The Colombian Transitional Justice Model: No Transition and No Justice

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In 2002, shortly after Alvaro Uribe Velez was elected for his first term as President of Colombia, Carlos Castaño, political leader of the Autodefensas Unidas de Colombia (AUC), announced his group’s intentions to engage in peace talks with the newly elected government. Since November 2004, more than 3000 members of the AUC have demobilised and taken part in a process that was supposed to lead to the successful incorporation into civilian life of the former combatants and to serve as a model for a peace process with the left-wing guerrillas of Fuerzas Armadas Revolucionarias de Colombia (FARC) and the Ejército de Liberación Nacional (ELN). In this essay, I highlight the limits of the ongoing peace talks with the AUC and the ways in which they are different from past peace negotiations. In particular, I argue that it is important to emphasise developments in international human rights law and international humanitarian law that significantly constrain the scope of state policies based on forgiveness of past crimes and that offer amnesties to perpetrators of human rights violations.

Law 975/2005, adopted in July 2005 and known as the Law of “Justice and Peace” (LJP), established the legal framework for the peace process with the AUC. On the one hand, the law adopted a form of retributive justice, whereby members of the AUC who have committed gross violations of international human rights law and international humanitarian law, could confess to their crimes and be sentenced to a prison term. On the other hand, in order to guarantee victims’ right to know the truth, the LJP provides for the creation of a National Commission for Reparation and Reconciliation with a mandate to analyse the causes of violence in Colombia and to support measures that could help victims to learn the truth and to facilitate national reconciliation. The Commission has a term of eight years, after which it is mandated to publish a report on the Colombian conflict and its causes.2

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1 The AUC is a right-wing organisation that emerged as the result of an alliance between narco-traffickers and the army to combat left-wing guerrillas. In the 1980s it began as MAS (Muerte a Secuestradores), and subsequently Fidel Castaño and Carlos Castaño created PEPES (Perseguidos por Pablo Escobar), an organisation that helped the Army in the persecution of Pablo Escobar and that later became AUC. See Mauricio Romero, “Reform and Reaction: paramilitary groups in contemporary Colombia”, in Diane E. Davis and Anthony W. Pereira, eds. Irregular Forces and their Role in Politics and State Formation Cambridge: Cambridge University Press, 2003.

2 The Commission is coordinated by Eduardo Pizarro, brother of Carlos Pizarro’s, the assassinated leader of the nationalist guerrilla M-19. M-19 was a guerrilla organisation that emerged during the 1970s and comprised former members of FARC. It demobilised in 1990 and some of its former members are now part of the leftist political party, Polo Democrático Alternativo. Thus far the Commission has produced a report in which it provides some guidelines for victims’ compensation for damages suffered, based on existing international law. The LJP also created a Commission to establish the historical causes of the conflict starting with the emergence of FARC as a left-wing guerrilla group in 1966.
This is not the first Reconciliation Commission created in Colombia and it is not the first time that attempts have been made to engage in a process of transition to end the armed conflict. First, after the bloody armed confrontation known as La Violencia (1948-1958) between the Liberals and the Conservatives (the two traditional parties of Colombian politics), which caused the death of about 300,000 people, the political leaders agreed to a blanket amnesty. But they also set up a Commission to study the causes of the violence and to find ways to prevent it from re-occurring. The Commission released a two-volume report that provided an analysis of the causes of violence but did not seek to hold any of the politicians involved in La Violencia accountable for grave crimes. However, the peace agreement between Liberals and Conservatives in 1958 ended their violent confrontation and marked the start of a peaceful coexistence between these two political groups that has lasted to this day. Second, between 1985 and 1990, the Colombian government and the leftist guerrilla Movimiento Armado 19 de Abril de 1970 (M-19) reached a peace agreement that led to the reincorporation of the M-19 into civilian life and their participation in a more open political system in exchange for a blanket amnesty for their crimes, which included a violent assault on the Supreme Court building in November 1985.

Drawing from these two experiences, some Colombian commentators have argued that amnesties and forgetting are the appropriate mechanisms to deal with the AUC and the best chance of achieving peace in Colombia. ³ Ivan Orozco Abad, among others, has criticised what he refers to as a prevailing ‘humanitarian conscience’, because, he argues, it impedes pragmatism in peace talks.⁴ Orozco suggests that victims should not participate in peace talks because their interests would risk undermining politically delicate negotiations. However, developments in international law have converged to limit the type of ‘pragmatic solutions’ that characterised the negotiations pursued during La Violencia or with the M19. Past governments had the option of blanket amnesties available to them during negotiations, as international legal norms did not force the prosecution of perpetrators of gross human rights violations. The 1949 Geneva Conventions, the 1997 Additional Protocols, the 1995 UN Convention on the Imprescriptibility of War Crimes and Crimes against Humanity, and the 1998 Statute of the International Criminal Court, among others, converge on the idea that grave crimes need to be punished and that state policies are constrained with regards to the scope of amnesties that can be offered to perpetrators of gross human rights violations. Perhaps the best expression of this idea is the ICC principle of complementarity by which states have the obligation to prosecute the perpetrators of these crimes and if they do not, then the ICC can acquire jurisdiction to prosecute them. Orozco also fails to recognise, moreover, the right of victims to truth as established in international law. Indeed, when he criticises the current ‘humanitarian conscience’ and the lack of pragmatism in peace negotiations, he claims that the use of truth as a central

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⁴ See Ivan Orozco Abad, Sobre los límites de la consciencia humanitaria: dilemas de la paz y la justicia en América Latina, Bogotá: Editorial Temis, 2005
element in such talks could lead to excessive demands for retribution and thereby affect the willingness of perpetrators to participate in peace talks. From his point of view, too much truth and too much justice could undermine peace talks.

When the bill that eventually became the LJP was debated, Uribe’s administration initially wanted to grant a blanket amnesty to the demobilised members of the AUC. However, the widespread criticisms that this government proposal generated, from among others from Human Rights Watch (HRW) and Amnesty International (AI), and the fact that a wide-ranging amnesty was not feasible due to legal restrictions, forced the government to accept a law that imposed some kind of punishment on convicted perpetrators. According to the law, perpetrators would face a maximum of eight years in prison if they confessed to all their crimes. But once the process of demobilisation was set in motion, many members of the AUC showed neither repentance for their crimes nor any real commitment to peace. One AUC member, for example, claimed that he suffered from Alzheimer’s and could therefore not confess to anything, while others sought to justify their crimes by claiming that their victims had been members of FARC. Moreover, as HRW and AI have shown, the process of demobilisation did not reduce violence in the country. Instead, it placed in a more precarious situation those victims who are already risking their lives in the pursuit of justice.

The situation in Colombia is clearly very complex, because it involves on the one hand issues of democratisation in a political context of fragile democratic governance, and on the other, questions of post-conflict justice in the context of an ongoing violent conflict - although the government denies from time to time the existence of an armed conflict. However, the current LJP and the peace process with the AUC have brought neither peace nor justice to victims. The crimes committed by the military, the increasing violence against human rights activists and students, combined with the fact that the president seeks another term in office despite current constitutional limits on re-election, leave little room for hope. Colombia therefore needs more direct involvement by the international community to ensure that the presidential term is not changed capriciously by Uribe’s administration and that perpetrators of grave human rights violations are tried for their crimes. Radical institutional reforms are also necessary, because institutions such as the Attorney General’s Office and the Consejo Superior de la Judicatura are directly influenced by the government, while the Supreme Court, for example, is attacked for its

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6 After the peace talks with the AUC, former members of the AUC joined the group Aguilas Negras, which employs the same methods as the AUC. This group has been involved in massacres of civilians, is threatening university students, and is allegedly cooperating with the Army in the commission of grave crimes. Moreover, the government recently fired 27 generals for their involvement with army units that were found to have presented as successful operations against the members of FARC, which in reality were attacks on innocent civilians.
commitment to bring to justice those politicians with alleged links to the paramilitaries. If the Colombian state proves to be unwilling or unable to bring justice for the victims of the Colombian armed conflict, then it is time for the ICC to intervene.

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7 For an account of the links between paramilitaries and members of the President’s political party see Leon Valencia et al., Parapolítica: la ruta de la expansion paramilitar y los acuerdos políticos, Bogotá: Intermedio Editores, 2007.