52.

<sup>67</sup> See Kimberly Theidon, *Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia*, 1 INT’L J. TRANSITIONAL JUST. 66 (2007); NIRA YUVAL-DAVIS, *GENDER AND NATION* (1997).

<sup>68</sup> See, for example, on the challenge of non-state actors to traditional approaches to security studies, Steve Smith, *The Increasing Insecurity of Security Studies: Conceptualizing Security in the Last Twenty Years*, 20 CONTEMP. SECURITY POL’Y 72 (1999).

<sup>69</sup> See, for example, *GENDER AND NATIONAL IDENTITY: WOMEN AND POLITICS IN MUSLIM SOCIETIES* (Valentine M. Moghadam ed., 1994).

feminists have identified the complex paradox that frequently results from women's involvement in national struggles. The involvement of women as combatants in national liberations movements, and the more mundane work of women in reproducing<sup>70</sup> and sustaining the boundaries on which such movements depend,<sup>71</sup> has given rise to this largely negative feminist assessment. Pragmatic acquiescence to women's engagement is balanced by an unwillingness to assume that a reformist agenda will transform such movements. As a result reformist attention remains firmly focused on the state. Notably the category of women combatants (or even women as tacit supporters of violence) poses particular quandaries theoretically and practically to this body of feminist work. Various scholarly disciplines are pervaded by the "assumption that women are generally more peaceful and less aggressive or warlike than men."<sup>72</sup> Generally speaking, the quantification of and rationale for women's political violence are grossly under-researched arenas across academic disciplines.<sup>73</sup>

This paucity of research is tied to complex social conventions about the role of women in the military apparatus of the state, or any roles that women may play within non-state structures in conflicted societies. Here also "the prevalent view of women as victims of conflict . . . tends to overlook, explicitly or implicitly, women's power and agency."<sup>74</sup> This blind spot tends to produce policy and practice that views women as homogeneously powerless or as implicit victims, thereby excluding the parallel reality of women as benefactors of oppression, "or the perpetrators of catastrophes."<sup>75</sup> Moreover, women's active roles in national or ethno-national military organizations is defined by deep ambiguity linked to resonant debates about the identity of nation, the meaning of citizenship, and the complex interface between cultural reproduction and gender roles in any society.<sup>76</sup> Nevertheless, the poor correlation between levels of women's involvement in combatant activities

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<sup>70</sup> See generally YUVAL-DAVIS, *supra* note 67.

<sup>71</sup> See, for example, Begoña Aretxaga's work on women and nationalism in Northern Ireland: BEGOÑA ARETXAGA, SHATTERING SILENCE: WOMEN, NATIONALISM, AND POLITICAL SUBJECTIVITY IN NORTHERN IRELAND ix (1997) ("Women are the backbone of the struggle; they are the ones carrying the war here.").

<sup>72</sup> MIRANDA ALISON, WOMEN AND POLITICAL VIOLENCE 1 (2008).

<sup>73</sup> In the sometimes related sphere of human trafficking, see for example, Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda, 21-25, U.N. Doc. A/HRC/4/23/Add.1 (2007), which sent shockwaves through the community of persons interested in, but not intimately knowledgeable about human trafficking, when it named women as traffickers.

<sup>74</sup> Simona Sharoni, *Rethinking Women's Struggles in Israel-Palestine and in the North of Ireland*, in VICTIMS, PERPETRATORS OR ACTORS? GENDER, ARMED CONFLICT AND POLITICAL VIOLENCE 86 (Caroline Moser & Fiona Clark eds., 2001).

<sup>75</sup> RONIT LENTIN, GENDER AND CATASTROPHE 12 (1997).

<sup>76</sup> See YUVAL-DAVIS, *supra* note 59. See also the assessment of the position of the 20,000 odd women who fought in the Marxist Eritrean People's Liberation Front, whose return back into a deeply patriarchal society has been fraught on numerous levels, James C. McKinley, *Eritrea's Women Fighters Long for Equality of War*, THE GUARDIAN, May 6, 1995.



and the status of women in postcolonial states<sup>77</sup> bears out Cynthia Enloe's assertion that national liberation movements tend to adopt a position of "not now, later" in respect to women's equality.<sup>78</sup> In parallel, one element of murky results for women in the post-conflict context is that the involvement of women in securing liberation/gaining independence gives little clear correlation to accountability for gendered violations committed in contribution to that political outcome.

This largely negative feminist assessment of non-state actors has, in turn, tended to cast the state in the role of "protector," as the guarantor of liberal legal rights to equality and non-discrimination. Although imperfect, the state's de jure guarantees of equality offer greater protection and greater leverage on decision-making within the state than within any of a range of non-state actors. But, in simple terms of numerical presence, women remain vastly under-represented within the state;<sup>79</sup> and empirical research demonstrates the cross-regional truth that women's political activity is concentrated within local civil society organization.<sup>80</sup> Nevertheless, for women's movements seeking to make political gains, their advocacy is remarkable consistent in targeting the state. We do not doubt the value and importance of that endeavor. The state is and will remain a legitimate site of feminist activity and feminist gains. However, we suggest, as the analysis above begins to explore, that in tandem feminists must also be concerned with the non-state actor and seek to influence their actions and institutional structures. Below we explore how non-state actors' actions can be influenced by pursuing state accountability for gendered violence perpetrated by non-state groups. We suggest that, raising the political and legal costs to states for public and private forms of violence against women by non-state entities will motivate states to better ensure the physical integrity of women while negotiating political compromises.

### **C. Due Diligence as a Method to Influence the Non-state Actor**

The privileging of the state is a point of concurrence between feminist interventions into transitional justice and the organization of international human rights law. States assume human rights obligations and accountability for human rights violations by treaty. Traditionally, these obligations were understood to govern the vertical relationship of states to citizens. However, the developing doctrine of

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<sup>77</sup> For discussion of these dynamics in the Eritrean and Colombian cases, respectively, see Patricia Campbell, *Gender and Post-Conflict Civil Society*, 7 INT'L FEM. J. POL. 377 (2005); LUZ MARÍA LONDOÑO F. & YOANA FERNANDA NIETO V., MUJERES NO CONTADAS: PROCESOS DE DEMOVILIZACIÓN Y RETORNO A LA VIDA CIVIL DE MUJERES EXCOMBATIENTES EN COLOMBIA 1990-2003 (2007).

<sup>78</sup> CYNTHIA ENLOE, *THE MORNING AFTER: SEXUAL POLITICS AT THE END OF THE COLD WAR* (1993).

<sup>79</sup> See, for example, the number of women in the parliaments of the world, available at the website of the Inter-Parliamentarian Union, <http://www.ipu.org>.

<sup>80</sup> See *THE CHALLENGE OF LOCAL FEMINISMS: WOMEN'S MOVEMENTS IN GLOBAL PERSPECTIVE* (Amrita Basu ed., 1995).

due diligence has introduced the notion of horizontal application of human rights, namely that human rights also bind the relationship between citizens. In practice, this accountability is affected through the state. Due diligence obligations require states to protect an individual's human rights from violations by another private individual. Due diligence doctrine has been one of the most significant developments in making international human rights law relevant to women's daily experiences of violence.<sup>81</sup> The articulation of states' duties to prevent, prohibit, investigate, and punish crimes of violence against women—predominantly occurring within homes and communities, at the hands of private actors—has been critical.

In transitional contexts, in which the state is fragile and mass crimes of violence may persist, there can be a struggle to make due diligence obligations pertinent to violence against women. Nevertheless, violent conflict does not exempt states from their due diligence obligations. And as we examine here, an important body of law exists for advancing accountability, much of it directly relevant to the Colombian context. With an eye toward gendered violence accompanying a failed or deficient DDR process, we trace several major legal developments that, when read together, support the expansion of state accountability for non-state actors, including: broader acceptance of gendered harms in traditional norms in due diligence requirements; extension of state responsibility to non-state actors for public harms; and due diligence analysis applied to private harms as discrimination.

### *1. Capturing Gender-based Violence*

The Inter-American human rights system has been one of the most progressive in its codification of the right of women to live free from violence. The Inter-American Convention of Belém do Pará, adopted in 1994, remains the only binding international human rights instrument dedicated to the prevention, punishment, and eradication of violence against women.<sup>82</sup> The Convention includes a mechanism for the communication of individual complaints to the Inter-American Commission.<sup>83</sup> While the Inter-American Court has been more conservative in its jurisprudential development of women's rights to live free from violence,<sup>84</sup> recent decisions signal an important new trajectory.

The 2006 decision concerning the sexual abuse of women detainees in the Peruvian Miguel Castro-Castro prison has set an important marker in the

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<sup>81</sup> See Rebecca Cook, *Accountability in International Law for Violations of Women's Rights by Non-State Actors*, 25 *STUD. TRANSNAT'L LEGAL POL'Y* 93 (1993).

<sup>82</sup> Inter-American Convention for the Prevention, Punishment, and Eradication of Violence Against Women, "Convention of Belem do Para", June 9, 1994, 33 *ILM* 1534, *entered into force* Mar. 5, 1995.

<sup>83</sup> *Id.* art. 12.

<sup>84</sup> See Patricia Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17 *TEX. J. WOMEN & L.* 228 (2008).

recognition of gender-specific forms of inhuman treatment.<sup>85</sup> Acts such as being surrounded by security forces while required to strip and remain naked for an extended period, being prohibited from showering, being accompanied to the bathroom by male guards, and denial of post-partum medical attention, were recognized as constituting “inhuman treatment” in violation of the American Convention on Human Rights.<sup>86</sup> Given that these human rights violations were perpetrated by state actors, within a state institution, the decision coheres with the traditional state-centric nature of human rights.

The State was found to be in violation of its due diligence obligations to investigate alleged cases of torture.<sup>87</sup> Further, in awarding reparations, the Court made specific consideration of the different types of violence to which the women were subjected.<sup>88</sup> Finally, the decision marked an important precedent in establishing the justiciability of the Convention of Belém do Pará. While the Peruvian government argued that the communications alleging violations of rights guaranteed under the Convention could only be considered by the Inter-American Commission,<sup>89</sup> the Court found the State in violation of its Article 7(b) obligation to investigate and punish violence against women. Read together, these different aspects of the Court’s decision reiterate states’ duty to prevent, punish, and eradicate violence against women; to investigate allegations of torture, including gender-based forms of sexual torture of women; and to appropriately compensate female victims of sexual violence. This language lays a strong foundation for the application of such principles in many other contexts, including horizontally to non-state actors.

## ***2. Imputed State Liability for Paramilitary “Public” Violence***

While the *Miguel Castro-Castro Prison* case concerned directly state-perpetrated violence against women, innovative jurisprudence by international courts and tribunals has increasingly found that a state may be held responsible for the actions of private actors when it fails to set appropriate regulatory standards, encourages non-enforcement of the relevant legal norms, or minimizes sanction.<sup>90</sup> The Inter-American Court has led the international human rights community in its imputation of state liability for violations of human rights by private parties.<sup>91</sup>

Here the Court’s jurisprudence has specifically addressed the Colombian State’s liability for human rights violations perpetrated by paramilitary groups

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<sup>85</sup> *Miguel Castro-Castro Prison v. Peru*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 160 (Nov. 25, 2006).

<sup>86</sup> *Id.* para. 197.

<sup>87</sup> *Id.* para. 347.

<sup>88</sup> *Id.* para. 432.

<sup>89</sup> *Id.* para. 379.

<sup>90</sup> See generally ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

<sup>91</sup> See especially *Velasquez Rodriguez v. Honduras*, 1988 Inter-Am.Ct.H.R. (ser. C) No. 4 (July 29, 1988).

based on the degree of ties between parts of the State and certain groups.<sup>92</sup> The paramilitary and political activities of the paramilitaries continue today,<sup>93</sup> and the Inter-American Court has held the Colombian State accountable for many of the most serious public harms of the paramilitaries which occurred during the conflict. For example, in the *Mapiripán Massacre* case, the Court found the Colombian State responsible for the abductions, torture, and killings committed by the paramilitary or self-defense groups, due to the “link between the armed forces and this paramilitary group to commit the massacre . . . conducted in a coordinated, parallel or linked manner.”<sup>94</sup> This linkage allied with an emphasis on due diligence remains critical to the protection of women in situations of armed conflict. The Court’s decision in the *Mapiripán Massacre* case can be read together with the *Miguel Castro-Castro Prison* decision to impute liability to the Colombian State for the alarming levels of public harms against women, such as the assassination of leaders of women’s organizations, perpetrated by paramilitary forces.

### ***3. International Human Rights Law and Capturing “Private” Harms***

One important theoretical frame in examining the violence experienced by women is the public/private divide and how that intersects with the state/non-state paradigm. The implications for women of the public/private divide have been well documented by feminist scholars.<sup>95</sup> Law’s oversight of the private domain is purposely constrained, and that deemed private remains effectively out-of-regulatory-bounds. The difficulties of the public/private divide applied to the state and non-state continuum are to some degree self-evident. Regarding the application of international law norms, the state is evidently held to the treaty standards of human rights enforcement when violations take place in the public sphere and involve a state official.

Horizontal application of human rights norms has been highly relevant to women seeking to “catch” violations taking place in the private sphere. In particular, jurisprudence of the European Court of Human Rights,<sup>96</sup> and the growing body of jurisprudence of the CEDAW Committee, have focused on the elaboration of states’ due diligence obligation to prevent, prohibit, investigate, and punish acts of

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<sup>92</sup> See, e.g., *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, 2005 Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005).

<sup>93</sup> GUSTAVO DUNCAN, *LOS SEÑORES DE LA GUERRA: DE PARAMILITARES, MAFIOSOS Y AUTODEFENSAS EN COLOMBIA* (2006).

<sup>94</sup> *Mapiripán*, *supra* note 92, para. 123.

<sup>95</sup> Feminist theorists have long articulated that the most pervasive harms to women tend to occur within the inner sanctum of the private realm, within the family. See SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

<sup>96</sup> *M.C. v Bulgaria*, [2003] ECHR 39272/98 (Dec. 4, 2003); *Opuz v. Turkey*, [2009] ECHR 33401/02 (June 9, 2009).

so-called private violence, in particular, domestic violence.<sup>97</sup> Importantly, within this articulation of states' due diligence obligations, impunity for violence against women has been explicitly recognized as discrimination against women. A state's failure to respond appropriately to forms of private violence that are experienced overwhelmingly by women is in violation of the state's obligations to provide equal protection of the law and is consequently discriminatory against women.

The Inter-American Court of Human Rights has now joined and reaffirmed this important trajectory in international human rights law and the right of women to live free from all forms of violence in the *Campo Algodonero* case.<sup>98</sup> The Court for the first time found a state in violation of its affirmative obligations to respond to violence against women by private actors. The decision concerned three in a series of hundreds of unsolved and poorly investigated disappearances, rapes, and murders of young women in Ciudad Juarez on the U.S.-Mexican border. Significantly, the Court considered the human rights violations in Mexico within the context of mass violence against women and structural discrimination in Ciudad Juarez. The Court found that the "culture of discrimination" against women within the city had penetrated the response of State institutions to the alarming levels of violence against women, resulting in poor criminal investigations and the perpetuation of impunity for such violence.<sup>99</sup> Noteworthy also is that, drawing on the definition of violence against women of both the CEDAW Committee in its General Recommendation 19 and the Convention of Belém do Pará, the Court for the first time held that gender-based violence can constitute discrimination against women.<sup>100</sup> Mexico was ordered to comply with a broad set of remedial measures including a national memorial, renewed investigations, and reparations of over \$200,000 each to the families in the suit.<sup>101</sup>

The implications of the *Campo Algodonero* decision for the Colombian context and more broadly are substantial. The Court's determination to consider individual incidents of violence against women within the context of mass violence against women and structural discrimination is highly pertinent to the Colombian context. This comprehensive and contextual approach to state complicity in perpetuating violence against women by private actors should draw attention and legal responsibility to the relationship between the State's role in negotiating the

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<sup>97</sup> See, e.g., AT v. Hungary, (Communication No. 2/2003), *Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women* (Jan. 26, 2005); Andrew Byrnes & Eleanor Bath, *Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of Discrimination Against Women*, 8 HUM. RTS. L. REV. 517 (2008).

<sup>98</sup> González and Others ("Campo Algodonero") vs. Mexico, Preliminary Considerations, Merits, Reparations and Costs, 2009 Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

<sup>99</sup> *Id.* paras. 399-400.

<sup>100</sup> *Id.* paras. 395 & 402.

<sup>101</sup> *Id.* Part IX, Reparations.

terms of demobilization of paramilitary actors and the alarming levels of public and private harms against women within the demobilization zones. While state actors may not be the direct perpetrators of these harms, and the range of harms identified goes beyond the abductions, torture, and killings by paramilitaries addressed in the *Mapiripán* case, the Colombian State has clear legal obligations to prevent, protect, investigate, punish, and compensate for the full range of public and private harms experienced by women within the demilitarization zones.

### **Conclusion: Humanitarian Law, International Human Rights Law, and Re-calibrating State Interests in the Negotiation of Transitional Justice**

As we conclude this chapter we come back to the point at which the issues of accountability are most squarely on the table (or clearly absent from the table)—namely at the point of negotiation between state and non-state actors. While a peace deal may transform relations between violent actors, it will likely do very little for social relations within the zones controlled by particular groups of violent actors. A peace deal may also do very little to resolve the legal and structural ambiguities that pervade prior and continuing overlapping regimes of control that have characterized the conflicted non-state and state zones. The constructive ambiguity of the peace deal may in fact incorporate that tension and reality directly into new arrangements.<sup>102</sup> In Colombia, the DDR process is widely attributed with legitimating paramilitary social control, rather than ending it.<sup>103</sup> Moreover it is seen as giving rise to concern that the de facto black hole of accountability created by the paramilitaries has been institutionalized by the contemporary process. We suggest that political compromises at the heart of peace deals often involve unspoken compromises around private harms and—in effect—women’s security, as borne out by the evidence of high levels of violence against women within demobilization zones. The lack of accountability for prior violations against women and others may be part of the stated trade-off for the end of public contestation between male combatants. Moreover, continued violence against women will not be viewed as undermining the basis of the “deal” itself and will be entirely incidental to its perceived success or failure. How do we address this reality?

We are not naive in presuming that gender is likely to move easily to center stage in such processes and dominate the “deals” that are made, despite the dictates of gender mainstreaming and UN Security Council Resolution 1325. Nonetheless,

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<sup>102</sup> Christine Bell & Kathleen Cavanaugh, *Constructive Ambiguity or Internal Self-Determination? Self-Determination, Group Accommodation and the Belfast Agreement*, 22 *FORDHAM INT’L L.J.* 1345 (1999).

<sup>103</sup> See, e.g., *CORPORACIÓN HUMANAS*, *supra* note 60, at 67.

in order to address the clear lacunae in gendered accountability we suggest some routes forward. The first is that feminists, policy makers, and others need to pay more attention to non-state actors, not only as perpetrators of violence but rather as entities of control and oversight. In this latter capacity, close attention needs to be given to the modalities of holding the non-state actor accountable, individually but also by affirming command and control responsibilities by commanders for their subordinates. Second, we revisit old but important territory in affirming the importance of holding non-state actors accountable under existing humanitarian law norms—specifically Common Article 3 of the Geneva Conventions applicable to non-international armed conflicts. Third, we encourage greater willingness to consider the relevance of minimum humanitarian standards to internal conflicts, particularly if such standards were to be gender-proofed and avoid the gendered gaps that proliferate treaty standards. Minimum standards might provide some buy-in from non-state groupings, and there is important precedent for such soft law norms crystallizing to constitute hard and binding rules.

Finally, in the arena of human rights obligations we argue that if due diligence obligations are brought to bear on states for violence against women in those zones of control ceded to the non-state actor, then legal and reputational costs to states could be made higher for compromises made when negotiating with non-state actors. This might prompt the recalibration of interests in negotiating these deals in the first place. This could mean that the reduction of public harms is not so readily traded for the persistence or exacerbation of a range of private harms. Indeed, the credible threat of imputed state liability for private harms perpetrated by paramilitary actors could mean that the material and symbolic benefits of inclusion (within the state) would, in a meaningful way, be made subject to principles of non-violence and non-discrimination against women. In sum, we urge greater attention to the non-state actor and greater attention to the capacity of human rights and humanitarian law, as well as transitional “deals,” to hold such actors accountable for gendered harms committed during armed conflict.

## Chapter 5

# Challenges for Transitional Justice in Contexts of Non-transition: The Colombian Case

Felipe Gómez Isa\*

What is known as transitional justice, or justice of transition, has developed vertiginously over the last three decades, becoming a fertile field for rich and thriving academic reflection,<sup>1</sup> the emergence of NGOs and research and consultancy centers,<sup>2</sup> the growing attention on the part of the international community,<sup>3</sup> and the adoption of increasingly sophisticated legal and institutional standards, both domestic and international.<sup>4</sup> The contexts in which the mechanisms of transitional

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<sup>1</sup> Of the vast and prolific scientific production, some of the most relevant titles are NEIL J. KRITZ, *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (1995); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1998); RAMA MANI, *BEYOND RETRIBUTION* (2002); CHANDRA LEKHA SRIRAM, *CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS. PEACE IN TIMES OF TRANSITION* (2004); *ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE* (Edel Hughes, William A. Schabas & Armes Thakur, eds., 2007); *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY* (Naomi Roht-Arriaza & Javier Mariezcurrena ed., 2006); JAVIER CHINCHÓN, *DERECHO INTERNACIONAL Y TRANSICIONES A LA DEMOCRACIA Y LA PAZ: HACIA UN MODELO PARA EL CASTIGO DE LOS CRÍMENES PASADOS A TRAVÉS DE LA EXPERIENCIA IBEROAMERICANA* (2007). There is a journal dedicated exclusively to the field of transitional justice, *International Journal of Transitional Justice*.

<sup>2</sup> One of the centers of reference is the International Center of Transitional Justice, with its central branch in New York, and offices in places as diverse as Cape Town, Brussels, Jakarta, Katmandu, Kinshasa, Beirut, and Bogotá ([www.ictj.org](http://www.ictj.org)). Likewise, there are also the Oxford Transitional Research Group, the Transitional Justice Institute of the University of Ulster in Ireland, and the Center for the Study of Violence and Reconciliation in Cape Town, South Africa.

<sup>3</sup> Proof of this growing interest is the study of the Secretary-General of the United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004). The Organization of American States (OAS) has also been increasingly involved in aspects relating to processes of transitional justice, such as in the case of the paramilitary demobilization in Colombia. In this case, in February 2004 the OAS General Secretary signed an agreement with the Colombian government to monitor the demobilization process. The OAS would provide technical support for the verification of the cessation of hostilities, the demobilization, the disarmament, and the initiatives for reintegration of the demobilized. To this end, the *Misión de Apoyo al Proceso de Paz en Colombia, MAPP/OEA*, was established, which has followed the developments of the peace process with the AUC very closely. See Inter-American Commission of Human Rights, *Informe sobre la implementación de la Ley de Justicia y Paz: etapas iniciales del proceso de desmovilización de las AUC y primeras diligencias judiciales*, OEA/Ser.L/V/II.129, Doc. 6 (Oct. 2, 2007).

<sup>4</sup> See Felipe Gómez Isa, *El derecho de las víctimas a la reparación por violaciones graves y sistemáticas de los derechos humanos*, 37 *EL OTRO DERECHO* 11 (2007).



justice operate are often extremely complex situations in which political and opportunistic considerations frequently take priority, and the categorical successes that can be held up are few.

Despite this, what is certain is that in both academic and political circles there is an increasing sense of *inevitability* in terms of turning to transitional justice mechanisms in order to tackle the process of democratic transition after an authoritarian or dictatorial period or when emerging from a conflict riddled with grave and systematic violations of human rights. In this sense, we can assert that at least to a certain extent transitional justice has had some *epistemic success*—it is placed at the center of discussions on processes of political transition and conflict resolution and there is a certain recognition of its usefulness in dealing with uncomfortable legacies of the past.

Paradoxically, this relative epistemic success has been accompanied by a “scant advance in the theory”<sup>5</sup> of transitional justice, which means that we still cannot properly speak of a new conceptual paradigm. We are still hostages of an episodic, partial, and very fragmented theoretical construction. This construction began in the 1980s in the heat of the transitions to democracy in the Southern Cone;<sup>6</sup> continued with the cases of conflict-resolution following the extremely prolonged conflicts in Central America; reached its pinnacle in South African post-apartheid; and has recently been extended to other contexts in Africa and Asia.<sup>7</sup> This particular evolution helps to explain why both the basic conceptual tools and the mechanisms of application of transitional justice have continued to evolve as they have been applied in new cases and in new contexts—revealing one of the inherent characteristics of transitional justice, its *versatility*. The norms and mechanisms of transitional justice cannot be absolutely uniform and monolithic; they must be sufficiently versatile and flexible in order to adapt to the distinct, complex, and varied circumstances in which they must necessarily operate.

Likewise, the experience of transitional justice to date shows that those who have designed and steered the processes of transition have normally been political actors with an agenda and interests that they wish to preserve and protect above all else. Such actors generally count on a power structure that supports their aspirations. Despite the fact that we have legal standards in the field of transitional justice that are increasingly elaborate and bearing a certain degree of

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<sup>5</sup> Pablo de Greiff, *Una concepción normativa de la justicia transicional*, in JUSTICIA Y PAZ: ¿CUÁL ES EL PRECIO QUE DEBEMOS PAGAR? 22 (Alfredo Rangel, ed., 2009) (“escaso avance de la teoría”).

<sup>6</sup> Some date the beginning of the field back to the period immediately following the Second World War, when mechanisms of transitional justice were applied in connection with the Nuremberg and Tokyo prosecutions and in reparation policies in France and post-fascist Italy. See Margalida Capellà, *Represión política y Derecho Internacional: una perspectiva comparada (1936-2006)*, in REPRESIÓN POLÍTICA, JUSTICIA Y REPARACIÓN. LA MEMORIA HISTÓRICA EN PERSPECTIVA JURÍDICA (1936-2008) 164-74 (Margalida Capellà & David Ginard eds., 2009).

<sup>7</sup> A solid historical analysis of transitional justice can be found in JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE (2004).

coercion, we must recognize that in general it has not been these standards leading the way. Instead, the different actors involved have attempted to accommodate their interests and objectives strategically within the normative and institutional framework of transitional justice. This political strategic use of transitional justice discourse to legitimize the pursuit of one's own agenda is something that we find, to a greater or lesser degree, inherent in all processes of transition.

On the other hand, the widespread conviction as to the effectiveness of applying transitional justice concepts and mechanisms has meant expanding the instances in which they are applied to contexts that are not, strictly speaking, transitional.<sup>8</sup> There is an increasingly marked pressure to amplify the spectrum of transitional justice's application, which could end up affecting both its basic conceptual character and the very nature of the mechanisms. In this vein, transitional justice discourse is lending itself to situations of open conflict, where there is no credible expectation of peace in the near future and where the peace processes are partial, limited to only one of the actors, such as in the case of Colombia.<sup>9</sup>

This expansion of the discourse is also affecting democratic transitions that took place with a preference for forgetting and not addressing the abuses of the past, such as in the case of Spain. Now, decades later, different actors are turning to transitional justice discourse and practice as a way of definitively closing the book on a transition which they believe to be unfinished.<sup>10</sup> At the same time, there is a resort to transitional justice by specific groups demanding recognition of their historic roles and reparations for their suffering over the course of a history of injustice.<sup>11</sup> This includes indigenous populations,<sup>12</sup> afro-descendents,<sup>13</sup> and other subaltern groups.<sup>14</sup> Finally, it is also being asked whether transitional justice should address not just the most grave violations of civil and political rights, as it has until now, but whether its scope ought to be widened to include aspects related

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<sup>8</sup> See Jordi Bonet & Rosana Alija, *Impunidad, derechos humanos y justicia transicional*, 53 CUADERNOS DEUSTO DE DERECHOS HUMANOS 110 (2009).

<sup>9</sup> See ¿JUSTICIA TRANSICIONAL SIN TRANSICIÓN? VERDAD, JUSTICIA Y REPARACIÓN PARA COLOMBIA (Rodrigo Uprimny et al. ed., 2006).

<sup>10</sup> See PALOMA AGUILAR FERNÁNDEZ, POLÍTICAS DE LA MEMORIA Y MEMORIAS DE LA POLÍTICA: EL CASO ESPAÑOL EN PERSPECTIVA COMPARADA (2008).

<sup>11</sup> See, e.g., JANA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL INJUSTICE (2002); POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES (John Torpey ed., 2003); ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000); REPARATIONS: REDRESSING PAST WRONGS (George Ulrich & Louise K. Boserup eds., 2003); RESPONSABILIDAD HISTÓRICA: PREGUNTAS DEL NUEVO AL VIEJO MUNDO (Reyes Mate ed., 2007).

<sup>12</sup> Felipe Gómez Isa, *El derecho de los pueblos indígenas a la reparación por injusticias históricas*, in LA DECLARACIÓN SOBRE LOS DERECHOS DE LOS PUEBLOS INDÍGENAS 157-91 (Natalia Alvarez, Daniel Oliva & Nieves Zúñiga eds., 2009).

<sup>13</sup> AFRO-REPARACIONES: MEMORIAS DE LA ESCLAVITUD Y JUSTICIA REPARATIVA PARA NEGROS, AFROCOLOMBIANOS Y RAIZALES (Claudia Mosquera Rosero-Labbé & Luiz Claudio Barcelos eds., 2007).

<sup>14</sup> The term "subaltern" was coined by Antonio Gramsci but has been developed in a very interesting way by those of the so-called field of subaltern studies. See, e.g., SUBALTERN STUDIES (Ranjit Guha & Gayatri Chakravorty Spivak, eds., 1985).

to development,<sup>15</sup> social justice,<sup>16</sup> or economic, social and cultural rights,<sup>17</sup> all of which are essential ingredients for a process of transition to reach a satisfactory conclusion.

We must recognize that these pressures to extend the scope of the application of transitional justice discourse necessarily oblige us to undertake a systematic reconsideration of the epistemological and conceptual suppositions upon which transitional justice has so far been based. They require us to be permanently alert regarding the suitability or not of these theoretical suppositions in each individual case and, above all, of their possible impacts on the concepts and mechanisms of transitional justice.

The objective of this chapter is to analyze the use and application of transitional justice discourse in the case of Colombia. Part I analyzes the context, the discourses employed, and the implementation of the mechanisms of transitional justice in this context. I will then in Part II attempt to extract some conclusions on whether the progressive amplification of the range of transitional justice to non-transitional contexts is an adequate strategy or not, and what the benefits and possible risks are that we run with this strategy. For this, I will look at the victims as political actors; responses to official discourse; the right to truth; the role of normative standards; and possible impact on future peace processes.

## I. Transitional Justice Discourse in Colombia

President Álvaro Uribe Vélez assumed the presidency in 2002 and immediately announced his policy of *democratic security*.<sup>18</sup> From the end of that same year a process of dialogue and subsequent demobilization of paramilitaries began, which has led to a reported 31,671 members of these illegal groups promising to demobilize and relinquish their weapons.<sup>19</sup> Uribe, and the political sectors that support him, from the beginning sought to create a way to make

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<sup>15</sup> See the interesting reflection coordinated by Pablo de Greiff and Roger Duthie, in *TRANSITIONAL JUSTICE AND DEVELOPMENT: MAKING CONNECTIONS* (Pablo de Greiff & Roger Duthie eds., 2009).

<sup>16</sup> *RETHINKING TRANSITIONAL AGENDAS: EQUALITY AND SOCIAL JUSTICE IN SOCIETIES EMERGING FROM CONFLICT* (Gaby Oré Aguilar & Felipe Gómez Isa eds., forthcoming 2010).

<sup>17</sup> James L. Cavallaro & Sebastián Albuja, *The Lost Agenda: Economic Crimes and Truth Commissions in Latin America and Beyond*, in *TRANSITIONAL JUSTICE FROM BELOW: GRASSROOTS ACTIVISM AND THE STRUGGLE FOR CHANGE* 121-41 (Kieran McEvoy & Lorna McGregor eds., 2008).

<sup>18</sup> An interesting analysis of the different implications of this new policy set out by President Uribe can be found in *SOSTENIBILIDAD DE LA SEGURIDAD DEMOCRÁTICA* (Alfredo Rangel ed., 2003). See also *CONFLICTO Y SEGURIDAD DEMOCRÁTICA EN COLOMBIA: TEMAS CRÍTICOS Y PROPUESTAS* (Fundación Social ed., 2006).

<sup>19</sup> These are the official figures managed by the Office of the High Commissioner for Peace. Speech by Luiz Carlos Restrepo, High Commissioner for Peace, *Desmovilización de las Autodefensas: Balance de un proceso*, at the Simposio de Evaluación y Balance: Dos años de Ley de Justicia y Paz, Universidad Santo Tomás, July 25, 2007.

this process as easy as possible. Several of the declarations of the government revealed that the real will to seek justice was largely conditional. In the words of the President, the process should try to seek “as much justice as possible, and as much impunity as necessary.”<sup>20</sup> This declaration of the President’s intentions is reflected in the process of negotiating demobilization with the paramilitary groups and continues to be seen today in the implementation of the transitional justice mechanisms designed to accompany this process. In this game of intentions, we cannot forget the forceful pressure exerted by the paramilitaries themselves,<sup>21</sup> with their demands of not being sent to prison, avoiding any possible extradition to the United States to be prosecuted for their crimes, and retaining a significant part of the assets acquired by their illicit activities.<sup>22</sup>

Transitional justice discourse was notably absent in the initial stages of this process of demobilization. The draft bill of alternative sentences<sup>23</sup> that the government presented in 2003 to facilitate the process of demobilization was a bill that, with vague references to restorative justice, in reality sought to guarantee impunity for the demobilized paramilitaries. Due to the avalanche of criticisms from political sectors and human rights organizations, as well as from international organizations that were following the process, the bill had to be withdrawn.<sup>24</sup>

In this complex scenario, the government began to work on a new draft law that suggested a radical change of strategy, as it fully assumed the discourse of transitional justice. This important change in discourse could be seen in both the government and the principal paramilitary leaders. Both went from an absolute rejection of the merest hint of criminal punishment and complete silence on victims’ rights to the admission of the pertinence of finding an equilibrium between the necessities of peace and the demands of justice,<sup>25</sup> which is as we know one of the essential dilemmas faced by all transitional justice processes.

During this process, the Colombian State did not have complete freedom to maneuver, as there was a fairly precise and sophisticated framework established both by international human rights law and by Colombian legislation, and likewise by both domestic and international jurisprudence. This framework suggests fundamentally that in accordance with international law there is no room for impunity for grave crimes, such as those committed by the different

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<sup>20</sup> *El as bajo la manga de los Uribistas*, EL TIEMPO, Feb. 13, 2005 (“tanta justicia como fuera posible, y tanta impunidad como fuera necesaria”).

<sup>21</sup> León Valencia, *Los caminos de la alianza entre los paramilitares y los políticos*, in PARAPOLÍTICA: LA RUTA DE LA EXPANSIÓN PARAMILITAR Y LOS ACUERDOS POLÍTICOS (Mauricio Romero ed., 2007).

<sup>22</sup> GUSTAVO DUNCAN, LOS SEÑORES DE LA GUERRA 353 (2006).

<sup>23</sup> Proyecto de Ley Estatutaria 85 de 2003, Gaceta del Congreso 436 (Aug. 27, 2003).

<sup>24</sup> The process of negotiation, with the different proposals and points of view, is very well analyzed in Gaby Oré Aguilar, *El derecho a la reparación en la desmovilización de los paramilitares colombianos*, 2005 ANUARIO CIP 263 (2005).

<sup>25</sup> Rodrigo Uprimny & María Paula Saffon, *Usos y abusos de la justicia transicional en Colombia*, in JUSTICIA Y PAZ, *supra* note 5, at 176-77.

actors in the Colombian armed conflict. The international framework, as well as all the international treaties ratified by Colombia, is summarized in 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*, passed in December 2005 by the United Nations General Assembly.<sup>26</sup> These Principles set out clear guidelines for transitional justice processes, which should always respect an essential nucleus of rights to justice, truth, comprehensive reparations to the victims of grave violations of human rights, and guarantees of non-repetition.

Through troubled and controversial negotiations, and with intense criticism from diverse sectors who considered that this was another attempt to adopt a legal umbrella of disguised impunity, the Colombian Congress finally passed the Justice and Peace Law in June 2005.<sup>27</sup>

The first point of criticism is that the process of negotiation, demobilization, and reinsertion of the members of the paramilitary groups, like the design of the normative framework to facilitate this process, has been unilaterally directed from the highest posts of the executive power—without any transparency and without effective participation of the victims of the violence.<sup>28</sup> The victims' absence has been criticized as one of the principle weaknesses of the process. As Rodrigo Uprimny has correctly asserted, “it seems ethically and politically questionable that it should be only the armed actors who negotiate the peace and agree on the design of transitional justice, given that these do not represent (in fact, they oppose) the interests of the rest of society.”<sup>29</sup> If we really want to advance along the path of peace and reconciliation, it would be appropriate for “all the actors involved in the conflict, and not just the armed actors, to participate actively in overcoming it,”<sup>30</sup> thus lending the necessary legitimacy to the project and assuring the support of Colombian society and that of the international community as a whole.

On the other hand, the law at hand fully adopts the discourse of human rights and victims' rights that belong in a scheme of transitional justice, purporting to reach a balance between peace and justice. The law concedes generous sentencing benefits to the paramilitaries who demobilize, with the stated intention that this would facilitate significant advances in terms of the victims' rights to truth and reparation, as well as establish guarantees of non-repetition for horrific crimes

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<sup>26</sup> U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

<sup>27</sup> Law 975 of 2005, Diario Oficial n° 45.980 (July 25, 2005). The law, passed on June 22, was approved by the President of the Republic and became law on July 25. For a detailed analysis of the Justice and Peace Law in light of international standards, see Felipe Gómez Isa, *Justicia, verdad y reparación en el proceso de desmovilización paramilitar en Colombia*, in *COLOMBIA EN SU LABERINTO: UNA MIRADA AL CONFLICTO* 87 (Felipe Gómez Isa ed., 2008).

<sup>28</sup> Mabel González Bustelo, *Las encrucijadas de Colombia*, 91 *PAPELES DE CUESTIONES INTERNACIONALES* 113 (2005).

<sup>29</sup> Rodrigo Uprimny, *Introducción*, in *¿JUSTICIA TRANSICIONAL SIN TRANSICIÓN?*, *supra* note 9, at 35.

<sup>30</sup> Rodrigo Uprimny, *Introducción*, in *¿JUSTICIA TRANSICIONAL SIN TRANSICIÓN?*, *supra* note 9, at 35.

attributed to paramilitarism (e.g. massacres, torture, disappearances). A principle criticism made of the law itself is that it fails to specify the mechanisms and instruments necessary to effectively implement these principles—as demonstrated by the enormous difficulties in the application of the Justice and Peace Law and its limited achievements to date.<sup>31</sup>

The Colombian Constitutional Court itself, which declared several provisions of the Justice and Peace Law unconstitutional in May 2006,<sup>32</sup> has accepted that the framework of transitional justice is perfectly applicable to the Colombian context. In its decision, the Court accepted the constitutionality of the measures of alternative sentencing established in the law so long as it is effectively employed as an initiative toward satisfying the rights to truth, reparation, and guarantees of non-repetition. Certainly the Court's judgment very significantly amended key elements of the Justice and Peace Law,<sup>33</sup> converting it into an instrument with more possibilities to ensure that the process of demobilization as a whole leads to the effective materialization of justice, truth, and reparation for the victims. As the Inter-American Commission on Human Rights has pointed out, this decision of the Court should be made the “cornerstone”<sup>34</sup> for managing the demobilization process, as it introduces significant and fundamental changes to the Justice and Peace Law.

In any case, the realization of these objectives does not exclusively depend on the integrity of a discourse and a legislative framework that is more or less in accordance with international standards on transitional justice. It ultimately and decisively depends on the will and capacity of the Colombian State to modify a situation that has led to the establishment of paramilitarism as an authentic economic, social, military, and political power<sup>35</sup> in vast regions of Colombia, in which the presence of the State has been residual and the enormous wealth generated by drug trafficking its fundamental nutrient.<sup>36</sup>

What underlies the criticisms regarding the application of a transitional justice scheme in Colombia is the danger that the process, under the formal

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<sup>31</sup> See Humberto de la Calle, *Castigo y perdón en el proceso de justicia y paz con los paramilitares*, in JUSTICIA Y PAZ, *supra* note 5, at 110.

<sup>32</sup> Constitutional Court, ruling C-370 of 2006, No. D-6032, May 18, 2006.

<sup>33</sup> See Jorge Iván Cuervo, *Estándares internacionales de verdad, justicia y reparación. La aplicación de la Ley de Justicia y Paz*, in JUSTICIA TRANSICIONAL Y EXPERIENCIAS INTERNACIONALES: A PROPÓSITO DE LA LEY DE JUSTICIA Y PAZ 50 (Jorge Iván Cuervo, Eduardo Bechara & Verónica Hinestrosa eds., 2007).

<sup>34</sup> *Statement of the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia*, OEA/Ser. L/V/II 125, Doc. 15, para. 51 (Aug. 1, 2006).

<sup>35</sup> For Mauricio Romero, one of the principal specialists on the paramilitary phenomenon in Colombia, the consolidation of the self-defense groups in the 1990s is the result of an entire process of redefinition of the regional power balances and a response to the potential changes that could come from a possible negotiation with the guerrillas. MAURICIO ROMERO, *PARAMILITARES Y AUTODEFENSAS 1982-2003*, at 33 et seq. (2003). See also ALFREDO RANGEL, *EL PODER PARAMILITAR* (2005); CORPORACIÓN OBSERVATORIO PARA LA PAZ, *LAS VERDADERAS INTENCIONES DE LOS PARAMILITARES* (2002).

<sup>36</sup> Fernando Cubides, *Narcotráfico y guerra en Colombia: los paramilitares*, in *VIOLENCIAS Y ESTRATEGIAS COLECTIVAS EN LA REGIÓN ANDINA 377* (Gonzalo Sánchez & Eric Lair eds., 2004).

disguise of prosecutions and victim's rights to justice, truth, and reparation, will end up becoming a process that grants impunity and does not effectively dismantle the paramilitary structures of economic power and social control, thus contributing instead to the legalization and institutionalization of paramilitarism and its consolidation as a political project. For some, it is an authentic *process of simulation*<sup>37</sup> in which, by appropriating the discourses of human rights and transitional justice, at its heart seeks to legitimize the high levels of impunity and the absence of any effective reparation to the victims, which so far have been the costs of the paramilitary demobilization process.

If this is the case, and there are sufficient indicators to show that it is so, we would find ourselves facing what Rodrigo Uprimny and María Paula Saffon have termed the “mere rhetoric” and “manipulative use” of transitional justice discourse,<sup>38</sup> which could end up greatly harming the integrity and consistency of the basic concepts and mechanisms of transitional justice. If this is deemed to be within the applicable normative and institutional standards, it could contribute to an even greater degradation of processes of transitional justice<sup>39</sup> and to particular instruments becoming unusable or tainted for cases in which there are in fact conditions to apply the mechanisms in a minimally honest way.

In contrast, other sectors have praised the legal framework of Justice and Peace Law as the “most exacting and rigorous of any peace process in recent decades.”<sup>40</sup> Such observers assert that in the transitional justice process in Colombia rather than manipulation, what we are seeing instead are the difficulties of application derived from the enormous complexity of the Colombian conflict. One pervasive opinion of this kind is that defended by the political analyst Plinio Apuleyo,<sup>41</sup> who argues that the establishment has not used manipulative maneuvers to mold transitional justice to respond to its own interests, as some have malevolently claimed,<sup>42</sup> but that rather it is the complexity of Colombian reality

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<sup>37</sup> HERNANDO VALENCIA VILLA, *LA LEY DE JUSTICIA Y PAZ DE COLOMBIA A LA LUZ DEL DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS* 9 (2005).

<sup>38</sup> Rodrigo Uprimny & María Paula Saffon, *Usos y abusos de la justicia transicional en Colombia*, in *JUSTICIA Y PAZ*, *supra* note 5, at 186-87.

<sup>39</sup> See Manuel Fernando Quinche Ramírez, *La degradación de los derechos de las víctimas dentro del proceso de negociación con los grupos paramilitares*, in *JUSTICIA TRANSICIONAL: TEORÍA Y PRAXIS* 489 (Camila de Gamboa ed., 2006).

<sup>40</sup> Alfredo Rangel, *Prólogo*, in *JUSTICIA Y PAZ*, *supra* note 5, at 12. Obviously, the government defends this positive take on the demobilization process in light of the international standards in the field of transitional justice. This is exemplified by Frank Pearl, High Commissioner for Peace and Reintegration, in the closing speech of the International Congress on DDR in Cartagena de Indias, May 4-6, 2009: “The Justice and Peace Law is one of the most ambitious transitional justice laws in the world. The government could have been less ambitious, but we decided to be visionaries.”

<sup>41</sup> Plinio Apuleyo, *El dilema colombiano: justicia y paz*, in *JUSTICIA Y PAZ*, *supra* note 5, at 258.

<sup>42</sup> This author makes reference to the “legal war” that the FARC and the ELN are also carrying out using collectives of lawyers and human rights NGOs in effect as their political arm in order to try to erode the legitimacy and the credibility of the government in its policy of transitional justice. Apuleyo, in *JUSTICIA Y PAZ*, *supra* note 5, at 258.

that has obliged the mechanisms of transitional justice to adapt. For Apuleyo, the Colombian government has shown more than sufficient proof of its will to carry out the process of demobilization based on the parameters of transitional justice, but dismantling the paramilitary structures is not an easy task.

What these different visions of how transitional justice is operating in Colombia show is that the discourse of transitional justice can be used in different ways and with different motives on the parts of the various actors in a given process, something that tends to be aggravated in situations of conflict. Plinio Apuleyo's accusation about the collusion of certain human rights defense groups with guerrilla groups<sup>43</sup> assumes a qualitative leap, because in this way the debates around transitional justice become part of the very dynamic of the conflict and not something completely removed from it. This makes it very difficult to debate transitional justice with a minimum of rationality, impartiality, and even security,<sup>44</sup> given that, deep down, each actor suspects that the positions of the other actors form part of their strategy in the framework of the conflict.

In line with this, in Colombia we have for some time been witnessing a strategic competition, what Delphine Lecombe calls "epistemic struggles,"<sup>45</sup> between the different actors over the meanings and ultimate objectives of transitional justice, as well as over the use of the various mechanisms it offers to attempt to emerge from the conflict. This delicate situation that transitional justice faces in the context of the Colombian conflict obliges us to employ a "cautious use"<sup>46</sup> of transitional justice language—a use that is devoid of the slightest hint of ingenuity, that is fully conscious of the complex circumstances in which it must operate, and that exposes any intent (from wherever it might come) to manipulate the standards of international justice for any objective other than peace, justice, and the defense of the rights of the victims.

Below I will analyze this strategic competition on the part of the different actors in the light of one of the measures taken suddenly by President Uribe in the framework of the process of demobilization of the paramilitaries—the extradition

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<sup>43</sup> Apuleyo, in *JUSTICIA Y PAZ*, *supra* note 5, at 258.

<sup>44</sup> This qualitative leap that I have mentioned has contributed to turning many human rights defenders into targets. This grave situation has led to the emission of a communiqué on the part of the UN Special Representative of the Secretary-General on the situation of human rights defenders, Hina Jilani, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston and the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, declaring that they are "deeply concerned by recent developments in Colombia indicating the deteriorating situation of human rights defenders in recent months, in particular the killings, harassment and intimidation of civil society activists, trade-union leaders and lawyers representing victims." *Press Release*, United Nations, "End violence against defenders in Colombia", the call of UN experts (Apr. 30, 2008).

<sup>45</sup> See her interesting contribution in this book entitled *A Conflicted Peace: Epistemic Struggles around the Definition of Transitional Justice in Colombia*.

<sup>46</sup> Rodrigo Uprimny & María Paula Saffon, *Usos y abusos de la justicia transicional en Colombia*, in *JUSTICIA Y PAZ*, *supra* note 5, at 227 ("uso cauteloso").



to the United States on May 13, 2008 of fourteen paramilitary leaders to be tried for drug trafficking. As stated above, one of the paramilitary leaders' conditions to participate in the demobilization process was the guarantee of not being extradited to the United States. This was criticized by some NGOs such as Human Rights Watch, who argued that by accepting this condition the government would lose an important, powerful tool for ensuring effective paramilitary demobilization,<sup>47</sup> strongly limiting the Damocles sword that the genuine application of the principle of universal jurisdiction might represent. The Justice and Peace Law of 2005 makes no explicit references to the figure of extradition. It avoids doing so by using an "astute stratagem"<sup>48</sup>—the inclusion of Article 71, which declared the crime of belonging to an illegal armed group a political crime by qualifying it as sedition. As Article 35 of the political Constitution of Colombia of 1991 establishes that extradition cannot take place for political crimes, this effectively eliminated the possibility of extraditing any paramilitaries admitted under the Justice and Peace Law. Fortunately, the Constitutional Court of Colombia declared this Article 71 of the law to be unconstitutional.<sup>49</sup>

Regardless, the Uribe administration publicly guaranteed that the paramilitaries, if they complied with all the requisites of the Justice and Peace Law, would not be extradited.<sup>50</sup> Despite this promise, surprisingly in the very early morning of May 13, 2008 fourteen members of the paramilitary leadership were extradited to the United States. This surprising turn of events<sup>51</sup> has provoked conflicting reactions among the different actors with regard to the government's real motives behind these extraditions. According to the administration and supporters,<sup>52</sup> the extradition is a result of the scant collaboration of the paramilitary leaders toward making real advances in demobilization and guaranteeing the victims' rights to justice, truth, and reparation.<sup>53</sup>

According to other sectors, including those that condemned the initial pact of non-extradition, the May 2008 extraditions are part of a political strategic move

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<sup>47</sup> HUMAN RIGHTS WATCH, *SMOKE AND MIRRORS: COLOMBIA'S DEMOBILIZATION OF PARAMILITARY GROUPS* 9-10 (Aug. 2005).

<sup>48</sup> VALENCIA VILLA, *supra* note 37, at 13.

<sup>49</sup> Constitutional Court, ruling C-370 of 2006.

<sup>50</sup> On July 9, 2006, the then Minister of Interior and Justice, Sabas Pretelt, declared that those paramilitaries who fulfilled the conditions set out in the framework of the Justice and Peace Law would see their extradition orders cancelled. *Sabas Revela 'Secreto' De Extradición*, EL TIEMPO, July 9, 2006, at 4.

<sup>51</sup> This decision, which has been called "opportunistic and sudden," surprised all, including the "paramilitary commanders, the country, and even state officials." Jaime H. Diaz, *Mensis terribilis: de la lógica de la cosecha a la del reloj*, 21 DATOS Y COMENTARIOS DE COYUNTURA COLOMBIANA 2 (2008).

<sup>52</sup> Apuleyo, in JUSTICIA Y PAZ, *supra* note 5, at 260-67.

<sup>53</sup> President Uribe declared in this respect: "I will not allow a few criminals to put the state up against the wall." *Extradición de 14 jefes 'paras' se comenzó a planear desde que 'Macaco' fue enviado a E.U.*, ELTIEMPO.COM, May 14, 2008, <http://www.eltiempo.com/archivo/documento/CMS-4163692>.

or “*jugada política*”<sup>54</sup> on the part of the government in order to distance itself from the paramilitary leaders and avoid the continued revelation of complicities between particular political and economic areas with the crimes committed by paramilitarism in what has been termed the “parapolitics” scandal.<sup>55</sup> These doubts regarding the true motives of the extraditions have led Rodrigo Uprimny to wonder why things were not done the other way around. If, in the government’s judgment, the paramilitary leaders continued to direct criminal paramilitary networks from prison and did not collaborate sufficiently, it should have sought to have them deprived of the generous benefits of the Justice and Peace Law. They could then be prosecuted in accordance with ordinary legislation, which would involve much more severe sentences for their grave crimes. Then, once they had served their sentence in Colombia, they could be extradited to the United States. Uprimny concludes his reflection with an enlightening question: “Why prosecute them first for drug trafficking when it is obvious that killing people is much more serious than exporting cocaine?”<sup>56</sup>

Where there is some consensus is in the fact that extraditions could affect the victims’ rights to truth and reparation because in the United States the extraditees are being tried essentially for crimes relating to drug-trafficking. In this respect, Iván Cepeda, of the Movement of Victims of State Crimes (MOVICE), emphasized in response to the extraditions that “extraditing the accused implies inhibiting the rights of society and of the victims to truth and justice. It should be determined whether these extraditions are the result of a pact of silence and impunity made behind the back of society.”<sup>57</sup>

As we can see, actions are susceptible to different interpretations in the context of the strategic competition over transitional justice discourse, a strategic competition that continues to evolve and adapt as the actors turn to different measures of transitional justice.

Despite all the precautions with which we must approach transitional justice discourse and its application in a non-transitional context such as of Colombia, and despite all the attempts at manipulating and devaluing the standards on the part of the dominant hegemonic rhetoric, as described below, the discourse

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<sup>54</sup> Alejandro Aponte, *Colombia: un caso sui generis de la justicia de transición*, in JUSTICIA TRANSICIONAL EN IBEROAMÉRICA 97 (Jessica Almqvist & Carlos Espósito eds., 2009).

<sup>55</sup> The ex-paramilitary leader Diego Murillo Bejarano, alias “Don Berna,” in a letter addressed to the Supreme Court of Justice on September 17, 2009, argues that his extradition to the United States was a strategy on the part of the Colombian government to keep quiet his links with government officials, military agents, and politicians. He writes: “There are many political, military, and economic sectors of people that still hold immense margins of power and infiltration . . . who are interested in keeping the truth of their participation hidden.” Diego Fernando Murillo Bejarano, alias Don Berna, Letter addressed to the Criminal Cassation Chamber, Colombian Supreme Court of Justice, from New York, Metropolitan Correctional Center (Sept. 17, 2009).

<sup>56</sup> Rodrigo Uprimny, *¿Y por qué no se hizo al revés?*, EL ESPECTADOR, May 27, 2008, at 29.

<sup>57</sup> Iván Cepeda, *No es el fin del camino*, CAMBIO, No. 776, May 15-21, 2008, at 25.

continues to offer enough positive elements to make it worth confronting the risks that these kinds of processes entail in contexts of conflict.

## II. Defense of the Application of Transitional Justice, Conscious of the Risks

### A. The Victims as Political Actors

One primary observation that results from analyzing the application of the normative and institutional framework of transitional justice is that for the first time in the history of the Colombian conflict, the victims have come to occupy a relevant place in the public scene. This is despite the initial intentions of the government and the paramilitary leaders who, as mentioned above, resisted taking notice of them. Until very recently, the victims were “the ghosts of the conflict; nobody saw them, and few spoke of them.”<sup>58</sup> The *invisibility* of the victims has been something that has characterized the majority of the attempts at conflict-resolution or transition to democracy after periods of dictatorship.<sup>59</sup>

One of the virtues of transitional justice discourse is that it puts the victims themselves, and their rights, into the center of the debate.<sup>60</sup> It focuses on providing the victims with “a sense of recognition, not only as victims, but as holders of rights.”<sup>61</sup> We must recognize that in this respect, important steps have been made; we have advanced on a road of no return, in which the victims will be, unavoidably, necessary travel companions, as “exceptional historic witnesses and the subjects of justice.”<sup>62</sup> From now on it will be totally unthinkable that victims should not be present in debates about peace and justice. The tumultuous debates around the draft Victims’ Law is just one example of this.<sup>63</sup> The victims’ growing public presence, the consolidation of some of their organizations, the channeling of resources, and the establishment of transnational networks with other international NGOs<sup>64</sup> have been for some victims a hopeful processes of *empowerment*. This could contribute decisively to encouraging their participation and generating a sense

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<sup>58</sup> Sergio Jaramillo, *Presentación*, in CUADERNOS DEL CONFLICTO: JUSTICIA, VERDAD Y REPARACIÓN EN MEDIO DEL CONFLICTO 6 (Fundación Ideas para la Paz ed., 2005).

<sup>59</sup> See Reyes Mate, MEMORIA DE AUSCHWITZ: ACTUALIDAD MORAL Y POLÍTICA (2003).

<sup>60</sup> Mauricio Gaborit, *Memoria histórica: revertir la historia desde las víctimas*, in EL DERECHO A LA MEMORIA 195 (Felipe Gómez Isa ed., 2006).

<sup>61</sup> De Greiff, in JUSTICIA Y PAZ, *supra* note 5, at 47.

<sup>62</sup> Iván Cepeda & Claudia Girón, *Testigos históricos y sujetos de justicia*, in JUSTICIA TRANSICIONAL: TEORÍA Y PRAXIS, *supra* note 39, at 375.

<sup>63</sup> The so-called *Mesa de Víctimas* or group of experts for this draft bill is a coalition of victims groups, human rights organizations, and organizations of international cooperation such as the United Nations Development Programme (UNDP).

<sup>64</sup> Uprimny & Saffon, in JUSTICIA Y PAZ, *supra* note 5, at 206.

of *ownership* of the process, which is seen as fundamental from the perspective of many victims themselves.<sup>65</sup> The challenge is to ensure these processes take place without any type of discrimination<sup>66</sup> and that they reach the greatest possible number of victims, without being limited, as often happens, to those victims who have access to supporting organizations and are *politically correct* at a particular moment.<sup>67</sup>

## B. Toward a “From Below” Response to the Official Rhetoric

A second positive aspect, strongly linked to the emergence of the victims as political actors, has to do with how the victims themselves have appropriated the discourses of internationally recognized human rights and of transitional justice to radically question the official rhetoric of the peace process. In the opinion of MOVICE,<sup>68</sup> one of the most representative victims’ groups, the official discourse has reduced the peace process with the paramilitaries to a limited process of handing over of weapons and reinsertion into civilian life, without going into basic questions such as real guarantees of the rights to truth, justice, and reparation, or the strengthening and deepening of democracy in the country. The discourses of transitional justice have served as catalyzing strategies of resistance(s) *from below*,<sup>69</sup> which attempt to counteract the powerful official rhetoric.<sup>70</sup> The progressive empowerment of victims has led to the victims themselves devising alternative strategies of truth, justice, and reparation,<sup>71</sup> beyond the official frameworks such

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<sup>65</sup> Kieran McEvoy & Lorna McGregor, *Transitional Justice from Below: An Agenda for Research, Policy and Praxis*, in TRANSITIONAL JUSTICE FROM BELOW, *supra* note 17, at 9.

<sup>66</sup> Principle 25 of the *Basic Principles and Guidelines*, *supra* note 26, stipulates that the “application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.”

<sup>67</sup> On the difficulties that victims and their organizations encounter in reparation processes, consult the extraordinary case study undertaken by Heidi Rombouts on Rwanda, VICTIM ORGANISATIONS AND THE POLITICS OF REPARATION: A CASE STUDY ON RWANDA (2004).

<sup>68</sup> Its composition, history, and principle objective can be found at the organizations website, <http://www.movimientodevictimas.org>.

<sup>69</sup> This new epistemological perspective analyzes the processes of creating and applying norms as social processes in which not only the political and legal elite participate but also local actors from below. See, e.g., BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003); LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura de Sousa Santos & César Rodríguez-Garavito eds., 2005); SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS (Bob Clifford ed., 2009).

<sup>70</sup> See the analysis of a member of *Movimiento de Hijos e Hijas por la memoria y contra la impunidad* (Movement of Sons and Daughters for Memory and against Impunity), José Darío Antequera Guzmán, *Contribuciones hacia la reivindicación social de un derecho a la memoria*, 37 EL OTRO DERECHO 65 (2007).

<sup>71</sup> On this, see the two *from below* experiences analyzed by Catalina Díaz—one on local processes of victim-recognition, truth-seeking, and property restitution in Medellín; the other on local reconciliation processes in eastern Antioquia. Catalina Díaz, *Challenging Impunity from Below: The*

as the Justice and Peace Law or the National Reparation and Reconciliation Commission (CNRR) created by that law. This trend can be seen, to a greater or lesser degree, in most transitional justice processes. Initiating these processes can set off certain social forces that begin to take over the reins and approach truth, justice, and memory as processes of social construction,<sup>72</sup> and as “part of a societal democratization process and an opportunity for the social forces that have been excluded, persecuted, and stigmatized to participate in public life.”<sup>73</sup> In this way, spaces are generated for “resistance to the *repression* (in both the political and psychic senses) of the past.”<sup>74</sup> This is one of the objectives of MOVICE’s project *Colombia Nunca Más*. This project is working to create a Center of Memory and Documentation that would serve the double function of a security archive and a public space for truth and memory.

In this context of emerging memory initiatives, interesting interactions arise between the processes coming from above and the processes emerging from below, in the case of the Area of Historical Memory of the CNRR for example. Because of the dynamics since its creation, the personality and enormous intellectual prestige of its Coordinator, historian Gonzalo Sánchez, and the collaboration of a broad group of experts,<sup>75</sup> the Historical Memory Area has obtained a considerable degree of autonomy from the CNRR—which is somewhat discredited in the eyes of the victims—and is contributing to the generation of truth and memory spaces for the victims as a mechanism of empowerment.<sup>76</sup> As the Area of Historical Memory itself emphasizes, its mission is “to develop an integrated, inclusive

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*Contested Ownership of Transitional Justice in Colombia*, in TRANSITIONAL JUSTICE FROM BELOW, *supra* note 17.

<sup>72</sup> Ana González Bringas, *Madres-Abuelas de Plaza de Mayo: la construcción social de la memoria*, in EL DERECHO A LA MEMORIA, *supra* note 61. See also Natalia Carolina Marcos, *La memoria insurgente de las Madres de Plaza de Mayo en la lucha por los derechos humanos*, ANUARIO DE ACCIÓN HUMANITARIA Y DERECHOS HUMANOS 87 (2008).

<sup>73</sup> Iván Cepeda Castro, *Ocho propuestas para la no repetición de los crímenes atroces y el desplazamiento forzado en Colombia*, in TIERRA Y DESPLAZAMIENTO EN COLOMBIA: CRISIS HUMANITARIA POR EL CONTROL DEL TERRITORIO 147 (Taula Catalana per la pau i els drets humans a Colombia ed., 2006).

<sup>74</sup> Iván Cepeda Castro & Claudia Girón Ortiz, *Justicia y Crímenes contra la Humanidad*, in CURSOS DE DERECHOS HUMANOS DE DONOSTIA-SAN SEBASTIÁN 85 (Juan Soroeta ed., 2004).

<sup>75</sup> The research team includes, among others, Absalón Machado, Álvaro Machado, Iván Orozco, Rodrigo Uprimny, Andrés Fernando Suárez, Pilar Gaitán, María Victoria Uribe, Fernán González, León Valencia, Jorge Restrepo, María Emma Wills, Ana María Gómez, Jesús Abad Colorado, Pilar Riaño, and Martha Nubia Bello.

<sup>76</sup> For example, the *Memory Week*, one of the Area’s initiatives in this regard, seeks to give visibility to the suppressed memories of the victims and give them a voice, in order to contribute to democratizing memory processes. In September 2008 the first Memory Week took place simultaneously with the launching of the Area’s first case-study report, on the emblematic Trujillo massacre, ÁREA DE MEMORIA HISTÓRICA, TRUJILLO: UNA TRAGEDIA QUE NO CESA (2008). In the framework of the second Memory Week, celebrated in September 2009, a whole collection of activities was celebrated for the recovery of memories, among which was included the presentation of the second report on one of the most atrocious massacres perpetrated by the paramilitaries. ÁREA DE MEMORIA HISTÓRICA, LA MASACRE DE EL SALADO: ESTA GUERRA NO ERA NUESTRA (2009).

narrative in tune with the voices of the victims about the origin and the evolution of the internal armed conflict in Colombia.<sup>77</sup>

The conclusion we can draw here is that in Colombia, even in a context of conflict, which clearly is not the most favorable for the emergence and development of these type of initiatives, interesting processes of recovery and dignification of memories of suffering are being carried out. And such processes have to be part of the reconstruction of the truth about the Colombian conflict and the grave affronts to dignity it has produced—and which, unfortunately, continue today.

### C. Some Advances in the Right to Truth

The right to truth is fundamental, for the victims of grave violations of human rights and for Colombian society as a whole. It is crucial both to move toward clarifying the individual cases of human rights violations and to unravel the factors that have contributed to the emergence, development, and consolidation of the phenomenon of paramilitarism. Fulfilling these conditions will permit us to determine if the demobilization process is really progressing, or whether it is a mere mask to cover the de facto legalization of what has been called the “successful paramilitary project.”<sup>78</sup>

With respect to the right to truth, we must recognize that the Justice and Peace Law was far from what would have been desirable. This was a major focus of the decision of the Constitutional Court in May 2006, which made amendments based on the increasingly developed international standards on the subject.<sup>79</sup> Once again, despite promising formulations of principle,<sup>80</sup> mechanisms for making this right effective turned out to be completely inappropriate and insufficient.<sup>81</sup>

A first criticism is that the law contemplates exclusively a judicial truth, without explicitly anticipating other forms of truth reconstruction and historical memory—such as a non-judicial truth commission for example,<sup>82</sup> an extreme that was on the table during the process of negotiating the Justice and Peace Law.

One of the most effective ways of being able to guarantee the right to truth, in both individual and collective aspects, would be “to make the *versiones libres* public in such a way that both the direct victims and their relatives, and society as a whole, could hear the declarations of the Justice and Peace participants and

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<sup>77</sup> Área de Memoria Histórica, CNRR, *Narrativa y voces del conflicto. Programa de investigación* (Aug. 2008), available at <http://www.memoriahistorica-cnrr.org.co>.

<sup>78</sup> Héctor León Moncayo, *Colombia: los territorios de la guerra. El impacto de la reinserción en la economía mundial*, in TIERRA Y DESPLAZAMIENTO EN COLOMBIA, *supra* note 74, at 43.

<sup>79</sup> Constitutional Court, ruling C-370 of 2006.

<sup>80</sup> See, e.g., Law 975 of 2005, arts. 1, 4, 7 & 15.

<sup>81</sup> Rodrigo Uprimny & María Paul Saffon, *Derecho a la verdad: alcances y límites de la verdad judicial*, in ¿JUSTICIA TRANSICIONAL SIN TRANSICIÓN?, *supra* note 9.

<sup>82</sup> LA LEY DE JUSTICIA Y PAZ, *supra* note 37, at 12.

know the truth.”<sup>83</sup> It is clear that at this point, with the enormous publicity given to the first *versiones libres* (voluntary depositions) and the parapolitics scandal, Colombian society can no longer deny the enormous atrocities that are coming into the public light, and the complicities of high political officials and allies of the administration.

In my opinion, the media, and particularly the written press, are playing a very important role by bringing the grave events to the wider public through the news, although we must be conscious of the limitations of written press in terms of reaching all corners of a country like Colombia. On the other hand, there are expressions of absolute alarm in light of the “apathy on the part of society in the face of the confessions of the most feared assassins . . . which should transcend mere shock and lead to rage, fury, and shame.”<sup>84</sup> Likewise, there has also been heavy criticism that some of the demobilized paramilitaries are using their *versiones libres* to justify their crimes as actions of war in the framework of an armed conflict,<sup>85</sup> and even to jeer at the victims—which is making a “mockery of the country”<sup>86</sup> and above all, of the victims of their horrendous crimes.

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<sup>83</sup> GUSTAVO GALLÓN, MICHAEL REED & CATALINA LLERAS, ANOTACIONES SOBRE LA LEY DE JUSTICIA Y PAZ: UNA MIRADA DESDE LOS DERECHOS DE LAS VÍCTIMAS 58 (2007). In this respect, it is important to recognize the enormous publicity that the CNRR is giving to the *versiones libres*, including the timeline, with the intention of encouraging the victims and society in general to pay attention. For this information, which is constantly updated, see the CNRR homepage, <http://www.cnrr.org.co>. Initially, many of the *versiones libres* were broadcast by television, to get the most publicity possible. However, this publicity has been limited by a sentence of the Constitutional Court, which has prohibited the direct transmission by mass media of the Law 975 *versiones libres*. Constitutional Court, ruling T-049/08, No. T-1.705.247, Jan 24, 2008.

<sup>84</sup> Germán Uribe, *Las tumbas del terror*, SEMANA, Oct. 20, 2008, available at <http://www.semana.com/noticias-opinion-on-line/tumbas-del-terror/107044.aspx>. For this columnist:

It is time that the awareness and knowledge of such aberration and injustice obliges all of us to commit—and that the investigating units, legal journalists, columnists and editors of the press, all do their part too—in order to make sure that this drama of mass graves does not end up becoming one more dismal twenty-first-century anecdote in the bloody history of Colombia.

Germán Uribe cites, along the same lines, the harsh words of the anthropologist María Victoria Uribe, who said that “Bogotá society does not give a damn that they found 15 corpses in Sucre.” *Id.* This pessimism seems to be corroborated by the disheartening public opinion poll in *Semana* magazine, which suggests that a significant percentage of Colombian society does not totally reject the atrocities carried out by the paramilitaries, nor their proven links to state agents. *La gran encuesta de la parapolítica*, SEMANA, May 5, 2007, available at <http://www.semana.com/noticias-nacion/gran-encuesta-parapolitica/103020.aspx>.

<sup>85</sup> As León Valencia emphasizes, certain powerful and very influential sectors of Colombian society consider the paramilitaries as “saviors” and believe that the country owes them a debt for having won so much land from the guerrilla. León Valencia, *Prólogo*, in PARAPOLÍTICA, *supra* note 21, at 8.

<sup>86</sup> As an editorial in the newspaper *El Tiempo* pointed out, Rodrigo Tovar Pupo, alias “Jorge 40”, used the beginning of his *version libre* “to state that he does not remember many things, to negate the majority of the crimes attributed to him, and to claim that the horrors and massacres for which he is responsible were legitimate acts of war.” *Una burla al país*, EL TIEMPO, July 11, 2007. On top of this, continues the editorial, “the families of the victims of the long list of crimes against humanity he committed (including 200 massacres and 800 disappearances) are denouncing threats telling them not to attend the hearings or present demands.” *Id.*

## D. The Role of Normative and Institutional Standards

As I have reiterated, transitional justice relies today on legal instruments and an institutional framework that serve as a limit for actors who are negotiating peace. Although the capacity that they have to orientate peace processes such as those in Colombia should not be overestimated, we must recognize that such standards can operate as “virtuous restrictions,”<sup>87</sup> which can impose intractable limits on political negotiations. As Rodrigo Uprimny and María Paula Saffon have correctly emphasized, “if they are clear, and appear very difficult to manipulate or evade, the legal standards can reduce uncertainty and diminish the spectrum of possible results of a peace agreement, making it easier to reach an acceptable compromise between the interests of antagonistic actors.”<sup>88</sup> Although it is difficult to prove with complete certainty, speculating I have the impression that normative standards have played a relatively important role during the government’s process of shaping and adapting its response during the successive stages of the peace process since the initial presentation of the draft law on alternative sentences in 2003.

Regardless, we face a situation of permanent ebb and flow on the part of the government, as demonstrated by its passing of various regulatory decrees. These decrees seek to return, wherever possible, to the content of the Justice and Peace Law as it was before the Constitutional Court’s ruling of May 2006.<sup>89</sup> This continuous tactic of the government means that we must be permanently alert and maximize precautions against any intent to distort the standards regarding justice, truth, and reparation. Although we must be conscious that we are moving in very complex and slippery terrain, as the Colombian case makes clear, at such junctures most important is to defend in all cases a minimum nucleus of legal standards not susceptible to negotiation: “One of the main advantages of using the transitional justice paradigm resides in its capacity to introduce objective components into processes of transition, based on legal international norms and principles that channel a particular conception of justice.”<sup>90</sup>

In this way, some supranational institutions, such as the Inter-American Court of Human Rights and the International Criminal Court, can and in fact do already function as “virtuous restrictions.” The Inter-American Court has issued several judgments condemning the Colombian State for complicity or omission in cases of massacres committed by paramilitary groups.<sup>91</sup> This is making an enormous

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<sup>87</sup> Uprimny & Saffon, in *JUSTICIA Y PAZ*, *supra* note 5, at 207.

<sup>88</sup> Uprimny & Saffon, in *JUSTICIA Y PAZ*, *supra* note 5, at 209.

<sup>89</sup> On this, see Camila de Gamboa Tapias’s text in this volume, *The Colombian Government’s Formulas for Peace with the AUC: An Interpretation from the Perspective of Political Realism*.

<sup>90</sup> Jordi Bonet & Rosana Alija, *supra* note 8, at 125.

<sup>91</sup> Case of the 19 Tradesmen vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 109 (July 5, 2004); Case of Mapiripán Massacre vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005); Case



contribution to the guarantee of individual and collective rights to truth regarding the atrocities of paramilitarism and the role played by the State. Likewise, the Court's judgments are very relevant in terms of the victims' rights to justice and reparation,<sup>92</sup> clearly establishing the principle that guaranteeing peace cannot involve boundless impunity. In this sense, the Inter-American Court maintains that the standard of reparation it has established must be the frame of reference for the CNRR, "not only to protect the Colombian process from potential international lawsuits before the Court, but to assure standards that permit the restoration of the dignity of the victims."<sup>93</sup>

The International Criminal Court (ICC) has also paid attention to the process of demobilization, prosecution, and punishment of the paramilitaries in Colombia. Colombia submitted its ratification of the Statute of Rome on the Permanent International Criminal Tribunal on August 5, 2002, which came into force beginning November 1, 2002.<sup>94</sup> A relevant event relating to the possible competence of the International Criminal Court over crimes committed in Colombia came about on March 2, 2005, when the ICC Prosecutor, Luis Moreno-Ocampo, sent an official communiqué to the Colombian government requesting more information<sup>95</sup> regarding how the State was responding to reports of the commission of numerous, grave crimes against humanity from November 2002 onwards. Similarly, the Prosecutor showed great interest in the different draft laws that were being debated to facilitate the demobilization of the paramilitary groups, asking the Colombian government to keep him "informed of advances made in this respect."<sup>96</sup>

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of Pueblo Bello Massacre vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 140 (Jan. 31, 2006); Case of Ituango Massacre vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 149 (July 1, 2006); Case of La Rochela Massacre vs. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 163 (May 11, 2007).

<sup>92</sup> An interesting analysis of the Inter-American system from the optic of victims' rights to reparation can be found in CARLOS MARTÍN BERISTAIN, *DIÁLOGOS SOBRE LA REPARACIÓN: EXPERIENCIAS EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS* (2008).

<sup>93</sup> Cuervo, *in* JUSTICIA TRANSICIONAL Y EXPERIENCIAS INTERNACIONALES, *supra* note 33, at 17.

<sup>94</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 U.N.T.S. 90, *entered into force* July 1, 2002. The Colombian government, using the prerogative conceded by Article 124 of the Rome Statute, made a declaration at the moment of ratification in virtue of which "for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8." This means that the International Criminal Court has no authority for the commission of *war crimes* in Colombian territory prior to the expiration of the declaration—November 1, 2009. The Tribunal does have competence over genocide (Article 6 of the Statute) and crimes against humanity (Article 8) beginning in 2002, the date in which the Rome Statute came into force in Colombia.

<sup>95</sup> Article 15.1 of the Statute of Rome permits that the Prosecutor "may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court." The Fiscal has to analyze the truth of the information received, in order, according to Article 15.2, "additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources . . ."

<sup>96</sup> Letter from the ICC Prosecutor Luis Moreno Ocampo to the Colombian Ambassador to the ICC, Guillermo Fernandez de Soto (Mar. 2, 2005).

The ICC Prosecutor intends to follow very closely the crimes committed in the armed conflict in Colombia, and the responses of the State, which was confirmed by his first official visit to Colombia in October 2007. In this visit, the Prosecutor made a very revealing declaration: “I am up to date with the legal processes in Colombia in connection with crimes that could fall under my jurisdiction. I follow the cases and procedures, and I verify that they are fulfilling their function.”<sup>97</sup> In principle, a correct application of the Justice and Peace Law would deprive the International Criminal Court of competence over the participating individuals and the crimes covered by the law, given the principle of complementarity that governs international criminal justice.

However, as Hernando Valencia has correctly emphasized, to the extent that the application of the Justice and Peace Law were to be only the “appearance or simulation of justice,”<sup>98</sup> the ICC would have jurisdiction over genocide and crimes against humanity (and for crimes of war from November 1, 2009 onwards). Article 17 of the Rome Statute regulates the conditions of admissibility of cases. Specifically, the Court has to “determine unwillingness in a particular case . . . having regard to the principles of due process recognized by international law . . . .”<sup>99</sup> In order to gauge whether or not there really is the will to do justice, Article 17 outlines a set of circumstances which must be considered. That is to say, if the state *is unwilling or unable* to carry out the investigation or prosecution of those alleged to be responsible, the competence of the International Criminal Court would come, subsidiarily, into play. Fundamentally, the objective is to avoid impunity for crimes abhorrent to the conscience of humanity and that have affected thousands of victims in Colombia. International criminal justice can in this way be a very important tool to complement the efforts of a society to pursue justice and guarantee victims’ rights to truth and reparation of the victims.<sup>100</sup>

## E. Clear Guidelines for Future Peace Processes

We must begin this consideration by recognizing that in previous peace processes in Colombia, crimes against humanity have never been prosecuted, the victimizers have never been required to confess, even negligibly, to the truth of their crimes, nor have the victims and their right to reparations been taken into consideration.<sup>101</sup> The current process of paramilitary demobilization, launched in

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<sup>97</sup> *Corte Penal Internacional Le Sigue La Pista A La Parapolítica*, EL TIEMPO, Oct. 21, 2007, available at <http://www.eltiempo.com/archivo/documento/MAM-2698429>.

<sup>98</sup> Hernando Valencia Villa, *Colombia ante la Corte Penal Internacional*, 4 HECHOS DEL CALLEJÓN 8 (June 2005).

<sup>99</sup> Rome Statute, art. 17(2).

<sup>100</sup> Elizabeth Odio Benito, *Posibles aportaciones del Estatuto de Roma a los procesos judiciales en las sociedades en transición*, in JUSTICIA TRANSICIONAL EN IBEROAMÉRICA, *supra* note 55.

<sup>101</sup> Alfredo Rangel, in JUSTICIA Y PAZ, *supra* note 5, at 13.

2002, even with all the limitations and abuses on the part of the government and the paramilitary leaders discussed above, is attempting, at least formally, to make the rights to justice, truth, reparation and guarantees non-repetition prevail. The process is by no means over, and we must wait a reasonable period before we are really able to gauge the degree to which the discourse of transitional justice has operated as a mere legitimizing cover for intentions of guaranteeing broad doses of impunity and failing to recognize the victims' rights to an authentic reparation, or whether it really has contributed to opening both official and unofficial spaces for justice, truth, and reparation.

The result from this overall process, and from an international context in which the principles of transitional justice operate increasingly as limits to impunity, is that it is very unlikely that future peace processes in Colombia will be able to shirk the minimum demands of transitional justice discourse. This process can contribute to establishing clear guidelines when approaching future peace negotiations with the illegal armed groups, whether paramilitaries who have not yet been demobilized or guerrilla groups. As Jorge Iván Cuervo has pointed out in this respect “the success of future negotiations with other illegal armed groups, and, in general, a just and dignified pacification of the country” depends on the success and consolidation of this process.<sup>102</sup>

Therefore, I assert that, despite all the limitations of seeking to apply a transitional justice scheme in a non-transitional context characterized by the persistence of a bloody conflict, there are well founded reasons to defend the use of transitional justice discourse. Caution will have to be exercised, but the eventual benefits that can be derived with regards to justice, truth, and reparation make it worth the risks; risks that, on the other hand, are indeed inherent to any process of transitional justice.

## Conclusion

From the analysis drawn from this *sui generis* model of transitional justice we can extract some conclusions which may be generally helpful for approaching these kinds of transitions that fall outside of the traditional framework of transitions to democracy or transitions to peace.

First, despite all the problems raised by this kind of transition that departs from the orthodoxy of transitional justice discourse, I believe the practice of continuing to apply this discourse to be justified. We must be very cautious, and exercise precautions, but I am convinced that the positive aspects clearly outweigh the risks we may run; risks that accompany any transitional justice process.

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<sup>102</sup> Cuervo, in JUSTICIA TRANSICIONAL Y EXPERIENCIAS INTERNACIONALES, *supra* note 33, at 56.

One of the most positive aspects of applying the transitional justice scheme is the progressive emergence of the victims as social and political actors, which is undoubtedly a necessary part of any transitional justice process. Their greater visibility, the creation of associations and organizations that legitimately represent their interests and speak in their name, and the channeling of a greater quantity of resources in their favor, have made interesting processes of empowerment possible. On the other hand, when the expectations generated are not fulfilled by the State, or if some victims feel discriminated against, feelings of frustration can arise which can end up undermining civic confidence, one of the objectives of transitional justice.

Likewise, we must recognize that the victims and civil society are the ones that have given a strong push to the process of extending the discourse of transitional justice. In this sense, interesting processes have been triggered *from below* for the generation of alternative spaces of truth, justice, and reparation, with a protagonist role for the victims themselves.

Another important element associated with these processes is the unstoppable presence of truth and memory. Once the processes begin, the different actors begin initiatives that, in one way or another, contribute to bringing light to the abuses of the past and giving a voice to the victims. The processes of transitional justice are accompanied by artistic, literary, cinematic, and documentary initiatives, whose sole objective is to contribute to the emergence of various truths and memories of a past that resists being forgotten.

Finally, the progress that has been made toward developing normative and institutional standards in the field of transitional justice has meant that the rights to truth, justice, reparation, and guarantees of non-repetition have been very present in the Colombian case. Today it is simply not possible to skirt these rights when a process of transitional justice is being debated, although its practical implementation is largely conditioned by the context in which it is applied.

For all this, and for many other reasons that must remain for another occasion, it seems to me unavoidable that we apply the discourse of transitional justice to these processes which depart from the classic molds, though always trying to remain conscious of the context and the difficulties and barriers that such a context imposes.

## Chapter 6

# A Conflicted Peace: Epistemic Struggles around the Definition of Transitional Justice in Colombia

*Delphine Lecombe*

Law 975 of 2005, the Justice and Peace Law, introduced the norms of transitional justice (victims' rights to truth, justice, reparation, and guarantees of non-repetition) in Colombia to accompany the demobilization process of the paramilitary groups that was negotiated in 2003. Despite the government's investment in the "grammar" of transitional justice, victims' organizations and human rights defenders continue to question and criticize its policies as a manipulation of international standards. In June 2009, after almost two years of discussion and despite the mobilization of a group of experts to provide technical input for a victims' law,<sup>1</sup> the senators allied with President Uribe blocked the passing of the bill. They rejected the cost of the measure and the fact that it included equal benefits for victims of "terrorists" and those of state agents.<sup>2</sup>

The story of the victims' law is emblematic of the tensions that continue to surround the application of transitional justice in the Colombian context and it permits a diagnosis: six years after the first debates around the draft law for alternative sentences, the power balance between the national government and the victims' organizations tied to the international human rights networks favors the coalition of Uribe allies. The diffusion of the "international standards" of transitional justice to State institutions is far from a success. The high number of key members of the international community that attended the International Disarmament, Demobilization, and Reintegration Congress, organized by the Office of the President in May 2009, revealed the capacity of the national government to disseminate its own interpretation of "transitional justice." The demobilization process of the paramilitaries in Colombia has been accompanied by epistemic struggles—struggles about the meaning and implications of transitional justice. The objective of this chapter is to understand what conditions generate the epistemic struggles around transitional justice in Colombia; how this is manifested; and what effects such struggles have on key concepts of transitional justice.

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<sup>1</sup> A coalition of victims' and human rights organizations—Fundación Social, Viva la ciudadanía, International Center for Transitional Justice, among others—supported by international cooperation agencies—including the United Nations Development Programme—supported the initiative of the Liberal Senator Juan Fernando Cristo.

<sup>2</sup> See President Álvaro Uribe, Speech at the Seminar "Poverty, Development, and MDG," Universidad de la Salle (June 18, 2009), available at <http://web.presidencia.gov.co/sp/2009/junio/18/07182009.html>.

This chapter starts from the hypothesis that the epistemic struggles that are inherent to transitional justice are reinforced in Colombia by the context of war. It will be shown that transitional justice functions as an “ambiguous consensus”<sup>3</sup> that spans a multitude of instruments. This leads to epistemic struggles reinforced by the international power structure and by the national context of war.

This study seeks to analyze the dynamics in play, in the social and political field, in the definition of transition justice in Colombia. For this, the reflection is based on the theoretical framework of cognitive analysis that has been developing since the 1970s in North American political science, and more recently in Europe. This type of analysis begins with the observation that changes in public policy are always accompanied by a change in the normative framework. Such analysis is dedicated to questioning the role of experts, ideas, symbols, and beliefs in the dynamics of the creation of the political.<sup>4</sup> Cognitive analysis has had an important technical development in France, which this chapter will incorporate. It is focused on the mechanisms through which the interests of actors are expressed in the ideas that they espouse.<sup>5</sup> The interest of this chapter is to apply these innovative analytical tools to the study of transitional justice in Colombia, tools that have not been regularly applied to this field.

Part I studies the endogenous factors of transitional justice. It will be shown that independently of the national context of ongoing armed conflict, transitional justice tends to generate epistemic struggles because of its historical construction of diverse instruments and the fact that it functions as an “ambiguous consensus.” Part II emphasizes the role of the Colombian political context in generating epistemic struggles. The focus is on the capacity of the national government to compete in the process of producing the transitional model. Part III will conclude by describing the effects of the epistemic struggles on the concepts and instruments of transitional justice.

## **I. The Endogenous Factors that Generate Epistemic Struggles**

Before analyzing the Colombian political context in particular—namely the absence of political transition—it is necessary to study why transitional justice itself leads to competitive uses of its concepts. This phenomenon is related to the historical construction of transitional justice and the fact that it functions as an “ambiguous consensus.”

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<sup>3</sup> Bruno Palier, *Gouverner le changement des politiques sociales*, in *ETRE GOUVERNÉ, ETUDES EN L'HONNEUR DE JEAN LECA 175* (Pierre Favre ed., 2003).

<sup>4</sup> Peter M. Haas, *Epistemic Communities and International Policy Coordination*, in *KNOWLEDGE, POWER, AND INTERNATIONAL POLICY COORDINATION* (Peter M. Haas ed., 1992).

<sup>5</sup> Pierre Muller, *Esquisse d'une théorie du changement dans l'action publique, Structures, acteurs et cadres cognitifs*, 55 *REVUE FRANÇAISE DE SCIENCE POLITIQUE* 155, 170 (2005).

## A. Transitional Justice is a Fragmented Historical Construction

Transitional justice does not have a pre-existing theoretical structure that might serve as a basis for its social and political manifestations. It is not a concept,<sup>6</sup> nor a paradigm.<sup>7</sup> What is today called transitional justice originated in instruments designed by political actors according to their particular interests and the political and legal obligations that they faced at the time. It is inseparable from its uses by national political actors—representative governments or human rights defenders. Transitional justice has its origins in the transitions to democracy of the Southern Cone of Latin American in the 1980s and 1990s, in contexts where the justice system was unavailable in light of amnesty laws. The Argentine National Commission on the Disappearance of Persons (CONADEP) and the Chilean Rettig Commission were established in contexts of political tension, and they sought to combine the interests of the military in protecting the amnesty from which they benefited and the interests of the new governments in maintaining the peace. Transitional justice therefore does not emanate from supposedly disinterested theoretical spheres but rather as a response to the demands and interests of political and social actors. As a result, the political uses of transitional justice<sup>8</sup> are not unique to the Colombian context.

The political configurations of the countries that have come out of conflict in the last two decades have generated a great diversity of instruments included nowadays under the umbrella of “transitional justice.” Truth commissions aside, examples worth mentioning include administrative reparation mechanisms for victims (for example, the Program of Integral Reparation and Attention in Health and Human Rights in Chile), the reinsertion programs for demobilized combatants (the UN’s creation of a new police force in Kosovo), and reconciliation mechanisms (for example, the “reconciliation communities” in East Timor). But transitional justice covers judicial instruments as well. In the last decade, transitional justice has been institutionalizing the area of international law, where the importance of the struggle against impunity has been emphasized.<sup>9</sup> The judgments of the International Criminal Tribunals for Rwanda and for the former Yugoslavia, as well as the Inter-American Court of Human Rights,<sup>10</sup> have focused on victims’ right to

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<sup>6</sup> Sandrine Lefranc, *La justice transitionnelle n'est pas un concept*, in MOUVEMENTS, VÉRITÉ, JUSTICE, RÉCONCILIATION, LES DILEMMES DE LA JUSTICE TRANSITIONNELLE 61-69 (2008).

<sup>7</sup> Pablo De Greiff, *Una concepción normativa de la justicia transicional*, in JUSTICIA Y PAZ, ¿CUÁL ES EL PRECIO QUE DEBEMOS PAGAR? 23 (Alfredo Rangel ed., 2009).

<sup>8</sup> Rodrigo Uprimny & Maria Paula Saffon, *Usos y abusos de la justicia transicional en Colombia*, in JUSTICIA Y PAZ, *supra* note 7, at 159.

<sup>9</sup> Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity, *Promotion and Protection of Human Rights: Impunity*, U.N. Doc. E/CN.4/2005/102 (Feb. 18, 2005).

<sup>10</sup> Catalina Botero Marino & Esteban Restrepo Saldarriaga, *Estándares internacionales y procesos de transición en Colombia*, in ENTRE EL PERDÓN Y EL PAREDÓN. PREGUNTAS Y DILEMAS DE LA JUSTICIA TRANSICIONAL 19 (Angelika Rettberg ed., 2005).

an effective legal recourse and the need for legal mechanisms to accompany truth-seeking and reparation measures. The normative and theoretical effort to integrate the diverse instruments of transitional justice is a very recent phenomenon,<sup>11</sup> one that must not hide or ignore the fragmented origin of the field.

Thus, transitional justice leads to epistemic struggles in the theoretical and normative construction based on its empirical manifestations to date. The varied origins of transitional justice allow it to function as an “ambiguous consensus.”

## **B. Transitional Justice as an “Ambiguous Consensus”**

For a foreign observer that discovers the Colombian political panorama, it can be very surprising to note that actors with tremendously different interests (for example the national government and representatives of the Movement of Victims of Crimes of the State (MOVICE) use the same language—the same slogans of the right to truth, justice, and reparation—the essence of transitional justice.

The hypothesis developed here is that in Colombia transitional justice has served as an “ambiguous consensus.” Studying the security sector reforms in France, Bruno Palier observes that “to be viable, an innovative measure has to be sufficiently polysemous in order to obtain votes from discrepant interests, to bring together contradictory interpretations based on the broadest possible consensus.”<sup>12</sup> Although the Colombian context does not correspond to the past experiences of transitional justice, the vast majority of advocates for peace did not reject on principle its implementation in the country.

The first factor that helps to explain the broad recognition of the necessity of transitional justice in a country that has yet to know transition is that transitional justice defends causes that garner consensus. The rights of victims of violence to truth, justice, reparations, and non-repetition of the crimes that they have suffered are mottos that originate in the ethical field and which do not allow for easy counterarguments. Moreover, even though much has been written about transitional justice during the last decade, it remains difficult to offer a precise definition of the concepts and instruments included. Therefore, the experts tend to offer a quite broad definition of transitional justice, referring to the objectives without going into the details or the debate on the most opportune instruments to reach them. This is the case of the United Nations for example, which stipulated that “transitional justice . . . comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses,

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<sup>11</sup> Diane Orentlicher, *Independent Study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity*, U.N. Doc. E/CN.4/2004/88 (Feb. 27, 2004); De Greiff, *supra* note 7.

<sup>12</sup> Palier, *supra* note 3, at 174.



in order to ensure accountability, serve justice and achieve reconciliation.”<sup>13</sup> However, “justice” and “reconciliation” are very broad notions, which have multiple meanings and lend themselves to contradictory interpretations. Thus, the “truth,” “justice,” and “reparation” that MOVICE defends do not have the same meanings as those promoted by the Colombian national government.

In this way transitional justice functions as an “ambiguous consensus.” Counting on consensual and universal values, this polysemous and polymorphous notion can adapt itself to distinct political and cultural contexts. These characteristics surely explain the success of its diffusion across the world. In effect, transitional justice emerges as the indispensable normative and discursive tool in post-conflict contexts, as well as contexts of ongoing conflict. This is the additional factor that explains the epistemic struggles and the adoption of a common discursive façade by the large majority of those that intervene in the field of human rights in Colombia. However, if it is in fact correct that there are endogenous factors of transitional justice that generate struggles over the definition of its “essence,” it remains necessary to highlight the political factors of the Colombian context that foster the phenomenon.

## **II. Factors that Reinforce Epistemic Struggles: International Structure and Internal Armed Conflict**

This Part will explore that argument that epistemic struggles around transitional justice are reinforced by the Colombian political context. The mobilization of an “epistemic community” that advocates for the implementation of international standards of transitional justice in Colombia has had a limited impact at the level of the State. Effectively, the policy of the national government benefits from an international power structure that privileges it. Moreover, at the national level, the armed conflict conditions the participation of the government in the definition of Colombian transitional justice. In effect, the need to adapt the instruments to the Colombian context opens a space for competition over the definition of the “best practices” and norms to implement—a competition in which the government knew to invest.

### **A. The Transitional Justice “Epistemic Community” before the International Power Structure**

The demobilization of paramilitaries opened a never-before-seen political configuration in Colombia: by the beginning of this century, the international

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<sup>13</sup> The Secretary-General, *Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies*, para. 8, U.N. Doc. S/2004/616 (Aug. 23, 2004) (cited in De Greiff, *supra* note 7).

community already rejected offering to demobilized illegal armed groups the type of amnesties that had been offered in the 1980s. The Santa Fé de Ralito agreements, outside of any legal framework, created a scenario marked by the uncertainty of which instruments to implement and their implications.<sup>14</sup> As Peter M. Haas has theorized, a context of uncertainty creates a demand on the part of the State and the organizations involved in a reform. In Colombia, the paramilitary demobilization created a demand on the part of the State and the human rights organizations for expertise in international practices of emerging from conflict. The diffusion of transitional justice began with the debates around the draft law for alternative sentences and continued with the proposed Justice and Peace Law.

An “epistemic community”<sup>15</sup> of lawyers, international law experts, and human rights advocates<sup>16</sup> formed during this time and presented an *amicus curiae* brief before the Constitutional Court in order to influence the amending of the Justice and Peace Law. This epistemic community of international organizations and Colombian organizations connected to international networks (CEJIL, ICTJ, CCJ) is tied to academic circles, state actors (Constitutional Court), political leaders (such as Rafael Pardo), and victims movements, and is supported by international cooperation actors (including the United Nations, European Union). They share the belief that the rights of the victims to truth, justice, reparations, and the guarantee of non-repetition constitute the base of the best practices to emerge from armed conflict.<sup>17</sup> They also share the knowledge of international norms and the belief in their superiority.

It is interesting to note that the epistemic struggles in 2005 between the Colombian government and this epistemic community continue much the same more than four years later, in the framework of the debates on the proposed Victims’ Law. These debates center on the definition of “victim,” the role of the Colombian State in reparations, and the effective participation of the victims in the process. The members of the Colombian transitional justice “epistemic community” also share a repertoire of advocacy activities, such as rights-based mobilizations, lobbying before relevant institutions, and knowledge-production through publications and conferences. The epistemic struggles with respect to transitional justice in Colombia are highly technical and emphasize the role of lawyers. The heart of the competence of the epistemic community—its expertise in legal norms—can

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<sup>14</sup> Haas, *supra* note 4, at 15.

<sup>15</sup> Haas, *supra* note 4, at 16. Peter M. Haas defines an epistemic community as “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain. . . . They have ‘a shared set of normative and principled beliefs,’ ‘shared causal beliefs,’ ‘shared notions of validity’ and ‘a common policy enterprise.’” *Id.* at 3.

<sup>16</sup> Examples include Center for Justice and International Law, International Center for Transitional Justice, Colombian Commission of Jurists, etc.

<sup>17</sup> See Orentlicher, *supra* note 11.

represent an obstacle at the moment of mobilizing the organizations of victims of the conflict. Thus, the organization of regional hearings to garner support in the regions for the proposed Victims' Law included the distribution of flyers designed by the member organizations of the technical experts group to explain the Victims' Law to the non-expert.

However, the defeat of the proposed Victims' Law, the epistemic community's most recent parliamentary battle of interest here, reveals that the diffusion of its norms at the level of the State was limited. According to Peter Haas, the impact of an epistemic community on a government is conditioned by the power structures at the national and international level.<sup>18</sup>

Regarding the international power structure, organizations of international cooperation (for example, U.S. Agency for International Development (USAID), International Organization for Migration (IOM), Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)) contribute important technical and financial support to the transitional justice policy of the Colombian government. It appears that the Colombian government's adoption of the transitional justice normative framework and implementation of several measures—such as the National Reparation and Reconciliation Commission, the administrative reparations decree, or a reinsertion program for demobilized combatants—have been received by the international community as guarantees of the respectability of the Colombian State. It must be mentioned that Colombia continues to be a strategic ally of the United States in a region not only marked by internal armed conflict but also by drug-trafficking and regional tensions with Venezuela and Ecuador. With the agreement signed that allows the United States to use seven military bases in Colombian territory, there is a clear sense that there are international political interests that privilege the normative stance taken by the Government over that of the epistemic community.

We will now turn to the power structure at the national level and how it conditions the government's participation in the epistemic struggles with respect to the adaptation of transitional justice to the national context.

## **B. The Interests of the State in War**

The context of war is related to the capacity of the Colombian government to compete in the production of ideas and tools of transitional justice in Colombia. The decisive element in the national power structure is that the government is an actor in the armed conflict. During the 1990s human rights organizations, both national and international, denounced the responsibility of the Armed Forces in massacres committed by the *Autodefensas Unidas de Colombia*, as was confirmed in the

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<sup>18</sup> Haas, *supra* note 4, at 7.

sentence of the Inter-American Court on September 15, 2005 in the Mapiripán Case. Adopting the transitional justice normative framework to organize the demobilization of the paramilitaries gave the government the opportunity to legitimize its policy at the international level, and neutralize the “boomerang effect”<sup>19</sup> generated by the demands of victims of state agents at the international level. However, the concepts of transitional justice are not completely compatible with the Democratic Security policy, a pillar of President Uribe’s campaign. Therefore, the government has adopted the implementation of transitional justice in such a way so as not to delegitimize the Democratic Security policy, based on the representation of a state threatened by irrational acts by terrorist groups and protected by its Armed Forces. The principle of non-discrimination of victims, demanded by the transitional justice epistemic community in Colombia, questions the representations of “victim” and “victimizer” as understood in the Democratic Security doctrine. According to this conceptualization, it is the State that is the victim of terrorist attacks. The soldiers killed in combat are the victims of the guerilla and dignified by their devotion to protecting the Nation.<sup>20</sup>

The problem of bestowing the same rights to all victims of the conflict is that it threatens this representation, offering the possibility of inverting the categories: not only the Armed Forces but also the State itself become potential victimizers, and in the same way, the guerillas, whom the government denies standing as a political actor. The proposed Victims’ Law was rejected by the President’s allies because of this. To call upon the vocabulary of Peter Haas, the national power structure comes from the ongoing armed conflict, and limits the impact of the transitional justice epistemic community in the highest spheres of the state.

The primacy of the war context at the national level, as well as the support by a segment of the international community for the implementation of the Justice and Peace Law, explains why the government has been so active in the epistemic struggles around transitional justice. The following section analyzes the effects of the implementation of transitional justice instruments and concepts in the Colombian context.

### **III. The Effects on the Instruments and Concepts of Transitional Justice**

The government’s role in the epistemic struggles around transitional justice materialized in the creation of institutional instruments such as the National

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<sup>19</sup> MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

<sup>20</sup> President Álvaro Uribe Vélez, Speech at the International Congress on Disarmament, Demobilization and Reintegration (May 6, 2009).

Reparation and Reconciliation Commission (CNRR), and more recently the Secretariat for Transitional Justice. The latter is quite new and therefore more difficult to analyze. Therefore, the following discussion focuses on the description of the CNRR as the product of a very partial transference of the model of truth and reconciliation commissions (TRCs). Then, the second section will study the effect of the epistemic struggles on transitional justice, based on an analysis of the aforementioned International Congress of Disarmament, Demobilization, and Reintegration (ICDRR) held on May 4-6, 2009.

### **A. The CNRR: A peculiar Commission**

Of all of the measures associated with transitional justice, the TRCs continue to be the most emblematic instrument for the victims' right to truth. During the last three decades, truth commissions were created in more than thirty countries. In political science, the term "policy transfer" is used to describe the processes of diffusion and adaptation of a mechanism in a country other than the one for which it was designed.<sup>21</sup> The Colombian context in 2005 did not present the conditions perceived to be favorable for the implementation of a TRC. As a result of the ongoing conflict and the absence of a political transition, the implementation of the Justice and Peace Law was not accompanied with the creation of the emblematic instrument of transitional justice. However, the law created an institution that in name is not so distant from the TRCs, but with different attributes. The literature about institutional transfer tells us that mechanisms that are transferred are rarely done so in an identical form, but rather are submitted to internal logics of appropriation.<sup>22</sup> The CNRR is the fruit of a very partial transfer of the TRC model, with transformations and struggles within the organization.

As its name suggests, the National Reparation and Reconciliation Commission does not have the task of clarifying and disseminating the truth about crimes perpetrated. It does not have the mandate to "collect individual statements, organize public hearings and undertake case investigations and thematic research."<sup>23</sup> Instead, the mandate of the CNRR is quite heteroclitic. It is charged in part with the task of following the JPL process and making recommendations, and then also with important executive functions such as "guaranteeing the participation of victims in the process" (Article 51-1) and "promoting national acts of reconciliation" (Article 51-8). The imprecise, heteroclitic, and unique character

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<sup>21</sup> See DAVID P. DOLOWITZ, *POLICY TRANSFER AND BRITISH SOCIAL POLICY: LEARNING FROM THE USA?* (2000).

<sup>22</sup> Thierry Delpuech, *L'analyse des transferts internationaux de politiques publiques : un état de l'art*, RESEARCH IN QUESTION, No. 27 ( Dec. 2008), <http://www.ceri-sciences-po.org/publication/question/qdr27.pdf>.

<sup>23</sup> Priscilla Hayner, *Truth Commissions: A Schematic Overview*, 88 INT'L REV. RED CROSS 295, 295 (2006).

of the CNRR mandate provoked its members to specify it, leading to “do-it-yourself” improvisations in the heart of the institution, which are transformations and interpretations of the TRC model.

The peculiarity of the CNRR in light of the TRC model manifests itself in the internal division of labor of the Commission. The CNRR is made up of five thematic areas: justice, reparations, reconciliation, DDR, and historical memory. It is interesting to note how such an organization creates a transformation of the constitutive norms of transitional justice. Of the four intrinsic rights of victims in the fight against impunity, references to the rights to justice and reparation can be found in the structure of the CNRR. The right to non-repetition of violence is translated into “DDR,” while the “right to truth,” which initially was thought to be absent from the Commission’s mandate, is translated into the area of “historical memory.”

The context of war makes truth-seeking a judicial activity tied to the *versiones libres* of the Justice and Peace participants. However, the “Historical Memory Group” has taken the task upon itself, without having assumed it completely.<sup>24</sup> The Group has assumed a task similar to that of a truth commission, with investigation projects around human rights violations, based on victim testimony.<sup>25</sup> Thus, the Historical Memory Group, which was created through a particular internal statute of the CNRR, reveals that because of the context of ongoing armed conflict, the absence of truth-seeking in the mandate of the organization, and broad governmental representation in the Commission, key norms of transitional justice are negotiated and reformulated. The adaptation to the Colombian context has led to “do-it-yourself” improvisations that depend on the resources of the actors: in the case of Gonzalo Sánchez, Coordinator of the Historical Memory Group, his academic authority and legitimacy and his capacity to mobilize human resources (the members of the area and human rights organizations) have allowed him to be relatively independent from the Commission and to create a space for the victims’ truth. However, the ongoing conflict does not allow him to speak of “truth” but instead “historical memory,” and without the symbolic stamp of a “truth commission.”

The “DDR” area is the translation of the victims’ right to non-repetition of the crimes perpetrated. This constitutes one of the main impacts of the implementation of transitional justice in the demobilization of paramilitaries. The absence of a political transition and the continuance of the armed conflict make guarantees of non-repetition in the form of state reform impossible. For the government, assuming such reforms would correspond with acknowledging the

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<sup>24</sup> Interview with Gonzalo Sánchez, Coordinator of the Historical Memory Working Group of the CNRR, Bogotá (Mar. 29, 2007).

<sup>25</sup> See TRUJILLO, *UNA TRAGEDIA QUE NO CESA*, PRIMER INFORME DE MEMORIA HISTÓRICA DE LA COMISIÓN NACIONAL DE REPARACIÓN Y RECONCILIACIÓN (2008).

faults in the state apparatus—a strategy that is irreconcilable with the policies of a state in war. The creation of the CNRR then is a product of a very partial transfer of the truth commission model: it is a scenario of tension between the internal logics of a conflict context (impossibility of creating a TRC, interest of the state in controlling it), and the influence of the TRC model defended by some of its members, as a function of its resources. The CNRR is subject to improvisation: composed by government representatives and actors that are trying to implement the inherited standards of truth commissions. It is in this way that the CNRR contributes to transforming the concepts of transitional justice in order to adapt them to a context of ongoing armed conflict.

## **B. The Conceptual Effects of the Transference of Transitional Justice to a Conflict Context**

While sectors of victims' and human rights organizations criticized the implementation of the Justice and Peace Law in 2005, the President, along with the CNRR President, Eduardo Pizarro, stressed the progressiveness of the process in comparison to foreign experiences.<sup>26</sup> This discourse aimed at inserting the Colombian experience into the international network of "best practices" for emerging from conflict really took shape in the Office of the President's organization of the First International Congress on Disarmament, Demobilization and Reintegration (ICDDR), held in Cartagena on May 4-6, 2009. Almost all of the international cooperation actors contributing to the Justice and Peace process participated in the Congress, in addition to foreign experts. Also present were demobilized guerilla and AUC members, who presented art and handiwork in booths not far from the principal organizations—the CNRR, the High Council on Reintegration (*Alta Consejería para la Reintegración*), the United Nations, and the International Organization for Migration. "The Justice and Peace Law is one of the most ambitious transitional justice laws in the world. The government could have been less ambitious, but we decided to be visionaries."<sup>27</sup> These words from the High Commissioner for Peace and Reintegration demonstrate that the ICDDR is part of the voluntary policy of the Colombian State to act on the international concepts and practices of peace-building. The Cartagena event offers a scenario to study the conceptual uses being employed.

The Justice and Peace process has its origins in the private negotiation between the leaders of the AUC and the government. The Santa Fé de Ralito Agreements

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<sup>26</sup> "I want to thank everyone for this great effort. This great effort that has given us a novel legal framework, which will begin to be seen by the world as something that raises the standards, as something that creates doctrine." President Uribe, Speech inaugurating the National Reparation and Reconciliation Commission (Oct. 4, 2005), available at <http://www.cnrr.visiondirecta.com/09e/spip.php?article266>.

<sup>27</sup> Closing speech for the ICDDR, Cartagena (May 6, 2009).

were determinative for the Justice and Peace Law, placing the demobilized combatants—and not the victims, who were absent from the negotiations—at the center of the process. Through the window of the CNRR structure, it can be seen that the right of the victims to non-repetition translates in Colombia into an emphasis on DDR as opposed to reforms of the State. The ICDDR is a manifestation of the government's uses of the principles of combating impunity. One might see the centrality given to DDR and the victimizers in the governmental rhetoric of transitional justice as being incompatible with the international standards that privilege the rights of the victims. The ICDDR reveals that the government tends to neutralize such contradiction by abolishing the distinction between victims and victimizers. This conceptual operation allows for placing at the center of the Colombian transitional justice policy (other) “victims”: the paramilitaries.

During his closing speech at the CIDDDR on May 6, 2009, President Uribe stated: “There is no total reparation. I say this before actors (demobilized combatants) that have realized they were victims.” A little later, in the middle of his speech, Frank Pearl, the High Commissioner for Peace, mentioned a woman from Cúcuta that he had met a few days earlier who had confessed to him that she was willing to forgive, “because forgiveness would liberate her and she didn't want her daughter to live with the fear with which she had lived.” That same afternoon, responding to the criticism that the demobilized combatants had not been given the chance to speak during the Congress, the organizing committee changed the agenda and improvised a panel of demobilized combatants.

Five demobilized combatants were given the chance to speak, including a demobilized woman from the AUC and a demobilized FARC member. Both thanked the national government and the High Council for Reintegration (ACR). Luz Meri, one of the demobilized combatants, thanked the international community and said, with a voice choking back tears: “We cannot build peace alone. If we fall seven times, we need you to help us get up seven times.” Her intervention provoked a lot of emotion from the audience and several people came to their feet applauding.

Later, between Frank Pearl and Uribe's speech, the demobilized woman from the FARC, Sara Morales Padilla, told the story of how she had been recruited as a twelve-year-old, that she was the victim of many abuses, and how she had two children while in the guerilla. She thanked the “immense support of the ACR and the education and psycho-social attention projects,” which had allowed her to better herself and today to take care of and love her children. Luz Meri finally presented the project “Canta Conmigo,” which unites the community and demobilized combatants as one unified voice asking for peace. It was explained that with this project the demobilized are asking for forgiveness and showing that they want peace and reconciliation.

The three testimonies described here reveal how the final segment of the ICDDR consecrated victim status for the demobilized. Belonging to an armed



group was hardly touched on in the testimonies, and when it was, it was for the purpose of emphasizing that it was involuntary (Sara) in nature, or in order to express regret and the suffering and emotional condition of the victim (Luz Meri). It is interesting to note the extent to which the lexical field of the victims transfers to the demobilized: Luz Meri referred to the need to make the reintegration process a participatory process (“this process is ours”) and one which would allow them “to be visible,” needs usually vindicated by and for the victims.

Finally, the abolition of boundaries between victims and victimizers was accompanied with the figure of forgiveness that was asked for (Sara) and given (in Frank Pearl’s anecdote). The ICDDR closed with the “Canta Conmigo” song, sang by the demobilized of various armed groups and members of the communities that are recipients of ACR’s program.

The final conceptual operation that legitimates DDR’s central position in the adaptation of Colombian transitional justice is the causal link made with reconciliation. It is not coincidental that the ICDDR closed with the “Canta Conmigo” song, interpreted by demobilized individuals and “members of the community that has reintegrated” (note that they are not referred to as “victims”)—indistinguishable from one another because they all wore a white t-shirt with the logo of the program and the ACR.

The transitional justice policy developed by the Colombian government therefore does not consider the notion of reconciliation as the result of the long process of implementing justice and reparation measures, but rather as something to actively foster. The CNRR, which includes a reconciliation area that seeks to bring together groups of demobilized and groups of victims, declared 2009 the “year of reconciliation.”

The implementation of transitional justice in a context of ongoing armed conflict thus has effects on the conceptual structure of post-conflict norms. In the case of Colombia, the implementation of the Justice and Peace Law came along with a normative mutation that allows for legitimizing the centrality of the demobilized in the process. The right of the victims to non-repetition was translated into DDR, legitimated by the abolition of the conceptual boards between the victims and the victimizers. A causal link between the successful reintegration of the demobilized and the reconciliation tends to exclude the epistemic panorama of the themes of justice, truth, and reparation.

## **Conclusion**

The transfer of transitional justice to the Colombian context has come with a normative mutation of its concepts and mechanisms. The concepts of “victim,” “truth,” “reparation,” “reconciliation,” and the mechanism of truth commission wind up transformed by the struggles that take place to define what should be

transitional justice in a context of conflict. This chapter has described the process through which such transformations take place. First, the epistemic struggles with respect to the adaptation of transitional justice to the Colombian context have their origins in the historical construction and the fact that transitional justice functions as an “ambiguous consensus.” The international standards defended in Colombia by the epistemic community that mobilized in 2008 in support of the Victim’s Law had limited impact on the highest spheres of the government. Effectively, since 2003, the power structures—both international and national (armed conflict)—fueled the capacity and interest of the national government in competing in the production of conceptual frameworks for the adaptation of transitional justice to the Colombian context.

This phenomenon led to the National Reparation and Reconciliation Commission, a very partial transference of the emblematic instrument of transitional justice. In May 2009, the ICDDR offered the government a scenario to spread its representation of the Colombian transitional justice process: a process centered on the DDR programs that would lead to the reconciliation between demobilized combatants and members of the communities that reintegrated, indistinguishable victims of the same conflict. The Colombian case illustrates that the transfer of this conceptual and institutional framework to a country with a political structure distinct from the post-conflict context leads to appropriations tied to the internal political dynamics. Thus, this chapter suggests further questioning of the transferable character of post-conflict “best practices”: Can the concepts and mechanisms of transitional justice be adapted to every political context? In contexts of conflict, are there not unpredictable or counterproductive effects for those that advocate for transference? Finally, does the Colombian case not in fact reveal the limitation of the normative construction of transitional justice?

## Chapter 7

# A Model of Justice for Democracy

*Iván Cepeda Castro*

Crimes against humanity are social processes and not just successive disparate events. At a time when the international justice system is being consolidated, the limits imposed by the casuistic view of criminal law are progressively giving way to analyses and typologies that examine the socio-historic and socio-political context in which crimes against humanity have manifested themselves—typologies where these manifestations are understood as social practices. This perspective conceptualizes genocide, forced disappearance, and torture as a set of diverse relationships that make up the so-called “technologies of power.”<sup>1</sup>

This implies a dual understanding: on the one hand, focusing on criminality as an expression of political, economic and social relationships; and on the other, conceiving of it as a system of relationships and not merely criminal acts. Forced displacement, for example, implies the uprooting of entire populations and usurpation through acts of terror. At the same time, it involves destruction of the material bases and life projects of the victim communities, complex processes for legalizing the usurped properties, creation of a discourse and an imagined social reality that hides or legitimizes the land-stripping, etc.

The analysis of this general approach sheds light on certain aspects of the criminal definition. First, contrary to what is frequently asserted, crimes against humanity are not “crimes of the past.” Their duration in time and their prolonged effects extend beyond the commission of the specific acts. Some of these crimes, such as forced disappearance or forced displacement, are crimes that are deemed continuous. In others, the surviving victims suffer prolonged effects that are not limited to the actual act that takes life or violates integrity. Reaffirmation of impunity, exploitation, legalization of power derived from criminality, and social stigmatization are just some of the visible consequences of regimes of atrocities. Thus, it is a contradiction in terms to catalog the victims of an event that occurred decades ago as “victims of the past.” That expression would seem to suggest that the criminal acts were limited to the commission of a determined action in which some particular damage has been caused. Sight is lost of the relationships that are established as part of the human rights violation and the effects of the new “correlation of forces” that is created with the use of mass violence. In this way, referring to the “crimes of the past” always creates a sense of temporal extinction

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<sup>1</sup> For examples of this kind of sociological studies, see DANIEL FEIERSTEIN, *EL GENOCIDIO COMO PRÁCTICA SOCIAL* (2007); NAOMI KLEIN, *THE SHOCK DOCTRINE* (2008).

of the consequences as well as of the violent practices themselves, even when they continue to be perpetrated under other or identical models of concealment.

Second, those new relations between the victim sectors and the perpetrator sectors are varied—domination, conquest, control, repression, extermination, invasion, aggression, forced integration—however, they all involve relationships of force and power in which “the victims”—or the victim social sectors—are the subordinates of the relationship and “the victimizers”—or the “victimizer sectors”—play the dominant role. The details in each case of these types of social ties depend on the state of development of the political and economic models. Genocides, to mention just one example, differ according to the historical phases of maturity of the State and the institutional systems in a society. Some sociologists that study genocidal practices have classified the relationships that are established according to whether the nation-state, in its modern meaning, is just being born, has been consolidated, or needs to transform and maintain itself. In each of those phases, the extermination of groups inaugurates or helps to maintain a certain class of social nexus at the service of colonization, revolution, or transformation of the political and economic models.<sup>2</sup>

Another characteristic that enables us to understand the definition to which I am referring is that the perpetration of systematic criminality, as its name indicates, involves the emergence and action of apparatuses, structures, and institutions. System crimes imply highly complex operations in terms of conspiring, designing plans, indoctrinating those that will execute the plans, and successfully carrying out the operations. It also implies the existence of operational guidelines, patterns, and protocols. Its conception and direction presupposes a hierarchy, a chain of command, and an authority at the top that conceives of the criminal plans and is also responsible for verifying their execution and initiating the machinery of death.<sup>3</sup>

Lastly, crimes against humanity require cultural, institutional, and legal frameworks that create hegemonic interpretations within the collective imagination. The continuity of these power relationships over time is supported by a permanent state of impunity, an imposition of the official version of history, a social segregation of the surviving victims, and in contrast, social legitimacy for the perpetrators. The types of political and historical discourse that shape such representations deny the existence of massive crimes, their perpetrators, and their victims (a distortion of reality known as denialism); reduce the state of affairs

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<sup>2</sup> See further Iván Cepeda, *Genocidio y régimen político: Consideraciones sobre la tipología del genocidio contra la Unión Patriótica*, in *ESCRIBIR LA VIDA CON MIL MANOS* 33 (Corporación Colectivo de Abogados José Alvear Restrepo ed., 2009).

<sup>3</sup> On this, it is worth noting recent jurisprudential developments coming from the trial of Peruvian ex-president Alberto Fujimori. In Colombia, jurisprudence on this matter is beginning to be developed in recent rulings by the High Courts. See, e.g., Criminal Cassation Chamber, Supreme Court of Justice, No. 32672, Dec. 3, 2009.

in an attempt to convert it into something banal; justify the causes that led to the execution of the crimes; or openly defend and incite hatred.<sup>4</sup> These forms of discourse arise in systems of open impunity—characteristic of dictatorial regimes—or in more subtle variations of impunity that are covered up using models of forced integration in which the victims must accept conditions of apparent “reconciliation” in which formal acknowledgement of responsibilities masks the continuation of the subordinate condition of the victims’ sectors—a situation characteristic of formally democratic societies.

One of the main consequences of this way of conceiving crimes against humanity is that we must scrupulously question certain concepts of justice and reconciliation schemes that are put into practice during so-called transitional periods. Likewise, such an understanding must enable us to comprehend measures for truth, justice, and reparation in a different way.

From that perspective, in the current Colombian context there are at least five criteria for evaluating the scope of the model of justice in relation to the rights of the victims and of society.<sup>5</sup> As a result of efforts to combat impunity, the following achievements should be attained: (1) satisfactory standards of justice and, particularly, prosecution of those bearing the greatest responsibility for massive human rights violations and grave breaches of international humanitarian law; (2) full dissolution of paramilitary structures and their political and economic bases; (3) non-repetition of the crimes against humanity that were committed and complete eradication of this type of crime from society; (4) a substantial and verifiable change in the situation of the victims and of the victims’ sectors through comprehensive reparation, and particularly, restitution of usurped lands and territories; and (5) the emergence of a historical narrative and a culture of memory in accordance with the reality of the spectrum of violence that has taken place in the country over the last half-century.

Certain official approaches seek to create the impression that Colombia is in the midst of an initial post-conflict stage, in which a process of transitional justice is being carried out. In reality, the process of truth and justice being implemented in the country confronts two different, perhaps even contrary positions: one that seeks to limit the rights, of the victims as much as possible—a model of justice for “reconciliation (Part I)”; and another based on the considerations outlined in the introduction to this text—a model of justice for democracy (Part II). I will review each of these models in turn below.

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<sup>4</sup> On this topic, see Iván Cepeda, *La legitimación social del genocidio contra la UP*, in DEMOCRACIA O IMPUNIDAD 78 (Fundación para la Investigación y la Cultura ed., 2005).

<sup>5</sup> These criteria are the fruit of international practice, jurisprudence, and norms, which have established a series of minimum standards in relation to the rights to truth, justice, and reparation with regard to crimes against humanity. See, e.g., 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, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

## I. The Model of Justice for “Reconciliation”

The first of these conceptions has been adopted by the government under President Uribe and is the result of progressive adaptations of the legal framework of the so-called demobilization process of the paramilitary groups. Essentially, this model allows the structures of the criminal apparatuses to be maintained, through a metamorphosis that permits them to retain their functions. It proposes a system of justice aimed exclusively at punishing the second-level perpetrators and leaving those with the greatest responsibility for massive crimes in impunity. At the same time, this model creates compensation programs through humanitarian assistance that are presented to the public as measures of authentic reparation for the victims, and it puts forth an interpretation of history that distorts or simplifies the character of the violence and denies the criminality of the State.<sup>6</sup>

At the heart of this model is a notion of forced reconciliation, which obliges the victims to accept formal acts of repentance and contexts in which the imbalance of power in the society is maintained. In circumstances in which the social control of the aggressors over their victims is maintained, the victims’ acceptance of this order and its rules implies publicly legitimizing the imposed coexistence. Or in other words, it is continuity of the same but with a new public legitimacy for the dispossession of the political and legal attributes of the victims.

In terms of justice, the normative framework that sustains the model—the application of Laws 782 of 2002 and 975 of 2005—does not permit criminal prosecution of those bearing the greatest responsibility because the methodology of the investigation does not correspond with what is necessary for clarifying macro-criminality and dealing with criminal apparatuses that include institutional structures. Looking at the currently available judicial and documentary information, it is clear that the real organizational chart of State criminality in Colombia contains complex structures, in which the *Autodefensas Unidas de Colombia* (AUC) and other paramilitary organizations have been merely a division of this criminal apparatus. Nonetheless, current investigations do not rigorously take into account the systematic character of the crimes, the patterns in which they have been committed, or the chains of command and commission, and they fail to adequately analyze the contexts.<sup>7</sup>

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<sup>6</sup> This model is reflected in the way that the government has sought to maintain the maximum margin of impunity in the application of Law 782 of 2002 and Law 975 of 2005 (the Justice and Peace Law), with its respective regulatory decrees. Part of this same effort are the extradition of the principal paramilitary leaders to the United States as a proven mechanism to obstruct judicial proceedings in Colombia; the administration’s diverse proposed regulations that guarantee immunity for Congress members linked to the so-called “*parapolítica*” scandal; and its initiatives for “reform” aimed at severely restricting the criminal jurisdiction of the Supreme Court of Justice.

<sup>7</sup> In the *versiones libres* (voluntary declarations) made by paramilitaries linked to the Justice and Peace Law, more than 3900 private individuals and public servants have been mentioned, including around 140 members of the security forces and more than 200 politicians or entrepreneurs.

Regarding the inability to guarantee the dismantling of the criminal structures, the problem is not limited to the demonstrated persistence of the paramilitary groups that—despite having adopted other names—continue to perpetrate diverse types of violence.<sup>8</sup> As has been widely documented, this stems from the fact that the political and economic bases, both of paramilitarism and sectors that have sponsored it, remain essentially intact.<sup>9</sup>

The measures designed as alternatives to mitigate the absence of reparation and legal recourse correspond to the neoliberal conception that the government of President Álvaro Uribe has applied in the field of attention to social demands. They are programs that replace the guarantee of the rights of persons and communities with the payment of subsidies of a welfare and humanitarian character or that confuse State provision of these services to the population with processes for reparation.<sup>10</sup> As is well known, one of the consequences of this policy is that crucial questions for producing an authentic transformation in the living conditions of millions of people are in fact made invisible. True transformative measures would include land restitution, cessation of all forms of legalized dispossession, reparation of damages caused by multinational companies, creation of democratic spaces for citizen participation in zones of paramilitary control, and elimination of the paramilitary groups and their links to official, political, and economic spheres.

## II. The Model of Justice for Democracy

The *Movimiento Nacional de Víctimas de Crímenes de Estado* (National Movement of Victims of State Crimes, MOVICE) is a wide-ranging network of community organizations that demand the right to identify themselves as victims of violence from State sectors and paramilitary groups and maintain that forms of extermination have been used in Colombia in the past and continue to be

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In relation to those incriminated in the Justice and Peace confessions, very few investigations have been opened. The Justice and Peace system has many other fundamental problems, such as its ineffectiveness at shedding light on the crimes confessed by paramilitaries in the process and the impossibility of ensuring reparation for the victims through judicial means. See MOVIMIENTO NACIONAL DE VÍCTIMAS DE CRÍMENES DE ESTADO, SIN JUSTICIA Y SIN PAZ (2010).

<sup>8</sup> See Human Rights Watch, *Paramilitaries' Heirs: The New Face of Violence in Colombia* (2010). According to the Colombian Commission of Jurists, from July 2002 to June 2008 the paramilitary groups committed more than 4600 acts of sociopolitical violence. Comisión Colombiana de Juristas, *Violaciones de derechos humanos y violencia sociopolítica en Colombia*, available at [http://www.coljuristas.org/Portals/0/vida\\_96\\_08.pdf](http://www.coljuristas.org/Portals/0/vida_96_08.pdf).

<sup>9</sup> Regarding the political bases for paramilitarism, see the comprehensive study *Corporación Nuevo Arco Iris, Parapolítica: La ruta de la expansión paramilitar y los acuerdos políticos* (2007).

<sup>10</sup> The Colombian Constitutional Court has clearly established the difference between humanitarian assistance, the guarantee of social rights, and measures for comprehensive reparation. See Constitutional Court, ruling T-085 of 2009, Feb. 16, 2009, Speaker Magistrate Jaime Araújo Rentería.

used today. For this reason, the coalition has opposed the model based on forced reconciliation, a conception in which the stated political goal of the processes of justice and non-repetition of crimes is democracy.

This stance of opposition is based on the supposition that it is unfeasible that democracy will emerge from a process of artificial reconciliation. In contrast, it is possible that voluntary options for reconciliation could arise from a situation of authentic social democratization. This objective—democracy in all of its expressions as the result of an authentic social change that contributes toward the eradication of crimes against humanity—could be served by the rights to truth, justice, and reparation, understood in a transforming sense. They should be processes with a public and universal character that generate the mutation of the political and economic power structures and whose essence would not be limited to the appearance of being “humanitarian” or “reconciliatory.”

This conception presupposes, of course, the recognition that the victims are individual and collective subjects of political action. The victims have lost their citizenship or suffered from its severe limitation as the result of varied forms of violence. The infringement of their liberties demands the movement for rights, which is expressed through diverse proceedings and lawsuits brought against State and transnational authorities, through public mobilizations, and through communications strategies aimed at reversing this situation.

The substance of these types of legal, political, and communications actions is based not only on the precepts contained in domestic law, the Constitution, and international human rights treaties. The condition of having been affected by extreme acts of violence implies a vital experience shaped by the impact of the trauma. This being the case, the victims conceive the social reality with the sensitivity and reflection that they have derived from the first-hand knowledge of having lived through such atrocities. The life stories of those who have suffered from violence also give rise to their conviction and strength to oppose war and massive crimes, to demand justice and, as subjects of memory, to speak to what they have gone through and that which they do not wish to see repeated. Testifying in public can become a labor of social pedagogy that, based on the ethical conviction of the need for peace and the moral authority deriving from the injustice suffered, serves as an example for society. That is why the victims’ words are so significant in situations where the aim is to put an end to the spiral of violence or to break a spiral of chronic impunity.

Along these lines, the first achievement that sectors that have been the targets of aggressions for long periods of time must make is precisely the recognition of that aggression, of their status as victims, and the status of perpetrators for those that have planned and carried out the criminal acts. In Colombia, a fundamental aspect of that demand has been to seek acknowledgement of the existence of



State criminality, of its systematic character, and of those bearing the greatest responsibility as government officials and employees with command capacity.<sup>11</sup>

Recognizing the existence of State criminality in the Colombian context provides a solid base for the historical interpretation of the violence, one which contrasts official versions that seek to dilute State responsibility by denying the existence of the armed conflict, by denying the idea of the “war against civilians,” and by excluding the concentration of wealth and power as a cause of massive crimes and genocide. In that kind of interpretation, the history of sociopolitical violence and of the armed conflict is replaced by explanations that only take into account drug trafficking—which is treated as separated from the genealogy of political power—and “terrorism” as factors of the violence.

The devastating consequences of State crimes are, in the context of this conception, the material proof of their existence. Genocide for socio-political reasons has been used to systematically eliminate political opposition, trade union movements, peasant communities, indigenous peoples, and Afro-descendant communities. One example of these exterminations is the genocide perpetrated for over twenty years against the Unión Patriótica political movement. Additionally, as previously stated, forced displacement has been a strategy developed to usurp large swaths of land and to control extensive territorial zones. The result has been to place millions of people in misery while depopulating entire regions of the country. In order to displace communities in paramilitary incursions, massacres have been used in rural and urban zones as public spectacles of terror. The practice of massive forced disappearances has also been employed, using mass graves and clandestine cemeteries. In this general context, other atrocities have occurred: extrajudicial executions, torture, arbitrary detentions and imprisonment, sexual violations, etc.

## Conclusion

MOVICE has proposed eight strategies employing an appropriate conceptualization of what can and should be a model of justice for democratic transformation. The framework of the proposed strategies identified first the need to articulate clear concepts regarding State criminality, its structure, and mechanisms of acting. It also puts forward the task of building a block

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<sup>11</sup> The demonstrations of March 6, 2008 promoted by MOVICE constituted an inaugural moment for social recognition. MOVICE maintains that in Colombia, in the past and in the present, forms of extermination have been and are being committed; these are expressed in criminal actions and patterns planned and executed by sectors and institutions of the State apparatus. Some of the criminal forms originating from the State over the last half-century include genocide for political and social motives, crimes against humanity, war crimes, grave human rights violations, and grave breaches of humanitarian law.

of community and victim organizations with the power and capacity to wield political influence in the country and to contribute to bringing about the changes required by an authentic process of eradication of crimes against humanity and genocide. This agenda includes all the areas in which participation by the victims could have social influence.

A alternative land registry is set out as an alternative aimed at gathering accurate information on the magnitude of dispossession, in order to demonstrate the agrarian counter-reform being carried out by destroying rural communities to guarantee the accumulation of lands. This instrument combines technical data gathered by specialists with participative research in which the dispossessed communities become subjects of memory and sources of information.

Citizens' hearings for truth are events held in public spaces and with the presence of judicial authorities, in which hundreds of cases are documented. These hearings enable the victims' communities in marginal rural and urban zones to denounce events that have not been investigated by the judicial system. At the same time, they make it possible to testify to and publicly disseminate the reality of those events.

These types of strategies include promoting draft legislation with wide-ranging debate by social organizations; humanitarian initiatives aimed at achieving a humane solution to the armed conflict; proposals for social memory that reshape the cultural hegemony; and designing guarantees of non-repetition aimed at dismantling the paramilitary groups and their political influence.

Obtaining political and economic power for the victims' sectors and weakening the power base of the perpetrators' sectors is a necessary goal for building a democratic State. In this sense, truth, justice, and reparation become rights that when exercised go beyond surmounting private and individual suffering and become a universal undertaking.

## Chapter 8

# Civil Society in the Colombian Transitional Justice Framework

*Gabriel Arias*

*That set of nongovernmental institutions, which is strong enough to counterbalance the state, and, whilst not preventing the state from fulfilling its role of keeper of peace and arbitrator between major interests, can, nevertheless, prevent the state from dominating and atomizing the rest of society.<sup>1</sup>*

The objective of this chapter is to explore the dynamics of Colombian civil society in light of the political-legal process that began with the agreements of the Álvaro Uribe Vélez administration and the senior commanders of the paramilitary groups in 2002, and which is currently being carried out mainly in the framework of the criminal proceedings of Law 975 of 2005. This law proposes the demobilization and reintegration of illegal armed groups in order to attain peace while satisfying the basic principles of transitional justice—namely, to guarantee for the victims the rights to truth, justice, reparation, and non-repetition. Part I of this chapter will explain the background relevant to the current dynamics of Colombian civil society. The analysis will focus on three central themes: the participation of civil society in the transitional context (Part II), the influence of international cooperation on the civil society agenda (Part III), and the role of the media in the transitional setting (Part IV).

In addition to my own experience with Colombian civil society, the reflections presented in this chapter are based on interviews that I conducted for this project with a variety of members of Colombian civil society as well as representatives of international cooperation agencies from September to November 2009.

## I. Background

To speak of civil society<sup>2</sup> in Colombia is to refer to a question that is as abstract as it is complex—because of its varied composition and vastly different

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<sup>1</sup> ERNEST GELLNER, *CONDITIONS OF LIBERTY, CIVIL SOCIETY AND ITS RIVALS* 5 (1994).

<sup>2</sup> The purpose of this reflection is not to offer an essay on the concept of civil society. For the objectives of this analysis, I begin from the elemental basis of understanding civil society as a network of associations, independent of the State or governmental sector, and which are grouped together according to certain identities in order to realize particular public objectives. In this way, civil society serves as a balance to the excesses of power. For the majority of the writers on this issue, civil society serves the role of intermediary between the individual and the State and, as a consequence, exercises a social power.

positions, as well as the fact that the detrimental consequences of the internal armed conflict affect all sectors. The logic of the armed confrontation, in which anyone can be the enemy, has penetrated the entire society. It has therefore fragmented society in such a way that it has been difficult to construct collective identities and struggles around common goals. This situation becomes even more evident when analyzed in the context of the transitional framework promoted by the well-known Justice and Peace Law.

In order to analyze Colombian civil society, it is important to first reference the evolution of our internal armed conflict, as it has affected all of the social, political, and economic structures of the nation. Second, we must recognize that the difficulties for building a civil society and its undeniable fragmentation also have to do with the notorious differences between the local or regional levels and the national level. Colombia is a country of at least five major regions, which generates dynamics of the most varied kind. Suffice it to say for our purposes here that at the local level civil society is invigorated more as a force against the violent actors, while at the national level it operates more as an exercise of political checks and balances.

In our country, like in many countries in Latin America, civil society began to have a greater prominence at the end of the 1960s and mainly in the 1970s, as a counterweight to democratic and State crises. In Colombia, there was a loss of State legitimacy given the growing number of violent actors that one way or another replaced the State in various regions of the country. Guerrillas and paramilitary groups positioned themselves throughout the country, mainly in the regions furthest from the urban centers—the regions where the institutionalism was most precarious.

The loss of credibility in the establishment made it so that a civil society in formation, focused on denouncing human rights violations, increasingly broadened the scope and reach of its activities. This expansion included the eventual creation of regional and national networks designed to demand State compliance of obligations to respect and guarantee human rights. In this way a sector of civil society was created and strengthened, whose principal sphere of intervention focused on human rights, denouncing violations and demanding protection.<sup>3</sup>

Different associations and organizations were created around common causes or identities, such as being victims of the forced disappearance, forced displacement, discrimination against women, or discrimination based on ethnicity or sexual orientation. At the same time, collectives interested in promoting the new and extensive range of fundamental rights and protection mechanisms for such rights also emerged.

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<sup>3</sup> Examples include the *Fundación Comité de Solidaridad con los Presos Políticos* (Foundation Committee of Solidarity with Political Prisoners) and the *Comité Permanente por la Defensa de los Derechos Humanos* (Permanent Committee for the Defense of Human Rights) created in 1973 and 1979, respectively.

As a consequence of the intensity and worsening of the internal armed conflict, there was also the emergence of victims' organizations coming together around the identity of their victimizer—as victims of the guerrilla or of the paramilitary groups. These groups began demanding their rights and seeking to have a voice in the political debates of the country. It was in this setting that the different stances of the Colombian civil society began to align—either an attitude of open opposition to the State or one of collaboration and defense of the State.<sup>4</sup>

An important segment of civil society saw a negotiated end to the armed conflict as the path to peace, and as a result important organizations were created that prioritized peace efforts in their public agenda.<sup>5</sup> A variety of political, economic, and civil society sectors pressured the different administrations to initiate dialogue with the armed actors to seek a negotiation that could bring an end to the conflict. Several failed attempts in this respect, such as those of the Belisario Betancur and Virgilio Barco governments, 1982-1986 and 1986-1990 respectively, and filled the national landscape with sharp skepticism. The result of these failures was the prevalence in public discourse that military defeat of the enemy (the guerrilla) was the only alternative.

Consequently, in the 1990s, and mainly in the administration of Ernesto Samper, the military strategy was reactivated and the civil population was brought into to the armed conflict through private security cooperatives, called *CONVIVIR* (Private Security and Vigilance Cooperatives).<sup>6</sup> The dismantling of these groups was ordered in 1997, however the policy created a lasting army of thousands of civilians organized into “self-defense” groups locally. Many of these groups would later seek to organize nationally under the umbrella paramilitary group called the United Self-defense Groups of Colombia (*Autodefensas Unidas de Colombia* – AUC).

The adoption of a new constitution in 1991 established a participatory and pluralist Social State. Constitutional status was given to mechanisms of democratic participation, strengthening the role that civil society was already exercising. Following the new Constitution, we see a society with greater interaction around the different issues of collective interest—a society that is increasingly interested in creating mechanisms to strengthen the weak national democracy.

The national government's dialogues with the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia* – FARC) guerrilla group were resumed during the Andrés Pastrana administration. The entire country was a spectator to yet another failed attempt at reaching a negotiated solution to the

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<sup>4</sup> On this, see the analytical overview in Mauricio Romero, *Paz, reformas y cambio en la sociedad civil colombiana*, in *SOCIEDAD CIVIL, ESFERA PÚBLICA Y DEMOCRATIZACIÓN EN AMÉRICA LATINA: ANDES Y CONO SUR 331* (Aldo Panfichi ed., 2002).

<sup>5</sup> See MAURICIO GARCÍA, *CINEP, MOVIMIENTO POR LA PAZ EN COLOMBIA 1978-2003* (2006).

<sup>6</sup> For a brief description in English of the *CONVIVIR*, see *Human Rights Watch, Breaking the Grip: Obstacles to Justice for Paramilitary Mafias in Colombia 46-47* (Oct. 16, 2008).

armed conflict. It was in this context that Álvaro Uribe took office for his first term in 2002. Just before this moment, the highest leader of the national paramilitary umbrella group, the AUC, had announced the dissolution of the organization. But a few months later the new leaders of the paramilitary groups declared publicly the re-establishment of the organization and their intention to seek a peace agreement with the new administration. This led to the signing of the well-known Santa Fe de Ralito Accord in mid-2003. In this accord, the government committed to seek legal mechanisms to resolve the concerns of pending and possible criminal charges for the paramilitaries, who in turn committed to demobilize within the following two years.

In observance of what was agreed with the paramilitaries, in August 2003 the Uribe administration presented Congress with a draft bill of alternative sentences to provide a substitute for imprisoning the demobilized individuals. This legislative process eventually culminated on July 25, 2005 with the approval of Law 975 (the Justice and Peace Law). The draft law was discussed practically behind closed doors in the presidential palace Casa de Nariño because of pressure from the paramilitary groups. Moreover, the bill passed in a Congress where a high percentage of the representatives had been elected with the local support of the perpetrators in question.<sup>7</sup>

In response to how the law of reduced sentences for the criminals was negotiated, discussed, and approved, a sector of the civil society has dedicated itself to vindicate the country's right to know the truth.

The Justice and Peace Law emerges then as a complementary legal mechanism to the preceding legal framework of amnesties and pardons (Law 782 of 2002, Decrees 128 and 3360 of 2003) which for a variety of reasons could not be applied to ex-combatants alleged to have committed crimes against humanity. With this legal backdrop, the demobilization process of more than 30,000 armed men began at the initiative of their commanders. It must be emphasized that although the demobilization of the self-defense groups was necessary, this is not in itself sufficient to attain the objectives set out in the Justice and Peace Law—on the face of the law it seeks to reach peace while guaranteeing the rights to truth, justice, and reparation for the victims, and for the society as a whole, a victim of crimes against humanity.

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<sup>7</sup> For example, as has been widely reported, at the time of the demobilization talks paramilitary commander Salvatore Mancuso declared that more than 35% of the Congress represented the interests of the paramilitaries. Subsequently, in the so-called *parapolítica* cases, the Supreme Court of Justice has opened criminal investigations against, and in some cases already convicted, approximately one-third of the Congress members of that time for alleged ties to paramilitarism.

## II. Civil Society Participation in the Transitional Context<sup>8</sup>

Any discussion of a transitional context in Colombia must have Law 975 and the Álvaro Uribe Vélez administration as a point of reference, given that the concept of “justice in transition” had not been previously introduced in the country on any grand scale. This does not mean that such legislation is effectively motivating the change from a persistent scenario of human rights violations toward one of respect and guarantees, nor that there are bases being built for a peaceful solution to the conflict—much less does this mean to suggest that there is advancement on the road towards peace and the consolidation of a true democracy. For these reasons when I speak of a “*transitional context*” or “*transitional justice*,” it must be understood that I do so with quotation marks because of my high level of skepticism in this regard.

Despite these observations, I note that according to the interpretation by the Supreme Court of Justice, by virtue of the Justice and Peace Law the country finds itself in a transitional context.<sup>9</sup> Moreover, transitional justice is undoubtedly a part of the public agenda and discourse today.

The approval of this legal framework made evident, once again, the fragmentation of Colombian civil society. In effect, a sector of the human rights community, aligned with the politics of the new government, unconditionally backed the legal framework without concern for the fate of the rights of the victims. Another sector, however, analyzed the regulation in light of international human right standards and the basic principles of transitional justice and in defense of the victims and society as a whole led a vocal rejection of the camouflaged pardon.

For example, a few days after the law was approved, the Movement of Victims of State Crimes (*Movimiento de Víctimas de Crimenes de Estado – MOVICE*)<sup>10</sup> proposed that public servants apply the “unconstitutional exception” to the Justice and Peace Law and refuse to follow it. This stance had the support of several national NGOs and numerous European organizations, which began to exert pressure on different sectors to undermine support for the application of this law. This advocacy was carried out in the framework of the alliance between this sector of Colombian civil society and the European organizations to demand respect for human rights in Colombia. This advocacy culminated in a lawsuit being filed before the Constitutional Court. “The constitutionality challenge that initiated the current process was interposed by a group of 105 Colombian citizens,

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<sup>8</sup> From this point forward, in referring to civil society, I will mainly be speaking of the sectors that work in the human rights field and those that advocate for peace and strengthening of democracy, without reference to the other sectors, such as labor unions or businesses.

<sup>9</sup> See, e.g., Criminal Cassation Chamber, Supreme Court of Justice, ruling of March 12, 2009, No. 31320, Speaker Magistrate Sigifredo Espinosa Pérez.

<sup>10</sup> See *Movimiento de Víctimas de Crimenes de Estado Home Page*, <http://www.movimientodevictimas.org>.

acting in their own name or as representatives of diverse organizations, against Law 975 of 2005.”<sup>11</sup> This joint action demonstrates the alignment of an important sector of civil society against an executive initiative that counted on the backing of the legislative branch.

It is not an easy task to determine quantitatively or even in approximate percentage levels how many or which sectors of the Colombian civil society organizations have assumed a more contentious role with the government in this transitional period, and how many or which sectors play a more collaborative role. Despite this I dare to assert that in our country, although an increasing number of civil society organizations are forming and acting in the public arena, there is in fact less civil society. By this, I refer to civil society that acts with more-or-less homogenous positions and serves as a balance of power against the homogenous discourse of the government. The bulk of our civil society has not only aligned itself with the language of the government but defends it to the extreme. Perhaps this is because a significant part of the organizations that have emerged in the last decade have done so on official impulse and financing, thus blurring the essential nature of civil society. This is also a testament to the fact that in Colombia the political and social fuse together around the extremist views and language imposed by the national government.

In the relationship of the Uribe government with a part of the human rights civil society there is a great inconsistency: on one hand, an invitation to dialogue and cooperation, and on the other, condemnation and stigmatization. The following section will explore this dynamic further.

### **A. Building Conditions for Working Together**

Paradoxically, under the Uribe administration, a strategic process of alliance began between the national government and Colombia civil society around the international cooperation agenda. Such proximity began to consolidate with the so-called London-Cartagena-Bogota process, a tripartite government/civil society/international organizations dialogue about cooperation strategies, mainly in the fields of human rights, democracy, and peace.

The London Declaration (2003)<sup>12</sup> became a first frame of reference in the government/civil society/international community relationships. Based on this, progress toward the National Plan of Action in Human Rights was proposed. The Cartagena Declaration (2005)<sup>13</sup> was aimed principally at reaffirming the

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<sup>11</sup> Constitutional Court, ruling C-370 of 2006, No. D-6032, May 18, 2006.

<sup>12</sup> The London Declaration is reproduced in English, in UNDP, *DE LONDRES A CARTAGENA Y A BOGOTÁ: ESTRATEGIA DE COOPERACIÓN INTERNACIONAL 12* (2007), available at <http://www.acnur.org/biblioteca/pdf/6031.pdf>.

<sup>13</sup> *Id.* at 17.



process begun in London. Prior to these meetings there had been Declarations of Consensus from Colombian Civil Society Organizations,<sup>14</sup> which represent an important achievement of coordination at the national level for Colombian civil society. This was received favorably by the international partners and the national government.

Finally, the third international conference on Colombia was held in Bogotá in November 2007. During this meeting, the Colombian government announced its adherence to the Paris Declaration<sup>15</sup> as a means to strengthen the harmonization and alignment of international cooperation. The third conference was a more political scene than the previous encounters, which had revolved more around cooperation and the thematic issues. In Bogotá however, Colombian civil society communicated to the international community that the cooperation projects extended to the government are used for war and not for peace or the promotion of human rights. The domestic civil society criticized Uribe's "Democratic Security" policy as incapable of resolving the internal armed conflict.

Though this interinstitutional setting of dialogue continues, particularly with regard to the creation of the National Plan of Action for Human Rights, the different parties have distanced themselves on substantial matters. This is due on one hand to the contradictory and inconsistent positions of the national government, and on the other, the inflexibility of a certain sector of non-governmental organizations, which have increased their advocacy around the justiciability of the State's human rights obligations.

## **B. A Dynamic of Checks and Balances**

In the past years, the human rights sector of the Colombian civil society has been increasingly strengthening mechanisms of coordination, which have allowed it to consolidate more homogenous positions that, at the same time, strengthen its interaction with the government. In fact, several platforms—thematic groupings of human rights organizations<sup>16</sup>—have been designed and implemented to advance the political dialogue not only with the government but also with international cooperation agencies. An important number of the organizations tied to such strategies have been exercising a role of representing victims, not only in the judicial setting—criminal and disciplinary proceedings—but also in the political sphere.

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<sup>14</sup> *Id.* at 24.

<sup>15</sup> Paris Declaration on Aid Effectiveness: Appropriation, Harmonisation, Alignment, Results and Mutual Accountability, Mar. 3, 2005, *available at* <http://www.oecd.org/dataoecd/11/41/34428351.pdf>.

<sup>16</sup> Currently there are three platforms: the Colombia-Europe-United States Coordination, which works mostly in the area of civil and political rights and was the first of its kind; the Colombian Human Rights, Democracy, and Development Platform; and the Alliance of Social and Like-Minded Organizations.

The government asserts, mainly on the international stage, that there is an opening for coordination with Colombian civil society organizations, but this does not play out in the same way at different levels of the administration. The dialogue and consensus takes place at the low and middle levels of the administration, but at the highest and decision-making levels the posture toward civil society has been antagonistic and, in general, closed. It is in the ambiguous spaces of the political game that ties and mechanisms for relating, coordinating, and cooperating are formed; the spaces where decisions are made are slow to respond and generally not interested in actually adopting the measures.

Thus, that sector of the Colombian civil society on which I have focused is perceived to be strengthened in relation to the government, which presents itself as assuming open and flexible positions. Nevertheless, most of the time this is only a political parody of eloquent ambiguities.

### C. “Carrot and Stick” Politics

The period of time that is the main focus of this analysis has been characterized by constant and reiterated defamatory and discrediting statements about human rights defenders and social leaders—their harassment, persecution, and stigmatization—by the President and Vice-president and all the way down. When taken together, one has the impression that this could be a governmental strategy, given that they have engaged in this behavior consistently throughout the years.

There is increasing polarization between the sector of the Colombia civil society that has appropriated the official discourse—that there is no internal armed conflict but rather a State struggle against terrorism—and the other sector of the same society, which recognizes the existence of the conflict and its devastating consequences for the civil population. This polarization reveals an inherent tension of armed conflicts: *you’re either with us or against us*. This fuels the phenomenon of defamatory and discrediting remarks, in public and private settings, against those who challenge and set themselves apart from the government’s hegemonic discourse.

In fact, there are a handful of organizations and individuals who have been suffering political persecution, in different ways, for maintaining critical and independent positions against the process that is being carried out with the perpetrators in the framework of Justice and Peace. Stigmatization and judgments of the activities carried out by these organizations and individuals are part of the governmental agenda.<sup>17</sup>

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<sup>17</sup> The defamatory remarks have been widely published. Regarding a march organized by civil society organizations to honor the victims of paramilitarism:

[T]he presidential advisor, Mr. Jose Obdulio Gaviria . . . assured that neither he nor “president Uribe, will participate in the march on March 6th” because

On the other hand, in exceptional cases, the government has shown itself to be open to dialogue and to the construction of consensus with the agendas of the human rights platforms, perhaps motivated only by the political agendas of international cooperation agencies and some embassies. This creates a sense of uncertainty in the public atmosphere about the administration's true intentions, producing even more distrust in the human rights movements.

It is precisely this lack of trust that has eroded dialogue and has caused the human rights community to seek more support and endorsement from international organisms, so that they can denounce and exercise the necessary pressure. The question then is, to what extent should this sector of civil society maintain dialogue with a government that is lacking in terms of democracy, which disrespects the Social State, and stigmatizes human rights defenders and opposition leaders, categorizing them as terrorists? So far, none of the parties have left the negotiation table because of the high political costs this would bring, despite the fact that many of the actors are aware that it could very well be a "dialogue of the deaf" with certain dividends in the purely political setting.

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according to him it is "organized by the FARC [Armed Revolutionary Forces of Colombia]. . . . I, personally, will not participate as I did with such enthusiasm in the march organized against the FARC," said Mr. Gaviria while also adding that "it is unlikely that Colombian society will participate in such action when we are marching precisely against those organizing it."

FIDH, Press Release, *El gobierno descalifica el homenaje nacional a las víctimas del paramilitarismo, la parapolítica y los crímenes de Estado*, Feb. 20, 2008, [http://www.fidh.org/IMG/article\\_PDF/article\\_a5247.pdf](http://www.fidh.org/IMG/article_PDF/article_a5247.pdf).

One of the main pillars of the National and International Campaign for the Right to Defend Human Rights is, "putting an end to systematic stigmatization: the public declarations of the high government officials, including the President, tend to disqualify human rights work and stigmatize human rights defenders as allies of the guerrilla, putting them in a situation of even higher risk." Declaration, *Colombia: Defensores de Derechos Humanos Bajo Amenaza*, available at <http://www.colombiadefensores.org/downloads/Declaration.pdf>. For more on the campaign, visit <http://www.corporacioncompromiso.org>. See also, Statement of Rep. James McGovern, House of Representatives, Sept. 10, 2003, available at <http://colombia.indymedia.org/mail.php?id=5807>:

Over the past few months, one public attack after another against human rights defenders and organizations has been made by the very highest-ranking members of Colombia's government and military, culminating this week in statements by President Uribe himself. On Monday, September 8th, President Uribe, in a speech to Colombian military personnel, attacked human rights organizations as "politickers at the service of terrorism." President Uribe stated that human rights groups in Colombia are "terrorist agents and cowards who hide their political ideas behind human rights." These highly inflammatory and dangerous remarks came on the same day as some 80 human rights groups released a report critical of some of President Uribe's security measures, which, in their view, have increased repression against the civilian population. The report was issued by some of Colombia's most respected human rights groups, including the Colombian Commission of Jurists, the Consultancy for Human Rights, and the Jesuit-affiliated Center for Popular Education and Investigation.

## **D. A Perspective Focused on the Victims of Human Rights Violations**

The transitional process purported by Law 975 inserted into the public agenda the traditional debate between justice and peace—the need to reach both ends without the obvious detriment of the other. In terms of grave and systematic violations of human rights, how severe of a sentence should the perpetrators endure in exchange for their reincorporation into society in through a peace-building process? How much impunity are, the victims and society as a whole willing to bear in exchange for the perpetrators contribution to favorable environments for peace?

These and other similar questions may have answers in the theory of transitional justice, but many times they have not been successfully resolved by concrete societies, the Colombian civil society as a case in point. Recall that the Justice and Peace Law was discussed behind the country's back and without enough public debate for the country to be informed about the shady agreements reached between the perpetrators and the legislative and executive powers.

The representation of the rights and interests of the victims is not new in the Colombian national setting. Nonetheless, since the new criminal procedure codes came into effect and, in particular, since the application of the Justice and Peace Law, the role of the victims in the judicial, political, and social context has acquired increased importance.

Without a doubt, in the political exercise of dialogue between the national government and the human rights sector of the Colombian civil society, the victims are the focal point. Some victims advocate for themselves for the defense and guarantee of their most legitimate aspirations. The government asserts that the State as a whole seeks to ensure the dignity of the victims and highlights that free legal counsel is provided. However, in fact, this service is absolutely insufficient relative to the demand and it suffers from obvious difficulties that make true legal assistance impossible. In response, several organizations have dedicated themselves to strategic litigation in the judicial review and control of Law 975, representing the victims and society.

Although numerous victim groups and associations have emerged, they generally have not reached the level of maturity necessary to participate in the often highly technical judicial and political spheres with full autonomy and independence. The organizations defending human rights continue to be their most frequent channel of dialogue with the relevant institutions in the transitional justice setting.

The landscape becomes more complex with the increased emergence of associations of victims from one particular armed group or another in the conflict. Given this situation, the disperse universe of Colombia civil society today has different associations of: victims of the guerillas, victims of the paramilitaries, and victims of State violence. There are also a number of associations of perpetrators—guerrillas as well as paramilitaries. All of these groups denounce the role of political officials with the different criminal organizations, which have

inserted themselves into the political equation. The groups not only appropriate the discourse of transitional justice but also vindicate their aspirations and demands through a variety of different mechanisms.

The Justice and Peace Law conditioned the benefit of the alternative sentence for the perpetrators, as an institutional exchange for their demobilization, on the guarantee of victims' rights to truth, justice, and reparation. However, nearly five years after the expedition of the law, the investigations led by the prosecution have not captured the generalized and systematic nature of the criminal conduct. Consequently, the truth produced by the process is not only significantly reduced but also completely partial and fragmented.

The only final sentence that has been issued was annulled and remanded,<sup>18</sup> which makes it clear that justice is not being done either. Moreover, at the time of this writing, there were no more than five cases that could be considered advanced procedurally—and these cases involve individuals that were middle- or low-level members of the paramilitary structures. None of the cases in the more advanced procedural stages include any of the highest AUC commanders or leaders—the majority of these were extradited to the United States, and the others are not cooperating in their proceedings. Finally, the only reparation judgment that had been issued was in the above mentioned sentence and was also annulled. Consequently, to date no victim has received reparation in the framework of the Law 975 judicial proceedings.

This devastating reality for the victims is aggravated to the extent that they are instrumentalized, both by the government as well as by some Colombian civil society organizations. On one hand, the government—anticipating the failure of the Justice and Peace criminal proceedings—has launched an administrative reparations policy, playing on the precarious social and economic conditions of the victims, undoubtedly a serious affront to the victims' dignity. Meanwhile on the international stage, the government proclaims supposed great achievements in the vindication of the rights of the victims. On the other hand, some of the organizations of the different groups in contention, for the sake of defending their interests, are nourishing themselves from the international cooperation agencies. I emphasize that this is not the case of all of the organizations that represent victims, but this phenomenon was detected in the series of interviews conducted for this analysis.

To conclude this section it is useful to analyze the stances of some of the human rights organizations that radically opposed the passing of Law 975 and condemned the government for its dialogue with the perpetrators. First, as the

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<sup>18</sup> On March 19th, 2009, the first sentence from the Justice and Peace Chamber of the Superior Tribunal of the Bogota Judicial District was issued against Wilson Salazar Carrascal, alias "El Loro." However, the Criminal Cassation Chamber of the Supreme Court of Justice declared this sentence null in its ruling of July 31, 2009, No. 31539, and remanded the case back to the beginning stages of the proceeding.

Justice and Peace criminal proceedings have been taking place, these organizations have been gradually incorporated into the process. Today, not only do they monitor closely the proceedings and the process as a whole, but they also intervene directly as legal parties representing the rights and interests of particular victims.

Second, despite an initial unwavering stance against dialogue with the ringleaders of the paramilitary groups, today some of these organizations have visited those leaders of the AUC who were extradited to the United States for charges related to drug-trafficking. The explanation given for this change in position is the need to seek mechanisms for these individuals to fulfill their commitment assumed under the Justice and Peace Process to reveal the truth.

These two realities are very controversial, to say the least. These interventions by civil society have been judged quite critically, mostly because of the high political costs of this type of turnaround, which may actually be converting them into instruments of the political-legal process of Justice and Peace that they once criticized so intensely. Though the motivations articulated for changes of positions can be supported by forceful arguments, there is a sense that it is also the result of a lack of clear definition in their missions. This contributes to a climate of mistrust against institutional action as well as actions of the Colombian civil society.

### **E. The Proposal of an Official Truth Commission**

On September 21, 2009, the Supreme Court of Justice Criminal Appeals Chamber, in a procedural ruling on a Justice and Peace criminal proceeding encouraged the national government to:

[C]all on the main social forces—representations of the three branches of government, victims' organizations, human rights organizations and other civil groups—in order to study and consider the creation of a truth commission, which, parallel to the criminal trials that continue in light of the Justice and Peace Law, would help establish the truth about the past.<sup>19</sup>

In the considerations leading up to this pronouncement, the Supreme Court of Justice recounted the legal foundation of the right to truth (Article 7 of Law 975) as a right of the victims and of the society as a whole, and it reiterated the corresponding duty of the State. The Court also referenced the interpretations of the Inter-American Court of Human Rights on the issue—analyzing the relevant article of the American Convention—as well as the interpretations of specialized bodies of the United Nations. Next, the SCJ highlighted the observations of the Constitutional Court about the scope of the right to truth in light of the Justice

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<sup>19</sup> Criminal Cassation Chamber, Supreme Court of Justice, ruling of Sept. 21, 2009, No. 32022, Speaker Magistrate Sigifredo Espinosa Pérez.

and Peace Law and then asserted that the truth commission would be a suitable mechanism to complement the limited truths that are being produced in the Justice and Peace proceedings.

There have been few sectors of the Colombian civil society that have actually spoken out regarding the invitation made by the Supreme Court of Justice. Though the matter was referenced in dictum, and the initiative referenced is one of an official character, human rights civil society must not sit out of the public debate that should be had over such an initiative because this debate and analysis could be a very positive exercise. I do not suggest that civil society must respond affirmatively outright to the call from the Court, but rather that many pedagogical proposals national and regional could be generated to encourage the society as a whole to participate directly in the exploration of arguments as to whether or not these mechanisms of transition are relevant or not. Undoubtedly the lack of reaction on the part of civil society to the Court's proposal reflects a lamentable indifference toward the fate of the Justice and Peace process and toward alternative instruments that could contribute to the pursuit of historical truth regarding the systematic violations that the country has suffered.

### **III. The Influence of International Cooperation on the Civil Society Agenda**

I will discuss this topic briefly and hesitantly due to the difficulties of attaining precise information about the stances, projects, objectives, and purposes of the international cooperation agents that interact in the Colombian scene, specifically by supporting different sectors of the Colombian civil society. A number of interviews with key protagonists in this area and my years of professional experience with different aspects of international cooperation are the basis of the following analysis that I offer for debate.

The first thing that can be noted is that there is a common international cooperation scenario and it can be divided in four categories of projects: human rights, strengthening democracy, searching for peaceful solutions to the armed conflict, and generating resources and development. Another generalized characteristic is that the vast majority of the cooperation agencies are foreign governments and, to a much smaller degree, private organizations. In fact, you can easily count about thirty States that make up the greatest percentage of the cooperation, which have fewer resources in comparison have fewer resources.

This aspect is relevant for the analysis here because in light of the Paris Declaration international cooperation must be focused primarily through the governments, which means that the cooperation for social organizations may be gradually reduced to some extent. This may be a possible explanation for the growing phenomenon of co-optation of Colombian civil society organizations. In

order to assure their administrative sustainability, organizations may benefit by aligning with the official discourse of the Colombian government, thus alienating themselves from the essential pillars of their own nature. The question then arises as to whether there is a sector of the international cooperation that strategically seeks to neutralize the natural mission of the Colombian civil society organizations. I do not have enough information to answer one way or another, but I pose the question to provoke reactions and further debate on the issue.

Nonetheless, one must recognize that the resources provided by international donors to the different Colombian civil society organizations are very important, and without such resources the majority of them would not exist.

Regarding cooperation in the field of human rights, we see that a good part of the resources are being directed to two related sectors: one, to organizations that have been advancing legal representation strategies in favor of the victims and, two, directly to the victims' organizations.

With respect to the representation of the victims, in the Justice and Peace proceedings we observe that an important number of victims have granted power of attorney to the lawyers enrolled with the Public Defender's Office of the Office of the Ombudsperson (*Defensoría del Pueblo*). Statistics reported by the Interinstitutional Justice and Peace Committee indicate that nearly 60,000 victims have turned to this state organ to receive free legal representation in the Law 975 criminal proceedings.<sup>20</sup> A smaller number of victims have granted power of attorney to personal lawyers of their choosing, the majority of them from human rights non-governmental organizations and a very small fraction, lawyers that work on a contingency fee.

This is an important dynamic because for the vast majority of victims, precarious financial situations mean that the only option is to turn to public defenders for legal counsel, despite the fact that many victims report feeling that they are not effectively represented. In light of this, several organizations have sought to fill the gaps, but they do not have enough lawyers to respond to the demand of litigating in the Justice and Peace process. Thus, the challenge is enormous—not just for the State with regard to its obligation to provide quality public defense, but also for civil society and cooperation agencies whose task it is to further the full guarantee of the rights of the victims.

The direct support to the victims' organizations has also increased notably since the introduction of the Justice and Peace legal framework. It is important to emphasize that since the passing of Law 387 of 1997, which regulates the integral assistance for the population forcefully displaced by the violence, organizations of internally displaced persons grew at an alarming rate—disorderly and with few references of inter-institutional coordination as part of belonging to civil

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<sup>20</sup> As of January 2010, the Office of the Ombudsman has a total of 190 attorneys that represent victims in the Justice and Peace proceedings.



society. This same phenomenon has happened with the Justice and Peace Law the emergence of numerous victims' associations motivated, it seems, by the expectations of judicial or administrative reparation.

Important financing has been granted around these two axes. One of the people interviewed for this analysis, who works for an international cooperation agency, indicated the alarm generated by the enormous quantity of requests for project financing to assist victims, to legally represent victims, to strengthen victims' associations, and to generate resources for victims' basic needs. The interviewee noted with some concern that it seemed that all of the projects rotated around the victims, which could lead to a certain exploitation or instrumentalization and have the counter-intuitive effect of doubly affronting their dignity.

In this sense, it is fit to ask what measures the donating agencies are taking to effectively strengthen the victims and not fall into the ingenuity of providing resources intended for their benefit but which instead may get lost in the growth of administrative and bureaucratic bodies.

The human rights community faces a related challenge of ultimate importance: to demonstrate, with verified sources, that its role in representing the interests and aspirations of the victims is being carried out in a satisfactory and effective way, and precisely as a reparation measure.

Lastly, I point out with certain discomfort that faced with the administrative and logistical challenges of implementing the institutional structure of Justice and Peace, the State has made noteworthy efforts. It must be recognized that were it not for international collaboration, the situation would be much worse than it is today. Public servants consulted about the role of foreign donors for the development of the Law 975 criminal proceedings convincingly indicated that the Justice and Peace framework is sustained in good measure by the resources from international cooperation, so much so that without them the system would collapse.

Is there not an evident risk that this international cooperation, at least in relation to the development of Justice and Peace, may have the unintended effect of supplanting the State itself, and with it dilute its obligations emanating from international human rights instruments? The question, without an answer for now, is posed to invite the realization of a rigorous study in this regard, given the connotations and eventual consequences of the answer, and to provoke greater attention and analysis from the Colombian civil society on this matter.

#### **IV. The Role of Mass Media in the Transitional Period**

In November 2003, when the first massive demobilizations of the paramilitary groups began, the mass media flooded the country with information. The same thing happened with the approval of the Justice and Peace Law in 2005 and with

the last demobilizations and surrender of weapons in 2006. During three years, the focus of national media attention gravitated around these situations.

Subsequently, toward the end of 2006 and the beginning of 2007, when the first *versiones libres* of the perpetrators submitted as candidates for the alternative sentence on Law 975 by the national government began, the media again saturated the national news with the stories of their criminal acts. Much of this reporting was more focused on sensationalism as opposed to providing objective information or generating discussions about what the society and international community was witnessing.

Nevertheless, the transition gradually began to lose importance in the front pages of the newspapers and the main headlines of television news. The stories about the terrifying ways that people were tortured, disappeared, or killed stopped being so shocking and, consequently, lost journalistic importance. Nowadays, judicial pronouncements are covered sporadically, and it would seem that public opinion has forgotten that criminals involved in grave human rights violations continue to be tried; it seems to have been forgotten that this process is pursuing the truth about the paramilitary violence of the past decades and intending to provide reparations to hundreds of thousands of victims.

This brief panorama as to how the media has managed the transitional experience of Justice and Peace poses two important questions for the analysis here: Is it only what is reflected in the media that is of national importance? Who determines the managing of national and regional public opinion?

Though some of us believe that Law 975 is not the optimal instrument for a real transition in the country, without a doubt the criminal proceedings being carried out in Justice and Peace are very significant because several hundred perpetrators are being prosecuted. These proceedings may be able to leave certain bases to reconstruct the truth about paramilitary actions and their close ties to the State, and because some percentage of the victims—although very minimal—may receive a degree of reparation.

With the exception of a few opinion media outlets and columnists, often commonly referred to as “alternative,” the majority of the media, especially the mass media, has generally been ignoring the Justice and Peace developments. This has unfavorably impacted public opinion as to the importance of these proceedings. The importance remains for the direct victims and for those involved in the human rights field, but for the majority of the population the issue of transition is not of any relevance.

In this sense, we need to recognize the social and political power of the media—its capacity not only to inform but also to form opinion. Unfortunately for Colombia, opinion is led by the owners of the media, who generally echo the official discourse of the government. These considerations help to explain why the media was so prolific in reporting on the demobilizations of the paramilitary groups but conversely do not do much to reveal the most

recent confessions from perpetrators who directly implicate State officials in the criminal enterprise.

Undoubtedly, any transitional process in the world requires an objective and independent media that reports on the developments of the process, which disseminates openly to the public the truths being reconstructed in the process, and which employs a language that respects the dignity of the victims. In this way, the media has an important role in the construction of history and consequently, in the reconstruction of memory. Unfortunately, in Colombia we cannot count on this type of media; the vast majority is fundamentally oriented at reproducing the official discourse. Given this situation, our society is not as informed as it should be about the development of Justice and Peace and it is. In this sense the society as a whole is contributing to limiting the right to know, which is a right the entire society shares along with the direct victims.

There are some exceptional media outlets—which in general receive support from international cooperation agencies—that struggle to maintain the society objectively informed about the real trajectory of Justice and Peace, its progress, the truths being constructed, and the judicial decisions. Nevertheless, the reach of its influence is very relative and is in effect limited to the sphere of the Colombian human rights community.

## **Conclusion**

To finalize these preliminary considerations about the role of Colombian civil society in the transitional framework, I reiterate that it is difficult to find analytical documents about this question—not just in the transitional framework, but more generally about the role played by Colombian civil society. Writing this chapter has led me to realize the importance of generating a process of reflection and analysis regarding the role that civil society plays—as well as regarding the ideal role it should play—in the Colombian transitional dynamic. Surely this process would produce interesting results that would give Colombian civil society tools in order to more actively and purposefully intervene and participate in this historic period. I offer the following closing thoughts as a contribution to what I hope will be the beginning of further dialogue and reflection.

The basic understanding of civil society is as a multiplicity of associations, independent of the governmental or State sector, which direct their efforts around a common cause. However, Colombian civil society finds itself completely fragmented into a multiplicity of sectors and interests, many of them openly in competition.

If the spectrum of analysis is reduced to only that sector that identifies itself around the human rights cause, we also find marked polarizations: between those stances that are decisively collaborative in nature with the government

and those that maintain a critical judgment. In the former, there are segments that—appropriating the official language—do not recognize the existence and consequences of an internal armed conflict. The latter, under the guidelines of international humanitarian law, recognize the existence of combatant groups that dispute social and territorial hegemonies. For the first group, the main problem can be boiled down to a State struggle against terrorism; for the others, underlying the ongoing armed conflict are not only political problems, but principally social and economic ones. Such differentiations are determining factors at the moment these groups outline their missions and activities, as well as at the moment of proposing alternative solutions to the complex problems that the country faces.

The fragmentation and greater distancing of sectors of the human rights civil society does not correspond in a strict sense to the arrival of this transitional proposal. Rather, the roots of this phenomenon can be found in the attitudes in response to the official denialist discourse toward human rights violations, to the internal armed conflict, and to the State's role in generating the criminal structures of paramilitarism. In this sense it is reasonable to assert that the process of co-optation of a large sector of civil society by the current government has been devastating, to such an extent that the line between official and social are remarkably blurry.

This extreme polarization has increased the defamatory and discrediting language, the harassment, and the persecution. This has been to such an extent that the vast majority of the spokespersons of the critical wing of the human rights civil society have been attacked in their professional and personal intimacy, through illegal wiretapping, arbitrary monitoring and investigations, and even direct death threats.

In light of all this, human rights civil society has before it a tremendous challenge to reclaim its essential nature—not simply contentious or collaborative, but as a heterogeneous but autonomous body that makes proposals to maximize the potential of the Justice and Peace framework; that makes recommendations regarding non-official mechanisms of truth-seeking and memory-recovery; that invigorates the society as a whole to find real exit strategies to the internal armed conflict; and that contributes to the strengthening of the Social State and the rule of law, as opposed to the empty concept of democracy that we have today.

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**PART II:**  
**Comparative experience**

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## Chapter 9

# Uganda: Pursuing Peace and Justice in the Shadow of the ICC

*Michael Otim & Marieke Wierda*

Uganda's struggle for peace and justice consumed decades but only recently became subject of intense international interest when Uganda became the first case to be investigated by the ICC. The establishment of the ICC, which came into force in 2002, was seen by many as a great step forward in the fight against impunity. But the Ugandan case before the ICC soon highlighted some of the difficulties of pursuing justice in ongoing conflict, as will be shown in this chapter.

Part I describes the complex origins of the conflict, its humanitarian consequences, and how this is reflected in positions on conflict resolution. The opening of an investigation in July 2004 by the Prosecutor of the International Criminal Court against senior LRA leaders gave rise to fears that peace could no longer be achieved. Nonetheless, the most hopeful negotiations to date between the Government of Uganda and the LRA took place at Juba between August 2006 and November 2008. A number of Agreements were signed as part of this process. However, a Final Agreement was not achieved, causing some to speculate that the ICC was the obstacle. Part II of this chapter will discuss the Juba negotiations, the impact of the ICC, and the content of the Agreement on Accountability and Reconciliation.

Part III analyzes the current state of affairs. Even though the Final Agreement was not signed, the other Agreements under Juba introduced a comprehensive framework for transitional justice that could play a constructive role in Uganda. But currently, the framework is being unevenly implemented, with an emphasis on criminal justice and the establishment of a War Crimes Division in July 2008, as well as legislation that allows international crimes to be tried domestically. Uganda also seems to be readying itself for a complementarity challenge before the ICC. This scenario is evaluated in Part IV.

Finally, in Part V, we turn to the question of how victims and affected communities view these issues. Public perceptions of the ICC and other transitional justice issues in the North are complex but indicate that there is demand for a comprehensive approach to justice, tackling the causes and consequences of the conflict through measures such as truth-seeking and reparations. Uganda's experience yields no tidy lessons, and its struggle with peace and justice is not yet over, but future steps toward should take into account this broader political context and the views of the most affected populations.

## I. Background

### A. The Conflict between the Government of Uganda and the LRA

On June 29, 2007, the rebels of the Lord's Resistance Army (LRA) and the Government of Uganda (GoU) signed an Agreement on Accountability and Reconciliation, followed by an Annexure on February 19, 2008, which form the basis of pursuing transitional justice in Uganda today. These documents formed part of a lengthy negotiation with the LRA. The peace talks, mediated by Dr. Riek Machar, began in July 2006 in Juba, South Sudan and concluded without a final agreement in early December 2008. The LRA leader Joseph Kony refused to appear to sign the final peace agreement, citing concerns over arrest warrants issued by the International Criminal Court (ICC) against three of the LRA's surviving leaders.

The Juba peace talks, discussed further below, were supposed to end a brutal conflict that lasted over twenty years in Northern Uganda. The conflict started out as a rebellion by the Uganda People's Democratic Army (UPDA), comprised mostly of Army officers who had been defeated and had fled the capital city Kampala when Uganda's current President Yoweri Museveni, leader of the National Resistance Army/Movement (NRA/M), took power in 1986.<sup>1</sup> Remnants of the rebels who did not surrender under the 1988 peace accord between the UPDA and NRA over time transformed into a highly structured rebel army and durable movement with cult-like qualities, called the Lord's Resistance Army.<sup>2</sup> Joseph Kony, the elusive leader of the LRA, was inspired by a woman named Alice Lakwena. Lakwena had previously formed the Holy Spirit Movement (HSM) in the North. This movement enjoyed significant public support, but was defeated at Jinja in late 1987. The LRA continues to follow particular practices and rituals, and Joseph Kony is widely believed to hold spiritual powers by his fighters.

In contrast to the HSM, the LRA managed to garner little open support for its cause and it turned increasingly against the civilian population of the North, many of whom belonged to the Acholi tribe. With financial and military support from Khartoum, and by using South Sudan as a safe haven and launch pad for its operations, the LRA proved successful militarily. The LRA waged a campaign with frequent use of terror tactics. Civilians, often accused of collaborating with the government, were its main target, and atrocities included killings, abductions, and horrific mutilations such as the cutting off of limbs, ears, noses, or lips. Although the atrocities of the LRA are often portrayed as senseless, the violence

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<sup>1</sup> Yoweri Museveni, leader of the rebel NRA/M, took power after a five-year protracted war in Luwero Triangle against the Obote II Government. He overthrew the Tito Okello Military Junta in January 1986.

<sup>2</sup> The name is thought to be a parody on the National Resistance Army/Movement. Ruddy Doom & Koen Vlassenroot, *Kony's Message: A New Koine? The Lords Resistance Army in Northern Uganda*, 98 AFR. AFF. 98 (1999).



was deliberately aimed at instilling terror, violating local values or power structures, swelling their ranks through abductions, and reinforcing internal cohesion. It is estimated that up to 75,000 people were abducted during the twenty years of conflict.<sup>3</sup> After the LRA was attacked by the Ugandan army, known as the Ugandan People's Defense Forces (UPDF), in South Sudan pursuant to Operation Iron Fist in 2001, the LRA stepped up its attacks killing hundreds of innocent civilians in the north and north east of the country, stopping only 200 kilometers from Kampala.

The resulting humanitarian consequences of the twenty-year conflict were catastrophic.<sup>4</sup> Approximately 1.8 million people in the North became Internally Displaced Persons (IDPs) and lived in camps where the living conditions were dreadful. In 2005, the World Health Organization estimated an excess mortality rate of 1,000 per week for the Acholi region.<sup>5</sup>

Basic needs of the IDP population were provided for by humanitarian organizations such as the World Food Programme, rather than by local or central government. The dire humanitarian situation led to an unraveling of the social fabric in Northern Uganda and to highly degrading social consequences. For instance, the internationally publicized phenomenon of "night commuting," where scores of children would walk into towns at night from the surrounding areas, was first presumed to relate mainly to insecurity and fear of abduction. However, upon deeper analysis, aid agencies reported that night commuting may have been a result of the breakdown in family life and an inability of parents to care for their children. Another illustration is the plight of child mothers who returned from captivity after having been abducted and forced into marriage to senior commanders and who bore children for whom they could not claim a paternal line. These are but some of the complex social consequences of this protracted conflict.

The dire nature of the humanitarian catastrophe had two immediate consequences: (1) it lent incredible urgency to resolving the conflict in order to enable people to return to their homesteads and villages and resume a normal life, which in due course would presumably allow for repairing the social fabric; and (2) in the North it gave rise to significant resentment against the government, which was seen to be failing both in resolving the conflict and in protecting civilians. The government took measures, such as imposing strict curfews, which had a very immediate effect on people's ability to pursue their ordinary livelihoods. Many of these measures were seen as degrading and to some extent

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<sup>3</sup> PHUONG PHAM, PATRICK VINCK & ERIC STOVER, BERKELEY-TULANE INITIATIVE ON VULNERABLE POPULATIONS, *ABDUCTED: THE LORD'S RESISTANCE ARMY AND FORCED CONSCRIPTION IN NORTHERN UGANDA* (2007).

<sup>4</sup> This aspect has been highlighted particularly by UN Under-Secretary General Jan Egeland. See *Briefing by Under-Secretary General for Humanitarian Affairs and Emergency Relief Coordinator*, 2-6, U.N. Doc. S/PV.5331 (Dec. 19, 2005).

<sup>5</sup> WHO, *HEALTH AND MORTALITY SURVEY AMONG INTERNALLY DISPLACED PERSONS IN GULU, KITGUM AND PADER DISTRICTS, NORTHERN UGANDA ii* (2005).

vengeful and punitive against the Acholi people. The relationship between the UPDF and the people in the IDP camps was also strained by both the failure to protect the population against attacks by the LRA and the UPDF's own excesses or undisciplined behavior toward the local communities.

## **B. Diverging Views on How to Resolve the Conflict**

Views on how to resolve the conflict have always differed a great deal between the national level and the local community. Resentment against the government and the UPDF on the local level sometimes translates into ambivalence among the Acholi towards the LRA. However, the more fundamental ground for this ambivalence is the fact that the LRA is composed largely of kidnapped relatives and children of the Acholi (and recently also other tribes). Indeed, due to the widespread nature of abduction, including of children, and the ferocity of indoctrination within the LRA, the line between victim and perpetrator has become blurred. Although the crimes committed by the LRA have been consistently condemned by Northerners, this reality influences opinions regarding the way to deal with the crimes.

The government response to the violence has been two-fold and contradictory: military confrontation and sporadic negotiations. For most of the twenty-year conflict, the government openly promoted a military solution and has waged an offensive war against the LRA—an approach for which it has been able to garner considerable foreign military assistance. Increasingly, the war in the North became a money-making venture, particularly for certain senior military figures. In the post-September 11 world, the government succeeded in getting the LRA on the list of terrorist organizations maintained by the U.S. government. President Museveni has usually favored amnesty as a fallback. The government has also sporadically pursued negotiations—mainly under the auspices of Betty Bigombe, an Acholi woman and Government Minister, who at great personal risk made serious attempts to meet with the LRA in 1994 and again in 2004. Her attempts were widely admired, but by the summer of 2005 they were seen as destined for failure.

Views on the conflict and how it should be resolved were therefore always drastically divided between Northern Uganda, where the conflict was playing out, and the rest of the country, which was generally prospering.<sup>6</sup> In the North, religious and traditional leaders increasingly mobilized to try to find peaceful local solutions to the conflict, involving dialogue and a focus on reintegration of former LRA combatants.<sup>7</sup> They were soon joined by coalitions of humanitarian and human

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<sup>6</sup> The dividing line is often said to run neatly along the Nile.

<sup>7</sup> Examples include the Acholi Religious Leaders Peace Initiative (ARLPI) and the Civil Society Organisations for Peace in Northern Uganda (CSOPNU). See BARNEY AFAKO, *CONCILIATION RESOURCES, RECONCILIATION AND JUSTICE: MATO OPUT AND THE AMNESTY ACT* (2002).

rights organizations. These coalitions were very vocal about the continued need for dialogue and the need to use traditional Acholi ceremonies to deal with LRA crimes. A related initiative was the passage of a comprehensive Amnesty Act in 2000. The Amnesty Act is unique because: (1) it was initiated by affected groups and was supported by a countrywide consultation prior to coming into force;<sup>8</sup> and (2) the amnesty continues to enjoy a certain level of support, including among populations most affected by the violence.<sup>9</sup> The amnesty was also passed in recognition of the fact that throughout Uganda's violent history since independence, justice in the domestic courts has not been a real option. The amnesty was construed as a gesture to reach out to those who have been abducted, to entice them to choose a path alternative to the LRA.<sup>10</sup> The onus for eligibility is low: reporters under the Amnesty Act are required to renounce the insurgency and are then eligible for reintegration—they are not required to divulge information about atrocities or to participate in any other kind of justice process. An Amnesty Commission hands out certificates and reintegration packages. Several senior LRA commanders and numerous rank-and-file have benefited from amnesty, but it has not led to an unraveling of the LRA.

Another approach promoted by traditional and religious leaders and civil society activists in the North is the use of traditional ceremonies to reintegrate former LRA. These ceremonies are a part of Acholi traditions and encompass a wide array, ranging from the simple cleansing ceremonies to the more elaborate ceremony of the *Mato Oput*. *Mato Oput* refers to the “bitter root.” It involves an extended negotiation between the clans of the perpetrator and the victim to arrive at a common version of events; an agreed compensation; and a reconciliation ceremony that culminates in the mutual drinking of the crushed bitter root. The *Mato Oput* is much publicized and debated both locally and internationally.

In spite of efforts by civil society groups, the war in Northern Uganda long remained a forgotten conflict.<sup>11</sup> Until the appointment of Joaquim Chissano as UN Special Envoy of the Secretary-General on LRA affected areas in late 2006, it was not on the agenda of the Security Council. News of the LRA only occasionally broke through to Western media outlets, and if so, always in very rough lines

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<sup>8</sup> Unlike many other amnesties, this amnesty was not requested by those who would seek to benefit from it.

<sup>9</sup> ICTJ & HUMAN RIGHTS CENTER, UNIVERSITY OF CALIFORNIA-BERKELEY, FORGOTTEN VOICES, A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA (2005); CONCILIATION RESOURCES & QUAKER PEACE & SOCIAL WITNESS, COMING HOME: UNDERSTANDING WHY COMMANDERS OF THE LORD'S RESISTANCE ARMY CHOOSE TO RETURN TO A CIVILIAN LIFE (2006). Uganda had several amnesties before the Amnesty Act of 2000, including an amnesty statute in 1987, but it excluded genocide, murder, kidnapping, and rape.

<sup>10</sup> The Preamble of the Amnesty Act reads in part: “it is the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities.”

<sup>11</sup> See LIU INSTITUTE FOR GLOBAL ISSUES, “THE HIDDEN WAR, THE FORGOTTEN PEOPLE”: WAR IN ACHOLILAND AND ITS RAMIFICATIONS FOR PEACE AND SECURITY IN NORTHERN UGANDA (2003).

where the main attention was on the horror of LRA atrocities and the lack of clarity of their political demands, with little in-depth analysis.

These factors arising from the background to the conflict, and in particular the North-South divide in Uganda, are very important to understanding some key components of the dynamics in Northern Uganda. First, they help to explain the initial quite negative reactions to the intervention of the ICC in Uganda among affected populations, which will be briefly explained in Part II. Second, they help to explain the widespread support for the Juba process described in Part III, which was seen as the most hopeful chance to resolve the conflict to date. The severe humanitarian crisis gave impetus to try to make the Juba talks succeed. Those who with the benefit of hindsight have expressed great skepticism about the process and whether the negotiations were taking place in good faith should not forget this dynamic.

This background also affects current developments. Supporting the arrest warrants is seen as effectively promoting a military solution to the conflict, particularly after the recent military operation (Operation Lightning Thunder) that started toward the end of 2008. The discussions around establishing a War Crimes Division and the International Criminal Court Act described below can be seen as an indication that the government has “won” the conflict.

### **C. Initial Opposition in the North against the ICC Intervention**

It is against this background that the attention of the international community suddenly was focused on Uganda in 2003-2004. This attention involved a much publicized visit by UN Office for the Coordination of Humanitarian Affairs (UNOCHA) Chief Jan Egeland to the IDP camps, during which he declared that Uganda was the “worst humanitarian crisis in the world,”<sup>12</sup> and also the increased attention of the ICC on the conflict. The ICC Prosecutor first declared his interest in Uganda following the Barlonyo massacre on February 21, 2004 in Lira, Northern Uganda, and formally announced the opening of an ICC investigation in July 2004.

As a significant amount of literature exists on the opposition to the ICC in the North the reasons will not be fully explored here.<sup>13</sup> The opposition generally stems from three sources. First, many in the North feared that ICC involvement would make a peace deal with the LRA impossible. There was much debate on this point prior to, during, and after Juba. Second, some also saw the ICC itself as

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<sup>12</sup> *Uganda Conflict “Worse than Iraq”*, BBC NEWS, Nov. 10, 2003, <http://news.bbc.co.uk/2/hi/africa/3256929.stm>.

<sup>13</sup> For two opposing views on this, see TIM ALLEN, *TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD’S RESISTANCE ARMY* (2006); Refugee Law Project, *Peace First, Justice Later*, Working Paper 17 (July 2005).

arbitrary and lacking in legitimacy. People in the North had not heard about the Court when the Government of Uganda signed the Rome Statute.<sup>14</sup> There was a sense that the “Western-style justice” that the ICC sought to impose should not trump local mechanisms. This debate was very controversial and resulted from a vast oversimplification of a complex situation. It is ultimately not helpful to suggest that it is an either/or situation between the stark alternatives of a few trials in The Hague or else Acholi traditional ceremonies.

Finally, there was also a strong sense that this specific ICC intervention was not impartial. The announcement of Uganda’s referral, which was made at a joint press conference with President Museveni, gave rise to perceptions that the Court was siding with the Government—a perception that has proved very difficult to undo. In Uganda, the political skills of President Museveni are admired and respected even by his opponents, and many subsequently assumed that he was in the driver’s seat rather than the ICC Prosecutor. Those who contest the impartiality of the ICC also point to the fact that the ICC has not opened an investigation into the Ugandan army (UPDF) or for the crime of forced displacement. Some argued that conditions in the camps were killing far more people than the LRA. Proponents also point to the fact that in the absence of an ability to enforce arrest warrants, the ICC’s reliance on state cooperation tilts it in that direction.

Although far from uniform, the fact that opposition came from the people in the North, who were essentially the victims of the conflict, was a shock to the ICC and supporters of international justice and posed a considerable political challenge. The ICC responded by adopting a low-profile approach in its investigation and by closely monitoring the ongoing Betty Bigombe peace process, only issuing arrest warrants after it seemed that the process was moribund in October 2005.<sup>15</sup> At that time, people could not have anticipated that the most significant negotiations were yet to come.

## **II. The Juba Peace Process**

### **A. The Negotiations**

In late 2005, the LRA surprised the world by moving to Garamba National Park in Democratic Republic of Congo (DRC). This was most likely a consequence of the realigned political situation in South Sudan after the Comprehensive Peace Agreement signed between North and South Sudan. In early 2006, senior LRA

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<sup>14</sup> Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, U.N.T.S. 90, entered into force July 1, 2002 [hereinafter “Rome Statute”].

<sup>15</sup> Decision on the Prosecutor’s Application for Unsealing of the Warrants of Arrest, ICC-02/04-01/05 (Oct. 13, 2005).

military leaders such as Vincent Otti first made overtures to open a dialogue. In the course of 2006, the Vice President of South Sudan Riek Machar offered to mediate, and on August 26, 2006 the LRA and the Government of Uganda signed the first Cessation of Hostilities (CoH) agreement.<sup>16</sup>

The two and a half years of negotiation known as the Juba peace talks were fraught and suffered several challenges and setbacks. The CoH Agreement was continuously breached and the LRA disrespected deadlines to assemble. Because of the ICC arrest warrants, senior LRA military leaders could not come to Juba to negotiate in person. Instead, they were represented by a delegation composed of exiled Acholi in the Diaspora, who often brought their own political agenda.<sup>17</sup> A number of meetings between the LRA, the delegation of the GoU, and the mediator had to be arranged in remote locations near Garamba Park. When misunderstandings arose between Kony and his negotiators he fired a number of the delegation leaders, including its chairman, Martin Ojul.

In addition there was also a significant difference in vision among the parties. The Government of Uganda perceived the negotiations mainly to be an opportunity to give a “soft landing” to the LRA and to reintegrate them back into Ugandan society, thus eliminating the security threat that existed then.<sup>18</sup> The LRA on the other hand, sought to raise issues relating to the root causes of the conflict in the North and held out hopes that they would be welcomed back as liberators.<sup>19</sup> The LRA received financial and humanitarian assistance throughout the negotiations, an issue that is still controversial. Probably the most serious setback to the negotiations was the LRA’s execution of Joseph Kony’s second in command, Vincent Otti, in October 2007. While this will continue to be a matter of speculation, there are those that believe that this was a turning point for the negotiations as Otti was seen as a proponent of the peace process—whereas many doubt whether Joseph Kony was ever interested in concluding the talks.

The agenda at the Juba peace talks was arranged to cover five agenda items: (1) Cessation of Hostilities; (2) Comprehensive Solutions; (3) Accountability and Reconciliation; (4) DDR; and (5) A Formal Ceasefire. Initially, the negotiations started with issues of accountability, but these proved so contentious that they were quickly deferred. In the final analysis, agreements were reached on all agenda items as well as various Annexures, but a Final Agreement was not reached.

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<sup>16</sup> For an extensive analysis on the Juba peace talks, see International Crisis Group, *Peace in Northern Uganda*, Africa Briefing No. 41 (2006).

<sup>17</sup> *Id.*

<sup>18</sup> David Clarke, *Uganda Rebels Not Serious about Peace—President*, REUTERS, NOV. 20, 2006.

<sup>19</sup> See “LRA Position Paper on Accountability, Truth and Reconciliation in the Context of Alternative Justice System for Resolving the Northern/Eastern Ugandan and Southern Sudan Conflicts,” presented in Juba, South Sudan, Aug. 19, 2006.

## B. Impact of the ICC Arrest Warrants on the Juba Peace Process<sup>20</sup>

In years to come, debate will continue to abound as to whether the arrest warrants were the most significant factor that broke down the Juba Peace Process. In this sense, international justice in Uganda posed a risk to the pursuit of national justice. This is a very complex issue on which it may be impossible to be strictly empirical. It is very difficult to pinpoint a single cause for the breakdown of the talks; rather, multiple factors led to this outcome. Analysts also argue about to what extent the arrest warrants served to bring the LRA to the negotiating table. The LRA certainly sought to use the talks to rid themselves from the problem of the ICC arrest warrants. But again, a variety of factors contributed to their participation in the talks and it is not possible to point to the ICC arrest warrants as the single, or even the main factor.

What is clear is that the ICC arrest warrants had a particularly significant impact on the content of the negotiation and the Agreement on Accountability and Reconciliation.<sup>21</sup> In the course of the negotiations, the LRA consistently demanded that the arrest warrants be removed as a condition for signing a final agreement. The government instead took the position that it would approach either the ICC or the Security Council to have the arrest warrants halted if and when the LRA signed the final agreement.

A number of informal, off-the-record discussions took place with the LRA leadership during the course of the negotiations, in order to explain to them the nature and consequences of the ICC arrest warrants. During these discussions, it was also explained to the LRA that a measure of accountability would need to accompany any final settlement, and that neither the affected population nor the international community would abide by an agreement that was seen to give another amnesty or a mere “slap on the wrist” for the LRA senior leaders. The religious, traditional, and other civil society leaders, who had been given formal observer status by the Mediator, played a critical go-between role in some of these discussions directly with the LRA leadership.

The dispute over the arrest warrants came to the fore with the discussions on Agenda Item 3, on Accountability and Reconciliation. A day-long workshop on Accountability and Reconciliation was held at Juba on June 1, 2007. The workshop addressed a number of topics including: (1) traditional justice in Acholi and other Northern areas; (2) international standards and practices on transitional justice; and (3) the Ugandan Constitution, the Ugandan legal system, and national institutions

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<sup>20</sup> See also Marieke Wierda & Michael Otim, *Understanding Juba*, in PAL WRANGE, *THE INTERNATIONAL CRIMINAL COURT AND THE JUBA PEACE PROCESS OR GLOBAL LAW AND LOCAL FRICTION* (Fountain Publishers, forthcoming 2010).

<sup>21</sup> Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (June 29, 2007) [hereinafter “Agreement”].

such as the Amnesty Commission and the Ugandan Human Rights Commission. All of these topics would eventually be reflected in the Agreement itself.

The discussion on international standards at Juba went beyond a discussion of the obligations of Uganda under the Rome Statute. Instead, it addressed current trends in transitional justice around the world and the impact of the Rome Statute having entered into force. One major conclusion of the workshop was that transitional justice processes at the domestic level have a better chance of bringing long-term transformation to a particular society and consequently that a national solution should be pursued.

The most relevant provisions of the Rome Statute for the discussion on the arrest warrants were deemed to be Articles 17-19, which lay out the complementarity framework, rather than Articles 53<sup>22</sup> or 16<sup>23</sup>, both of which had been a part of the discussions prior to Juba. Participants discussed the fact that national criminal proceedings were most likely to meet the complementarity threshold.<sup>24</sup> The Colombian Justice and Peace Law (2005) was examined as a possible model as it provides some guidance on the issue, particularly in terms of its provisions linking justice to truth and reparations and on reduced sentences. Article 17 of the Rome Statute is silent on the exact requirements for punishment.<sup>25</sup>

The discussions of June 1, 2007 formed the backbone for detailed negotiations on the Agreement on Accountability and Reconciliation, which was signed on June 29, 2007. The choice to pursue a national solution paved the way for the talks to proceed well beyond Agenda Item 3, as it theoretically provided for a way to deal with the arrest warrants.

Following this, there was a period of intense consultations in Northern Uganda where people in various locations were asked their views on the mechanisms that should be put in place to implement the principles set out in the Agreement. The Government and LRA consultations were held separately. Although some aspects of the consultation process have been criticized, the visits of the Head of Uganda

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<sup>22</sup> Article 53 of the Rome Statute states that the Prosecutor may discontinue an investigation or prosecution if proceeding is not “in the interests of justice.” Some of its decisions are subject to judicial review. What is meant by this phrase has been the subject of intense debate including in the Ugandan situation. In 2006, the Office of the Prosecutor published an Internal Policy Paper that clarifies that the expression interests of justice does not equal the interests of peace and that Article 53 would only be used in exceptional circumstances.

<sup>23</sup> Article 16 provides that the Security Council may request the Court to defer an investigation or prosecution for a twelve-month renewable period, acting under Chapter VII of the U.N. Charter.

<sup>24</sup> This would have to include the opening of an investigation for the same acts and conduct charged in the ICC arrest warrants, and a reversal of the grounds on which the referral was made, which was an inability to arrest the LRA. In other words, the LRA would have to disarm and come onto Ugandan soil, including in particular the LRA leaders.

<sup>25</sup> This is not to suggest that the issue of punishment is irrelevant. In terms of willingness, pursuant to Article 17(2), the Court may examine whether “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.” A disproportionately low sentence may be said to be intended to shield a perpetrator.



Government Delegation, Minister Rugunda, to remote areas such as West Nile were quite important to creating a sense of ownership in the outcome of the talks. Following these consultations, an Annexure to the Agreement was drafted and signed in February 2008.<sup>26</sup> The contents of this Agreement and Annexure are discussed in the following section.

Toward the end of the talks, there were intensive efforts to clarify with the LRA what was being proposed, particularly regarding the relationship between the proposed War Crimes Division and traditional justice.<sup>27</sup> In final meetings between Joseph Kony and religious and traditional leaders in November 2008 it was clear that the LRA senior leadership did not trust the process and that they were not inclined to demobilize.

### **C. The Juba Agreement on Accountability and Reconciliation: A Framework for Transitional Justice in Uganda**

An important decision that was taken at Juba was that no single mechanism would suffice to meet all justice needs, but rather that multiple mechanisms would be needed, including new and pre-existing ones. The Annexure lays out the mechanisms that will form part of an “overarching justice framework.”<sup>28</sup> The Agreement foresees a comprehensive and integrated approach including formal justice, traditional justice, truth-seeking, reparations, and the Amnesty and Ugandan Human Rights Commissions.

A cornerstone of the Agreement is found in Article 4.1 which states that “[f]ormal 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. Provided that, state actors shall be subjected to existing criminal justice processes and not to special justice processes under this Agreement.” The Annexure specifies that “a special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict.”<sup>29</sup> These parts of the Agreement were seeking to lay the foundation for a possible complementarity challenge and were directly influenced by the Rome Statute’s insistence on investigation and prosecution.

Throughout the Agreement, one can see the influence of the Rome Statute but also of other international human rights instruments. There are provisions to reflect international conventions, such as the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of*

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<sup>26</sup> Annexure to the Agreement on Accountability and Reconciliation (Feb. 19, 2008) [hereinafter “Annexure”].

<sup>27</sup> Final Report, *Workshop on Accountability and Reconciliation in Uganda: Juba Peace Talks* (May 6-7, 2008).

<sup>28</sup> Agreement art. 5.2.

<sup>29</sup> Annexure art. 7.

*the Child*,<sup>30</sup> and also developments on the rights of victims in international law.<sup>31</sup> For instance, on reparations, the Agreement notes that “reparations may include a range of measures such as: rehabilitation, restitution, compensation, guarantees of non-recurrence and other symbolic measures such as apologies, memorials and commemorations. Priority shall be given to members of vulnerable groups.”<sup>32</sup> This language borrows from the definition of reparations encompassed in the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the General Assembly of the UN in 2005.<sup>33</sup>

In terms of truth-seeking, the Juba Annexure refers to a “body” whose mandate shall be an “inquiry into the past and related matters.” It avoids the term “commission” although many of the listed functions resemble remarkably closely those ordinarily assigned to truth commissions.

The Agreement on Accountability and Reconciliation also designates traditional justice as a “central part of the framework for accountability and reconciliation.” It recognizes the diversity of mechanisms available, making specific reference to *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc*, and *Tonu ci Koka*.<sup>34</sup> Importantly, these various approaches have common elements that emphasize a negotiated process of arriving at a mutually accepted version of events, followed by reconciliation and reparations to restore the relationship between the affected clans. Under the Annexure, the Government has an obligation to examine these mechanisms “with a view to identifying the most appropriate role for such mechanisms.”<sup>35</sup> To combat concerns that such measures may be coercive, the Annexure specifies that participation in these mechanisms will be voluntary.<sup>36</sup>

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<sup>30</sup> For instance, the Agreement provides for a “gender sensitive approach” and is explicit that implementation will “recognize and address the special needs of women and girls” and protect them as well as encourage and facilitate their participation. Agreement art. 11. The Agreement recognizes the special needs of children and the need to recognize their views, encourage and facilitate their participation, promote reparations for them, and protect them. Agreement art. 12.

<sup>31</sup> The Agreement gives a definition of victims that reads as an elaborated version of the definition of victims found in Rule 85 of the Rules of Procedure and Evidence of the ICC: victims are “persons who have individually or collectively suffered harm, including physical or psychological injury, emotional suffering or economic loss, as a consequence of crimes and human rights violations committed during the conflict.” Agreement art. 6.1. The Agreement states that the Government “shall promote the effective and meaningful participation of victims in accountability and reconciliation proceedings” and that victims “shall be informed of the processes and any decisions affecting their interests.” Agreement art. 8.2.

<sup>32</sup> Agreement art. 9.1.

<sup>33</sup> See, e.g., Agreement art. 12(v).

<sup>34</sup> Agreement art. 3.1. For a more in-depth look at these mechanisms, see ERIN BAINES, JUSTICE & RECONCILIATION PROJECT, ROCO WAT I ACHOLI: RESTORING RELATIONSHIPS IN ACHOLILAND: TRADITIONAL APPROACHES TO JUSTICE AND REINTEGRATION (2005).

<sup>35</sup> Annexure art. 20.

<sup>36</sup> Annexure art. 22. Several reports have noted the diversity of opinions regarding traditional reconciliation ceremonies, including JUSTICE & RECONCILIATION PROJECT & QUAKER PEACE & SOCIAL

Many questions are left open, including whether these systems ought to be codified. There are also outstanding questions about whether *Mato Oput* in Acholi would suffice to redress crimes other than murder. Representation of women or youth remains another concern.<sup>37</sup> The Annexure specifies that the impact on women and children should be considered.<sup>38</sup>

The Juba Agreement provided the beginnings of a transitional justice framework that could be built on in the Ugandan case. Regrettably, its potential has been stifled by the failure to reach a final agreement.

### III. The Current Situation in Uganda

#### A. Legal Status of the Juba Agreement

As mentioned elsewhere,<sup>39</sup> in a curious way the Juba process was simultaneously a failure and a success. The renewed fighting with the LRA during Operation Lightning–Thunder on December 14, 2008 and the atrocities committed by the LRA in the final months of 2008 have eliminated the possibility of a continued negotiation in Uganda—making a final settlement with the LRA seem more elusive than ever.<sup>40</sup> At the same time, relative peace has returned to Northern Uganda and IDP return is taking place on a fairly widespread basis. The gains derived from this peaceful period are deemed by many to be permanent.

Nonetheless, the non-signature of the Final Peace Agreement has left a complex legal situation. Several agreements had been signed by the LRA along the way, but it was clear that the LRA did not intend to live up to these obligations. The Government however pledged implementation. The mediator, Dr. Riek Machar, also urged implementation for confidence-building with the LRA, for addressing underlying grievances, and for the benefits that would accrue to conflict-affected communities.<sup>41</sup> The mediator also argued that the Agreements reached in Juba are

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WITNESS, SHARING THE BURDEN OF THE PAST: PEER SUPPORT AND SELF-HELP AMONGST FORMER LORD'S RESISTANCE ARMY YOUTH (2008).

<sup>37</sup> JUSTICE AND RECONCILIATION PROJECT, *THE COOLING OF HEARTS: COMMUNITY TRUTH-TELLING IN ACHOLILAND* (2007).

<sup>38</sup> Annexure art. 20.

<sup>39</sup> Wierda & Otim, *supra* note 20.

<sup>40</sup> It is estimated that a thousand civilians were killed by the LRA in the aftermath of Operation Lightning Thunder, hundreds were abducted, and around 200,000 displaced. See Ronald Atkinson, *Revisiting 'Operation Lightning Thunder'*, *THE INDEPENDENT*, June 9, 2009. The figures given by the ICC are higher: with 1250 killings, 2000 abductions and 300,000 displacements in Congo alone and 80,000 displaced and 250 killed in the Central African Republic ("CAR"). See ICC, The Office of the Prosecutor, *OTP Weekly Briefing Issue 26*, Mar. 1, 2010.

<sup>41</sup> Report and Recommendations of the Chief Mediator of the Peace Process between the Government of the Republic of Uganda and the LRA (June 16, 2008), available at [http://www.beyondjuba.org/peace\\_agreements/Machar\\_Report\\_1.pdf](http://www.beyondjuba.org/peace_agreements/Machar_Report_1.pdf).

legally valid and not provisional instruments. They were all signed or initialed by both parties.

## **B. The War Crimes Division and International Criminal Court Bill/Act**

In the aftermath of the non-signature of the final agreement, the Government of Uganda set up a War Crimes Division (WCD) of the High Court of Uganda as required by the Annexure.<sup>42</sup> Most recently, on March 10, 2010, it has also passed into law the International Criminal Court Bill. Prior to that, in the absence of other legislation, it was not clear why LRA combatants should not continue to benefit from the amnesty which continues to be in force. During the recent fighting with the LRA there have been a number of arrests, including that of Coronel Thomas Kwoyello. Kwoyello is now charged before the Gulu Magistrates Court on counts of kidnap with intent to murder. This may become the first case before the War Crimes Division.

Until recently, the legal basis for the jurisdiction of the War Crimes Division was unclear. Some argued that the legal basis lies in Uganda's sovereign right to try crimes committed on its territory or by its nationals. Others argued that while the constitution of the War Crimes Division was possible by administrative act, through the Judiciary, further legislation would be required before it can begin to function.

A difficult issue for debate is whether the Juba Agreement prevents the War Crimes Division from trying state actors or whether it can try anyone who commits crimes within its jurisdiction. Article 4.1 states that "[s]tate actors shall be subjected to *existing criminal justice processes* and not to special justice processes under this Agreement."<sup>43</sup> This is widely interpreted to refer to the military courts martial under which the UPDF are ordinarily liable. But it is not entirely clear to what extent the War Crimes Division is bound by the Agreement. However, politically, it is highly likely that the War Crimes Division will in the first instance concern itself with crimes committed by the LRA, even if its mandate may not be restricted to the LRA.

Four Ugandan judges have already been appointed to the Court. A number of these judges have international experience and some prior exposure to similar mechanisms. The suggestion has also been made to request the addition of international judges to the bench, preferably from other common-law, African countries. This could be helpful in further bolstering the perceived independence of the Court.

Increasingly, discussion on the required legislation centered on the draft International Criminal Court Bill of 2006. Discussions were advised by an

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<sup>42</sup> Annexure art. 7.

<sup>43</sup> Agreement art. 4.1 (emphasis added).

international organization called the Public International Law and Policy Group (PILGP). The gist of this initiative has been to amend the previously tabled International Criminal Court Bill in order to criminalize the crimes found in the Rome Statute (war crimes, crimes against humanity, and genocide) as well as to add some provisions that cover the operations of the War Crimes Division.<sup>44</sup> As a result, some of the discussions drifted increasingly away from the purposes of Juba and centered on ICC implementation.

In terms of the substantive law that the War Crimes Division could apply, three options were on the table:

- *Geneva Conventions Act, 1964*. There is some difficulty in applying this Act, in that it criminalizes only grave breaches of the Geneva Conventions, which are widely recognized only to apply to international armed conflict. It is not clear that the LRA conflict can be classified as international. An argument could be made that the provisions of Common Article 3, also included in this national legislation, sufficiently define the crimes in Ugandan law so as to criminalize war crimes in internal armed conflict. Nonetheless, the fact that violations of Common Article 3 probably are punishable under customary international law only became very clear with the creation of the ad hoc International Criminal Tribunals in 1993 and 1994.

- *International Criminal Court Bill 2006*. As described above, while this Bill originally dealt mostly with cooperation with the ICC, recent amendments expanded it to implement Rome Statute crimes. There was much argument about how far back the Bill could go and whether applying it to the LRA conflict would violate the Ugandan Constitution's prohibition on retroactive application of the law.<sup>45</sup> Some argued that the "underlying acts" of crimes against humanity and war crimes, such as murder, abduction, or rape have been prohibited under Ugandan law, and that on that basis, it would not be unfair to convict people of war crimes and crimes against humanity. Others argued that the unfairness caused by retroactive application can be cured in other ways, such as through mitigating sentences.

- *Domestic criminal law*. As mentioned, the Ugandan Penal Code contains a number of offenses that could be relevant to the conflict. Some

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<sup>44</sup> These provisions were later omitted.

<sup>45</sup> CONSTITUTION OF THE REPUBLIC OF UGANDA art. 28(7): "No person shall be charged with or convicted of a criminal offence which is founded on an act or omission that did not at the time it took place constitute a criminal offence." On the other hand, Article 15(2) of the International Covenant on Civil and Political Rights states that the prohibition on retroactivity shall not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

have argued that it is not satisfactory to use these charges as they do not adequately describe the widespread or systematic nature of the conduct in question. The Juba Agreement stated that the Court should focus on “the most serious crimes, especially crimes amounting to international crimes.”

On March 10, 2010, the Legal and Parliamentary Affairs Committee passed the International Criminal Court Act, incorporating the Rome Statute crimes, and dated it 2002.

Some contentious issues in respect of the Bill now appear resolved. For instance, there was a lot of discussion on the age of criminal liability. The Rome Statute puts the age of individual criminal responsibility at eighteen. Under Ugandan law, the age of criminal liability is twelve. The ICC Act 2010 seems to leave this issue to Ugandan law rather than adopting the Rome Statute threshold.<sup>46</sup>

Likewise, the issue of the death penalty underwent much discussion. An early draft proposal stated: “The penalty for a crime against humanity is imprisonment for the remainder of the convicted person’s life or a lesser term of years, or other penalties as the court may impose.” The ICC Act 2010 seems to uphold life imprisonment as the maximum penalty. As in countries such as Rwanda, this creates the complexity that offenders accused under Ugandan law for less serious offenses face the death penalty, whereas offenders appearing before the WCD will not. In any case, the reference to “alternative penalties” that was found in Juba seems to be off the table.

It is also not clear what will happen with lesser offenders. During the Juba talks, the presumption was that the number tried would be small and that most of the LRA would not be tried. Since Juba, this has become considerably less clear. The Directorate of Public Prosecutions (DPP) has already established a Special Unit staffed with analysts and other multidisciplinary functions. It is now anticipated that captured LRA could be tried, even if they are comparatively low in the hierarchy. The Juba Agreement also emphasized the right of individuals to cooperate with criminal proceedings through confessions, disclosures, and provision of information. The Agreement stipulated that cooperation will be recognized in sentencing.<sup>47</sup> Relevant information for this purpose includes that concerning the individual’s own conduct, details on missing persons, and the location of landmines or unexploded ordinances or other munitions.<sup>48</sup> These provisions are not reflected in the International Criminal Court Act.

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<sup>46</sup> At the time of writing, a public version of the International Criminal Court Act was not yet available.

<sup>47</sup> Agreement art. 3.6.

<sup>48</sup> Annexure art. 15.

### C. Prioritization of Formal Criminal Justice

In August 2008, the Government assigned the task of “developing and managing an effective transitional justice system for Uganda” to its Justice, Law and Order Sector (JLOS). JLOS represents a multi-donor approach to developing the justice sector as a whole. A Transitional Justice Working Group was established under the chairmanship of Justice James Ogoola, the Principal Judge. It is composed of five subcommittees: (1) formal criminal jurisdiction; (2) truth-seeking; (3) traditional justice; (4) the integration of formal and other forms of justice; and (5) issues of funding. These subcommittees are working, albeit at different speeds, and producing position papers.

In practice, leaving transitional justice solely to a sector used to dealing with formal justice has meant unequal implementation with an emphasis on criminal justice rather than on other justice measures. Moreover, Uganda has rushed to put the War Crimes Division and ICC Act in place by the time it hosts the Rome Statute Review Conference in May and June 2010 in Kampala, which has further accelerated the implementation of criminal justice measures over other, more victim-oriented approaches.

As mentioned, the ICC Act effectively only deals with criminal justice and does not address the question of integration between the formal and informal justice systems, such as traditional justice. A central question remains as to whether the formal and traditional justice systems should be conceived of as parallel—i.e. functioning independently and with little interaction—or as having integrated key functions, including investigations or sentencing mechanisms.

There are some risks to associating traditional justice too closely with formal justice. If former combatants think that their participation in traditional justice ceremonies will somehow be used to pursue formal justice, it may have a chilling effect on their willingness to participate. If more people are likely to participate in traditional justice than in formal justice proceedings, it may be important to disassociate traditional justice from formal justice. In the context of Northern Uganda it is important to acknowledge that the traditional justice system is likely necessary to deal with serious crimes, possibly in large numbers. Several options have been discussed in terms of the integration of formal and informal justice, including using traditional justice as the entry point to formal justice,<sup>49</sup> using it

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<sup>49</sup> Some have argued that the traditional justice system should form an entry point for all returnees, so that each will first go to traditional justice before being streamlined to other mechanisms, and that an investigation as part of traditional justice should determine where a returnee goes next. However, participation in traditional justice should remain voluntary, meaning that nobody can be forced into it. Also, the investigations conducted by the Special Unit of the DPP are likely to proceed quite independently. In this sense, it is not realistic to conceive of traditional justice carrying out a so-called “classification of the crimes” as an entry point to an integrated system.

for the purpose of investigations;<sup>50</sup> allowing traditional leaders to attend the trials as “assessors” as is permitted to lay persons under Ugandan law; allowing LRA returnees to undergo traditional justice after they go through formal justice; and taking the willingness to undergo traditional justice into account for sentencing purposes.

These questions around traditional justice still have to be addressed by the Transitional Justice Working Group. However, the debate has increasingly focused on technical aspects of both Ugandan and international law, and it is dominated by a different set of actors than those that were involved in Juba. Lawyers and technocrats have come to play an important role, whereas the politicians and community-level leaders previously involved have become increasingly absent. The forum for the current discussion is Kampala, with a view to engaging the international community in advance of the Rome Review Conference. Overall, the legislative changes currently in place eliminate some of the flexibility in dealing with rebels, which might complicate any future attempts at negotiations.

#### **IV. ¿Challenging Complementarity?**

A crucial part of Uganda’s attempt to put in place domestic measures currently is to be able to eventually challenge complementarity before the ICC. While currently the question is theoretical, it is also a political issue and has sparked intense interest in and outside of Uganda. Although the arrest warrants remain in place, Uganda maintains the right to challenge the admissibility of the case against the three surviving LRA leaders under Article 19 of the Rome Statute. Uganda is entitled to do this because the Rome Statute requires the ICC to defer to national proceedings where states are “willing or able genuinely to investigate or prosecute.”<sup>51</sup> Complementarity may be challenged by a state or an individual accused of crimes before the Court. Article 19 states that in principle complementarity can only be challenged once, with some exceptions. This basically means that Uganda should only challenge when it is most likely to succeed.

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<sup>50</sup> In general, the criminal investigation of serious crimes is a distinct process, involving considerations that should be differentiated from fact-finding or investigations that may take place as part of traditional justice. The DPP is required to carry out these investigations in an independent manner, using a methodology that is multi-disciplinary in nature—i.e. employing investigators, analysts, lawyers, experts on gender issues, etc. He is likely to be most interested not only in the crimes themselves but also in the command structures, forms of liability, evidence of the mental state of the perpetrator, etc. These crucial differences would seem to point to the advantages of proceeding largely separately in the case of investigations. However, traditional justice ceremonies have real potential to contribute to truth-seeking. It may be necessary to devise ways in which information revealed can be captured and used for other transitional justice processes.

<sup>51</sup> Rome Statute art. 17.



Complementarity is often misunderstood, both because it is procedurally complicated and has not yet been clarified in the jurisprudence. Some commentators take the view that the Court will look at a wide range of factors, including whether the death penalty applies; whether there is adequate victim participation or witness protection; the level of capacity of the legal system; and whether the trial complies with international fairness standards. They suggest that trials at the national level would need to be similar in standards and process as those at the ICC. However, while some of these issues may be addressed as good practice, this is not what the Rome Statute actually says. The Rome Statute sets a lower threshold, namely whether “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or is otherwise unable to carry out its proceedings.”<sup>52</sup> This means that in terms of ability, the Court gives considerable deference to national legal systems.

In terms of willingness, the Court may examine whether “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.”<sup>53</sup> For instance, a disproportionately low sentence could be an indicator of this. Other factors may be undue delay, or more generally, whether “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>54</sup>

There are a variety of factors that may make a complementarity challenge more likely to succeed. First, in terms of what is known about the practice of the ICC on complementarity to date, it is clear that Uganda would need to *open an investigation* in those cases in which it wants to challenge admissibility. In the absence of national proceedings, under the current jurisprudence of the Court the case remains admissible. Furthermore, the ICC has stated in the *Lubanga* case that “national proceedings [must] encompass both *the person and the conduct* which is the subject of the case before the Court.”<sup>55</sup> It is not yet clear if this standard would be followed here, but in order to increase the likelihood of a successful challenge, national prosecutors should examine the existing arrest warrants against LRA leaders and try to follow them as closely as possible, including the forms of participation in the crimes. The more advanced a national proceeding, the more likely it may be to successfully challenge admissibility.

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<sup>52</sup> Rome Statute art. 17.3.

<sup>53</sup> Rome Statute art. 17.2(a).

<sup>54</sup> Rome Statute art. 17.2(c).

<sup>55</sup> Prosecutor v. Thomas 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, Annex I, para. 31, ICC-01/04-01/06 (Feb. 24, 2006) (emphasis added).

Second, Uganda would need to argue that the grounds on which it first made the referral no longer apply. When it made the referral it argued that it was unable to arrest the LRA because they were outside of its territory. The ICC Pre-Trial Chamber found that the case was admissible, and noted that “the Government of Uganda has been unable to arrest . . . persons who may bear the greatest responsibility for the crimes within the referred situation.”<sup>56</sup> Uganda would need to demonstrate that it has the ability to obtain custody of the persons in question.<sup>57</sup>

Third, Uganda would need to ensure that it does not appear unwilling by having in place an alternative sentencing regime that allows for disproportionately low sentences. Under the current ICC Act, this is unlikely to occur as the current draft does not include alternative penalties.

Some argue that the Ugandan legal system lacks independence and impartiality and that it should not try the LRA. However, as previously mentioned, Uganda would not need to demonstrate independence and impartiality on a system-wide basis but only in the cases at hand. The additional international scrutiny on the War Crimes Division will be helpful in this regard.

The matter remains undecided. On February 29, 2008, pursuant to its *proprio motu* powers to examine whether the case remains admissible under Article 19(1) of the Statute, the Pre-Trial Chamber asked the Government of Uganda for further information on recent developments. In its March 27, 2008 filing, the Government of Uganda stated: “The special division of the High Court is not meant to supplant the work of the International Criminal Court and accordingly, those individuals who were indicted by the International Criminal Court will have to be brought before the special division of the High Court for trial.” The Prosecutor had argued in a submission of November 18, 2008 that he had not identified any national proceedings and that therefore the case remained admissible. Two NGOs, Redress and the Uganda Victims Foundation, submitted observations on the legal and factual background of the implementation of the Agreement and the Annexure. On March 10, 2009 the Pre-Trial Chamber issued a decision that held:

Pending the adoption of all relevant texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of

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<sup>56</sup> ICC Pre-Trial Chamber II, Warrant for Arrest for Okot Odhiambo, para. 27, ICC-02/04-01/05-56 (July 8, 2005) (internal citation omitted).

<sup>57</sup> There is some ambiguity about the extent of Uganda’s legal obligations towards the Court in anticipation of a challenge. For instance, does Uganda remain bound by its obligations to enforce the arrest warrants, or how will non-enforcement be perceived? Article 95 of the Rome Statute states that “[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court . . .” It may be that Uganda would be entitled to postpone the execution of the arrest warrants, but it is not entirely clear whether this could be done before a challenge is brought.

the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage.<sup>58</sup>

The Appeals Chamber upheld the Pre-Trial Chamber's decision on September 16, 2009.<sup>59</sup> An actual challenge to the admissibility of the case will remain theoretical for some time to come, but the decision lends impetus to putting in place the War Crimes Division and International Crimes Bill as soon as possible.

## V. The Views of Affected Populations<sup>60</sup>

The Ugandan transitional justice debate has gone through highs and lows in terms of involving those who have been most affected by the conflict. In the initial stages of the process, opinions of the affected population on transitional justice were studied more extensively in Northern Uganda than in many other parts of the world. A significant number of surveys and other studies have been carried out on various aspects of transitional justice. Key studies include those by the UN Office of the High Commissioner for Human Rights<sup>61</sup> and a report on truth-seeking produced by the Gulu District NGO Forum and the Liu Institute's Justice and Reconciliation Project.<sup>62</sup> A lot of these were initiated due to heightened interest because of the ICC intervention in Uganda.

A survey called *Forgotten Voices* was conducted by the Berkeley Human Rights Center and ICTJ in 2005, a considerable period before Juba.<sup>63</sup> This survey was repeated in 2007 in a report entitled *When the War Ends*, at the height of the Juba peace process.<sup>64</sup> Both of these were large-scale, representative, affected-population surveys with approximately 2500 respondents each. When surveyed

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<sup>58</sup> *Prosecutor vs. Kony et al*, Pre-Trial Chamber Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377 (Mar. 10, 2009).

<sup>59</sup> *Prosecutor vs. Kony et al*, Appeal Chamber, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute" of 10 March 2009, ICC-02/04-01/05-408 (Sept. 16, 2009).

<sup>60</sup> See also Wierda & Otim, *supra* note 20.

<sup>61</sup> UNOHCHR, MAKING PEACE OUR OWN: VICTIMS' PERCEPTIONS OF ACCOUNTABILITY, RECONCILIATION AND TRANSITIONAL JUSTICE IN NORTHERN UGANDA (2007).

<sup>62</sup> JUSTICE & RECONCILIATION PROJECT, *supra* note 37. Other examples include OXFAM, BRIEFING PAPER, THE BUILDING BLOCKS OF SUSTAINABLE PEACE: THE VIEWS OF INTERNALLY DISPLACED PEOPLE IN NORTHERN UGANDA (2007); HUMAN RIGHTS FOCUS, FOSTERING THE TRANSITION IN ACHOLILAND: FROM WAR TO PEACE, FROM CAMPS TO HOME (2007).

<sup>63</sup> ICTJ & HUMAN RIGHTS CENTER, *supra* note 9.

<sup>64</sup> ICTJ & BERKELEY-TULANE INITIATIVE FOR VULNERABLE POPULATIONS, WHEN THE WAR ENDS: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN NORTHERN UGANDA (2007).

in 2005, a majority of respondents (66%) said that they favored “hard options” in dealing with LRA leaders, including trials, punishment, or imprisonment. Only 22% preferred options such as forgiveness, reconciliation, and reintegration. In 2007, this statistic had reversed, with 54% preferring soft options and 41% preferring hard options. This may indicate that during the height of Juba, people were more willing to compromise on justice issues. The survey has not been repeated since the end of Juba, but it could be that the period of relative calm that has prevailed in Uganda since then would change these perceptions once again.

While a number of the studies on Northern Uganda used “peace” and “justice” in their titles, the goal could never be to determine whether people would prioritize peace or justice. As would be the case anywhere, the people of Northern Uganda want both. Still, some significant findings emerged from the studies. Most victims support comprehensive approaches to justice that also involve measures for victims, such as reparations or truth-seeking. From the research work that has been done, it is clear that people also do not take an either/or approach to different justice options but want an approach of multiple mechanisms. In Uganda, where the debate had become very polarized between the ICC and traditional justice, this was a significant finding that lent further legitimacy to the approach taken at Juba.<sup>65</sup>

Another important factor that emerged from the survey work is that knowledge of the ICC increased considerably over the years. In 2005, only 27% of respondents had heard of the ICC, whereas in 2007 this number had increased to 60%. Among those who had heard of the ICC, many expressed support, thereby challenging to some extent the notion that the North was universally opposed to it. On the other hand, quantitative methodologies were not necessarily effective at testing whether people understood the Court. For instance, in 2007 55% of respondents who had heard about the ICC (32% of the total) still thought that the Court had the power of arrest. Out of those who had heard about the Court, 76% took the view that pursuing trials at that time would endanger the Juba talks.

Besides revealing the varied and changeable nature of local opinions, the research and subsequent consultations that formed a part of the Juba process assisted to fill out the menu of options included in the Juba Agreement. A concrete impact of the consultations and the research has been the focus on victims’ issues such as reparations in the Agreement and Annexure, and particularly the inclusion of a truth commission in the Annexure. But as mentioned, in the current debates these issues have increasingly slipped down the list of priorities. Currently the views of the affected populations are in danger of being neglected in the wider transitional justice process.

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<sup>65</sup> Sometimes the dichotomy between the ICC and traditional justice is mischaracterized as one between “Western-style retributive justice” and “African restorative justice.” This stark dichotomy both neglects the restorative aspects of the ICC, including its provisions for victim participation and reparations, and the retributive aspects of traditional justice.

## Conclusions

Uganda's search for peace and justice has attracted much attention over the last few years. Uganda is one of the first countries to go through a full-fledged peace process under the scrutiny of the ICC and its supporters. While it may be too early to draw sweeping conclusions, a few tentative ones are possible.

For instance, while the arrest warrants of senior LRA leaders were a complicating factor in the Juba talks, negotiations did not prove impossible and proceeded some way before they broke down. This challenges the perception that the ICC itself is an obstacle to peace.

On the other hand, the pressure of the arrest warrants was carefully utilized at Juba in order to negotiate a solution that would seek to achieve a comprehensive approach to justice at the national level. This was possible because Uganda had something to offer to the LRA: the alternative of a trial at a national level, which would have not resulted in impunity but which may have rendered issues such as penalties subject to further negotiation and mitigation. This will not necessarily be the same in other situations.

A further lesson from Uganda is that the involvement of the ICC has had the tendency to skew the justice debate away from comprehensive transitional justice solutions and towards criminal justice. The upcoming Review Conference in Uganda has impacted the speed with which certain justice measures have been put in place. While it is appropriate that Uganda develops its own ability to investigate and prosecute international crimes, it should not neglect a series of wider considerations that may be at stake.

These wider considerations include the political context. For instance, current moves should not resemble victor's justice or else they may further contribute to the North-South divide. Second, future negotiations may still be necessary but are complicated by the recent legislative proposals in the International Crimes Bill which deviate from the Juba Agreement. Finally, people in Northern Uganda continue to desire a comprehensive approach to justice, which incorporates measures such as truth-seeking, reparations, and culturally sensitive approaches such as traditional justice. Since the people of the North have borne the brunt of this conflict, a victim-centered approach to justice demands that their views are adequately considered.

## Chapter 10

# The Impact of Hybrid Tribunals: Current Practice in Bosnia and Herzegovina and Cambodia

*Olga Martin-Ortega & Johanna Herman\**

A new model of justice administration emerged at the end of the 1990s through the development of hybrid or internationalized courts. These courts are composed of a mixture of international and domestic staff and apply a combination of national and international law. Now, ten years after the first hybrid tribunals were established, the Special Panels in Timor-Leste have finished their work, the Special Court for Sierra Leone is entering its final stages, and the international judges and prosecutors program in Kosovo has been handed from the UN Interim Administration Mission in Kosovo (UNMIK) to the European Union. The Extraordinary Chambers in the Courts of Cambodia (ECCC) and the War Crimes Chamber (WCC) in the State Court of Bosnia and Herzegovina (BiH) are fully operational and this hybrid model has been suggested for many other situations where for various reasons national prosecutions cannot take place in accordance to international standards, such as Northern Uganda, Kenya, Liberia, or Darfur.

This chapter looks at the ECCC and the WCC and examines their practice in light of the expectations that hybrid tribunals have raised in terms of peacebuilding. This chapter will focus particularly on the tribunals' impact on the rebuilding of the rule of law and the strengthening of public institutions in the countries in which they operate, as well as on the public's perception of their work. It considers the problems and ongoing challenges of the tribunals so far, in order to draw some lessons for their future work and for that of other potential tribunals in post-conflict settings. The information and analysis included here are drawn from field research conducted in BiH and Cambodia during August and September 2009 by the authors. This research included interviews with national and international staff at the courts, members of the judiciary and legal profession, staff of the United Nations, European Union, international organizations, and donors, as well as members of national and international non-governmental organizations.

Part I will introduce briefly the model of hybrid tribunals and their potential role in transitional justice and peacebuilding efforts. In Part II we will look at

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the establishment and work of the WCC and ECCC and present the rule-of-law context in each country. Part III evaluates the work of each court and reflects upon whether they maximize their potential positive impact on the domestic legal system through capacity-building and how they affect the public's perception of rule of law. Part IV reviews the risk for negative impacts, and in the Conclusion we summarize the lessons that might be drawn from this analysis.

## I. Hybrid Tribunals and Peacebuilding Activities

Peacebuilding and transitional justice often take place within the same context and timeframe since they both concentrate on the post-conflict period and the needs of a recovering society. Analysis of the complicated relationship between the two fields has traditionally put them in opposition in the so-called “peace vs. justice” debate. This discussion emphasizes the potential disruptive effects that pursuing accountability in a post-conflict environment could have on the advancements towards peace. However, a growing practice and literature highlights the complementarities between transitional justice and peacebuilding.<sup>1</sup> Both ultimately aim to establish the basis for a democratic society compliant with human rights standards, capable of withstanding social tension and avoiding the repetition of atrocities. This link between transitional justice initiatives and peacebuilding activities is more explicit regarding activities to restore of the rule of law and is explored further below.<sup>2</sup>

Since the growth of multi-dimensional peace operations in the 1990s, the international community now carries out a number of peacebuilding activities after conflict to reconstruct both physical infrastructure and social structures. Peacebuilding efforts focus on a number of activities, including the disarmament, demobilization, and reintegration of ex-combatants; security sector reform, repatriation of refugees; election monitoring; human rights protection; and reform or strengthening of government institutions. The rule of law has been a focus for peacebuilding since the early 1990s and is highly important to UN efforts, as demonstrated by the 2004 Secretary-General report, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.<sup>3</sup> Rule-of-law

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<sup>1</sup> See, e.g., Chandra Lekha Sriram, Olga Martin-Ortega & Johanna Herman, *Transitional Justice and Peacebuilding Strategies: Considerations for Policymakers*, Policy Brief, Just and Durable Peace, No. 2, July 2009, available at <http://www.justpeace.se>; Wendy Lambourne, *Transitional Justice and Peacebuilding after Mass Violence*, 3 INT'L J. OF TRANSITIONAL JUST. 28 (2009).

<sup>2</sup> This link has been acknowledged in the UN Secretary-General's report, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. A/2004/61 (Aug. 23, 2004). However, although they often overlap, it should not be assumed that transitional justice activities automatically support rule-of-law programming or vice versa.

<sup>3</sup> *Id.*

programming aims to guarantee a justice and security system that is effective, professionalized, and compliant with human rights standards.<sup>4</sup> Activities depend on the particular country context but can include electoral assistance; reform, restructuring, and rebuilding of police and law enforcement services; strengthening of legal and judicial systems; and reinforcement or rebuilding of the prison system and facilities.<sup>5</sup> The nature of the activities undertaken means that rule-of-law work is part of a long-term strategy that involves a wide range of actors and sectors.

Hybrid tribunals fulfill one of the most important goals of transitional justice—to achieve justice after conflict by prosecuting perpetrators of the most serious violations of human rights.<sup>6</sup> They also have the potential to positively interact with peacebuilding activities, particularly rule-of-law promotion and justice sector reform.<sup>7</sup> Hybrid tribunals developed as a response to both the cost and distance of the ad hoc tribunals and the impunity or bias perpetuated by domestic prosecutions. These tribunals have not followed one particular model, however all are located within the country in which the atrocities took place; have local and international staff; use a set of substantive and procedural norms based on both national and international standards; and are financially supported in whole or part by the international community.

The mix of international and domestic components has been seen as better suited to address the needs of countries emerging from conflict<sup>8</sup> and as having the potential to achieve the “best of both worlds” in the attempt to promote justice after conflict.<sup>9</sup> The international element is thought to guarantee expeditious prosecutions, impartiality, expertise, and compliance with international human rights standards and international criminal law.<sup>10</sup> That they take place where the atrocities were committed provides the advantages of national staff that are familiar with the language, territory, and social behavior of those involved in the trials and greater accessibility to evidence and witnesses.<sup>11</sup>

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<sup>4</sup> On the definition of rule of law in the context of peacebuilding, see Chandra Lekha Sriram, Olga Martin-Ortega & Johanna Herman, *Promoting Rule of Law: From Liberal to Institutional Peacebuilding*, in PEACEBUILDING AND RULE OF LAW IN AFRICA: JUST PEACE?, (Chandra Lekha Sriram, Olga Martin-Ortega & Johanna Herman eds., forthcoming 2010).

<sup>5</sup> Robert Pulver, *Rule of Law, Peacekeeping and the United Nations*, in PEACEBUILDING AND RULE OF LAW IN AFRICA, *supra* note 4. In addition to criminal justice, peace operations engage in a wide range of non-criminal matters, from constitutional reform and land tenure to citizenship and identification processes. *Id.*

<sup>6</sup> On hybrid tribunals in general, see CHANDRA LEKHA SRIRAM, OLGA MARTIN-ORTEGA & JOHANNA HERMAN, WAR, CONFLICT AND HUMAN RIGHTS 195-213 (2009).

<sup>7</sup> Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 307 (2003).

<sup>8</sup> CHANDRA LEKHA SRIRAM, GLOBALIZING JUSTICE FOR MASS ATROCITIES: A REVOLUTION IN ACCOUNTABILITY 80 (2006).

<sup>9</sup> Beth Dougherty, *Right-sizing International Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, 80 INT’L AFF. 311 (2004).

<sup>10</sup> Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality*, in INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 6 (Cesare Romano, André Nollkaemper, & Jann Kleffner eds., 2004).

<sup>11</sup> *Id.*



From a transitional justice perspective, prosecutions that take place within the framework of a hybrid tribunal, and therefore in compliance with international standards, could make an important contribution to social reconstruction within a post-conflict society. Arguments on the benefits of prosecutions range from their role in establishing an official record of the crimes committed by the individuals on trial and other facts pertaining to the conflict; exonerating whole communities of responsibility by individualizing guilt, and having a cathartic effect for the victims.<sup>12</sup> However, some commentators argue that there is no sufficient empirical evidence to back up such claims.<sup>13</sup> Equally, trials could be destabilizing politically if specific communities or groups feel targeted by the prosecutions or if victims do not feel their grievances are being redressed.<sup>14</sup>

From a peacebuilding point of view, these tribunals have a potential positive impact on the domestic justice system and human rights compliance of national public institutions.<sup>15</sup> Advocates argue that hybrid tribunals have the potential to impact national justice systems by strengthening national justice institutions and encouraging fairer processes.<sup>16</sup> Furthermore, they could produce a significant spill-over effect, contributing to the promotion of democratic legal training of local staff.<sup>17</sup> Capacity-building of national staff and the provision of better facilities and increased financial resources may ensure that standards are raised after the institution's work has finished. They may also be able to contribute to broader programs of legal reform in the country.<sup>18</sup> Their activity does not only assure victims, former perpetrators, and the general public that there will not be total impunity for those that are responsible for perpetrating war crimes, but also holding proceedings impartially and in compliance with the law could have a demonstration impact on purely domestic proceedings. This may increase public trust in justice and national institutions and reinforce the democratic process.<sup>19</sup>

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<sup>12</sup> See generally Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 1000 YALE L.J. 2537 (1991); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 L. & CONTEMP. PROBS. 81 (1999); Michael P. Scharf, *Trading Justice for Peace: The Contemporary Law and Policy Debate*, in ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE 251 (Edel Huges, William A. Schabas & Ramesh Thakur eds., 2007).

<sup>13</sup> See, e.g., ERIC STOVER & HARVEY WEINSTEIN, *MY NEIGHBOR, MY ENEMY* (2004).

<sup>14</sup> See, e.g., Orentlicher, *supra* note 12; Landsman, *supra* note 12.

<sup>15</sup> OHCHR, *Rule of Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, U.N. Doc. HR/PUB/08/2, at 1 (2008); Jane Stromseth, *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?*, 1 HAGUE J. RULE OF LAW 87 (2009).

<sup>16</sup> Jane Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 266 (2007).

<sup>17</sup> Cassese, *supra* note 10, at 6.

<sup>18</sup> Stromseth, *Justice on the Ground*, *supra* note 15, at 94-97.

<sup>19</sup> Stromseth, *Justice on the Ground*, *supra* note 15, at 92-94.

But, as this chapter highlights, it is important to remember the limitations of internationalized courts and not set unrealistic goals or expectations.<sup>20</sup> What many commentators seem to forget is that first and foremost, the overall objective of these courts is to carry out criminal prosecutions. If their limitations are recognized and realistic objectives set, hybrid courts may be able to contribute to the broader strategy of rule-of-law promotion—especially with the wide range of resources and expertise that is available to them.<sup>21</sup>

## II. The Hybrid Tribunals in Bosnia and Herzegovina and Cambodia and the Rule-of-Law Context

### A. The Establishment of the Tribunals

The establishment of the WCC emerged from a firm decision of the international community with the agreement of national authorities,<sup>22</sup> while the development of the ECCC was a much longer and more difficult process. They are both national institutions with international support; however, the WCC is conceived to ultimately become a fully operational national institution without any international presence.<sup>23</sup> In contrast, the ECCC has a three-year mandate, with international involvement throughout, and its jurisdiction is limited to those most responsible for the crimes of the Khmer Rouge.

Prosecutions of war crimes and crimes against humanity in Bosnia and Herzegovina (BiH) take place at three levels: the ICTY, the WCC, and national courts—both at the cantonal and district level.<sup>24</sup> Together they will handle several thousands of cases. The ICTY is scheduled to cease operations in 2013.<sup>25</sup> As part of its completion strategy, the ICTY has been transferring its functions to the national courts, including six cases concerning ten accused to BiH. The WCC was established both as a response to the need to close the ICTY and the fact that purely national prosecution had previously created serious problems in terms of

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<sup>20</sup> Stromseth, *Pursuing Accountability*, *supra* note 16, at 221-22.

<sup>21</sup> Stromseth, *Pursuing Accountability*, *supra* note 16, at 221-22; Stromseth, *Justice on the Ground*, *supra* note 15, at 94; OHCHR, *supra* note 15, at 2.

<sup>22</sup> Agreement between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina, Sept. 26, 2006, available at <http://www.hjpc.ba/secr/app-dept/app-mat/pdf/NewRegistryAgreementeng.pdf>.

<sup>23</sup> *Id.* The original agreement established the Transitional Council to advise and coordinate the transition of the Registry into national institutions (art. 4) and provisions to integrate the Registry staff and property (art. 7).

<sup>24</sup> The Dayton Peace Agreement established the current territorial and administrative division of BiH into two entities, Republika Srpska and the Federation of BiH, and the autonomous district of Brčko. Each entity has its own governmental and judiciary structure. The Federation of BiH is divided in ten cantons.

<sup>25</sup> See ICTY, *Completion Strategy*, <http://www.icty.org/sid/10016>.

international justice standards and potential destabilization and aggravation of ethnic tensions in the country.<sup>26</sup> It was created as part of the Criminal Division of the BiH State Court—itsself a hybrid institution conceived to become fully national over the course of five years. The WCC was officially inaugurated on May 9, 2005, opening for its first trial in September that year. The ultimate national nature of the WCC is an innovation in comparison to the hybrid panels in neighboring Kosovo or the Special Court of Sierra Leone and was intended to ensure greater domestic ownership of the institution and the war crimes prosecution process.

The State Court was to become a fully national institution financed by the national budget by December 2009. However, many called for the international mandate and support to be extended. This was mainly due to perceived risks for the Court, both from political attacks and from the uncertainty over financing of activities. The issue became a highly charged political one with the High Representative taking the executive decision to impose this extension. The mandate of international judges and prosecutors at the WCC has been extended until December 2012.<sup>27</sup>

The establishment of the ECCC took many years of difficult negotiations over the nature of international participation. Prior to the establishment of the ECCC there had been few attempts at justice for Khmer Rouge perpetrators.<sup>28</sup> The question of accountability for human rights abuses was not really addressed until 1997 when a UN-appointed Group of Experts released its report on the accountability for crimes committed during the Khmer Rouge period. The group found that due to the problems in the Cambodian domestic judicial system—such as government interference, corruption, and lack of capacity—an international criminal tribunal would be the best option.<sup>29</sup> The report also stated that the best location would be outside of Cambodia.<sup>30</sup>

However, Prime Minister Hun Sen wanted to limit international involvement in a tribunal and the Royal Government of Cambodia (RGC) refused to cooperate with any form of tribunal outside of the country, leading to a period of deadlock

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<sup>26</sup> Domestic war crimes prosecution in the early post-war years were tinged by fears of partiality, especially in mono-ethnic territories, where national courts lacked independence from the dominant nationalistic political parties and arbitrary arrests were common. *See, e.g.*, HUMAN RIGHTS WATCH, JUSTICE AT RISK: WAR CRIMES TRIALS IN CROATIA, BOSNIA AND HERZEGOVINA AND SERBIA AND MONTENEGRO (2004); OSCE MISSION TO BiH, WAR CRIMES TRIALS BEFORE THE DOMESTIC COURTS OF BOSNIA AND HERZEGOVINA: PROGRESS AND OBSTACLES (2005). This lack of impartiality prompted the creation of a system of ICTY supervision over national prosecution, the so-called “Rules of the Road.”

<sup>27</sup> OHR, *Decision Enacting the Law on Amendments to the Law on Court of Bosnia and Herzegovina No. 19/09*, Official Gazette of Bosnia and Herzegovina, No. 97/09 (Dec. 14, 2009).

<sup>28</sup> In 1979 Pol Pot and Ieng Sary were found guilty of genocide *in absentia* in what has widely been considered a show trial that failed to follow due process. *See* Suzannah Linton, *Putting Cambodia's Extraordinary Chambers into Context*, 11 SINGAPORE Y.B. INT'L L. 211 (2007).

<sup>29</sup> U.N., *Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135*, paras. 178-79, U.N. Doc. A/53/850, S/1999/231 Annex (Mar. 16, 1999).

<sup>30</sup> *Id.* para 171.

in negotiations.<sup>31</sup> Finally, the suggestion of a hybrid model seemed to strike a compromise.<sup>32</sup> However, the UN and the RGC had very different opinions on the hybrid tribunal, which set the scene for a further seven years of fraught negotiations. The RGC wanted a majority of Cambodian judges while the UN wanted an international majority.<sup>33</sup> The UN hoped to avoid a situation where the Cambodian judges could potentially ignore the international judges, in order to evade any sort of undue influence or interference by the government.

Following a proposal from the United States, all decisions would be made on the basis of a supermajority.<sup>34</sup> The supermajority rule meant that at least one foreign judge would have to agree with the Cambodian judges and there would at least be a basic level of consensus. The UN was still not happy with this, but ultimately, following pressure from a number of member states to compromise, 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* was signed by the UN and the RGC in June 2003 and approved by the National Assembly and Senate in October 2004.

## **B. Composition and Functioning of the Tribunals**

As these brief histories demonstrate, the motivations behind each hybrid tribunal are quite different, and this is reflected in their composition. The WCC aims to guarantee that domestic prosecution is up to international standards, but it is part of a wider strategy and a number of hybrid institutions designed to strengthen the rule of law and build national capacity.<sup>35</sup> As exemplified by the supermajority requirement, with the ECCC a primary concern was possible replication of the problems of the domestic system, such as political interference and corruption.

The WCC has five first-instance court panels and two appellate panels, composed by three judges each. The initial composition of the chambers was of two international judges and one national judge, who was often the president of the chamber, but in 2008 this changed to one international judge and two national judges. This transition was planned from the beginning.<sup>36</sup> As of January 2010

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<sup>31</sup> Thomas Hammarberg, *Efforts to Establish a Tribunal against the Khmer Rouge Leaders: Discussions between the Cambodian Government and the UN 13* (Paper presented at seminar organized by the Swedish Institute of International Affairs and the Swedish Committee for Vietnam, Laos and Cambodia on the Proposed Trial against Khmer Rouge Leaders Responsible for Crimes against Humanity, Stockholm, May 29, 2001) (on file with authors).

<sup>32</sup> *Id.* at 16.

<sup>33</sup> *Id.* at 19.

<sup>34</sup> *Id.* at 22.

<sup>35</sup> Other hybrid institutions include the Organised Crime, Economic Crime and Corruption Chamber of the State Court, the High Judicial and Prosecutorial Council (HJPC), the Constitutional Court, and the now-extinct Human Rights Commission.

<sup>36</sup> OHR, *WAR CRIMES CHAMBER PROJECT, PROJECT IMPLEMENTATION PLAN: REGISTRY PROJECT REPORT 8* (2004).

there are forty-one national judges and seven international judges. International prosecutors on the other hand have from the outset been the minority in relation to national prosecutors, although the Head of the Special Department for War Crimes of the Office of the Prosecutor (OTP) and Deputy Chief Prosecutor was until recently an international.<sup>37</sup> The composition of both the WCC and the Special Department of the OTP represents the main three ethnic groups in the country.<sup>38</sup> The Registry was originally a separate body under international leadership, which would later be integrated in the State Court and is currently composed by national staff. Finally, the Defense Office, OKO, had an international director and deputy director until May 2007 when a national lawyer took over the role of director.

The ECCC's Pre-Trial Chamber and Trial Chamber both have five judges (three Cambodian and two international). For these two chambers to reach an affirmative vote, four judges are required to make a "supermajority." The Supreme Court Chamber has seven judges (four Cambodian and three international) with five votes required for a "supermajority." In addition to the two co-prosecutors (one Cambodian and one international), there are also two co-investigating judges (one Cambodian and one international). The Defence Support Section (DSS), Office of Administration, and Victims Unit have a mix of international and Cambodian staff.<sup>39</sup>

The ECCC's mandate is "to bring to trial senior leaders of Democratic Kampuchea and those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognized by Cambodia that were committed during the period from 17 April 1975 to 6 January 1979."<sup>40</sup> The ECCC began operation in February 2006 and since it has a very different mandate to the WCC only a limited number of accused are on trial. Whilst the WCC has jurisdiction over a great number of crimes—it has competence over the crimes contained in the Criminal Code of BiH, which specifically criminalizes crimes against humanity, genocide, and war crimes, in Cambodia only five individuals are on trial in the ECCC. The WCC has pronounced seventy verdicts, half of them in second instance, from September 2005 to February 2010, and 118 accused have cases pending.<sup>41</sup>

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<sup>37</sup> All the international prosecutors, including the Head of the Special Department, left the OTP in December 2010 even though their mandate had been extended at the last minute.

<sup>38</sup> There have been complaints that there is an overrepresentation of Bosniaks among court staff. The fact that more staff are of Bosniak origin could be explained in demographic terms, as they are the majority of the population in Sarajevo, and there are no provisions to subsidize the move from other parts of the country of court staff or their families.

<sup>39</sup> The Defence Support Section is headed by an international: the Victims Unit is headed by a Cambodian national; and the Office of Administration has a Cambodian Director and an international Deputy Director.

<sup>40</sup> *Law on the establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004*, Ch. I, art. 1.

<sup>41</sup> Data provided by Public Information and Outreach Section (PIOS) to authors in February 2010.

This is very significant in comparison to the number of cases dealt with by the ICTY.<sup>42</sup> In BiH there seems to be an intention to prosecute as many perpetrators as possible, with the National War Crimes Prosecution Strategy stating that 6000 of them remained under investigation in 2008.<sup>43</sup> However, in Cambodia there is controversy regarding attempts to increase the number of prosecutions. The case of Kaing Guek Eav or “Duch” is known as case 001 and the other four accused, Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea, will be tried at the same time in case 002.<sup>44</sup>

An interesting fixture of both tribunals is that they combine elements of procedure of both civil and common law jurisdictions. In BiH the reform of the Criminal Procedural Code introduced elements of common law, such as the change from an inquisitive criminal procedure to an adversarial one, therefore shifting the responsibility of marshalling a case from the investigative judge to the prosecutor. It has also meant other changes such as the introduction of plea agreements or cross examination of witnesses, which were completely unknown in the Bosnian legal system. In Cambodia the set-up of the ECCC has reflected the domestic civil law system, and certain elements have been used for the first time in a hybrid tribunal, which make this court particularly unique. These include the presence of two investigative judges (in addition to two prosecutors) and the possibility for victims to participate as *parties civiles* during the trial or to file complaints. The ECCC is also innovative in that it can award collective or moral reparations to the victims.

### C. The Rule of Law in BiH and Cambodia

The war in Bosnia had a significant impact on the justice system; the relocation of judges and prosecutors distorted the prior ethnic distribution of professionals and the number of judges doubled because of politically or ethnically interested

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<sup>42</sup> The ICTY has indicted 161 persons and conducted 120 proceedings in 89 cases since 1993. *ICTY Key Figures*, <http://www.icty.org/sid/24>.

<sup>43</sup> According to the Bosnian National War Crimes Prosecution Strategy, approved in December 2008 by the Council of Ministers of BiH, there are 10,000 suspects, of whom 6000 remain under active investigation. Its first objective is to prosecute the most complex and top-priority war crimes cases within seven years of the adoption of the strategy and the rest of the cases within fifteen years. *National War Crimes Strategy adopted by the Council of Ministers of Bosnia and Herzegovina on 28 December 2008, reproduced in* MORTEN BERGSMO ET AL., FORUM FOR INTERNATIONAL CRIMINAL AND HUMANITARIAN LAW, THE BACKLOG OF CORE INTERNATIONAL CRIMES CASE FILES IN BOSNIA AND HERZEGOVINA Annex 2 (2009).

<sup>44</sup> Duch was the head of the S-21 prison, where thousands of people were tortured and killed. He is indicted with crimes against humanity and grave breaches of the Geneva Conventions. Ieng Sary, former Deputy Prime Minister and former Foreign Minister; his wife, Ieng Thirith; Khieu Samphan, President during the Khmer Rouge; and Nuon Chea, the second in command to Pol Pot and known as Brother Number Two, have all been charged with crimes against humanity, war crimes, and just recently genocide.

appointments.<sup>45</sup> At the end of the war, not only was there a massive backlog of cases but the judiciary had become an instrument of ethnic discrimination by implementing laws in a biased and politically influenced way.<sup>46</sup> The influence of nationalistic political parties was notorious before and after the war on sectors of the judiciary and the prosecution, which were open to corruption.<sup>47</sup> Therefore, judicial institutions were highly distrusted by the general public.

The promotion of rule of law, even if neglected in the early stages of post-conflict reconstruction in BiH, has now been on the international agenda since 1998, when the UN Judicial System Assessment Programme was created, and more systematically since 2002 when the High Representative presented its strategy for the reform of the justice sector.<sup>48</sup> The most important reforms included vetting and reappointment of judicial staff, the establishment of independent bodies for the appointment and review of judges and prosecutors, the passing of new Criminal and Criminal Procedure Codes at the state level, the passing of a law on witness protection, and the establishment of the State Court with jurisdiction in the whole of BiH. The High Judicial and Prosecutorial Council (HJPC) was established as the state body in charge of appointment and discipline of judges and prosecutors, including the internationals since 2006. The WCC was created, as a Section of the State Court, as part of this wider judicial reform of the country—in particular the efforts to provide the justice system with the tools and capacity to prosecute and carry out war crimes trials according to international standards.<sup>49</sup> Therefore, the establishment of the WCC was not exclusively created as part of the ICTY completion strategy.

Over the past fifteen years, Cambodia has entered a period of stability with strong economic growth. The huge amount of international support to Cambodia is reflected in the \$5 billion disbursed between 1991 and 2002. Despite all this foreign assistance, there are still ongoing political crises: a lack of democracy, widespread corruption, a legacy of impunity, and a precarious human rights situation. Following the devastation carried out by the Khmer Rouge, the legal profession in the country was decimated.<sup>50</sup> Very little was done until the RGC established a legal and judicial policy in 1998 focusing on strengthening judicial

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<sup>45</sup> UNDP, EWS Special Report, JUSTICE AND TRUTH IN BiH. PUBLIC PERCEPTIONS 8 (2006); Michael H. Doyle, *Too Little, Too Late? Justice and Security Reform in Bosnia and Herzegovina*, in CONSTRUCTING JUSTICE AND SECURITY AFTER WAR 248 (Charles T. Call ed., 2007).

<sup>46</sup> Doyle, *supra* note 45, at 248; INTERNATIONAL CRISIS GROUP, EUROPE REPORT NO. 127, COURTING DISASTER: THE MISRULE OF LAW IN BOSNIA & HERZEGOVINA (Mar. 25, 2002).

<sup>47</sup> UNMIBiH-Judicial Assessment Programme, *Political Influence: The Independence of the Judiciary in Bosnia and Herzegovina*, Thematic Report 9 (Nov. 2000).

<sup>48</sup> OHR, JOBS AND JUSTICE: OUR AGENDA (2002).

<sup>49</sup> OHR, *supra* note 36.

<sup>50</sup> REBUILDING CAMBODIA: HUMAN RESOURCES, HUMAN RIGHTS, AND LAW 69 (Frederick Brown ed., 1993).

independence, justice, trust, and respect for the law.<sup>51</sup> Prime Minister Hun Sen stated that rule of law would be a priority for the RGC in order to establish strong, sustainable political power in society.<sup>52</sup> The Council for Legal and Judicial Reform was established in 2002 to monitor the implementation of the policy and program of justice reform.<sup>53</sup> A plan of action for implementing legal and judicial reform was adopted in April 2005 with the following goal: “The establishment of a credible and stable legal and judicial sector upholding the principles of the rights of the individual, the rule of law and the separation of powers in a liberal democracy fostering private sector led economic growth.”<sup>54</sup> However, despite these strategies and goals successive UN Special Representatives of the Secretary-General on Human Rights in Cambodia have criticized the RGC for its poor record on rule of law and very little of their recommendations have been implemented.<sup>55</sup> In 2006 the High Commissioner for Human Rights stated that court reform was the most important area in the country requiring progress.<sup>56</sup>

Although a great amount of resources have been devoted to rule-of-law promotion,<sup>57</sup> there are severe problems with independence of both the prosecution and the judiciary. For example, it is well known that judges accept bribes or have to submit to political interference. The problems within the judiciary are emblematic within post-conflict Cambodia and inherent to the wider political system where power is based on patronage.<sup>58</sup> There is also a severe lack of material and human resources.<sup>59</sup> With such fundamental problems within the legal and judicial sector, there is a wide scope in terms of work to impact the weak rule of law in the country. In fact, most donors justify their financial support to the ECCC by claiming that it will improve the rule of law in Cambodia.<sup>60</sup>

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<sup>51</sup> Council for Legal and Judicial Reform, Office of the Council of Ministers, Bulletin: Legal and Judicial Reform, No. 01, Oct.-Dec. 2008, at 8.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.* at 3.

<sup>55</sup> See, for example, U.N. Human Rights Council, Yash Ghai, *Technical Assistance and Capacity-building: Report of the Special Representative of the Secretary-General for human rights in Cambodia*, A/HRC/7/42 (Feb. 29, 2008); PETER LEUPRECHT, SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR HUMAN RIGHTS IN CAMBODIA, CONTINUING PATTERNS OF IMPUNITY IN CAMBODIA (Oct. 2005).

<sup>56</sup> Yash Ghai, *supra* note 55, para. 8.

<sup>57</sup> There are many active donors in the rule-of-law sector. The Program on Rights and Justice is funded by USAID and implemented by the East-West Management Institute and the American Bar Association, <http://www.ewmi-praj.org>. The Cambodia Criminal Justice Assistance Project is an AusAid project improving service delivery across the legal and judicial sectors, <http://www.ccjap.org.kh>. UNDP has an Access to Justice project to bridge the gap between the formal and informal justice systems, <http://www.un.org.kh/undp>.

<sup>58</sup> Kheang Un, *The Judicial System and Democratization in Post-Conflict Cambodia*, in BEYOND DEMOCRACY IN CAMBODIA 95 (Joakim Öjendal & Mona Lilja eds., 2009).

<sup>59</sup> *Id.* at 75.

<sup>60</sup> For example, Japan, the biggest donor to the tribunal, states that the ECCC process will promote democracy, the rule of law, and good governance in Cambodia. Embassy of Japan, *Japanese Assistance for the project to enhance judicial process of the ECCC*, JAPANESE ODA NEWS, June 17, 2008.



### III. Hybrid Tribunals' Impact in BiH and Cambodia

#### A. The Impact of the WCC and ECCC on the Domestic Justice Systems

##### 1. *General Impact on the Justice System*

A systematic application of the law and coherent jurisprudential development are key to establishing regularized procedures and implementing norms in a fair way. In this sense, the State Court in BiH is playing a significant role in developing new judicial practice under the reformed criminal laws and procedures of the country, referred to above. In the opinion of the authors, this has had a positive impact in the judiciary as a whole and has improved the perception regarding the application rules and procedures in an impartial and professional way. However, such impact is diminished by the fact that it is a very specialized court with its own competences and therefore unable to interact on a day-to-day basis with the rest of the judicial domestic system. Also, the WCC applies different Criminal and Criminal Procedures Codes than the rest of the courts do in the prosecution of war crimes. Whilst the WCC applies the new reformed codes the cantonal and district courts apply the criminal code of the Former Yugoslavia. Additionally, tensions and competition over jurisdiction and resources have arisen with respect to the entity courts that are involved in prosecution of human rights violations during the conflict at the local level, which are the only ones which would need to have a working relationship with the WCC.<sup>61</sup>

In Cambodia, the ECCC faces a real challenge in trying to change the culture of the Cambodian domestic legal system. The politicized nature of the judicial system means that most judges are perceived to serve the interest of political parties.<sup>62</sup> There is little legal reasoning involved in judges' decisions, which tend to be very short, and trials of even serious offenses may last only an hour. Therefore, many international observers reported that just getting basic messages across to the domestic system of fair trial principles, rights of the defense, and how the prosecution should present a case would be a real achievement. In addition, it was reported that the lack of tradition of written legal culture meant the example of the drafting of legal documents at the ECCC could have an important impact.

Two issues however could diminish this potential positive effect. First, the ECCC and the national judicial system are not even comparable in terms of resources, which is relevant for assessing whether elements of the Court's work could be transferred to the domestic system. For example, the Ministry of Justice has 1% of the ECCC's budget to run twenty-five courts in the country

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<sup>61</sup> BOGDAN IVANEŠEVIĆ, ICTJ, *THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA: FROM HYBRID TO DOMESTIC COURT* (2008).

<sup>62</sup> Kheang Un, *supra* note 58, at 88.

and it is difficult to envision how replicating practices such as computerized case management could be transferred to the domestic system. Second, the reported lack of political will to improve the rule of law on the part of the RGC in order to continue its control of the judiciary is a significant obstacle to any progress.<sup>63</sup> This fundamental block at the executive level means that any attempts by the ECCC to impact the rule of law may make some positive change but will be unable to build a “rule of law culture,” which requires structural change.<sup>64</sup>

The impact of the two tribunals on the national justice system has been significantly different in both countries. However, both experiences demonstrate the difficulties in changing the legal culture or trying to form a “rule of law culture.”<sup>65</sup> Equally, they show how any attempts by hybrid courts to engage with the (re)building of the rule of law needs to be realistic and necessarily limited in scope, rather than expect to impact “rule of law” in a broad manner.

## ***2. Capacity-building and Training***

In both BiH and Cambodia it was hoped that the experience of the international judges and lawyers, some of whom have worked at other international tribunals or courts of the highest levels in their own countries, would contribute to the training of the judicial and legal profession. Capacity-building and its impact on the domestic system is an argument put forth for hybrid tribunals in general.<sup>66</sup> This could potentially be done in two complementary ways: (1) the international staff shares skills and knowledge with the national staff within the Court through everyday working practices and specific departmental or institution-only training, and (2) the international staff, and the Court as an institution, train or engage with the judicial and legal domestic actors outside of the Court. We explore both of these methods below.

### ***a. Capacity-building and Training within the Institution***

Developing professional capacity in judicial institutions takes place both through formal training and everyday activities and interaction between staff. In BiH the presence of international staff has been particularly important in terms of court management and implementation of the specific figures that have been introduced anew in the Bosnian legal system. The general feeling is that there has been a joint learning process rather than a direct teaching exercise from

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<sup>63</sup> Tara Urs, *Imagining Locally-motivated Accountability for Mass Atrocities: Voices from Cambodia*, 7 SUR-INT'L J. HUM. RTS. 61 (2007).

<sup>64</sup> *Id.*

<sup>65</sup> JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 310-16 (2007).

<sup>66</sup> Dickinson, *supra* note 7, at 307.

internationals to locals. Nevertheless, some resentment has been expressed in the fact that some of the international staff themselves did not necessarily have training in international humanitarian law and international crimes.<sup>67</sup>

The Court now has its own Judicial Education Committee, composed of six nationals and two internationals, with competence over the educational needs within the Court.<sup>68</sup> The establishment of the Judicial College meant an important improvement in training.<sup>69</sup> It was created on the initiative of two international judges in 2006, and consists of annual specialized workshops outside of Sarajevo where judges, legal officers, and other court staff can work and socialize together, promoting both knowledge exchange and team-building. The issues covered by the Colleges include efficiency, credibility of witnesses, and jurisdiction of the Court. It is the national staff that selects the topics of most interest for discussion. This has been an important exercise of handing over responsibility from international to national staff.<sup>70</sup> The Defense Section, OKO, has also carried out training both for the defense lawyers acting before the Court and more widely.

Early on at the ECCC there were training courses on international humanitarian law for judges and prosecutors.<sup>71</sup> The ECCC has also been assisted by the Open Society Justice Initiative (OSJI) and the Asian International Justice Initiative (AIJI),<sup>72</sup> including training for national and international staff of the Office of Co-Investigating Judges and Office of Co-Prosecutors and training on international criminal law.<sup>73</sup> Importantly, at the early stages they trained not only nationals, but also international judges, as few of them had experience with other internationalized tribunals.<sup>74</sup> There has also been a great deal of training for the Defence Support Section.

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<sup>67</sup> In BiH, three judges had worked as prosecutors at the ICTY, and one other judge had worked with the UNMIK panels in Kosovo.

<sup>68</sup> International judges took the initiative to create a Judicial Education Committee to take over the organization of the Judicial College. The committee was endorsed by the President and set up in 2008, with international Judge Whalen as its Chair. It meets regularly to discuss the educational needs of the court, screens the many requests for funding and training offers by donors, develops criteria for who should attend trainings offered offsite and internationally, and also oversees education for the legal officers.

<sup>69</sup> The Judicial College, modeled after the Vermont Judicial College, started under the impulse of Judge Fisher and was later taken over by Judge Whalen.

<sup>70</sup> In 2009 nationals took responsibility for the development and implementation of 50% of the program. In 2010 and 2011 the plan is to have internationals responsible for only 25% with nationals totally responsible for the College in 2012.

<sup>71</sup> Training was carried out in association with UNDP, the Royal School of Judges and Prosecutors, and the Bar Association of the Kingdom of Cambodia.

<sup>72</sup> AIJI asked the ECCC to come up with the key issues that needed to be covered and then brought in people from around the world with the corresponding expertise. The OSJI also produced a handbook on international criminal law.

<sup>73</sup> ALEJANDRO CHEHTMAN & RUTH MACKENZIE, *CAPACITY DEVELOPMENT IN INTERNATIONAL CRIMINAL JUSTICE: A MAPPING EXERCISE OF EXISTING PRACTICE*, Annex 19 (Sept. 2009).

<sup>74</sup> Of the seven international judges, only one judge and two reserve judges had previously worked at internationalized tribunals—UNMIK, ICTR, and ICTY.

Prosecution of war crimes is an exceptional practice of which very few personnel have the required skills; therefore formal training may need to be addressed not only to national but also international staff. It is of course desirable that international staff have previous experience and knowledge of international law, but if they do not have such a background training needs to be formally organized in that area as well as in the national laws and procedures, as has happened in both courts. Another insight from both countries is that an overall strategy for mentoring and in-house training is worth considering at the set-up stage and appropriate resources should be made available to this end. It is essential that the necessary budget for training be provided, as well as establishing a systematic identification of the training needs of the organization.

The BiH case shows that dependency on ad hoc donor support for organizing training can generate difficulties. On two occasions the Court Judicial Education Committee refused funds from a donor who imposed a format of the Judicial College which the Committee considered was not conducive to achieving the expected results. As a consequence, in 2008 the Judicial College took place in-house and it was reported to the authors that the experience was frustrating for judges and other court staff. In 2009 the United Nations Development Programme (UNDP) had to urgently supply its own funds to finance it in its original format outside of the capital and the everyday working environment.

At the ECCC, the lack of systematic planning means that the individual departments differ as to what they provide for staff. For example the DSS carries out a number of initiatives, such as weekly briefings for all staff on international justice issues and trainings for the lawyers and case managers within DSS.<sup>75</sup> However, other departments are not as well organized and such activities are dependent on the initiative of the particular head of department.

Observing both cases it is clear that the structure of tribunals can either help or hinder the experience of national staff. Ensuring a productive, working relationship between national and international staff has been a challenge for other internationalized tribunals. For example, the Special Court for Sierra Leone has been criticized for its failure to share responsibilities between international and national staff and for insufficiently integrating national staff—with only a few Sierra Leoneans in positions of high responsibility.<sup>76</sup>

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<sup>75</sup> The mandate of DSS is quite broad compared with other tribunals. “The role of the DSS is to ensure fair trials through effective representation of the accused. The Section is responsible for providing indigent accused with a list of lawyers who can defend them, and for providing legal and administrative support to lawyers assigned to work on cases, including the payment of fees. The DSS also acts as a voice for the defence at outreach events and in the media, liaises with other tribunals and NGOs, runs training courses and organises an internship program for young lawyers.” See Defence Support Section, [http://www.unakrt-online.org/07\\_defencesupport.htm](http://www.unakrt-online.org/07_defencesupport.htm).

<sup>76</sup> THIERRY CRUVELLIER, ICTJ & SIERRA LEONE COURT MONITORING PROGRAMME, FROM THE TAYLOR TRIAL TO A LASTING LEGACY: PUTTING THE SPECIAL COURT MODEL TO THE TEST 30-33 (2009).

In BiH, this has been less of an issue since it was always designed to give a prominent role to the national judges, shift the composition of the chambers to give nationals greater control, and therefore increase the sense of ownership of the process.<sup>77</sup> In general judges are reported to have good relationships with each other and there is a collaborative spirit of working. At the ECCC, the split between the national and international side means that how they work together depends on the particular circumstances. For example, the work on the proposed additional prosecutions (see below Part IV) was only done by the international prosecution side, which is a lot of work for only half the department to do. However, staff within the Defence Support Section report that they work very well together. Even the Office of Administration is structured in this split way, with Cambodian staff reporting to the Cambodian head and international staff reporting to the international deputy head of the office. This structure does not necessarily facilitate integration where it is not being actively promoted on a particular department initiative.<sup>78</sup>

The aim of capacity-building and training by the tribunals is most importantly to help the national staff. In this way, it can be said that both courts have been successful with their various initiatives. International and national staff in both courts reported to the authors that the national staff has become more confident and able to carry out their work. Although doubts have been raised over whether the national staff in BiH has embraced the new working practices fully and whether they still lack certain case management capacities, some members of the national staff have expressed the view that they are ready to take over and that the experience and knowledge of the internationals is no longer needed. In Cambodia, it was noted that the Cambodian President of the Court has become much better at taking charge during proceedings and running the trial. The authors were informed that when the ECCC first began its work there was a gap between the national and international judges in terms of knowledge and expectations but that there is now a common language and their work should be termed “collaborative” rather than capacity-building.

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<sup>77</sup> International prosecutors, on the contrary, have played a more visible role. As Ivanešević explains they have argued most of the Rule 11 *bis* cases and have jointly prosecuted with their national counterparts complex cases related to the genocide in Srebrenica. IVANEŠEVIĆ, *supra* note 61, at 11-12.

<sup>78</sup> United Nations Assistance to the Khmer Rouge Trials (UNAKRT), which represents the international side of the court, carried out a number of expert assessments and audits throughout 2007, including an evaluation on the ECCC’s capacity for judicial proceedings. The final report was leaked to the press, with newspaper reports stating that the divided nature of the court was detrimental to the functioning of the court. *See, e.g.*, Erika Kinetz, *Another Delay for Justice?*, NEWSWEEK WEB EXCLUSIVE, Oct. 6, 2007, <http://www.newsweek.com/id/42429>.

b. *Capacity-building and Training by the Institution to External Domestic Actors*

Building the capacity of national staff within the institution is perhaps the minimum that can be expected from the two courts and from any hybrid court in general. Ensuring that national staff members “learn on the job” comes from having good relationships between nationals and internationals, which is an obvious goal for both courts.

However, the engagement with the broader judicial and legal communities outside of the institutions has been mixed. This was a criticism of the Special Court for Sierra Leone, which has reportedly had minimal impact on the national judiciary, mainly due to being separated from national legal institutions.<sup>79</sup> This could be seen as a missed opportunity, especially where the needs of the judiciary at national level were so apparent, both in terms of resources and capacities.<sup>80</sup> The experience of the WCC and the ECCC do not, at first glance, seem to have improved upon this in terms of engagement with the wider domestic justice system. This reinforces the need for future internationalized tribunals to have a more coherent strategy on how to interact with domestic institutions to materialize the alleged “spill-over” effect in terms of capacity-building of the international investment in material and human resources.<sup>81</sup>

In BiH this deficiency has been balanced out by the fact that rule-of-law reform in the country has included the development of specific institutions to undertake such tasks and several programs assure funding for it. The HJPC coordinates central components of support to the judiciary, and specific judicial and prosecutorial training centers have been set up to undertake capacity-building in both entities, including in war crimes prosecution.<sup>82</sup> This makes it less important that the WCC or the State Court, in general, participate in direct capacity-building to the rest of the members of the judiciary and more difficult to assert any immediate impact. New initiatives are emerging however, such as the 2009 conference for entity court staff in which national State Court judges presented workshops on witness protection and other matters addressed in the previous internal Judicial College.

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<sup>79</sup> CRUVELLIER, *supra* note 76, at 35-37.

<sup>80</sup> Stromseth, *Pursuing Accountability*, *supra* note 16, at 266.

<sup>81</sup> Similar to the other internationalized tribunals both the WCC and ECC have received great support from the international community, both in terms of material and human resources. In BiH donors pay not only the international lawyers and prosecutors but also an array of international legal officers and interns that support the work of the State Court, and the WCC in particular. In Cambodia, UNAKRT provides technical assistance to the ECCC and is the international side of the ECCC. For an organizational chart, see <http://www.unakrt-online.org>.

<sup>82</sup> Funding has been provided for specific training in this area, for example, the three-year program from UNDP (2008-2011) on “Building Capacities of Cantonal and District Prosecutors and Courts in BiH to Process War Crimes.”

In the case of Cambodia, the interaction of the Court with the wider domestic justice system has been quite restricted. The Supreme Council of Magistracy has the authority to appoint judges and prosecutors to the ECCC and some observers state that that has been the extent of the interaction. There may be ways for the ECCC to engage with the Royal School for Judges and Prosecutors or the national trial chamber, but these are still at the idea stage.<sup>83</sup>

In both cases the bodies in charge of the defense have played an important role in capacity-building. In BiH, OKO supports defense counsel acting before the Court but also organizes trainings for other defense counsel, which are considered to have had important repercussions. In Cambodia, DSS has also carried out training for other lawyers, training several hundred between 2006-2008.<sup>84</sup> DSS has also conducted outreach presentations to the NGO community on defense rights and the context, structure, and laws relating to the ECCC. DSS's mandate includes training, and the department interpreted this obligation broadly to mean that they could train local lawyers too. This is a highly important development in both courts, since a criticism of other international and hybrid tribunals is equality of arms,<sup>85</sup> and often rights of defense are neglected in a post-conflict context. This work by the defense sections can provide a good basis on which to build knowledge of these rights and contribute to a crucial aspect of stronger rule of law.

Finally, it is important to consider the contribution that the national staff currently working at both courts could have when they return to their previous jobs or undertake new ones. In this regard it would be important to assess the longer-term effect of training of national legal officers and trainees working alongside international judges and international legal officers, given that they are the future judges and prosecutors. However, in order for capacity-building of national staff within the tribunal to have an impact on the domestic system the "brain drain" needs to be avoided with former court staff actually staying in the country.<sup>86</sup> Whether national lawyers, judges, and prosecutors will return to the domestic judicial system with their newly acquired skills is a question that will need to be taken up in the future.<sup>87</sup>

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<sup>83</sup> Ideas suggested to the authors included using the judgments and detention orders at the Royal School for Judges and Prosecutors, bringing the national trial chamber to watch the judgment for the Duch trial, and some private universities may take the judgments to discuss in class.

<sup>84</sup> This was supported by the International Bar Association, British Embassy, and University of Berkeley.

<sup>85</sup> Cassese, *supra* note 10, at 10.

<sup>86</sup> On the potential impacts of brain-drain in Sierra Leone see, Chandra Lekha Sriram, *Wrong-sizing International Justice? The Hybrid Tribunal in Sierra Leone*, 29 *FORDHAM INT'L L.J.* 472, 502-03 (2006).

<sup>87</sup> In BiH there has been concern over the incentive for national staff staying at the Court after the internationals have left given the continuous political attacks and the lack of economic support for their relocation to Sarajevo.

## B. Improving Understanding of the Rule of Law and Trust in Institutions

Conflict ended in both countries less than twenty years ago, but the situation in each is quite different. Most of the population in BiH has been affected by the conflict. Many politicians active today played a role during the conflict and political discourse is very polarized with constant appeals to underlying resentments. A generation of young professionals has been particularly traumatized by the events they lived as teenagers; whilst today's younger people seem disaffected towards the past. Cambodia on the other hand, was in conflict until the mid 1990s, but the Khmer Rouge period, on which the ECCC is focused, ended in 1978. Sixty-eight percent of the population is under thirty and has no memory or knowledge of the atrocities perpetrated by the Khmer Rouge.<sup>88</sup> It was therefore obvious from quite early on that a concerted outreach strategy would be needed to ensure that young people who were not alive during the period would feel engaged.

The ICTY and ICTR were criticized for their lack of outreach and it was hoped that the hybrid tribunals would be at an advantage because of their locations inside the relevant countries.<sup>89</sup> It is therefore important to evaluate the WCC and ECCC to see whether they have improved upon the performance of the ad hoc and other internationalized tribunals. The ultimate goal of these tribunals is to prosecute those responsible for the most serious crimes and to render justice for their victims. But they can have related effects with regard to the trust of the wider population in their work both as justice institutions and more broadly as public institutions and representatives of the rule of law.

First, the work of these institutions can send the powerful message that new safeguards are in place and old patterns of impunity and exploitation are no longer tolerated.<sup>90</sup> Second, they can generate demand from society for accountability norms and proceedings.<sup>91</sup> The extent to which both the victims and the wider population perceive the institutions as legitimate depends both on their transparent and accountable internal functioning and their capacity to demonstrate and convey this aspect of their work.<sup>92</sup>

In BiH the Court has had to act in an environment of distrust towards the judiciary as a whole and disillusionment over the work of the ICTY.<sup>93</sup> The presence

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<sup>88</sup> PHUONG PHAM ET AL., U.C. BERKELEY HUMAN RIGHTS CENTER, *SO WE WILL NEVER FORGET: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT SOCIAL RECONSTRUCTION AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 2 (2009).

<sup>89</sup> See, e.g., Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 9 J. INT'L CRIM. JUST. 89 (2009); Victor Peskin, *Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme*, 3 J. INT'L CRIM. JUST. 950 (2005).

<sup>90</sup> Stromseth, *Pursuing Accountability*, *supra* note 15, at 262.

<sup>91</sup> Stromseth, *Pursuing Accountability*, *supra* note 15, at 264.

<sup>92</sup> See Stromseth, *Pursuing Accountability*, *supra* note 15, at 263.

<sup>93</sup> In a UNDP survey published in 2006, most people responded that they distrusted the judicial system overall; almost half believed in neither the laws nor the judges applying them, and twenty



of the international staff has been essential to provide an aura of legitimacy.<sup>94</sup> Even if the State Court is criticized by groups that attempt to politically manipulate its every decision, as will be discussed below, the authors were told that there is a general perception that this is an independent and impartial institution. In Cambodia, there are signs that there is some impact from the work of the ECCC on communicating the impartiality and effectiveness of the institution. A recent 2009 opinion survey by the Human Rights Center at the University of California, Berkeley found that 87% of those who had some knowledge of the ECCC believed that it would respond to the crimes committed,<sup>95</sup> compared to only 36% that replied that they trusted the national criminal justice system.<sup>96</sup>

The role of outreach is crucial in terms of public perception and is considered more and more an important component of prosecutorial institutions. Following the example of the Special Court for Sierra Leone, both courts have a section devoted to Public Affairs or Information.<sup>97</sup> The State Court incorporated outreach as part of its budget from the beginning, in clear response to the lessons learned from the ICTY experience.<sup>98</sup> The State Court has a Public Information and Outreach Section (PIOS), and the OTP has its own public relations department, called the Press Office, whose work is limited to relations with the media.<sup>99</sup> It has been pointed out however, that the outreach of the WCC has not been as effective as it could be, both due to the lack of staff in PIOS resulting in a limited capacity to implement certain activities<sup>100</sup> and internal battles for the extra-legal functions of the Court.<sup>101</sup>

The Public Affairs office of the ECCC has Public Information, Media Relations, and Outreach departments. Since the ECCC is so far away from Phnom Penh, there is a second Public Affairs office there so that the Court is more accessible

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percent of those interviewed expressed faith in the law but not in the judges. Public perceptions of the ICTY and its performance differed greatly between the two entities; but even in the Federation a significant segment of the population considered that it has not done a good job but was necessary. The State Court faced, before it started its work, the difficult challenge of a population not particularly confident in its abilities and a significant fraction considering that it would not make any difference. UNDP, *supra* note 45, at 15-16.

<sup>94</sup> IVANEŠEVIĆ, *supra* note 61, at 11.

<sup>95</sup> PHUONG PHAM ET AL., *supra* note 88, at 3.

<sup>96</sup> PHUONG PHAM ET AL., *supra* note 88, at 4.

<sup>97</sup> The Special Court for Sierra Leone has a dedicated outreach section staffed by Sierra Leonean nationals and a network of District Outreach Officers. See RACHEL KERR & JESSICA LINCOLN, THE SPECIAL COURT FOR SIERRA LEONE: OUTREACH, LEGACY AND IMPACT - FINAL REPORT 11 (Feb. 2008).

<sup>98</sup> Lara Nettelfield, *Localizing War Crimes Prosecutions: The Hague to Sarajevo and Beyond*, in COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA: THE HAGUE TRIBUNAL'S IMPACT IN A POSTWAR STATE (Lara Nettelfield ed., forthcoming 2010).

<sup>99</sup> Information on the different departments of the Prosecutor's Office is available at its homepage, <http://www.tuzilastvobih.gov.ba>.

<sup>100</sup> *Id.*

<sup>101</sup> The fact that the Court Support Network project, referred to below, lost financial support from the Registry at one point, illustrates one of these obstacles. Nettelfield, *supra* note 98.

to the public. This is an initiative that could be replicated in other countries where relevant because it provides easier access to court staff. Both the PIOS at WCC and Public Affairs office at ECCC aim to communicate with national and international media and the general public to encourage a wider understanding of their work and a general awareness of its importance. The courts have tried to use a number of reports and publications to explain their work to the public. In BiH PIOS produces a booklet on the weekly activities and the Registry published a brochure in 2007 of the work of the Court, both in English and Bosnian.<sup>102</sup> Courtroom audio recordings are available upon request. The Public Affairs office at the ECCC produces a court report every month and has published a booklet explaining the work of the Court.<sup>103</sup> It has also distributed posters across the country clarifying who will be prosecuted and the fact that both international and national judges will have to agree.<sup>104</sup> The Public Affairs office has also produced literature for those who visit the trial, both in Khmer and in English. These information sheets describe the background to the Duch trial and also include photos of all the lawyers and judges involved with the trial and their bios. There are weekly press briefings and sometimes the audio is available online.

### ***1. Media, Civil Society and General Public Engagement***

The various strategies of opening the courts to the general public, such as producing publications and providing recordings need to take into account the challenges of reaching the population and the needs of the public. Issues such as the literacy rate of the population, the accessibility to the location of the courts, and the general awareness of the legal procedures need to be addressed with specific media outreach strategies. Similar to the Special Court for Sierra Leone, which engaged with radio and even carried out training to promote effective reporting of the Charles Taylor trial,<sup>105</sup> both the ECCC and WCC have built relationships with the media.

In BiH, the mainstream media has not paid great attention to the trials and interest in war crimes reporting is decreasing.<sup>106</sup> The mainstream media tends to

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<sup>102</sup> The English brochure, *The Court of Bosnia and Herzegovina: The Registry 2007*, is available at [http://www.sudbih.gov.ba/files/docs/brosura/brosura\\_eng.pdf](http://www.sudbih.gov.ba/files/docs/brosura/brosura_eng.pdf).

<sup>103</sup> The English publications of the Public Affairs office are available at <http://www.eccc.gov.kh/english/publications.aspx>.

<sup>104</sup> Poster slogans are: “Every decision must have the support of both Cambodian and International judges”; “Everyone can be involved in the process”; “It’s time for the record to be set straight”; and “Only the senior Khmer leaders and those most responsible for committing serious crimes will be tried.” The poster series is available at <http://www.eccc.gov.kh/english/publications.poster.aspx>.

<sup>105</sup> KERR & LINCOLN, *supra* note 97, at 16-17.

<sup>106</sup> This seems to be a regional trend, with commercial media in Croatia and Serbia also losing interest. See *Decreasing Interest in War-crimes Reporting*, BIRN, Sept. 3, 2009, <http://www.bim.ba/en/1/40/21972>.

focus only on scandals that undermine the credibility of the Court. The work of a specialized organization that reports on the trials, the Balkan Initiative Reporting Network (BIRN) of BiH, has made a significant contribution to public information on the functioning of the State Court in general and on the individual trials in particular. Through its Justice Report program it covers every single trial before the WCC. It has started a radio program, Radio Justice, and a TV show, TV Justice, to bring the work of the WCC closer to the public.<sup>107</sup> BIRN has also organized two conferences in Sarajevo on the role of the media reporting on war crimes. The latest one on Transparency of the Courts and Responsibility of the Media was attended by regional representatives of courts prosecuting war crimes, public information offices, international donors and organizations, the media, and civil society. Even if the media has open access to the Court, there have been complaints about the lack of availability of judges and prosecutors for comment as well as lack of access to documents, video recordings, and photographs.<sup>108</sup>

In Cambodia, there are a number of initiatives carried out by NGOs and international organizations to ensure media coverage. The AIJI and East-West Center prepare a weekly report “Duch on trial” that is broadcast to two to three million people on Channel CTN every Monday during lunchtime.<sup>109</sup> The AIJI also produced a three-part educational program called “Time for Justice”, which was widely shown before the trial started.<sup>110</sup> There are a number of organizations monitoring and providing expert commentary on the Duch trial and the ECCC in general. Among these, the Cambodia Tribunal Monitor and OSJI are the most active in providing summaries of proceedings and legal analysis.<sup>111</sup>

Importantly, both courts have had to rely upon the work of NGOs to maximize their impact due to lack of resources. Their experience shows that such relationships should be developed early to ensure a fruitful engagement. At a very early stage in BiH, the State Court approached several NGOs to establish a network of civil society organizations with the purpose of creating “such a climate that will be motivating for all citizens across communities and in which citizens will relate to the judicial system in BiH with a trust, which this country enormously lacks.”<sup>112</sup> The network has four regional information centers, which work independently

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<sup>107</sup> For Justice Report and TV Justice, see <http://www.bim.ba>.

<sup>108</sup> See, for example, *Public Outreach Section Letter*, BIRN, posted Oct. 28, 2009, <http://www.bim.ba/en/1/40/23238>, where the Association of Court Reporters states that the selectiveness that the Court shows in providing photographs to the reporters undermines their capacity to provide information to the general public about the proceedings.

<sup>109</sup> Examples of the broadcasts are available at the Time For Justice, Cambodia website, <http://forum.eastwestcenter.org/Khmer-Rouge-Trials>.

<sup>110</sup> *Id.*

<sup>111</sup> Cambodia Tribunal Monitor, <http://www.cambodiatribunal.org>; OSJI, <http://www.soros.org>.

<sup>112</sup> Website of Centre for Civil Initiatives (CII), <http://www.ccibh.org> (follow “Present Activities”; “The Court BiH Support Network”). The CII is in charge of the Court Support Network information office in Mostar.

of the Court and serve as a link with citizens. It is composed of extremely varied organizations.<sup>113</sup> There is however no public information on specific activities undertaken, which makes the impact of this initiative very difficult to assess.

In Cambodia, the Center for Social Development (CSD), a national NGO, held a number of community forums to inform the public about the Court.<sup>114</sup> Many staff members from the ECCC were present at these events, not just from Public Affairs, but also DSS staff and international or national co-prosecutors. Other NGOs such as Association for Human Rights and Development in Cambodia (ADHOC) and the Documentation Center of Cambodia (DC-Cam) have carried out similar outreach activities.<sup>115</sup>

However, there has been criticism that the ECCC has relied too much upon external activities rather than carrying out its own activities. The Public Affairs office has been unable to carry out a comprehensive strategy due to financial constraints. However, it gained additional staff in 2009 and additional funding for outreach, which should help to improve its work in the future. Even if the initiatives at both courts show good practice, they also underline that it is not enough for the outreach sections to merely rely on NGOs to create and promote public awareness and positive engagement. Specific activities and initiatives are necessary so that civil society and the general public are engaged.

The public's interest in the work of the WCC and ECCC has been somewhat different. Public engagement is important as it allows people to see the accountability in action, improves understanding of the process, and could potentially stimulate demand for fair trials. For this reason, it is important to think about how to open the courtroom doors, both physically and virtually, and promote attendance and engagement from early on. Both courts have been quite successful in setting up websites and keeping them up to date, and the resources available there are very valuable.<sup>116</sup> The ECCC has also now set up a Facebook and Twitter account.<sup>117</sup>

In BiH, the promotion of attendance to the trials by the general public was not really considered. The Court is completely open to the public and the schedule of the ongoing trials is updated daily in the website. However, Bosnian society has

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<sup>113</sup> *Id.* As Ivanešević states, there is no restriction on membership and the NGOs vary considerably, from social welfare providers to volleyball teams. IVANEŠEVIĆ, *supra* note 61, at 36.

<sup>114</sup> Due to internal management problems within the organization, these stopped mid-2009 and future activities seemed uncertain.

<sup>115</sup> Under its Khmer Rouge Trials and International Criminal Court program, ADHOC provides information on the ECCC and ICC nationwide. DC-Cam holds meetings under its Victim Participation project, which briefs communities on the proceedings and developments of the ECCC as well as their right to participate.

<sup>116</sup> As Nettelfield points out in relation to the BiH State Court website, the information is more up-to-date than the websites of the courts of Western nations. Nettelfield, *supra* note 98.

<sup>117</sup> ECCC Facebook page, <http://www.facebook.com/krtribunal>; ECCC Twitter account, <http://twitter.com/krtribunal>.

not demonstrated a pressing interest in following the trials, and the general public is rarely present in the trials. Most days the only attendance is BIRN reporters and Organization for Security and Co-operation in Europe (OSCE) war crimes monitors, and often there are more foreign researchers than local citizens.<sup>118</sup> On many occasions, the limited interest of the general public in the trials in BiH has been blamed on fatigue of the Bosnian civil society with war-related themes.<sup>119</sup>

In Cambodia, although the beginning of the Duch trial was not very well attended, by the end of August 2009 over 20,000 people had attended the hearings, which is very high compared not only to BiH but also to other internationalized tribunals. The initial lack of attendance was partly due to the location of the Court, which is sixteen kilometers outside of Phnom Penh. However, a few weeks into the trial buses to the Court were organized and widely publicized by the Public Affairs section. Currently, court sessions are attended by 500 people, with many getting up in the early hours of the morning to reach the Court.<sup>120</sup>

Similar programs could be implemented to encourage attendance both for other internationalized courts and truth commission hearings. However, it is important to remember that a full courtroom is not enough. Beyond the people attending the trials in Cambodia, around 20% of the population is watching the TV program “Duch on Trial.”<sup>121</sup> Although this is a real achievement, there is still a large proportion of the population who may not really know what is going on or be keeping up with developments. This demonstrates the challenges posed by a youthful population as well as very pressing daily needs in Cambodia, such as poverty and current human rights abuses.<sup>122</sup>

It is too early to properly assess the impact of the outreach strategy in either country; however, the experience so far, in these and other courts, shows how necessary it is to have a strategy in place early and to be realistic about the resources available. If this is not done, outreach activities will not start in time to have the full impact that they could potentially have.

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<sup>118</sup> See Nettelfield, *supra* note 98.

<sup>119</sup> IVANEŠEVIĆ, *supra* note 61, at 33.

<sup>120</sup> For the closing statements in the Duch trial, for which there was wide interest, the majority of seats were allocated to the *parties civiles* and the general public, and the rest was divided between national and international NGO representatives, media, and diplomats. See ECCC, *Invitation to attend the Closing Statements in the “Duch” Trial, 23-27 November 2009*, [http://www.eccc.gov.kh/english/cabinet/fileUpload/145/Invitation\\_to\\_Closing\\_Statements\\_Eng.pdf](http://www.eccc.gov.kh/english/cabinet/fileUpload/145/Invitation_to_Closing_Statements_Eng.pdf).

<sup>121</sup> Christophe Shay, *Cambodia’s Trial of the Century, Televised*, TIME, Sept. 11, 2009.

<sup>122</sup> Cambodia ranked 131 out of 177 countries in the 2007 Human Development Index and remains one of the poorest countries in Asia. See UNDP, Human Development Report 2009: Cambodia, [http://hdrstats.undp.org/en/countries/country\\_fact\\_sheets/cty\\_fs\\_KHM.html](http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_KHM.html), (reproducing Cambodia’s human development index 2007).

## 2. *Public Perceptions of Truth*

The work of the courts is limited in terms of establishing a narrative of the conflict that could serve as a shared basis for peace and reconciliation in both countries. It is often pointed out that international trials fail in terms of assisting national reconciliation.<sup>123</sup> In general, the outcome of a criminal trial in terms of truth is restricted to the needs of the case, which can be unsatisfactory for victims and society as a whole. Furthermore, in both Cambodia and BiH the approach to accountability for past atrocities has so far been limited to a retributive justice model. Complementary transitional justice activities, especially truth-seeking ones, are not officially promoted or recognized and have come mainly from civil society groups.

In BiH all of the truth finding initiatives have been led by civil society and only undertaken in a limited manner by public authorities. There have been two failed initiatives to establish a truth and reconciliation commission.<sup>124</sup> There is currently a regional proposal (RECOM) on the table led by civil society organizations from Serbia, Croatia, and BiH, which is gathering a significant amount of support. However, until recently wider society has been quite reluctant to accept initiatives of this sort, with certain victims associations strongly opposed.<sup>125</sup> This opposition is grounded in a punitive approach towards justice and suspicion over the possibility of amnesties.<sup>126</sup> The word reconciliation is often avoided and it is constantly suggested that there does not exist one single truth, but rather three. It is encouraging that the latest consultations seem to show a more extended support for the possibility of establishing a regional truth commission.<sup>127</sup>

Other initiatives have been more limited fact-finding efforts. Some have come from public authorities: the Commission for Investigation of the Event in and around Srebrenica between July 10-19, 1995 (Srebrenica Commission), which had to be established in 2003 by the Republika Srpska authorities in response to a resolution of the Human Rights Chambers of BiH; and the State Institute for Missing Persons in 2008 in substitution of three separate public bodies that had been undertaking these tasks on the basis of ethnicity.<sup>128</sup> Among the civil society

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<sup>123</sup> Sriram, *Wrong-sizing international justice?*, *supra* note 86, at 497.

<sup>124</sup> The first initiative was launched by a coalition that included a great number of organizations. In 1997 and 2000 a draft Law on the Truth and Reconciliation Commission was submitted to the Parliamentary Assembly of BiH but was never adopted. In 2005 a second initiative was pushed to revive the draft law, but all talks related to such initiative were suspended in March 2006. See UNDP, *TRANSITIONAL JUSTICE GUIDEBOOK FOR BOSNIA AND HERZEGOVINA* 26-28 (2009).

<sup>125</sup> *Id.* at 28.

<sup>126</sup> *Id.*

<sup>127</sup> Nataša Kandić, *The RECOM Initiative: From a Non-Governmental Challenge to a State Programme*, in *EUROPEAN INTEGRATION AND TRANSITIONAL JUSTICE: FROM RETRIBUTIVE TO RESTORATIVE JUSTICE IN THE WESTERN BALKANS* 107 (Denisa Kostovicova ed., 2009), available at <http://www.lse.ac.uk/Depts/global/Publications/Forum3.pdf>.

<sup>128</sup> UNDP, *supra* note 124, at 31.

initiatives an interesting example is the efforts by the Research and Documentation Centre of Sarajevo to create the most comprehensive database of events that occurred during and after the war, from sites of massacres to attacks of buildings, displacements, concentration camps, etc.<sup>129</sup>

In Cambodia there has been no official truth commission process; however a number of NGOs have been carrying out informal programs for memorialization and reconciliation. DC-Cam first started as Yale University's Cambodian Genocide Program to conduct research, training, and documentation on the Khmer Rouge regime and is now run by Cambodian nationals. Its wide range of activities and prominence in the field has led to it being called an "unofficial truth project."<sup>130</sup> DC-Cam aims to record and preserve the history of the Khmer Rouge regime for future generations and to compile and organize information that can serve as potential evidence in a legal accounting for the crimes of the Khmer Rouge.<sup>131</sup> It has the largest collection of primary documents on the Khmer Rouge.<sup>132</sup>

A smaller but no less interesting initiative is by the organization Youth for Peace (YfP)—the Youth for Justice and Reconciliation project started in 2007.<sup>133</sup> YfP carries out "Understand, Remember, and Change" workshops where the root causes of genocide are discussed, looking at both internal and external factors to examine the mobilization of the Khmer Rouge. Following these workshops, YfP facilitates discussion within the community, where youth listen and ask questions. This provides a space for survivors and victims to tell their stories. This has been a successful project with good response from both older and younger participants who were grateful for the learning and sharing experience,<sup>134</sup> with some communities stating that they want to compile the stories of their victims.

There is increasing work being done on memorialization, with visits organized by NGOs to the sites of the Killing Fields and Tuol Sleng or to the prison S-21, which are currently visited more by tourists than by Cambodians.<sup>135</sup> Importantly, DC-Cam has been working on getting a textbook on the Khmer Rouge period introduced, which is currently going through the government approval process.<sup>136</sup> This is very important because until 2000 there was only one paragraph on the whole Khmer Rouge period in high school textbooks and even this disappeared

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<sup>129</sup> See the Research and Documentation Centre of Sarajevo Website, <http://www.idc.org.ba>.

<sup>130</sup> Louis Bickford, *Unofficial Truth Projects*, 29 HUMAN RIGHTS Q. 1020 (2007).

<sup>131</sup> DC-Cam website, History and Description of DC-Cam, <http://www.dccam.org>.

<sup>132</sup> The archive has over 155,000 pages of primary Khmer Rouge documents and more than 6,000 photographs.

<sup>133</sup> See Youth for Peace Homepage, <http://www.yfpcambodia.org>.

<sup>134</sup> Mark Channasitha, "Evaluation Report for Youth for Peace" (2008) (on file with authors).

<sup>135</sup> LOUIS BICKFORD, ICTJ, *TRANSFORMING A LEGACY OF GENOCIDE: PEDAGOGY AND TOURISM AT THE KILLING FIELDS OF CHOEUNG EK 13* (2009).

<sup>136</sup> For information on the DC-CAM Genocide Education Project, see [http://www.dccam.org/Projects/Genocide/Genocide\\_Education.htm](http://www.dccam.org/Projects/Genocide/Genocide_Education.htm).

after 2002.<sup>137</sup> The Genocide Education project will also train around 3000 teachers in how to use the book. This may go some way to ensure that young people have knowledge and care about the period.

These initiatives show that there is space and need for other transitional justice mechanisms and that prosecutions and a hybrid tribunal alone are not enough. It also shows how important it is to conceive the prosecution activity in the context of a wider transitional justice strategy to provide complementary means to dealing with the past. Hybrid courts and national prosecution in general have a better chance of impacting public perceptions of truth and awareness of the need for reparations and memorialization when accompanied by both official and civil society initiatives.

#### **IV. Hybrid Tribunals' Potential Negative Impact on the Rule of Law**

It should not be assumed that the courts will only have a positive impact. The experience of both countries demonstrates that there can be possible negative effects that the courts must address before they begin to undermine their work. In Cambodia, there have been a number of problems with the ECCC that may actually have a negative impact on the public perception of rule of law. There has been a widely publicized controversy regarding alleged kickbacks. Cambodian staff reported that they had to give a percentage of their salary to their superiors.<sup>138</sup> This was reported widely in the international press following the Open Society Justice Initiative's work on the subject. An audit commissioned by UNDP found several problems in human resources management, with salary inflation and unnecessary creation of posts (although it did not investigate the kickbacks claim).<sup>139</sup> Negotiations between the UN and the RGC to tackle these problems stalled and allegations of corruption continued to gather press interest.<sup>140</sup> Furthermore, donors withheld funding from the ECCC until the issue was resolved. Finally, in August 2009 a range of anticorruption measures were agreed upon, including the establishment of an Independent Counselor who will be available to hear all complaints of corruption.<sup>141</sup> Nevertheless, the OSJI still argued that better protection was needed for staff.<sup>142</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> OSJI, Press Release, Corruption Allegations at the Khmer Rouge Court Must Be Investigated Thoroughly, Feb. 14, 2007.

<sup>139</sup> UNDP, Audit of the Human Resources Management at the Extraordinary Chambers in the Courts of Cambodia, Report No. RCM0172, June 4, 2007.

<sup>140</sup> On problems with negotiations, see Seth Mydans, *Corruption Allegations Affect Khmer Rouge Trials*, N.Y. TIMES, Apr. 9, 2009. For general coverage of corruption, see *The Court on Trial*, THE ECONOMIST, Apr. 4, 2009.

<sup>141</sup> Press Release, Office of Legal Affairs, Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in Courts of Cambodia, U.N. Doc. L/3146 (Aug. 12, 2009).

<sup>142</sup> OSJI, Press Release, New Anticorruption Measures at Khmer Rouge Tribunal Are Insufficient, Aug. 17, 2009.



With these problems, it is unclear whether the ECCC is providing the expected demonstration effect that public institutions should be transparent. If a UN-backed internationalized court is unable to overcome corruption then this could actually undermine public perception of institutions and raise skepticism that things will never change. However, there could be a positive impact in demonstrating that problems existed but were addressed properly. A 2008 audit found that most of the problems in the 2007 audit had been resolved. As mentioned above, the survey by the Human Rights Center at the University of California, Berkeley shows that the majority of those who know about the ECCC believe in its potential to provide a response to the crimes committed and two-thirds believed that the judges would be fair/the ECCC would be neutral.<sup>143</sup> The question of how the Court is perceived requires further investigation as the ECCC continues its work in case 002 and a follow-up survey is currently planned.

The controversy over additional prosecutions also has the potential to limit the impact of the Court. In December 2008, the Cambodian Co-Prosecutor Chea Leang opposed former International Co-Prosecutor Robert Petit's submission of an additional six suspects for prosecution. Leang stated that further investigations should not proceed because of the past instability of the country, the spirit of the agreement between the RGC and the UN, and the limited duration and budget of the Court.<sup>144</sup> Petit filed a Statement of Disagreement for the Pre-trial Chamber to decide on this matter. In September 2009 it was announced that the pre-trial judges had not reached a decision as they failed to obtain a supermajority.<sup>145</sup> In such a case, the Internal Rules provide that the submission proposed by the Co-Prosecutor automatically moves to the next stage, which is an investigation by the Co-Investigating Judges. The considerations of the Pre-trial Chamber showed that the three Cambodian judges agreed with Leang while the two international judges found Leang's reasoning insufficient.<sup>146</sup> It remains to be seen whether the Cambodian half of the tribunal cooperates if the additional prosecutions go forward. Prime Minister Hun Sen has stated that these additional prosecutions would lead to a civil war with hundreds of thousands of deaths.<sup>147</sup> The reputation of the Court rests on whether the prosecutions are able to go forward and whether it is perceived that the Cambodian side is making decisions based on political interference.

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<sup>143</sup> PHUONG PHAM ET AL., *supra* note 88, at 39.

<sup>144</sup> ECCC, Press Release, Office of the Co-Prosecutors in the Extraordinary Chambers in the Courts of Cambodia, Statement of the Co-prosecutors, Jan. 5, 2009.

<sup>145</sup> ECCC, Press Release, Sept. 2, 2009.

<sup>146</sup> ECCC, Annex I: Public Redacted Version. Considerations of the Pre-trial Chamber regarding the Disagreement between the Co-prosecutors pursuant to Internal Rule 71, Disagreement no. 001/18-11-2008-ECCC-PTC, Aug. 18, 2009.

<sup>147</sup> Cheang Sokha & Robbie Corey-Boulet, *ECCC ruling risks unrest: PM*, PHNOM PENH POST, Sept. 8, 2009.

There is a risk that trials could be counterproductive if they are perceived as biased.<sup>148</sup> Courts may be vulnerable to political attacks and accusations that can undermine both their prosecutorial activity and the wider impact in the rebuilding of the rule of law in the country. In BiH, politicians' attempts to use the work of the Court to further their own agendas put the State Court at risk of being perceived as partial. Serbian political leaders have been very vocal in their rejection of the Court arguing that it has focused more strongly on the prosecution of Serbs. The fact that the State Court is located in a former detention facility for Serbs during the war has not helped to refute their arguments that "it is a Court to condemn Serbs."<sup>149</sup>

In line with the discourse of Serb political leaders, Serb victim associations have led protests against the Court and several demonstrations have taken place in front of the building. Their attacks also undermine public opinion towards judges and prosecutors at the state level. The accusations of lack of integrity and professionalism impact people's perception of their work, the very constitutionality of the existence of the Court and OTP, and more widely the judicial reforms undertaken so far.<sup>150</sup>

Therefore public outreach work is crucial to explain to society how the prosecutorial process works. The efforts by the Court so far do not seem to have been able to counterbalance the political attacks. The WCC cannot change the reality that Bosniaks constituted the majority of victims during the war. Bosniak organizations were also very active during and after the war in gathering evidence about the crimes, which has inevitably resulted in a predominance of cases concerning crimes against Bosniaks.<sup>151</sup> The WCC could do more to explain not only the prosecutorial strategy but also why certain cases do or do not progress.

The lesson for BiH is also applicable to future courts. Public outreach efforts need to pay more attention to the impact that specific trials could have on the affected communities where the crimes were committed or where the victims and perpetrators currently live and try to pre-empt political manipulation by facilitating information in an accessible language. Furthermore, it is also important to take other kinds of protective measures to preserve the reputation of the institution—to shield judges from politically motivated claims of bias or even corruption and to protect the tribunals and the judicial systems as a whole when they are vulnerable to political attacks. In this sense, mechanisms to safeguard the independence of the judiciary should be strengthened. In the case of BiH, protective procedures against defamation of judges, for example within the HJPC, would not only preserve their independence, but also contribute to the public's perception of the State Court as an impartial, non-politically motivated institution and to the strength of the judiciary as a whole.

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<sup>148</sup> Stromseth, *Pursuing Accountability*, *supra* note 15, at 263.

<sup>149</sup> For the initial protests regarding the use of such a location and the Court's success in dealing with them, see Nettelfield, *supra* note 98.

<sup>150</sup> OECD, Mission to BiH, *Universal Periodic Review of Bosnia and Herzegovina "Stakeholder's submission"* (2009), available via <http://www.lib.ohchr.org>.

<sup>151</sup> IVANEŠEVIĆ, *supra* note 61, at 34.

## Conclusions

This chapter has explored the impact that both the WCC and ECCC are having and could potentially have on the rule of law in their countries. As we have argued, expectations for hybrid tribunals must be realistic—they cannot transform national institutions and procedures or conjure up systems governed by the rule of law on their own but rather must be considered as part of the broader strategy concerning the sector.

The experiences in both Cambodia and BiH show that expectations should also take into account the political context that has shaped the tribunals and in which they will have to develop their activities. Although a strength of hybrid tribunals is that they can be adapted to suit a particular national context, as Stromseth states, they also will be “shaped by political necessity and compromise.”<sup>152</sup> In addition, hybrid tribunals alone cannot be considered enough to impact the rule of law in countries. The BiH experience shows that inserting the work of the hybrid courts within a wider rule-of-law reform strategy can allow the court to fulfill some of the broader expectations for its impact, such as capacity-building in the wider justice sector.

Both courts have had to overcome difficult challenges to successfully carry out trials. From our analysis we can conclude that despite contributions to accountability, in both cases more concerted efforts are needed to engage with the domestic judicial actors in order to maximize the impact on the rule of law. Similarly, although some lessons regarding outreach have been applied, more engagement is possible. To achieve constructive engagement, our analysis highlights that the necessary objectives and competences must be reflected in the institutional mandate and budgetary provisions. In future hybrid tribunals the necessary provisions should be made and accompanied by the appropriate human and economic resources in order to maximize the capacity-building potential of international staff from the offset. The reliance on ad hoc initiatives, always vulnerable to changes in funding priorities, undermines their full potential.

Beyond the effect on rule of law, there is a question of how much impact hybrid tribunals can have in the absence of other transitional justice initiatives. In both countries other initiatives have been neglected, mainly due to political sensitivity and lack of prioritization. The fact that a number of civil society initiatives in both BiH and Cambodia are trying to promote alternatives demonstrates that there is support and a need for truth-seeking and reconciliation activities. Equally, the work of the courts in isolation, without a wider transitional justice strategy with a multi-faceted approach, is limited in terms of their possible contribution to broader reconciliation processes in the country.

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<sup>152</sup> Stromseth, *Pursuing Accountability*, *supra* note 15, at 263, 280.

## Chapter 11

# Domestic Legal Process and International Judicial Systems: The Argentine Case

*Leonardo Filippini*

As the editors of this volume suggest, many discussions about transitional justice raise the concern that the international legal framework, within the challenging context of overcoming a conflictual past, may lead to undesirable situations. This concern was present in the seminal exchange between Carlos Nino and Diane Orentlicher on the options and duties of the Argentine state shortly after resuming a democratic path in the wake of the last military dictatorship (1976-1983).<sup>1</sup> Orentlicher argued in favor of an international duty to punish human rights violations, assuming, in part, that international pressure would strengthen the new democratic government. On the other hand, Nino believed that a strong, internationally imposed duty to criminally prosecute would have destabilized the accountability process and increased polarization between human rights groups and the military. For Nino, an international duty to prosecute all human rights violations committed under the previous regime could prove excessive for a government that must struggle to reestablish democracy.<sup>2</sup>

Nevertheless, I assert that the case of Argentina has not represented, and does not represent today, a fatal dilemma between the necessary domestic flexibility for maneuvering and the international arena's conception of certain solutions to the problems of transition. There was no international pressure of the scope or intensity that Nino criticized, nor the potential negative results that he foresaw. Neither did international law pose such a rigid moral or legal framework so as to render it unusable or clearly incompatible with the needs of the Argentine community. Instead, international law, its institutions, and its political influence and pressure have offered valuable instruments for the Argentine transition. It has been at times a source of pressure and at times a space for refreshing debate that is open to the thought and action of democratic forces, something denied on the domestic level.

Since the reestablishment of democracy, Argentine jurisprudence participates in what Anne Marie Slaughter and others have labeled *judicial*

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<sup>1</sup> See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537, 2548-49 (1991); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context*, 100 *YALE L.J.* 2619 (1991); Diane F. Orentlicher, *A Reply to Professor Nino*, 100 *YALE L.J.* 2641, 2641-43 (1991).

<sup>2</sup> CARLOS S. NINO, *JUICIO AL MAL ABSOLUTO: LOS FUNDAMENTOS Y LA HISTORIA DEL JUICIO A LAS JUNTAS DEL PROCESO* (1997).

*cross-fertilization*;<sup>3</sup> that is, Argentine courts' penchant for borrowing non-authoritative elements (or clearly authoritative for some observers), and their frequent citation of court decisions from the strongest western democracies as well as of jurisprudence from international courts. There has been habitual use of international law in the adjudication of individual cases, including holdings that declare national laws unconstitutional for being contrary to international law.<sup>4</sup> These tendencies are contemporaneous with the growing importance of international law throughout the globe.<sup>5</sup>

During Argentina's transition, there has been increasing transnational influence, interaction, and dialogue. We observe a progression starting from the joint ratification of several international human rights instruments during the earliest stages of democracy (1983 to 1985) and citation to those commitments in Supreme Court decisions, to eventually establishing the supremacy of international law over national laws—first through judicial action, and then through constitutional reform in 1994. Since 1994, the Argentine Constitution expressly establishes that “treaties and concordats are hierarchically superior to laws” and over ten international human rights legal instruments not only enjoy “constitutional status”<sup>6</sup> (e.g. superiority over the legal codes), but also the same hierarchical status as the articles of the Constitution itself.

In the first decade of this century, this process of progressive absorption and prioritization of international norms has proved a key factor in certain concrete decisions pertaining to the democratic transition process. Most importantly, it has led the Supreme Court, beginning in 2004, to revise the entire legal framework of the previous two decades in light of the principles and rules of international law; primarily with regard to criminal prosecution, but also on issues pertaining to memory, truth-seeking, vetting of public servants involved in past criminal acts, reparations policies, and identification of the sons and daughters of the disappeared.

The path taken at the beginning of democracy paved the way for watershed decisions two decades later in favor of the domestic application of human rights law in resolving sensitive matters related to transition. This process of integrating human rights into domestic law is not so much the distinctive seal of a particular set of Supreme Court Justices, but rather the evolution—maybe not inevitable, but foreseeable—of the first democratic administration's decision to link the democratic transition process to the main human rights treaties. The international bias of the

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<sup>3</sup> See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

<sup>4</sup> This description is adequate at least with regard to international human rights law. As to other rules of international law, such as international economic law, the situation can vary.

<sup>5</sup> As Oona Hathaway warns, international law, long the province of diplomacy, today applies not only to the interaction between states, but also to the actions of states within their borders. As of the start of the twenty-first century, over 100,000 international treaties regulate matters from taxes and business transactions to the prohibition of torture. Oona Hathaway, *International Delegation and State Sovereignty*, 71 *LAW & CONTEMP. PROBS.* 115 (2008).

<sup>6</sup> *CONST. ARG.* art. 75, para. 22.

Argentine democratic transition, which is still present today, is neither a novelty nor a complete departure from previous doctrine. Instead, it is a characteristic of state policy that all democratic administrations have generally upheld.

The fate of democratic stability was entrusted in 1983, in part, to international human rights law. From then on, despite tensions and failures to comply with international guidelines, the various political forces in charge of the nation's destiny chose to consistently maintain an open and receptive stance towards international human rights law. In recent decades, each of the administrations signed the main human rights treaties and declarations that emerged during their terms; they have all been concerned with maintaining a relationship that is at least decent with international oversight bodies; and, none has found serious incompatibility between those international agreements and the constitutional framework.

The reference to foreign and international law is a practice that did not truly start in 1983. From a very early stage, Argentine jurisprudence has drawn upon foreign case law including, paradigmatically, that of the Supreme Court of the United States of America on certain constitutional clauses. What can be seen starting in 1983 is an intensification of this practice. From the 1980s to today, there has been a gradual and steady increase in the Argentine courts' openness to incorporate and use foreign and international law. Today, the Argentine judicial system is receptive and attentive to legal developments beyond its borders.

In terms of the democratic transition, international law's presence is evident. Inter-American human rights law has a particularly notable role. The Inter-American Commission on Human Rights (IACHR) visited the country in 1979, in the midst of the military dictatorship—a move that enjoyed great support among the human rights community. It is probably not mere coincidence that Raul Alfonsín, the president during the democratic transition, was among the politicians that met with the visiting commissioners. He may have realized the democratizing potential of the visit and of the international support networks. The Commission's report changed the paradigmatic general understanding of state-sponsored terrorism. It proved the violations that the military government hid and permanently discredited the theory of simple excessive use of force. The report thus definitively consolidated the condemnation of systematic repression.

This close relationship with the Inter-American system from the very beginning of the path towards democracy has continued to today. In the 1980s, the IACHR received complaints of unsatisfied reparations, and in 1992, it issued its report Number 28, condemning the "Impunity Laws." Since then, the IACHR has actively monitored the domestic process. In recent years, given its increasing volume of case law, the Inter-American Court of Human Rights (IACtHR) joined the network of regional influence. The repudiation of the Full Stop ("*Punto Final*") and Due Obedience ("*Obediencia Debida*") laws (together referred to as the "Impunity Laws"), as well as the pardons granted by ex-President Carlos

Menem, are anchored in the principles and rules of the inter-American system and consistent with the holding in *Barrios Altos*.<sup>7</sup>

In the following sections, I will suggest some ideas about the possible causes of this tie between international law and transition, its manifestations and the forms of interaction, and its value as in terms of effective contribution to the pursuit of justice. As we will see, the international system has not stifled the domestic community's political skill in proposing its own solutions. Argentina offers an example of a society that deems the rationale and procedures of international human rights law to be suitable, and therefore decided to model and even modify its own transitional norms in light of the principles of justice and political considerations better reflected in international law than in the domestic legal system. The Argentine society unequivocally recognized that certain rules of international law may reflect its own convictions about transitional justice better than certain national laws adopted amidst antidemocratic pressures.

## **I. Possible Tensions between International Principles on Transition and the Domestic Experience**

Before going into more detail about how international law and its organs behave and interact with the democratic transition process, I will clarify two points, which raise questions about the assertion that the growing evolution and acceptance of international law coexists harmoniously with the consolidation of democracy in Argentina: tensions around the concept of reconciliation and the reopening of criminal prosecutions. Nonetheless, as I will describe, neither of these situations is important enough to change the scene. I mention these phenomena in order to provide a more accurate description of this case and, of course, to recognize the limitations inevitable in all generalizations, including the one that I shall defend.

### **A. Reconciliation**

The first source of tension is that the accumulated international experience with the idea of *reconciliation*—unlike that of other international developments related to memory, justice, and truth—always faced strong resistance from the local human rights movement in Argentina. Even today, many find that framing the Argentine problem in terms of conflict and reconciliation ignores the most important fringes of the domestic process and leads to an erroneous historical accounting of the nature of the violence of

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<sup>7</sup> See *Barrios Altos v. Peru Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

the past and its perpetrators. It would be unthinkable that an institution like the Peruvian Truth and Reconciliation Commission, which received great support from the international community, could ever exist under that name in Argentina.

Of course, there may not be a real conflict between certain imperatives of international law that may fall under the category of reconciliation—broadly speaking, directing group actions towards peacebuilding or establishing certain limits to criminal prosecution— and national needs and assessments. This is the case even if we recognize a certain degree of discrepancy at the national level. Nevertheless, the term *reconciliation*—regardless of what it may entail in the international debate on transitions—was used in domestic debates largely in the context of demands to prevent the criminal prosecution of the responsible parties and was often touted by certain people and institutions.<sup>8</sup> This predictably resulted in the lack of meaningful local debate around a possible conception of *reconciliation*, including its scope and implications, or about the possibility of learning from other nations undergoing more elaborate processes of transition built upon *reconciliation* or other similar concepts, such as South Africa.<sup>9</sup>

The high degree of receptivity that we witness toward international initiatives that deal with truth, justice, and memory, becomes entrenched distrust when it comes to reconciliation initiatives—this without a full discussion of the nature of the concept. Reconciliation does not operate as a useful concept or normative ideal to stimulate debate or encourage action but rather as an inflexible label that is very difficult to disentangle from the established positions of certain opinion groups or even from a certain religious connotation.<sup>10</sup>

It is possible to frame or interpret some Argentine events in light of the idea of reconciliation; I do not believe that the Argentine experience is, in fact, impervious to the very idea of reconciliation, or at least some of its possible interpretations. However, it is futile to seek a historical and political understanding invoking this term without paying attention to the full semantic weight that it carries. Neither would it be correct to interpret its mention in Argentine history, without considering how it is used. International law's notions of memory, truth, and justice have certainly been much more useful. These notions have allowed us to share ideas and consider disagreements with a common understanding of what each terms involves. *Reconciliation*, as well as any international attempt in that

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<sup>8</sup> For example, the Catholic Church, or sectors of it, has repeatedly alluded to the idea of reconciliation in public statements criticizing the criminal prosecution of serious human rights abuses. See, e.g., Mariano Obarrio, *Pide la Iglesia al Gobierno que deje atrás el pasado* (The Church Asks the Government to Leave the Past Behind), DIARIO LA NACIÓN, May 16, 2004.

<sup>9</sup> In this vein, there are frequent non-critical and misinformed references to the South African case.

<sup>10</sup> Albeit with many references to the local situation, the news article by Horavio Verbitsky, *Castagnazos*, DIARIO, May 23, 2004, at 12, can be viewed as an example of the use of the term.



vein, leaves us with thin results. It does not offer a shared platform, but rather closes down debate.<sup>11</sup>

## **B. International Law, the Constitution, and the Invalidation of the “Impunity Laws”**

A second, more recent situation that may also complicate the idea that international law has favorably upheld the Argentine transition process is the debate generated by the reopening of the criminal prosecutions of human rights violations. These prosecutions had been halted by the Full Stop Law (1986), the Due Obedience Law (1987), and the pardons granted by ex-president Carlos Menem (1989-1990). For many, the decision to reopen prosecutions in accordance with international commitments was a plausible decision that was morally defensible and compatible with the Constitution. However, some critics have questioned the reopening of these prosecutions on a number of grounds. One of their relatively recurrent arguments is that international law’s demand that trials be conducted is both a flawed solution and unconstitutional. For those who share this view, international law is a source of undue interference in the country’s constitutional development.

On June 14, 2005, the Supreme Court of Argentina declared the Full Stop and Due Obedience laws unconstitutional in the *Simón* case,<sup>12</sup> and thus revoked its prior *Camps* doctrine,<sup>13</sup> which had upheld the validity of those laws. The Court in effect defended its decision by noting the evolution of Argentine jurisprudence in terms of its acceptance of international human rights law.<sup>14</sup> Many commentators pointed out the numerous references to international law in the Court’s decision and its intervention in the course of the transition. Carolina Fernández Blanco highlighted that *Simón* was decided “based almost exclusively on arguments of

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<sup>11</sup> In a somewhat similar sense, see Lesley McEvoy, Kieran McEvoy, & Kirsten McConnachie, *Reconciliation as a Dirty Word: Conflict, Community Relations and Education in Northern Ireland*, 60 J. INT’L AFF. 81 (2006).

<sup>12</sup> Corte Suprema de Justicia de la Nación, CSJN, Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/privación ilegítima de la libertad, etc., Causa N° 17.768, S. 1767. XXXVIII (June 14, 2005).

<sup>13</sup> Corte Suprema de Justicia de la Nación, CSJN, *Camps*, Decision 310:1162 (1987), established the constitutional validity of the Law of Due Obedience. A variety of decisions that followed cited and applied this precedent. See, e.g., Decisions: 311:401, 816, 890, 1085 & 1095; 312:111; 316:532 & 2171; 321:2031.

<sup>14</sup> The President of the Court expressed that “since the amendment of the National Constitution in 1994, the Argentine State has undertaken a series of constitutional duties in light of international law, and, especially, the inter-American legal framework. These duties have been further consolidated and clarified in terms of their scope and content as part of an evolution that clearly limits domestic law’s authority to condone or omit the prosecution of events like the *sub lite*.” Corte Suprema de Justicia de la Nación, CSJN, Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/privación ilegítima de la libertad, etc., Causa N° 17.768, S. 1767. XXXVIII (June 14, 2005).

International Law;<sup>15</sup> according to María José Guembe's interpretation, the evolution of domestic and international law "forced" the judges to revise their initial position;<sup>16</sup> and, Pablo Parenti observed that the decision's arguments "deal mainly with international law and its possible application by our courts."<sup>17</sup>

Critics denounced that the highest court had erroneously applied rules of international law and mistakenly interpreted the constitutional limits on such application.<sup>18</sup> The National Academy of Law and Social Sciences concluded that "[t]he judicial doctrine that assigns primacy to human rights treaties and international norms . . . entails a breach . . . of the mandate of judicial precedence in the Argentine legal system . . . ."<sup>19</sup> The constitutionalist Gregorio Badeni pointed out that the Supreme Court must not accept an authority superior to itself on constitutional matters.<sup>20</sup> Some even wrote that with respect to human rights, "a stalwart internationalist and unilateral approach has become fashionable."<sup>21</sup> Reflecting a different perspective, Carlos Rosenkrantz warned that the issue with a decision like *Simón* is not whether international law has become part of Argentina's legal system or whether Argentina should honor its current international obligations, but rather the decision served a reminder that collective self-governance requires looking "deep inside in order to find solutions that can be seen as the reconstruction of the principles that make us the political community that we are."<sup>22</sup>

For all of these critics apparently, the decision to invalidate the "Impunity Laws" would restrict or interfere with domestic tendencies that should generally be more politically introspective, more rigorous in interpreting the Constitution, and less influenced by arguments created by the international community. As we can see, this is not about reliving Nino's fears, for political instability does not seem to be linked to the use of international law. At the current point in the transition, what critics are questioning is the quality of the procedures through

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<sup>15</sup> Carolina Fernández Blanco, *La relación entre derecho internacional y derecho interno en el caso 'Poblete'*, in NUEVA DOCTRINA PENAL 595 (2005).

<sup>16</sup> María José Guembe, *La reapertura de los juicios por los crímenes de la dictadura militar argentina*, 3 REVISTA INTERNACIONAL DE DERECHOS HUMANOS SUR 121 (2005).

<sup>17</sup> Pablo Parenti, *La relación entre Derecho Internacional y Derecho Penal nacional: El caso "Simón"- Algunas observaciones sobre la aplicación del derecho internacional por la mayoría de la Corte en el fallo "Simón"*, in EL SISTEMA PENAL EN LAS SENTENCIAS RECIENTES DE LA CORTE SUPREMA (Daniel Pastor ed., 2007).

<sup>18</sup> See, e.g., Ezequiel Malarino, *La cara represiva de la reciente jurisprudencia argentina sobre graves violaciones de los derechos humanos: Una crítica de la sentencia de la Corte Suprema de Justicia de la Nación de 14 de junio de 2005 en el caso Simón*, EL DIAL.COM, Sept. 14, 2009.

<sup>19</sup> National Academy of Law and Social Sciences, *Dictamen de la Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires sobre los Tratados Internacionales y la Supremacía de la Constitución Nacional*, Aug. 25, 2005, <http://www.academiadederecho.org.ar/declaraciones.htm>.

<sup>20</sup> Gregorio Badeni, *El caso 'Simón' y la supremacía constitucional*, LA LEY, SUPLEMENTO PENAL, July 2005, at 9.

<sup>21</sup> Enrique Díaz Araujo, *Internacionalismo salvaje*, JURISPRUDENCIA ARGENTINA, 2005-III-898.

<sup>22</sup> Carlos F. Rosenkrantz, *Advertencias a un internacionalista (o los problemas de Simón y Mazzeo)*, 8 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 213 (Sept. 2007).

which certain holdings have been reached. The reopening of trials in part raised questions about the very legitimacy of international law as a basis for Argentina's collective agreements.

I, on the other hand, tend to think that there are no insurmountable objections that require us to distrust international law's authority to contribute to resolving issues such as the criminal prosecution of past human rights violations. Nor do I believe that the Constitution invalidates the adopted approach, or that the reopening of the cases is a signal that we should change our assessment of the general synergy created in Argentina between the international sphere and domestic legal process. Contrary to the critics, I find absolutely no empirical support for the assertion that the Argentine case represents a clear distinction between international and domestic legal process with respect to human rights. Although I will address some of the criticisms further below, I will not repeat here more precise observations that I have made elsewhere regarding several of the criticisms.<sup>23</sup>

For the purposes of this reflection, it suffices to note that there are voices of dissent that honestly claim to find tensions strong enough to require us to talk about contrasts between domestic legal process and international law. They would respond differently to the questions posed by the editors of this volume. However, in the company of many others, I believe that such contrasts do not at all have the intensity perceived by critics.<sup>24</sup>

## II. Permeable and Impermeable Legal Communities

An initial reaction when dealing with a community that is very permeable with respect to international law is to ask what gives rise to this condition. What leads a legal community to have greater faith than others in the ability of international law's rules and principles to solve a difficult dilemma, such as that pertaining to a transition? Why do some legal communities, relative to others, more intently study comparative experiences as a source of inspiration for solving their own

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<sup>23</sup> Leonardo Filippini, *La definición de los crímenes contra la humanidad en el fallo "René Jesús Derecho" de la Corte Suprema argentina*, in JURISPRUDENCIA PENAL DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN 316 (Leonardo Pitlevnik ed., 2008); Leonardo Filippini, *El prestigio de los derechos humanos – Respuesta a Daniel Pastor*, in TEORÍA Y CRÍTICA DEL DERECHO CONSTITUCIONAL. TOMO I: DEMOCRACIA 1207 (Roberto Gargarella ed., 2008); Leonardo Filippini, *El derecho internacional de los derechos humanos no es un préstamo - Reflexiones sobre la crítica a los préstamos de Carlos F. Rosenkrantz*, 8(1) REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 191 (2007).

<sup>24</sup> To put the importance of this contrast in perspective, see Víctor Abramovich, *Editorial*, 2 NUEVA DOCTRINA PENAL 1 (2007); Martin Böhmer, *Préstamos y adquisiciones: La utilización del derecho extranjero como una estrategia de creación de autoridad democrática y constitucional*, in TEORÍA Y CRÍTICA DEL DERECHO CONSTITUCIONAL: TOMO II. DERECHOS (Roberto Gargarella ed., 2008); Javier De Luca, *Punitivismo y Derechos Humanos: El caso de Argentina* (Apr. 2009); Pablo F. Parenti, *La jurisprudencia argentina frente a los crímenes de derecho internacional*, 18 LATEINAMERIKA ANALYSEN 61 (2007).

problems? What makes a judge seriously consider emulating a colleague from another jurisdiction instead of taking new unexplored approaches? All of these questions, in some way or another, are inevitably connected to the question of international law's place in the legal life of a society in transition.

Given that diverse theories compete to explain the behavior of the State—and in particular, of the judges and operators of the judicial system—it proves useless to aim for definitive answers that predict the influence of a principle, a treaty, or an international court decision.<sup>25</sup> For example, Oona A. Hathaway, in her research on the ratification of human rights treaties, has highlighted the importance of considering the benefits, in terms of international reputation, that a state believes it will gain by signing a treaty. In her opinion, this is a factor that helps explain a state's decision to ratify an international treaty.<sup>26</sup> Other research establishes a relationship between the nature of the local political structure and the permeability of that structure vis-à-vis an international system of laws and principles. There is a tendency to associate political systems that guarantee respect for political and civil liberties with greater acceptance of international oversight regimes.<sup>27</sup> Andrew Moravcsik states that the need to strengthen a democratic transition increases the likelihood of ascription to an international human rights protection regime.<sup>28</sup> Other authors have applied the tools of economic analysis of law to international human rights systems.<sup>29</sup> Part of the literature, in contrast, highlights the value of the principles that shape an international system as a reason to adhere to such a system.<sup>30</sup> Others, such as Harold H. Koh, emphasize the dynamics of transnational law in norm-creation, or the particular role of transnational advocacy networks.<sup>31</sup> We could grossly simplify the matter and assume that a state molds

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<sup>25</sup> See e.g., OONA A. HATHAWAY & HAROLD HONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* (2005); Anne-Marie Slaughter, *International Law and International Relations Theory: A Prospectus*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* (Eyal Benvenisti & Mose Hirsch eds., 2004); Beth A. Simmons, *Compliance with International Agreements*, 1 *ANN. REV. POL. SCI.* 75 (1998); Beth A. Simmons, *International Law and International Relations: Scholarship at the Intersection of Principles and Politics*, 95 *A.S.I.L. PROC.* 1 (2002); JOSÉ ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* (2005); Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 *HARV. INT'L L.J.* 487 (1997).

<sup>26</sup> Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 *U. CHI. L. REV.* 469 (2005).

<sup>27</sup> Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L L.* 503 (1995); Simmons, *Compliance with International Agreements*, *supra* note 26, at 83.

<sup>28</sup> Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *INT'L ORG.* 217 (2000).

<sup>29</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

<sup>30</sup> Simmons, *Compliance with International Agreements*, *supra* note 26, at 87.

<sup>31</sup> Harold Hongju Koh, *International Law as Part of Our Law*, 98 *AM. J. INT'L L.* 43 (2004); Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997); Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 *INT'L ORG.* 411 (1993); MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); ALISON BRYSK, *THE POLITICS OF HUMAN RIGHTS IN ARGENTINA: PROTEST, CHANGE, AND DEMOCRATIZATION* (1994).

itself according to international law out of interest or conviction. More concretely, a state sees international law as an obstacle or vehicle for its interests or it believes in respecting the norms based on some intrinsic quality, such as, for example, being an expression of justice or the result of a democratic pact.

At the time when the Inter-American Commission prepared for its 1979 visit to the country, it is very likely that the military junta's acceptance of the Commission's mandate can be explained by economic incentives that the promise of credit offered and external pressure from President Carter's administration.<sup>32</sup> However, after democracy's return and possibly even today, the acceptance of external sources could be explained by another type of interest, which is most likely related to the quest for international recognition in certain fora or the reputational interests of a new democratic government that must end its international isolation by joining the international community of democracies.<sup>33</sup>

Nevertheless, I believe that the Argentine case is best explained by those theories that associate the position of international and foreign law with the very nature of the rules and values. This means, more concretely, that the relative position of international and foreign law can be explained by the moral authority behind the very principles that are reflected in the rules of international law. At least in the context of the transition, it is hard to deny that judges and the wider legal community greatly adhere to international human rights law's core elements. Just as global condemnation of genocide can be fundamentally explained by the genuine aversion that this crime provokes, it is possible to give credence to the moral theses to explain why certain communities in transition may find in these norms, which prohibit the most basic offenses against an individual, a reflection of their own convictions.

Obviously, our position as observers of these explanations affects, in part, our judgment of their legitimacy. Our views as to the correct way to evaluate the dynamics of this interaction also say something about the kind of relationship that is established—for example, of adhesion, cooperation, or subordination. Furthermore, we may judge, in a variety of ways, the legitimacy of the reference to and use of international law to the extent that we are capable to understand what drives it. For a community of moderate international stature and without chances of global leadership, such as Argentina, there will always be a sense that it does not have total freedom in creating its own options, but rather that it can only choose from the limited array of possibilities that have been defined by other actors.

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<sup>32</sup> IAIN GUEST, BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS 174 (1990); BRYSK, *supra* note 32, at 54; MARCOS NOVARO & VICENTE PALERMO, LA DICTADURA MILITAR (1976–1983): DEL GOLPE DE ESTADO A LA RESTAURACIÓN DEMOCRÁTICA 290 (2003); Maria Luisa Bartolomei & David Weissbrodt, *The Effectiveness of International Human Rights Pressures: The Case of Argentina 1976–1983*, 75 MINN. L. REV. 1009 (1991).

<sup>33</sup> Moravcsik, *supra* note 28.

### III. Manifestations of International Justice in the National Ordinary Jurisdiction

As professor Hitters says:

Some time ago, it would have been unthinkable for most scholars of legal studies, and of international law in particular, to imagine that judicial decisions, that the pronouncements, guidelines and reports issued by judicial and quasi-judicial bodies . . . could “intrude” in the veins of different countries with such force so as to manage to noticeably alter certain local norms, including those of a constitutional nature.<sup>34</sup>

Argentina has been receptive to inter-American human rights law and to its bodies’ decisions and doctrine. Since 1983, the general tendency has been, albeit with fluctuations, toward greater responsiveness to the inter-American system’s institutions.

One way to answer the question of how international law influences judicial practice is to observe the way in which international law is manifested in the legal system’s routine activities—namely, through the recognition of norms and their concrete application in adjudicating a case.

With regard to norm-recognition, we can quickly conclude that the Argentine legal system easily recognizes applicable international laws. As we have already stated, according to Argentine constitutional law, international treaties have supremacy over the domestic legal code. Moreover, the Supreme Court has stated that IACtHR jurisprudence is persuasive authority in interpreting the scope of the State’s obligations. The same principle has been established, in a general sense, with regard to the interpretation of human rights treaty bodies in terms of their respective provisions. Thus, the Argentine legal system has recognized principles from reports from the Committee Against Torture and other similar bodies. The jurisprudence of the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia is recognized as a guide for the definitions of international crimes and other elements of international criminal law. Norms of customary international law are also regularly cited in Argentine jurisprudence on State obligations, although there is no rigorous method for doing so. As the Procurator General stated in the *Simón* case, not only treaties, but also the customary norms and general principles of law are an integral part of the domestic legal system, together with the Constitution and domestic laws.

However, the recognition of all possible applicable rules is not exhaustive. Sometimes it is difficult to discern a consistent thread guiding judicial practice.

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<sup>34</sup> Juan Carlos Hitters, *¿Son vinculantes los pronunciamientos de la comisión y de la Corte Interamericana de Derechos Humanos? Control de constitucionalidad y convencionalidad*, LA LEY, Sept. 17, 2008.

This can be seen in relation to international criminal tribunals and also in other areas, such as international law pertaining to economic, social, and cultural rights. Argentine jurisprudence easily recognizes international obligations that should shape judicial interpretation; however, Argentine courts' are often not exhaustive in their examination of international legal issues, nor do they employ the rigor that should be expected of a judicial community that has decided to adopt an outlook that open to penetration by international law.

We observe the same openness and fluidity with respect to the absorption of international rules in the adjudication of cases. International norms—customary, treaty, and jurisprudential—appear and are often applied without the slightest adaptation to the concrete cases. Domestic law functions as a loose sieve, and it is not unusual to find decisions in which the holding is directly borrowed from an international standard. This is the case even in decisions that invalidate congressional laws. We can identify, individually or jointly, the various uses of international law: direct application; as an interpretative tool for construing domestic laws; a complement to the domestic legal code; consideration of interpretations by the international human rights institutions in defining the scope of pacts and declarations and shaping constitutional and legal hermeneutics; and, finally, the domestic execution of decisions proffered by international judicial and quasi-judicial institutions in particular cases.

Of course, these different uses are determined by, *inter alia*, the domestic law that regulates international law's incorporation into the domestic legal sphere, the extent to which rights established in treaties are to be recognized, the consideration of the dispositive nature of certain conventions, and the superior hierarchy of agreements.<sup>35</sup> In the Argentine case, the Supreme Court has interpreted article 75, paragraph 22 of the Constitution to require judges to apply international human rights norms in adherence to the jurisprudence of the international tribunals that have jurisdiction over the application of such laws. Moreover, the Constitution establishes the constitutional status of human rights treaties and the supremacy of all international treaties over domestic law. Still, in terms of the application of international rules, the case law is not entirely consistent.

#### **IV. Threats Posed by International Justice to the Transition Process**

The Argentine case does not suggest that international justice poses a threat to the process of national transition. Despite the strong imperative tone that characterizes certain international principles, international human rights

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<sup>35</sup> See LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS EN EL ÁMBITO LOCAL: LA EXPERIENCIA DE UNA DÉCADA (Victor Abramovich, Alberto Bovino, & Christian Curtis eds., 2006).

law has undoubtedly operated always, in this community at least, as a symbolic pressure aiming for truth, justice, and memory. It has never been a serious threat to the necessary balance for building democratic stability. International justice does not affect the current process, nor did it ever negatively impact periods of the Argentine history where the transition process grossly ignored any possible international restriction. Even the critics of the current reopening of criminal trials agree with this observation, for international justice has never been a destabilizing factor. The International Criminal Court—the global institution today that holds a direct mandate over criminal prosecution—lacks temporal jurisdiction over the human rights crimes of Argentina’s past. The primary interaction continues to be with the inter-American system, which lacks the jurisdiction to prosecute individuals. The predominate opinion, which is naturally held by most courts and the Supreme Court, is that regular engagement with international legal developments nourishes debate and is part of the historical progression of the national process.

As mentioned above, the most important deviation today is perceived by those who, from a critical perspective, believe that the Argentine Supreme Court decisions that follow the IACtHR’s jurisprudence produce political and legal consequences that affect democratic transition. For those who thought that the “Impunity Laws” sealed a finished process, the influence of international law has, from their perspective, undermined the system’s legal certainty—the irrevocable closing of criminal investigations into state-sponsored terrorism should be respected. This is the view of Daniel Pastor, for example, who believes that “for better or for worse,” the matter should be considered definitively closed.<sup>36</sup>

The main objection is that this international legal influence has resulted in the abandonment of certain basic legal principles of Argentine constitutional and criminal law, such as *res judicata*, the prohibition against double jeopardy, the guarantee of specificity in defining crimes, and the exclusive authority of Congress to make criminal law, etc. Furthermore, critics also claim that victims’ rights have been expanded disproportionately at the expense of the defendant,<sup>37</sup> and that this occurs under the guise of reinstating the rule of law, which should effectively establish certain ethical limits on the State’s range of action. Another

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<sup>36</sup> Daniel Pastor, *La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos*, 1 NUESTRA DOCTRINA PENAL 73 (2005). This expression is similar to that used by another Argentine professor, Pablo Manili; he says it is so “whether we like it or not”. Pablo Manili, *Sobre la inconstitucionalidad de la ley 25.779*, 70 REVISTA ABOGADOS 46 (2003). Still, Manili, unlike Pastor, believes that, “[w]hether we like it or not, the laws known as ‘full stop’ and ‘due obedience’ were, at the time, perfectly constitutional and widely recognized as politically legitimate.”*Id.* According to Pastor, wise legal scholars such as David Baigun, Julio Maier, and Marcelo Sancinetti, without taking a position on the matter, had proved that it was possible to argue that these laws were legally flawed. Pastor, *supra*, at 114.

<sup>37</sup> Ezequiel Malarino, *Jurisprudencia latinoamericana sobre derecho penal internacional – un resumen*, 18 LATEINAMERIKA ANALYSEN 191 (2007).



criticism is that the Argentine Supreme Court has recognized elements of binding precedent in IACtHR's decisions in cases where the Argentine State was not a party. There are objections to the *Barrios Altos* doctrine and its application as precedent without prior evaluation of the factual differences between the Peruvian and Argentine cases.<sup>38</sup> The central argument of this criticism is that international law sends us down a slippery slope and leads to the waning of the rule of law. However, even amidst such skillful argumentation, it does not seem possible to speak of international law as a threat in the sense of being an intrusion that could exacerbate a situation of violence. In the worst case, critics claim that international law is a bad influence, and express their disapproval of the dogmatic choice to be deferential to international law.

We can reaffirm the inability of international justice to truly pose a threat by taking a careful look at the arguments of those who criticize the Argentine courts' open dialogue with international justice. These critics pay little attention to what international bodies have done, and continue to do, in relation to Argentina. Instead, they concentrate on the Argentine courts' response to the stimulus created by international law. With this in mind, I consider that the idea of international justice as an intrusion or a source of undue influence on local actors has been disproved by the very arguments of those who put forth the objection. Those who claim undue influence or error in international law's influence in Argentina direct their criticism only at the domestic judicial authorities who drive the legal process through their own autonomous decision-making power.

## V. The Influence of International Oversight or Judicial Institutions on Domestic Actors

As Margaret Keck and Kathryn Sikkink observed, the inter-American supranational forum has served as a sounding box or place for grievances for those citizens who have been blocked from domestic channels of accessing justice.<sup>39</sup> The international legal system has operated in this way as an alternative forum for domestic politics, in which those who were denied access to justice in their home jurisdiction could seek recognition of their personal dignity. Still, this level of minimal consideration often fails to have any easily visible impact for a long time: an example of the lack of immediate results is the IAHRC Report 28/92, which determined that certain laws and pardons were inconsistent with

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<sup>38</sup> Leonardo G. Filippini, *Algunos problemas en la aplicación del derecho internacional de los derechos humanos en el fallo Simón de la Corte Suprema Argentina*, in *JUDICIALIZACIÓN DE CRÍMENES DE SISTEMA* (Michael Reed Hurtado ed., 2008).

<sup>39</sup> MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* (1998).

the American Convention on Human Rights. It is doubtful that this report had any decisive influence on the resumption of criminal prosecutions in 2003.

In the Argentine jurisprudence, however, there has been a strengthening of the argument that certain solutions are needed in order to avoid the State's international liability. This is especially true after the constitutional reform of 1994. Justifying an argument with this rationale is common in the technical jargon of international public law. However, it has been perceived as an argument in favor of international law's authority and is not particularly persuasive at the local level. This is how many norms of international law were immediately incorporated, and also how domestic legal analysis has been fostered by the experience of the international bodies.

The International Criminal Court, in particular, has had a moderate influence over the domestic legal process. There was, and has continued to be, a strong academic interest, which intensified during the debate over the implementation of the Rome Statute. This generated a debate on the classification of certain crimes. These debates have proved to be a valuable contribution to interpreting Argentine criminal law at the time of the state-sponsored terrorism. These interpretations and rules are applied in today's criminal cases, with ample examples of references to the ICC, ICTY, and the ICTR in numerous judicial opinions.

The established practice of looking to international criminal tribunals has brought about an interesting, albeit limited, outcome—debate over the possible expansion of criminal prosecution to members of armed organizations that acted without State support. In response to certain public statements made by Luís Moreno Ocampo<sup>40</sup> and the interpretations of some authors, a new school of thought arose. Contrary to criteria established by the Supreme Court and the Procurator General, this new line of thinking supports the idea that Argentina has the international obligation to prosecute crimes committed by the guerrilla, either as war crimes, crimes against humanity, or in virtue of international norms about terrorism.<sup>41</sup> The issue, however, has been resolved in various judicial decisions. Today, it seems unlikely that this position will be modified.

On the other hand, there have been few problems with the incorporation of international norms and jurisprudence in the terms of international criminal law. The only exceptions have to do with the non-applicability of statutes of limitations to certain criminal prosecutions and the nullity of the "Impunity Laws," which, as we have already seen, had been the most debated. Law 26.200 incorporated the criminal provisions of the Rome Statute into the domestic legal framework. Moreover, recent jurisprudence on the reopening of trials has been incorporating the international

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<sup>40</sup> *Las FARC pueden ser investigadas por "crímenes de lesa humanidad"*, DIARIO PERFIL, Mar. 16, 2008.

<sup>41</sup> Emilio J. Cárdenas, Javier Vigo Leguizamón & Carlos A. Manfroni, *EL TERRORISMO COMO CRIMEN DE LESA HUMANIDAD* (2009).

tribunals' jurisprudence on matters of truth and criminal justice. According to some critics, there has been a degree of manipulation or inappropriate application of such jurisprudence. I tend to think that, although there are some problems, the Argentina courts' legal interpretation has been proven to be consistent.

## VI. Foreign and International Jurisdictions

Along with the inter-American system's relevance in the Argentine criminal justice system, it is also worth noting that other countries have generally and consistently followed a similar line of establishing criminal liability for Argentine state-sponsored terrorism. In this way, these countries exerted pressure on Argentina, fundamentally moral or symbolic. This has allowed for continuity of the denunciations outside of Argentina against the country's closed criminal justice system.

Among the earliest examples is the U.S., which beginning with the case of *Peña Irala v. Paraguay*, the path was opened for some civil cases involving Argentine perpetrators. In the 1990s, numerous extradition requests in the *Josef Schwamberger* and *Priebke* cases led the Federal Chamber of La Plata and the Supreme Court of Justice respectively to issue opinions supporting international cooperation in criminal matters and the non-applicability of statutes of limitations to crimes against humanity. While the "Impunity Laws" were in effect, there were two important cases in Spain against Adolfo Scilingo and Ricardo Miguel Cavallo, who was living at the time in Mexico.

Both cases drew attention to the matter, and allowed the human rights community to rally around concrete petitions. The Argentine political environment at the time was hesitant to authorize these extraditions. By the beginning of this century, the administration of then-President Fernando de la Rúa received requests to cooperate with judicial processes in foreign jurisdictions, if the Argentine government preferred not to address issues of impunity. There were criminal cases against members of the Argentine military in Spain, Italy, Sweden, France, and Germany. In the first case, universal jurisdiction was invoked. In the other cases, jurisdiction was based on the fact that the particular victims in the case were citizens of those countries.<sup>42</sup>

In fact, the reopening of trials since 2003 has been enabled on two levels: on the national level through the nullity of the "Impunity Laws" and on the foreign level through the repeal a decree by ex-President de la Rúa that did not authorize extradition in the mentioned cases. Coincidentally, two transnational situations provided the opportunity for the Argentine Supreme Court to define the current direction of criminal prosecution. The *Arancibia Clavel* (2004) case,

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<sup>42</sup> See, for example, the opinion at that time of Víctor Abramovich, *La decisión, en manos de la Justicia*, DIARIO LA NACIÓN, July 15, 2003.

which involved a member of the Chilean secret police, was the precursor to many of the concepts that supported *Simón* (2005). Then in the *Lariz Iriondo* (2005) case, which involved an extradition request for a member of the ETA, the Basque separatist terrorist group, the Argentine Supreme Court of Justice established its position on the scope of the concepts of terrorism and crimes against humanity.

It is also worth mentioning the current international cooperation in the extradition of those indicted in the Argentine criminal justice system. The extraditions made important contributions to the domestic criminal justice system. Consider, for example, the extradition from Spain of former Triple A agent Rodolfo Almirón<sup>43</sup> or the extradition from Uruguay of Manuel Cordero.<sup>44</sup> Similar contributions have been made thanks to the cooperation of individual citizens of other countries, such as the denunciation of Argentine pilot Julio Alberto Poch for his participation in the “death flights,”<sup>45</sup> claims that were later supported by Spanish and Dutch authorities. This cooperation not only facilitates concrete action by the criminal justice system and the advancement of particular cases, but also, in a certain sense, serves as an implicit endorsement of the current trajectory of Argentine judicial process.

In contrast, the legal tendencies in the Latin American region, while observed, most likely have little impact on the transition process or judicial intervention vis-à-vis international law. There is a strong academic interest in developments in Colombia, particularly with respect to the role of that country’s Constitutional Court in the protection of fundamental rights and the operation of the Justice and Peace Law. There is also interest in developments in Uruguay. In the case of Chile, the Pinochet case, which took place while the impunity laws were in effect, made an especially important contribution to the legal community’s incorporation of these issues and provoked careful observation of developments in Spain, the United Kingdom, and Chile. Arguably, Venezuela presents the same challenges as other countries in terms of inter-American integration on human rights matters, particularly in light of its strong criticism of the inter-American system. The Brazilian experience, which is different from that of the Southern Cone countries, does not seem to have a particularly important impact, although certain criminal cases related to Operation Condor seem to cohere with the apparently generalized tendency throughout the region. Finally, the Central American cases are read primarily through the developments of the Inter-American Court and Commission.

It is difficult to conclude whether the activities of international judicial bodies and its members define Argentina’s perceptions of transitional justice. There is no empirical material that would allow us to reach such a conclusion—we can only speculate. Most notably, the visit of the IACHR in 1979 gave rise to a relationship

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<sup>43</sup> *Almirón, sin excusas*, DIARIO PÁGINA/12, Apr. 1, 2008; Alejandro Rebossio, *Rodolfo Almirón, jefe de los asesinos de la Triple A*, EL PAÍS, June 13, 2009.

<sup>44</sup> *Manuel Cordero fue extraditado a Argentina*, EL PAÍS, Jan. 23, 2010.

<sup>45</sup> “Death flights” refers to the Argentine military dictatorship’s extermination practice where disappeared detainees were drowned by being thrown defenseless into the waters of the Río de la Plata.

that exists today. The IACHR, along with the IACtHR, is the institution with possibly the strongest association to the democratic transition process.

## VII. The Challenge of Legal Reasoning

The Argentine case reveals the value of courts' legal reasoning efforts with regard to collective perceptions. Judging from many of the interpretations, in the tone and contents of recent decisions, more thoughtful legal reasoning in decisions that incorporated international law would have led to a more favorable perception of domestic application of international law. The main perception underlying the complaints of the highest court is that domestic application of international law has taken place without adequate consideration of its value and possible consequences. According to this line of thought, it has been said that courts reserve a margin of discretion, which is both inconvenient and inappropriate in the adjudication of cases, particularly criminal ones. Moreover, the avoidance of subsequent international liability is not a sufficiently persuasive argument in order to justify domestic application of international standards.

In this vein, critics question Argentine courts on the following grounds: application of the rules of customary international law that has not been reinforced by consistent practice in the international community; unjustified exaggeration of the authority of inter-American case law; erroneous interpretation of international courts' holdings and decisions; and, finally, application of international rules without any constitutional review, thus granting these rules impregnable authority. I disagree, as do others, with such a radical characterization of the state and quality of Argentine jurisprudence. There are inconsistencies, errors in citation, and weaknesses in certain arguments that could probably be based on sounder reasoning. However, I do not find it problematic to read all of this case law as being compatible with Argentina's history of conflict, constitutional values, and principles of justice. Still, this debate persists in the legal community. In some cases, this view only aims to weaken the process of justice, thus revealing its total lack of concern for law or justice. However, some believe that there is a real disconnect brought about by judges who take a course of action that defies the predominant legal understanding.

The courts' logical shortcuts and weak arguments in support of certain decisions do not reflect the necessary effort, and have thus undermined the persuasive capacity of their holdings. A decision as forceful as ordering the resumption of a series of criminal trials pertaining to a painful chapter of Argentine history demanded more effort in logical reasoning and exposition. This, at least, would have minimized the likelihood that discussions on the tendencies of Argentine justice would be rife with doubts regarding the roles of judges.

This factor should be given serious consideration in the creation of common agreements on the lawfulness of collective decisions. The defenders of established

practices, predominant routines, or habitual interpretations might react with a certain degree of distrust when faced with decisions that openly propose a different orientation in the way institutions should react to the demands of transition.

Acknowledging then that there are diverse forms of legal reasoning, some doubts remain: what extent can we speak of profound disagreements, such as discrepancies between the Constitution and international law? On the other hand, to what extent would this be a different type of disagreement, say an epistemic disagreement, that has to do, instead, with the friction caused by a novel line of reasoning that is introduced into a legal community that is accustomed to a different orientation? The Argentine case illustrates some of the problems associated with both types of disagreement.

## VIII. International Law in Context

From a different perspective, another question arises, quite naturally, about how to accurately characterize the problem of national adoption of international law's norms and principles in a context of deep political and social change, such as transition. How much of the tension comes from the international jurisdiction-transition pair, and how much, truly, does it correspond with the very tension caused by judicial intervention in a social problem? The idea that I propose here is that many of the debates that arise have not to do with international law and the workings of its institutions, but rather with the legal assimilation of highly sensitive matters, for which many may defend a political solution.

Conceiving a problem as an issue of rights generally implies that the interests at stake are so critical "that other goals and preferences must be subordinated to them . . . . Rights are interests that deserve special and preferential protection in public agendas and policies."<sup>46</sup> Judicial interventions clearly exhibit a strong dose of legalism in facing certain matters. This implies limiting certain possible definitions of terms in a discussion, limiting available procedures and remedies at hand, circumscribing policies, limiting discretion, and imposing lines of argument.

The international law option has enabled judges to become involved, by way of their decisions, in a social process that would otherwise have fewer principles and rules of reference. We generally do not expect judges to play with purely political rules. However, international law, with its array of norms related to transition, expanded the sphere of judicial review. As a result, judges can move through the political and social arena—not as purely political actors, but rather still within the realm of the capacity conferred upon them by law.

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<sup>46</sup> Marcelo Alegre, *Pobreza, Igualdad, y Derechos Humanos*, 6(1) REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 176 (2005).

At least in Argentina, there is a debate precisely on the flexibility and powers inherent in these rules. There is a genuine problem with international law—it has effectively been used by judges to activate their jurisdiction to resolve cases that traditionally were not viewed as justiciable. This peculiarity that international law seems to have offered us—namely the expansion of judicial possibilities—may be anecdotal if we think about this matter more generally, and consider for example, other possible judicial interventions in society’s transformative disputes.

The non-textualist judicial interpretation of constitutional clauses on equality for example, led to legal advancements on topics of race and discrimination. A judicial defense that is more committed to economic, social, and cultural rights coincided with a doctrine that vigorously assures their justiciability. The idea of the judicial branch as a referee in political processes opens the possibility of greater judicial presence in areas that have traditionally been strictly associated with the political sphere. There are many examples of this. All of these interpretations, along with calls for the implementation of transitional measures endorsed by international law, have been supported and rejected by schools of thought and political movements. When we consider the wide array of judicial interventions associated with changes in value paradigms or significant modifications to existing ones, we also find changes in the understanding of the judicial role. This understanding can foster a more active or more limited approach to procedural matters, or it can provide conceptual support to new ways of understanding the scope of certain rights, such as the right to equality.

Therefore my hypothesis—which I believe merits greater discussion, at least in legal communities like that of Argentina—is that much of the attention paid to international law’s relationship with the domestic legal process truly and fundamentally reflects rival forms of understanding the substantive matters at stake. The expectant and highly respectful view of past institutional adjustments has been associated with nationalist theses, while the revisionist and skeptical view of the value of consolidating unjust solutions advanced basing itself on international human rights law. What has always been at stake—possibly the only thing that is at stake—is the tension between these two perspectives of the solution of 1980s and 1990s.

The evolution of international law as a framework of reference for values and principles of justice was more or less concurrent with the Argentine transition. International law has always been associated with the clamor of the human rights movement, starting with the watershed moment marked by the IACHR report in 1980. At the same time, this movement served to strengthen international law itself. Generally speaking, advocates on the other side offered interpretations regarding the possibilities for judicial intervention. In the 1980s, they argued that it was impossible for civil courts to judge cases that fell within military jurisdiction or to review the military’s self-amnesty. Their explanation for this was the criminal law principle of leniency requiring application of the most favorable interpretation of the law to defendants. This same line of thought has been applied more recently

against any kind of revision to the “Full Stop” and “Due Obedience” laws and against the application of rules of international human rights law. The foregoing thus suggests that the appeal of international law was not so much its capacity to transcend borders, but rather its capacity to authorize judicial interventions into the political context of transition.

Furthermore, the Argentine case reveals that its transition was not defined *from the outside* through the application of international laws that are foreign to the country’s legal community. On the contrary, these foreign laws evolved alongside the transition process and reflected, at any given point, the aspirations of justice of those who led the transition process. Pressures *from the outside* were almost always linked to the efforts of a member of the domestic community. Similarly, in the first years of democracy the aspirations for justice manifested itself in legal constructions such as the supremacy of civil jurisdiction over military jurisdiction and the thesis of perpetrator by means (autoría mediate) for leadership in a repressive apparatus. Later, it appeared as a justification for intense legal monism. A remaining task is to figure out when we can truly speak of a fundamental problem in the application of international law vis-à-vis the Constitution and, on the other hand, when we embark upon this discussion simply because there is an underlying issue of greater importance.

## Conclusion

It is definitely possible to suggest that the use of international law in the Argentine case reflects a legal view that recognizes the existence of *principles*, not necessarily positive, that we apply in resolving difficult cases.<sup>47</sup> It is possible that we who understand that the law can be no more than a space for moral discourse tend to be less critical of the transnational application of laws and more prone to accept them as manifestations of universally plausible rules and principles.

International law in the context of Argentina’s transition seems to have permitted the manifestation of elements of justice that were absent or denied in the black-letter law, but that were alive in the country’s legal community. International law thus may have triggered a moral discourse and expressed, through standard laws and holdings, a strong moral judgment condemning impunity. However, this has not implied a complete denial of the virtue of positive law vis-à-vis moral reasoning. The legal decisions of the Argentine transition are not based on mere moral principle, but rather upon recognized rules, holdings, and respected texts such as treaties and declarations, which have nourished domestic legal norms with a notion of justice that would have been otherwise absent.

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<sup>47</sup> See, e.g., María Lourdes Santos Pérez, *Una filosofía para erizos: Una aproximación al pensamiento de Ronald Dworkin*, 26 DOXA 347 (2003).



## Chapter 12

# Transitional Justice, Criminal Justice, and Exceptionalism in South Africa

Howard Varney\*

During the mid-1990s extraordinary measures were invoked in South Africa for the purpose of nurturing the nation's passage from a divided, violent, and oppressive past to a peaceful and democratic future. These measures involved the partial suspension of the rule of law. The process has been credited with helping to facilitate South Africa's successful transition and create "the miracle of the rainbow nation."<sup>1</sup> The apparent success of this well publicized and celebrated experience seems to have inspired other countries to resort to similar measures.<sup>2</sup> Some of these countries have been involved in genuine transitions, while others have remained in the grip of armed conflict.

Countries have been quick to emulate the South African experience with some adopting the model uncritically. Sight has been lost of the fact that transitional justice tools of truth-seeking, reparations, justice, and amnesty played a fairly limited role in the overall scheme of the transition in South Africa. They were but a small part of a much larger package of tools and instruments. The key to the success of the South African transition lay firstly in the agreements that were struck between former conflicting parties, following years of painstaking negotiations. The glue that held the transitional program together was the promise of a new constitution based agreed upon principles that would provide enforceable rights for all, including minorities. Accountability would be required from those wielding public power. Independent institutions would be established with the

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\* I express my great appreciation to Edward Jeremy, intern at the Cape Town office of the ICTJ, for carrying out the initial research for this paper.

<sup>1</sup> Sven Lunsche, *A Celebration of Miracles and Rainbows*, FINANCIAL MAIL, May 7, 2004; Justin Cartwright, *The Rainbow Nation's Miracle Turns a Little Rusty*, THE INDEPENDENT, Apr. 11, 2004.

<sup>2</sup> For example, Kenya has passed a law that includes a chapter on amnesty that is copied in large part from South Africa's TRC Act (Promotion of National Unity and Reconciliation Act 34 of 1995). Nepal has a bill for the establishment of a truth commission which incorporates a program of truth for amnesty. Indonesia passed a law for the establishment of a truth commission which offered amnesty in exchange for truth, although the entire law was struck down as unconstitutional by the Indonesian Constitutional Court in 2005. The Community Reconciliation Programme attached to the East Timorese Commission for Reception and Reconciliation (CAVR) allowed for granting immunity against prosecution in relation to less serious offenses in exchange for truth and the performance of an act of reparation. Colombia's Justice and Peace Law makes provision for perpetrators to give a "free version" or disclosure of the truth for purposes of gaining reduced prison sentences. A civil society organization in Uganda, in consultation with the government, has drawn up a draft National Reconciliation Bill that includes the grant of amnesty in exchange for full disclosure in respect of offenses that do not constitute international crimes.

authority to hold public power responsible. The highly participatory nature of the constitution-building process laid the foundation for the beginnings of a just and democratic society.

The efforts to deal with the past, namely truth-seeking, conditional amnesty, and reparations played a significant—but not central—role in South Africa’s transition. Perhaps the most striking feature of the transitional justice program was the offer of an “insurance policy” to perpetrators for all sides to use, in case they faced prosecution.<sup>3</sup> This insurance policy was in the form of a conditional amnesty: truth for amnesty. Should a perpetrator face criminal prosecution or civil action, he or she could cash in the “insurance” by disclosing details of the relevant crimes and gain an immunity against all legal consequences. This policy persuaded many, particularly those in the former security forces, to remain committed to a peaceful transition and not return to arms. This was the single most important benefit of the South African amnesty program. It probably justified the limited but serious suspension of the ordinary criminal justice process.

While most South Africans are likely to agree that the partial suspension of the rule of law was warranted, it has to be asked how this exceptional measure has impacted upon the system of criminal justice. This paper suggests that the impact has been a deleterious one and that South Africa is still struggling to deal with the ramifications of a policy of officially sanctioned impunity. Such measures have tended to take on a life of their own, regardless of temporal restrictions. Moreover, this has created a culture of entitlement for perpetrators to special or lenient treatment which persists to the present day.

In part I, this chapter will briefly set out the relevant background to South Africa’s transition and the measures employed to address the past. It will review the sporadic and limited attempts to bring perpetrators criminal justice during the life of the Truth and Reconciliation Commission (TRC or Commission) and post-TRC. Part II then deals with the steps taken by the State to further accommodate perpetrators through measures that closely resembled the TRC’s conditional amnesty. These included amendments that were made to South Africa’s prosecution policy and the introduction of a special dispensation on political pardons. This section also deals with the efforts of civil society to stop the implementation of these measures. The chapter then assesses in Part III the current state of post-conflict justice in South Africa and concludes that victims are no closer to justice. Part IV explores the relationship between transitional justice measures and the criminal justice system, as well as the seepage of such exceptional measures into the criminal justice system. It is proposed that exceptional or lenient measures introduced to assist perpetrators of the past outside of a transitional period ought to be tested against more exacting

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<sup>3</sup> The amnesty was also available to persons that had already been convicted of politically motivated crimes.

standards. This chapter suggests that the exceptional measures pursued by the South African authorities fail to comply with such standards.

## I. Background

South Africa's apartheid era was characterized by political violence and human rights violations, including massacres, killings, torture, lengthy imprisonment of activists, and severe economic and social discrimination against black South Africans. Until the dying days of apartheid rule, South Africa was a country in which violations of human rights were commonplace. The TRC found that torture was carried out as standard practice against political detainees by members of the South African Police and its Security Branch, and that such practices carried the official approval of the political leadership.<sup>4</sup> The Commission received more than 22,000 complaints alleging incidents of torture.<sup>5</sup> According to the TRC, human rights groups estimated that more than 73,000 security detentions took place in the country between 1960 and 1990. The Commission found that it was established practice for torture to accompany a detention, which was invariably without charge or trial.<sup>6</sup> The Commission found that the former State perpetuated impunity by tolerating and sanctioning the practice of torture.<sup>7</sup>

### A. Amnesty for Truth

In 1994, prior to the election of Nelson Mandela as South Africa's first democratically elected President, an interim Constitution<sup>8</sup> was adopted for the purpose, as set out in the preamble, of "the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution." The postscript to the interim Constitution reflected the outcome of the negotiated settlement between the former conflicting parties. In order to achieve the objectives of national unity and reconciliation there would be no pursuit of victor's justice, but neither would there be a blanket amnesty for perpetrators. The postscript authorized a limited amnesty with "a firm cut-off date" for politically motivated offenses "[i]n order to advance . . . reconciliation and reconstruction . . ." It accordingly contemplated

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<sup>4</sup> TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, Vol. 6, § 5, Ch. 2, paras. 16-17, 25-49 (Mar. 21, 2003).

<sup>5</sup> *Id.* para. 22.

<sup>6</sup> *Id.* para. 24.

<sup>7</sup> *Id.* paras. 25-49. *See also* INTERIM TRUTH AND RECONCILIATION COMMISSION REPORT, Vol. 2, Ch. 3 (1997).

<sup>8</sup> *Constitution of the Republic of South Africa, Act 200 of 1993.*

the establishment of mechanisms, criteria, and procedures, all regulated by law, through which amnesty would be granted or denied.

To this end the Promotion of National Unity and Reconciliation Act 34 of 1995 (“the TRC Act”) incorporated the granting of amnesty for political offenses committed within a specified period when full disclosure was made and certain other criteria met (“the amnesty criteria”). In total, the Amnesty Committee received 7112 applications for amnesty, of which 849 were granted, 5392 were rejected, and 871 were withdrawn.<sup>9</sup> The Amnesty Committee of the TRC wound up its work and published its report in 2003.

## **B. Obligation to Follow-Up**

On October 29, 1998, and in compliance with the TRC Act, the interim TRC Report was handed to President Nelson Mandela and subsequently tabled in Parliament. It comprised five volumes of approximately 2250 pages. A substantial portion of Volume 5 dealt with victims of gross violations of human rights. The Commission specifically called for the investigation and prosecution of those perpetrators who had refused to apply for amnesty.<sup>10</sup>

In its Final Report dealing with the work of the Amnesty Committee, released on March 21, 2003, the Commission stressed that the amnesty process should not be seen as promoting impunity. It highlighted the need for “a bold prosecution policy” in those cases where amnesty had not been applied for in order “to avoid any suggestion of impunity or of South Africa contravening its obligations in terms of international law.”<sup>11</sup> The Commission called upon the State, and in particular the National Prosecuting Authority, to investigate unsolved disappearance cases.<sup>12</sup>

The philosophy underpinning the TRC and its amnesty process was a once-and-for-all process of limited duration. It was a manifestation of a deliberate policy to contain the process and to finalize it within a limited period, so that the nation could put the past behind it and move on. Indeed there was nothing in the constitutional and statutory design of the TRC process that contemplated the extension of the rights of perpetrators to amnesty or immunity from prosecution. It was specifically envisaged that criminal investigations and where appropriate, prosecutions, would take place where perpetrators were refused amnesty or had failed to apply for amnesty. This lay at the heart of the compact struck with victims.

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<sup>9</sup> FINAL TRC REPORT, *supra* note 5, Vol. 6.

<sup>10</sup> INTERIM TRC REPORT, *supra* note 8, para. 14.

<sup>11</sup> FINAL TRC REPORT, *supra* note 5, Vol. 6, § 5, Ch. 1, para. 24.

<sup>12</sup> FINAL TRC REPORT, *supra* note 5, Vol. 6, § 5, Ch. 4, para. 94. The TRC recorded some 1500 cases of disappearances. *Id.* para. 52.

Such a far-reaching program required a severe limitation of the fundamental rights of the victims of human rights violations. These sacrifices were authorized for the specific objective of facilitating a peaceful transition towards a democratic order. Most victims accepted the necessary and harsh compromises that had to be made in order to cross the historic bridge from apartheid to democracy. They did so on the basis that there would be a genuine follow-up of those offenders who spurned the process and those who did not qualify for amnesty. The State was accordingly required to take all reasonable steps to prosecute deserving cases in respect of offenders who were not amnestied.

### **C. Criminal Justice Activity during the Life of the TRC**

At the time of the start of the South African Truth Commission there was no dedicated body in the criminal justice system tasked with investigating and prosecuting political crimes of the past. Certainly nobody expected the tainted police to fill this role. This enormous task fell to two small ad hoc criminal investigations, one based in Pretoria and the other in Durban. Ad hoc, because the prosecutions were not intended to specifically complement the TRC process. If the amnesty offered by the TRC was regarded as the “carrot” to incentivize disclosures, these investigations were not intended to provide the “stick.” Rather, they were intended to address specific situations, see below. There was unfortunately no dedicated and parallel criminal investigation established at the time of the TRC to provide the necessary “stick” or threat of actual prosecution.

The Pretoria investigation, set up in early 1994 under the Transvaal Attorney General, was tasked with cleansing the South African Police of death squads. The Durban initiative, the Investigation Task Unit established in late 1994, had the task of intervening in the bloody Natal conflict. It attempted to book those behind the organized hit squads, orchestrated by the South African military and acting under the cover of the homeland police.<sup>13</sup> At the time of these two investigations the suspects in question wielded considerable power. It was feared that if they were not challenged and exposed, they may play future destabilizing roles.<sup>14</sup>

Both investigations faced enormous odds. The Pretoria inquiry achieved a measure of success with the conviction of Colonel Eugene de Kock, commander of a police death unit.<sup>15</sup> It was the conviction of de Kock that led directly to the

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<sup>13</sup> Melanie Lue, *A Short History of the Establishment of the ITU: Making Enemies - Dismantling KwaZulu Natal's Hit Squads*, in *CRIME & CONFLICT* (1996).

<sup>14</sup> Howard Varney, “The Role of the Former State in Political Violence: Operation Marion: A Case Study,” (Mar. 1997) (unpublished report submitted to the President and the TRC, on file with author).

<sup>15</sup> Eugene de Kock, former head of the counter-insurgency unit, Vlakplaas, was convicted in August 1996 on six counts of murder, as well as scores of lesser charges, and was sentenced to life imprisonment in October that year. See Mike Hanna, *South African apartheid assassin jailed for life*, CNN.COM, Oct. 30, 1996, <http://edition.cnn.com/WORLD/9610/30/s.africa/index.html>. Ferdi Barnard, a member of the South African Defence Force's Civil Co-operation Bureau, was also

applications for immunity against prosecution of several senior police officials. However, the Pretoria investigation failed to pursue these investigations to reach those responsible for the planning and authorizing of such atrocities, namely the generals and the political leadership.

The Durban investigation focused on the roles played by the military in supporting the Inkatha and KwaZulu Police hit squads.<sup>16</sup> Whereas the Pretoria inquiry received the enthusiastic support of the Transvaal Attorney General, the Durban investigation did not experience the same support from the Natal Attorney General. The Natal Attorney General declined to prosecute key cases on questionable grounds, and he delivered a perfunctory performance in the one case he did prosecute, the Malan trial. The case against the former Minister of Defence, Magnus Malan, and several other senior ranking officers<sup>17</sup> for the murders of thirteen people in an attack on a township near Durban ended in the controversial acquittal of all accused.<sup>18</sup> To compound the problems, the court hearing the case failed to consider properly the mass of evidence, which not only included oral evidence of hit squad members and military officers but also authenticated military documents that directly referred to the use of “hit squads.”<sup>19</sup> As a result of the failure of this case, very few members of key perpetrator organizations, the military and the Inkatha Freedom Party (IFP), approached the Truth Commission for amnesty.

The last trial of any note to take place began in 1997 against military Colonel Wouter Basson, head of a notorious chemical and biological unit and population control project. Basson was accused of forty-six counts of poisoning anti-apartheid activists. In April 2002, Basson was acquitted by a Pretoria court following a failed attempt by the prosecution to have the presiding judge removed from the case on the grounds of bias. While the Supreme Court of Appeal confirmed the acquittal, the Constitutional Court partly reversed this decision in 2005 by holding that crimes committed outside the territorial jurisdiction of South Africa could be prosecuted within the domestic courts. This opened the door to fresh charges

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convicted in 1998 on various counts, including two murder charges. He received two life sentences. Gideon Nieuwoudt, Wynand du Toit, and Marthinus Ras were also convicted in 1996 for the murders of the “Motherwell 4” and sentenced to between ten and twenty years in prison.

<sup>16</sup> The Durban initiative also investigated allegations of hit squad activity by the African National Congress in the town of Richmond in the KwaZulu Natal midlands and secured several murder convictions.

<sup>17</sup> Altogether there were twenty accused. The accused included the former Minister of Defence, two former Chiefs of the former South African Defence Force (SADF), a number of senior officers of Military Intelligence, the Chief of Staff Intelligence, a security branch colonel, the deputy secretary-general of the Inkatha Freedom Party, and six Inkatha recruits. These six were members of the SADF-trained “offensive” group of Operation Marion, who were alleged to have carried out the actual massacre in KwaMakhutha.

<sup>18</sup> *State v. Peter Msane and 19 Others* 1996, Case No. CC1/96, Durban & Coast Local Division of the Supreme Court.

<sup>19</sup> See Howard Varney & Jeremy Sarkin, *Failing to Pierce the Hit Squad Veil: A Critique of the Malan Trial*, 10 S. AFR. J. CRIM. JUST. 141 (1996).

being preferred against Basson in relation to offenses that had taken place outside South Africa; however the National Prosecuting Authority has not pursued such charges to date.<sup>20</sup>

There was no strategic plan to investigate and prosecute crimes of the past in South Africa, notwithstanding the truth-for-amnesty formula that demanded that there be a coordinated criminal justice response. It was not enough to sanitize a criminal investigation from a corrupt police force that was unable to investigate itself and its former masters. The same sanitization ought to have happened with the prosecution services. Moreover, the composition of the judiciary was a debilitating factor. The handling of the Malan case by the court raised questions as to whether such politically sensitive cases should be treated as normal criminal cases to be allocated to judges who were ill-suited to adjudicate such matters or whether they should have instead been heard by specially appointed panels of respected, independent-minded judges.

#### **D. Post-TRC Developments**

In 2002, when the TRC had finally concluded the amnesty process, the Commission submitted the final two volumes of its report and handed over a list of 300 names to the National Prosecuting Authority for investigation and prosecution. Little action in pursuit of justice has taken place since the handing over of this list. In the same year President Thabo Mbeki exercised his executive authority under the Constitution to pardon and release thirty-three former liberation-movement fighters. Government spokespersons claimed that each pardon had been granted on a case-by-case basis, but serious allegations of political bias were leveled because only members associated with the liberation forces were pardoned whereas none associated with the right-wing appeared to have been considered.<sup>21</sup> According to the Department of Justice, these pardoned prisoners had applied for amnesty under the TRC system but their applications had been rejected. The former chairperson of the TRC, Archbishop Desmond Tutu, labeled the pardons as “the thin edge of a general amnesty wedge.”<sup>22</sup>

The granting of these pardons led to a number of pardon applications from perpetrators associated with the apartheid order. In 2003, some 384 prisoners made applications for presidential pardons claiming that they had been convicted of politically motivated offenses. They were all assisted in the processing of their applications for presidential pardons by the Inkatha Freedom Party, which had

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<sup>20</sup> *S v Basson* 2005 (1) SA 171 (CC); *S v Basson* 2007 (3) SA 582 (CC).

<sup>21</sup> *South African Justice Minister Defends Controversial Presidential Pardon*, BBC MONITORING AFRICA, May 22, 2002.

<sup>22</sup> John Battersby, *Pardons Make a Mockery of TRC*, SUNDAY INDEPENDENT, May 19, 2002.

been aligned with the former apartheid government. The TRC found that Inkatha Freedom Party members and supporters had committed the most human rights violations.<sup>23</sup> The Minister of Justice failed to process their applications for pardons claiming that there was no policy in place to deal with requests for “politically motivated” offenses.<sup>24</sup>

In March 2003 the National Prosecuting Authority established the Priority Crimes Litigation Unit (PCLU) to pursue, among other cases, matters emanating from the TRC process. Following an audit of the 300 cases, the PCLU indicated that just over half of these cases could not be prosecuted, but that twenty-one cases, with some further investigation, were ripe for immediate prosecution.<sup>25</sup> However, the unit was rendered impotent by the failure of the State to assign it investigators or to compel the police to provide investigation officers. Less than a handful of prosecutions were taken forward between 2002 and 2004.<sup>26</sup> The only significant prosecution, that of three security police officers who were denied amnesty for the murder of three activists, has stalled.<sup>27</sup> From November 2004 to December 2005 the National Prosecution Authority imposed an effective moratorium on prosecutions of apartheid era cases on the pretext that a new policy was being developed for such matters. Civil society groups expressed their disquiet at the fact that this meant that every day that passed during this effective moratorium saw crimes prescribed in terms of South Africa’s statute of limitations.<sup>28</sup> They pointed out that the prejudice suffered by affected victims and communities was irreversible.

Following the implementation of a new policy in 2005 (discussed further below) the effective moratorium was lifted but did not result in any significant program of prosecutions. The only matter of note to take place was on August 17, 2007 when a plea bargain agreed to between the State and the former Minister of Law and Order, Adriaan Vlok, the former police commissioner, and three others was confirmed by the High Court. The accused had been charged with the attempted murder of anti-apartheid activist, the Reverend Frank Chikane in 1989. The plea bargain was roundly criticized for the light sentences agreed to (suspended sentences) and the fact that the accused were not required to disclose

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<sup>23</sup> INTERIM TRC REPORT, *supra* note 8, Vol. 2, Ch. 5, para. 279.

<sup>24</sup> *Chonco and Others v Minister of Justice and Constitutional Development and Another*, T.P.D. Case no. 21224/2007.

<sup>25</sup> Anton Ackerman, *Prosecutions Emanating from Conflicts of the Past*, presentation at the ICTJ “Domestic Prosecutions and Transitional Justice Conference”, May 16–19, 2005, Magaliesburg, South Africa.

<sup>26</sup> See Carnita Ernest, *Reconciliatory Justice: Amnesties, Indemnities and Prosecutions in South Africa’s Transition*, in AFTER THE TRANSITION: JUSTICE, THE JUDICIARY AND RESPECT FOR THE LAW IN SOUTH AFRICA 12-14 (Centre for the Study of Violence and Reconciliation ed., 2007).

<sup>27</sup> The case of *The State v. Nieuwoudt and Two Others* in relation to the “Pebeo 3” murders has been suspended pending the outcome of a judicial review of the TRC’s Amnesty Committee’s decision to deny the perpetrators amnesty.

<sup>28</sup> Criminal Procedure Act, No. 51 of 1977, § 18.



information on hit lists and hit squads that could have been used against other senior security officers.<sup>29</sup>

## II. Dealing with “Political” Crimes

The response of the government to calls from victims for justice and from perpetrators for leniency was to create an “Amnesty Task Team” in early 2004. The team was required to consider and report on, among other things, “a process of amnesty on the basis of full disclosure of the offence committed during the conflicts of the past.”<sup>30</sup> The name of this task team suggested its priorities. This team in turn recommended the creation of a Departmental Task Team comprising members of the Department of Justice, the Intelligence Agencies, the South African National Defence Force, the South African Police Service, Correctional Services, the National Prosecuting Authority, and the Office of the President. Its functions were to consider the advisability of criminal proceedings for offenses committed during the conflicts of the past and make recommendations to the National Director of Public Prosecutions—to consider cases appropriate for parole or presidential pardon. The work of these task teams paved the way for the government’s policy on expanding the ambit of impunity for perpetrators through a new prosecution policy and a special dispensation on political pardons.

The justification for these measures appeared to be an endeavor to deal with “unfinished business” of the TRC.<sup>31</sup> Such unfinished business included giving the many perpetrators that did not apply for amnesty during the lifespan of the TRC an opportunity to come forward and disclose. There was a view that there were many offenders that wished to apply for amnesty but were prevented from doing so by leadership figures in various factions who played a “gatekeeper” role and intimidated lower-order individuals from coming forward. There were others that apparently did not have sufficient information and lacked legal advice to make amnesty applications. It was argued that by coming forward now, such perpetrators will contribute to building greater knowledge of the past. There may be some reluctance on the part of the government to spend vast sums of money

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<sup>29</sup> See OLE BUBENZER, *POST-TRC PROSECUTIONS IN SOUTH AFRICA* (2009) for an account of all post-TRC prosecutions, as well a consideration as to whether South Africa has violated international law by not instituting prosecutions and background information on secret consultations the South African government conducted with former apartheid generals on the question of post-TRC prosecutions.

<sup>30</sup> *Report: Amnesty Task Team*, which was classified “secret” and disclosed during the proceedings in the matter of *Nkadimeng & Others v The National Director of Public Prosecutions & Others*, T.P.D Case No. 32709/07.

<sup>31</sup> See the statement of President Thabo Mbeki quoted in Christelle Terreblanch, *New Deal ‘Stops Short of General Amnesty’*, IOL, May 18 2003.

prosecuting crimes of the past.<sup>32</sup> Finally, there appeared to be a concern that the population at large would not accept prosecutions of liberation force members and others that were involved in the resistance to apartheid.

Civil society groups voiced their concern at indications that the proposed policy would amount to a rerun of the truth-for-amnesty procedure of the former TRC. The groups urged the government to circulate the proposed amendments to the prosecution policy agency so that they and other interested groups and individuals could provide comment and input. Notwithstanding their early written representations, the amended policy was issued in late 2005 without such consultation; at least not with the civil society groups representing the interests of victims.

### **A. Amendments to the Prosecution Policy**

On December 1, 2005 the National Director of Public Prosecutions (NDPP) effected changes to the Prosecutions Policy under section 179 of the Constitution (the amended policy). The amended policy permitted the NDPP to employ the same amnesty criteria as those used by the TRC when deciding whether or not to prosecute offenders involved in the conflicts of the past. Victims and civil society groups viewed the amended policy as an extension of the TRC's amnesty regime under the guise of prosecutorial discretion.

The additional criteria included whether the perpetrator had made full disclosure; his attitude toward reconciliation; the degree of indoctrination to which the perpetrator had been subjected; a showing of remorse; and a "willingness to abide by the Constitution." Prosecutors were also required to descend into matters of high political policy and determine whether a prosecution would contribute to "nation-building through transformation, reconciliation, development and reconstruction within and of" South African society.

The amendments to the policy contemplated the prosecutors being "assisted" in their determinations by officials from the National Intelligence Agency, the detective division of the South Africa Police Services, the Department of Justice and Constitutional Development, and the Directorate of Special Operations (a unit within the office of the NDPP). Ironically, the amended policy declared that the "[g]overnment did not intend to mandate the NDPP to, under the auspice of his or her own office, perpetuate the TRC amnesty process."<sup>33</sup>

The amendments accordingly allowed for the granting of an effective immunity from prosecution even in cases where there was sufficient evidence to obtain a conviction; the crime in question is serious; the victim was in favor of a prosecution; and the applicant did not apply for or was not granted amnesty at

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<sup>32</sup> See the statement of Frank Chikane published in Christelle Terreblanche & Edwin Naidu, *Apartheid Henchmen Take Up Offer of Indemnity*, IOL, May 11 2003.

<sup>33</sup> See *Nkadimeng & Others*, T.P.D Case No. 32709/07.

the TRC. Moreover, the amended policy did not allow victims to see the “truth” disclosed by perpetrators as the whole process was to occur behind closed doors.

A court challenge was launched in 2007 to have the amended policy struck down as unconstitutional. The case was brought by the widows of the “Cradock Four,” who were abducted and murdered by security police, and the sister of Nokuthula Simelane, who was abducted, tortured, and disappeared by security police. They were supported by three civil society organizations: the Khulumani Support Group, the International Center for Transitional Justice (ICTJ), and the Centre for the Study of Violence and Reconciliation (CSVR).

The applicants claimed that the amended prosecution policy allowed the National Prosecuting Authority to “re-run” the TRC amnesty process and grant effective immunities from prosecution to those who had failed to make use of the amnesty provisions of the TRC. It was argued that this not only eroded the integrity of the TRC process, but it also undermined the rule of law and the independence of the office of the prosecuting authority. In addition, it infringed the human rights of the victims, including their rights to life, dignity, and equality. Furthermore, the policy amendments were argued to be in breach of international law.

Archbishop Desmond Tutu filed a supporting affidavit in which he stated that the attempts by the State to promote impunity

represented a betrayal of all those who participated in good faith in the TRC process. It completely undermined the very basis of the South African TRC which provided a truth for amnesty formula for a specific and limited time period. Above all, it stood as a betrayal of all South Africans who embraced the spirit of truth and reconciliation in order to move beyond the bitterness of the past.<sup>34</sup>

In its judgment in December 2008, the Pretoria High Court declared the policy amendments unconstitutional and “a recipe for conflict and absurdity.” The court found that the policy amendments amounted to a “copy or duplication” or “copy-cat” of the TRC amnesty process. This was unlawful because “when there is sufficient evidence to prosecute, the [NDPP] must comply with its constitutional obligation.” The court further found that “many of the criteria . . . were not relevant for the purpose of deciding whether or not to prosecute.” The court rejected the submission that the policy amendments did not allow for an immunity since the victims could still bring a private prosecution. According to the court, “crimes are not investigated by victims. It is the responsibility of the police and prosecution authority to ensure that cases are properly investigated and prosecuted.”<sup>35</sup>

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<sup>34</sup> Supporting affidavit of Desmond Mpilo Tutu, *Nkadimeng & Others*, T.P.D. Case no 32709/07.

<sup>35</sup> Judgment, *Nkadimeng & Others*, T.P.D. Case no. 32709/07.

## B. Special Dispensation on Political Pardons

In November 2007, then-President Thabo Mbeki announced in a joint sitting of both houses of Parliament that he intended to establish a special dispensation on political pardons in order to address the “unfinished business” of the TRC. In early 2008 he created a multi-party Pardons Reference Group (PRG) to solicit and consider applications for pardons for politically motivated crimes committed before June 1999.<sup>36</sup> The written parameters for Reference Group state that—because the TRC’s amnesty provisions have lapsed—the President is invoking his pardon powers.<sup>37</sup> Unlike the TRC however, the PRG was comprised only of politicians and it excluded any involvement of the victims. Moreover, all of its proceedings were conducted secretly and none of the applications for pardons have been disclosed to victims, interested parties, or the public.

Central to the TRC process was the acknowledgement of victims. But the special pardons process gave no voice to victims whatsoever. This was not a mere oversight on the part of the Reference Group and the President. The PRG was asked on several occasions to permit victim input and it specifically refused to do so. The PRG also refused an offer by a civil society coalition to facilitate victim input in those cases where they had recommended pardons. The PRG has also declined to disclose which cases it is recommending to the President.<sup>38</sup>

Pardon applicants include former Police Minister, Adriaan Vlok, former Commissioner of Police, Johan van der Merwe, and a group of right-wingers that viciously attacked black people in Kuruman in 1995; and a right-winger who bombed a supermarket in Worcester on Christmas Eve of 1996. Four people died in the Worcester bombing, two of which were nine-year-old children. The Worcester bomber claims that he was a prisoner of war, even though he attacked civilians and his crime was committed more than two years into South Africa’s constitutional democracy. A list of some 121 names of prisoners and convicted persons recommended for presidential pardon was compiled by the Pardons Reference Group, through a special pardons process, and handed over to interim President Kgalema Motlanthe in March 2009.<sup>39</sup>

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<sup>36</sup> Press Release, Presidency, Commencement of Presidential Pardons Period, Jan. 16, 2008.

<sup>37</sup> Terms of Reference for Pardons Reference Group, published by the Department of Justice & Constitutional Development and available at [http://www.info.gov.za/events/2008/tor\\_pres\\_pardon.pdf](http://www.info.gov.za/events/2008/tor_pres_pardon.pdf).

<sup>38</sup> See the background section to the founding affidavit of H. M. van der Merwe in the matter of *CSV & Others v President of the Republic of South Africa & Others*, Case No. 15320/09, North Gauteng High Court.

<sup>39</sup> Annex “I” to the founding affidavit of Paul Snaid in the application of Ryan Albutt for leave to appeal to the Constitutional Court. Even from the incomplete list of those recommended for pardon it is apparent that there was something seriously remiss with the process. Those recommended for pardon included an offender convicted for twenty-one murders and fifteen attempted murders; an offender convicted for nineteen murders and fourteen attempted murders; at least sixteen offenders each convicted for four or more murders; offenders convicted, in addition to murder and attempted murder, for crimes such as kidnapping, robbery, arson, housebreaking, theft, and

Court action was prompted by President Motlanthe's decision on March 13, 2009 not to permit victim input or lift the blanket of secrecy under which the pardons process had been conducted. When the President indicated that he planned to go ahead with the pardons process, a coalition of civil society organizations<sup>40</sup> approached the High Court as a matter of urgency for an order restraining the President from issuing pardons under the special dispensation.<sup>41</sup>

The coalition argued that not only was the pardons process unconstitutional but it also violated the spirit and legacy of the TRC, which upheld the rights of victims to be heard before amnesty was granted to perpetrators. Lawyers for the coalition claimed that, since the President chose to impose specific criteria for the qualification for a pardon—namely disclosure and the showing of a political objective—he was obliged to ensure a fair process to determine that the criteria were satisfied. A one-sided process, in which only the views of perpetrators are heard, can never determine whether the criteria have been met. This rendered the process not only manifestly unjust but also arbitrary and unconstitutional.<sup>42</sup>

In April 2009, the North Gauteng High Court issued an interim order restraining the President from granting any pardons under the Special Dispensation for Political Pardons pending final determination of the legal proceedings. The Court also ordered that the President and the Minister of Justice provide the civil society coalition with a list of prisoners recommended for release by the Pardons Reference Group. The Court found that that the President was bound to abide by his “lawful public commitment” that the political pardons process would be conducted in “an open and transparent manner, uniformly and in strict compliance with pre-determined procedures and criteria” and that the process would accord with the principles, values, and criteria of the TRC process, particularly its amnesty process.<sup>43</sup>

The presiding judge held that this “commitment accords with the basic values and principles enshrined in the Constitution” and that victims should be heard prior to the release of prisoners on pardon. Moreover he found that the President must have considered all relevant information from any interested party before making his decision.<sup>44</sup>

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unlawful possession of explosives, weapons, and ammunition. This suggests that these offenders were not political offenders but rather habitual criminals. This highly irrational outcome was not surprising given that nobody was allowed to confirm or rebut claims made by perpetrators that their crimes were politically motivated.

<sup>40</sup> The ICTJ, CSVR, Khulumani, the Institute for Justice and Reconciliation, the South African History Archive, the Human Rights Media Centre, and the Freedom of Expression Institute.

<sup>41</sup> Notice of Motion, *CSV & Others v President of the Republic of South Africa & Others*, Case No. 15320/09, North Gauteng High Court.

<sup>42</sup> Applicant's heads of argument, *CSV & Others*, Case No. 15320/09.

<sup>43</sup> Judgment and Order of Seriti J, Apr. 28, 2009, *CSV & Others*, Case No. 15320/09.

<sup>44</sup> For the judgment and court documents, see <http://ictj.org/en/news/features/2563.html>.

The President and one of the right-wing interveners in the case took the High Court decision on appeal to the Constitutional Court.<sup>45</sup> This was argued on November 11, 2009 and judgment is awaited. The outcome has important implications for victims' rights in pardons and amnesty processes.

### III. The State of Post-Conflict Justice in South Africa

As matters stand, the perpetrators who applied for political pardons retain their convictions and criminal sanctions pending the outcome of this case. Prosecutors may no longer employ amnesty-type criteria for the purposes of declining to prosecute deserving cases. The National Prosecution Authority has agreed to pursue the cases handed to it by the TRC. However, prosecutors are struggling with resource constraints and the police have, to date, declined to assign police investigators to the cases. So in reality, notwithstanding the court victories, victims are no closer to justice. Victims may be forced to approach the courts again to review the inaction of the police and prosecutors and compel them to act.

The Constitutional Court in the *Basson* matter made very helpful holdings in regard to the obligations of the State in respect of the crimes of the past. The Court asserted that:

There can be no doubt that the use of instruments of state to murder captives long after resistance had ceased would, in the 1980s, as before and after, have grossly transgressed even the most minimal standards of international humanitarian law. . . . Such means of warfare are abhorrent to humanity and forbidden by international law.<sup>46</sup>

Most significantly the Court confirmed that the National Prosecuting Authority represents the community and is obliged under international law to prosecute crimes of apartheid:

[T]he State's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that international law obliges the State to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes.<sup>47</sup>

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<sup>45</sup> *Ex parte Ryan Albutt in the matter between CSV & Others v President of the Republic of South Africa & Others* CCT 54/09.

<sup>46</sup> *S v Basson* 2005, (1) SA 171 (CC), paras. 179-180.

<sup>47</sup> *S v Basson* 2005, (1) SA 171 (CC), para 37.

So far the ringing words of the Constitutional Court seem to have fallen on deaf ears. Few cases have been brought in terms of domestic criminal law, let alone international law. According to the head of the PCLU, the prosecuting unit dealing with the “TRC cases,” there are several obstacles to bringing prosecutions. These include the lack of investigative capacity within his unit; the fact that the South African Police Services are not keen to take on the cases due to “the political dimensions attached to them, as well as the heavy workload”; the prescribing of certain crimes; the introduction of new guidelines for the prosecution of cases arising from the TRC process in the amended policy (now struck down); and the passage of time, especially in relation to illness or death of perpetrators and witnesses.<sup>48</sup>

The design of the TRC process was never meant to close down prosecutions. The TRC itself called for robust prosecutions of the most deserving cases and even submitted a list of such cases to the prosecuting authority. However, South Africa’s political elite has shamefully closed down and effectively stopped such prosecutions forcing victims to resort to the courts to protect their rights.

#### **IV. The Relationship Between Transitional Justice and the Criminal Justice System**

The TRC represented what Desmond Tutu described as a “third way,” a compromise between Nuremberg-style prosecutions on the one hand, and blanket amnesty or national amnesia on the other.<sup>49</sup> In South Africa, this “third way”—a conditional amnesty of truth-for-amnesty—was largely a result of a political compromise reached in the latter stages of the transition from apartheid.

The success of this design rested entirely on providing perpetrators with an incentive to come forward. This incentive depended largely on the perception of the threat of a criminal investigation, prosecution, and conviction. The equation was a simple one: the greater the threat, the greater the incentive. The converse applied with equal force. Once this equation was agreed upon, the truth process was inextricably tied to the criminal process. Little attention, however, was given to the creation of a dedicated parallel criminal investigation and prosecution of political offenders, with most resources devoted to setting up the Truth Commission.

Instead of recognizing that there ought to have been an umbilical cord between the criminal justice process (“the stick”) and the truth commission process (“the carrot”), the TRC tended to present itself as an alternative to criminal prosecutions. Aside from the political imperatives, amnesty was further justified

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<sup>48</sup> Ackerman, *supra* note 26.

<sup>49</sup> DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS 30 (1999).

on the basis that criminal justice mechanisms would have been difficult to pursue due to a compromised judiciary, destruction of records, and concerns that holding trials would be too disruptive to societal transition.<sup>50</sup> The unsuccessful attempts to convict Wouter Basson and General Magnus Malan tended to support this view. The amnesty process meant investigations and court cases were in most cases suspended pending completion of the process. Sadly the vast majority of the suspended cases were not revived and the continued passage of time makes their revival less likely.

Moreover, the TRC actually expressed a preference for a somewhat limited approach to prosecutions: “where amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation. . . . consideration must be given to imposing a time limit on such prosecutions.”<sup>51</sup> Audrey Chapman and Hugo van der Merwe have criticized the TRC’s “morally ambiguous” stance on amnesty, arguing that “[i]nstead of viewing the amnesty process as a necessary evil that was saddled through the constitution and the TRC act, the commission actively defended its morality and presented it as a space for contrition, reconciliation, and truth recovery.”<sup>52</sup>

The post-TRC political developments described in this chapter have given rise to legitimate concerns that a culture of impunity in respect of politically motivated crimes has permeated the criminal justice system. Within the last five years, the South African government has attempted to implement a series of measures that risk further bolstering the growing politics of impunity in South Africa. The effective rerunning of the TRC amnesty process under the guise of prosecutorial discretion and the presidential pardon process suggest that amnesty has been decoupled from its exceptional context and incorporated into the ordinary criminal justice system.

### **A. Testing Exceptional Measures Outside of Transitions**

This chapter has suggested that a strong justification is needed for the suspension of the normal criminal justice process, even in a transition. The question then arises as to what kind of justification is required for the incorporation of such exceptional measures within a society that has completed its transition. I suggest it follows that such measures should be tested against a more exacting standard. A more compelling justification should be demanded. Moreover, the benefits of

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<sup>50</sup> Audrey R. Chapman & Hugo van der Merwe, *Reflections on the South African Experience*, in *TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER?* 296 (Audrey R. Chapman & Hugo van der Merwe eds., 2008).

<sup>51</sup> FINAL TRC REPORT, *supra* note 5, at 309.

<sup>52</sup> Audrey R. Chapman, *Perspectives on the Role of Forgiveness in the Human Rights Violations Hearings*, in *TRUTH AND RECONCILIATION*, *supra* note 51, at 84.



such measures should be commensurably higher than one would have expected during the actual transition.<sup>53</sup>

South African author and journalist Jonny Steinberg made the following perceptive observation concerning the possibilities of a second amnesty in 1999:

[I]n the AZAPO case,<sup>54</sup> the Constitutional Court did not need to speculate. It had before it in black and white the negotiated terms of SA's transition to democracy. It knew of an agreement between the protagonists that constitutional democracy would never be born unless justice was suspended. Ruling against amnesty then would have been a rash and arrogant betrayal of those who made constitutionalism itself possible. But that was then.

It may be that what is worrying Mbeki is the question of governance. SA would be a more difficult place to govern if trials about apartheid era deeds hit the court rolls every year. Perhaps such trials would indeed produce a political culture that looks backwards rather than forwards. Perhaps it would make it harder to reconfigure the political terrain into shapes undreamed of under apartheid. Perhaps Mbeki's dream of government by broad-based consensus would wither and die.

Yet if this is the case we are no longer bartering justice for the future of constitutional democracy, but for convenience. We are saying that suspending justice is not a condition of the new order's survival, but a condition of making it easier to manage. If that is the case, it is not at all clear that the barter is an acceptable one, for we are no longer suspending the rule of law in order to protect its posterity; its posterity is already as sure as it can be.<sup>55</sup>

When a transition has ended the assessment of the suspension of the rule of law may no longer be tested against former transitional imperatives.<sup>56</sup> Such measures can only be tested against the more stringent standards dealing with limitations of rights, which are normally spelt out in a constitution.<sup>57</sup> In the

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<sup>53</sup> Jon Klaaren & Howard Varney, *A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues*, 3 S. AFR. L.J. (Nov. 2000) (republished with a postscript in *THE PROVOCATIONS OF AMNESTY* (Charles Villa-Vicencio & Erik Doxtader eds., 2003).

<sup>54</sup> *AZAPO v President of the Republic of South Africa* 1996 (4) SA 671 (CC).

<sup>55</sup> Jonny Steinberg, *Amnesty Quandary Looms for Judges*, *BUSINESS DAY*, June 8, 1999.

<sup>56</sup> However, different considerations may very well apply in relation to the testing of exceptional measures in a society that has yet to undergo transition and is still in the grip of conflict.

<sup>57</sup> The test under the South African Constitution of 1996 is set out in section 36:

The rights in the Bill of Rights may be limited only in of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation the nature and extent of the limit the relation between the limitation and its purpose, less restrictive means to achieve the purpose.

first place there should be no retreat from protections and checks and balances previously provided for, such as full disclosure; an independent and impartial adjudication of the proportionate association of acts to political objectives; a fair degree of transparency and openness; strong victims' rights of participation and confrontation; and an attenuated right to reparations.<sup>58</sup>

Any new amnesty or leniency would need to meet a higher standard in relation to truth. While Jon Klaaren suggests that there is a form of human rights truth that persists within and without transitions, the truth-for-amnesty bargain would have different prices depending on the context.<sup>59</sup> A non-transitional truth-for-amnesty measure would need to meet a higher level of disclosure of truth in order to be justified. The specific procedures of any new legal framework would need to be justified solely on the basis of whether or not they will provide for the full disclosure of information such that it adequately compensates extinguishing the rights of the victims.<sup>60</sup>

## **B. South Africa Fails the Test**

The exceptional measures introduced in South Africa following the transition fail on all counts. First, no compelling justification is provided. While South Africa faces many serious challenges it cannot be said that applying the rule of law to those who declined to participate in the TRC amnesty process will threaten the new constitutional democratic order. Such measures are not taken to ensure the survival of the constitutional democracy but rather for the sake of expedience.

Second, instead of retaining and strengthening the rights of victims, the new measures do away with them. Indeed the measures are contemptuous of victims' rights and needs. The imperative of delivering the truth is also disregarded given that both processes were largely secret and disclosure requirements less demanding.

## **Conclusion**

This chapter has attempted to demonstrate that the exceptional measures employed during South Africa's transition have taken on a life of their own. In the post-transitional phase, these measures now dictate the handling of a whole class of crimes, the so-called political crimes of the past.

It was submitted on behalf of victims in the court challenges described above that certain impacts of such measures have been already detected. These include

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<sup>58</sup> Klaaren & Varney, *supra* note 53, at 588-89.

<sup>59</sup> Klaaren & Varney, *supra* note 53, at 588-89.

<sup>60</sup> See *AZAPO*, 1996 (4) SA 671 (CC), para. 20.

the generation of a public perception that there are very serious crimes that are not taken seriously by the prosecuting authority and the State, namely crimes committed during the conflicts of the past, including murder, torture, and forced disappearances; where crimes are committed with a political agenda there is a strong likelihood that there will be no consequences; the commission of crimes is accordingly a legitimate political tool; and should politically motivated conflict arise again, those involved need not be concerned about the consequences of their actions.<sup>61</sup>

While there may have been strong justification for the use of an exceptional measure such as conditional amnesty, South Africa is still grappling with the fallout. This suggests that such measures should only be used as an absolute last resort. An additional consideration is the appetite and capacity of a country to prosecute cases with vigor for purposes of validating the conditional amnesty. In most post-conflict and post-authoritarian situations, prosecuting authorities lack skills, resources, and infrastructure to pursue such cases. Prosecutors are often politically manipulated to drop sensitive matters. This outcome tends to undermine or discredit the entire truth and reconciliation process and adds considerably to the trauma of victims.

The actual impact outside of the class of political crimes has yet to be determined, but it is possible that the doctrines behind such measures have seeped into the criminal justice system more generally. This may serve to explain the leniency that has been accorded to senior political figures.<sup>62</sup> There is no doubt that perpetrators of political crimes have come to expect lenient treatment and that such expectations may have been assumed by many in the political elite. This is regardless of the fact that their misdemeanors have nothing to do with political struggle. A culture of entitlement to lenient treatment will take root in South Africa unless firm steps are taken to respect the rule of law.

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<sup>61</sup> See Rule of Law section: Applicants' Heads of Argument, *Nkadimeng & Others*, T.P.D. Case No. 32709/07.

<sup>62</sup> See, e.g., Michael Trapido, *If Zuma Immunity is Speculation Convene Arms Deal Inquiry*, THOUGHT LEADER, Jan. 19, 2009; ANDREW FEINSTEIN, *AFTER THE PARTY: A PERSONAL AND POLITICAL JOURNEY INSIDE THE ANC* (2007).

## Chapter 13

# Power of Persuasion: Impact of Special War Crimes Prosecutions on Criminal Justice in Bosnia and Serbia

*Bogdan Ivanišević*

This paper examines the relationship between two sets of criminal justice in Bosnia and Herzegovina (BiH) and Serbia: transitional justice (“extraordinary”) measures and regular (“ordinary”) criminal justice. The “spill-over effect” of transitional justice mechanisms upon ordinary criminal justice has been modest in both countries. However, one should refrain from concluding from this that the power of special transitional justice measures to affect ordinary justice is inherently weak. Each context is different, and the prospects for long-term impact in BiH differ from those in Serbia. Additionally, it takes time for effects of transitional justice to be felt. In BiH and Serbia alike, more time is needed for final conclusions.

In this examination of special (transitional justice) measures in the field of criminal prosecutions in BiH and Serbia, the notions of “special” and “transitional” are not used interchangeably. Some measures of criminal justice can be applied in a “special” manner, without belonging to the realm of transitional justice. For example, prosecutions for organized crime in both countries contain important special features, but they are not measures of transitional justice as they address ongoing violations of the penal code by private individuals rather than mass violations of human rights committed in the past by persons with some measure of state or quasi-state power. Conversely, the judiciary in a given country can contribute to transitional justice while operating under altogether “ordinary” rules. Cantonal and district courts in BiH, which for decades functioned much in the same way that they do today, are a case in point.

For these reasons, this paper proceeds on the understanding that in the Bosnian and Serbian context special mechanisms of transitional justice in the field of criminal prosecutions are limited to the following: (1) the International Criminal Tribunal for the former Yugoslavia (ICTY); (2) the “hybrid” War Crimes Chamber of the Court of BiH (BWCC) and the Special Department for War Crimes in the BiH Prosecutor’s Office (SDWC); and (3) the Office of the War Crimes Prosecutor in Serbia and the War Crimes Chamber of the District Court in Belgrade.

These institutions operate within the framework of *transitional* justice, because their purpose is to prosecute war crimes committed in the past. But in what sense are they *special*? While it is quite obvious in the case of the Hague-based international ad hoc tribunal, it may be less obvious in the case of the two

Bosnian institutions and the Serbian counterparts. The latter, in contrast to the ICTY, are located in the region for which they dispense justice and their creators envisaged them to be institutions of long duration. The BWCC and the SDWC in BiH are special both because of the crucial role played by foreign judges and prosecutors and their detached place in the country's criminal justice architecture. The Court of BiH, of which the BWCC is a part, has its own exclusive appellate chamber. The Court does not have superior jurisdiction over the courts of other jurisdictions in the BiH. Similarly, the BiH Prosecutor's Office cannot issue binding instructions to other prosecutors in the country. In Serbia, the War Crimes Chamber of the District Court in Belgrade and the Office of the War Crimes Prosecutor are integrated into the ordinary structures—but they have exclusive competency over war crimes cases, and thus a special character.

As mentioned above, organized crime trials in both countries are “special” in several important aspects. The power to prosecute or try offenses with elements of organized crime resides in *special* structures in the police, prosecutorial offices, and court chambers. Furthermore, in Serbia the applicable criminal procedure rules in matters relating to organized crime differ to a certain extent from the rules pertaining to ordinary crimes. Both in BiH and in Serbia, organized crime prosecutions are also physically separate from the rest of the judiciary. They take place in specially constructed buildings that house the judges and prosecutors for organized crime and war crimes. Because organized crime trials fall outside of the scope of transitional justice, this chapter will examine them along with other segments of “ordinary” criminal justice—war crimes trials before ordinary courts (in BiH) and all other criminal trials before ordinary courts (in BiH and in Serbia).

The different areas of ordinary criminal justice have been affected to some degree by the practices developed within the framework of transitional justice. Examples of positive effects include (1) the trials in BiH, including in non-war crime cases, have employed a more efficient criminal procedure modeled on the ICTY procedure; (2) some elements of ICTY-like adversarial procedure have been gradually introduced into the mainly inquisitorial criminal procedure in Serbia; (3) prosecutors and judges in the ordinary structures in BiH that deal with war crimes have increasingly used ICTY jurisprudence; (4) prosecutors and judges in the ordinary structures have to a certain extent used the “best practices” developed by the BWCC and the SDWC; (5) the number of war crimes prosecutions before ordinary courts in Republika Srpska, one of Bosnia's two constituent parts, has increased; and (6) witness support mechanisms in non-war crimes cases in Serbia have been extended.

At the same time, the relationship between the two frameworks of justice in BiH has not been tension-free. In particular, the use of different substantive laws has led to significant discrepancies in sentencing. Such tensions are largely absent in Serbia as there has been scarce interconnection between the two tracks of justice.

Part I of this chapter begins by presenting the origins of the special prosecution structures in BiH and Serbia, and Part II briefly describes the structures themselves. Part III presents some of the positive effects of both the ICTY and the national-level structures on the ordinary jurisdiction. The tensions experienced and possible negative effects are analyzed in Part IV. Finally, Part V concludes by reflecting on whether there is a tendency for the special measures to be normalized into the ordinary judicial system and considering the overall contribution of transitional justice in these two particular cases.

## **I. Special—But Less Urgent than the Organized Crime Counterparts**

Special structures for the prosecution of war crimes in BiH and Serbia were established after similar models had been introduced for the prosecution of organized crime. The chronological priority of the latter structures has limited the potential impact of the special war crimes prosecutions on the prosecutions for organized crime.

The establishment of the ICTY in 1993 was a consequence of a lack of commitment by the governments in the region to prosecute war crimes. By 2003-2004, when the special mechanisms in BiH and Serbia were established, the authorities had become more receptive to demands for prosecution but still did not consider it a priority. Decision-makers in both countries considered tackling organized crime the task of primary importance. The push for special prosecution of war crimes came from the outside—the ICTY, intergovernmental organizations, and the United States.

### **A. BiH: ICTY Added Special Prosecution to the Reform Plate**

In BiH, the Office of the High Representative (OHR) was the effective ruler of the country in the first decade after the end of the war, which had lasted from 1992 to 1995.<sup>1</sup> The OHR endeavored early on to push forward comprehensive reform of the Bosnian judiciary to assure judicial and prosecutorial independence and competence. The reform's key objective was to curb rampant corruption and organized crime—the major obstacles to political and economic reconstruction of

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<sup>1</sup> The Dayton Peace Agreement, which ended the armed conflict in BiH in November 1995, created the OHR to represent the international community in Bosnia. In 1997, the OHR was endowed with special powers, commonly referred to as the Bonn powers, including the capacity to impose laws. The powers of the OHR exemplified the status of BiH as a *de facto* protectorate: international authorities carried out nation-building and foreign soldiers guaranteed security.

the country ravaged by war.<sup>2</sup> An ineffective judiciary and outdated laws in Bosnia's two "entities"<sup>3</sup>—the Federation of Bosnia and Herzegovina (Federation of BiH) and Republika Srpska—made successful prosecutions for corruption, money laundering, and other economic crimes extremely rare, if not altogether nonexistent.<sup>4</sup> As a step toward the effective prosecution of organized crime, in March 2003 the OHR created a Special Department for Organized Crime, Economic Crime and Corruption in the Prosecutor's Office of BiH.<sup>5</sup> The first trials for organized crime started in May 2003, two years before the BWCC became operational.<sup>6</sup>

The maturing approach of decision-makers to tackling organized crime in BiH coincided with the crystallization of the "completion strategy" for the ICTY, based in The Hague.<sup>7</sup> In July 2002, the United Nations (UN) Security Council endorsed a joint report by the President, Prosecutor, and Registrar of the ICTY, which envisaged the transfer of cases involving intermediary- and lower-level accused to competent national jurisdictions as the most efficient way to allow the Tribunal to complete all trial activities in timely manner.<sup>8</sup> The previous year, in November 2001, the then Chief Prosecutor of the ICTY, Carla del Ponte, argued in a speech at the UN that Bosnia should have a more active role in trying war criminals.<sup>9</sup>

The priorities of the OHR and the ICTY converged during 2002. In July of that year, the then President of the ICTY, Judge Claude Jorda, told the Security Council that a Chamber with special jurisdiction to try serious violations of international humanitarian law should be established within the Court of BiH.

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<sup>2</sup> See Sebastian van de Vliet, *Addressing Corruption & Organized Crime in the Context of Re-establishing the Rule of Law*, in *DECONSTRUCTING THE RECONSTRUCTION: HUMAN RIGHTS & RULE OF LAW IN POSTWAR BOSNIA AND HERZEGOVINA* 205, 228-30 (Dina Francesca Haynes ed., 2008); Fidelma Donlon, *Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina*, in *DECONSTRUCTING THE RECONSTRUCTION*, *supra*, at 257, 275-76.

<sup>3</sup> As a result of the Dayton Peace Agreement, BiH consists of two main "entities" of roughly the same size: the Federation of Bosnia-Herzegovina (mainly composed of Bosniaks and Bosnian Croats) and Republika Srpska (mainly composed of Bosnian Serbs). Each entity has its own government, parliament, and judiciary. The Brčko District is a separate political entity with autonomous status.

<sup>4</sup> INTERNATIONAL CRISIS GROUP, EUR. REP. NO. 127, *COURTING DISASTER: THE MISRULE OF LAW IN BOSNIA & HERZEGOVINA* 27 (2002).

<sup>5</sup> For more information, see the description of the departments on the website of the Prosecutor's Office of BiH, <http://www.tuzilastvobih.gov.ba>.

<sup>6</sup> Rt. Hon. Paddy Ashdown, High Rep. for BiH, Speech to the International Rescue Committee, "Broken Communities, Shattered Lives", (June 20, 2003) ("Just last month, this new Chamber took on its first case—the biggest human trafficking trial in Bosnia's history.")

<sup>7</sup> In July 2002, the UN Security Council endorsed a strategy to end all first-instance trials by 2008 and all appellate proceedings by 2010. See Press Release, Security Council, Security Council Endorses Proposed Strategy for Transfer to National Courts of Certain Cases Involving Humanitarian Crimes in Former Yugoslavia, U.N. Doc. SC/7461 (July 23, 2002). In 2003 and 2004, two UN Security Council Resolutions mandated completion of all investigations by the end of 2004 and all first-instance trials by the end of 2008. See S.C. Res 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

<sup>8</sup> See Press Release, SC Endorses Proposed Strategy, *supra* note 7.

<sup>9</sup> INTERNATIONAL CRISIS GROUP, *supra* note 4, at 32.

Jorda underscored that the plan had the support of the ICTY Prosecutor, the High Representative, and the members of the Presidency of BiH.<sup>10</sup> During 2003 and 2004, the OHR, ICTY, and Bosnian officials drafted a new Criminal Code and Criminal Procedure Code, a revised Law on the Court of BiH, a Law on the Office of the Prosecutor of BiH, a Law on the Transfer of Cases, and a Law on the Protection of Victims and Witnesses. The final package of legislation was passed in November and December 2004.<sup>11</sup> The War Crimes Chamber was officially inaugurated in March 2005 and became operational in May with the appointment of the first international judges by the High Representative.<sup>12</sup>

## **B. Serbia: State of Emergency Gave Birth to Special War Crimes Prosecution**

After the removal of Slobodan Milošević from power following street protests in October 2000, the continued strength of organized crime presented a fundamental obstacle to the desire of the new Serbian government to radically transform Serbia's political and economic system. Some of the most powerful gangs were created during the 1990s by individuals linked to Milošević's secret services and involved in wartime atrocities in BiH, Croatia, and Kosovo.<sup>13</sup> A telling expression of the power of organized crime came with the assassination of the Assistant Head of the Public Security Sector of the Serbian Ministry of Interior, Boško Buha, in June 2002.<sup>14</sup>

During the same period, Serbia was under pressure from the international community to improve its cooperation with the ICTY and to launch credible

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<sup>10</sup> Press Release, ICTY, Address by his Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council (July 26, 2002), <http://www.icty.org/sid/8080>.

<sup>11</sup> William W. Burke-White, *Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia-Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279, 336-37 (2008).

<sup>12</sup> *Id.* at 338.

<sup>13</sup> In John Mueller's interpretation of the armed conflicts in the former Yugoslavia, "the violence seems to have been the result of a situation in which common, opportunistic, sadistic, and often distinctly nonideological marauders were recruited and permitted free rein by political authorities." John Mueller, *The Banality of 'Ethnic War'*, 25 INT'L SECURITY 42, 43 (2000). According to Mueller:

[A] group of well-armed thugs and bullies encouraged by, and working under rough constraints set out by, official security services would arrive or band together in a community. Sometimes operating with local authorities, they would then take control and persecute members of other ethnic groups, who would usually flee to areas protected by their own ethnic ruffians, sometimes to join them in seeking revenge.

*Id.*

<sup>14</sup> The trial against four members of the so-called "Maka's Group" resulted in acquittal for lack of evidence in 2004. The head of the group, Željko Maksimović-Maka, has been a fugitive from justice since the assassination of General Buha.



domestic war crimes prosecutions. Much like in BiH, the need to initiate domestic prosecutions gained importance with the establishment of a completion strategy for the ICTY. The Serbian government recognized a twofold benefit in conducting credible war crimes trials domestically: officials hoped that such trials could improve the image of the country internationally and lead to the transfer of ICTY cases to Serbia, thereby rendering unnecessary the unpopular practice of surrendering Serbian nationals for trials abroad.<sup>15</sup>

In July 2002, the Serbian parliament enacted a law creating special structures for fighting organized crime.<sup>16</sup> The law provided for the establishment of a Special Prosecutor's Office for the suppression of organized crime within the District Public Prosecutor's Office in Belgrade. It also vested the Belgrade District Court with exclusive original jurisdiction for the territory of the Republic of Serbia in cases concerning specific criminal offenses that include the element of organized crime.<sup>17</sup> "Offences against humanity and international law" were also included in the law on organized crime. The judicial structures created to fight organized crime, in other words, were given the authority to prosecute and try war crimes as well.

The July 2002 law only briefly mentioned war crimes because the key international organizations in Serbia—the Organization for Security and Cooperation in Europe (OSCE), the United Nations Development Program (UNDP), and the Council of Europe—as well as the influential U.S. embassy in Belgrade, argued that war crimes prosecutions required separate legislation and the establishment of special structures. The Serbian government resisted this approach fearing that the high profile of a special mechanism might antagonize the Serbian public, which generally did not support war crimes prosecutions.<sup>18</sup> The authorities preferred instead to subsume war crimes under the broader label of "organized crime."<sup>19</sup> As a compromise, the July 2002 law on organized crime referred to war crimes, but it tilted heavily toward addressing traditional forms of organized crime: counterfeiting and money laundering; the illicit production and sale of narcotics; illicit trade, including arms, ammunition, and explosive substances; human trafficking; robbery; aggravated theft; offering and accepting bribes; and extortion and kidnapping.<sup>20</sup> The international community

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<sup>15</sup> Interview with a former member of the OSCE Mission to Serbia (Nov. 2009).

<sup>16</sup> Law on Organization and Jurisdiction of Government Authorities in Suppression of Organized Crime, Official Gazette of the Republic of Serbia, No. 42/02, July 18, 2002.

<sup>17</sup> *Id.* arts. 4 & 12.

<sup>18</sup> This resistance arguably comes from discomfort stemming from the fact that Serb forces committed by far the most—and the most serious—war crimes in the armed conflicts in the 1990s in the former Yugoslavia. The ICTY jurisprudence provides abundant evidence corroborating this claim regarding the share of responsibility.

<sup>19</sup> Interview with a former member of the OSCE Mission to Serbia (Nov. 2009).

<sup>20</sup> The offenses are enumerated in Article 2(3) of the Law on Organization and Jurisdiction of Government Authorities in Suppression of Organized Crime, *supra* note 16.

continued to advocate for the enactment of special legislation concerning war crimes.

On March 4, 2003, the Serbian government appointed a Special Prosecutor for Organized Crime.<sup>21</sup> A major arrest operation against the members of key criminal groups was planned for mid-March. The criminals, however, moved first. On March 12, 2003, members of the so-called Zemun clan, named after the Belgrade suburb where most of them lived, assassinated Serbian Prime Minister Zoran Djindjić. Some perpetrators were also active members of the Special Operations Unit of the Serbian police, a creation of the wars in Croatia and BiH. This unit had been considered the best trained and equipped among the official armed formations in the country, and its members resented the new, pro-Western government.

By April 2003, the Ministry of Justice had come to accept the introduction of a special legislation on war crimes prosecutions. The change of attitude likely reflected the preoccupation of the authorities in fighting Djindjić's assassins under the conditions of a state of emergency; the government disbanded the Special Operations Unit and arrested hundreds of criminal group members. Ongoing resistance to international pressure to establish separate war crimes prosecutions structures therefore was an unnecessary distraction. On July 1, 2003, two months after the state of emergency was ended, the Serbian parliament adopted the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes.<sup>22</sup> The law envisaged establishment of an Office of the War Crimes Prosecutor for the Territory of the Republic of Serbia. On July 23, Vladimir Vukčević was elected War Crimes Prosecutor.<sup>23</sup>

## II. Relevant Structures for War Crimes Prosecutions in BiH and Serbia

There are three levels of relevant structures for prosecuting war crimes in the Bosnian context: the ICTY, domestic special structures, and ordinary domestic courts and prosecutorial offices. The last group is absent from the relevant war crimes prosecution structures in Serbia because the District Court in Belgrade and the Office of the War Crimes Prosecutor for the Territory of the Republic of Serbia have exclusive jurisdiction over war crimes.

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<sup>21</sup> *Glavni akteri sudenja* ("Trial's Main Actors"), POLITIKA, May 6, 2007.

<sup>22</sup> The law was published in the *Official Gazette of the Republic of Serbia*, No. 67/2003, July 1, 2003.

<sup>23</sup> See Website of the Office of the War Crimes Prosecutor, [http://www.tuzilastvorz.org.rs/html\\_trz/O\\_NAMA\\_ENG.HTM](http://www.tuzilastvorz.org.rs/html_trz/O_NAMA_ENG.HTM).

## A. Special Structures in BiH

The War Crimes Chamber within the Court of BiH tries the most complex war crimes cases adjudicated by the Bosnian judiciary. Less complex cases fall within the jurisdiction of the ordinary courts in BiH's two entities and in the separate Brčko District. The War Crimes Chamber has the ultimate authority to determine the complexity of a case.

War crimes cases received by cantonal prosecutors in the Federation of BiH and district prosecutors in Republika Srpska before March 1, 2003 fall under their jurisdiction respectively; however the War Crimes Chamber of the Court of BiH can decide to transfer such cases to the State Prosecutor's Office. Cases reported after the March 2003 legislation came into force fall under the exclusive jurisdiction of the Court and Prosecutor's Office of BiH. The Court can however decide to transfer a case to a court in the Federation of BiH, Republika Srpska, or Brčko District. The local courts have played a role in adjudicating war crimes. In 2006, for example, they issued sixteen first-instance judgments; in 2007, the number rose to nineteen.<sup>24</sup>

The Court of BiH does not have superior jurisdiction over the courts in the Federation of BiH and Republika Srpska, and its jurisprudence is not binding on the cantonal and district courts. BiH does not have a supreme court, so decisions of the trial panels at the Court of BiH are reviewed by the Appellate Chamber alone. The BiH Prosecutor's Office lacks coordination with the entity prosecutor offices, and cannot issue binding instructions to cantonal and district prosecutors. It has developed better cooperation with the ICTY Prosecutor and prosecutors in neighboring countries than with the cantonal and district prosecutors.<sup>25</sup>

## B. Special Structures in Serbia

As described above,<sup>26</sup> the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes was enacted on July 1, 2003. The legislation established the specialized War Crimes Chamber of the District Court in Belgrade and the Office of the War Crimes Prosecutor in the Territory of the Republic of Serbia as the two agencies with exclusive responsibility for war crimes cases. The War Crimes Chamber was set up in October 2003, and the Office of the War Crimes Prosecutor became fully operational in January 2004. The legislation also mandated a special detention unit and a special War Crimes Investigation Service in the Ministry of Interior.<sup>27</sup>

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<sup>24</sup> BOGDAN IVANIŠEVIĆ, ICTJ, *THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA: FROM HYBRID TO DOMESTIC COURT* 29 (2008).

<sup>25</sup> *Id.* at 30-31.

<sup>26</sup> *See supra* Part I. Special—But Less Urgent than the Organized Crime Counterparts.

<sup>27</sup> BOGDAN IVANIŠEVIĆ, ICTJ, *AGAINST THE CURRENT—WAR CRIMES PROSECUTIONS IN SERBIA* 2 (2007).

Vesting exclusive competence for acting in war crimes matters in specialized agencies in Belgrade meant that, in contrast to the Bosnian model, local (“ordinary”) prosecutors and judges in Serbia had no role to play in war crimes prosecutions. This separation limits the potential of special measures of transitional justice’s impact on the ordinary criminal justice system. The government has not given any hints that it might extend jurisdiction in war crimes cases to other district courts in Serbia. Considering that numerous perpetrators of the war crimes committed in BiH, Croatia, and Kosovo now live in Serbia, and that resources of the War Crimes Chamber and War Crimes Prosecutor’s Office are limited, there would be plenty of work for courts and prosecutors at the district level. The two special institutions could serve as a model from which the others could learn. But for this scenario to materialize, policy makers in Serbia must consider prosecution of war crimes a goal of paramount importance, which to date has not been the case.

### **III. Positive Effects of Special Measures of Transitional Justice on the Ordinary Criminal Justice System**

Special measures of transitional justice have had several positive effects on the ordinary criminal justice system in BiH, while the impact in Serbia has been minimal. The impact of the ICTY has been greater than the impact of the domestic special prosecution.

#### **A. Contribution of the ICTY**

The positive impact of the ICTY on the ordinary courts in BiH has been twofold. First, all BiH courts use a hybrid criminal procedure modeled in part on the ICTY, which has brought improvements compared to the purely inquisitorial procedure used before. Second, the ordinary courts on occasion interpret the municipal substantive law with the help of ICTY jurisprudence.

The State-level Criminal Procedure Code from March 2003, and the identical codes in Republika Srpska (July 2003) and the Federation of BiH (August 2003), represent a marked departure from the procedures governing criminal trials in the preceding decades. The earlier, purely inquisitorial system was replaced by a hybrid one, with a prevalence of adversarial elements. The ICTY procedural rules were *not* the only source that the drafters of the new criminal procedure consulted. Also important was the legislation in the Brčko district, which was already using an adversarial procedure modeled on Italian and ICTY practice. In any event, lessons learned at the ICTY did play a significant role.

The chart below (*Adversarial and Inquisitorial Aspects of Criminal Proceedings (ICTY, BiH, Serbia)*) presents elements of the new criminal procedure in BiH. The distribution of adversarial and inquisitorial elements mirrors the

distribution at the ICTY. The adversarial elements include: the abolishment of the position of investigative judge, instead putting prosecutors in charge of investigations; the mainly passive role of the judges, with dominant roles for the two parties in a trial; a strict order of case presentation; the prohibition of trials in absentia; the use of plea bargaining; the possibility for the defendant to testify under oath; and, the reduced role for victims in criminal proceedings. The elements of the inquisitorial practice are the following: the absence of strict rules of evidence; the joining of trial and sentencing phases; and broader rights of appeal for both parties.

Having investigations conducted by prosecutors has been a major procedural improvement. Cantonal and district prosecutors share the view that this model has led to more time-efficient investigations.<sup>28</sup>

The use of plea bargaining by BiH ordinary courts is another novelty which, on balance, has been beneficial. Plea bargaining is frequent in non-war crimes trials, as a principal means of expediting criminal prosecutions. In the Sarajevo Cantonal Court, for example, of the total ninety-eight criminal cases resolved in 2007, in thirty-four cases the accused pleaded guilty following an agreement with the prosecutor.<sup>29</sup> In the Bijeljina District Court, in 2008, convictions in twenty-three cases—out of the total thirty-two—resulted from plea agreements.<sup>30</sup> Prosecutors in organized crime cases at the Court of BiH also make frequent use of plea agreements. In 2006, such agreements were the basis of thirteen convictions before the Chamber for Organized Crime and Corruption of the Court of BiH, out of twenty.<sup>31</sup> In 2008, the number of plea agreements in the cases of organized crime reached to thirty-six.<sup>32</sup>

In war crimes matters, plea bargaining is still a sensitive issue because many Bosnians consider the sentences inappropriately low given the gravity of the underlying crimes. Of the thirty-nine final verdicts reached before cantonal and district courts between March 2006 and June 2009, four involved plea agreements.<sup>33</sup>

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<sup>28</sup> Prosecutor's Office of Unsko-Sanski Canton, "Izveštaj o stanju i tokovima kriminala na području Unsko-sanskog kantona u 2007. godini" ("Report on Crime Developments in the Unsko-Sanski Canton in 2007"), Bihać, Feb. 2008, at 2, <http://www.tuzilastvoustk.com.ba/izvjestaj/2007.doc>; Telephone interview with a cantonal prosecutor (Nov. 2009).

<sup>29</sup> Tadija Bubalovic, *Novela Zakona o kaznenom postupku Bosne i Hercegovine od 17.6. 2008. godine* ("Amendments of 17 June 2008 to the Criminal Procedure Code of Bosnia and Herzegovina"), 8 PRAVO I PRAVDA 419, 439 fn 28 (2008).

<sup>30</sup> District Court of Bijeljina, *Izveštaj o radu Okružnog suda Bijeljina za 2008. godinu* ("Report on the Activities of the Bijeljina District Court in 2008"), at 9, Jan. 28, 2009.

<sup>31</sup> High Judicial and Prosecutorial Council of BiH, *Godišnje izvješće za 2006. godinu (Annual Report for 2006)*, at 96, Jan.-Dec. 2006, <http://www.hjpc.ba/intro/gizvjestaj/pdf/VSTVGI2006hr.pdf>.

<sup>32</sup> High Judicial and Prosecutorial Council of BiH, *Godišnji izvještaj za 2008. godinu (Annual Report for 2008)*, Annex III, Jan-Dec 2008, <http://www.hjpc.ba/intro/gizvjestaj/pdf/8dioTuzilastva.pdf>.

<sup>33</sup> Marko Pantić, sentenced by Tuzla Cantonal Court in June 2006 to two-and-a-half years in prison; Ivica Mlakić, Novi Travnik Cantonal Court, March 2007 (six years); Goran Kalajdzija, Banja Luka District Court, June 2008 (two years); and, Željko Mitrović, Sarajevo Cantonal Court, March 2009 (two years).

ICTY decisions sometimes inform the reasoning of the courts in Republika Srpska, while the courts in the Federation of BiH have refrained from such practice. This is a surprising development, given the Bosnian Serb public's unfavorable views of the ICTY and the generally positive perceptions of the ICTY in the Federation of BiH. The Supreme Court of Republika Srpska has often invoked arguments by the ICTY Appeals Chamber about the criteria for determining the existence of an armed conflict and the nexus between the act of the accused and the conflict, required to turn an infraction of criminal law into a war crime.<sup>34</sup> District courts in Trebinje and Banja Luka also do not shy away from referring to the ICTY jurisprudence, including on issues such as the definition of torture,<sup>35</sup> the existence of an armed conflict, and the nexus between the defendant's act and the conflict.<sup>36</sup>

In Serbia, the impact of the ICTY on the non-transitional justice prosecutions materialized in August 2009 with the addition of a few adversarial elements to the Criminal Procedure Code. The code applies to all types of criminal proceedings. The adversarial elements include plea bargaining and a strict order for case presentation.<sup>37</sup> The practices before the ICTY have played a role in the adoption of these innovations.<sup>38</sup>

*Chart: Adversarial and Inquisitorial Aspects of Criminal Proceedings  
(ICTY, BiH, Serbia)*

The following chart summarizes procedural rules governing war crimes trials in BiH and Serbia. Before the enactment of changes in BiH, both countries

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<sup>34</sup> See, e.g., Supreme Court of Republika Srpska, Case No. 118-0-Kz-K-06-000, Judgment of Feb. 22, 2007, at 4-5.

<sup>35</sup> Trebinje District Court, Case No. 015-0-K-06-000 010, Judgment of July 13, 2007, at 14 (referring to the ICTY Trial Chamber decision in the *Kunarac* case).

<sup>36</sup> Trebinje District Court, Case No. 015-0-K-08-000 003, Judgment of Nov. 4, 2008, at 19; Trebinje District Court, Case No. K-6/05, Judgment of Dec. 9, 2005, at 8-9.

<sup>37</sup> Law Amending the Criminal Procedure Code, Official Gazette of the Republic of Serbia, No. 72/09, Aug. 31, 2009, art. 74 (introducing Chapter HHa (plea agreements)); arts. 87 & 88 (amending Articles 328 and 331 (order of case presentation)).

<sup>38</sup> Telephone interview with a member of the former working group to draft the Law Amending the Criminal Procedure Code of the Republic of Serbia (Dec. 2009). Plea bargaining has not been used in the trials for organized crime in Serbia because it was not in the law prior to August 2009. The only reward mechanism has been withdrawal of charges against so-called witness-collaborators, i.e. indicted members of organized criminal groups that agree to cooperate with the prosecution. If the prosecutor and the suspect agree on the arrangement and the suspect testifies truthfully, the 2002 Criminal Procedure Code obliged the prosecutor to waive the charges against the witness-collaborator. This scheme was not, however, a direct or even indirect effect of transitional justice. The chapter of the Criminal Procedure Code that includes the provisions on witness-collaborators was taken primarily from similar Italian legislation. Under the Criminal Procedure Code as amended in August 2009 however, the witness-collaborator's cooperation results in a 50% reduction of the minimum sentence instead of dismissal. In non-defined "exceptional circumstances," the court can free the accused from serving the sentence despite conviction, if the prosecutor so requests. Law Amending the Criminal Procedure Code, art. 124 (amending Chapter XXIXa (Article 504t)).

used the same inquisitorial model. As the chart demonstrates, BiH now uses a hybrid model, first developed at the ICTY, in which adversarial elements prevail.

		<b>ICTY</b>	<b>BiH</b>	<b>Serbia</b>
<b>INQUISITORIAL</b>	Judges' advance knowledge of witness statements			*
	Active role of judges	* In part (ordering presentation of additional evidence)	* In part (ordering presentation of additional evidence)	*
	Investigating judge			*
	No jury trial	*	*	*
	Trials in absentia allowed			*
	No strict order of case presentation			* (before August 2009)
	Victims can participate in trial			*
	No plea bargaining			* (before August 2009)
	Defendant's testimony under oath not possible			*
	No strict rules of evidence	*	*	*
	Trial and sentencing phases joined	*	*	*
Broader rights of appeal by both parties	*	*	*	
<b>ADVERSARIAL</b>	Mainly passive role of judges	*	*	
	No judges' advance knowledge of witness statements	*	*	
	Prosecutorial investigation (no investigating judge)	*	*	
	Dominant role of two parties	*	*	
	Trials in absentia not allowed	*	*	
	Plea bargaining	*	*	* (after August 2009, for crimes punishable up to 12-years' imprisonment)
	Defendant can be (cross-) examined, under oath	*	*	
	Strict order of case presentation	*	*	* (after August 2009)
Victims considered mainly as witnesses	*	*		

## B. Contribution of National Special Mechanisms

Although the BWCC and the SDWC stand apart from the ordinary judicial structure in BiH, they have made themselves felt in the rest of the judiciary. The two agencies share their task—prosecution of war crimes—with segments of the ordinary judiciary. Due to the high profile of the Court of BiH and the BiH Prosecutor’s Office, some practices developed by the BWCC and the SDWC have resonated among the cantonal and district courts and prosecutorial offices. That said, the State-level war crimes prosecutions have had a lesser impact than the ICTY. The impact can be recognized through the increased numbers of war crimes prosecutions in Republika Srpska, adoption of best practices by cantonal and district judges and prosecutors, and improvements in the Criminal Procedure Code prompted by the developments before the BWCC.

It is tempting to conclude that the work of the BWCC and the SDWC contributed to an increase in prosecutions in Republika Srpska. Only two war crimes trials had been completed in the entity prior to the establishment of the BWCC in March 2005.<sup>39</sup> In 2005, courts in Republika Srpska rendered four first-instance judgments, and in 2006 the number rose to six.<sup>40</sup> Debates surrounding the establishment of the BWCC may have had a role in the intensification of efforts in Republika Srpska to bring war crime suspects to justice. (In the Federation of BiH, dozens of war crimes had been tried annually in the years preceding its establishment.)

One form of impact is the adoption of the BWCC’s and SDWC’s best practices; but in the absence of empirical research on the matter it is difficult to assess the extent of this practice. A current member of the SDWC said that, in her earlier role as a cantonal prosecutor in Zenica she drafted motions for pre-trial detention using SDWC’s “impeccably argued” motions as a model.<sup>41</sup> It may well be that such occurrences remain limited to isolated initiatives of individual practitioners. There are no regular channels of communication, such as trainings, through which the State-level judges and prosecutors share their experiences with colleagues in the entities.

The Criminal Procedure Code (2003) underwent changes in 2007 and 2008, with some of the improvements stemming from best practices as developed by the BWCC. The criminal procedure codes in the Federation of BiH and Republika Srpska adopted the identical amendments a few months later, so the solutions which the Court of BiH reached first are now part of the binding law in the entities.<sup>42</sup>

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<sup>39</sup> *Human Rights Watch, A Chance for Justice? War Crime Prosecutions in Bosnia’s Serb Republic* 15-16 (Mar. 2006).

<sup>40</sup> The figures are based on the examination of the first-instance verdicts in Republika Srpska made available to the author by the OSCE Mission in BiH.

<sup>41</sup> Interview with a member of the SDWC, Belgrade (Nov. 2009).

<sup>42</sup> Law Amending the Criminal Procedure Code of Republika Srpska, Official Gazette of Republika Srpska, No. 119/08, Dec. 18, 2008; Law Amending the Criminal Procedure Code of the Federation of BiH, Official Gazette of the Federation of BiH, No. 9/09, Feb. 11, 2009.



In July 2007, the High Representative imposed amendments to the Code, including provisions that allowed for expanded use of non-custodial measures to ensure the presence of the accused during the criminal proceedings. Prior to that, entity and Brčko district prosecutors and judges interpreted the Criminal Procedure Code as authorizing the use of non-custodial measures when circumstances indicated only that the defendant might flee. Such less restrictive measures were not available where there were other grounds supporting pre-trial detention—circumstances indicating that the defendant might destroy, conceal, alter or falsify evidence, or influence witnesses, accessories, or accomplices, or repeat the criminal offense; or, if the criminal offense was punishable by a sentence of imprisonment of ten years or more, and the manner of commission or the consequence of the criminal offense required that custody be ordered for the reason of public or property security.<sup>43</sup>

The Appeals Chamber of the Court of BiH first departed from that practice in November 2006, in a war crimes case, by ordering the release of the accused in favor of less restrictive measures (house arrest and prohibition of contact or interference with individuals who might appear as the Prosecutor’s witnesses), although the prosecutor had requested detention based on the threat to public safety or property.<sup>44</sup> The July 2007 amendments clarify that the court can order one or more of the alternative measures<sup>45</sup> “when the circumstances of the case so indicate.”<sup>46</sup> This covers grounds such as the threat to public safety or property, and circumstances indicating that the defendant might continue with criminal activities or interfere with the course of justice.

The practice of the Court of BiH has led to another legislative change that enhances the protection of defendants’ rights. June 2008 amendments to the Criminal Procedure Code mandate assignment of counsel to the suspect during the deliberation on the prosecutor’s motion for pre-trial detention.<sup>47</sup> In the earlier version of the provision, the suspect had to have counsel “immediately after the decision ordering detention has been made.” The Court of BiH, however, practiced appointing a counsel after receiving prosecutor’s motion for pre-trial detention, even in the absence of the legal obligation to do so.<sup>48</sup>

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<sup>43</sup> The bases for such detention policies were found in articles 126 and 132 of the Criminal Procedure Code, Official Gazette of BiH, No. 36/2003, Dec. 21, 2003.

<sup>44</sup> See Court of BiH, Press Release Custody terminated for Zoran Janković, Nov. 30, 2006, <http://www.sudbih.gov.ba/?id=295&jezik=e>.

<sup>45</sup> The alternative prohibitive measures include: prohibition from performing certain business or official activities; prohibition from visiting certain places or areas; prohibition from meeting with certain persons; orders to report occasionally to a specified body; and, temporary withdrawal of the driver’s license.

<sup>46</sup> Decision Enacting the Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina, art. 4, July 9, 2007 (introducing new Articles 126a to 126g).

<sup>47</sup> Law Amending the Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of BiH, No. 58/08, July 21, 2008, art. 11 (amending Article 45(2)).

<sup>48</sup> Interview with a member of the Human Rights Department in the OSCE Mission in BiH.

More controversial is the origin of the provision of the June 2008 amendments that introduced the so-called status conferences. The conferences provide the parties and the panel the opportunity to consider the trial plans of the prosecution and the defense. International judges introduced this procedure in the work of the BWCC in 2006—despite the initial absence of any explicit provision in the Criminal Procedure Code—to increase the efficiency of the proceedings. The innovative procedure was based on the positive practice of the ICTY.<sup>49</sup> The June 2008 amendments to the Criminal Procedure Code explicitly provide for status conferences,<sup>50</sup> and identical provisions were subsequently enacted in the criminal procedure codes of Republika Srpska and the Federation of BiH.<sup>51</sup> On the other hand, two war crimes prosecutors in the entities—one in the Federation of BiH, the other in Republika Srpska—have said that the courts in which they serve had been holding status conference for years, unrelated to the practice at the Court of BiH. According to the prosecutors, status conferences stem from the logic of the adversary system and the frequency of cases with a significant number of witnesses.<sup>52</sup> The introduction of status conferences to the legislation thus appears to reflect developments in both special and some ordinary prosecutions alike.

In Serbia, the practices developed by the Office of the War Crimes Prosecutor and the War Crimes Chamber in Belgrade only cursorily touched the ordinary justice system. At a conference held in December 2008 in Belgrade, representatives of the Ministry of Justice expressed public commitment to establishing witness support units in ordinary courts. The inspiration for this came from the work of the Victim and Witness Support Unit in the War Crimes Chamber.<sup>53</sup> This unit, established in June 2006, interacts with witnesses before their arrival in Belgrade, arranges for their travel and accommodation there, offers encouragement and basic explanations about the trial before they enter the courtroom, and handles other practical matters.<sup>54</sup> In 2007, the unit extended its services to witnesses in organized crime trials, which are held in the same building housing the War Crimes Chamber and Organized Crime Chamber, as well as to other departments of the Belgrade District Court, housed in a separate building. Implementation of the plan to establish witness support units in other ordinary courts remains at an inception stage.<sup>55</sup>

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<sup>49</sup> IVANIŠEVIĆ, *supra* note 24, at 12.

<sup>50</sup> Law Amending the Criminal Procedure Code of Bosnia and Herzegovina, *supra* note 46, art. 68 (introducing new Article 233a).

<sup>51</sup> Law Amending the Criminal Procedure Code of Republika Srpska, *supra* note 42, art. 79 (introducing new Article 241a); Criminal Procedure Code of the Federation of BiH (consolidated version) (on file with the author), art. 248a.

<sup>52</sup> Telephone interview with a cantonal prosecutor (Nov. 2009); Telephone interview with a district prosecutor (Nov. 2009).

<sup>53</sup> Interview with an OSCE official, Belgrade (Nov. 2009).

<sup>54</sup> IVANIŠEVIĆ, *supra* note 27, at 21.

<sup>55</sup> Interview with an OSCE official, Belgrade (Nov. 2009).

## IV. Tensions and Negative Effects of the Use of Transitional Justice Initiatives

The analysis so far has mainly focused on the positive effects, albeit limited, of special measures of transitional justice on the rationale and operation of the ordinary criminal justice system. However, there are also tensions between the two tracks of justice. The problem is more pronounced in BiH than in Serbia, because the potential for tensions is greater when two structures cover the same field (war crimes prosecutions), as they do in BiH. War crimes continue to be tried before regular—cantonal and district—courts, in addition to the BWCC. While all courts apply identical procedures, cantonal and district courts apply one set of substantive penal codes, and the BWCC applies another. This difference has been a source of major friction. In Serbia, in contrast, ordinary justice and transitional justice criminal prosecution initiatives are for the most part separated.<sup>56</sup>

The political climate in Republika Srpska, the half of BiH with a Serb majority, also discourages professional alliances between judges and prosecutors at the Republika Srpska and State levels. The nationalistic Prime Minister of Republika Srpska, Milorad Dodik, has been campaigning fiercely against the Court of BiH and the BiH Prosecutor's Office, blaming their international judges and prosecutors for plotting against Republika Srpska leadership in order to break its opposition to the centralization of State power. The votes of the Serb members of the Bosnian parliament were decisive in its October 2, 2009 decision not to extend the mandates of the international judges and prosecutors in the Court of BiH and the Prosecutor's Office.<sup>57</sup> On December 14, 2009, however, the High Representative for BiH imposed amendments to the Law on Prosecutor's Office of BiH and the Law on Court of Bosnia and Herzegovina, extending the mandates of international judges and prosecutors until December 31, 2012.<sup>58</sup>

### A. Overlapping Exceptional and Ordinary Measures—A Threat to the Rule of Law in Bosnia?

The Court of BiH applies the Penal Code adopted at the State level in 2003. District and cantonal courts use the Penal Code of the former SFR Yugoslavia as the applicable law at the time of the commission of the crimes. This difference

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<sup>56</sup> The only significant exception is the power of the Supreme Court, the highest judicial institution in the country, to decide on appeals against the decision of the War Crimes Chamber of the Belgrade District Court.

<sup>57</sup> *See Lack of Support for International Judicial Personnel*, BALKAN INVESTIGATIVE REPORTING NETWORK - BIRN, Oct. 2, 2009.

<sup>58</sup> Decision Enacting the Law on Amendments to the Law on Prosecutor's Office of Bosnia and Herzegovina, Dec. 14, 2009; Decision Enacting the Law on Amendment to the Law on Court of Bosnia and Herzegovina, Dec. 14, 2009.

has been a source of tension between the two layers of justice, with some local practitioners resenting what they consider a retroactive application of law before the State-level institutions. Only the Court of BiH has tried individuals for crimes against humanity and applied the doctrine of command responsibility. In March 2007 the Constitutional Court of BiH ruled that the country's Penal Code permits trial and conviction of a person whose act of omission was prohibited under the general principles of international law, even if the conduct did not constitute a criminal offense under municipal law at the relevant time.<sup>59</sup> Cantonal and district courts have refrained from doing so.

Significant discrepancy exists in the sentencing at the State and entity levels as a result of the application of different laws. The maximum penalty before the Court of BiH is forty-five years imprisonment, in contrast to twenty years in Republika Srpska and fifteen years in the Federation of BiH. The BWCC has already imposed several prison sentences of around thirty years, all far exceeding the maximum allowed in the entities. On average, sentences delivered by the Court of Bosnia and Herzegovina in war crimes cases have been almost double the length of those delivered by cantonal and district courts.<sup>60</sup> The Constitutional Court found that imposing penalties under the Penal Code of BiH instead of the Penal Code of the former Yugoslavia was in accordance with the European Convention of Human Rights and, accordingly, with the Constitution of BiH.<sup>61</sup> However, the accused before the Court of BiH have launched hunger strikes on two occasions in protest against the application of the Penal Code of BiH—first in January 2007 and again in September of that year. The discrepancies in the punishments and more generally the application of different laws concerning war crimes remain a crucial challenge for the BiH judiciary.

## **B. Decreased Role for Victims**

The application of the ICTY-like procedure, in which the adversarial aspects prevail, has reduced the role of the victims in criminal trials in BiH. Victims participate in the ICTY proceedings as witnesses only.<sup>62</sup> In BiH, victims participate

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<sup>59</sup> Constitutional Court of BiH, Application No. AP-1785/06 (Abduladhim Maktouf), Decision on Admissibility and Merits, para 79, Mar. 30, 2007.

<sup>60</sup> See OSCE MISSION IN BiH, MOVING TOWARDS A HARMONIZED APPLICATION OF THE LAW APPLICABLE IN WAR CRIMES CASES BEFORE COURTS IN BOSNIA AND HERZEGOVINA 8 (Aug. 2008).

<sup>61</sup> The court reasoned that the sanctions prescribed by the Penal Code of the former Yugoslavia for perpetrators of war crimes were inadequate and failed to protect victims. This lack of protection “does not comply with the principle of fairness and the rule of law, embodied in Article 7 of the European Convention, and which . . . allow this exemption from the rule set forth in paragraph 1 of the same Article.” Constitutional Court of BiH, Application No. AP-1785/06 (Abduladhim Maktouf), para. 78.

<sup>62</sup> See Claude Jorda & Jerome de Hemptinne, *The Status and Role of the Victims, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

as witnesses, but additionally they can make compensation claims during the trial as injured parties.<sup>63</sup> A provision in the BiH Criminal Procedure Code allows for the court to assign legal representation to witnesses, including victim-witnesses, in circumstances in which “it is obvious that the witness himself is not able to exercise his rights during the hearing and if his interests cannot be protected in some other manner.”<sup>64</sup> In practice, victims are almost never represented. Most witnesses seem unaware of the possibility of engaging legal representation, and no system is in place to provide such representation.<sup>65</sup> Prior to 2003, in the civil law system, victims could continue the proceedings as private plaintiffs if the prosecutor decided not to pursue the charges. Now, the Criminal Procedure Code of BiH only gives victims the right to lodge a complaint to the same prosecutor who decided to discontinue the proceedings.<sup>66</sup>

Serbia has left the criminal procedures largely intact, and victims can participate in the proceedings in significant ways, in person or through representatives. At the pre-trial stage, they can propose that the investigating judge take certain investigative actions, and they can continue the proceedings as private plaintiffs if the prosecutor decides not to pursue the charges. At the trial stage, victims can question witnesses, introduce evidence, inspect the case file, and make closing arguments.

## V. ¿Is There a Tendency to “Normalize” the Special Measures?

The “exceptional” mechanisms of transitional justice have performed better, on average, than the rest of the criminal justice system in BiH and Serbia. It would be beneficial for these societies if the special measures became part of the ordinary criminal justice system. This has been achieved in part, through the introduction of ICTY-like elements into the procedural codes in BiH and the use of witness support services before ordinary courts in Serbia. But there is little indication that the specially created institutions will become fully integrated parts of the domestic judiciaries in the foreseeable future.

Creators of the BWCC and the SDWC have from the start planned for the evolution of the hybrid bodies into fully domestic institutions. But even with the departure of foreigners, the BWCC and the SDWC will maintain their special character if they remain placed outside the ordinary justice system. This

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<sup>63</sup> The Criminal Procedure Code defines an injured party as “a person whose personal or property rights have been jeopardized or violated by a criminal offence.” Criminal Procedure Code, Official Gazette of BiH, No. 36/2003, art. 20(h), Dec. 21, 2003.

<sup>64</sup> *Id.* art. 84(5).

<sup>65</sup> IVANIŠEVIĆ, *supra* note 24, at 21.

<sup>66</sup> Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of BiH, No. 36/03, art. 216 (4), Nov. 21, 2003.

extra-ordinary status will be difficult to change because of the peculiar political dynamics in the country. In the past two years, the leadership of Republika Srpska has been pursuing an increasingly secessionist course. As State-level institutions, the BWCC and the SDWC are among the targets of frequent attacks by the Bosnian Serb leaders. This is not a favorable environment for integration of the two institutions in the ordinary justice system.

In Serbia, “normalization” of the special measures would require a decision by the government to remove the exclusive jurisdiction to try war crimes from the War Crimes Chamber of the Belgrade District Court. As explained above,<sup>67</sup> there is no indication that the authorities are ready to move in that direction. They appear to be satisfied with the current—modest—numbers of the prosecutions, for which the War Crimes Chamber and the Special Prosecutor’s Office suffice.

## **Conclusion: Contribution of Transitional Justice Measures to Strengthening the Domestic Judicial System and a Rule-of-Law Culture**

While still limited, the impact of transitional justice measures on the ordinary courts in BiH has been positive. It would now be inappropriate to employ the harsh assessments that routinely described the Bosnian judiciary prior to the reforms of 2003-2004. In 2002, the International Crisis Group described the Bosnian judiciary as “highly politicised, war-inflated . . . nationally divided, financially dependent and institutionally deficient.”<sup>68</sup> According to the OSCE, the prosecution of war crimes in the immediate post-war period suffered from “ineffectual investigations, excessive and systematic delays in the resolution of trials and dubious decisions, compounded by a lack of public faith in the judicial system.”<sup>69</sup> As William W. Burke-White has noted, until 2003, cantonal and district courts in the two entities “did not want to subject to criminal prosecution” individuals of their own ethnic group.<sup>70</sup>

Since 2003, *the professionalism of judges and prosecutors* has arguably improved. War crimes prosecutions before ordinary courts in the two entities and the Brčko district are now conducted beyond strict ethnic lines. In stark contrast to the pre-2003 period, some courts in Republika Srpska regularly try war crimes suspects, usually of Bosnian Serb ethnicity. The operation of the criminal justice system as a whole has become more efficient.

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<sup>67</sup> See *supra* Part II: Relevant Structures for War Crimes Prosecutions in BiH and Serbia.

<sup>68</sup> INTERNATIONAL CRISIS GROUP, *supra* note 4, at 37.

<sup>69</sup> OSCE, WAR CRIMES TRIALS BEFORE THE DOMESTIC COURTS OF BOSNIA AND HERZEGOVINA: PROGRESS AND OBSTACLES 4 (Mar. 2005).

<sup>70</sup> Burke-White, *supra* note 11, at 315.

At least some credit for the measured progress can be attributed to the work of special judicial and prosecutorial bodies in the field of transitional justice.<sup>71</sup> In particular, the application of the ICTY-modeled procedure and the demonstration effect of ICTY judgments have positively impacted the work of the judicial and prosecutorial agencies in BiH's two entities. It should be noted, however, that the bulk of the ICTY's efforts to bolster domestic capacity has been directed at domestic *special* structures—the BWCC and the SDWC—while impact on ordinary structures has been largely incidental. The State-level structures—the BWCC and the SDWC—have had lesser effect on ordinary structures.

The impact of special mechanisms has been most evident where the international community was in a position to directly shape the criminal justice system, such as in the introduction of the new criminal procedure in BiH, in which the ICTY and the Office of the High Representative played a key role. When given a chance to decide on their own whether to follow the best practices developed by special structures, domestic lawmakers and practitioners, showed less inclination to do so, as seen, for example, in the scant use of ICTY and BWCC jurisprudence by cantonal and district judges and prosecutors in BiH.

The limitations of positive contributions derive in part from the lack of structural links between State-level institutions and those at the entity levels, as well as the absence of sustained efforts by the ICTY and State-level bodies to transfer know-how to judges and prosecutors in the entities. The professional pride of practitioners in the ordinary “track” and a certain aversion to foreign influence might also inhibit the impact of special structures—although these factors are difficult to corroborate with specific examples. Easier to demonstrate is the adverse effect of the political climate in Republika Srpska and of the scarce funding available to judiciaries in the two entities. For example, cantonal and district courts do not have access to the use of video-links—a standard practice at the Court of BiH and the ICTY—and sophisticated measures of witness protection and victim support remain unused at the entity level.

Compared to BiH, the impact of transitional justice measures in Serbia has been more modest, as evidenced by the prevalence of inquisitorial elements in the criminal procedure and the lack of references to ICTY jurisprudence in the Supreme Court's judgments in war crimes matters. International lawmakers and

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<sup>71</sup> The comprehensive “vetting” of ICTY judges and prosecutors, carried out between 2002 and 2004 by the High Judicial and Prosecutorial Council of BiH, has also contributed to progress. Approximately 30% of the incumbents that applied for their positions were not reappointed. The vetting of the judiciary reduced the number of unqualified individuals in judicial positions and enhanced ethnic diversity in the courts and prosecutorial offices. See ICTJ, Case Study Series, *Bosnia and Herzegovina: Selected Developments in Transitional Justice* (Oct. 2004), <http://ictj.org/images/content/1/1/113.pdf>; Alexander Mayer-Rieckh, *Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Offices in Bosnia and Herzegovina*, in *JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES* (Alexander Mayer-Rieckh & Pablo de Greiff eds., 2007).

practitioners have not directly shaped the contours of the Serbian criminal justice system, which may account for the resilience of ordinary justice to the influence of special mechanisms. In addition, the exclusive jurisdiction of the District Court in Belgrade to adjudicate war crimes creates a paramount structural obstacle to the application of ICTY and District Court know-how throughout the Serbian judiciary.

In spite of the application of transitional justice measures in BiH and Serbia, informal constraints that should ensure society's respect for the rule of law and prevent the arbitrary exercise of government power remain weak in both countries. Specialized structures have not significantly *increased the willingness of society to fight impunity* for war crimes, as evidenced in the high level of support for indicted, or even convicted, war criminals among populations with shared ethnicity. When Naser Orić, a Bosniak, was released from the ICTY after a Trial Chamber convicted him to two years in prison for crimes against Bosnian Serbs, several thousand people greeted him at the Sarajevo Airport.<sup>72</sup> (Orić was eventually acquitted on appeal.) Ten thousand people welcomed Tihomir Blaškić at a football stadium at Kiseljak, BiH, after the Tribunal's President granted him early release.<sup>73</sup> Blaškić had been convicted to nine years in prison for crimes against Bosnian Muslims. In Serbia, a 2009 opinion poll showed that 56% of respondents believed Bosnian Serb General Ratko Mladić to be not guilty of the crimes alleged by the ICTY prosecutor (in contrast to the 22% that believed him to be guilty), and 64% opposed his surrender to the ICTY (against 25% that favored it).<sup>74</sup>

The ethno-nationalistic lenses through which these societies perceive accountability for war crimes encourage, in turn, the authorities and the judiciary to keep the numbers of war crimes prosecutions low. In Serbia, there were six final convictions from 2003 to 2009.<sup>75</sup> Between March 2006 and June 2009, a total of thirty-nine final judgments in war crimes cases from all cantonal courts in the Federation of BiH, district courts in Republika Srpska, and the Brčko Basic Court.<sup>76</sup> The significantly higher numbers in BiH are not impressive considering

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<sup>72</sup> *Naser Orić Returned to BiH/Further Reaction on his Verdict*, OHR BiH MEDIA ROUND-UP, July 2, 2006.

<sup>73</sup> *Blaškić nije htio Thompsona na dočeku u Kiseljaku* ("Blaškić Did Not Want Thompson To Be at the Welcome Ceremony in Kiseljak"), VJESNIK, Aug. 6, 2004.

<sup>74</sup> OSCE MISSION TO SERBIA, IPSOS – STRATEGIC MARKETING & BELGRADE CENTER FOR HUMAN RIGHTS, INFORMISANOST I STAVOVI PREMA HASKOM TRIBUNALU I SUDJENJIMA ZA RATNE ZLOCRINE U SRBIJI "Knowledge and Attitude vis-à-vis the Hague Tribunal and War Crimes Trials in Serbia" 14 (2009).

<sup>75</sup> Statement by Ivana Ramić, Belgrade District Court Spokesperson, at a public presentation of the results of the public opinion poll, *Knowledge and Attitude vis-à-vis the Hague Tribunal and War Crimes Trials in Serbia*, Belgrade, Dec. 8, 2009.

<sup>76</sup> The figure is based on the author's examination of all first and second-instance verdicts in BiH in the period March 2006 to June 2009, not including the verdicts at the Court of BiH. Ten cantonal courts in the Federation of BiH, five district courts in Republika Srpska, and the Brčko Basic Court, have jurisdiction to try war crimes cases (in addition to the BWCC).



that there are almost 10,000 known war crimes suspects in the country.<sup>77</sup> Only the work of the SDWC and the BWCC has led to an impressive number of final judgments before the Court of BiH—thirty-one between April 2006 and June 2009<sup>78</sup>—primarily due to the heavy involvement of foreigners in the operation of the two institutions and the unparalleled financial support received from the international community.

Special structures, in other words, are not a panacea for the imperfections of the criminal justice system as a whole. Nonetheless, these structures have injected, directly or indirectly, a measure of professionalism and respectability in the operation of the ordinary criminal justice system in BiH and, on a lesser scale, in Serbia. In view of tendencies over the past period, it is likely that in time the positive impact of the special structures will grow.

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<sup>77</sup> National War Crimes Strategy, document adopted by BiH Council of Ministers on Dec. 29, 2008, at 9-10, figures 1 & 2 (on file with the author).

<sup>78</sup> The figure is based on the author's compilation of the data available at the website of the Court of BiH, <http://www.sudbih.gov.ba/?jezik=e>, and the website Justice Report, maintained by the Balkan Investigative Reporting Network - Bosnia and Herzegovina, <http://www.bim.ba/en/197/?tpl=95>.

## Chapter 14

# Honduras: Transition to Democracy

*Rigoberto Ochoa*

Honduras is characterized by a strong authoritarian tendency, in which the traditional model of powerful individuals representing power groups and exercising and excessive influence on political decisionmaking remains a determining factor. Since 1980, Honduras has held presidential and parliamentary elections at regular intervals. Its transition process has been long and the principal changes have focused on institutional creation and reform, aimed at peacefully reducing the influence of the military in the government, as well as increasing the participation of civil society and the promotion of human rights. The political system rests on the power of two traditional parties—National and Liberal. Representative democracy has eroded and there is very low credibility and trust in the public institutions and their leaders.<sup>1</sup>

The exchange of political interests and favors among the primary governmental actors and decision-makers has served to discredit the system of checks and balances, and consequently no power-balance exists. The formal and informal political power groups undermine the foundations of rule of law by seeking to influence the judicial power, which is unable to exercise effective legal control over economic, political, and financial forces.

From this perspective, this chapter (Part I) seeks to highlight the common thread that connects authoritarianism, transition, and the consolidation of electoral democracy in Honduras—the latter of which is vigorously restrained by the institutions that hold a monopoly on the use of force and arms. These institutions have definitively consolidated as the ultimate force in the political regime.

In Part II of this chapter I explore the process of institutional reform that was implemented following the return to formal democracy, especially judicial reform, and show that despite their modernizing character the reforms did not make any significant progress for judicial independence and therefore posed no risk for the interests of the power groups that enjoy privileges and control the judicial system.

Finally, in Part III, I seek to outline the situation's complexities with respect to guarantees of non-repetition. As a conclusion I propose guidelines for the country's development of transitional justice to contribute to national reconciliation, truth, punishment of those responsible for human rights violations, and reparations to victims.

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<sup>1</sup> See UNDP, *DEMOCRACY IN LATIN AMERICA* 184 (2004).

I thank the ICTJ for this invitation to participate with the contribution of this article and for the confidence that it has deposited in me to take on this analysis, which aims to foster knowledge on a topic that is has been little studied in the country.

## **I. Honduras: From Authoritarianism to Electoral Democracy**

### **A. Authoritarianism<sup>2</sup>**

In 1957, the Liberal Party made a deal with the military: Ramón Villeda Morales would be elected President of the Republic and, in exchange, the Armed Forces would enjoy autonomy. This political arrangement became the central factor in the military's rise as a key political force in Honduras, a position which would be continually ratified by a succession of military regimes and coups d'état. This context gave rise to a new political and institutional framework, with a new Political Constitution in 1957. It also led to a state involved in planning the domestic economy, a model that began to replace the old structures of the liberal oligarchic state.

During this period new economic groups emerged. These groups expressed their interests through the ideological renewal of the Liberal Party and encouraged processes of industrialization and economic diversification. This generated political and social dynamics that stimulated the modernization of the State. However, this also sparked opposition from banana companies and the local land owners, who feared structural changes in land tenure. These sectors thus allied themselves with the Armed Forces in their quest to regain power and block the progress of reform. This alliance brought about a military coup in 1963, which contributed to constituting the military as the hegemonic power group with the last word in the Honduran political regime.

The consolidation of the military regime continued to the point that in April 1965 the leader of the coup, General Oswaldo López Arellano, was elected President of the Republic with the support of the National Party. Prior to this, in the same year, the El Jute Massacre took place in the Yoro province. This massacre was directed by members of the military against a peasant movement emerging from the Honduras National Federation of Peasants.

In 1971 the military regime ended briefly with the election of the Nationalist civil leader, Ramón Ernesto Cruz, as President. However, in 1972 there was another military coup, again led by López Arellano, who adopted the reformist policies of the business and labor organizations and designed a

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<sup>2</sup> See generally MARVIN BARAHONA, *HONDURAS EN EL SIGLO XX: UNA SÍNTESIS HISTÓRICA* (2005).

national development plan. One of the central pillars of this plan was a land reform policy. Again, the traditional oligarchic forces—through agricultural and cattle-raising associations—opposed the reform process and claimed that such policies were populist and demagogic; but they never questioned the de facto nature of the regime. In February of 1972, another massacre—the Talanquera Massacre in the Olancho province—took place. This massacre again was effectively carried out by members of the military against a group of peasants in order to repress the movement fighting for land.

On April 9, 1975 a Wall Street Journal article denounced General López Arellano's acceptance of a bribe from a banana company in exchange for a promise not to increase taxes on banana exports. Following this, he was forced to resign and was substituted by General Juan Alberto Melgar Castro. In June 1975, the Massacre of Los Horcones took place in the Olancho province, carried out against a peasant group and members of the Catholic Church.

In 1978, the country was going through an internal political, economic, and social crisis along with the erosion of the Armed Forces' rule, which intensified from 1978 to 1980 during the Military Junta Government commanded by General Policarpo Paz García. During this period, among many other violations of human rights, the military attacked the *Empresa Asociativa Campesina de Isletas* (Isleta Peasants' Cooperative), the Jesuit priest James Francis Carney was arrested and deported, and the country saw the first case of forced disappearance.

On the other hand, external factors favoring democratization and the promotion of human rights were determining factors in the turnabout in the political situation in Honduras. Such factors include the election of Democrat James Carter to the presidency in the United States of America in 1976 and the victory of the Sandinista Revolution in Nicaragua in 1979. These events influenced the country's path towards democracy.

In this context, Policarpo Paz García of the Military Junta Government—backed by the United States and supported by the traditional political parties and economic groups—held elections in 1979 in order to choose the deputies of the National Constitutional Assembly. This Assembly was responsible for electing a Provisional President in 1980, adopting a new Political Constitution, and holding general elections in 1981 for a new president for the 1982-1986 term. The National Constitutional Assembly adopted the new Constitution of the Republic in 1981 and, paradoxically, elected General Paz García as Provisional President of the Republic.

## **B. Restricted Electoral Democracy**

The two-party system—set up by the traditional Liberal and National parties—did not evolve and change in the 1980s in order to better face the new challenges of democracy. This system mapped onto the general state of crisis in

the Central American region, where political clout was propped up by old forms of authoritarianism, often referred to in Latin America as *caudillismo* or *caciquismo*. The new political parties—the Christian Democratic Party and the Innovation and Unity Party—were incorporated into political and electoral processes but without any chance of reaching power given their small social bases.

The continuity of military power until January 1982 allowed the Armed Forces to reestablish its leadership, justify its actions with a national security doctrine, and consolidate its role in the regional context of Central America. For example, the Honduran military pointed to the 1979 triumph of the Sandinista Revolution (the external enemy) and pressure from the local subversion (the internal enemy) in order to justify the use of Honduran territory as a center for U.S. military operations.

Honduras enjoys a special geo-strategic position in Central America, bordering with three other countries in the region: El Salvador, Nicaragua, and Guatemala. This, along with the discourse about “internal and external subversion,” served as a justification for strengthening the military institution as a pillar of the military and political alliances between the United States and the Central American region and as an internal guardian of the incipient Honduran democracy. Together, this context ensured the military’s position as the *de facto* power in the country.

The Liberal Party won the 1981 elections, and on January 27, 1982, Robert Suazo Córdova assumed the presidency. At the same time, General Gustavo Álvarez Martínez became the new leader of the Armed Forces. This fact opened the way for the implementation of the U.S. political-military strategy for Central America, which involved a military campaign against Nicaragua’s new government and the insurgency in El Salvador. On the domestic level, the Honduran political-military organizations did not pose a threat to the continued authority of the military and the weak civil government.<sup>3</sup>

The implementation of the national security doctrine also involved the creation of the Association for the Progress of Honduras (APROH), a civil intervention in which U.S. interests converged with those of businesses, politicians, public servants, union leaders, guild leaders, and military officials, among others. Its purpose was to provide guidelines to the executive branch in the areas of economics, politics, ideology, and security. The association also fully supported General Álvarez Martínez, at least until March 31, 1984, when Álvarez was arrested and exiled from the country by a group of military officials. He was replaced by General Walter López Reyes, who became the new head of the Armed Forces. The government then declared the APROH illegal and had it dissolved.<sup>4</sup>

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<sup>3</sup> Mark Rosenberg, *El indicador hondureño, militares y demócratas en la américa central*, in HONDURAS: PIEZA CLAVE DE LA POLÍTICA DE ESTADOS UNIDOS EN CENTROAMÉRICA 90 (Victor Meza ed., 1986).

<sup>4</sup> MARGARITA OSEGUERA DE OCHOA, CENTRO DE DOCUMENTACIÓN DE HONDURAS, HONDURAS HOY: SOCIEDAD Y CRISIS POLÍTICA 26 (1987).

With the Contadora Declaration in January of 1983,<sup>5</sup> the Ministers of Foreign Relations of Colombia, Mexico, Panama, and Venezuela expressed their deep concern about the foreign intervention in Central America's conflicts, warned of the danger of incorporating these conflicts into east-west Cold War confrontation, and identified the need to eliminate the external factors that served to exacerbate the conflicts. These ministers called on the Central American countries to ease tensions through dialogue and negotiation in order to establish the foundation for a climate of peaceful coexistence and mutual respect among states.

In October of 1984, the new military leadership set up an Investigative Commission on Disappearances, which presented a report to President Roberto Suazo Córdova.<sup>6</sup> However, he never made this report public. Although the report was eventually published in 1985, the Catholic Church considered it to be a joke.<sup>7</sup> This situation evidenced once again the State's lack of political will to recognize and protect victims' rights to truth, justice, and reparations.<sup>8</sup>

In the general elections of 1985, the Liberal candidate José Azcona Hoyo was elected president and took office in January 1986. At that time, the presence of the illegal "Contra" forces in the eastern region of Honduras led to numerous harms to people and their property. The "Contra" modus operandi included theft, robbery, rape, and kidnapping, even going so far as to place landmines throughout the region. This brought about the displacement of thousands of Hondurans from the area along the border with Nicaragua.

In May 1986, the Presidents of the Central American countries revisited the dialogue about peace and democracy. The May 1986 Esquipulas Declaration<sup>9</sup> expressed these Presidents' intentions to create the Central American Parliament and to sign the Contadora Declaration, which was promoted by Oscar Arias, President of Costa Rica.

In June 1986, the Ministers of Foreign Relations of the various Central American countries signed the Contadora Declaration for Peace and Cooperation in Central America.<sup>10</sup> In doing so, they recognized the grave situation that prevailed in the region, characterized by the erosion of political trust, border skirmishes, the arms race, illegal arms-trafficking, the presence of foreign military advisors (among other forms of foreign military presence), as well as the use of parts of certain States' territories by illegal armed groups in order to attack and destabilize other countries in the region.

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<sup>5</sup> Declaración de Contadora (Contadora Declaration), Jan. 9, 1983, *available at* <http://www.acnur.org/biblioteca/pdf/2513.pdf>.

<sup>6</sup> *Nada dice el informe militar sobre los culpables de los desaparecidos*, DIARIO TIEMPO, Oct. 18, 1984.

<sup>7</sup> *See La Iglesia califica de "burla" Informe sobre los desaparecidos*, DIARIO TIEMPO, Oct. 19, 1985.

<sup>8</sup> *See Velásquez Rodríguez v. Honduras Case*, Inter-Am. Ct. H.Rts. (ser. C) No. 4, para. 180 (July 29, 1988).

<sup>9</sup> Esquipulas Declaration, May 25, 1986, *available at* <http://www.acnur.org/biblioteca/pdf/2529.pdf>.

<sup>10</sup> Contadora Declaration for Peace and Cooperation in Central America, June 6, 1986, *available at* <http://www.acnur.org/biblioteca/pdf/1566.pdf>.

The governments of the region made substantive commitments to the following issues: easing of intra-regional tensions, national reconciliation, human rights, electoral processes and parliamentary cooperation, military maneuvering, military weapons and forces, foreign army bases, terrorism, rebel groups and sabotage, communication systems, refugees, and economic and social concerns.

It is thanks to this process that tensions in the region began to dissipate, a political aim established with the signing of the Esquipulas Agreement II,<sup>11</sup> which presented the “Procedure for Establishing a Strong and Lasting Peace in Central America.” This consisted of eleven points: 1) national reconciliation, which integrates the issues of dialogue, amnesty, and the National Reconciliation Commission; 2) call for a cessation of hostilities; 3) democratization; 4) free elections; 5) commitment to end support for illegal armed forces and insurrection movements; 6) commitment to refrain from using national territory to attack other states; 7) negotiations on matters of security, verification, control, and restrictions on arms; 8) refugees and displaced people; 9) cooperation, democracy, and freedom in order to achieve peace and development; 10) international verification and oversight; and 11) timetable for fulfillment of commitments.

In Honduras, the Catholic Church supported the National Reconciliation Commission. On November 3, 1987, the government of Azcona Hoyo legally established the Commission, and it was presided over by Monsignor Héctor Enrique Santos. On November 4, 1987, the National Congress approved Amnesty Decree 199-87 for political crimes and related common crimes.

In the 1989 general elections, the opposition candidate from the National Party, Rafael Leonardo Callejas emerged victorious, and he took office as President in January 1990. This marked the beginning of a new phase for the country, dominated by efforts to modernize the State within the context of the expansion of neo-liberalism. Following the ease of east-west tensions in 1989 and the new agreements in the Central American region, a process of political opening took place, which had been preceded by Amnesty Decree 30 90E. This political opening led to: the return in January and May 1991 of leftist politicians who had been in exile; another Amnesty Decree, number 87-91 of July 1991; and the establishment in 1993 of the Democratic Unification Party (UD), which brought together four political organizations that did not have legal recognition at the time. These events gave rise to a political agenda oriented towards the demilitarization of the State, the strengthening of the justice sector, and the implementation of a Structural Economics Adjustment Program, which impacted positively the economic and social rights of the Honduran population.

Within the context of modernization of the State, in June 1992 President Callejas issued an Executive Decree for the Creation of the National Commission

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<sup>11</sup> Esquipulas Agreement II: Procedures to Establish a Strong and Lasting Peace in Central America, Aug. 7, 1987, available at <http://www.acnur.org/biblioteca/pdf/2530.pdf>.

for the Protection of Human Rights, with the National Reconciliation Commission as the consulting body. By December 1993, the Commission presented its Preliminary Report<sup>12</sup> on the disappeared in Honduras titled “The Facts Speak for Themselves.” This report revealed the systematic practice of forced disappearances during the 1980s—a practice that the political and judicial authorities allowed, either actively or by omission.

In terms of justice, one of the main problems had to do with constant jurisdictional disputes between ordinary and military courts. This was due to the use of military jurisdiction as a special forum, such that all crimes involving a member of the military—even common crimes—were tried in military forums. This did not change until March 1993, when the National Congress interpreted Article 90 of the Constitution of the Republic declaring that “in the case of jurisdictional conflict as to whether a crime belongs to the ordinary criminal jurisdiction or military criminal jurisdiction, ordinary jurisdiction shall prevail.”<sup>13</sup>

In 1993 Carlos Roberto Reina was elected President of the Republic for the period from 1994 to 1997. The tendency towards the demilitarization of the public administration strengthened with the transference of several institutions and companies that had previously been under the control of the military to the civil sphere. Among these were the Honduran Telecommunications Company, the Merchant Navy, the National Geographical Institute, and the Directorate of Migrations. Other important measures were taken: mandatory military service was abolished and, in its place, a voluntary scheme was set up; the repressive National Directorate of Investigations (NDI), which was subordinate to the Public Security Force (PSF) branch of the Armed Forces, was disbanded; and, the Criminal Investigation Directorate (CID) was created as part of the new Office of the Attorney General.

In 1997, the Liberal Party candidate Carlos Flores Facussé was elected for the 1998-2002 term. The demilitarization agenda sought to bring the military institution under the Central Public Administration, by eliminating the Superior Council of the Armed Forces and creating the Board of Commanders. In September 1998, the National Congress undertook an important constitutional reform to the chapter on the Armed Forces, which was renamed “On National Defense.” This reform, ratified in January 1999, eliminated the autonomy the military had enjoyed for over forty years. The figure of the Chief of the Armed Forces disappeared and was replaced by the civil Secretary of Defense, within the executive branch. Public

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<sup>12</sup> Comisionado Nacional para la Protección de los Derechos Humanos (National Commission for the Protection of Human Rights), *Los hechos hablan por sí mismos, Informe Preliminar sobre los desaparecidos en Honduras (1994)* (English translation by Human Rights Watch & CEJIL, *The Facts Speak for Themselves: The Preliminary Report of the National Commissioner for the Protection of Human Rights in Honduras (1994)*).

<sup>13</sup> Congreso Nacional de la República (National Republican Congress), Decree 58-93, *La Gaceta*, No. 27-059 (June 2, 1993).



security was removed from the military's responsibilities; in 1998, the National Police Law was adopted, and the institution was transferred to the Security Office of the Secretariat of State, under the Executive.

The constitutional reform established a wide range of objectives that went beyond the usual goals of preserving territorial integrity and national sovereignty. These objectives included: guarantee the free exercise of suffrage, the custody, transport, oversight of electoral materials, and security in the electoral process; provide logistical support and consulting in communications and transport; combat illegal drug trafficking; effectively handle natural disasters and emergency situations; and establish programs for the protection and conservation of the ecosystem. The reforms provide for cooperation in combating terrorism, arms trafficking, and organized crime, as well as in efforts related to literacy, education, agriculture, environmental protection, public roadway services, communications, health, land reform, and other areas of national interest.<sup>14</sup>

In 2001, the Nationalist candidate Ricardo Maduro Joest was elected President of the Republic for the period of 2002 to 2006. In September 2001, the representatives of the five political parties signed the "Manifesto of the Political Parties to the Honduran People" and the "National Agreement on Transformation for Human Development in the 21st Century," which aimed to: 1) separate the National Registry of People from the National Electoral Tribunal; 2) incorporate the electoral instruments of plebiscite and referendum into the Constitution; 3) regulate electoral campaigns; 4) authorize the formation of political alliances; 5) introduce new ways to elect congressional representatives; 6) abolish a the figure of presidential appointee and replace it with a Vice-President; 7) regulate political financing; and 8) approve a new Law on Elections and Political Organizations.

The passage in May 2004 of the new Law on Elections and Political Organizations proved an important step in the advancement towards the democratization of the electoral and political system, thus leaving behind the regulatory framework of the previous six electoral processes in 1981, 1985, 1989, 1993, 1997, and 2001.

Finally, in 2005, the Liberal candidate Manuel Zelaya won the general elections, and assumed the presidency in January 2006.

From the beginning of his administration, President Zelaya increased the budget for the Armed Forces, assigning it important financial resources for the protection of national forests. He also granted the Armed Forces the temporary administration of the electricity company and put it in charge of building the commercial terminal of the Palmerola Airport. In order to carry out the "*cuarta urna*" referendum to consult the public as to the creation of a National Constitutional Assembly to draft a new Constitution, President Zelaya involved the military in

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<sup>14</sup> CONSTITUTION OF THE REPUBLIC, arts. 272 & 274.

the custody and distribution of the ballots and ballot boxes. Three days prior to the event, however, the military decided not to support this process.

It is in this context that the constitutional order in Honduras broke down. At dawn on Sunday, June 28, 2009, around 5:00 a.m., in the 3 Caminos neighborhood of the city of Tegucigalpa, military troops violently stormed into the residence of President Manuel Zelaya, captured him, and took him to an Air Force base, from which he was then taken by air to San José, Costa Rica.

The seizure of power by a *de facto* government, following the arrest and expulsion both from power and from the country of the constitutionally elected President of the Republic, brought with it the gravest political and institutional crisis Honduras has seen in thirty years. This fractured the political system as well as the democratic transition which had begun in 1979 with the National Constitutional Assembly. These events have interrupted the continuous and constitutionally endorsed alternation of power contemplated in the Political Constitution of 1982 and confirmed the erosion of the country's democratic institutions.

Although this arbitrary action was a step backwards in the country's history of coups d'état, the "removal" and "substitution" of President Zelaya was defended by various sectors and public institutions, including civil authorities such as the Supreme Court of Justice, the Office of the Attorney General, the National Human Rights Commission, the Procurator General's Office, the Congressional majority, and the *de facto* government itself. Through numerous statements, these sectors defended President Zelaya's removal as a legal and constitutional measure that was necessary to safeguard democracy and the rule of law against a President that had defied the judiciary and underhandedly attempted to amend the Constitution to allow his reelection for a second term.

The National Congress, without the necessary competence to do so and without concretely setting out the relevant facts, declared that President Zelaya was guilty of violating the Constitution and the law in general, and guilty of disobeying and ignoring resolutions and judicial decisions. These abstract accusations proved sufficient for the National Congress to declare President Zelaya's guilt for having carried out actions that have not been clearly identified, even though under Honduran law the declaration of criminal responsibility is reserved exclusively for the judicial branch. Congress assumed the powers of another branch: the judiciary.

"Substitution" is the term used in the Constitution for situations where a public servant exercises executive powers when the President is totally absent—by reason of death, abdication, or legal exclusion—before the end of that constitutionally defined presidential period.<sup>15</sup> Given the foregoing definition, referring to the expulsion of President Zelaya as "substitution" is rather arbitrary,

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<sup>15</sup> CONSTITUTION OF THE REPUBLIC, art. 242.

especially when considering that he was expatriated in violation of article 102 of the Constitution, which expressly prohibits the expatriation of Hondurans.

Although the removal of President Zelaya meant a step backwards in the consolidation of democracy in Honduras and revealed the deficiencies of the country's political and judicial system, the advances that have made since the 1980s toward modernizing the State cannot be denied. Below I will explore the nature of the institutional reforms that have been implemented in Honduras in recent years. Such reform has allowed for the modernization of the judicial system to some extent, despite not yet achieving its independence and autonomy.

## II. Institutional Reform

### A. The Judiciary

Honduras gained independence from the Spanish crown in the 19th century and adopted its first Constitution in 1825, establishing the Republic. With the liberal reform at the end of that century, the republic built the legal and institutional foundations for developing the nascent rule of law in the country. During the first decade of the 20th century, the Honduran legal system was revamped with the adoption of new legal codes—the civil code, the code of civil procedure, and the criminal code—as well as with the legal framework for the organization and jurisdiction of the courts. However, the Honduran legal system's development was chaotic because of the rampant political instability throughout the last century.<sup>16</sup>

Historically, the Honduran judiciary has not played its proper role within the system of checks and balances necessary for the rule of law. In such system the judiciary is assigned the role of safeguarding the Constitution, conducting judicial review of the constitutionality of laws and government decisions, and resolving disputes that come before it. However, the judiciary has adopted a on institutional profile and has failed to exercise any effective legal control over economic, political and financial forces.

During the first half of the 20th century, the administration of justice in the country was seriously undermined by the influence of armed warlords, political bosses, and the traditional political parties, at times characterized by dictatorships and frequent struggles among factions.<sup>17</sup> The second half of the century witnessed a series of military coups and civil governments whose authority was circumscribed by the military. Having taken over public power, the military easily controlled a weak Honduran judiciary.

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<sup>16</sup> RAMÓN ROMERO & LETICIA SALOMÓN, CEDOH, LA REFORMA JUDICIAL: UN RETO PARA LA DEMOCRACIA 57 (2000).

<sup>17</sup> See BARAHONA, *supra* note 2.

As indicated in the previous section, the formal transition from authoritarianism to democracy during the last century made it possible for the country's legal system to begin its "modernization." Beginning in the mid-1980s, the Commission for the Reform of the Judicial System was established, thus giving rise to several changes, including: the organization of the Judicial School, the implementation of the Law for the Judicial Profession, the emergence of adjunct judges, the establishment of the Public Defender's Office, the creation of the Office of the General Court Inspector, and the creation of courts with specific jurisdiction for family law, minors, and administrative law, among others.

As mentioned above, as part of the State's modernization process in the 1990s, the military was brought under the structure of the Central Public Administration and the police force was shifted over to the civil sphere. All of this took place in a context of low judicial credibility due to its weak institutional presence and its lack of transparency and predictability in applying the law, which reaffirmed the need for impartial administration of justice and an autonomous judiciary.<sup>18</sup>

Thus, with the support of international assistance, there has been progress in judicial reform in several respects: the implementation of tenure for judges, improved organization and administration of the judiciary, development of the infrastructure needed for effective judicial services, institutional strengthening of the Public Defender's Office and the Office of the General Inspector of Courts, and the adoption and implementation of new laws.<sup>19</sup> In 2001, an amendment to the Constitution's chapter on the judiciary came into effect. The amendment provided for a new method for electing Supreme Court magistrates, described further below in reference to judicial independence.

Several new laws were passed: the Criminal Procedure Code in 2002, the Constitutional Justice Law in 2005, reforms to the Criminal Code in 2005, and a new Code of Civil Procedure. These changes reveal a tendency in favor of modernizing the Honduran legal system. However, two new laws are still pending congressional approval—the Law on the Judicial Branch and the Law on the Judicial Council and Judicial Career—both of which are important challenges for strengthening the democratic rule of law in Honduras.

In sum, judicial reform has been supported by bilateral and multilateral cooperation, however, the reforms have been largely oriented towards organization, technical, and administrative aspects. These reform measures have all been part of the attempt to modernize the judiciary, without having as their principal emphasis strengthening judicial independence with respect to the other branches of the State.

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<sup>18</sup> UNDP, HUMAN DEVELOPMENT REPORT: HONDURAS 2002, at 73.

<sup>19</sup> *Id.* at 76.

## ***1. Perceptions of the Judiciary***

The 2003 Human Development Report on Honduras emphasized that corruption in Honduras is perceived as a phenomenon that has evolved over time and that has permeated public institutions to the extent that it is institutionalized.<sup>20</sup> This perception is a reflection of the progressive waning and erosion of the State's institutional strength, an unfortunate reality that has seriously undermined the social and political foundations of the legitimacy of the democratic State.

The aforementioned report thus reveals the overwhelmingly prevalent view that the justice system supports a structure of impunity that serves the interests of "white collar" corruption, which, in turn reinforces the general belief that the justice system neither works nor is impartial. This perception has had a negative impact on democratic governance and socioeconomic development in the country.<sup>21</sup> Despite the steps taken towards judicial modernization, the perception that the justice system serves to sustain the existing structures of power, corruption, and impunity continues to hold sway.

## ***2. Judicial Independence***

In the judiciary, there is a confluence of two types of influence: external and internal. External influence comes from government authority and the traditional groups with de facto power, particularly in the nomination and election of Supreme Court magistrates. Internal influence results from the dominant position enjoyed by the same two sources of power, which concentrate administrative powers and thus increase their pressure on the judicial function. This has served to weaken judicial independence and impartiality.<sup>22</sup>

### ***a. External Interference***

Interference by the legislative branch is evidenced by the fact that it co-opted the process of nominating and electing the Supreme Court of Justice magistrates. Its influence is also apparent in its intention to amend the Constitution so as to grant the legislature the power to interpret constitutional provisions—a power that is always reserved exclusively for the judiciary in any system in which the rule of law prevails.

In 2002, the National Congress indeed approved a constitutional amendment that granted the legislature the power to interpret the Constitution, something that

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<sup>20</sup> UNDP, HUMAN DEVELOPMENT REPORT: HONDURAS 2003, at 158.

<sup>21</sup> *Id.* at 159.

<sup>22</sup> See RIGOBERTO OCHOA ET AL., DUE PROCESS OF LAW FOUNDATION, CONTROLES Y DESCONTROLES DE LA CORRUPCIÓN JUDICIAL 281 (2007).

it had already been doing without the requisite legal permission. This served to undermine the judiciary's authority and further weaken its autonomy with respect to the legislative and executive branches. Contrary to what the Constitution expressly requires, Congress did not publish this decision in the official Gazette. The Constitutional Chamber of the Supreme Court of Justice declared the amendment unconstitutional.

Notwithstanding this decision, in 2007 the ruling party's congressional caucus presented another initiative to reform one of the Constitution's provisions so as to allow Congress to interpret the Constitution by a vote of two-thirds of all congressional votes and then a ratification vote in the following legislative session passing by an equal majority. Neither of these attempts at constitutional reform was successful, but there continue to be threats to the balance of power along with growing uncertainty as to the limits of the rule of law.

With the constitutional reform of 2000, Congress's influence in the nomination and election of Supreme Court magistrates increased. Magistrates are elected by a two-thirds majority of all members of congress from a ballot with forty-five candidates, all of whom are nominated by the Nominating Board, which includes one representative from each of the following bodies or sectors: the Supreme Court of Justice, the National Bar Association, the National Human Rights Commission, the Honduran Private Enterprise Council, the faculties of the several law schools, civil society organizations, and the labor unions. The amendment extended the magistrates' terms of service from four to seven years and increased the total number of Supreme Court magistrates from nine to fifteen. The reform also organized the Court into Chambers, including a constitutional chamber responsible for reviewing the constitutionality of laws and protecting constitutional rights.

This new method for nominating and electing Supreme Court magistrates has been viewed as a step toward democracy. However, whether or not citizens see progress in terms justice, especially with respect to judicial independence, can be viewed two ways: on one hand, citizens may take note of civil society's opportunity to participate in the nomination of candidates for positions as Supreme Court magistrates; on the other hand, some citizens will point out that Congress ultimately chooses the magistrates from the list of proposed candidates, and Congressmembers vote according to political and party alliances. This is further complicated by the influence that political, economic, and financial groups exercise over Congress, controlling and delegitimizing the democratic processes initiated by the different sectors of society.<sup>23</sup>

The implementation of this model for electing Supreme Court magistrates is, in practice, subject to the influences of traditional party interests. This is attributable to, among other things, the legal framework that regulates the nomination and

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<sup>23</sup> See RIGOBERTO OCHOA ET AL., DPLF & WORLD BANK, LAS REFORMAS A LA ADMINISTRACIÓN DE JUSTICIA EN HONDURAS Y BOLIVIA 61 (2008).

elections of the highest court's magistrates. Accordingly, the Nominating Board becomes an instrument promoted by the traditional political parties to control the judiciary. First, they wield influence with respect to the selection and supervision of the members that make up the Nominating Board. Then, they manage to assure that the Nomination Board members nominate candidates who are ideologically aligned with them and with the economic and financial groups they represent. Afterwards, they do all the political maneuvering necessary to increase their negotiating capacity within the Nominating Board in order to ensure the greatest possible number of candidates within the list of the forty-five nominees share their political views. Then, the political parties represented in Congress reach a consensus on the candidates that are to be elected, with approval of the economic and financial forces that their parties represent. Finally, the congressional caucuses votes in what is essentially a mere formality to make official and legitimate their previously agreed-upon appointees.

In sum, the Law of the Nominating Board tolerates conflicts of interest in terms of nominators and nominees, and gives them legal legitimacy. This is the case because the system for nominating and electing Supreme Court magistrates does not guarantee the judiciary's independence. Instead, the system facilitates deal-making and power distribution between the traditional political parties. One of the means of holding power in the judiciary is through clientelist practices, which has allowed the powers that be to equip and expand the judicial infrastructure while at the same time maintaining the independence of the judiciary limited.

#### *b. Internal Interference*

Internal interference results from the influence of institutional authorities and the traditional sources of power, as well as from internal interest groups. In particular, it is characterized by concentration of the administrative role and its influence over jurisdictional matter, which undermines judicial autonomy and impartiality.

In Honduras, candidates from the opposition for judicial tenure are the exception, not the rule. Because of the discretionary nature of the management of personnel, equal treatment does not apply with regard to promotions, transfers, salary adjustments related to tenure, technical training, and new opportunities. The result has thus been a system rife with favoritism. Demands from civil society have included that judicial positions be subject to internal and/or external selection processes, whenever appropriate; that a public auditing scheme be established to supervise the selection process and appointment of judges, magistrates, and support staff; and that there be a foundation for a balanced and transparent approach with respect to judgeships.

By virtue of the 2002 constitutional amendment to current Article 313, section 8, and Article 317, the Council of the Judiciary and Judicial Careers was

created. This new body was designed to be the highest administrative authority within the judicial branch, responsible for the selection, appointment, and removal of judges and magistrates. According to the Constitution, members of the Council are to be appointed by the Supreme Court of Justice, thus concentrating within that body both jurisdictional and administrative roles. However, in practice this Council has not been set up, and its administrative responsibilities—in violation of the Constitution—have been held by the President of the Supreme Court.

To the extent that the judicial and administrative functions of the State are centralized and clientelism continues to be encouraged by the judicial hierarchy, both functions obviously mix and promote corruption, thus leading to negative results for the judicial system. For example, the concentration of activities relating to the management of personnel in the President of the Supreme Court has served to undermine the impartiality of the judiciary.

Indeed, the importance of concentrating personnel management under the authority of the President of the Supreme Court stems from the fact that it serves to facilitate and promote clientelist practices. Direct control over personnel-related decisions—appointments, promotions, transfers, and termination—establishes a system of rewards and penalties. When promoted from the highest level of the judicial system, this control directly relates to the job security of judges and their chances for promotion within the court system. The foregoing dynamics affect and directly influence the independence of judges, thus undermining hopes for building a democratic judiciary.<sup>24</sup>

In 2006, the Supreme Court sent to Congress a bill on the Judiciary Council and Judicial Career Law, which would derogate the current Judicial Career Law, and which to this date has not been ratified. This law has become the main instrument for bringing order and transparency to the judiciary and strengthening its independence from other branches of government. Congress's consideration and ratification of this bill, in accordance with democratic legislative practices, is fundamental for strengthening the rule of law in Honduras.

The creation and integration of the Council is essential to the process of structuring the system of judicial tenure and reorganizing the system of selection and appointment of public servants to the judiciary, as well as their training, evaluation, and professionalization in judicial activity. The Council would thus serve to guarantee judges' job security and their promotion to higher judicial positions based on objective, not clientelist, criteria, which would ensure the independence and impartiality of judges and magistrates in their decision-making activities.

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<sup>24</sup> *Id.* at 59.



## B. Office of the Attorney General

The Office of the Attorney General (*Ministerio Público*) was created on the initiative of the “Ad-Hoc High Commission for Institutional Reforms that Guarantee Peace and Social Security in Honduras,” and through Congress’s ratification of Legislative Decree 228-93. The Office came into being in January 1994, with the objective of contributing to the independent, impartial, legal, practical, and efficient administration of justice. For this reason, the Office of the Attorney General has been granted independence in carrying out its activities, and it was determined that the prosecutorial personnel would be selected based on merits and competence. This inaugurated a new phase in the strengthening of the legal system and the rule of law.

When the Office of the Attorney General began carrying out its activities an inter-generational clash arose between the new prosecutors and the judges that had been appointed through political clientelism. This led to reports of corruption in the judiciary system, revealing it to be one of the main obstacles to the effective administration of justice in the country.

The role assumed by the Attorney General is a determining factor in the strengthening or weakening of the legal system. This is demonstrated by the crises that affected the Office of the Attorney General in 2004 as a result of the poor policy decisions with regard to the protection and defense of general societal interests. The crisis began when the Attorney General (from the National Party) decided to abandon several high-impact corruption cases, thus sparking the protest of many prosecutors, ten of whom were removed from office and six of whom were transferred to different posts. This represented a setback in the struggle to combat impunity and corruption while strengthening the rule of law.

The Office of the Attorney General already enjoyed little credibility and confidence among citizens. The situation worsened, however, when the United States Department of State revoked the visa of the Adjunct Attorney General (of the Liberal Party) for acts of corruption.<sup>25</sup> After complicated negotiations between the traditional National and Liberal political parties, the Attorney General resigned from his post after dealing with a severe crisis that lasted eight months. The Adjunct Attorney General also resigned. Within this context of ridiculous partisan polarization and power distribution, the National Party reassumed the position of Attorney General, and the liberals the Adjunct Attorney General.

By virtue of the criminal procedural reforms in 2002, the Office of the Attorney General assumed investigative responsibilities throughout the criminal justice process—from the commission of a criminal act all the way up to the moment of sentencing. However, the Office’s budget (400 million lempiras, approx. USD\$21

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<sup>25</sup> See *Por corrupción revocan visa a Yuri Melara*, EL HERALDO, June 8, 2005.

million) has not been increased in order to allow the institution to fulfill its new responsibilities. Therefore, the Office of the Attorney General lacks the human and logistical resources necessary to successfully face the challenges of the new criminal justice system and to satisfy society's demands to reduce the high levels of impunity.

### ***1. Criminal Investigation***

With the implementation of the new police model in 1998—a single police force under the supervision of the Secretariat of Security—the Office of the Attorney General was affected by the transfer of its Criminal Investigation Directorate to the National Police. This policy measure seriously weakened the criminal investigative capacity of the Office of the Attorney General further contributing to high levels of impunity. It has been deleterious and counter-intuitive. The National Congress, rather than increase the capacity for professional criminal investigation under the new criminal procedure instead weakened it. This change in criminal policy came from the context of security sector reform, which sought to separate the National Police from the Armed Forces.

According to information from the Office of the Attorney General,<sup>26</sup> of 62,463 criminal reports received in 2005, 48,507 were sent to the National Police for investigation, of which only 7825 returned with an investigative report. This does not even account for the delay in prosecution from earlier years. An average of 25% of the cases tried resulted in acquittal. For example, in 2005, the judiciary issued 1317 oral verdicts, 996 of which found the defendant guilty. The remaining 321 verdicts, in which the defendants were found not guilty, amounted to 24% of the all the cases.

Of all criminal reports sent for investigation to the Criminal Investigation Directorate of the National Police therefore, only 16% of the cases were actually investigated. Of these, 90% were for criminal infractions *in flagrante delicto*, and only 10% were the results of investigations. Of the initial 16% that were taken on by the CID, only 17% were actually tried in court, and of these 24% resulted in acquittal.

In order to have an idea of the magnitude of the situation, below is a table that summarizes the yearly statistics from the Technical Unit on Criminal Legal Reform of the Office of the Attorney General. The goal is to have a better understanding of the effectiveness of criminal investigation during the period from 2002 to 2006, during which the Code of Criminal Procedure was in effect.

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<sup>26</sup> OFFICE OF THE ATTORNEY GENERAL, TECHNICAL UNIT FOR CRIMINAL LEGAL REFORM, STATISTICAL YEAR-BOOK (2005).

**Table 1**  
**Effectiveness of Criminal Investigation: 2002-2006<sup>27</sup>**

Year	Crimes Reported	Reported Crimes Submitted for Investigation	Reports Investigated	Verdicts Issued	Acquittals
2002	41,689	23,644	4987	271	62
2003	52,965	26,104	8005	982	223
2004	59,561	35,094	8697	1349	316
2005	62,463	48,507	7825	1317	321
2006	63,537	49,198	9213	1347	332
<b>Total</b>	<b>280,215</b>	<b>182,547</b>	<b>38,727</b>	<b>5266</b>	<b>1254</b>

Generally speaking, from the foregoing table we can deduce that of all crimes reported to the Office of the Attorney General during the period of 2002-2006, 65% were sent to the CID of the National Police. Of these, only 21% were returned with investigation reports. Of these only 14% led to a trial, and 24% of the tried cases resulted in acquittals. The lack in criminal investigation corresponds to 79% of all of the crime reports that were sent to the DGIC for investigation.

The personnel in charge of investigations require better training, technical resources, and materials in order to carry out their tasks more professionally and to successfully face the challenges of a new criminal justice system. Some prosecutors point out that they are expected to produce certain results but that the institution has not received the financial and human resources needed in order to effectively confront the different types of crimes.

In general, the Criminal Investigation Directorate has been weakened in different areas. This is evidenced by the paltry budget and human resources allocated to the office, the lack of professionalism and competence among investigators, and the lack of equipment and materials in order to effectively carry out a criminal investigation. These factors contribute to the inefficiency of the criminal justice system and the high levels of impunity, an issue that has undermined the legality and legitimacy that should characterize the institutional workings of the criminal justice system.

According to the Office of the Attorney General's Annual Activity Report (Annual Statistics 2005-2006 and 2007-2008), the Office of Human Rights Prosecutions reveals the following data:

<sup>27</sup> Table compiled based on information obtained by the author from the Technical Unit for Criminal Legal Reform of the Office of the Attorney General.

**Table 2**  
**Human Rights Prosecutions: 2006-2008<sup>28</sup>**

Year	Reports Received	Convictions	Acquittal	Stay of Proceedings
2006	541	10	3	11
2007	605	6	8	13
2008	873	11	4	16
<b>Total</b>	<b>2019</b>	<b>27</b>	<b>15</b>	<b>40</b>

From this chart we can see that during the period 2006-2008, a total of 2019 cases were received, of which 27 resulted in convictions, 15 resulted in acquittals, and 40 in stays on proceedings. This is a clear indication of the ineffectiveness of the Office of Human Rights Prosecutions and the prevailing high levels of impunity.

## 2. *The Reform in Criminal Procedure*

In Honduras, criminal procedure reform came about in the form of the new Criminal Procedure Code, which came into effect in February 2002. The new code was part of a movement throughout Latin America to revamp criminal justice systems. By design, the new Code is respectful toward civil liberties, an important part of this renovation process. The system is based on oral advocacy, and it gives the Office of the Attorney General control over investigation and prosecution. The prosecutor is in charge of the criminal investigation, which is performed by the National Police's Criminal Investigation Directorate. The investigation serves as the basis for criminal indictments.

Only the Office of the Attorney General has the power to prosecute. This monopoly over prosecution process has stymied access to justice and interferes with the rights of victims to bring criminal actions. This has created a procedural unbalance—there is no efficient prosecution (due to limits placed upon the prosecution), no due punishment of offenders, no protection of the victims<sup>29</sup>—given that criminal investigations require coordination between prosecutors and investigators, something that has not yet been achieved. This has posed an obstacle for presenting evidence, for both the prosecution and the defense, and for challenging the arguments presented by the parties to the adversarial process.

The intermediate stage of trial does not, in fact, fulfill its stated purpose. Preliminary hearings are often held with the purpose of confirming what was

<sup>28</sup> Table compiled by the author based on information from the Technical Unit for Criminal Legal Reform of the Office of the Attorney General.

<sup>29</sup> See César Barrientos, *Las fugas epistemológicas*, REVISTA JUSTICIA 52 (May 2007).

determined in the prior initial hearing (generally without offering new results of the investigation). As such, when an oral and public trial begins, it is based only upon the investigation conducted for the initial hearing. Likewise, limits are placed on the development of the defense's case, for defense attorneys often have restricted access to the files located at the prosecutor's office. Moreover, defense attorneys are not always given notice of new developments in investigation processes from which evidence may be derived. This goes against the principles of judicial objectivity and the standard rules that should apply to an adversarial system.

Discovery has been distorted by prior evidence, which started out as an exception, but has quickly become the rule. So, instead of producing and evaluating evidence at trial, attorneys make express references to evidence in written submission, thus incorporating it into the trial. Expert witnesses are required to give their testimony at trial. However, this generally does not happen. Instead, the expert witnesses' written reports are read during the court proceedings, thus incorporating them as evidence at trial. When the expert witness takes the stand, he or she generally limits his or her testimony to a mere confirmation of the content of the written report that was already read to the court as evidence.

As a result of this situation, witnesses are not summoned because the court receives their testimony prior to trial. The same is true for expert witnesses. They do not give their opinions and testimony at trial. Instead, their reports are read at trial and are not questioned. Documentary evidence becomes preeminent in criminal trials.<sup>30</sup> Therefore, the immediate, adversarial, oral, and public elements of the new system are effectively abandoned in favor of a system that relies primarily on written documents, as is the case with most inquisitorial systems.

In sum, the 2002 Criminal Procedure Code set the foundation for a criminal justice system that would be respectful of civil liberties. However, these good intentions have disintegrated because the new code has been subject to various reforms and because the judicial officials, prosecutors, defense attorneys, and police investigators lack the requisite training. Therefore, despite the introduction of this new code, the legal culture of an inquisitive system has persisted.

### **III. Toward a Transitional Justice Model in Honduras**

As argued above, since the independence of Honduras, the State has been an asset exclusively at the service of the elites; it has been a source for accumulating wealth and for excluding of the majority of the population. Honduras adopted a republican form of government, understood in this text as a model that protects the highest values of liberty, equality, and justice, is found on rights and the law

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<sup>30</sup> See José María Tijerino, *Mediatización de la oralidad: la perversión del juicio en la práctica judicial penal centroamericana*, JUSTICIA 25 (June 2006).

as sovereign expressions of the people's will, and is based on representative democracy. However, the lack of legitimacy and legality that characterize the ways in which political power in Honduras has been gained and exercised throughout the country's history have created a situation in which the ideals of republican government and its democratic foundations have been converted into a political fiction.

The Liberal-National bipartisan model—interrupted in 1936 by the dictatorship of Tiburcio Carías and in 1963 by the military coup, and then reestablished with the return of democracy in 1982—has not been able to fulfill the goals of participatory democracy or the social demands of the majority of the population. Herein resides the importance of recuperating the principle of popular sovereignty in order to strengthen a republican government of free citizens that have a voice in political matters, the right to vote, and the capacity to decide important matters that affect them directly.

The transition in Honduras has been slow despite the end of the military dictatorships and the succession of formally elected governments. The major advancements in the transition included establishing a formal democracy with three branches of governmental power; the creation of a new institutional framework (the Office of the Attorney General, the National Human Rights Commission, the Superior Court of the Public Budget, the Electoral Superior Court, the Institute for Access to Public Records, among others); the military's diminished role in the public sphere; and the establishment of an electoral regime that guarantees the alternation of political power. However, these changes did not translate into improved social, economic, and cultural conditions to allow the Honduran population to reach a satisfactory standard of living.

From the perspective of transitional justice, the contribution of these institutional reforms to democracy has not been sufficient. Moreover, they have not been accompanied by initiatives of historical clarification, reparation for the victims, or criminal prosecutions against those responsible for human rights violations.

Likewise, one cannot ignore the consequences of the deficiencies in the transition in terms of strengthening democracy in light of the low levels of human development in Honduras. The UNDP report *Democracy in Latin America* indicates that, in order to understand democracy and its development, social deficits must be considered as shortfalls of democracy.<sup>31</sup> Thus, poverty and inequality are not simply social problems, but also problematic for sustainable democracy. In this way, democracy amounts to a civilizing promise that liberty, equality, justice, and progress will be expanded.

According to the UNDP's *Human Development Report: Honduras 2006*, the country continues to suffer from a stalled human-development process.<sup>32</sup>

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<sup>31</sup> UNDP, *supra* note 1.

<sup>32</sup> UNDP, HUMAN DEVELOPMENT REPORT: HONDURAS 2006.

This can be explained by certain backward societal characteristics combined with high levels of poverty, a high degree of inequality, and significant regional fragmentation in terms of access to social services and economic opportunities.

In Honduras, inequality is one of the primary facets of poverty. Manifestations of inequality are evident in the country's wealth and income distributions; in the gaps in education, health, and salaries; in the weakness of the system of social security and protection; as well as in social, generational, ethnic, and gender differences. The foregoing scenario is, to a large extent, the result of factors such as the unequal distribution of wealth, the lack of a balance in political representation, and the existence of public management as a source of illicit self-enrichment and continued impunity. Therefore, it is necessary to reexamine the people's sovereignty as the basis of representative and participatory democracy and as an instrument for achieving political, economic, social, and cultural democracy. Consequently, transitional justice initiatives should be complemented by concrete measures to overcome poverty and promote development.

Since the second half of the twentieth century, the Armed Forces have led three coups d'état against constitutional administrations: in 1963 against Ramón Villeda Morales, in 1972 against Ramón Ernesto Cruz, and in 2009 against Manuel Zelaya Rosales. Additionally, three de facto governments were removed by military action: Julio Lozano in 1956, Oswaldo López in 1975, and Juan Melgar in 1978. The constitutional governments brought down in 1963 and in 2009, as well as the de facto government in 1975, had several things in common: they proposed reforms that generated expectations of change; they opposed the interests of the economically powerful sectors of the time; and, they had been attacked for supposedly serving as instruments for foreign governments that threaten democracy.<sup>33</sup>

Likewise, the media in the country responds to a model of concentration of property; owners control the flow of information and promote their businesses, social policy agendas, and political causes. Several of the main politicians in the country own a media source or are the immediate family member of an owner, which guarantees their social influence, state control, and expansion strategy. Through the media, the economic groups promote their particular agendas as agendas in the national interest and they seek to influence public opinion on policies in line with their interests.<sup>34</sup>

Two things are evident: the weakness of the Honduran State and the fragility of the country's democracy. Neither is prepared to respond to the forces of authoritarianism, *caudillismo*, and political clientelism that emanate from the traditional power-holding groups. This is why the "rule of law" that has predominated in Honduras has served to reinforce illegality and impunity. When the political class

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<sup>33</sup> RAMÓN ROMERO, *POR LA DEMOCRACIA Y CONTRA EL GOLPE: UN ANÁLISIS INDEPENDIENTE* 16 (2009).

<sup>34</sup> See ALEXANDER SEGOVIA, *INTEGRACIÓN REAL Y GRUPOS DE PODER ECONÓMICO EN AMÉRICA CENTRAL: IMPLICACIONES PARA EL DESARROLLO Y LA DEMOCRACIA DE LA REGIÓN* (2005).

perceives threats to its interests, it responds through the use of force. Therefore, it is military intervention and not the institutional authority of the rule of law that is used to resolve conflicts that threaten the traditional political order.

Corruption in Honduras is seen as a phenomenon that has evolved with time and has permeated state institutions to the point that corruption has become a political institution of its own. This situation has contributed to the institutional weakness of the State as well as its reduced effectiveness and credibility. This has brought about stagnation in the social, political, and economic life of the country and consequently the nation's lack of democratic development.<sup>35</sup>

With regard to the legal system, there has been progress in terms of its modernization. However, there continues to be a general perception that the legal system serves to maintain a structure of impunity that benefits corrupt elites. This view serves to reinforce the belief that the legal system does not work and is not impartial. After all, the judicial system, which enjoys little credibility and trust, is subject to influence by economic and political pressures. This perception is associated with the progressive waning and deterioration of the state's formal institutions, a situation that destroys the social and political foundations for the legitimacy of democracy and the rule of law.

With respect to amnesty, its validity is assessed based upon the extent to which it fosters reconciliation, helps establish a foundation for creating a democratic society, satisfies the demands of justice, and does not include amnesty for violations of fundamental rights. In the past, the amnesty decrees were adopted in the name of peace and national reconciliation, denying victims and their families the right to truth, justice, and reparations, while allowing state actors to avoid punishment for human rights violations. These measures have continued, protected by erroneous court decisions.

The general view is that the criminal justice system applies only to the poor,<sup>36</sup> for there are privileges and exceptions to the application of the law and it systematically violates the principle of impartiality. This view is reaffirmed upon reviewing the socioeconomic profile of the incarcerated population, composed primarily of people with scarce economic resources and low levels of education. The legal system has maintained a structure of impunity. The judiciary neither works nor is impartial, for it is influenced by economic, financial, and political interests that seek to benefit only themselves or their allies. This explains why the legal institutions have enjoyed little confidence and credibility.

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<sup>35</sup> OCHOA ET. AL., CONTROLES Y DESCONTROLES, *supra* note 22, at 326-27.

<sup>36</sup> See generally ANDRÉS PÉREZ MUNGUÍA, UNDP, CARACTERÍSTICAS SOCIALES DE LA POBLACIÓN PENITENCIARIA Y SU RELACIÓN CON LAS POSIBILIDADES DE TRABAJO Y EDUCACIÓN EN LOS CENTROS PENALES Y DE REEDUCACIÓN SOCIAL DE HONDURAS: ESTUDIO EXPLORATORIO 53 (2005).



There has been a discussion about establishing a truth commission “in order to clarify the events that occurred before and after June 28, 2009, to identify the acts that lead to the current situation, and to offer the Honduran people elements to avoid that such events be repeated in the future.”<sup>37</sup> There have been serious criticisms of this effort that could lead it to fail in its mandate to contribute to the consolidation of democracy in Honduras. It is essential that the establishment of any such body, the definition of its mandate, and its intervention be preceded by broad public consultations that build consensus and take into account the opinions of the victims. This has not been the case in Honduras.<sup>38</sup>

There is a risk that such a measure would serve only to justify the coup d'état, benefit the de facto regime, and prioritize impunity over national reconciliation. It is not clear how the Commission would contribute to clarifying the violent past in Honduras and lay the foundation for non-repetition of the events. Given the particularities of the Honduran case, it would be pertinent to tackle: the political dimension of the events and their consequences for building democracy; the legal dimension of the conflict between the branches of government and constitutional review of the legality of the events; the human rights violations and the role of the armed forces in a democratic society; and the challenges for strengthening the democratic rule of law.

## Conclusion

The reestablishment of the constitutional democratic order is imperative. It is important that political agreements and peace negotiations expressly include guarantees of non-repetition and provisions oriented toward strengthening democratic institutions. Moreover, a new legal culture should be established—based on respect for human rights and responding to the ethical challenges related to national reconciliation, seeking a balance between peace and justice while fulfilling the legal duty to protect the rights of victims.

All of this posits that the strengthening of justice depends on judicial independence, both internal and external. This requires a formal program for judicial tenure, transparency in the selection and appointment of judges and other judicial servants, training and technical improvement in order to assure professional excellence in judicial and administrative activities, and the creation

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<sup>37</sup> Tegucigalpa-San José Accord for National Reconciliation and Strengthening of Democracy in Honduras, Oct. 30, 2009, available at <http://www.boell-latinoamerica.org/downloads/AcuerdoTeguSJO.pdf>.

<sup>38</sup> See for example the criticisms of international organizations such as the International Center for Transitional Justice and the Center for Justice and International Law: CEJIL, *Comisión de la Verdad de Honduras nace con graves carencias jurídicas*, May 5, 2010, <http://cejil.org/comunicados>; ICTJ, *Honduras: nueva comisión de la verdad debe garantizar los derechos de las víctimas*, May 6, 2010, <http://www.ictj.org/es/news/press/release/3713.html>.

of external supervisory mechanisms that are able to monitor the social, political, and technical aspects of the process.

Since the transition of the 1980s, Honduras has implemented a number of judicial reforms, which continued into the 1990s and underwent further development in this decade. However, these measures have failed to develop in light of the guarantee of non-repetition. The creation of an efficient and effective system of justice has yet to be achieved, which continues to be one of the main challenges for the consolidation of democracy in Honduras.

Moreover the institutional reforms did not incorporate an aim to fulfill the victims' legitimate expectations of justice, truth, and reparations. Therefore, a basic step for carrying out transitional justice in Honduras would be for the State and society to recognize that serious political and human rights violations were committed and that it is necessary to punish the perpetrators and compensate the victims. Likewise, there must be judicial reforms that translate into efficient and effective justice involving investigation of the facts, identification and punishment of the perpetrators, and reparation for victims.

Finally, the Honduran transition has yet to address the demilitarization of the State and the role of justice in achieving national reconciliation, fighting impunity, and defending victims' rights. This is why it is so important to give thought to the role of transitional justice in countries characterized by weak states, controlled by powerful factions, in contexts of non-traditional coup d'états and the realization of electoral processes under the aegis of illegitimate governments and in questionable declarations of states of emergency. In these contexts it becomes necessary to evaluate the degree to which constitutional and democratic order has been reestablished, and participatory democracy restored, the level of confidence in public institutions raised, and the efficiency of the legal system improved.

In the case of Honduras, from the political-legal perspective, it is imperative to develop a new political-electoral system and establish the competencies and limits of each branch of power under the rule of law. This involves the discussion and passing of the Law of the Legislative Branch, which regulates its democratic and transparent organization and functioning; pass the Law of Civil Service of the Executive Branch, which would ensure stability and professionalism of public servants; as well as the approval of the Law on Judicial Authority and the Judiciary Council and Judicial Career Law, instruments that would guarantee the independence of the Judicial Branch. It is also important to create the Constitutional Court of Honduras, which would be in charge of constitutional review and control of the laws, the development of human rights jurisprudence, and the resolution of disputes among government bodies. The arrival of this Court would generate the conditions and greater guarantees for the development and strengthening of democracy in Honduras.

## Chapter 15

### Maybe Some Day...

### The Challenges of Non-repetition in El Salvador

*Benjamín Cuéllar Martínez\**

*“En esta tierra donde nacimos,  
me da tristeza lo que vivimos.  
Cuántas promesas de nuevos días  
y la justicia no se avecina.”  
(Illapu, Chile)*

*“In this land where we were born,  
I’m saddened by what we live.  
So many promises of new days  
and justice does not come.”*

Eighteen years after the signing of the Peace Accords for El Salvador,<sup>1</sup> the causes that gave rise to the conflict continue to be latent: economic and social exclusion, lack of opportunities for political participation, fragile or inoperative institutions, violence, and above all, impunity. While some initiatives have been taken to change the situation, they have not been based on a human rights approach, as pointed out by Ignacio Ellacuría, the Jesuit rector of the Universidad Centroamericana José Simeón Cañas (UCA) assassinated in 1989.<sup>2</sup> Ellacuría argued that the human rights approach should not be converted into an interminable list of principles that end up as unfulfilled desires, which are valuable but not attainable in practice except for a few privileged sectors that enjoy them in abundance. Consequently, he emphasized the importance of attaining the liberation of marginalized social groups, calling this “the path of the poor majority,

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\* This title (“*Por si algún día*”) is borrowed from the video of the Tribunal for the Application of Restorative Justice in El Salvador, “Maybe one day”. See <http://idhuca.blogspot.com/2009/04/sentencia-tribunal-internacional-para.html>.

<sup>1</sup> The Peace Accords, also known as the Chapultepec Agreement, was the final document resulting from the process of negotiation between the Salvadoran Government and the Frente Farabundo Martí para la Liberación Nacional (FMLN). It was signed in Mexico City on January 16, 1992. The Accords are reproduced in English in United Nations, “El Salvador Agreements: The Path to Peace”, U.N. Doc. DPI/1208-92614 (1992).

<sup>2</sup> The UCA rector was executed in quarters at that University on November 16, 1989, by members of the Salvadoran military. He was assassinated along with five other Jesuit priests—Ignacio Martín Baró, Segundo Montes, Amando López, Juan Ramón Moreno, and Joaquín López y López; also assassinated were Julia Elba Ramos and her teenage daughter, Celina Mariceth.

who will only accede to true freedom when they liberate themselves from a world of oppressions and when there are genuine conditions for everyone to be able to exercise their freedom.”<sup>3</sup>

This is essentially the “from where,” “for whom,” and “to what end” of the proposal put forth in this chapter, which seeks to address the challenges of guaranteeing non-repetition of human rights violations in El Salvador. Primarily I assert that to achieve this, the social and political causes that generated the violence must be addressed.

The approach proposed by Ignacio Ellacuría finds concrete expression in the following Salvadoran constitutional principle:

El Salvador recognizes the human person as the origin and aim of the activity of the State, which is organized to secure justice and the common well-being. . . . Accordingly, it is an obligation of the State to ensure for the inhabitants of the Republic the enjoyment of liberty, health, culture, economic well-being, and social justice.<sup>4</sup>

For the martyred rector of the UCA, it is a question of imposing the “common good” over the “common evil.” That was the goal, at least in theory, of the agreements between the belligerent parties that, among other tools, created a Truth Commission to help clarify the violent events that had occurred in the country since 1980 and to overcome impunity. Despite this, in El Salvador surviving victims of grave human rights violations, crimes against humanity, and war crimes continue to be denied truth, justice, and comprehensive reparation.

The State completely ignored the “measures aimed at national reconciliation” that the Commission recommended in its final report. Many other recommendations—to disqualify persons responsible for human rights abuses from public office for example—were either not fully carried out or simply were not taken up at all. The lack of political will and political valor needed to take on the human and material obstacles that stood and still stand in the way of justice was noted five days after that report was presented. On March 20, 1993 an amnesty that continues in force was approved with the nod of the political powers that be. This was despite the repeated criticisms of many intergovernmental and social organizations both inside and outside the country. The government also failed to give effective impetus for structural changes such as vetting and judicial reform, which were needed to construct and consolidate a genuinely democratic society.

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<sup>3</sup> Ignacio Ellacuría, *Historización de los derechos humanos desde los pueblos oprimidos y las mayorías populares*, REVISTA ESTUDIOS CENTROAMERICANOS 502, 594-95 (Aug. 1990).

<sup>4</sup> CONSTITUTION OF EL SALVADOR, art. I.

Therefore it cannot be said that the Salvadoran peace process that was agreed to in the Geneva Accord<sup>5</sup> culminated successfully. Except for ending the war by political means in the shortest time possible, the major requirements for national reconciliation remain pending. Such requirements include the unconditional respect for human rights, democratization of the country, and the “reunification” of society. In large part, this failure stems from the decision made by some and accepted by others to protect those guilty of the atrocities, many of whom continue to be influential political, economic, and social actors. The essential measures of transitional justice were not applied seriously in the postwar period. Despite the establishment and work of the Truth Commission, its results were not sufficiently disseminated. This made it possible to deny or distort the grave acts of violence and the human rights violations that occurred before and during the armed conflict. And things will continue in this way, so long as there is no break with the “normalcy” that protects victimizers and offends victims.

Looking back on the “farewell to arms” by the parties in conflict, the four dimensions of impunity described by Roberto Garretón—judicial, political, moral, and historic—are still present, in an affront to the dignity of persons and society.<sup>6</sup>

In order to speak of a real process of social re-foundation based on truth, justice, and comprehensive reparations for the victims from before and during the war, along with inclusion and equity for the poor majority, it is helpful to analyze developments in light of the Chicago Principles on Post-Conflict Justice.<sup>7</sup> This analysis will be the focus of Part I of this chapter. Part II will then address the structural causes of the social and military conflicts that continue to be present in El Salvador. By way of conclusion, this chapter will propose actions with a view toward positioning respect for human rights and the struggle against impunity on the public agenda, and guaranteeing that the tragedies of the past century, in 1932 and again beginning in 1972,<sup>8</sup> are not repeated.

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<sup>5</sup> This initial accord was signed by the representatives of the Salvadoran government and the insurgency, with the seal of the then UN Secretary-General, Javier Pérez de Cuéllar, on April 4, 1990, in Geneva, Switzerland.

<sup>6</sup> See the interview with Roberto Garretón in Roger Rodríguez, *Las dimensiones de la impunidad sin Pinochet*, LA REPÚBLICA, No. 2968, July 14, 2008.

<sup>7</sup> See INTERNATIONAL HUMAN RIGHTS LAW INSTITUTE, *THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE* (2008).

<sup>8</sup> Beginning on January 22, 1932, the Salvadoran Army unleashed a large-scale killing spree directed principally against the indigenous population. From February 1972 on, after a fraud in the presidential elections, government repression and guerrilla violence grew to the point of open war breaking out in January 1981.

## I. The Salvadoran State and the Chicago Principles

The Chicago Principles on Post-Conflict Justice set out essential criteria for devising strategies to address past atrocities and to achieve democratization of a society with a view to upholding the dignity of the victims, the responsibility of the perpetrators, the functioning of the institutions, and the guarantees of non-repetition. These principles, which were discussed and agreed upon over the last ten years, find their closest antecedents in the meetings of experts in Washington and Siracusa (Italy) in 1997 and 1998, respectively. They have proven to be useful for analyzing processes such as postwar El Salvador. This analytical exercise, while not a “straitjacket,” is offered below in order to assist in assessing the reality of what has happened in El Salvador.

### A. Investigation into the Events of the Past (First Principle)

The Salvadoran State cannot respond positively when confronted on this principle due to its constant resistance to investigating, prosecuting, and punishing those responsible for the grave human rights violations that occurred before and during the war. A clear example of this is the Law on General Amnesty for the Consolidation of Peace,<sup>9</sup> which continues to be in effect. This law is incompatible with commitments acquired in the area of human rights and is held up as the main barrier standing in the way of investigations. This is despite the fact that the parties to the Chapultepec Agreement recognized “that acts of this nature, regardless of the sector to which their perpetrators belong, must be the object of the exemplary action by the law courts so that the punishment prescribed by law is meted out to those found responsible.”<sup>10</sup>

On March 14, 1993—one day before the presentation of the report by the up Truth Commission at the United Nations headquarters in New York—then President Alfredo Cristiani<sup>11</sup> announced to the country and to the world his intent to approve the amnesty law. His successor, Armando Calderón,<sup>12</sup> kept the obstacle in place in order to advance peace; and the next three presidents were emphatic in affirming that the law would not be modified. This wounded the dignity of the victims, the organizations that accompanied them, and the part of the population that has always opposed criminal authoritarianism-made state policy.

President Francisco Flores, who governed from June 1, 1999, to May 31, 2004, said that the amnesty was “the cornerstone of the peace accords” and that

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<sup>9</sup> Legislative Assembly of El Salvador, *Ley de Amnistía General para la Consolidación de la Paz*, Decree No. 486, Mar. 20, 1993.

<sup>10</sup> United Nations, “El Salvador Agreements: The Path to Peace”, *supra* note 2, at 53.

<sup>11</sup> President of the Republic from June 1, 1989 to May 31, 1994.

<sup>12</sup> President of the Republic from June 1, 1994 to May 31, 1999.

the country could be submerged “in an additional conflict” if it were repealed.<sup>13</sup> The same thing happened with Antonio Saca;<sup>14</sup> when the *Frente Farabundo Martí para la Liberación Nacional* (FMLN) demanded that it be repealed in April 2005, Saca said that it was the “frontier between a sad past, which we condemn and which should not be repeated, and a promising future . . . . [T]hose nostalgic for the past, the only thing they seek with this is to destabilize the country.”<sup>15</sup>

Mauricio Funes,<sup>16</sup> in his electoral campaign and with a discourse distinct from that which had been offered earlier by his party, asked that the nation take stock of “the moment in which we are. . . . Far from contributing to reconciliation, it would, to the contrary, open wounds.”<sup>17</sup> “Repealing the Amnesty Law,” he said, “would imply creating an ungovernable climate, it would imply creating a climate that would not allow for building the future.”<sup>18</sup> Upon taking office, he said:

We need to bring an end to what remains of our victim-complex, because that feeds hatred, self-pity, vengeance, and easy excuses. Let’s accelerate this process of emotional and spiritual renewal, the process of believing in ourselves, respecting and seeing to it that we are respected, leaving behind the dark shadow of our own worst social and personal experiences.<sup>19</sup>

The inter-American and universal human rights systems have pressured the Salvadoran State. The Inter-American Commission on Human Rights (IACHR), in addition to its special report on the country’s situation in 1994, in which it questioned the Amnesty Law, recommended that the State adjust “its domestic legislation to the American Convention and thereby render null and void the General Amnesty Law.”<sup>20</sup> And it reiterated this message in the report on the merits in the case of Monsignor Óscar Romero.<sup>21</sup>

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<sup>13</sup> Asociación Pro Búsqueda de niñas y niños desaparecidos durante la guerra (Probúsqueda) et al., *La elección del nuevo secretario general de la OEA*, 25 Proceso, No. 1118, (Oct. 20, 2004).

<sup>14</sup> President of the Republic from June 1, 2004 to May 31, 2009.

<sup>15</sup> See *El presidente salvadoreño rechaza derogar la ley de amnistía, como pide el FMLN*, LUKOR, Apr. 14, 2005, <http://www.lukor.com/not-mun/americ/0504/14033440.htm>.

<sup>16</sup> President of the Republic for the term from June 1, 2009 to May 31, 2014. He won the elections as a candidate of the FMLN and is the first president since the war that is not a member of the Alianza Republicana Nacionalista (ARENA). ARENA was founded by Major Roberto D’Aubuisson Arrieta, described by the Truth Commission as an organizer of “death squads” and the person ultimately responsible for the assassination of Monsignor Romero, the archbishop of San Salvador.

<sup>17</sup> Eric Lemus, *Sin perdón ni castigo*, BBC.MUNDO.COM, Oct. 24, 2008, [http://news.bbc.co.uk/hi/spanish/latin\\_america/newsid\\_7684000/7684038.stm](http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7684000/7684038.stm).

<sup>18</sup> Jorge Ávalos, *FMLN abrirá juicios de Guerra*, EL DIARIO DE HOY, Sept. 4, 2008.

<sup>19</sup> Mauricio Funes, *Discurso de toma de posesión de Mauricio Funes*, in PRESIDENCIA DE LA REPÚBLICA, DISCURSOS (June 1, 2009), <http://www.presidencia.gob.sv/discurso/index.html>.

<sup>20</sup> Ignacio Ellacuría, S.J. & Others v. El Salvador, Case 10.488, Inter-Am. C.H.R., Report No. 136/99, OEA/Ser.L/V/II.106, doc. 3 (1999).

<sup>21</sup> Monsenor Oscar Arnulfo Romero y Galdamez v. El Salvador, Case 11.481, Inter-Am. C.H.R., Report No. 37/00, OEA/Ser.L/V/II.106 Doc. 3 rev. (2000).

Among the main concerns of the UN Human Rights Committee in 2003, the first was the amnesty law and its application to “serious human rights violations, including those considered and established by the Truth Commission.”<sup>22</sup> The Committee considered that this “infringes upon the right to an effective remedy set forth in Article 2 of the Covenant, since it prevents the investigation and punishment of all those responsible for human rights violations . . . .”<sup>23</sup>

The Working Group on Enforced or Involuntary Disappearances also gave its opinion in this respect:

With regard to the right of victims and their families to the truth, justice and redress, the Working Group concludes that the 1993 Law on General Amnesty for the Consolidation of Peace clearly departs from the principles of the Declaration, in particular its article 18, as interpreted by the Working Group in one of its general comments.<sup>24</sup>

Accordingly, it recommended that the State take effective steps “to guarantee and implement the rights to justice, truth, redress and rehabilitation. It therefore respectfully but forcefully urges the Legislative Assembly to amend the 1993 Amnesty Act substantially” and bring it into line with the guidelines of the Working Group.<sup>25</sup> Yet the amnesty remains unmovable. And that law, which has buried the demands for truth, justice, and comprehensive reparation for the victims, is what Kofi Annan, then UN Secretary-General, cited in 1997 as an example of the parties’ rejection of the Truth Commission’s recommendations.<sup>26</sup>

While international human rights law and the Chicago Principles do not prohibit amnesties, they cannot be applied in favor of those who committed crimes against humanity. Nonetheless, that was exactly what happened in El Salvador. In its first article the amnesty law grants

broad, absolute, and unconditional amnesty in benefit of all those persons who, in whatever form, have participated in the commission of political crimes, common crimes related to political crimes, and common crimes

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<sup>22</sup> U.N. Human Rights Committee, *Review of the reports submitted by the member states under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: El Salvador*, para. 6, U.N. Doc. CCPR/CO/78/SLV (July 22, 2003).

<sup>23</sup> *Id.*

<sup>24</sup> U.N. General Assembly, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Working Group on Enforced or Involuntary Disappearances, Add. Mission to El Salvador, para. 83, U.N. Doc. A/HRC/7/2/Add.2 (Oct. 26, 2007) (internal citation omitted).

<sup>25</sup> *Id.* para. 90.

<sup>26</sup> Kofi Annan, *Assessment of the peace process in El Salvador, The situation in Central America: Procedures for the establishment of a firm and lasting peace and progress in fashioning a region of peace, freedom, democracy and development*, United Nations, General Assembly, Fifty-first session, Agenda item 40, A/51/917, July 1, 1997.



committed by at least twenty persons before January 1, 1992, whether or not a judgment had been handed down against those persons, whether or not a proceeding had been initiated for the same crimes, granting this pardon to all persons who had participated as direct perpetrators, perpetrators by means, or accomplices in the criminal acts referred to above.<sup>27</sup>

Thus, as there has not been domestic progress in the serious investigation into the events that occurred before and during the war, in January 2009 the Audiencia Nacional of Spain (Spanish National Court), admitted a claim against the material and intellectual authors of the massacre at the UCA based on the principles of universal jurisdiction and the subsidiary nature of international human rights law.<sup>28</sup> The complaint was submitted by a Spanish organization and a U.S. organization in response to the consistent disinterest on the part of the Salvadoran State when it came to ensuring respect for the human rights of all persons under its jurisdiction.

## **B. Creation of Truth Commissions and Publication of Their Reports (Second Principle)**

The Truth Commission published its report on March 15, 1993, after eight months of work and after receiving approximately 25,000 denunciations—almost 2000 from direct victims, and the remainder indirect. It included a general and analytical chronology of the events from 1980 until the end of the war, including the patterns of State and insurgent violence. It also established personal and institutional responsibilities on both sides for grave human rights violations, in both quantitative and qualitative terms. Yet this was not enough to achieve its objective and essence set out at the beginning of that report: “the search for, finding of, and publication of that truth.”<sup>29</sup>

This was not enough because although there was a search for the truth, it was without the firm backing of the authorities, who by act or omission rejected the report. In addition to President Cristiani demanding amnesty and the communiqué read by General René Emilio Ponce,<sup>30</sup> the Supreme Court of Justice issued a ruling

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<sup>27</sup> Legislative Assembly of El Salvador, Law on general amnesty for the consolidation of peace, Decree No. 486, Mar. 20, 1993.

<sup>28</sup> To learn more about this case, see the report *Caso jesuitas*, IDHUCA, <http://www.uca.edu.sv/publica/idhuca/jesuitas.html>.

<sup>29</sup> Belisario Betancur, et al., *Introducción, mandato y cronología, De la locura a la esperanza. La guerra de 12 años en El Salvador: Informe de la Comisión de la Verdad para El Salvador*, 48 REVISTA ESTUDIOS CENTROAMERICANOS 162 (Mar. 1993) (hereinafter “Truth Commission Report”).

<sup>30</sup> See Benjamín Cuéllar Martínez, *Los dos rostros de la sociedad salvadoreña*, in VERDAD, JUSTICIA Y REPARACIÓN: DESAFÍOS PARA LA DEMOCRACIA Y LA CONVIVENCIA SOCIAL 160-61 (Institute for Democracy and Electoral Assistance (IDEA) and Inter-American Institute of Human Rights (IIDH) eds., 2007). The report is also available in English, *From Madness to Hope – The 12-year War in El Salvador: Report on the Commission on the Truth in El Salvador*, U.N. Doc. S/25500 Annex (Apr. 1, 1993).

along the same lines and similarly harsh. The Supreme Court President, Mauricio Gutiérrez Castro, hindered the investigations in the case of the El Mozote massacre. This meddling was denounced by the Truth Commission itself, citing his words anticipating that the exhumation at El Mozote would reveal only “buried dead guerrillas.”<sup>31</sup> On March 22, 1992, seven days after the Truth Commission’s report was released, the Supreme Court rejected its conclusions and recommendations, considering them to be “against the administration of justice in El Salvador, the Supreme Court of Justice, and its President.”<sup>32</sup>

In terms of the Commission’s mission and essence, “the publication of that truth” was reduced to a modest and limited edition of the actual document and its annexes. What was published amounted to basically two thick pamphlets, prepared upon the initiative and under the responsibility of the United Nations Observer Mission in El Salvador (ONUSAL). With this, the State considered the mission proclaimed in the introduction of the report to be fulfilled. Other efforts to disseminate the report and make Salvadoran society more familiar with the tragic episodes—the “madness”<sup>33</sup>— were few in number and limited in scope.

All of the recommendations that aimed at achieving “national reconciliation” went unfulfilled.<sup>34</sup> For example, a Forum of Truth and Reconciliation was proposed as a specific entity through which diverse social sectors with well-known track records in the matter could come together for the purpose of monitoring strict adherence to the recommendations. That Forum was never even created. For Annan:

[A] less than positive evaluation of the actions taken in response to the substantive recommendations of the Commission on the Truth is unavoidable. This represents a disappointing failure to respond to the unique opportunity represented by the Commission and its work to make important advances in the eradication of impunity and the furthering of a climate of national reconciliation.<sup>35</sup>

Then UN Secretary General considered that the measures to tackle impunity and contribute to reconciliation were the most important of all those proposed in the document. Yet for the Salvadoran Government and the FMLN they were not; and consequently both parties have ignored them.<sup>36</sup> This resulted in their complicit silence in the face of the victims of grave human rights violations, war crimes,

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<sup>31</sup> Truth Commission Report, *supra* note 30, at 264.

<sup>32</sup> Supreme Court of Justice, *La Corte Suprema de Justicia, respuesta oficial al informe y recomendaciones de la Comisión de la Verdad*, in *Documentación*, REVISTA ESTUDIOS CENTROAMERICANOS 490 (Mar. 1993).

<sup>33</sup> The Truth Commission entitled its report “From Madness to Hope: The 12 Year War in El Salvador.”

<sup>34</sup> See Annan, *supra* note 27, para. 26.

<sup>35</sup> Annan, *supra* note 27, para. 26.

<sup>36</sup> Cuéllar Martínez, *supra* note 31, at 152-67.

and crimes against humanity, including not acknowledging their responsibilities in the events. The next-of-kin of the disappeared during the period examined by the Commission know nothing of their loved ones' whereabouts and the justice system has not responded to their demands.

The Commission never suggested that whether to punish those guilty was a dilemma. In consonance with the Chapultepec Agreement, the Commission stated that "public morality demands that those responsible for the crimes described here be punished." The problem was whether, in 1993, the institutions entrusted with investigating crimes and enforcing the law were capable of doing so. On this question, it suffices to note the attitude of the president of the Supreme Court in the case of El Mozote described above. Another example is the attitude of the Attorney General of the Republic of the time, which led the prosecutors in the UCA case mentioned above to leave their positions and instead become private accusers in the same case.

In El Salvador, to what truth do we refer in relation to the atrocities that occurred during the period scrutinized by Commission? To begin to understand the organized criminal structures and the terrible consequences of their operations one must go back in El Salvador's history to at least the early 1970s, when state repression against the opposition began to intensify and guerrilla activity began. Despite the Commission's efforts, there are still great disparities in the different visions and versions of those events that amounted to the absolute transgression of ethical and legal norms. The State failed in every respect by not honoring the recommendations received and fully carrying them out in violation of its commitment to do so together with the FMLN.<sup>37</sup> The State also did so by hiding the contents of the report. This is a serious matter, for "the truth is good because it makes the full reality—that of the victims, their victimizers, and their defenders—real instead of a fantasy with no tie to reality."<sup>38</sup> That humanization of reality did not reach El Salvador, and the negative consequences of this failure persist.

Based on the Commission's recommendations, another entity was created: the Joint Group for the Investigation of Illegal Armed Groups having Political Motivations. The Commission referred to the "death squads" as one of the "the most horrendous instruments of the violence, which swept the country in recent years" and determined that they "operated with complete impunity."<sup>39</sup> Consequently the Commission demanded that necessary measures be taken to ensure their dismantling and their immediate and in-depth investigation with the technical assistance of police agencies from other countries.

Despite the recommendation and demand to look into this matter as soon as possible, the State did not establish that Joint Group until December 8, 1993—nine

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<sup>37</sup> El Salvador Agreements: The Path to Peace, *supra* note 2.

<sup>38</sup> Jon Sobrino, *La verdad de las víctimas*, REVISTA ESTUDIOS CENTROAMERICANOS 467 (May 2003).

<sup>39</sup> Truth Commission Report, *supra* note 30, at 318.

months after the recommendation. This was also in the midst of a serious wave of selective political violence in which two prominent members of the former guerrilla forces who had become fully incorporated into civilian life, Francisco Velis and Heleno Hernán Castro, were assassinated.

United Nations Under-Secretary-General Murrack Goulding traveled to El Salvador from November 8 to 11, 1993 to pressure the government to start up the work of the Joint Group. He did so after his boss, Boutros Boutros-Ghali, expressed his concern that “recent cases of arbitrary execution in El Salvador confirmed the need for the immediate implementation of the recommendations of the Commission on the Truth regarding the investigation of illegal groups.”<sup>40</sup> One day after the installation of the mechanism designed to that end, José Mario López—a high-level leader of the FMLN, member of the party’s Political Commission, and a candidate for deputy in the Central American Parliament—was assassinated.

The first difficulty appeared in the very mandate conferred upon the Joint Group: it would only operate for six months, including the year-end vacations, which subtracted valuable working days, especially in the stage of organization and start-up. In addition, this occurred during the first election campaign that would include the participation of the FMLN. This delay may have been a deliberate attempt to further shorten the time available for the investigation, analysis, drafting of recommendations, and production of the final report. This is particularly troubling given the depth required in each step to address such a complex phenomenon. Its offices did not open until February 1994, and it had to present its report by May 31. The deadline was eventually extended to July 31.

There was also criticism of the selection of members, including the Human Rights Ombudsperson, Carlos Mauricio Molina Fonseca, and the director of the human rights division of ONUSAL, Diego García Sayán. Both had to devote time to the important institutions they headed and dedicate a special effort to the demanding work that would be required of them by the Joint Group. The Group’s other two members were appointed by the Salvadoran government. Another obstacle was that only cases from January 16, 1992 and later would be investigated. Ideally the period covered should have dated back to 1980, when the civil war began. This further limited the possibilities of establishing the ties between the criminal activity that occurred before and during the war and the criminal activity of the postwar period. In addition, the vast majority of victims of grave human rights violations, which were committed mainly from 1979 and onward, were denied the prospect of attaining justice.

It was precisely in 1979, on November 6, following the October 15 coup, that the Special Commission to Investigate Disappeared Political Prisoners was established. This Commission was established by the Revolutionary Government

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<sup>40</sup> U.N. Security Council, Letter from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/26865 (Dec. 7, 1993).

Junta through Decree No. 9. Seen in retrospect, it was a valuable example for the two postwar initiatives examined above. That Special Commission, made up of three attorneys each with a respectable personal and professional résumé,<sup>41</sup> only seventeen days into its mandate, recommended that the president who had been overthrown and his predecessor be tried in their capacity as General Commanders of the Armed Forces of El Salvador, along with the directors of all the security agencies of those administrations. In addition, it proposed compensating the next-of-kin of the disappeared victims. In its final report of January 3, 1980, it concluded that the persons detained and disappeared were executed.

Returning to the report of the Joint Group, there are three of its conclusions worth highlighting here: that the “death squads” continued operating after the war; that members of the military and the former repressive corps linked to politically-motivated violent acts participated in those killings; and that far from growing weaker, they had become better-organized, diversifying their action without abandoning their origins. Before publishing its conclusions, the Joint Group lamented the lack of collaboration at every level for carrying out its investigation. It placed blame for lack of cooperation on the government, the political parties, and what it called “non-governmental organizations.” This assessment is unfair, especially vis a vis the NGOs, as the information that social organizations could offer on criminal structures was much more general given that they did not have the capacity or resources for more in-depth inquiries.

The Joint Group’s creation, operation, and preparation of the final document was aimed at “helping the government of El Salvador to discover the existence of the politically-motivated illegal armed groups.”<sup>42</sup> Nonetheless, it appears that this objective was not attained because the official reactions at the highest political and military level were similar to those in response to the Truth Commission. General Carlos Humberto Corado Figueroa—then recently appointed as the Minister of National Defense—without having had time to analyze the report, declared almost immediately that it was inconclusive and confusing. His reasoning included that the Joint Group did not have the resources to establish the existence of the “death squads” and that the Armed Forces of El Salvador did not have anything to hide, for there were no illegal groups in its ranks. Minister of Foreign Affairs, Óscar Alfredo Santamaría, made a mockery of the document and asserted that it did not contribute anything new.

It is clear that the Salvadoran State did not value the recommendations of the Joint Group. It rejected the recommendations in both its discourse and its practice, just as it had done with several of the recommendations of the Truth

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<sup>41</sup> Roberto Lara Velado, Luis Alonso Posada, and Roberto Suárez Suay were the members of this Commission.

<sup>42</sup> Joint Group for the Investigation of the Politically-Motivated Irregular Armed Groups, *Documento Especial: Informe del Grupo Conjunto para la Investigación de los Grupos Armados Irregulares con Motivación Política*, REVISTA ESTUDIOS CENTROAMERICANOS 993 (Sept. 1994).

Commission. Three years after ending the inquiry into the “death squads,” in July 1997, Annan affirmed that “the recommendations formulated by the Joint Group for the Investigation of Illegal Armed Groups having Political Motivations were not complied with by the Government, especially those that relate to the strengthening of a specialized unit within the National Civil Police to investigate these types of cases.”<sup>43</sup> Accordingly, those or other criminal groups continued acting illegally and with impunity. Annan himself noted that “[t]he recent recurrence of assassinations with the appearance of execution, which seem to have been carried out by groups outside the formal police structure dedicated to ‘social cleansing,’ has raised concern.”<sup>44</sup>

### **C. Comprehensive Reparation for Victims, Both Individual and Social (Third Principle)**

This principle, like the first two, has also been breached by the Salvadoran State. The State has not even recognized all victims and has denied them time and again—in fact and in law, by act and omission, inside and outside the country. For this reason, José María Tojeira, Jesuit rector of the UCA stated the following in March 2007, when opening a meeting to analyze the country fifteen years after the presentation of the Truth Commission report:

Certainly, this commemoration needs another reading because the official ceremonies have never considered the victims, the true and genuine protagonists of peace that have been entirely forgotten. The victims, who motivated so many, and so much, to struggle for peace, were absent from the signing of the Chapultepec Agreement . . . . On this day, a reading was given that satisfied its signatories. It is the reading of peace from the standpoint of the complacency of those who agreed upon the document . . . . There was a great deal of showmanship in that ceremony, in contrast to the dissatisfaction of the people “on the ground” in the country. Today we want another reading: the reading of those of us who believe in a society without violence, without social injustices, without impunity, without such marginalizing social structures. . . . A reading from the victims who want the truth and recognition, which was called for by the Truth Commission at that time and which has never been carried out: moral compensation for the victims . . . . To date there has been none, for the victims are considered a sort of garbage of history that must be forgotten and cast into a corner.<sup>45</sup>

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<sup>43</sup> Annan, *supra* note 27, at 6.

<sup>44</sup> Annan, *supra* note 27, at 6.

<sup>45</sup> José María Tojeira, *Conferencias iniciales: Presentación*, in EL SALVADOR QUINCE AÑOS DESPUÉS: OTRA LECTURA 13-14 (IDHUCA ed., 2007).

These words are strong and raw, but true from the standpoint of the formal and *de facto* powers that decided to protect the perpetrators with the March 1993 amnesty—a decision that to date stands.

The Truth Commission recommended that a fund be established to compensate the victims named in its report and its annexes. It suggested that part of the resources from nations committed to the Salvadoran peace process should be earmarked to that end. It even defined the structure and parameters to govern the fund's operations. Yet this, like the other recommendations aimed at moving towards "national reconciliation," was not heeded. With regard to moral reparation, the national monument with the names of the victims, proposed by the Commission, was not built. Nor was there ever any public recognition forthcoming to uphold their honor, as was necessary and only fair—much less any recognition of the State's responsibility and the FMLN's responsibility for the grave human rights violations committed. The recommendation to declare a national holiday to remember the victims suffered the same fate.

Justice for the victims has not been done either. As already indicated, the precarious and lamentable situation of the national justice system, verified on the ground by the Truth Commission, was an obstacle that should have been overcome by carrying out the recommendations and obligations assumed with the peace accords, as well as in the orientations of ONUSAL. Yet the scenario did not change, at least not substantively. Evidence of this is the fact that the next-of-kin of the Serrano Cruz sisters, two young girls who disappeared during the war, had to bring a case against the Salvadoran State before the inter-American system. The State was held responsible for violating the rights to judicial guarantees and judicial protection for both of them and their family, as well as the family's right to personal security.<sup>46</sup> Even though almost five years have elapsed since the Inter-American Court of Human Rights issued that judgment, as of year-end 2009 it had not been met with compliance. At least the family secured some compensation, although this does not take the place of the right to comprehensive reparation for the victims and their next-of-kin in the domestic legal system.

As Salvadoran society has never learned and still does not know the full breadth and depth of the truth of what has happened in the postwar period, there are two main versions of what happened: the victims' version and the victimizers' version. And two positions derive from these: one in favor of revealing what happened and the other preferring to cover up what happened. The latter stance was described in the following terms by Ignacio Martín-Baró:<sup>47</sup>

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<sup>46</sup> See *Serrano-Cruz Sisters v. El Salvador*, Inter-Am. Ct. H.R. (ser. C) No. 120 (Mar. 1, 2005).

<sup>47</sup> One of the six Jesuit priests executed by members of the military on November 16, 1989, in the same crime in which the rector of the UCA, Ignacio Ellacuría, was also executed. See *supra* note 3.

First and foremost, it is a question of creating an official version of the facts, an “official history,” that ignores crucial aspects of reality, distorts others, and even falsifies or invents others. This “official history” is imposed through an intense and very aggressive propagandistic deployment, which is supported by drawing on the full weight of the highest level official positions. . . . When, however it may be, facts come to light that directly contradict the “official history” a “quarantine” is placed around them, a circle of silence that relegates them to quick oblivion or to a past, presumably overtaken by events. The continuing violations of human rights by the members of the Armed Forces obviously fall within that encasing silence.<sup>48</sup>

The first stance, which favors revealing what has happened, is considered subversive by Martín-Baró. The powers-that-be felt the same about the report of the Truth Commission and denouncements made in El Salvador and abroad—before governmental agencies, intergovernmental bodies, and social organizations—before, during, and after the war. Martín-Baró, who was assassinated, argues that this is the case because

they subvert the established order of the lie. This leads to the paradox that one who dares to name reality or to denounce the abuses becomes at least a prisoner of justice. What matters is not whether the facts referred to are or are not true, which is always denied a priori; what matters is that they are named. It is not the reality that counts, but the image.<sup>49</sup>

In addition, regarding reparations, all that exists is a law on benefits for the protection of the war-wounded and persons disabled as a result of the armed conflict. This law has not achieved the full social reinsertion of these persons, for the pensions they receive are minimal and do not cover their basic needs. The benefits also do not include the medical treatment that is required.

During the administration of President Flores, the Foreign Ministry hired a consultant to establish the amounts of material reparations to the victims.<sup>50</sup> Yet the results were never made public and it is still unknown what use was made of that study. What is clear is that there was no progress toward fulfilling the State’s obligations in terms of measures of restitution or with regard to compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

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<sup>48</sup> Ignacio Martín-Baró, *La violencia política y la guerra como causas en el país del trauma psicosocial en El Salvador*, 28 REVISTA DE PSICOLOGÍA DE EL SALVADOR 70, 70-71 (1988).

<sup>49</sup> *Id.* at 71.

<sup>50</sup> Alexander Segovia, Salvadoran economist and Technical Secretary of the Presidency in the Funes administration.



#### **D. Vetting and Administrative Punitive Measures Imposed on the Perpetrators (Fourth Principle)**

The Truth Commission's recommendations concerning administrative punishments for perpetrators stemmed directly from the facts investigated. Three had to do with the following basic efforts to combat impunity: first, the Commission highlighted the need to remove from the Armed Forces those active-duty members of the military mentioned in the report for their specific participation in human rights violations, cover-ups of violations, or omission in terms of investigating and punishing the persons responsible. Second, it indicated the need to remove those civilian officials of the public administration and the judiciary that covered up human rights violations and breached their obligations to investigate and punish the perpetrators. The third was to disqualify from the exercise of public rights all persons not covered by the foregoing circumstances—whether or not they were active-duty officers—who executed, ordered, covered up, failed to inquire into relevant facts, and did not punish the persons responsible; this included retired military officers, civilians, and members of the guerrilla command mentioned in the report. The proposal, which was not carried out, was to prohibit these individuals from holding positions in public administration for ten years, and to exclude them for life in the areas of public security or national defense.

As mentioned above, no reparation was made to the victims for the harm caused them, and furthermore, the persons responsible for that harm agreed not to abide by their disqualifications, alleging that their constitutional rights would be violated were they to do so. That subterfuge was used by persons alleging noble ideals—"the defense of the Homeland and democracy" or "the liberation of the oppressed classes." This was used to justify grave violations of human rights and was tolerated and even legitimated by then Secretary General of the United Nations, Boutros Boutros-Ghali.<sup>51</sup> Therefore, in the postwar period, individuals that were called out by the Truth Commission have continued parading about in public affairs. And the complicit agreement continues in force, ever-renewed, so as to block any repeal of the amnesty or attempt to bring it into line with international human rights standards.

The foregoing scenario can be considered a failed vetting process. Another failed initiative that had been set out in the peace accords was the ad hoc Commission for Vetting the Armed Forces of El Salvador. This initiative was plainly boycotted and truncated on purpose. The Commission was to investigate the record of each officer in light of legality and human rights, as well as the commitment each officer to correcting and sanctioning subordinates who violated human rights. It was also to assess, one-by-one, their professional fitness and capacity to operate in a peaceful

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<sup>51</sup> See Cuéllar Martínez, *supra* note 31, at 155-58.

and democratic society, as a guarantor of respect for human rights and promoter of social “reunification.” That evaluation would determine who continued in the institution, who would be transferred, and who would be dismissed.

Over four months, the military hierarchy provided the ad hoc Commission with information that was limited and late and which did not contain cases of human rights violations. Most of the reports were presented by Salvadoran and international social organizations; cases of corruption and others related to organized crime were not included because of lack of evidence. The high-level military commanders sought to intimidate the organizations that presented evidence. To this end, among other things, they filed a criminal complaint against one of the institutions, accusing it of trying to cause harm to the Armed Forces. Such resistance further complicated an already difficult task.

And could the victims point to the persons responsible for the abuses suffered? Were they afforded any opportunity to produce evidence of these facts to the ad hoc Commission? Were they capable of establishing the organized power apparatus—with its members and structures that planned, ordered, consented to, and sought to conceal such barbarism? The answer is no, and for two basic reasons. The perpetrators operated in a manner that made it extremely difficult or practically impossible to identify them. For example, according to the sister of a disappeared man: “the persons who saw his capture say that the agents who detained him were uniformed as guards and took the young man away on foot, but no one followed them.”<sup>52</sup> In another case: “[T]he disappeared man was headed to Zacatecoluca to distribute biblical literature, and it has been learned from unreliable sources that a young man of Óscar’s characteristics was detained by plainclothes agents.”<sup>53</sup> In a very large number of cases, the most that those who filed complaints could say, was that the responsibility lay with “members of the army and security forces” or “heavily armed men in plainclothes.” The other consideration is the precarious economic and social situation of most of the victims, with all that this entails.

The ad hoc Commission submitted its report in September 1993. It took stock of only 240 cases, from a list of 2,203 officers who were in the military as of May 22, 1992: in other words 11% of the total. To address this situation the UCA Human Rights Institute (IDHUCA) proposed creating an entity that would continue the vetting based on specific allegations by victims, social organizations, or any person or institution with a legitimate interest in the matter. The proposal was not implemented; perhaps it was not even considered. By way of contrast,

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<sup>52</sup> Case of José Anibal Criollo Chacón, student, seventeen years of age, disappeared on August 25, 1980, in the city of San Salvador. Office of Legal Assistance of the Archdiocese, book VIII (1980).

<sup>53</sup> Case of Óscar Alfredo Castellanos Gutiérrez, student, seventeen years of age, disappeared on October 8, 1980, at an unknown place. Office of Legal Assistance of the Archdiocese, book VIII (1980).

some leaders of the FMLN and President Cristiani negotiated the retirement of the military high command and other officers facing accusations; it was retirement with money in their pockets and ceremonies in their “honor.”<sup>54</sup>

Upon leaving the position of Minister of National Defense on July 1, 1993, General Ponce said: “[w]e submitted in good faith to a drastic cut of 50.2 percent of our force, to the dissolution of immediate response battalions, to the dissolution of the public security agencies, to the dissolution of the paramilitary forces, to an ill-intentioned ad hoc Commission for a so-called vetting . . . .”<sup>55</sup> He left no lingering doubts as to what the military officers felt and thought about the ad hoc Commission and its work.

If one combines this expression of the strengthening of impunity with the official attitudes and the attitudes of the FMLN after the presentation of the reports by the Truth Commission and the Joint Group, one can understand in part why El Salvador today is one of the countries with the largest number of homicides regionally and internationally.

### **E. Restitution of Historical Memory (Fifth principle)**

The first sign of what appears to be the State’s position on historical memory in El Salvador was evidenced in the decision not to analyze—either broadly or narrowly—the document produced by the Truth Commission. The FMLN, which in the past was the leading opposition party, did not promote any relevant action in this regard either. And now that the FMLN has come to occupy the presidency, it has not given any clear signs of a change in path. President Funes has stated that he will promote truth-seeking and reparation for the victims; however these words have yet to be translated into action that would allow one to judge the scope of the proposal and to understand whether the failure to mention the word “justice” in his speech is nothing more than a mere error or oversight. The President has sent a clear message that he will not lift a finger to repeal the amnesty.

Beyond formalities, the State has not—as of the end of 2009—taken any actions or implemented any programs to disseminate or study historical memory in schools or for the society at-large. Nor has it made efforts to keep alive the memory of the victims of grave human rights violations. One who visits the country already knowing what happened will note a lack of monuments or museums, archives or dates, holidays or other expressions from the successive postwar governments to keep alive the memory of the events that so shook Salvadoran society and moved the world. Nor has there been a serious and sustained official

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<sup>54</sup> Instituto de Derechos Humanos de la Universidad Centroamericana “José Simeón Cañas” (IDHUCA), *Se van los generales, permanece la impunidad*, 14 PROCESO 13, 14 (June 7, 1993).

<sup>55</sup> René Emilio Ponce, *Discurso de entrega de mando del Ministerio de la Defensa Nacional*, 502 REVISTA ESTUDIOS CENTROAMERICANOS 782, 782-83 (July-Aug. 1993).

concern to promote and consolidate a culture of respect for human rights and the rule of law. Instead what has been promoted from the highest-level spheres is a cult of perpetrators. To illustrate, it suffices to cite two examples.

On February 13, 2007, the Committee on Culture and Education of the Legislative Assembly approved a report intended to pay posthumous tribute to a former president of the Republic, José Napoleón Duarte, and a former president of the last Constitutional Assembly, Roberto D'Aubuisson Arrieta. There was great indignation among victims and social organizations, sparking a collective action that brought the initiative to a halt.<sup>56</sup>

Months later, on May 7, President Saca gave the key-note speech commemorating the day of the soldier. The then Minister of National Defense General Otto Romero gave him a bust of Coronel Domingo Monterrosa, who both the Truth Commission and the Inter-American Commission on Human Rights accused as having been responsible for the El Mozote massacre. Notwithstanding, Saca exalted Monterrosa's "image" and "charisma"; he also described him as "a military officer who loved the homeland, who defended the homeland in the sad moments of the communist aggression that this country suffered."<sup>57</sup> In addition to presenting himself as an admirer, he cited Monterrosa as an example for the new generations of cadets.

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<sup>56</sup> IDHUCA issued a public statement on this matter on February 19, 2007:

In other countries, the victims of grave human rights violations are asked for forgiveness and measures are adopted to make reparation for the harm suffered; here, the power structure ignores them and holds them in contempt. In other countries there are investigations, trials, and punishment for those responsible for those terrible acts; here, the power structure rewards them. In other countries, such as Germany, Russia, and Iraq, effigies of those criminals were brought down, in El Salvador—15 years after the war—they want to present the perpetrators of genocide as heroes and they intend to complete the process of sealing the armor of impunity that protects them with insulting and provocative tributes.

Until [2006] they had done so less shamelessly. In the cemetery, singing belligerents at the tomb of the mastermind of the assassination of Monsignor Romero and the father of the "death squads," as noted by the Truth Commission, or putting up a statue to him at the headquarters of his party. Yet today, they are no longer content with private worship. With no shame, they stepped out of the shadows to baptize public spaces with the name of Roberto D'Aubuisson Arrieta. Not satisfied with that, in the Legislative Assembly they sought—this past Thursday, February 15—to declare as "highly distinguished sons" ("*hijos meritisimos*") of El Salvador the greatest death squad leader and one who, for years, presided over the massacres such as those at El Mozote and El Sumpul. Neither D'Aubuisson nor José Napoleón Duarte merit this distinction, because their names are stained with the blood of a people whose martyrs are the ones who should be enshrined as the best of our long-suffering Homeland.

Press release, IDHUCA, *Por la dignidad de las víctimas, no a los criminales impunes*, Feb. 19, 2007, <http://www.uca.edu.sv/publica/idhuca/comunicado.pdf>.

<sup>57</sup> Instituto de Derechos Humanos de la Universidad Centroamericana "José Simeón Cañas" (IDHUCA), *Cuidado con ese militar que lleva dentro (I)*, 28 PROCESO 10, 11 (May 23, 2007).

## F. Focus on Populations in Vulnerable Situations (Sixth Principle)

Historically, the Salvadoran State has not promoted policies aimed at respecting the rights of indigenous peoples. To the contrary, in the twentieth century there were two genocides that left thousands of victims. Prior to the first, which occurred in 1932, indigenous communities were stripped of their communal lands in order to introduce the coffee crop and to give way to the oligarchy that came to dominate political, economic, and social life for most of that century. No official figure has been established; however estimates indicate that 20,000 to 30,000 were killed in suppressing the uprising of a population anguished by the effects of the global economic crisis.

Those events in January 1932 set the precedent for a type of conduct that was to become the custom: the proclamation of amnesties.

On July 11, 1932, the National Legislative Assembly issued a decree granting:

broad and unconditional amnesty for the officials, authorities, employees, agents of authority, and any other civilian or military person who may somehow appear to be responsible for breaking laws of any nature, in order to reestablish order in the country and repress, prosecute, punish, and capture the persons accused of the crime of rebellion mentioned above.<sup>58</sup>

This is how the perpetrators “resolved” the matter. The victims, on the other hand, hid, blended in—putting away their traditional garb and dressing as *ladinos*<sup>59</sup>—or fled, mostly to Honduras, where they were then persecuted and harassed in the context of the economic, political, and military conflict between El Salvador and Honduras in the late 1960s. Those who returned and joined the survivors were then trapped by the growing wave of political violence and war, which razed entire communities from 1972 to 1992.

According to data from the Truth Commission, the vast majority of the victims lived in the countryside. Based on the direct sources, it was established that rural victims accounted for 57.7% of the total; according to the indirect sources, they were 40%. The Truth Commission documented the assassination of sixteen people on February 22, 1983, but considered them as part of extrajudicial executions, and not of massacres in rural zones. Several of the victims belonged to the Las Hojas cooperative, which was affiliated with the Asociación Nacional Indígena Salvadoreña (ANIS).<sup>60</sup>

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<sup>58</sup> National Legislative Assembly of the Republic of El Salvador. Decree 121, July 11, 1932.

<sup>59</sup> According to the dictionary of the Real Academia Española, “*ladino*” is a person of mixed European and indigenous blood who speaks only Spanish.

<sup>60</sup> See Truth Commission Report, *supra* note 30, at 224-29.

Once again, in this case the perpetrators were amnestied by application of the Legislative Decree approved on October 28, 1987, and the dignity of the victims was once again trampled. A complaint was filed with the Inter-American Commission on Human Rights (IACHR) on January 27, 1989. On September 24, 1992, the IACHR issued its report on the merits,<sup>61</sup> identifying the Salvadoran State as a violator of human rights, and recommending that the facts be investigated, that the persons responsible be punished, and that reparation be made to the victims; it also asked the State to take measures to prevent the repetition of similar acts. The Supreme Court of Justice used the 1987 amnesty as a “legal” reason for not following through on these recommendations.

As regards women, children, adolescents, and seniors, the Truth Commission report does not include data, analysis, or significant recommendations stemming from their vulnerable status. In the case of El Mozote, we can look to the forensic study done at a property of approximately 31.5 m<sup>2</sup> known as “El Convento” (“The Convent”).

Among the non-combatant civilian population massacred, the forensic study identified:

the presence of 143 skeletons, including 136 children and adolescents and seven adults. The average age of the children was approximately six; there were women between ages 21 to 40, one of whom was in the third trimester of pregnancy, and a man approximately 50 years old. It is possible that there were more dead . . . . It is possible that several children of a very young age were totally cremated and that other children were not counted because of the considerable bodily fragmentation. Approximately 117 victims were children under 12 years of age.<sup>62</sup>

According to the annexes to the report, based on the direct witness statements it was established that 27.5% of all victims were female and 72.5% male. Based on the indirect sources, females accounted for 24.2% and males 74.1%. In summary, one of every four victims was female. As for ages, both sources indicate that the majority of those affected by the violence were young persons ages 15 and up.<sup>63</sup>

A study by the IDHUCA established statistics for children and adolescents:

more than 16% of all the victims on record . . . . The age bracket of most child victims is 12 to 17 years: 60% (2,424) of all children that

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<sup>61</sup> Annual Report of the Inter-American Commission on Human Rights 1992-1993, Report No. 26/92, Case 10,287, El Salvador, Sept. 24, 1992, OEA/Ser.L/V/II.83, Doc. 14 (Mar. 12, 1993).

<sup>62</sup> Clyde Snow et al., *El Mozote: Informe de la investigación forense*, Annex to the Truth Commission Report, *supra* note 30.

<sup>63</sup> See Truth Commission, “Análisis estadístico de los testimonios recibidos por la Comisión de la Verdad,” xx *Annexes tome I, Report of the Truth Commission for El Salvador, United Nations*, San Salvador-New York, 1993.

were affected by the violence (4,040). These do not include the cases of persons under 18 years of age who were indirectly affected by the loss of one of their parents, greater impoverishment, sadness, hunger, disease, or exile, but rather these are persons whose human rights were violated directly. Like a large number of adults, they too suffered imprisonment and were subjected to practices of torture and other cruel and inhumane treatment. . . . In that context, one should note the alarming number of minors who are victims of the most grave human rights violations, such as execution and forced disappearance. In different ways 1,449 children were deprived of their lives, while another 719 were detained and subsequently disappeared by their captors.<sup>64</sup>

Combining these two patterns of violence—homicides and disappearances—there were 2,168 attacks on life (37.85%). In all, 5,727 human rights violations were committed against more than 4,000 children and adolescents, according to that study.

It is said that there were “scant” cases of rape and that they occurred “almost exclusively in the first four years” of the 1980s.<sup>65</sup> Neither the victims of this modality of torture nor the victims of other grave human rights violations were given a special place in the “transition.”

### **G. Institutional Reform and Effective Governance (Seventh Principle)**

One of the main initiatives that resulted from the accords between the Salvadoran government and the FMLN was the fundamental transformation of the Armed Forces of El Salvador, with a view to achieving the swift demilitarization of society. In this respect, the Truth Commission recommended

1. Profound and swift changes marshaled by a special legislative commission, with a major emphasis on bringing the military under the control of the civilian authorities. Promotions and command assignments should be subject to democratic control, as well as the budget. Special attention must be paid to the new doctrine of the institution, its new educational system, and the constant professionalization of its members.
2. Comprehensive review of military rules and regulations to bring them in line with constitutional reforms and respect for human rights.
3. Creation of a simple and expeditious mechanism to resolve the cases of subordinates who refuse to carry out an illegal order; and making it clear that “due obedience” does not exonerate one who carries out an unlawful order.

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<sup>64</sup> Instituto de Derechos Humanos de la Universidad Centroamericana “José Simeón Cañas” (IDHUCA), *Buscando entre las cenizas*, 589 REVISTA ESTUDIOS CENTROAMERICANOS 1126 (Nov.-Dec. 1997).

<sup>65</sup> Truth Commission Report, *supra* note 30, at 28.

4. Internal punishment for those who commit human rights violations, including their discharge with no possibility of readmission, without such action releasing them from criminal liability.
5. Military studies should include in-depth research on human rights. To accomplish this, civilian professors should be included.
6. The selection of military officers to pursue studies abroad should take into consideration democratic attitudes and respect for human rights.
7. Any relationship between members of the military and paramilitary apparatuses and illegal armed groups must to be definitively severed.

The foregoing review was carried out formally. Changes were made to the Constitution and within the Armed Forces of El Salvador. Nonetheless, there are indicia of regression at the moment of implementing the new provisions. IDHUCA has accompanied officers in the promotion of human rights within and outside the institution and has been able to verify the gap between what is on paper and reality. IDHUCA has also filed criminal complaints on behalf of particular victims, while facing resistance from military superiors.<sup>66</sup> Within the military system,<sup>67</sup> which includes a military judge and the “*tribunal de honor*,” there is a lack of respect for due process and the appointment of independent judges and prosecutors.<sup>68</sup>

The participation of members of the military in public security tasks has been a constant for fifteen years; this is despite the fact that the reform of the military doctrinal principles stripped it of that authority and defined its involvement in security tasks as purely exceptional. The reforms have not been implemented in practice. From the Cristiani administration to today with the Funes administration,

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<sup>66</sup> See Order of the Inter-American Court of Human Rights, Matter of Adrián Meléndez-Quijano et al., *Provisional Measures with regard to El Salvador in favor of Adrián Meléndez-Quijano et al.* (May 12, 2007), available at [http://www.corteidh.or.cr/docs/medidas/melendez\\_se\\_02\\_ing.pdf](http://www.corteidh.or.cr/docs/medidas/melendez_se_02_ing.pdf); IDHUCA, *El caso del cadete Peña Carmona*, <http://www.uca.edu.sv/publica/idhuca/cadete.html>.

<sup>67</sup> Article 216 of the Constitution establishes military jurisdiction, indicating that in order to judge purely military offenses and breaches there will be special procedures and courts in keeping with the law. The military jurisdiction, as an exceptional regime, will be limited to hearing purely military-related offenses and breaches, understanding that to mean those which affect a legal interest that is strictly military . . . . Active-duty members of the Armed Forces enjoy military jurisdiction for purely military offenses and breaches.

<sup>68</sup> It is worrisome that for naming military judges the El Salvador Military Justice Code of El Salvador, approved in 1964 and amended in 1992, gives preference in appointments of military investigative judges to active officers subordinated to the top-level commands (Article 195); Also concerning is that the Ministry of National Defense sends the National Judicial Council the three-person slate of aspirants to military judge of first instance to be appointed by the Supreme Court of Justice (Article 200). This same officer of the Executive branch may propose the appointment, removal, or replacement of military prosecutors to the Public Ministry (Article 216). Finally, to appoint a public defender, priority is given to active-duty military officers of equal or greater rank than the accused; this makes it difficult to get representation by an independent civilian attorney with a broader grasp of the law (Article 228). See Military Justice Code (*Código de Justicia Militar*), Decree No. 562, Diario Oficial No. 97, May 29, 1964.



the Armed Forces of El Salvador have almost constantly patrolled both rural and urban areas with the National Civilian Police. With the latter government—that of the “center-left”—the numbers of rank-and-file<sup>69</sup> increased substantially. Their functions were extended beyond deterrence, incorporating tasks such as searches. This is notwithstanding the fact that the FMLN had questioned the use of the military for such tasks when it was the leading opposition party.

In addition to the reform of its doctrinal principles, the military as a whole was reduced in size, including eliminating the elite battalions and the paramilitary entities. Moreover, forced recruitment was ended, and the education system was reformed. The National Intelligence Agency (*Dirección Nacional de Inteligencia* - DNI) was dismantled, and the Armed Forces of El Salvador were subordinated to civilian authorities. The numerical reduction and elimination of forced recruitment has been implemented; however, the other changes have been not been put into practice.

The Armed Forces continue undertaking military intelligence activities, despite the shutting down of the DNI and the creation of the State Intelligence Agency (*Organismo de Inteligencia del Estado* - OIE) under the executive branch. It must be pointed out that from its creation in 1992 until 1999 the OIE was directed by Mauricio Eduardo Sandoval Avilés, accused by the UCA as the instigator of the execution of the Jesuit priests, Elba Ramos, and her daughter Celina, and also of covering up the participants. Contrary to what is called for in the Chapultepec Agreement,<sup>70</sup> the activity of the OIE has been dark and closed to legislative supervision.

The case of Lieutenant Coronel Adrián Meléndez Quijano is a clear example of the lack of subordination to the civilian authority and of the predominant view of human rights organizations among the military.<sup>71</sup> As regards the appointment of a person outside the institution as Minister of National Defense, a possibility established in the Chapultepec Agreement, it has not happened either in the ARENA administrations or in the current FMLN administration.

Examination of the disqualifications and administrative punishments imposed on the perpetrators has highlighted the two ill-fated vetting processes:

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<sup>69</sup> By presidential order on November 6, 2009, 2500 members of the military joined the 1500 who were already conducting joint patrols with the National Civil Police.

<sup>70</sup> “[T]he doctrine of the OIE will reflect democratic principles; the notion of state intelligence as a function of the State for the common good, independent of any political, ideological, social status consideration or any other discrimination; and strict respect for human rights.” United Nations, “Acuerdos de El Salvador: en el camino de la paz”, p. 56

<sup>71</sup> See *supra* note 67. The High Command of the Armed Forces of El Salvador and the principal actors in the Ministry of National Defense since the Flores administration, (particularly General Otto Romero Herrera, who held the post from June 2004 to December 2007), were in contempt of the judgment on an *amparo* action resolved by the Constitutional Chamber of the Supreme Court in favor of Meléndez Quijano. Romero Herrera directed intimidating words at IDHUCA; the director and attorneys of that Institute, who have accompanied the defense of the lieutenant colonel’s rights, reported several threats they received by telephone to the Office of Public Prosecutor.

that of the Truth Commission and that of the ad hoc Commission. Other elements reinforced doubts as to the depth of the changes in the Armed Forces of El Salvador, including the lack of cooperation to investigate human rights violations. Had a different stance been taken, perhaps the fate of the many who were disappeared before and during the war could have been determined. Open or veiled support for officers investigated and prosecuted outside the country has also been a bad sign.

In the area of public security, two essential agreements were reached: (1) to dissolve the bodies that since before the war had become instruments of political persecution and repression against the real or imaginary opposition, and (2) to create the National Civil Police (PNC). Before ending the international verification process in El Salvador, Annan considered that all the commitments had been carried out;<sup>72</sup> he cited only one caveat—the practice of having police personnel living in barracks, which, according to then UN Secretary General, contradicted what was agreed upon by the parties. One of the first changes in the Funes administration was precisely to suspend that practice. Nonetheless, upon announcing the increase in the number of military forces on the ground in public security tasks in early November 2009, the Legislative Assembly approved a decree with certain provisions typical of having the police forces in military barracks. This was done under the “regime of availability” or “*régimen de disponibilidad*” set forth in that decree.

The PNC is questioned especially for mistreating youth who are stigmatized due to their economic and social conditions, the areas where they live, and for their appearance, associating them almost automatically with members of gangs or *maras*. In addition, the existence of “social cleansing” groups has been denounced within the National Police, but without solid indicia; that doesn’t mean there has not been individual police participation in this type of criminal action.<sup>73</sup> Also noted is the participation of police in other forms of organized crime, especially drug trafficking. This includes, among others, one former general director of the PNC.<sup>74</sup>

This appears to be related, among other ingredients, to the difficult conditions in which the low levels of the institution perform their work, and the high levels of violence and insecurity that prevail in El Salvador. Yet above all it responds to poor political leadership, based on the idea of a “party” police, or, in the best of cases, a police that answers to the particular administration in power, and not to the State. One particularly nefarious result is the deficient and discretionary internal disciplinary controls that favor arbitrariness, especially among high-level officers, and even the confrontation of groups within the institution.

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<sup>72</sup> Annan, *supra* note 27, at 4.

<sup>73</sup> See Raúl Gutiérrez, *El regreso de los grupos de exterminio*, IPS, Aug. 31, 2007, <http://ipsnoticias.net/nota.asp?idnews=42030>.

<sup>74</sup> See Equipo Nación, *PNC investiga ex director por vínculo con pandillero*, LA PRENSA GRÁFICA, Oct. 21, 2009, <http://www.laprensagrafica.com/el-salvador/judicial/67562-pnc-investiga-ex-director-por-vinculo-con-pandillero.html>.

In addition, obstacles persist in terms of increasing the quality of the investigations. This strengthens impunity, which is more selective than absolute: impunity depends on who the victim is and who the victimizer is, their economic and social status, as well as their political power or relationship with political power. These factors determine how widespread impunity is, always disparately affecting the poor. Institutional reforms could not be avoided, but they were insufficient; beyond their decree, they must be made a reality in order to meet the expectations they generated. Those serious structural deficiencies have limited the ability of the PNC to successfully take on the high levels of crime and have increased distrust of the population towards the institution. This generates a widespread sense of helplessness, and an lauded, larger, and dangerous military protagonism.<sup>75</sup>

On the protection of human rights, the Truth Commission recommended strengthening the institution of the Ombudsperson, beginning by taking stock of its priorities and its presence in the national territory. For years there have been fourteen offices: the central office and thirteen department-level ones. Recently, four local offices were established. With this, it is possible to assert that the recommendation regarding national deployment was followed. Nonetheless, that and other efforts have been undermined to the extent that the Office of the Human Rights Ombudsperson (*Procuraduría para la Defensa de los Derechos Humanos* - PDDH) is victim of an ever-precarious budget, the election of inappropriate principals, and the failure of other authorities to heed its recommendations. The negative consequences are its low institutional profile, limited impact, and low credibility vis-à-vis the population.

The Truth Commission also proposed the need for the Office of the Ombudsperson to make frequent use of its authority to visit any site or facility in the country, especially detention centers. It has done this; the institution has had an acceptable level of communication with the prison authorities. Except for two

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<sup>75</sup> See the op-ed by former Minister of National Defense General Otto Romero Orellana, *Organicémoslos contra las maras*, EL SALVADOR.COM, Oct. 27, 2009, available at [http://www.elsalvador.com/mwedh/nota/nota\\_opinion.asp?idCat=6342&idArt=4192458](http://www.elsalvador.com/mwedh/nota/nota_opinion.asp?idCat=6342&idArt=4192458).

Therefore we dare affirm that what must be explained to society is not that an effort is being made to use the Armed Forces in public security tasks, because that is only part of the solution . . . it should be made clear to our people that to resolve the problem of structural insecurity that we experience, a system of local and community security must be constructed anew, one that ties in with the macro-level of security that we already have, to which end the first step is necessarily to organize and control the country's entire population, beginning with the places with the most conflict, requiring not only the use of the Armed Forces, but of all of society, which, led by its Armed Forces, may be organized into *barrios*, *colonias*, and *cantones*, such that there are no spaces or gaps for committing a wrongdoing. The function or task is complex but the Armed Forces can do it with the collaboration of the Government and Salvadoran society.

worrisome incidents,<sup>76</sup> it has visited locations and intervened in situations without any major problem.

It also proposed to make *amparo* and *habeas corpus* remedies more effective by expanding knowledge of them among the justices of the peace. However, this proposal was not carried out, as jurisdiction over them was reserved for courts at the appellate level. It should be clear that neither these remedies nor the guarantees of due process could be annulled under any circumstance. Nonetheless, Article 29 of the Constitution on the state of emergency regime was maintained; it allows for not informing a detained person of his or her rights—immediately and comprehensively—and the reasons of his or her arrest. Moreover, it is still possible to set aside the guarantee against self-incrimination and the right to legal counsel in all judicial and extrajudicial proceedings. Finally, once an emergency regime is decreed, detentions can exceed the seventy-two-hour limit, but are not to exceed fifteen days.

In addition, human rights were to be accorded constitutional status, including those recognized only in international instruments, yet this was not done. Another important recommendation that was not fully implemented was to ratify international human rights treaties. Among the important documents related to fighting impunity as a guarantee of non-repetition, El Salvador is not a party to the Rome Statute, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, or the Inter-American Convention on Forced Disappearance of Persons. El Salvador accepted the contentious jurisdiction of the Inter-American Court of Human Rights on June 6, 1995, but with a reservation for “the legal acts or events whose performance or occurrence commenced before . . . the established deadline . . . [but which] produce effects after such date . . . since their main characteristic is that they commenced before [the date of acceptance].”<sup>77</sup>

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<sup>76</sup> See Office of the Human Rights Ombudsperson, *Informe especial de la señora Procuradora para la Defensa de los Derechos Humanos, doctora Beatrice Alamanni de Carrillo, presentado al Comité de Derechos Económicos, Sociales y Culturales de la ONU sobre la aplicación del Pacto Internacional de Derechos Económicos, Sociales y Culturales en El Salvador (1995-2005)*, Special Report by the Human Rights Ombudsperson, Beatrice Alamanni de Carrillo, presented to the Committee on Economic, Social and Cultural Rights on the application of the International Covenant on Economic, Social and Cultural Rights in El Salvador, (Nov. 8, 2005), available at <http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/pddh-elsalvador.pdf>. It highlighted the attack on April 28, 2005:

against two lawyers from the Office of the Ombudsperson and their driver, when verifying the arrest and deportation of an Ecuadoran citizen who served as adviser to the social security institute doctors’ union, *Sindicato de Médicos Trabajadores del Instituto Salvadoreño del Seguro Social* (SIMETRISSE), which violated the most basic due process provisions, occurred with excessive use of force and police aggression, and violated rights related to the protection of the family, as the professional in question is the husband of a Salvadoran citizen and the father of a minor who is also Salvadoran. On that occasion, even the President of the Republic expressed direct responsibility in said procedure.

*Id.* para. 44.

<sup>77</sup> Case of *García-Prieto et al. v. El Salvador*, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 188, section IV.8 (Nov. 24, 2008).

## II. Nefarious Past, Dubious Present, Risky Future

In January 1978, the IACHR made an observation visit to El Salvador at the invitation of the government. General Carlos Humberto Romero, the last president of El Salvador to be overthrown in a coup d'état, decided to invite the Commission "in order to make its valuable contribution to the promotion of human rights."<sup>78</sup> The result of that experience was a report approved in November of that year, in which serious accusations were made against the governmental authorities concerning the grave disrespect for the right to life, right to humane treatment, right to physical liberty, and right to a trial and due process, among others.

After that description, the IACHR focused its attention on the deterioration of economic and cultural rights. Chapter XI of the report concluded with the following words: "the preceding data shows more clearly the economic and social imbalance that seriously affects the Salvadoran society, and, in particular, the immense majority of the population, with consequent negative repercussions in the . . . observance of human rights."<sup>79</sup>

What is the current situation in El Salvador, more than three decades after this report? Below are some illustrative data in this respect, obtained from the Multiple Purpose Household Survey for 2007 and 2008, prepared by the General Bureau of Statistics and Censuses, the most recent statistics from this body.

**Table 1: Employment situation**

Category	2007	2008
Fully employed	65.8%	62.4%
Underemployed	28.4%	32.1%
Unemployed	5.8%	5.5%
Persons with employment problems	34.2%	37.6%

While the percentage of persons unemployed dropped three-tenths, there is an increase of more than three percent in the level of underemployment, such that 37.6% of the population faces the difficulties of unemployment or underemployment.

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<sup>78</sup> Inter-American Commission on Human Rights, Report on the Situation of Human Rights in El Salvador, OEA/Ser.L/V/II.46, Doc. 23 rev. 1, at 3 (Nov. 17, 1978).

<sup>79</sup> *Id.* at 150.

**Table 2: Population employed ages 5 to 17 years (Child employment)**

Category	2007	2008
Total	172,588	190,525
Boys	124,080	136,803
Girls	48,508	53,722

The data are particularly relevant, insofar as they reveal an increase from one year to the next in the number of boys and girls who work in El Salvador. Many of the forms of work done by children in El Salvador constitute breaches of Convention 182 of the International Labor Organization.<sup>80</sup>

**Table 3: Percentage of households in poverty**

Category	2007	2008
Total poverty	34.6%	40.0%
Extreme poverty	10.8%	12.4%
Relative poverty	23.8%	27.6%

The 5.4 percent increase in the number of Salvadoran households in total poverty reveals a dramatic worsening in the quality of life. From 2000 to 2001, the percentage of poverty held steady at 38.8%, according to the Multiple Purpose Household Survey 2000-2001. This means that four of every ten households do not adequately meet their most basic needs. The decline has been brutal. Indeed, that figure of almost 40% means that El Salvador is at the level of development of the early 1990s, i.e. the end of the war.

**Table 4: Situation of poverty by geographic area**

Category	2007	2008
Total poverty - urban	29.8%	35.7%
Extreme poverty - urban	7.9%	10.0%
Relative poverty - urban	21.9%	25.7%
Total poverty - rural	43.8%	49.0%
Extreme poverty - rural	16.3%	17.5%
Relative poverty - rural	27.5%	31.5%

<sup>80</sup> Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor (ILO No. 182), 2133 U.N.T.S.161 entered into force Nov. 19, 2000.

From this perspective, the scenario becomes even worse. Rural poverty is greater in almost all cases; yet both, from one year to the next, shot upwards. Efforts have been made to address that scenario with official programs like Red Solidaria (Solidarity Network) and Comunidades Solidarias (Solidarity Communities);<sup>81</sup>. Judging by the results, either they have not been effective, or the mechanisms that generate poverty—exclusion, marginality, concentration of wealth—are more powerful than the efforts to reduce it.

Many problems stem from the situation of poverty. Of these, this encumbers progress to ward attaining the Millennium Goals; disrespect for basic human rights such as the right to food in the case of extreme poverty, and to education, health, clothing, and housing, in the case of relative poverty. It is clear that El Salvador loses in competitiveness by falling back in the indicators of human development.

According to the statistics and projections of the Central Reserve Bank (*Banco Central de Reserva - BCR*), the country's economic outlook is hardly encouraging. With negative growth of gross domestic product (GDP) of 1.5% for 2009, the problems proliferate. According to the Minister of Economy of the Funes administration, Héctor Dada Hirezi, the year ended with a decline of 3.3%. Tax revenues will thus fall, in a context in which resources are urgently needed to fight poverty. Although the BCR estimated that exports would grow 7%, the first semester of 2009 presented a 16% drop. This performance reinforces the declining GDP and negatively impacts the level of employment, especially in industry, commerce, and, to a lesser extent, agriculture. In addition, family remittances dropped 10% in 2009, i.e. some US\$ 350 million. This makes the situation even more critical, insofar as the national economy largely depends on those funds.<sup>82</sup>

The conclusions of the IACHR's 1978 report on El Salvador referred to "the existence of a tense atmosphere of polarization,"<sup>83</sup> the main causes of which included the economic and social conditions of the poor majority. These conditions explained "to a considerable extent serious violations of human rights"<sup>84</sup> in the civil and political area, but did not justify them. Poor living conditions and violations of rights were part of a perverse state of affairs, which was discriminatory and exclusionary for large portions of the population and favored a privileged few, leading to the outbreak of war in El Salvador.

After the end of the war, one of the great and undeniable achievements was ending the state practices of grave, politically motivated human rights violations.

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<sup>81</sup> The first of these programs was given impetus during the Saca administration and included the hundred poorest municipalities in the country's rural zones; the second was initiated as of the Funes administration and also encompassed municipalities in urban areas.

<sup>82</sup> Remittances constitute approximately 18% of GDP. See James Painter, *US woes slow migrant remittances*, BBC NEWS, Mar. 12, 2008, <http://news.bbc.co.uk/2/hi/americas/7292216.stm>.

<sup>83</sup> IACHR Report on the Situation of Human Rights in El Salvador, *supra* note 79, at 152.

<sup>84</sup> *Id.*

Since the ceasefire, the annihilation of persons or organizations considered opponents through executions and forced disappearances, the use of torture to discourage political participation or to obtain information in that context, and the impossibility of reporting abuses of human dignity or any other type of abuse as part of an official policy have not occurred in El Salvador, with a few exceptions.

Having contained such practices has been good for the country; but if it is not made clear that they cannot be used ever again, not even on an exceptional basis, whatever the reasons invoked, history may repeat itself.

The conditions are in place for El Salvador to suffer another tragedy. Homicidal violence is on the rise once again and may climb back to its most critical levels since the armed conflict. In February 1998 the National Council on Public Security published an assessment of the institutions in the public security sector in which it expressed its particular concern over the “very high levels of intentional homicides, which have remained at an average level of 7,211 per year from 1995 to 1997.”<sup>85</sup> Even though ten years later that annual average fell to approximately 3,000, the number of intentional killings has begun to climb once again, taking a toll of 4,365 victims in 2009, which represents more than 75 persons killed per 100,000.<sup>86</sup>

In addition to poverty and insecurity in and of themselves, there are other related factors to consider: the lack of opportunities for comprehensive human development; an armed society; violence against women; expressions of organized crime engaged in trafficking drugs, persons, vehicles, and arms, among other things; selective impunity; the criminal actions of the *maras* and other gangs; a prison system that is collapsed in every sense of the word; political parties—which are divided publicly or internally disputed—the leadership of which buys others’ wills when in power and in the opposition negotiates favors; corruption, until a short time ago a “well-known secret” that was not denounced, is now denounced but not fought. And to all of this one can add the temptation to experiment with a coup d’état, such as the one suffered by neighboring Honduras on June 28, 2009.

## **Conclusion: Transition to Peace with Justice**

President Funes has insisted that his is a government of national unity. Yet, can one speak of a united society if the victims have not been addressed? Is it possible to expect victims to consider themselves part of a national project if historically they have not been so economically, socially, politically, or legally?

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<sup>85</sup> NATIONAL COUNCIL ON PUBLIC SECURITY, *DIAGNÓSTICO DE LAS INSTITUCIONES DEL RAMO DE SEGURIDAD PÚBLICA I* (Feb. 1998).

<sup>86</sup> See *La violencia amenaza a algunas democracias de Centroamérica, alerta la WOLA*, SOITU, Sept. 1, 2009, [http://www.soitu.es/soitu/2009/09/01/info/1251760718\\_918156.html](http://www.soitu.es/soitu/2009/09/01/info/1251760718_918156.html); Rossy Tejada & Ernesto Pérez, *Año cierra con 4365 homicidios*, LA PRENSA GRÁFICA, Jan 2, 2010, <http://www.laprensagrafica.com/el-salvador/social/83167-ano-cierra-con.html>.



Therefore, it is necessary to keep a close eye on what happens during the administration led by the FMLN and President Funes. So far, there are more shadows than light in terms of ensuring victims' rights and combating impunity. Unfortunate statements by the President regarding amnesty and his perspective on the victims have already been cited. The official representatives in the hearing responsible for following up on the recommendations of the IACHR in the Romero case stated, on November 6, 2009, that the government recognized the binding nature of those recommendations. They noted however that "the investigation of the crime and the derogation of the Amnesty Law are the competence of the Office of the Public Prosecutor and the Legislative Assembly."<sup>87</sup> The entirety of the IACHR's recommendations included investigating the crime and repealing the Amnesty Law, along with punishing those responsible for the assassination and making comprehensive reparation to the victims. Yet at the hearing the State only undertook to build a plaza and produce a video in tribute to the martyred archbishop.

In the context of the twentieth anniversary of the execution of the six Jesuit priests, Julia Elba Ramos, and her daughter Celina, President Funes bestowed on the next-of-kin and representatives of the priests the highest national honor. And they were well received. In the UCA massacre case there is an opportunity, unlike the killing of Monsignor Romero, to open the doors to justice for all victims in El Salvador.

With scant material resources yet creative and generous capacities, the victims and the organizations that accompany them have done quite a bit to overcome impunity. And this work makes them more dignified because through their demands they keep alive the cause of their loved ones and produce the hope of advances in the much-hindered peace process agreed upon in Geneva, on April 4, 1990.<sup>88</sup> This process did not move forward significantly, as the victims were not given due consideration. Without vindicating the victims' dignity, there can be no full respect for human rights, democratization of the country, or "reunification" of society.

The victims have worked arduously to keep the historical memory alive by building monuments and mausoleums in symbolic sites; the best known is in the main park in San Salvador. They have organized artistic and cultural festivals, gatherings of committees, and international events; they have produced publications, programs, and debates in the media—mostly alternative media, and have been persistent in presenting their claims in international forums. Yet their economic and social conditions, in the context of an adverse political and

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<sup>87</sup> See Ricardo Vaquerano, *Tibio compromiso de Gobierno ante OEA por asesinato de monseñor Romero*, EL FARO.NET, Nov. 7, 2009, [http://archivo.elfaro.net/secciones/Noticias/20091102/noticias8\\_20091102.asp](http://archivo.elfaro.net/secciones/Noticias/20091102/noticias8_20091102.asp).

<sup>88</sup> See *supra* note 6.

institutional scenario, have kept them from having a greater impact. Hence the great question: will the change in government be as profound as is necessary in order to leave behind the prevailing state of affairs after the war? Beyond bestowing honors and giving explanations, beyond acknowledging and repenting, will the new government have the political will and valor to seek the transition to peace with justice?

The agenda is clear. The country needs development that is inclusive economically, socially, politically, and legally, as a fundamental guarantee of non-repetition. The poor majority must be the protagonists of that change announced in the official discourse. Accordingly, “the principle of according priority to common and human interests over and above private interests should be implemented.”<sup>89</sup>

To that end, the “organs of the State” should serve as such, and not as they commonly have, generally serving privileged minority sectors. The head of State should carry out the State’s international commitments in the area of human rights, before both the universal and the inter-American systems. In this regard, he should also consider the document submitted to the universal periodic review mechanism of the UN Human Rights Council in September 2009 by the International Center for Transitional Justice (ICTJ) and IDHUCA.<sup>90</sup>

El Salvador today is not the same country that drew the world’s attention due to the atrocities before and during the war, in light of the dialogue and negotiation used to bring it to an end and the agreements adopted to found a democratic society respectful of human rights and unified around the “common good.” Consequently, it does not have the same massive support it received to achieve peace, although this continues to be an unfinished agenda. It is rather a country that faces many dangers and whose timid advances in these areas are at risk.

Yet it has two opportunities of which its leaders should take full advantage. The first is to investigate the most serious crimes of yesterday and today and to punish those responsible, regardless of their economic, social, or political status. This could help reduce the levels of insecurity and poverty and would set a precedent to discourage those who might seek once again to capture or manipulate the institutions to their own ends. Second, to seek and find among the poor majority the strength and valor needed to fight impunity in all its dimensions, i.e. legal, moral, and historical.

“All these efforts will be fruitful to the extent that they are situated in the context of peace with justice in the national territory, which appears unfortunately to be a utopia until there is a profound transformation of society.” Those were the words with which the founder of IDHUCA, Jesuit priest Segundo Montes,

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<sup>89</sup> Ellacuría, *supra* note 4, at 595.

<sup>90</sup> See ICTJ & IDHUCA, *Presentación al Mecanismo de Revisión Universal Consejo de Derechos Humanos de Naciones Unidas*, Sept. 8, 2009, available at [http://www.ictj.org/static/Publications/UPR\\_ElSalvador\\_Spanish.pdf](http://www.ictj.org/static/Publications/UPR_ElSalvador_Spanish.pdf).

concluded a research project that he coordinated and published in February 1988.<sup>91</sup> He titled this project *La resistencia no violenta ante los regimenes salvadoreños que han utilizado el terror institucionalizado en el período 1972-1987* (Non-violent Resistance to the Salvadoran Regimes that Have Used Institutionalized Terror During the Period, 1972-1987). Almost two years after the publication of this research project, Father Segundo Montes was executed. Yet Montes' visionary and relevant words continue to set the bar for those persons and social organizations seeking precisely that: peace with justice. The current stage of Salvadoran society poses the great challenge for beginning to achieve that. This requires pooling efforts and multiplying results, so as to defeat those who attempt to divide society and diminish its force.

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<sup>91</sup> UNIVERSIDAD CENTROAMERICANA "JOSÉ SIMEÓN CAÑAS," *LA RESISTENCIA NO VIOLENTA ANTE LOS REGÍMENES SALVADOREÑOS QUE HAN UTILIZADO EL TERROR INSTITUCIONALIZADO EN EL PERÍODO 1972-1987*, at 186 (1988).

## Chapter 16

# Afghanistan and the Challenge of Non-repetition of Violence

*Patricia Gossman*

It has become something of a cliché to describe Afghanistan as standing at the precipice, poised between the possibility for a genuine transition to peace and the prospect of a return to all-out civil war. The approach of spring in Afghanistan typically signals the onset of a new fighting season. In 2010, this latest round of offensives has been accompanied by negotiations, both public and clandestine, among the belligerent parties as both sides flirt with the idea of making a deal. Talk of reconciliation, or at least “reintegration,” is in the air while NATO and the Taliban attempt to recoup political capital through battlefield gains. Both sides know that they have limited time; pressure is growing inside Afghanistan and in Europe and the United States for an end to the international military engagement. The United States and its North Atlantic Treaty Organization (NATO) allies are now weighing the benefits of negotiating with elements of the Taliban while expanding their military presence in the field and deploying tribal militias to carry the fight forward in the most embattled provinces. Well aware of the international forces’ timetable, the Taliban are equally conscious of the fact that any attempt on their part to take power outright would strengthen international resolve. All of this suggests that Afghanistan is indeed at a crossroads. Whether it will lead to a genuine transition to peace, or more war, remains to be seen.

A conference was held in London in January 2010 under the auspices of the United Kingdom government to mark this crossroads and persuade those involved with both the military and reconstruction effort that “there was a plan and an end in sight.”<sup>1</sup> However, no new political plans came to light; instead, military considerations “still dominate[d] the discussion and the agenda . . . [was] set by domestic issues” in the troop-donating countries.<sup>2</sup> Indeed, since the Taliban resurgence emerged as a potent threat, a military approach has outpaced the development of a coherent political strategy. The major national and international actors involved in trying to stabilize Afghanistan acknowledge that there is a serious governance deficit in the country but cannot agree on the way forward. The debate

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<sup>1</sup> Martine Van Bijlert, *London Conference (1): Calling for Afghan Ownership and Afghan Leadership*, AFGHAN ANALYSTS NETWORK, Feb. 1, 2010, <http://aan-afghanistan.com/index.asp?id=598>.

<sup>2</sup> Thomas Ruttig, *Are We Afghanistan-Driven in London?*, AFGHAN ANALYSTS NETWORK, Feb. 1, 2010, <http://aan-afghanistan.com/index.asp?id=598>.

continues to center on Washington's latest approach: more troops, more pressure on the Taliban, and a hearts-and-minds strategy toward civilians, all combined with the rapid training of local forces. How committed the Afghan government is to this approach and why there is a lack of progress to date in achieving a reasonably competent and minimally corrupt Afghan security forces remain open questions. Nor has much detail been made public about the composition of the local forces and the quality of their training. The entire experiment has been given only eighteen months.

This chapter reflects on the challenges national and international actors have faced in trying to incorporate transitional justice measures in the context of ongoing conflict in Afghanistan, and how the major political and military actors have responded to calls for reckoning with the country's legacy of atrocities. Part I discusses governance issues in Afghanistan, and the inter-connectedness of the critical problems of corruption, impunity, and conflict. In Part II, I examine the nature of Afghanistan's transition, which has not yet reached to a state of post-conflict and does not resemble other examples of transitions based on negotiated peace agreements. Part III looks at the difficulties and risks that those involved in promoting transitional justice face in a situation that is not actually post-conflict. Part IV analyzes concerns of stability and security in the accommodationist approach.

## I. The Governance Deficit

The crisis provoked by President Karzai's blatant rigging of the August 2009 elections epitomizes the conundrum at the heart of the effort to foster stability in Afghanistan. Just after the country's inaptly named Independent Election Commission ruled that Hamid Karzai would be president for another four years, the UN Special Representative Kai Eide observed that it was time for all those involved in Afghanistan's transition to change course, noting that "We cannot do more of the same, there has to be a change of mindset."<sup>3</sup> His comments echo those of General Stanley McChrystal, the head of U.S. operations in Afghanistan, who has predicted failure and the risk of resumption of full-fledged conflict unless the United States, its allies, and the government of Afghanistan focus not only on defeating the insurgency but on improving the performance of the State.<sup>4</sup> The United States and its NATO partners realize that the success of any exit

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<sup>3</sup> Kitty Donaldson & Caroline Alexander, *Taliban Has Infiltrated Afghan Police, Ex-U.K. Soldier Says*, BLOOMBERG.COM, Nov. 5, 2009, <http://www.bloomberg.com/apps/news?pid=20601102&sid=alxTSUyZU0yM>.

<sup>4</sup> See, e.g., *US in Afghanistan failure warning*, BBC NEWS ONLINE, Sept. 21, 2009, <http://news.bbc.co.uk/2/hi/8266072.stm>.

strategy in Afghanistan depends at least minimally functional and sustainable government.

The McChrystal report<sup>5</sup> specifically links security and governance, and advocates for prioritizing accountability, noting that abuse of power and criminality within the government has exacerbated popular disenchantment with the Karzai administration and increased support for the Taliban. The report's recommendations have been adopted by the Obama administration as part of its new Afghanistan policy. However, detractors within the administration, most notably the U.S. Ambassador to Afghanistan Karl Eikenberry, opposed sending any more U.S. troops unless and until the Karzai administration takes genuine steps to curb corruption. Eikenberry's comments, which became public when a classified cable to the White House was leaked in early November 2009, included the observation that President Karzai "was not an adequate strategic partner," "continues to shun responsibility for any sovereign burden," and has a "record of inaction or grudging compliance" in dealing with corruption.<sup>6</sup> He also argued that there was no "political ruling class that provides an overarching national identity that transcends local affiliations and provides reliable partnership" in Afghanistan.<sup>7</sup> Other analysts have also argued that there can be no military solution; rather, defeating the insurgency and achieving a sustainable peace will depend on improvements in four key areas: more voice and autonomy to local communities; coordinated and coherent international aid; serious efforts to criminalize corruption and prosecute those involved; and measures to curb the might and influence of warlords and strongmen who have undermined security and engaged in criminal activity.<sup>8</sup> The next few months will be crucial for determining how successful the United States and its allies will be in gaining ground on the battlefield and achieving meaningful progress politically.

Karzai's post-election promise of reform notwithstanding, there is little indication that his administration will do anything to reduce corruption or rein in abusive political figures. His campaign strategy amounted to a wholesale embrace of those powerful figures who could deliver votes, among them a number of accused war criminals from the ranks of former mujahidin and militia commanders. Politically, Karzai cannot afford to risk losing their support, especially if the Obama administration goes ahead with announced plans to bypass

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<sup>5</sup> Gen. Stanley McChrystal, *Commander's Initial Assessment*, Aug. 30, 2009 [hereinafter "McChrystal report"], as cited online by the Washington Post, Sept. 21, 2009, [http://media.washingtonpost.com/wp-srv/politics/documents/Assessment\\_Redacted\\_092109.pdf](http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf).

<sup>6</sup> After the leak became public, Ambassador Eikenberry stated that his concerns had been addressed during the Obama administration's review of its policy toward Afghanistan, but he has not elaborated. See Eric Schmitt, *U.S. Envoy's Cables Show Worries on Afghan Plans*, N.Y. TIMES, Jan. 25, 2010, at A1.

<sup>7</sup> *Id.*

<sup>8</sup> ANDERS FANGE, AFGHANISTAN ANALYSTS NETWORK, *THE STATE OF THE AFGHAN STATE* (Jan. 2010), [http://aan-afghanistan.com/uploads/20100108AFaenge\\_paper\\_website\\_version.pdf](http://aan-afghanistan.com/uploads/20100108AFaenge_paper_website_version.pdf).

Karzai's network to the extent possible. That it will is not clear: this apparent shift in U.S. policy coincided with news reports that the Central Intelligence Agency (CIA) was providing aid to Wali Karzai, the president's brother, who has been accused of involvement in the illegal drug trade, and that the United States and other NATO forces have been using private militias (many answering to local warlords) to provide security for military bases.

The other crucial element of the debate is whether and how to either win over or vanquish the Taliban. There is an emerging consensus that creating room for the political participation of those Taliban leaders willing to forego violence and accept a political role in accord with the Afghan constitution must be part of an overall political strategy. But what to do about those Taliban leaders responsible for the worst crimes of that period? For all the right notes McChrystal sounds on the need for legitimacy and transparency in government, his response to questions about the need to address the legacy of war crimes is not much different from his predecessors who argued it was too soon or too risky to raise such concerns until Afghanistan has moved back an inch or two from the edge. Not rocking the boat was the mantra of the early post-2001 years, invoked by political leaders unwilling to endorse an international peace-keeping force and unwilling to invest in state-building. If negotiations with local Taliban commanders to switch sides merely entail the further co-optation of another set of warlords to act as a buffer against the rest of the Taliban, it will work no better than the previous co-optation of the Northern Alliance did in fostering a viable state. The question that continues to plague the entire undertaking is what to do with the spoilers and potential spoilers—including not only the insurgents likely to wreck any peace process, but powerful figures within the government who have done the most to undermine efforts toward achieving justice and reconciliation.

## **II. ¿Afghanistan's Transition to What?**

Like many other countries emerging—or trying to emerge—from prolonged conflict or repressive rule, Afghanistan has had to tackle problems on many fronts. In fact, it has never achieved post-conflict status. Instead, it represents a critical example of a country not in transition to peace or democracy but instead caught in an escalating spiral of violence and repression fueled by the same forces that launched the conflict more than two decades ago. Since the initial military success of the U.S. operation against the Taliban and al-Qaeda in 2001, the country has had only periods of less conflict, never peace.

Following the attacks of September 11, 2001, the primary objective of U.S. forces has been to defeat al-Qaeda and their Taliban supporters, and only secondarily to provide security within Afghanistan. U.S. forces have often taken a unilateral approach based on their overriding priority of fighting al-Qaeda and

the Taliban—an objective that has drawn them to seek allies on the ground without regard to their human rights records. In the immediate aftermath of the Taliban’s defeat, the Coalition armed and funded Afghan commanders to act as a bulwark against any return of the Taliban and al-Qaeda. Some of these commanders used the Coalition’s support and arms to consolidate their control over territory and criminal enterprises—particularly opium production. Some also engaged, or continued to engage, in abuses against the local civilian population, including human trafficking, forced evictions, and extortion. The growing power of these commanders has represented one of the most serious threats to security for most Afghans.

The International Security Assistance Force (ISAF) was initially deployed in 2002, but it was hampered from the beginning by a restricted mandate that confined it to Kabul. While Afghan officials as well as many donor nations and other international actors called for an expansion of ISAF, the United States continued to oppose ISAF expansion until late 2003. The ISAF was hampered by its relationship with the U.S.-led Anti-terrorism Coalition, and countries were slow to commit additional troops. After 2001, Afghan militia forces allied with the Coalition were supposed to withdraw from areas occupied by ISAF; they did not, but instead further entrenched themselves to gain political influence and to carry out various criminal activities, including drug trafficking.

The Bonn Agreement<sup>9</sup> established Afghanistan’s interim government and set out a timetable for the political processes that would follow, including the establishment of a six-month interim administration; the holding of a Loya Jirga (Grand Council)<sup>10</sup> to select the subsequent eighteen-month transitional administration; a constitutional Loya Jirga to ratify a new constitution; and presidential and parliamentary elections. All of these benchmarks have been met, though the fact that former mujahidin leaders and commanders dominated virtually every stage has hurt the credibility of the so-called Bonn Process.

The Emergency Loya Jirga, held in June 2002, established Afghanistan’s transitional government until presidential elections were held in October 2004. In December 2003 the Constitutional Loya Jirga was held. Though the document it eventually ratified was widely hailed as the most democratic (and protective of human rights) of any in the nation’s history, the consultation and drafting process was heavily influenced by former faction leaders. In October 2004, presidential elections were held and President Karzai was elected; the poll was viewed as largely free and fair and took place without major incident. There was a far lower

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<sup>9</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001) (“Bonn Agreement”).

<sup>10</sup> See BARNETT RUBIN, *THE FRAGMENTATION OF AFGHANISTAN: STATE FORMATION AND COLLAPSE IN THE INTERNATIONAL SYSTEM* 166-75 (1996). A jirga or “circle” is a council, usually consisting of adult males of a tribe. “Since at least the 1920s, the Afghan state has defined an institutionalized, partly nontribal body, the Loya Jirga (Great Council), as the highest representative body of the Afghan state.” *Id.* at 42. An Emergency Loya Jirga could be convened to address national emergencies.



voter turnout for the national assembly elections held in September 2005, which also took place without any major security problems. However, these elections were flawed in the eyes of many voters because of the failure to disqualify a large number of candidates known to be commanders of illegal armed militias.

UN Security Council Resolution 1510, signed on October 13, 2003, opened the way for an expansion of ISAF. NATO had taken over command and coordination of ISAF in August 2003. In mid-2006, ISAF under NATO took over responsibility for security in the insurgency-ridden south of the country, paving the way for a withdrawal of some 2500 U.S. forces and an increase in its own troop strength from approximately 9000 to 18,000 forces. In early October, NATO announced the expansion of ISAF into the east of the country, with up to 12,000 U.S. troops coming under NATO control. Another 8000 U.S. troops in the east planned to remain under the U.S.-led Coalition, which had been commanding the area. The presence of these foreign military forces was essential for Afghanistan to meet the goals of the 2001 Bonn Agreement: to draft and ratify a new Constitution; hold presidential and parliamentary elections; and gradually implement reforms to build an army, police force, and other essential institutions. The benchmarks of the Bonn Agreement have been met, but the Afghan government has yet to tackle some of the most important aspects of institution-building and has far to go to establish its own legitimacy. Nearly seven years after the U.S. intervention, U.S. and allied Coalition forces are fighting an insurgency that has grown in strength and now threatens areas just outside Kabul.

### **III. Transitional Justice in a Not-Yet-Post-Conflict Setting**

The challenge of pursuing a transitional justice process is linked to the problem of promoting human rights more generally in the country. In post-2001 Afghanistan, major international actors steering the state-building process saw the pursuit of transitional justice as potentially destabilizing and spurned robust interventions on human rights for the same reason. As a result, building support within the Afghan government and among international donors for a transitional justice process has been slow. Most importantly, a number of powerful faction leaders and commanders who returned to power after the defeat of the Taliban have attempted to discredit transitional justice initiatives by claiming that all such initiatives are aimed at maligning the *mujahidin*—those combatants who liberated Afghanistan from the Soviets and the Taliban.

In the first few years of the post-Taliban period, U.S. and UN policy sought to stabilize a post-Taliban Afghanistan with a minimal investment in an international force and in security sector reform. The approach involved accommodating commanders and factional leaders in the emerging government administration and power structure. Thus, by the end of 2002, commanders who not only had long records of human rights abuses and war crimes accusations, but who were

also involved in drug-trafficking and other crimes, had entrenched themselves in new positions of power. Questions of past war crimes were suppressed or deferred, and the disarmament process proceeded selectively in order to avoid confrontation with the most powerful players. Throughout the state-building process in Afghanistan, the UN adopted a “light footprint” approach that in theory would strengthen the capacity of the new Afghan administration by discouraging reliance on external support. This in turn was meant to ensure greater buy-in for the reform process from Afghan leaders. In reality, the “light footprint” has meant that vital reforms lagged for lack of capacity and clear leadership. In addition, with the compartmentalization of key reform efforts—disarmament, police reform, judicial reform, human rights—cooperation among donor and Afghan officials has been inadequate, undermining the creation of accountable institutions.

Transitional justice was largely a taboo subject during the first several years after the establishment of the interim and transitional administrations. Senior UN and U.S. officials argued that it was far too early to initiate any reckoning with the past, and that to do so could destabilize the fragile peace process that depended on the cooperation of the same factional leaders who would be among the subjects of any inquiry into war crimes. International actors were reluctant to confront any of the militia leaders on the grounds that stability required the participation—or appeasement—of all powerful factions, and that there was a genuine risk of civil war if these leaders were not granted positions of power. Thus, the entrenchment of many of these commanders was not inevitable, but a consequence in large part of the Pentagon’s policy of supporting those whom they have seen as a useful bulwark against penetration by al-Qaeda.

The participants at the Bonn Conference did discuss the issue of war crimes in the context of a proposed prohibition against an amnesty. During the closed sessions at Bonn, a heated discussion took place over the idea. The original draft of the agreement—written by the UN—stated that the interim administration could not decree an amnesty for war crimes or crimes against humanity. This paragraph nearly caused the talks to break down after a number of powerful faction leaders told their supporters that the paragraph was aimed at discrediting all Afghans who took up arms, and that foreigners would use the agreement to disarm them. Principal among those making this argument was Abdul Rasul Sayyaf, a former professor of Islamic law at Kabul University and the powerful leader of the Islamist Ittihad-i Islami (Islamic Union). This party had amassed enormous support from Saudi sources and brought many Arab fighters to join the jihad against the Soviet occupation into Afghanistan in the 1980s. It is also a party allegedly responsible for massacres and other war crimes. UN Special Representative Lakhdar Brahimi argued forcefully in favor of keeping the paragraph prohibiting an amnesty, but in the end, the paragraph was removed, leaving open the possibility for an amnesty.<sup>11</sup> In March 2007 the

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<sup>11</sup> E-mail interview with participant in negotiations (Feb. 2006).

National Assembly passed a bill on national reconciliation that included a provision to grant immunity from prosecution for actions including war crimes.

The Bonn Agreement called for an Afghan human rights commission, mandated to promote human rights and investigate violations. The agreement also gave the UN “the right to investigate human rights violations and, where necessary, recommend corrective action.”<sup>12</sup> Transitional justice falls within the human rights mandate of the UN Assistance Mission to Afghanistan (UNAMA).<sup>13</sup> UNAMA has provided support to the Afghanistan Independent Human Rights Commission (AIHRC) on its human rights programs, including transitional justice, while also maintaining human rights monitoring staff in various parts of the country. In March 2002, the UN Office of the High Commissioner for Human Rights held a series of workshops on human rights issues in Kabul. At the workshop on transitional justice, Afghans voiced strong support for finding ways to address the need for truth, reconciliation, and justice. At the inauguration of the workshops, President Karzai endorsed the idea of a truth commission, although he subsequently disavowed support for the idea and instead demonstrated great reluctance to promote a transitional justice program.

The AIHRC was formally established by presidential decree on June 6, 2002, and was charged with

developing a national plan of action for human rights in Afghanistan, and with human rights monitoring, investigation of violations of human rights, development and implementation of a national programme of human rights education, undertaking of national human rights consultations, and development of domestic human rights institutions, in accordance with the terms of the Bonn Agreement, applicable international human rights norms, standards, and conventions, and the provisions of this decree and annex.<sup>14</sup>

Transitional justice was understood as falling within the definition of human rights investigations.

The establishment of the AIHRC and the March 2002 workshops contrasted sharply with other developments at the time. In the immediate aftermath of Bonn, the office of the UN Special Representative of the Secretary General actively opposed efforts to draw international attention to human rights concerns or to

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<sup>12</sup> Bonn Agreement, *supra* note 9, Annex II, art. 6.

<sup>13</sup> The Human Rights Unit focuses on the five priority issues of protection of civilians, violence against women, transitional justice, freedom of expression, poverty, and human rights and assistance and support to the Afghanistan Independent Human Rights Commission (AIHRC). See UNAMA Website, “Human Rights” <http://unama.unmissions.org/Default.aspx?tabid=1816>.

<sup>14</sup> Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission art. 2, June 6, 2002, *available at* <http://www.aihrc.org.af/decreeofp.htm>.

focus on the crimes of the past. This resistance stemmed from a fear of “rocking the boat,” a conviction that the situation was too fragile and the possibility of a return to war too great to risk confronting divisive issues like human rights. Fear of antagonizing powerful warlords and upsetting a delicate balance of power meant that human rights issues were underemphasized and devalued. The United States also had great influence over policy at this time and was unwilling to confront its own allies in the field or allow greater scrutiny of its own practices. In March 2003, a proposal for a UN commission of inquiry on Afghanistan was dropped because of U.S. opposition.

Two months after the establishment of the AIHRC, the Emergency Loya Jirga was held to select a transitional administration to govern before elections in 2004. The Loya Jirga took place in June 2002 and ratified the next phase of administration—the Afghan Transitional Administration (ATA). The rules governing the selection of delegates for the Loya Jirga stipulated that persons against whom there were credible allegations of war crimes or other abuses were not eligible. The rule was rarely enforced—in part because some of the UN staff responsible for making decisions found the grounds for exclusion too vague, and in part because of pressure within UNAMA not to challenge some powerful commanders. More importantly, contrary to the rules governing the selection of delegates, a number of political delegates were added at the last minute, among them commanders accused of war crimes. Delegates complained that the very presence of these commanders was intimidating. In any case, little choice was left to the delegates, as all the important decisions had already been made in backroom deals involving the UN, the United States, and Shura-i Nazar.<sup>15</sup>

Controversy over the legacy of past abuses again reared its head during the Constitutional Loya Jirga in December 2003. After Abdul Rasul Sayyaf, a former mujahidin leader, had maneuvered to ensure that a mujahidin leader headed all the important working committees, one young delegate criticized the arrangement, calling the faction leaders who were present “criminals” and accusing them of destroying the country.<sup>16</sup> Amid protests against the remarks from many of the delegates, Sayyaf tried to have the delegate ousted from the proceedings. Since then, the delegate has had the protection of the UN in her home district. Shortly after the conclusion of the Constitutional Loya Jirga, Kabul Television broadcast footage of a speech Sayyaf made in 1993, during the height of the civil war. In that year, Sayyaf’s forces were playing a major part in the massacre of ethnic Hazaras and the destruction of the areas in which they lived in west Kabul. The video clip showed him boasting: “We have destroyed much of Kabul, but there

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<sup>15</sup> J. Alexander Thier, *The Politics of Peace-building: Year One: From Bonn to Kabul*, in *NATION-BUILDING UNRAVELED: AID, PEACE AND JUSTICE IN AFGHANISTAN* 55-56 (Antonio Donini, Norah Niland & Karen Wermester eds., 2004).

<sup>16</sup> See Statement of “Defense Committee for Malalai Joya,” Rise in support of Malalai Joya!, Dec. 20, 2003, available at <http://www.malalaijoya.com> (follow “Our Statements”).

are still some buildings left. We will destroy these too, to make way for the City of God.”<sup>17</sup>

The Afghan Constitution makes no reference to transitional justice as such, other than granting official status to the AIHRC (its powers to be determined by the legislature), and imposing the restriction on candidates for presidential office and for the national legislature mentioned above. Article 85 of the Constitution specifies that candidates “should not have been convicted by a court for committing a crime against humanity, a crime, or sentenced to deprivation of his/her civic rights.”<sup>18</sup> Requiring “conviction” as the standard for exclusion negated prospects for vetting on these grounds as there is no competent criminal justice system to conduct trials of this kind in Afghanistan.

The AIHRC’s first initiative on transitional justice was to conduct a nationwide survey of public attitudes toward dealing with past abuses. The International Center for Transitional Justice (ICTJ) worked with the Commission to develop a detailed proposal for a public consultation to help determine a transitional justice policy for Afghanistan and to train those carrying out the survey. By October 2004, there had been over 6000 participants in individual surveys and focus groups. ICTJ again assisted with analysis of the results and production of the AIHRC’s consultation report, *A Call for Justice*.<sup>19</sup>

The exercise alone was a significant achievement in a country completely lacking in any of the modern technological tools for assessing public opinion. Thirty-two of Afghanistan’s thirty-four provinces were visited by teams who conducted a survey of 4151 individual respondents and separately convened 200 focus groups with over 2000 participants. Refugee communities were surveyed separately. The results show that up to 70 percent of Afghans see themselves as victims of serious human rights abuses during the war and that most believe that similar crimes continue in the present. The report highlights a public perception that impunity is entrenched in Afghanistan and that perpetrators are rewarded with positions of power. The report also reflects a popular demand for breaking the cycle of impunity. The final recommendations included vetting for official appointments, provision for further documentation of war crimes, appropriate mechanisms for truth-telling, the establishment of a special investigations unit or prosecutor’s office to begin investigating past war crimes, and symbolic steps to commemorate the victims.

A month after the Constitutional Loya Jirga, the Afghan Independent Human Rights Commission held a press conference to release *A Call for Justice*. The plan was to release the AIHRC report together with a 300-page report prepared by the

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<sup>17</sup> The video clip was aired at a time when Sayyaf’s allies in the courts were trying to censor Kabul Television and prevent it from broadcasting programs featuring female singers.

<sup>18</sup> CONST. OF AFGHANISTAN art. 85.

<sup>19</sup> AFGHAN INDEPENDENT HUMAN RIGHTS COMMISSION, *A CALL FOR JUSTICE: A NATIONAL CONSULTATION ON PAST HUMAN RIGHTS VIOLATIONS IN AFGHANISTAN* (2005).

Office of the UN High Commissioner for Human Rights mapping major incidents of war crimes and serious human rights violations committed by all parties to the conflict in the course of the war; however, in the weeks before the scheduled release of the UN report, UNAMA pressed the High Commissioner, Louise Arbour, not to make the mapping report public. UNAMA officials argued that a public release would endanger UN staff<sup>20</sup> and complicate negotiations surrounding the planned demobilization of several powerful militias, including the Tenth Division loyal to Sayyaf. They also argued that as a “shaming exercise,” the report raised expectations that neither the UN nor the Afghan government could meet: namely that something would be done about the individuals identified in the report.

In March 2005, at the Human Rights Commission in Geneva, U.S. pressure succeeded in terminating the mandate of the Independent Expert on Human Rights in Afghanistan, who was at the time Cherif Bassiouni, a professor of law who also served as Chairman of the UN Security Council’s Commission to Investigate War Crimes in the Former Yugoslavia. The United States argued that because of the progress toward democracy in Afghanistan, the country did not need an independent expert. Bassiouni commented that “without a UN Independent Expert, the Afghan Independent Human Rights Commission as well as civil society in that country will not have that external support to advance human rights.”<sup>21</sup>

In the year following the release of the AIHRC report, the AIHRC and representatives of the Karzai government, together with staff from the UNAMA human rights office, developed a plan of action on transitional justice that laid out a number of steps toward truth-finding, memorializing victims, establishing vetting procedures, and other measures. After months of delay, the Action Plan on Peace, Reconciliation and Justice in Afghanistan was adopted by the cabinet on December 12, 2005. Shortly afterward, the UN held a conference on “Peace, Justice and Reconciliation” to discuss the practical implications of carrying out and financing the process. The plan included five areas for key action: symbolic measures, institutional reform, truth-seeking and documentation, reconciliation, and accountability, to take place over a three-year time frame ending in 2008. By mid-2008, there had been little progress on any of these. There was considerable cooperation among a Core Group comprising of key donor countries and NGOs to provide input into the transitional justice action plan. That effort has continued

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<sup>20</sup> In November 2004, three expatriate UN staff members were kidnapped and held for three weeks in Kabul. A massive manhunt led to the arrest of scores of suspects, many of them former members of the Hizb-i Islami faction, an armed group whose leader, Gulbuddin Hikmatyar, is opposed to both the current Afghan administration and the presence of American and other foreign troops. The government appeared eager to pin the blame for the kidnappings on him. One suspect died as a result of beatings in custody. Further investigations pointed to the involvement of forces loyal to Sayyaf and former Defense Minister Fahim. All three UN staff members were released—left in a car in Kabul, unharmed. UN staff members and others involved in investigating the incident read it as a warning. Interviews with UN staff members and other diplomats (Jan.-Feb. 2005).

<sup>21</sup> Cherif Bassiouni, e-mail communication made available to this author, Apr. 27, 2005.

in a number of areas related to transitional justice, notably vetting government appointments and police and judicial reform. Core Group membership, originally including the EU, the AIHRC, UNAMA, and the Netherlands, has since grown to include Canada, Germany, and other Afghan civil society groups. The group works to keep transitional justice issues on the governmental and international agenda—a goal that has become more difficult with increased attention focused on the rising insurgency—and coordinate actions among members.

At a conference in London on January 31 and February 1, 2006, Afghanistan's major donors, plus President Karzai, UN Secretary-General Kofi Annan, and British Prime Minister Tony Blair, issued the Afghanistan Compact, an agreement that set forth both the international community's commitment to Afghanistan and Afghanistan's commitment to state-building and reform over the next five years. Some elements of the Action Plan on Peace, Reconciliation and Justice were included in the Afghanistan Compact, including the requirement that the government establish an independent board for senior appointments to vet candidates for the necessary qualifications and to ensure that they do not have links to armed groups and have not been involved in drug-trafficking, corruption, or past human rights violations. On December 10, 2006, President Karzai launched the Action Plan and dedicated December 10 as the National Day of Remembrance paying tribute to those killed in successive wars and civil strife.

As of 2010, little of the Action Plan has been implemented, although a number of activities have taken place, including a conference on truth-seeking; limited capacity-building with respect to forensic work, including a forensic site assessment; and a limited amount of documentation to map major incidents of the war. A weak civil society and the lack of strong public pressure, combined with an atmosphere of intimidation and general insecurity, have undermined efforts to carry out intensive fact-finding investigations or establish formal truth-seeking mechanisms. The failure thus far of judicial reform has also stymied prospects of criminal prosecutions; even ordinary criminal trials lack legal safeguards, leaving the high-profile war crimes cases even less likely to enjoy due process. There have been several successful prosecutions abroad, but these have had only a minor impact on the processes inside Afghanistan.<sup>22</sup>

In the midst of this, the question of transitional justice has become a battleground, pitting the country's former warriors against what they claim is an imposed idea. Losing ground in this struggle have been the voices of the victims—many of whom have just begun speaking out about the need for clarifying the truth about the country's thirty-year war, with foreign forces and

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<sup>22</sup> Cedric Ryngaert, *Another Afghan Case in the Hague District Court: Universal Jurisdiction over Violations of Common Article 3*, THE HAGUE JUSTICE PORTAL, Sept. 13, 2007, <http://www.haguejusticeportal.net/eCache/DEF/8/213.html>; Trial Judgment in the case against Heshamudin H, Hague District Court, Oct. 14, 2005, available at <http://www.haguejusticeportal.net/eCache/DEF/5/104.html>.

with itself. Some fear that the chance for any reckoning with the past may be slipping away, with corruption, insurgency, and the exploding narcotics trade crippling the rebuilding effort.

Many key interlocutors, including human rights activists and those working in legal aid, are generally of the view that the climate for doing any work on transitional justice in Afghanistan has never been worse. While there is little discussion anymore about whether or how an Amnesty Law passed by parliament in 2006 might be implemented, its very existence has had crippling repercussions. The fact that those responsible for promoting the law are among those granted governmental positions by the president or are members of parliament has reinforced the perception of total impunity. Increased surveillance, interference, and outright threats to persons involved in human rights and transitional justice work has created a repressive climate for civil society generally. The tainted Karzai victory and the proximity of the Taliban have led many to despair.

#### IV. ¿Stability or Security?

Security has been an elastic concept in Afghanistan, with little clarity among the international actors about who should be providing security for whom. McChrystal's report marks a shift in approach if for no other reason than that it specifically addresses the need to protect Afghan civilians not only from the Taliban insurgents but also from corrupt and predatory officials and their militias on the other side. In the initial post-2001 period, U.S. policy defined security narrowly as crushing al-Qaeda, and tried to achieve that by co-opting anti-Taliban warlords. After the Taliban's defeat, the United States pushed for an expedited process to create an interim government to fill the vacuum and provide stability; and for this the principal anti-Taliban political-military leaders were again co-opted. The operating principle was that a government was needed, and almost any government would do—an approach that finds an unfortunate echo in some official reactions to Karzai's de facto re-election.<sup>23</sup>

Luring combatants away from conflict by co-opting them is accepted wisdom, and as crucial to negotiating peace as getting combatants to work out their differences in the sphere of politics rather than on the battlefield. But while necessary and even desirable in many cases, it does not answer the question of what to do with those who have not simply fought a war but also engaged in war crimes.

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<sup>23</sup> After Karzai's rival for the presidency, Dr. Abdullah, withdrew from the race on grounds that nothing had been done to prevent a repeat of fraud, U.S. Secretary of State Hillary Clinton stated that a runoff with only one candidate would not necessarily threaten the legitimacy of the process. Ben Farmer, *Hillary Clinton: Afghanistan vote legitimate even if Abdullah boycotts*, TELEGRAPH, Oct. 31, 2009.



In Afghanistan, in the absence of any constraints, many power-holders responsible for past war crimes have continued to engage in a range of criminal pursuits with impunity: drug-trafficking, land grabs, rape, murder, and kidnapping. They represent a key component of a “nexus of corruption, incompetence and criminality”<sup>24</sup> that lies at the heart of the government. In dealing with such individuals, Afghanistan confronts the key questions that have a bearing on the applicability of transitional justice standards to a not-yet-post-conflict situation: is it really feasible to marginalize or exclude those responsible for past crimes in a situation of ongoing conflict? Alternatively, is it ever desirable to accommodate them in the new political order? In a state where basic police and justice institutions are totally lacking, how can such figures be constrained and by whom?

The defeat of the Taliban in 2001, and the end to that particular phase of the war, was not brought about by a popularly backed revolution or by a negotiated power-sharing among all parties to the conflict. The Bonn Agreement was a power-sharing agreement among the victors, not a peace deal.<sup>25</sup> As such, it did not address questions about how to deal with the legacy of past abuses, nor the continuing powerful role played by many leaders and military figures who continued to hold power. In the absence of any international force in the first years after the initial defeat of the Taliban, there was no military force capable of constraining or containing these militia forces. Instead, powerful figures from these militias either seized control of existing ministries or were granted positions in the government in exchange for not opposing it.

Well aware of what had happened when the Najibullah government collapsed in 1992, leaving the mujahidin rivals to battle each other for control of Kabul, Western interlocutors at Bonn had good reason to worry that the armed opposition to the Taliban would resort to a power struggle and prolong the civil war unless they were invited to share power in a new government. Fear that commanders and their militias would resume hostilities haunted the negotiators at Bonn and has influenced the international response to incidents of blatant abuse by these figures ever since. As one advisor who was at the Bonn negotiations wrote:

[T]he biggest threat to human rights and everything else in Afghanistan [was] the autonomy of all these armed groups. The most important initiative... [was] demobilizing and disarming them. ... [W]hat will bring more peace and more justice to Afghanistan is not the removal of offending individuals, but the creation of a system of institutions to control them and make government effective and lawbound.<sup>26</sup>

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<sup>24</sup> McChrystal report, *supra* note 5.

<sup>25</sup> “The Bonn Agreement . . . was not a ‘grand bargain’ for peace; it sealed a ‘victors’ peace’ by legitimizing a change of regime that involved handing over power to factional leaders who were on the ‘right side’ of the war on terror.” Jonathan Goodhand & Mark Sedra, *Bribes or Bargains? Peace Conditionalities and ‘Post-Conflict’ Reconstruction in Afghanistan*, 14 INT’L PEACEKEEPING 41 (Jan. 2007).

<sup>26</sup> Email communication with an analyst working with UNAMA (Dec. 2001).

There have been very few instances since 2002 when the Afghan government and its international supporters were willing to use political or military force to compel factional leaders to comply with the law and refrain from abusive actions. As the power of these militia leaders has grown, the central government's leverage has diminished to the point where militia commanders and faction leaders function as a shadow state. As Rubin argues, "[t]here is no state that operates independently of power holders,"<sup>27</sup> like these commanders and faction leaders, and there are no state institutions to hold such persons accountable. Instead, a neo-Taliban insurgency that re-emerged in 2003 has grown in strength and now threatens to engulf the entire country in war. At the same time, the viability of the State is in question, particularly after the fraudulent elections of August 2009. President Karzai's government has distinguished itself by rampant corruption, involvement in the opium trade, and a marked unwillingness to address past war crimes and human rights abuses—all of which has added to doubts about his leadership and the legitimacy of his government. Judicial mechanisms to address past and current crimes and abuses are non-existent; indeed, the utter incompetence and venality of the judiciary is one of the principal reasons for popular discontent with the government, and support for the Taliban (and their version of swift justice) in some parts of the country. The few instances in which there was any effort to address war crimes resulted in further miscarriages of justice—badly flawed trials of now-powerless figures manipulated for political purposes. The possibility of prosecuting persons who continue to wield power remains remote, and there is little political will among internationals to sanction powerful figures.

Afghanistan's international supporters recognized early on the need to address corruption, narcotics, human rights abuses, and transitional justice, but argued that these concerns had to be "sequenced in" after the fundamental issue of disarmament was tackled. There was a reasonable fear that to tackle such issues too soon could derail disarmament at a time when difficult negotiations were underway to convince the most powerful Northern Alliance militias to agree to hand over their heavy weaponry and support the reforms necessary to build a new National Army. For a combatant—particularly one who has lived virtually his entire life in a state of war, as have many of the militia forces in Afghanistan—peace is far less secure than war.<sup>28</sup> Finding a place in the new order for former fighters underlies this philosophy of inclusion, with the ultimate aim to prevent a return to hostilities. Defending that new order against corruption from within

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<sup>27</sup> Posting of Barnett R. Rubin, "Schweich, ICG, etc. -- Assume the Existence of a State in Afghanistan," INFORMED COMMENT GLOBAL AFFAIRS, [http://icga.blogspot.com/2008\\_07\\_01\\_archive.html](http://icga.blogspot.com/2008_07_01_archive.html) (July 25, 2008, 9:05 EST).

<sup>28</sup> For a thoughtful discussion on the implications for transitional justice, see Barnett Rubin, "Transitional Justice in Afghanistan," The Anthony Hyman Memorial Lecture at the School of Oriental and African Studies, University of London, (Feb. 3, 2003), *available at* <http://www.cic.nyu.edu/archive/pdf/Transitional.pdf>.

remains the challenge. Co-optation is a time-honored strategy for brokering peace deals among former enemies and is often vital to prevent spoilers from sabotaging the peace. But without sound investment in the institutions fundamental to good government, especially capable police and judicial systems, co-optation empowers would-be spoilers without providing the means to constrain them.

Advocates for transitional justice argue that the new government or the international power or powers overseeing the transition should put vetting procedures in place to exclude the worst offenders from positions of power, and establish judicial mechanisms or a truth and reconciliation process to hold them accountable. The World Bank cautions new governments to tackle corruption; UN agencies along with donor governments urge swift action to eradicate drug production. These are potentially crushing demands for fledgling states emerging from war, repression, and, usually, interminable poverty. Few have been capable on their own of meting out justice and reining in powerful criminals in the immediate aftermath of the end of conflict or transition from a period of repression. How to avoid further conflict among a host of contenders *and* foster legitimacy in the new state has been the critical challenge in Afghanistan. In a society that is not post-conflict but remains engulfed in violence, the principles of transitional justice should provide an important guide for the appropriate uses of state power. In such societies, institutional reform and transitional justice should not be treated as separate objectives, the latter to be sequenced in after the former has been achieved. The two are linked, with success in one dependent on progress in the other.

## **Conclusion: Inclusion versus Exclusion**

Finding a place for warlords and their fighters in the new order in Afghanistan follows a philosophy of inclusion; securing that new order against corruption and abuse from within is the challenge. In Afghanistan, the strategy of co-optation and disarmament of the warlords should have been mutually reinforcing. Instead the failure of the latter undermined the potential benefits of the former. Afghanistan's disarmament program screened prospective candidates for links to illegal armed groups and used their candidacy as an incentive to persuade them to voluntarily disarm and disband their militias. The idea was to reduce the threat to the elections from potentially armed candidates; ensure that such militia commanders did not become members of parliament and thereby extend their access to power; and finally, spur on disarmament by compelling reluctant militias to disarm. As of January 2006, an estimated 2795 of these illegal armed groups operated in some capacity throughout the country.<sup>29</sup>

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<sup>29</sup> UNDP/ANBP, M&E SECTION, DISBANDMENT OF ILLEGAL ARMED GROUPS (DIAG) PROJECT AND RELATED PROJECTS: PHASE I DIAG EVALUATION (Feb. 2006), *available at* <http://erc.undp.org/evaluationadmin/downloadaddocument.html?docid=1045>.

The UN, other donors, and international forces feared that such groups posed a serious threat to security during the 2005 parliamentary elections. Several reports released by local NGOs echoed this concern, citing “fear of the gun” as the major issue for the Afghan electorate.<sup>30</sup> This concern prompted the UN, working with Afghan government agencies, to launch a program to disband some portion of these groups in the months leading up to the elections.

In theory, those who did not disarm should have been disqualified as candidates. In fact, very few were barred, and of those, few were very powerful or very dangerous. The fact that the law was not enforced against many known and serious violators remains the main criticism of the process. Of 208 candidates initially identified as having links to illegal armed groups, only thirty-four were disqualified in the end. Among the candidates allowed to stand for election were a number of notorious commanders who had been a source of trouble not only in the past but in the post-Bonn period for their criminal activities, attacks on rivals, predatory behavior toward civilians, and caches of weapons. According to the Afghanistan Research and Evaluation Unit report on the elections, the new parliament included “40 commanders still associated with armed groups, 24 members who belong to criminal gangs, 17 drug traffickers, and 19 members who face serious allegations of war crimes and human rights violations.”<sup>31</sup>

Militia candidates and members in parliament represent only part of the problem. Many other warlords and others with links to illegal armed groups hold positions as ministers, governors, district officials, and police chiefs. The Afghanistan Compact explicitly recognized the need to minimize the damage such persons could do by calling for a “clear and transparent national appointments mechanism . . . for all senior level appointments to the central government and the judiciary, as well as for provincial governors, chiefs of police, district administrators and provincial heads of security.”<sup>32</sup> But there has been little support for the advisory panel on presidential appointments that is supposed to vet out candidates with inappropriate credentials. Like other essential elements of effective reform of the police and judiciary, a vetting mechanism cannot succeed while those who need to be vetted out remain more powerful than any who would enforce the vetting.

An argument can be made that candidates who successfully made the transition from militia leader to members of parliament are the poster children of the co-optation policy: those who were elected got a stake in legitimate government

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<sup>30</sup> HUMAN RIGHTS RESEARCH AND ADVOCACY CONSORTIUM, TAKE THE GUNS AWAY: AFGHAN VOICES ON SECURITY AND ELECTIONS (2004). Many people interviewed stated that most local commanders were protected and supported by powerful individuals within the central government.

<sup>31</sup> ANDREW WILDER, AFGHANISTAN RESEARCH AND EVALUATION UNIT, A HOUSE DIVIDED? ANALYSING THE 2005 AFGHAN ELECTIONS 14 (Dec. 2005).

<sup>32</sup> Afghanistan Compact, London, Feb. 1, 2006, at 7, available at <http://unama.unmissions.org/Portals/UNAMA/Documents/AfghanistanCompact-English.pdf>.

with incentives to preserve it, rather than being forced outside of government with incentives to destroy it. One Afghan policy analyst has concluded that:

[P]arliament has been the preferred institutional home for the commanders or military-political leaders who dominated Afghanistan in 2001/02. They successfully translated their old military status into a position in the new legislature . . . [M]any of them found themselves squeezed out of their original post-2001 homes in the Ministry of Defence and Ministry of Interior. So they chose parliament as their rehabilitation option.<sup>33</sup>

At the same time, gaining the status and power that a position in parliament offers emboldened some members who then simultaneously claimed to have been “vetted” (because they were not disqualified from the ballot) while continuing criminal pursuits for personal enrichment. This has contributed to the erosion of public faith in the institutions of electoral politics and the parliament itself.<sup>34</sup> Having successfully “bought-in” the warlords for the Bonn arrangement, there was subsequently “little effort to make their co-option conditional upon respect for the rule of law or refraining from narcotics trafficking.”<sup>35</sup>

In many ways the most dangerous approach to dealing with warlords in post-Taliban Afghanistan has been inclusion that allowed warlords to entrench themselves and further their criminal activities and abusive behavior. Many of the worst abusers from past regimes were appointed to important executive positions, including those appointed as governors, ministers, and police chiefs. With more resources and opportunity for patronage at their disposal, some of those who benefited from Karzai’s protection have had a greater negative effect on governance than those in parliament.<sup>36</sup>

Marshall Fahim represents one example of the costs of political expediency. The prerogatives of the U.S. military operation in Afghanistan dictated the accommodation of Fahim in the 2001-2003 period; his forces were one of the first to be contacted and funded by CIA and Special Forces units in September 2001. With the realization that some measure of disarmament had to take place before the presidential elections, the United States ultimately backed a confrontation with Fahim that ended with his resignation from the Ministry of Defense and removal from the vice presidency. However, by then some U.S. administration officials had come to believe that

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<sup>33</sup> Michael Semple, *SSR and Non-state Actors*, in LOCAL OWNERSHIP AND SECURITY SECTOR REFORM (Timothy Donais ed., forthcoming).

<sup>34</sup> WILDER, *supra* note 31, at 14.

<sup>35</sup> Semple *supra* note 34, at 16.

<sup>36</sup> Antonio Giustozzi, “‘Good’ State vs. ‘Bad’ Warlords? A Critique of State-Building Strategies in Afghanistan,” Crisis States Research Centre, London School of Economics, Working Paper no.51, October 2004, p. 1.

the decision to turn a blind eye to the warlords and drug traffickers who took advantage of the power vacuum in the aftermath of the Sept. 11 attacks was one of the fundamental strategic mistakes of the Afghan war. It sent a signal to the Afghan people that the most corrupt warlords had the backing of the United States, that the Karzai government had no real power or credibility and that the drug economy was the path to power in the country.<sup>37</sup>

The 2004 confrontation did not result in any “destabilizing” violence, and for a time it appeared that this effort had been at least partially successful (Fahim reportedly continued his involvement in the narcotics trade). Fahim has returned, however, as President Karzai’s vice-president, and it appears that the United States and other international actors will continue to work with him, although there have been some indications that the United States is investigating his ties to drug-trafficking.<sup>38</sup>

One could argue that Fahim represents an extreme case, or—as proponents of an accommodationist approach maintain—one that cannot be weighed against the overall gains made in holding elections, establishing a parliament, and generally meeting the benchmarks of the Bonn Agreement. But the cost of unconditional co-optation has been very high. The strength of the insurgency, and the insecurity and violence that has resulted, is one consequence. The majority of those fighters opposed to the Karzai government and the foreign troops is motivated less by an extremist Islamist ideology and more by:

[P]ragmatic and opportunistic reasons . . . . [I]n spite of how much development assistance is increased, how many more foreign troops and civilian experts are sent to Afghanistan, if the performance of the state is not radically changed and improved, the insurgency is most likely to continue to grow. . . . Similarly, any efforts to negotiate with the insurgency or reconcile with parts of it are doomed to failure and will only serve as steps towards a complete defeat without a relatively well functioning state.<sup>39</sup>

The cost can also be measured in ordinary Afghans’ concerns about basic security. According to the Asia Foundation’s 2008 nation-wide survey, half of the adult population in Afghanistan fears for his or her safety.<sup>40</sup> Distrust of government and pessimism about the direction the country is heading has also risen—a trend confirmed anecdotally in much of the media coverage on Afghanistan.

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<sup>37</sup> James Risen & Mark Landler, *Accused of Drug Ties, Afghan Official Worries U.S.*, N.Y. TIMES, Aug. 26, 2009, at A1.

<sup>38</sup> *Id.*

<sup>39</sup> FANGE, *supra* note 8, at 2.

<sup>40</sup> ASIA FOUNDATION, AFGHANISTAN IN 2008: A SURVEY OF THE AFGHAN PEOPLE (Oct. 28, 2008), available at <http://asiafoundation.org/country/afghanistan/2008-poll.php>.

During the first crucial years after 9/11 the Bush administration's policy toward Afghanistan was to arm and fund any commander willing to fight Al Qaeda and the Taliban. The administration shunned nation-building and effectively blocked deployment of an international peacekeeping force for many years. Building essential institutions that could have acted as a counterweight to the power of the warlords was underfunded and uncoordinated. As Ambassador Jim Dobbins has observed "no nation, including most notably the United States, made the effort necessary to get these institutions up and running. Neither were lead nations able to secure significant support for their programs from other donors."<sup>41</sup> The government of Italy, which took responsibility for reform of the judiciary, was conspicuous in its lackluster approach to the effort. European officials acknowledged in November 2009 that the European Union's efforts in rebuilding the police have been dismal.<sup>42</sup> In any case, the separation of police reform from judicial reform was destined to fail. It was not just the initial "embrace" of the warlords that mattered; it is every decision since then that has crippled the prospects for legitimate institutions and a functioning government.

In Afghanistan, rooting out abuse is not simply a matter of removing or marginalizing those persons responsible for specific acts (which is not itself a simple task). The country's police, judiciary, and intelligence apparatus have institutionalized abuse in a way that has endured through successive regimes. Prosecuting individuals represents an important deterrent against future abuse, but building accountability will require far-reaching reforms to create effective, accountable institutions.

Restoring legitimacy to the Afghan State will require an international investment in functioning institutions; a commitment to confronting powerful militias; and a commitment to the integrity of representative political processes, be they elections or—more appropriately—traditional *loya jirgas* or something similar. Local control over the distribution of aid is also essential. Endless rounds of training for Afghan police are not enough; there needs to be strong civilian oversight of the performance of police and the judiciary and appropriate vetting for civil service appointments. The principles that inform transitional justice have a bearing on all of these points. Only these will lay the foundations of a legitimate and strong state capable of winning the support and confidence of its public to find a peaceful end to the conflict.

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<sup>41</sup> JAMES DOBBINS, *AFTER THE TALIBAN: NATION-BUILDING IN AFGHANISTAN* 105 (2008).

<sup>42</sup> Judy Dempsey, *Training of Afghan Police by Europe Is Found Lacking*, INT'L HERALD TRIBUNE, Nov. 17, 2009.

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