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Claudia Pacileo

The tension "Justice v. Peace" in post-conflict societies.

The Colombian case

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PREFAZIONE

"La tensione giustizia VS pace nelle società post-conflitto, il caso della Colombia". Con questo titolo e attraverso le pagine di approfondimento, la dott.ssa Pacileo c'invita ad entrare nel merito di questioni chiave in ogni processo di riconciliazione post-conflitto; lo fa soffermandosi sugli strumenti giuridici utilizzati durante i negoziati in Colombia.

Quali sono le potenzialità dei meccanismi di giustizia transizionale? Come possono questi contribuire a riconoscere il passato e ad articolare una visione per un futuro democratico, ricostruendo la fiducia smarrita? Qual è la relazione fra giustizia e riconciliazione? Riferendosi ad un'ampia e articolata bibliografia, questo testo di approfondimento dà alcune risposte a questi quesiti, illustrando come giustizia e pace si intrecciano con responsabilità individuali e memoria, contrapponendosi ad impunità ed oblio.

Il processo in Colombia è emblematico (e problematico) in molti di questi aspetti. Il risultato del referendum popolare di ottobre 2016 ha mostrato un Paese diviso di fronte al processo di pace in corso, con un'alta astensione, il fronte del NO vincitore con poco scarto, e un deciso SÌ nelle regioni rurali più colpite dal conflitto armato. Nell'analizzare il percorso che ha portato a questo voto, la dott.ssa Pacileo ci ricorda come la partecipazione delle vittime sia stato un aspetto molto rilevante in questo processo di pace.

Vittime che, uscendo dai limiti semantici del termine, rivendicano ed assumono un ruolo protagonista e attivo. Vittime che, ben prima e ben oltre il negoziato ufficiale e il processo formale, hanno ribadito a livello nazionale e internazionale il legame tra riconciliazione e verità, tra pace e memoria. Vittime, donne e uomini che oggi sono quei difensori di diritti umani che hanno portato al tavolo dei negoziati proposte concrete e visioni di pace a lungo termine. Il processo di pace in Colombia è quindi emblematico anche e soprattutto per il movimento popolare che da decenni è presente, e che nonostante la violenza mirata e continua, ha resistito e continua a resistere. Questo stesso movimento che oggi, nonostante l'accordo e gli impegni presi, è ancora preso di mira in modo continuo.

Riflettere su quanto sta accadendo in Colombia, anche attraverso queste pagine di approfondimento sulla giustizia transizionale, ci ricorda quanto pace e giustizia siano legate, quanto impunità e oblio siano minacce continue a qualunque processo di pace, quanto sia importante costruire processi di pace a partire dalle organizzazioni di base, dalle proposte concrete che queste portano, dalla memoria di cui sono custodi le comunità e le vittime di ogni conflitto.

Sara Ballardini, Centro Studi Difesa Civile

ABSTRACT

The purpose of this research paper is to highlight the essential contribution given by justice, truth and reparation programs for the attainment of peace. In particular, attention is given to the crucial role of justice for a sustainable peace, highlighting the difficulty in balancing the latter with the need of justice amongst a community ravaged by conflict and grave violations.

The investigation goes to focus on the Colombian case, which is a paradigmatic example of the tension between justice and peace. The research briefly recalls the conflict and traces the steps of the peace talks in the country, until the October 2, 2016 plebiscite on the ratification of the final peace accord.

The critical analysis of the plebiscite outcome and the research made on the conception Colombian people have about transitional justice allows us to conclude that it is necessary for Colombia to reach a peace agreement based on justice, and thus respectful of the rights and needs of the victims affected by the armed conflict. A peace agreement that overlooks about the need of justice and that is unable to correctly balance justice and peace is doomed to failure because there cannot be peace without justice.

1. How to address a past of violations?

Once wars, violent conflicts or dictatorships come to an end, the first goal is the reconstruction of the country, with regard to both infrastructures and institutions. However, this is not the sole problem that needs to be addressed. During transitions from violent conflict to peace and democracy, a new question emerges: how to deal with the crimes and the human rights violations?

The transitional justice system is a 'toolbox' which provides a collection of judicial and non-judicial responses put into practice in order to address a violent past by reaching important goals: justice, reparation, truth, acknowledgment and, in the end, reconciliation among community members. This "package of mechanisms"[1] includes criminal prosecutions, truth-seeking mechanisms (i.e. truth commissions), reparation programs, institutional reforms and other community-building initiatives. All these strategies are inter-related and complementary, because each one by itself is not sufficient to achieve reconciliation. It is evident that the search for truth in past gross violations of human rights is useful to fight impunity and could thus work closely with retributive justice mechanisms and vice versa; the same inter-dependence takes place between reparation programs and accountability instruments.

Many cases of the past confirm the complementarity amongst different transitional justice instruments. Paradigmatic are the experiences of Argentina, Peru or Sierra Leone, in which Truth Commissions have positively complemented criminal courts; or the case of East Timor, where the Serious Crime Unit worked very closely with the Reception, Truth and Reconciliation Commission. In conclusion, reconciliation must be interpreted and analyzed as a multi-ingredient recipe, an "over-arching process which includes the search for truth, justice, forgiveness, healing and so on"[2].

2. Reconciliation as a peacebuilding activity

Socio-political reconciliation can be described as the way to restart social and political processes on new grounds shared by the whole community. The glue of this procedure is the reestablishment of minimal conditions of civic trust, a notion hardly translatable, that subsumes two different levels of trust complementary and intrinsically bonded: the trust of society in society. The rebuilding of civic trust concerns both an interpersonal level – related to the trust which each social group places in others and to the sense of belonging to the community itself –, and an institutional level – linked with the restoration and the following strengthening of the community's trust in institutions: "the process of reparation through renewed State-citizen relations contributes to the restoration of civic trust"[3]. This sense of a renewed trust in the reconstituted political community can be

[1] N. Roth-Arriaza, *Transitional Justice and Peace Agreements*, in Working Paper, International Council on Human Rights Policy, n. 3, 2005, p. 5, in http://www.ichrp.org/files/papers/63/128_-_Transitional_Justice_and_Peace_Agreements_Roth-Arriaza_Naomi_2005.pdf (accessed December 7, 2016).

[2] D. Bloomfield, *Reconciliation: an Introduction*, in D. Bloomfield, N. Callaghan and others, *Reconciliation after violent conflict. A handbook*, International Institute for Democracy and Electoral Assistance, Sweden 2003, p. 17.

[3] P. De Greiff, *Justice and Reparations*, in P. De Greiff, *The Handbook of Reparations*, Oxford Scholarship Online, 2008, p. 462.

reached thanks to the capability of transitional justice mechanisms to acknowledge the past and to articulate a vision for a democratic future.

It is undeniable that restoration of civic trust is a goal shared by the peacebuilding process too, which is defined by the European Peacebuilding Liaison Office (EPLO) as "a long-term process aimed at preventing the outbreak, recurrence or continuation of violent conflict"[4]. The peacebuilding's specific mission is to consolidate a democratic order based on the public legitimacy of the arrangements concluded at the cessation of conflicts and on a new framework of values and beliefs shared by the whole community, in order to rebuild a nation on solid grounds. According to the UN Agenda For Peace (1992), peacebuilding is the "action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict"[5], and for this goal to be achieved it is crucial that the whole community and its members trust post-conflict institutions and identify themselves in the new architecture of values. The peacebuilding process, thus, recognizes the need of civic trust as necessary and unavoidable in order to reach and maintain social security[6]: "[...] With a basic trust in others, the individual can go about his/her day-to-day business with a reasonable expectation that many of the dangers in life can simply be put to one side"[7].

Since the restoration of civic trust in post-conflict societies is one of the targets of peacebuilding, considered an unavoidable component for a solid rebuilt nation and in turn prevention of gross human rights violations, reconciliation and thus transitional justice can be considered as one example of peacebuilding activities[8]. In this sense, transitional justice tools contribute to lay the basis for a "re-imagined political community"[9], by reaffirming essential norms and values, and as such play a fundamental role in nation-building and democratization processes sustained by peacebuilding tools.

In pursuing the goal of civic trust restoration and, hence, of a democratic polity, reconciliation – which is the result of transitional justice mechanisms – is one of the activities included in the peacebuilding approach, since it contributes to reaching a "sustaining peace". As stated in the 2015 Review of the United Nations Peacebuilding Architecture, "sustaining peace requires a fully integrated approach at the strategic and policy-making level as well as at the operational level"[10], and it has thus a multidimensional nature.

Given this fact, it is also valid to say that a "total failure at reconciliation will guarantee a very cold peace and perhaps a return to violence"[11].

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4 European Peacebuilding Liaison Office (EPLO), http://eplo.org/wp-content/uploads/2016/09/EPLO-Leaflet_2016.pdf (accessed December 14, 2016).

5 UN Secretary General, *An Agenda For Peace*, UN Doc. A/47/277-S/24111, June 17, 1992, para. 21, http://www.un-documents.net/a47-277.htm (accessed December 14, 2016).

6 Commission on Human Security, *Human Security Now*, New York 2003, p. 63, in http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/chs_final_report_-_english.pdf (accessed December 14, 2016).

7 P. Roe, *The Value of Positive Security*, in Review of International Studies, vol. 34, issue 4, 2008, p. 777.

8 European Peacebuilding Liaison Office (EPLO), see note 4.

9 R. Culbertson and B. Pouligny, *Re-imagining Peace After Mass Crime: A Dialogical Exchange Between Insider and Outsider Knowledge*, in B. Pouligny and others, *After Mass Crime: Rebuilding States and Communities,* pp. 271-287.

10 UN Advisory Group of Experts, *The challenge of sustaining peace: Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture*, June 2015, para. 7, in http://www.un.org/en/peacebuilding/pdf/150630%20Report%20of%20the%20AGE%20on%20the%202015%20Peacebuilding%20Review%20FINAL.pdf (accessed December 12, 2016).

11 R. L. Rothstein, *Fragile Peace and its Aftermath*, in R. L. Rothstein (ed.), *After the Peace: Resistance and Reconciliation*, Lynne Reiner, London 1999, pp. 223-247.

Nevertheless, some tensions still remain among practitioners and scholars about the relationship between a long-lasting peace and the elements of reconciliation – first of all justice.

2.1 The tension "Justice v. Peace"

In the late 1980s and early 1990s a long-standing debate over whether justice or peace should be prioritized in addressing the many needs of post-conflict countries emerged. Many practitioners engaged in peacebuilding were concerned that the promotion of accountability – through, for instance, trials and punishments – could disrupt the peacebuilding process: those targeted by accountability mechanisms may oppose resistance to peace deals which do not shield them from prosecutions; while short and medium term security could be hindered by punishment measures. This conception was the reason why in several Latin American countries amnesty laws prevailed over punishment proceedings, in the name of the imperative "impunity for the sake of peace and reconciliation". During those years, in post-dictatorship or post-conflict countries "a choice would have to be made between pursuing peace **or** seeking justice (emphasis added)"[12]. On the other hand, justice and hence accountability advocates have emphasized the ability of punishment to deter future abuses[13] and the high risk that impunity for certain perpetrators could undermine people's faith in the rule of law[14], the promotion of which is one of the goals of peacebuilding processes.

The debate has been overcome by the recognition at all levels of the role of justice and accountability in the achievement of peace. If 'peace' is considered not only as peace agreements or negotiations but "as an ongoing process of political and social transformation based on the rule of law"[15], justice and accountability must be recognized as a premise and "a part of an effective transition to positive peace"[16]. As Kofi Annan noted, "this debate of justice and peace [..] is a false debate in the sense that you need both. Justice reinforces peace and the long-term peace that one is looking for"[17]. Accountability, indeed, contributes to rebuild relations of trust in post-conflict societies because it allows the reintegration of former perpetrators into society without neglecting victims' rights. Furthermore, it simultaneously acknowledges the rights of victims, victimizers and ex-combatants[18]. Each of these accountability components are key to long-term peace.

From the late 1990s and the early 2000s, an increasing number of peace processes included measures of transitional justice and accountability.
Prominent examples are international *ad hoc* tribunals, like the International Criminal Tribunal for Former Yugoslavia (hereinafter ICTY) and the International Criminal Tribunal for Rwanda (hereinafter ICTR); hybrid tribunals, such as the Special Court for Sierra Leone (hereinafter SCSL) or the Extraordinary Chambers in the Courts of Cambodia; the International Court of

[12] J. García-Godos, *It's about trust*, in C. M. Bailliet and K. M. Larsen, *Promoting Peace Through International Law*, Oxford University Press, April 2015, p. 325.

[13] L. Huyse, *Amnesty, truth or prosecution*, in L. Reychler and T. Paffenholz, *Peace-building, a field guide*, Boulder, Lynne Rienner Publishers, p. 325.

[14] Ivi.

[15] J. García-Godos, see note 12.

[16] P. Firchow and R. MacGinty, *Reparations and Peacebuilding: Issues and Controversies*, in Human Rights Review n. 14, 2013, pp. 231-239.

[17] Kofi Annan, former United Nations Secretary General, interviewed by the International Center for Transitional Justice, see video "Peace and Justice", in https://www.facebook.com/pg/theICTJ/videos/ (accessed December 15, 2016).

[18] J. García-Godos, see note 12, p. 323.

Justice (hereinafter ICJ) and the International Criminal Court (hereinafter ICC). These courts are the mechanisms of transitional justice that receive most international and media attention and they are strictly related to peace-furtherance. Peace as a goal is indeed included in these courts' Statutes or in the mandating UN resolutions, conferring specific legal basis to them. In the UN Charter, in which the ICJ Statute is annexed, the use of the ICJ is considered as "a peaceful means" to settle disputes among States. In addition, the maintenance of international peace is part of the UN considerations for the establishment and the activity of this court. In the preamble of the ICC it is made specific reference to the maintenance of peace, which is considered threatened by mass atrocity crimes prosecuted by ICC itself[19]. Furthermore, it is important to recall the 2007 policy paper of the Office of the Prosecutor of the ICC, which notes that the ICC was created on the premise of justice as an essential component of a stable peace. Finally, the UN Security Council resolutions establishing both ICTY and ICTR emphasize that prosecutions of perpetrators of gross human rights violations would contribute to the process of national reconciliation and to the restoration and maintenance of peace[20]. The 'interests of peace', hence, "become germane to the Court's activities, and to policy decisions, such as whom to prosecute"[21]. Peace is reached through the exercise of judicial functions by international courts: judgments and punishments have indeed a potentially preventive effect, absolutely relevant for the purpose to ensure peace and to deter atrocities. Prosecutions end the circle of impunity that has been at the origin of past gross human rights violations. They are a deterrence against future abuses and violence: this was precisely the argument behind the establishment of the ICTY, the ICTR and, finally, the ICC. The measures adopted by the courts carry "the potential to change the behavior and actions of states or non-states actors involved in activities that might be detrimental to peace"[22].

A very considerable contribution to the achievement of peace is the fact that prosecutions individualize guilt, which means that individual accountability is established. This is a crucial aspect because it defuses any risk of a "responsibility generalization", eradicating the detrimental perception that a whole community can be responsible for atrocities. The collective guilt is the source of negative stereotypes and hatred, both enemies of peace.

Another important criminal prosecutions' contribution to peacebuilding is the fact that trials also help long-term democratic consolidation. Retributive justice consolidates the values of democracy and public confidence in the new institutions, encouraging people to believe in the capability of the new regime to reinstate democratic values.

At the same time, prosecutions also mean attention to the victim's needs and rights. The 'victim-oriented perspective' is central to the promotion of peace, since it supports political transformation of peacebuilding processes by enhancing the transitions legitimacy in the eyes of the victims. Victims ultimately perceive their reasons and their dignity recognized at an institutional level, and this restores their self-confidence and helps heal their wounds. Trials also reduce the occurrence of private revenge, which victims may be tempted to. This

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[19] Rome Statute of the International Criminal Court, Preamble, para. 3, in https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed December 15, 2016).

[20] UN Security Council, Res. 827/1993, UN Doc. S/RES/827 (1993), in http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf; UN Security Council, Res. 955/1994, UN Doc. S/RES/955 (1994), in https://documents-ddsny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement (accessed December 15, 2016).

[21] G. Zyberi, The *Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest*, in C. M. Bailliet and K. M. Larsen, *Promoting Peace Through International Law*, Oxford University Press, April 2015, p. 7.

[22] *Ibidem*, p. 9.

function of justice is of paramount importance to reach peace, because it is easily understandable that the so-called 'self-help' justice can trigger social and political disturbances.

3. The balance between justice and peace in the Colombian peace process

3.1 The armed conflict and the peace process: a brief introduction

Colombia has been ravaged by an internal conflict since the early 1950s, with a period of civil war known as *La Violencia* (1948-1957), that was then re-ignited in 1964, when the government attack on the communist-held land gave rise to the first communist guerrilla groups: the Revolutionary Armed Forces of Colombia – People's Army (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo,* FARC-EP), the Army of National Liberation (*Ejército de Liberación Nacional,* ELN) and the Popular Liberation Army (*Ejército Popular de Liberación*, EPL). The stated intention of the guerrilla groups was to overthrow the government and to establish a Marxist regime, giving priority to a land reform. The rise of these first guerrilla groups coincided with the establishment of paramilitary groups too, uniting in 1997 under the name *Autodefensas Unidas de Colombia* (United Self-Defense Forces of Colombia, AUC).

The conflict lasted over five decades and has become the longest conflict in the history of the Western hemisphere. The war involved dozens of different armed groups, including leftist guerrilla organizations, paramilitary groups, narco-traffickers, and state actors. The violence has displaced millions of Colombians, and left hundreds of thousands of dead.

Since the early 1980s, peace negotiations became a crucial aspect of the war. A first peace talk started in 1982 but fell apart; other attempts had been undertaken in 1989-1990 and in the late '90s. In 2005, a first result has been reached thanks to a negotiation with paramilitaries which led to the demobilization of the AUC. However, it was with President Santos that the peace process was stimulated again and undertaken in a continuous way. Santos reached important results and his efforts led him to win the Nobel Peace Prize in 2016. The peace talks started again in Havana, Cuba, in November 2012, with the Colombian government and the FARC sitting at the negotiating table. The negotiators fixed an Agenda for Peace, defining six points to be reached in the final peace agreement: 1) a comprehensive agricultural development policy; 2) political participation; 3) the end of the conflict, which implies a bilateral and definitive cease of fire and hostilities, the abandonment of arms and the reintegration of guerrilla members into civil life; 4) a solution to the problem of illicit drugs; 5) victims, which include two sub-points on human rights and trust; 6) mechanisms of implementation, verification and countersignature of all the agreed points.
In May 2013, the government and the FARC reached the first agreement on the agricultural issue, named "*Hacia un Nuevo campo colombiano: Reforma Rural Integral*" ("Towards a new Colombian countryside: an integral rural reform").In November, the two sides reached a deal on the second point: the political participation with full guarantees to the guerrilla members who confess their crimes imploring social forgiveness. The fourth point of the agenda was addressed by the agreement signed in May 2014: the deal tried to prevent and resolve the phenomenon of drug trafficking by providing jail exemption for guerrilla members and

amnesty for drug traffickers since the traffic of drugs was used by guerrillas to finance the political war[23].
In September 2015, the FARC agreed to cease fire and to be prosecuted by special tribunals that would "restrict their liberty" for five to eight years (third point in the Agenda).
In December 2015, an agreement on the fifth point of the Agenda was reached. It stems from the June 2015 negotiation[24], which saw the two sides agreeing to form an independent and impartial truth commission once the peace accord would be implemented. The December Agreement on the Victims of the Conflict (the *Acuerdo sobre las Víctimas del conflicto*) provided a system based on truth, justice, reparation and non-repetition (*Sistema Integral de Verdad, Justicia, Reparación y no Repetición*) composed of various judicial and extrajudicial transitional justice mechanisms (a Commission to clarify the truth, coexistence and non-repetition; the Special Unit for the Search of Missing Persons (*Unidad para la Búsqueda de Personas dadas por Desaparecidas*); the Special Court for Peace; reparation measures and guarantees of non-repetition)[25]. This system grants the FARC ten political seats and allows amnesties for the guerrilla members.
Finally, in September 2016 the National government and the FARC signed the *Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera* (the General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace), a 297-page peace agreement supposed to put an end to the 52-years war.
The treaty was signed with a pen made of recycled bullets once used in the conflict and engraved with an inscription that reads: "Bullets wrote our past. Education, our future"[26]. The peace accord contains the above-mentioned six agreements, about land reform, FARC's political participation, ceasefire, solutions for drug trafficking, victim's reparation and transitional justice and implementation mechanisms.
On October 2, 2016 plebiscite on the ratification of this historic peace accord, 50,2% of the Colombian people voted "no". In November, the government ratified a revised version of the peace deal: the new 310-page accord introduced 50 changes to the initial agreement rejected by the voters and has officially put the word "end" to the conflict. However, the implementation of the accord remains difficult and long, therefore the peace process is currently in a state of limbo.

3.2 Justice, truth, reparation: how transitional justice mechanisms have been applied in order to reach reconciliation

The transitional justice process in Colombia differs from the past experiences because its scheme entered the political discourse while the armed conflict was still ongoing. As such, the aim of the transitional justice mechanisms was to achieve a partial peace by,

[23] A. E. M. Cardona, *The Justice and the Colombia Peace Talks*, in Open Journal of Political Science, n. 6, 2016, pp. 261-273 in http://www.scirp.org/journal/ojps http://dx.doi.org/10.4236/ojps.2016.63024 (accessed December 28, 2016).

[24] This agreement stems from the 2012 Legal Framework for Peace, which allowed the government to create transitional justice instruments in its peace negotiations. The Legal Framework for Peace will be discussed below.

[25] Alto Comisionado para la Paz, *Acuerdo sobre las Víctimas del conflicto*, in http://www.altocomisionadoparalapaz.gov.co/Documents/informes-especiales/abc-del-proceso-de-paz/victimas.html (accessed December 28, 2016).

[26] K. Chen, N. Gallón, R. Romo, *The last armed conflict in Latin America is finally ending*, in CNN, September 2016, http://edition.cnn.com/2016/09/26/americas/colombia-farc-peace-deal/ (accessed December 28, 2016).

first of all, reaching demobilization of illegal armed groups[27]. The link between the demobilization process and the victims' rights to be guaranteed through transitional justice is one of the main features of the Colombian case and it has frequently fueled a public and academic debate[28] since the first legal codification of transitional justice mechanisms in the *Ley de Justicia y Paz* (Justice and Peace Law, also known as Law 975), approved in July 2005. The Law 975 introduces the concept of retributive justice in terms of imprisonment and recognizes the role of the victims and their rights in the peace process. It consists of two parts: the first refers to the judicial process and the second focuses on the victims' rights to justice, truth and reparation.

With regard to the first part, the law requires that *all* perpetrators of war crimes and crimes against humanity to be prosecuted and sentenced (referred by some scholars as the "maximalist" model of transitional justice)[29]. Since the law was adopted *during* the armed conflict and since reaching a partial peace was necessary, the Law 975 provides a new judicial feature, as an incentive to perpetrators' demobilization and, hence, to negotiation. Such incentive is what the Law 975 refers as "alternative sentencing", which is the alternative reduced penalty of five to eight years of prison applicable to those members of illegal armed groups who fully confess their crimes, depose their weapons and contribute to truth and reparation. The *Unidad Nacional de Fiscalías para la Justicia Y la Paz* (the Attorney General National Unit for Justice and Peace), a special agency prescribed by Law 975, has the mandate to ensure that these obligations are fulfilled by the demobilized paramilitaries.

As a result of this negotiation process, between 2002 and April 2010, 21.909 members of illegal groups have demobilized[30].

The criminal proceedings are carried out by a new institutional framework composed of the Office of General Prosecutor, responsible for the investigation stage; the Justice and Peace Chamber, in charge of the trial stage; and the Supreme Court of Justice, competent in case of appeal. The fact that the proceedings are entrusted by the ordinary judicial system has the great advantage of strengthening the local institutional capabilities and of bringing justice closer to the communities affected by the crimes[31].

Proceedings begin with the so-called "free-statement hearings", which have the purpose to collect the full confession of all crimes committed by the indicted. These hearings are public and hence represent the first step towards reconciliation, because they provide a confrontation between victims and their perpetrators. Up to 2010, more than 36.000 criminal actions and the existence of more than 52.400 victims were reported during these hearings[32].

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[27] J. García-Godos and K. A. O. Lid, *Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case if Colombia*, in Journal of Latin American Studies, vol. 42, n. 3, Cambridge University Press, August 2010, p. 488, in http://www.jstor.org/stable/40984893 (accessed January 3, 2017).

[28] The debate will be analyzed further.

[29] D. Acosta Arcarazo, R. Buchan and R. Urueña, *Complementarity as the focus of contemporary debates on the ICC in Colombia: two visions of transitional justice*, in D. Acosta Arcarazo and others, *Beyond Justice, beyond Peace? Colombia, the interests of justice, and the limits of International Criminal Law*, in *Criminal Law Forum*, n. 26, CrossMark 2015, p. 295. See also D. López-Medina, *Estandares Internacionales Para la Investigación Y Acusación de Delitos Complejos En El Marco de La Justicia Transicional: Su Aplicación Al Caso Colombiano*, in *International Law* n. 16, 2010, pp. 45-80.

[30] Republic of Colombia, *Transitional Justice in Colombia. Justice and Peace Law: an experience of truth, justice and reparation*, RC/ST/PJ/M.1, June 2010, p. 9, in https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-PJ-M.1-ENG.pdf (accessed January 3, 2017).

[31] *Ibidem*, pp. 6-7.

[32] *Ibidem*, p. 14.

The second part of the law focuses on the victims: for the first time in Colombia's history, victims are put at the center of the peace process. The Law 975 gives also a definition of "victim" (Art. 5), as:

> *Anyone who individually or collectively has suffered direct harm such as temporary or permanent injuries that cause certain forms of physical, psychological and/or sensory handicap (sight and/or hearing), emotional suffering, financial loss or disrespect for their fundamental rights. These harms must have resulted from acts of transgression of criminal legislation, carried out by organized armed groups at the margins of law.*

However, this definition is restricted because it lists only the violations committed by members of "armed groups at the margins of the law", thus excluding those victimized by official state agents.

The Law 975 promotes the victims' rights to justice, truth and reparation (Art. 4). The first, namely justice, is granted by the possibility for victims to participate in all the stages of the criminal proceeding (after registering the violations they have suffered by filling a form called *Registro de hechos atribuíbles a grupos organizados al margen de la ley* – Register of Acts Attributable to Organized Armed Groups at the Margin of the Law), to demand answers via their legal representatives from the accused about the crimes perpetrated and to demand reparation in its different forms.

The right to truth is implemented in two dimensions: the judicial truth and the historical truth[33]. In the first case, truth refers to the information gained during the criminal proceedings, specifically through the free-statement hearings: the law establishes the obligation for the accused to confess not only their personal crimes, but also those committed by the group they belong to.

As regards to the second case, historical truth refers to what indeed happened during the conflict and hence the truth about its nature and evolution.

The acquisition of historical truth is one of the mandates of the *Comisión Nacional de Reparación y Reconciliación* (the National Commission for Reparation and Reconciliation, hereinafter CNRR), created by the Justice and Peace Law. The CNRR is an independent institution composed by the representatives of government agencies, civil society and victims' organizations. Its duties include the guaranteeing of the victims' rights to participate in the process, the provision of specific measures and programs and the promotion of historical truth through the work of the *Grupo de Memoria Histórica* (Historical Memory Group, hereinafter GMH), formed by CNRR itself. The GMH has the aim to construct an "integrated history" (*memoria integradora*) of the Colombian armed conflict, in order to contribute to create "an environment for political negotiations and reconciliation"[34].

Another duty of CNRR includes the acknowledgment and implementation of the victims' right to reparation. The Commission strategy establishes that reparation must be sufficient for the victims; effective, so as to cover the majority of the victims; timely; favorable to those groups of victims particularly vulnerable, and differentiated, in order to respond to the different needs of different people[35]. Victims have the right to receive reparations directly from the victimizers through a judicial process. If the victimizer is unable to provide it, the State has a subsidiary obligation to repair, and no budgetary limitation exists. In addition to judicial

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[33] J. García-Godos and K. A. O. Lid, *Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case if Colombia,* in Journal of Latin American Studies, vol. 42, n. 3, Cambridge University Press, August 2010, pp. 505-507, in http://www.jstor.org/stable/40984893 (accessed January 3, 2017).

[34] *Ibidem*, p. 507.

[35] *Ibidem*, p. 508.

reparation, the CNRR established in 2008 the Individual Administrative Reparation Program, destined towards those who are unable to identify or are afraid to confront their victimizers. The administrative reparation is covered by the State in the name of the "solidarity compensation" (not because the State assumes the responsibility for the crimes committed, unlike what happened, for instance, with the Peruvian or Guatemalan administrative reparation programs) and pertains monetary compensation only. Besides individual reparation, collective reparation is provided as well, with the aim of "rebuilding the social fabric and inserting state institutions into the communities affected by systematic violence"[36]. Symbolic reparations are also guaranteed.

This "maximalist" transitional justice model offered by the Justice and Peace Law led to weak results in practice. Following the introduction of the alternative sentence, up to 2015 only fourteen sentences were pronounced, over a total of 4400 cases[37]. According to the Historical Memory Group,

> *En las actuales condiciones es imposible judicializar adecuadamente a los postulados por el gobierno nacional a ser beneficiarios de la pena alternativa. Los cálculos más optimistas […] hablan de varias décadas de trabajo para lograr cumplir con el objetivo de una completa judicialización. Los menos optimistas hablan de una tarea de varios siglos[38].*

In a transitional justice system that relies almost exclusively on the judicial process to achieve any result, this could be considered a failure of the model as a whole[39]. Furthermore, as I have outlined above, the Law 975 fueled a public and academic debate. The central question concerned why the law focuses at the same time and with the same legal instruments on both demobilization of illegal armed groups and victims' rights and how it is possible that a peace process involves paramilitaries and the application of transitional justice measures when no transition has occurred yet[40]. While supporters of the process have argued that there is full compliance with international human rights standards[41], critics

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[36] National Commission for reparation and Reconciliation (CNRR), *Informe al Congreso: proceso de reparación a las victimas – balance actual y perspectivas futuras*, Bogotá, 2007.

[37] Grupo de Memoria Histórica, *¡Basta ya! Colombia: memoria de guerra y dignidad*, Centro Nacional de Memoria Histórica, Imprenta Nacional, Bogotá 2013, p. 246, in http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-memorias-guerra-dignidad-new-9-agosto.pdf (accessed January 5, 2017).

[38] Ivi. "In the present conditions, it is impossible to properly judge the postulates of the national government to be recipients of the alternative penalty. The most optimistic calculations[...] speak of several decades of work to achieve the objective of a complete judicialization. The least optimistic speak of a task of several centuries".

[39] D. Acosta Arcarazo, R. Buchan and R. Urueña, *Complementarity as the focus of contemporary debates on the ICC in Colombia: two visions of transitional justice*, in D. Acosta Arcarazo and others, *Beyond Justice, beyond Peace? Colombia, the interests of justice, and the limits of International Criminal Law*, in *Criminal Law Forum*, n. 26, CrossMark 2015.

[40] M. P. Saffon and R. Uprimny, *Uses and Abuses of Transitional Justice in Colombia*, in M. Bergsmo and P. Kalmanovitz, *Law in Peace negotiations*, Oslo 2009, pp. 217-243.

[41] E. Pizarro, president of the CNNR, has repeatedly claimed the compliance of the Colombian peace process with international human rights standards. See, for instance, his interview, *AHORA*, October 11, 2005, in www.cnrr.org.co/contenido/09e/spip.php?article285 (accessed January 5, 2017).

have argued that the Law 975 is motivated more by political and economic interests than by a real protection of victims' rights[42].

As the debate was taking place, a new transitional justice model had been adopted, the "minimalist" one, represented by *El Marco Jurídico Para la Paz* (the Legal Framework for Peace, hereinafter LFP), an amendment to the Constitution approved by the Congress in June 2012 in order to facilitate negotiations with the FARC-EP. The LFP is, as the name says, just a framework, and so it does not itself set any transitional justice alternative. On the contrary, it outlines the scope of possible options that might be adopted in subsequent legislations.

In contrast with the maximalist idea of prosecuting all perpetrators and commuting their sentences with alternative ones, the LFP proposes a process of prioritization and selection: not all perpetrators are prosecuted, but only those considered "most responsible" are selected and actually serve a full sentence. The Congress shall determine, by statutory law, the selected criteria, without any prejudice to the general duty of the State to investigate and to punish serious violations of international humanitarian law, identified in the LFP as crimes against humanity, genocide, and war crimes[43]. This brings us to clarify one feature: in case of war crimes, only the persons most responsible for those crimes "committed in a systematic manner" ("*crimenes de guerra cometidos de manera sistemática*") are prosecuted.

The Congress is also able to decide when it is appropriate to suspend sentences[44] and apply extrajudicial penalties or alternative sentences. This vast array of possibilities intends to facilitate any agreement with the guerrillas[45]. All these alternative measures are applied only if certain conditions are met, including laying down weapons, acknowledging responsibility, releasing hostages, freeing all the minors forcibly recruited, contributing to the clarification of truth and providing reparation to victims.

Besides the principle of selection, the LFP establishes also the principle of differentiation, furnishing a "differentiated treatment for the different armed groups operating outside of the law who have been parties to the internal armed conflict and also for state actors". This is an important aspect because, unlike what was outlined by the Law 975, in the LFP gross human rights violations committed by state actors are not excluded from the scope of the amendment.

Finally, the LFP declares the establishment – through a subsequent law – of a truth commission, with the role of investigating the truth and of formulating recommendations for any transitional justice measure that may be adopted.

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[42] Among others, victims' organizations and entities representing victims and also the Colombian Commission of Jurists, that does not think that the process can contribute to the solution of the conflict because Law 975 just intends to offer impunity to victimizers.

[43] Colombia is, in fact, under an international law obligation to prosecute the offenders, as it is a party of the Convention on the Prevention and Punishment of the Crime of Genocide, 1949 Geneva Conventions on the law of armed conflict and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[44] The Colombian Constitutional Court, however, ruled that is impermissible for the state to *completely* suspend the execution of sentences of those convicted of being most responsible for serious violations of international humanitarian law. See Corte Constitucional [C.C.] [Constitutional Court], August 28, 2013, Sentencia C-579/13 (Colom.), para. 9.9.8., in http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm (accessed January 5, 2017).

[45] F. Gómez Isa, *Justice, truth and reparation in the Colombian peace process*, published in Norwegian Peacebuilding Resource Centre, Report April 2013, p. 3, in http://noref.no/var/ezflow_site/storage/original/application/5e7c839d7cf77846086b6065c72d13c5.pdf (accessed January 6, 2017).

The attempt of the LFP remains the same as the one adopted by the Justice and Peace Law: to find the right balance between achieving peace and reconciliation and guaranteeing the victims' rights to justice, truth and reparation[46]. Nevertheless, the principle of selection has been intensely criticized because it means that certain offences committed during the armed conflict are not prosecuted nor punished, undermining the rights of the victims[47]. In fact, the LFP contemplates the possibility for the legislation to enact a law providing for the "conditional waiver" not only for perpetrators of international crimes not considered "most responsible", but also for all those not selected for prosecution under the prioritization scheme.

In 2015, a new transitional justice system has been adopted: The Integrated System of truth, justice, reparation and non-repetition, envisaged by the Agreement on the Victims of the Conflict (December 2015). The new system includes the establishment of five mechanisms or measures: the *Commission to clarify the truth, coexistence and non-repetition*, which is composed of eleven members nominated by the community and by the victims' organizations; the *Special Unit for finding persons reported missing*, with the purpose to find and to identify missing persons; the *Special Jurisdiction for Peace*, made up of the Chambers of Justice and of the Tribunal for Peace; *Reparation-measures[48] for building peace*, to restore the rights of the victims; and *Guarantees of non-repetition*, that guarantee the implementation of the above-mentioned mechanisms. Here, I focus on the Special Jurisdiction for Peace to simplify and clarify the matter.

The new system makes some progress in the transitional justice process compared to the LFP. First of all, in perfect accordance with the International Human Rights Law – and, more specifically, with the American Convention on Human Rights, of which Colombia is part – the agreement clearly bans any amnesties or pardons for crimes against humanity, genocide, serious war crimes, hostage-taking or other deprivation of liberty, torture, extrajudicial executions, enforced disappearances, violent carnal access and other forms of sexual violence, child abduction, forced displacement and recruitment of children[49]. If the accused person recognizes such human rights violations and implores social forgiveness, he or she will hence be punished by the Special Court for Peace with a penalty of five to eight years of restriction of liberty under special conditions. Those who recognize their responsibility after their sentencing will be deprived of liberty under ordinary prison conditions for five to eight years. The perpetrators who do not recognize their responsibility and do not ask for social forgiveness will be imprisoned for no less than fifteen years nor more than twenty[50].

The broadest possible amnesty is rather granted for political and related/connected crimes: an amnesty law will be implemented to determine the scope and the extent of the relation/connection.

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[46] *Ibidem*, p. 1.

[47] Human Rights Watch, *Colombia: Amend "Legal Framework for Peace" Bill*, March 2012, in http://www.hrw.org/news/2012/05/31/colombia-amend-legal-framework-peace-bill (accessed January 4, 2017).

[48] Reparation measures include: repatriation of victims abroad, land restitution, psychosocial rehabilitation, acts of recognition of responsibility, as well as monetary compensation. See the Office of the High Commissioner for Peace, *The Colombian Peace Process. The Agreement regarding the victims of the conflict,* p. 17, in http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/Cartilla-victimas-ingles-af-web.pdf (accessed January 5, 2017).

[49] Agreement on Victims of the Conflict, art. 40, in http://equipopazgobierno.presidencia.gov.co/acuerdos/Documents/acuerdo-punto-victimas.pdf (accessed January 5, 2017).

[50] Office of the High Commissioner for Peace, *The Colombian Peace Process. The Agreement regarding the victims of the conflict*, see note 150, p. 10.

The Agreement also states that under this Special Jurisdiction confessed perpetrators of crimes against humanity have no restriction on their political rights, including the possibility to run for political office[51].

As far as crimes eligible of being amnestied or pardoned are concerned, perpetrators who fully confess will be exempt from prison and from any equivalent form of detention, and will instead be subjected to sanctions with "restorative and reparative function", such as social work and activities which will contribute to satisfy the victims' rights[52]; confessed perpetrators will face restrictions on freedom or rights – such as freedom of residence or movement – only when these measures are necessary for the execution of the restorative and reparative sanctions[53].

As already stated in the LFP, this special judicial mechanism, established to prosecute conflict-related crimes, has jurisdiction over both the FARC and the state agents.

An original aspect compared to the LFP is that criminal proceedings are not limited to the "most responsible" persons, but to all those involved, directly or indirectly, in the commission of the mentioned crimes.

The judicial system envisaged by the Agreement on Victims of the Conflict has been created in order to reach the goals defined in the accord, such as ending impunity, getting the truth, contributing to victims' reparation and providing guarantees of non-repetition.

Surely, the new system established by the Agreement on the Victims of the Conflict has restored criminal justice to a central position in the transitional process[54], but it has been exposed to several criticisms by Colombian people and the international community.

3.3 How is transitional justice interpreted by the Colombian people? The tension "Justice v. Peace"

In countries in the midst of a conflict like Colombia, where there has not been a radical political transformation, the idea of transitional justice keeps on circulating in different ways depending on the different social and political contexts.

First of all, it is important to understand how the idea of transitional justice is seen by the government. Without any doubt, the government's interest in transitional justice pertains to its flexible approach to law, that enables the government to decide whom to punish and in which way. The aim is to end the conflict as well as to minimize all the different types of repercussions the war could have on the government itself for its role during the hostilities. This aspect was evident under Uribe's administration, when the Justice and Peace Law was adopted: as explained above, the Law 975 exempted state actors from punishment.

Precisely regarding this matter, in an interview conducted in 2010 a research-oriented NGO's Director in Bogotá commented:

> *As far as Colombia is concerned, what we're witnessing more than a transitional justice movement is the manipulation of transitional justice rhetoric in order to conduct a denial strategy of state-sponsored violence*[55]*.*

[51] Agreement on Victims of the Conflict, see note 49, art. 36.

[52] *Ibidem*, art. 60.

[53] Ivi.

[54] Ivi.

The above interviewee talks about "manipulation" of the concept of transitional justice and this supports the initial statement about the different perceptions of transitional justice circulating in Colombia.

If attention is focused on civil society, it is simple to understand how the development of a transitional justice framework has been diffusely supported by Colombian people since the adoption of the Justice and Peace Law, as it was expected to bring reconciliation in the country. Obviously, the idea has circulated in a different way from the one supported by the government. To Colombian people, transition does not mean impunity:

> *If transition is amnesty or impunity, there is no point in it; but our bet is on peace, a peace that has to come from truth and justice. It is very complicated for a person to be told, "forget about it" when they have to see the person who murdered their family member in the mayoralty (interview with the Director of a victims' organization, February 2010)*[56].

According to a 2012 poll conducted by Ipsos, the general idea of peace with the FARC is accepted by the 77% of Colombians, while 68% rejects the idea of some FARC members not being punished[57]. In December 2014, thousands of Colombians rallied on the streets yelling "*paz sin impunidad*" (peace without impunity), to urge the government to punish FARC members rather than pardon them for the violence committed[58]. To Colombian people, peace has thus to do with justice and truth, with a comprehensive approach that can "set up the ground to a new idea of democracy or state"[59].

This powerful political demand for justice played a crucial role in the outcome of the October 2, 2016 plebiscite on the ratification of the peace agreement, one of the pillars being the Agreement on Victims of the Conflict.

The plebiscite narrowly failed: 50,2% of voters rejected the peace accord, while 49,8% were in favor (which means a difference of fewer than 54.000 votes), despite polls taken before the date of the referendum showed the "yes" as favored. This result needs to be analyzed carefully. Firstly, the turnout was rather low – less than 40% of Colombians – partly due to weather conditions (the hurricane in the Caribbean region, creating obstacles for the inhabitants, especially in the rural regions, to reach the polls).Secondly, the margin between "yes" and "no" was very narrow, which means that the "no" vote was representative of just half of the Colombians and that thus the society was profoundly divided. Finally, the vote showed a rural-urban division in Colombia: the rural zones, which have been mostly ravaged by the conflict, predominantly voted in favor of the peace agreement; the majority of urban voters, instead, least affected by the war, voted against the deal (an exception was capital

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[55] The interviews were conducted by J. R. Rowen in January and February 2010 and were collected in May 2015. Parts of these interviews are included in J. R. Rowen, *"We don't believe in Transitional Justice:" Peace and Politics of Legal Ideas in Colombia*, p.3, in Law & Social Inquiry, American Bar Foundations, 2016.

[56] *Ibidem*, p. 13.

[57] The poll is available at: http://m.semana.com/nacion/articulo/paz-paradojica/264804-3 (accessed January 6, 2017).

[58] M. Hoffman, *Thousands of Colombians Rally Against Amnesty for FARC Guerrilla Fighters*, VICE NEWS, December 14, 2014, in https://news.vice.com/article/thousands-of-colombians-rally-against-amnesty-for-farc-guerrilla-fighters (accessed January 6, 2017).

[59] Interview with a research-oriented NGO in Bogotá, January 2010, available in J. R. Rowen, see note 55.

Bogotá, where the "yes" vote prevailed)[60]. All these considerations lead to the conclusion that the outcome of the plebiscite is not a faithful photography of what Colombia thinks: not even half of the Colombians voted and there was not an overwhelming victory of "no". The outcome shows a country profoundly divided over whether reaching peace at any condition or postponing peace in order to negotiate better terms. This is why voters of the peripheral zones of the country, which are the most affected by the armed conflict, voted "yes" to the details of the peace accord: it is fair to suppose that the victims preferred the proposed agreement due to the 52-year conflict they have experienced firsthand.

But why did 50,2% of Colombians vote "no"? Before answering, it is important to start by saying that the "no" was not a rejection of peace, but it was a rejection of the terms of the peace accord. Indeed, the question posed was: "Do you support the final agreement for the conclusion of the armed conflict and the construction of a stable and lasting peace?"[61]. Many Colombians do not support such agreement because they believe it fails to provide adequate sanctions for guerrilla groups. The "no" was, thus, an objection to the transitional justice provisions envisaged by the peace accord, specifically towards two aspects of the framework.

The first aspect is the impunity for all FARC members who acknowledge their responsibility and thus cooperate towards the search for truth. As explained in the previous section, the Agreement on Victims of the conflict exempts from prison any FARC member who fully confesses his or her crimes, receiving instead sanctions with "restorative and reparative functions" and limited restriction on freedom (such as liberty of movement or of residence) for five to eight years.

The second is the guerrilla leaders' political participation. According to the agreement[62], they can have observer seats in the Congress during the discussion of the reforms envisaged by the peace accord and are also allowed to run for Congress from the next political cycle (2018), as long as they depose weapons, cooperate with judicial proceedings and fully confess their crimes.

It is here evident the previously mentioned tension "justice v. peace"[63]. The peace accord seems to give priority to peace instead of justice, as it considers it an obstacle to reach a lasting peace. Therefore, the agreement prescribes the implementation of an amnesty law. On the other hand, people refuse to accept a situation where peace is only reached thanks to the impunity of perpetrators.

Given these terms, for many Colombians transitional justice seems a euphemism for impunity[64] rather than a holistic framework in which there is a balance between restorative measures (the achievement of truth and reparation) and the retributive ones (judicial proceedings and punishment), and in which justice is not just judicial accountability. For Colombians, justice, of course, means holding perpetrators accountable, but most of all it means adequate punishment[65].

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[60] A. Idler, *Colombia just voted no on its plebiscite for peace. Here's why and what it means*, October 3, 2016, in https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/03/colombia-just-voted-no-on-its-referendum-for-peace-heres-why-and-what-it-means/?utm_term=.ddae056fad4d (accessed January 6, 2017).

[61] T. Smiley, *This is the exact question asked in Colombia's peace deal plebiscite*, Colombia Reports, August 30, 2016, in http://colombiareports.com/exact-question-asked-colombias-peace-deal-plebiscite/ (accessed January 6, 2017).

62 See paragraph 3.2.1.1., p. 63, and paragraph 3.2.1.2., a), p. 64, of the 297-page Agreement, in http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Paginas/Texto-completo-del-Acuerdo-Final-para-la-Terminacion-del-conflicto.aspx (accessed in January 7, 2017).

[63] See "The tension "Justice v. Peace" paragraph.

[64] J. R. Rowen, see note 55, p. 22.

[65] Ivi.

In order to better adapt this discourse to the concrete case, the particularity of the Colombian context must be taken into consideration. The end of the 52-year conflict will not occur through the military defeat by one party on the other(s): this means that the end of the conflict must be negotiated among the parties. The negotiation, of course, also includes the issue of transitional justice aspects such as accountability, which must be bargained since there is not a victorious side seeking for criminal prosecution of the defeated side's perpetrators, as it has happened in the aftermath of the Rwandan genocide or in the case of the overthrow of Saddam Hussein's regime[66]. Thus, the negotiated nature of the end of the Colombian conflict, in which both the government and the guerrilla sides have perpetrated atrocities, requires that the needs of both parties must be taken into account. The FARC's strong interest in limiting prosecution for its members played a crucial role in the implementation of a partial accountability system, as the one envisaged by the Agreement on Victims of the conflict.

If this is certainly true, it is not difficult to understand the aim of the Colombian peace accord. Nonetheless, to what extent must negotiations take into consideration both sides? What about victims' rights and expectations?

The Colombian peace process tried, in an unusual way for a peace negotiation, to acknowledge victims' rights, by letting five delegations of twelve victims each (selected by the National University of Colombia, the Episcopal Conference and by the UN) sit at the Havana negotiation table[67]. The victims' participation in such context is a unique feature and highly relevant for the peace process itself. Indeed, as the Americas Director of Amnesty International said, "for any peace agreement to be effective and long lasting, it must also be implemented in very close consultation with the individuals, groups and communities who have been affected by this bloody conflict for decades. Anything less will be little more than words on paper"[68].

The 60 victims exposed their desire of ending the conflict and their support to the peace process. Moreover, they gave suggestions on how to build a truth commission and justice mechanism and on how to empower reparation programs.

However, it is evident that 60 victims are not representative of the 7.9 million of victims of the armed conflict, let alone of all Colombians. In addition, not all victims' needs have been taken into consideration in the peace accord: this is why, despite everything, 50,2% of the voters chose "no".

For instance, what was not taken into consideration is that, even when peace must be negotiated, it is important to understand and to include also the victims' need to see their perpetrators adequately punished for their crimes to have the possibility to address their painful past and to restart to believe in the institutions. As Kofi Annan highlighted: "you first need to stop the killing, but if you do not have justice and people do not feel that their grievances have been dealt with, this is extremely difficult to get a serious reconciliation"[69].

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[66] A. S. Weiner, *Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court*, in Stanford Journal of International Law, vol. 52, n. 2, 2016, p. 220.

[67] For more information, listen to Juanita Goebertus, coordinator of the transitional justice group of the Office of the High Commissioner for Peace of Colombia, interviewed by the International Center for Transitional Justice, in https://www.facebook.com/theICTJ/?fref=ts (accessed in January 7, 2017).

[68] E. Guevara-Rosas, Americas Director of Amnesty International, in https://www.amnesty.org/en/latest/news/2016/09/colombia-historic-peace-deal-must-ensure-justice-and-an-end-to-human-rights-abuses/ (accessed January 7, 2017).

[69] Kofi Annan, former United Nations Secretary General, interviewed by the International Center for Transitional Justice, see note 22.

It must also be considered that an effective punishment would represent a message to the victims. In their eyes, a prison sentence would mean a real attempt of the government to condemn the past in an adequate and fair way and the willingness to punish perpetrators of atrocities with concrete measures, acknowledging the victims' pain and their rights:

> *Si bien los juicios sin castigo efectivo pueden hacer contribuciones importantes en un proceso de transición, una dosis de pena privativa de la libertad para ciertos casos es necesaria a fin de satisfacer ciertos propósitos de la transición que no pueden ser garantizados a través de otras medidas*[70].

During the transition from war to peace, the effective punishment of those responsible of atrocities increases its relevance, demonstrating the intention of reaching a long-lasting stable peace and promoting reconciliation. Punitive reproach reaffirms social support towards democratic values, fundamental to rebuild a society based on human rights protection.

The sanction regime outlined by the peace accord has been criticized by many international actors as well. Human Rights Watch, for instance, stated that such regime does not reflect accepted standards of appropriate punishment for grave violations. The practice of international tribunals shows that this proportionate punishment is imprisonment[71]: this makes it "virtually impossible that Colombia will meet its binding obligations under the international law to ensure accountability for crimes against humanity and war crimes"[72]. The same type of criticisms is moved by Amnesty International.

Colombia has attracted the attention of the Office of the Prosecutor (hereinafter OTP) of the ICC, Fatou Bensouda, as well. Since 2012 – when peace negotiation started – the OTP has always sent the same message, namely that justice cannot be sacrificed by peace: "justice must be done and must be seen to be done" because an inadequate punishment would "invalidate the authenticity of a national transitional justice process" and activate an ICC intervention[73]. Despite all the recommendations and the messages given by the ICC, the peace accord has been adopted.

The question, thus, remains open: is there a way to lasting peace?

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[70] "While trials without effective punishment can make important contributions in a transition process, a deprivation of liberty for certain cases is necessary in order to satisfy certain purposes of transition that cannot be guaranteed through other measures". R. U. Yepes, L. M. Sánchez Duque, N. C. Sánchez León, *Justicia para la Paz. Crímenes atroces, derecho a la justicia y paz negociada*, Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, Bogotá 2014, p. 112.

[71] Human Rights Watch, *Human rights watch analysis of Colombia-FARC Agreement*, December 2015, in www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement (accessed January 7, 2017).

[72] Ivi.

[73] M. Kersten, *Peace with Justice in Colombia: Why the ICC isn't the Guarantor*, Justice in Conflict, October 2016, in https://justiceinconflict.org/2016/10/13/peace-with-justice-in-colombia-why-the-icc-isnt-the-guarantor/ (accessed January 7, 2017).

Conclusions

Justice, truth and reparation are three essential components of national reconciliation and, thus, of peace. Especially justice has often been seen in the past as an antagonist of peace rather than one of its founding pillars. According to my opinion, it is not an excluding choice between justice and peace, but it is a chance to apply justice in order to reach peace. Criminal accountability has undoubtedly a powerful peaceful effect, given its deterrent function and its capacity for identifying individual accountability. Of course, limited amnesties and pardons may play a role in the peacebuilding process. However, it must not become the general rule and it cannot be granted to those responsible of gross and systematic human rights violations.

The contrast between justice and peace has been highlighted in Colombia, in the October 2, 2016 plebiscite. The peace accord has not been accepted by the Colombians because it has sacrificed the need for justice in order to reach peace with the FARC, attributing to impunity the power to quickly pacify the country. Colombia is the most evident example that the relationship between justice and peace is a very delicate issue, but it is of outmost importance to find a balance in order to reach reconciliation, without prioritizing one aspect over the other one. In conclusion, as it emerged from the arguments presented in this paper, there cannot be peace without justice.

Appendix

At the end of January 2017, I had the possibility to discuss the topic with Ms Sara Ballardini, board member of *Centro Studi Difesa Civile*, who worked in Colombia for three years in the regions of Curvaradó and Jiguamiandó, in the department of Chocó. These two communities are composed of at least 200 Afro-Colombian families and have constituted the so-called *zonas humanitarias* in Colombia. The *zonas humanitarias* are well-organized rural communities of civilian people who propose a non-violent resistance to the conflict. These are rural territories which have been particularly ravaged by the war and demand the right to live in their own land. The communities of Curvaradó and Jiguamiandó have been particularly devastated by violent actions and harassments before and after their constitution as *zonas humanitarias*. These protracted forms of injustice led the two communities to organize non-violent resistance.

It is very interesting how the communities of Curvaradó and Jiguamiandó interpret the concept of justice. As Ms Ballardini reports, the inhabitants of these two regions link the idea of justice to the concepts of truth and memory: justice is not private revenge, but it is the need to shed light on the past and to find the truth regarding the violence experienced, in order to prevent the repetition of human rights violations. Remarkably, this idea of justice is shared by two of the most conflict-affected zones, which have decided to seek justice by knowing the truth. In doing so, they chose the deterrent effect of memory rather than being tempted by a violent response.

This case is paradigmatic of what I tried to demonstrate throughout my work: justice cannot be isolated from the search for truth, because only a holistic approach can actually have a deterrent effect and can genuinely be successful in the attempt to reconcile a society.

REFERENCES

Acosta Arcarazo D., Buchan R. and Urueña R., *Complementarity as the focus of contemporary debates on the ICC in Colombia: two visions of transitional justice*, in Acosta Arcarazo D. and others, *Beyond Justice, beyond Peace? Colombia, the interests of justice, and the limits of International Criminal Law*, in *Criminal Law Forum*, n. 26, CrossMark 2015,

African Union, African Commission on Human and Peoples' Rights, *Directives et Principes sur le Droit à un Procès Equitable et à l'Assistance Judiciaire en Afrique*, DOC/OS(XXX)274, para. C (b,3), 5, in http://www.afrimap.org/english/images/treaty/file43662d79568b0.doc

Al Jazeera, *Colombia and FARC sign historic pact ending 52-year war*, in http://www.aljazeera.com/news/2016/09/colombia-farc-sign-historic-pact-52-year-war-160926211928052.html

Alto Comisionado para la Paz, *Acuerdo sobre las Víctimas del conflicto*, in http://www.altocomisionadoparalapaz.gov.co/Documents/informes-especiales/abc-del-proceso-de-paz/victimas.html

Amnesty International, *Colombia: Peace agreement must open the door to justice*, December 2016, in https://www.amnesty.org/en/press-releases/2016/12/colombia-peace-agreement-must-open-the-door-to-justice/

Annan K., former United Nations Secretary General, interviewed by the International Center for Transitional Justice, see video "Peace and Justice", in https://www.facebook.com/pg/theICTJ/videos/

Arvelo J.E., *International law and conflict resolution in Colombia: balancing peace and justice in the paramilitary demobilization process*, in Georgetown Journal of International Law, vol. 37, n. 1, 2005

Bloomfield D., *Reconciliation: an Introduction*, in Bloomfield D., Callaghan N. and others, *Reconciliation after violent conflict. A handbook*, International Institute for Democracy and Electoral Assistance, Sweden 2003

Boesenecker A.P. and Vinjamuri L., *Charting the Path of Justice in Peacebuilding*, in Llewellyn J.L. and Philpott D., *Restorative Justice, Reconciliation, and Peacebuilding*, Oxford Scholarship Online, April 2014

Cage M., *Colombia just voted no on its plebiscite for peace. Here's why and what it means*, in https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/03/colombia-just-voted-no-on-its-referendum-for-peace-heres-why-and-what-it-means/?utm_term=.1083c6369339

Cardona A. E. M., *The Justice and the Colombia Peace Talks*, in Open Journal of Political Science, n. 6, 2016, in http://www.scirp.org/journal/ojps http://dx.doi.org/10.4236/ojps.2016.63024

Chen K., N. Gallón and R. Romo, *The last armed conflict in Latin America is finally ending*, in CNN, September 2016, http://edition.cnn.com/2016/09/26/americas/colombia-farc-peace-deal/

Collin K., Sunday, *Colombians vote on the historic peace accord with the FARC. Here's what you need to know*, October 2016, in https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/01/sunday-colombians-vote-on-the-historic-peace-accord-with-the-farc-heres-what-you-need-to-know/?utm_term=.8ab0e78ac00b

Culbertson R. and Pouligny B., *Re-imagining Peace After Mass Crime: A Dialogical Exchange Between Insider and Outsider Knowledge*, in Pouligny B. and others, *After Mass Crime: Rebuilding States and Communities*

De Greiff P., *Justice and Reparations*, in De Greiff P., *The Handbook of Reparations*, Oxford Scholarship Online, 2008

Dress T. P., J.D., *Designing a peacebuilding infrastructure: Taking a System Approach to the Prevention of Deadly Conflict*, United Nations New York and Geneva, 2005

European Peacebuilding Liaison Office (EPLO), http://eplo.org/wp-content/uploads/2016/09/EPLO-Leaflet_2016.pdf

Firchow P. and MacGinty R., *Reparations and Peacebuilding: Issues and Controversies*, in Human Rights Review n. 14, 2013

Gallen J., *Jus Post Bellum: An Interpretative Framework*, in Stahn C., Easterday J. S. and Iverson J., *Jus post bellum: Mapping the normative foundations*, Oxford University Press, 2014

García-Godos J. and O. Lid K.A., *Transitional Justice and Victims' Rights before the End of a Conflict: The Unusual Case if Colombia*, in Journal of Latin American Studies, vol. 42, n. 3, Cambridge University Press, August 2010

García-Godos J., *It's about trust*, in Bailliet C.M. and Larsen K.M., *Promoting Peace Through International Law*, Oxford University Press, April 2015

Gómez Isa F., *Justice, truth and reparation in the Colombian peace process*, published in Norwegian Peacebuilding Resource Centre, Report April 2013, in http://noref.no/var/ezflow_site/storage/original/application/5e7c839d7cf77846086b6065c72d13c5.pdf

Governance, social development, conflict and humanitarian conflict, *State-society relations and citizenship in situations of conflict and fragility. Topic guide supplement*, April 2016, p. 12, in http://www.gsdrc.org/wp-content/uploads/2015/07/CON88.pdf

Grupo de Memoria Histórica, *¡Basta ya! Colombia: memoria de guerra y dignidad*, Centro Nacional de Memoria Histórica, Imprenta Nacional, Bogotá 2013, in http://www.centrodememoriahistorica.gov.co/descargas/informes2013/bastaYa/basta-ya-memorias-guerra-dignidad-new-9-agosto.pdf

Guevara-Rosas E., Americas Director of Amnesty International, in https://www.amnesty.org/en/latest/news/2016/09/colombia-historic-peace-deal-must-ensure-justice-and-an-end-to-human-rights-abuses/

Herman J., Martin-Ortega O., Sriram C. L., *Beyond justice versus peace: transitional justice and peacebuilding strategies*, in https://ecpr.eu/Filestore/PaperProposal/6e3e3742-d3fb-405e-aa53-56d810f1b4b2.pdf

Hoffman M., *Thousands of Colombians Rally Against Amnesty for FARC Guerrilla Fighters*, VICE NEWS, December 14, 2014, in https://news.vice.com/article/thousands-of-colombians-rallyagainst-amnesty-for-farc-guerrilla-fighters

Human Rights Watch, *Colombia: Amend "Legal Framework for Peace" Bill*, March 2012, in http://www.hrw.org/news/2012/05/31/colombia-amend-legal-framework-peace-bill

Human Rights Watch, *Human rights watch analysis of Colombia-FARC Agreement*, December 2015, in www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement

Huyse L., *Amnesty, truth or prosecution*, in Reychler L. and Paffenholz T., *Peace-building, a field guide*, Boulder, Lynne Rienner Publishers

Idler A., *Colombia just voted no on its plebiscite for peace. Here's why and what it means*, October 3, 2016, in https://www.washingtonpost.com/news/monkey-cage/wp/2016/10/03/colombia-just-voted-no-on-its-referendum-for-peace-heres-why-and-what-it-means/?utm_term=.ddae056fad4d

International Association for Humanitarian Policy and Conflict Research, *Transitional Justice: Transitional Justice & Peacebuilding Processes*, 2008, in http://www.peacebuildinginitiative.org/indexf0e6.html?pageId=1883

Iverson J., *Contrasting the Normative and Historical Foundations of Transitional Justice and Jus Post Bellum*, in Stahn C., Easterday J.S., Iverson J., *Jus post bellum: Mapping the normative foundations*, Oxford University Press, 2014

Goebertus J., coordinator of the transitional justice group of the Office of the High Commissioner for Peace of Colombia, interviewed by the International Center for Transitional Justice, in https://www.facebook.com/theICTJ/?fref=ts

Kersten M., *Peace with Justice in Colombia: Why the ICC isn't the Guarantor*, Justice in Conflict, October 2016, in https://justiceinconflict.org/2016/10/13/peace-with-justice-in-colombia-why-the-icc-isnt-the-guarantor/

Lerche C., *Peace building through reconciliation*, in International Journal of Peace Studies, vol. 5 n. 2, 2000, in http://www.gmu.edu/programs/icar/ijps/vol5_2/lerche.htm

Llewellyn J.J. and D. Philpott, *Restorative Justice and Reconciliation: Twin Frameworks for Peacebuilding*, in Llewellyn J.J. and Philpott D., *Restorative Justice, Reconciliation, and Peacebuilding*, Oxford Scholarship Online, April 2004

López-Medina D., *Estandares Internacionales Para la Investigación Y Acusación de Delitos Complejos En El Marco de La Justicia Transicional: Su Aplicación Al Caso Colombiano*, in *International Law* n. 16, 2010

National Commission for reparation and Reconciliation (CNRR), *Informe al Congreso: proceso de reparación a las victimas – balance actual y perspectivas futuras*, Bogotá, 2007

Nussio E., Rettberg A., Ugarriza J.E., *Victims, Nonvictims and Their Opinions on Transitional Justice: Findings from the Colombian Case*, in International Journal of Transitional Justice, vol. 9, April 2015

Office of the High Commissioner for Peace, *The Colombian Peace Process. The Agreement regarding the victims of the conflict,* in http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/Cartilla-victimas-ingles-af-web.pdf

Olasolo H., *The special jurisdiction for peace in Colombia and the cautious optimism of the prosecutor of the International Criminal Court*, in Peace Process Online Review, Vol. 1, n. 1, Autumn 2015, https://debateglobal.wordpress.com/2015/10/09/the-special-jurisdiction-for-peace-in-colombia-and-the-cautious-optimism-of-the-prosecutor-of-the-international-criminal-court/

Osiel M., *Mass atrocity, collective memory, and the law*, New Brunswick, NJ: Transaction Publishers, 1997

- Republic of Colombia, *Transitional Justice in Colombia. Justice and Peace Law: an experience of truth, justice and reparation*, RC/ST/PJ/M.1, June 2010, in https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-PJ-M.1-ENG.pdf

Roe P., *The Value of Positive Security*, in Review of International Studies, vol. 34, issue 4, 2008

Roth-Arriaza N., *Transitional Justice and Peace Agreements*, in Working Paper, International Council on Human Rights Policy, n. 3, 2005, in http://www.ichrp.org/files/papers/63/128_-_Transitional_Justice_and_Peace_Agreements_Roth-Arriaza_Naomi_2005.pdf

Rothstein R. L., *Fragile Peace and its Aftermath*, in Rothstein R.L. (ed.), *After the Peace: Resistance and Reconciliation*, Lynne Reiner, London 1999

Rowen J.R., *"We don't believe in Transitional Justice:" Peace and Politics of Legal Ideas in Colombia*, in Law & Social Inquiry, American Bar Foundations 2016

Saffon M.P. and Uprimny R., *Uses and Abuses of Transitional Justice in Colombia*, in Bergsmo M. and Kalmanovitz P., *Law in Peace negotiations*, Oslo 2009

Smiley T., *This is the exact question asked in Colombia's peace deal plebiscite*, Colombia Reports, August 30, 2016, in http://colombiareports.com/exact-question-asked-colombias-peace-deal-plebiscite/

The Bogotá Post, *What next? Post-plebiscite questions and possibilities*, October 2016, in http://thebogotapost.com/2016/10/04/next-post-plebiscite-questions-possibilities/

The Office of the High Commissioner for Peace, *The Colombian Peace Process. The Agreement regarding the victims of the conflict*, in http://www.altocomisionadoparalapaz.gov.co/herramientas/Documents/Cartilla-victimas-ingles-af-web.pdf

Turgis N., *What is Transitional Justice?*, in International Journal of Law, Transitional Justice and Human Rights, n. 9, 2010

Washington Office on Latin America, *Social Leaders Face a Wave of attacks in Colombia*. *The Peace Accord's credibility Hinges on Immediate Action to Stop It*, in http://colombiapeace.org

Weiner A.S., *Ending Wars, Doing Justice: Colombia, Transitional Justice, and the International Criminal Court*, in Stanford Journal of International Law, Vol. 52, n. 2, 2016

Yepes R.U., Sánchez Duque L.M., Sánchez León N.C., *Justicia para la Paz. Crímenes atroces, derecho a la justicia y paz negociada*, Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, Bogotá 2014

Zyberi G., The *Role and Contribution of International Courts in Furthering Peace as an Essential Community Interest*, in Bailliet C.M. and Larsen K.M., *Promoting Peace Through International Law*, Oxford University Press, April 2015

Zyl V., *Promoting Transitional Justice in Post-Conflict Societies*, in Bryden A. and Hanggi H. eds., *Security Governance in Post-Conflict Peacebuilding*, Geneva Center for the Democratic Control of Armed Forces, Geneva 2005

SOURCES OF INTERNATIONAL LAW AND JURISPRUDENCE:

Agreement on Victims of the Conflict, http://equipopazgobierno.presidencia.gov.co/acuerdos/Documents/acuerdo-punto-victimas.pdf

Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/Paginas/Texto-completo-del-Acuerdo-Final-para-la-Terminacion-del-conflicto.aspx

Commission on Human Security, *Human Security Now*, New York 2003, http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/chs_final_report_-_english.pdf

Corte Constitucional [C.C.], August 28, 2013, Sentencia C-579/13 (Colom.), para. 9.9.8., http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm

International Covenant on Civil and Political Rights, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, *Preocupación por aumento de la violencia en contra de líderes, lideresas, defensores y población que habita zonas rurales*, Bogotá, December 2, 2016, http://www.hchr.org.co/publico/comunicados/2016/8fCEYkS6RNZg.pdf

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470

Rome Statute of the international Criminal Court, Preamble, https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, ihttp://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx

UN Advisory Group of Experts, *The challenge of sustaining peace: Report of the Advisory Group of Experts for the 2015 Review of the United Nations Peacebuilding Architecture*, June 2015, in

http://www.un.org/en/peacebuilding/pdf/150630%20Report%20of%20the%20AGE%20on%20the%202015%20Peacebuilding%20Review%20FINAL.pdf

UN Charter, http://www.un.org/en/sections/un-charter/un-charter-full-text/

UN Secretary General, *An Agenda For Peace,* UN Doc. A/47/277-S/24111, June 17, 1992, http://www.un-documents.net/a47-277.htm

UN Security Council, Res. 827/1993 UN Doc. S/RES/827 (1993), http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf

UN Security Council, Res. 955/1994 UN Doc. S/RES/955 (1994), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement

UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616,4, August 23, 2004, http://www.ipu.org/splz-e/unga07/law.pdf