

Considerations on Transitional Justice and the Defense of Human Rights in the Continuum of the Colombian Armed Conflict*

Considerações sobre justiça de transição e defesa dos direitos humanos no contínuo do conflito armado colombiano

Yennesit Palacios Valencia¹

Universidad de Valladolid (España)
yennesit.palacios@uva.es

Abstract

Transitional justice according to international standards for the protection of human rights, must satisfy the demands of the victims regarding the rights to truth, justice, reparation, and measures of non-repetition. Nevertheless, as far as the Colombian case is concerned, the persistence of the armed conflict shows a tension between the defense of human rights and the imprecise outcome of the transitional justice process. For this reason, the main advances of the Special Tribunal for Peace are identified, noting among other things that fear and crime factors, as categories of analysis, have legitimized the attack against the "enemy", since the historicity of the armed conflict as a continuum.

Keywords: Colombia, armed conflict, human rights, transitional justice, fear, victim.

Resumo

A justiça de transição, de acordo com os padrões internacionais de proteção dos direitos humanos, deve atender às demandas das vítimas quanto aos direitos à verdade, justiça, reparação e medidas de não repetição. No entanto, no caso colombiano, a persistência do conflito armado mostra uma tensão entre a defesa dos direitos humanos e o resultado impreciso do processo de justiça de transição. Por isso, identificam-se os principais avanços do Juizado Especial para a Paz, observando, entre outros, que os fatores medo e criminalidade como categorias de análise legitimaram o

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¹ Investigadora postdoctoral "María Zambrano". Facultad de Derecho. Plaza de la Universidad, s/n, 47002, Valladolid, España.

ataque contra o “inimigo”, a partir da historicidade do conflito armado como um contínuo.

Palavras-chave: Colômbia, conflito armado, direitos humanos, justiça de transição, medo, vítima.

Introduction

The Colombian State is currently implementing the Havana Peace Accords, with a model that requires the implementation of legal institutions such as the Legal Framework for Peace and with it, the Special Jurisdiction for Peace. This regulatory framework, inspired by the needs of the victims and the international obligations undertaken, is based on the search for the truth to generate justice and reparation along with measures of non-repetition.

This is because the serious and systematic violations of human rights and breaches of international humanitarian law in Colombia have constituted international crimes represented in genocide, torture, enforced disappearances, massacres, massive displacement of people, with differential impact on women, Afro-descendant communities and indigenous and tribal peoples, to mention a few. All of which arose in a scenario of notorious impunity, the false positives. They are the model par excellence in the matter and the permanent defenselessness of the displaced population. To date, they confirm the regressive nature of human rights due to this phenomenon.

In this context, transitional justice is approached as an alternative institution that demands the necessary minimums in accordance with international standards on the matter. These elements are essential for the transition from war to peace, after the conflictive past. It should be noted that, in this regard, a sufficiently solid *corpus juris* has been created since 2012, driven by the negotiations in Havana (Cuba) and resulting in the Peace Agreement between the national government and the Revolutionary Armed Forces of Colombia, better known as FARC, in 2016.

This is precisely to meet the demands not only of the victims, but also of the international community, due to the set of obligations acquired through international treaties. Among them, the American Convention on Human Rights or Pact of San José de Costa Rica (1969) is of vital importance as a guiding instrument in the inter-American system for the protection of human rights, since Colombia is a State party and this pact demands protection, guarantee, promotion and respect for the rights enshrined therein.

The Havana Peace Accords, among its institutions, contemplates the constitution of a Peace Tribunal to judge those responsible for crimes committed during the armed conflict. However, such powers must be adjusted to international standards that prohibit exemptions from liability, such as amnesty laws to those who are responsible for crimes of international transcendence. Regardless of the sovereignty attributed to the States, they are obliged to comply with the agreement, as *ius cogens* or *ius naecessarium*, since it governs the duty to investigate, prosecute and punish the commission of crimes contrary to international law.

In the case of Colombia, it is necessary to clarify, in accordance with the purpose of this study, that there is a multiplicity of related phenomena, since guerrilla activities linked to drug trafficking and the kidnapping of civilians for economic purposes increasingly blur the dividing line between political violence and criminality. Indeed, a correct diagnosis of the problems of insecurity and criminality can lead to the corrective policies that are necessary in an environment of impunity and pessimism (Montenegro & Posada, 1994).

Methodological design

The study relies on the documentary method to explain the progress and pending challenges in the transitional justice process based on three analytical categories. One of them is fear, addressed by different doctrinarians, in a disciplinary and transversal context, which allows understanding from a phenomenological-hermeneutic approach, the context of the armed conflict in Colombia that, after the "overwhelming presence of drug trafficking, the collapse of justice since the 1980s and the history of violence itself" (Montenegro, Posada, & Piraquive, 2000), is maintained with different levels of intensity.

To date, these circumstances are becoming more complex with the rise of new participants and phenomena. One of them, is neo-paramilitarism, linked to organized crime with the rise of drug trafficking (Guevara, 2015). Another no less important category is criminality, which transversally crosses the history of the armed conflict. Finally, the essential elements in the processes of transitional justice will be addressed in an attempt to offer a brief systematization of the cases currently under study by the Special Tribunal for Peace - JEP (Tribunal Especial para la Paz - JEP).

This paper is theoretically and epistemologically based on philosophers such as Thomas Hobbes and Robert Castel. Both share a vision of fear as an important variable in the social and political life of the state (Korstanje, 2010). Fear as a theoretical approach appears in a disciplinary context nourished not only by philosophy, but also by political sociology. This circumstance crosses the paradigms of security policies in the context of the armed conflict, until reaching the holistic study of experts in law, criminology, and sociology itself.

In the latter case, the theoretical reference of Daniel Pécaut - a French sociologist who is a specialist in Latin American political sociology, very specifically, in the social and political history of Colombia - is foundational, along with María Teresa Uribe, who as a Colombian sociologist and prior her death, contributed to the study of the armed conflict. The study is also supported by legal experts such as Raúl Zaffaroni, Claus Roxin, Alejandro Aponte and Lola Aniyar de Castro, the latter is one of the most brilliant criminologists in Latin America.

Genesis of fear in the Colombian context

In order to speak of the genesis of fear, as an analytical category, it is appropriate to situate it in the evolutionary process of the armed conflict, a phenomenon that, as Ríos (2017) explains, has incipient roots in the 1930s due to the peasant struggles, in the context of a country without agrarian reform. This situation, however, formally and officially began in the 1960s. In Colombia, the armed conflict has had a climate of multiple victims and significant variations with the confrontation of its participants (guerrillas, paramilitaries and the State itself). The forced disappearance of people in the framework of the armed conflict, for example, stands out as a phenomenon that was encouraged as part of criminal actions to confront fear.

A report by the National Center of Historical Memory (2016), highlights how entire communities were transformed not only because of the fear driven by the number of missing persons, a corollary intensifying not only the aftermath of the conflict, but also the response to it. The different governments were forced, after the wave of violence, to guide the issuance and application of continuous states of exception, with the creation of Security Statutes designed to counteract the "enemy" that is, dissident forces that violated human rights and

attempted against citizen security.

In this way, the attack on the enemy was validated by the same legislation. The incursion of private individuals with a high tendency to crime, under the creation of the state of siege decree No. 3398 (1965) must be brought into discussion, since it justified the armed defense of the civilian population in the 60's, a situation that allowed the polarization of counterinsurgency strategies in a mixture of powers. On the one hand, the monopoly of force that resided in state political sovereignty, and on the other, the transfer of this monopoly to private individuals by the doctrine of self-defense of the Nation.

Once the guerrillas were formed, the creation of the National Security Statute, by the government of former President Turbay Ayala, extended from 1978 to 1981 and became a "regulatory framework that expanded the procedural powers of the Military Forces, restricting rights and freedoms in the procedural guarantees of those who were captured" (Centro Nacional de Memoria Histórica, 2016). This doctrine was a faithful reflection of the security model emanating from the United States (U.S.), but molded to the state perception in the face of threats and attacks by dissident armed groups. This paradigm became the operative and ideological *corpus* to attack the "enemies" of the State. It should also be noted that by 1980, the focus of concern in the country was not only the armed conflict, but also drug trafficking.

In this regard, Daniel Pécaut, a great connoisseur of Colombian history, clearly contextualizes how drug trafficking became a central problem, as it appears closely linked to terrorist acts that contributed to destabilizing institutions, while the phenomenon was also linked to guerrilla activities. Pécaut summarizes "if drug trafficking also becomes a political problem, fear also affects political institutions" (Pécaut, 2006).

With this background, the fear of crime or the perception of insecurity itself is linked to the context of the armed conflict, a scenario in which paramilitaries, emerging criminal gangs, guerrillas and the State itself play a central role. In this scenario, by virtue of the right to security demanded by society, the victims and the community in general demand from the State, in the exercise of *ius puniendi*, a security model with extreme incidence in criminal law as a regulator of social life due to its punitive effect.

Fear, therefore, became a key variable, taking into account that after the 60's the armed conflict had unimaginable consequences. It was not about committing crimes of international transcendence due to the systematicity and generality in which the conducts were committed, but about creating a culture of terror where the practice of dismembering bodies, for example, in the presence of the victims, founded collective panic, to such a level that the first option for survival was to lose the land and abandon the inhabited territory. The following scenario reflects this in a convincing manner:

The use of chainsaws to dismember bodies and throw them into the water, or incineration in piles of tires or clandestine graves, are part of the repertoire of the mafias that began to be used in the 80s with the rise of drug trafficking. It has continued to this day in a confusing plot in which the violence of drug trafficking is not infrequently used to invisibilize the violence of the armed conflict, recognizing that both occur simultaneously and even overlap in time and space (Centro Nacional de Memoria Histórica, 2016, p. 115).

This situation gave birth to a scenario that fuels collective panic: murders, kidnappings, extortions, forced disappearances, crimes of sexual violence and forced displacement with a significant impact, not only from an ethnic perspective, but also from a gender perspective.

Therefore, this increases a series of risks and insecurities, as Paz (2013) argues, associated with the rise of the conflict in an atmosphere of political instability that spreads, in short, fear (Ordóñez, 2006). This has had a significant effect on women, as they are affected in a differential and special way.

This is explained by one of the most representative phenomena derived from the conflict, i.e., forced displacement. This humanitarian drama has been sufficiently supported by the Constitutional Court, which has warned about the existence of risks from an ethnic and gender perspective due to its impact on women. Among them, the risk of violence, exploitation or sexual abuse in the context of the armed conflict; the risk of forced recruitment of their sons and daughters by illegal armed actors; the risk of losing their lands and assets more easily to illegal armed actors, given their historical position in relation to property, especially rural real estate; the risks arising from the condition of discrimination and heightened vulnerability of indigenous and Afro-descendant women; among many others (*Cfr. Auto 092, 2008*).

These risks become specific vulnerability factors to which, different than men, women are exposed because of their feminine condition in the context of the armed confrontation. Also, this affects indigenous and Afro-descendant women, since each ethnic group has its own specificities that, with the rise of the conflict, have triggered dissimilar consequences and not of lesser importance.

In this regard, the differential nature of the impact of forced displacement on indigenous peoples has been significant: "it merges individual facets with collective facets of affectation, i.e., it has destructive impacts both on the individual rights of the affected ethnic groups and on the collective rights of each ethnic group to autonomy, identity and territory" (*Auto 004, 2009*).

The displaced Colombians, as contextualized by María Teresa Uribe (2000), are a sort of stateless collectivity, although "they do not have to abandon the Nation. For them, it is enough to move within the borders of their country and to relocate themselves outside the territory controlled by the power with pretensions of sovereignty that expelled them, in order to make their lives safe" (2000, p. 54). Furthermore, Uribe insists, the fact that there is a tradition of dispossession and displacement, of mobility in the territory, of frequent changes in places of residence, to which displaced Colombians are familiar with, it does not mean that they are less affected by this experience than refugees from other countries" (2000, p. 57).

Several studies point out that violence has become a secular, habitual and typical phenomenon of Colombian life. According to them, there was an "original sin" that unleashed a wave that has not ceased. This "original sin" is, some say, a political event, a civil war or an assassination. To others, it consists of something cultural that has marked the life of the country. According to other conjectures, it is the result of the struggle between parties, the struggle for land tenure or a defect or deformation of some institutions (Montenegro & Posada, 1994, p. 2).

Finally, another position would involve associating violence with a mix of historical, economic, cultural and sociological issues. It would be a multivariate, complex phenomenon, conjunction and causes intimately linked. At bottom, violence would be the result of various forms of social and economic injustice, but its immediate causes would be multiple (Montenegro & Posada, 1994, pp. 2-3). From the latter perspective, not only do differentiated and aggravated impacts appear, but also multiple forms or manifestations of violence.

Based on the theory developed by Durán, López, & Restrepo (2009), these can be, on the one hand, criminal violence, which includes organized crime and common crime; and on the other hand, political violence, which includes armed conflict. However, they clarify that the

boundary between organized crime and political violence is blurred, due to the existence of different forms of interaction between the two.

This confirms, as stated in the introductory section, that "guerrilla activities linked to drug trafficking and the kidnapping of civilians for economic purposes increasingly blur the dividing line between political violence and criminality. In the Colombian context, violence and criminality are almost synonymous in its contemporary history, especially in recent years (Montenegro & Posada, 1994).

However, since its inception, the armed conflict has had different actors and varying levels of intensity. In its origins, *the era of violence*, unleashed with the *Bogotazo* (1948), was undoubtedly a decisive step in the formation of the first liberal guerrilla groups in the 60's, which spread with the advent of various guerrilla groups - Revolutionary Armed Forces of Colombia (FARC), *Camilista* Union-National Liberation Army (UC-ELN), Popular Liberation Army (EPL), the April 19 Movement (known as M19), among many others.

In addition to the groups described above, the AUC-United Self-Defense Forces of Colombia has also played a key role. This paramilitary organization has been internationally catalogued as a terrorist group that has left victims at the same level as the guerrillas. This fact generated the process of Disarmament, Demobilization and Reinsertion of the organization, on December 1, 2002, under the government of former President Alvaro Uribe Velez. Therefore, although incipiently, transitional justice has been widely used in the history of Colombia, even in the 90's a peace agreement had already been attempted during the government of former president Andrés Pastrana, with the clearing zone in San Vicente del Caguán, in 1998, but it was a failed effort and, years before, a peace agreement was reached with the April 19 Movement, M-19.

Notwithstanding the process of Disarmament, Demobilization and Reinsertion, the AUC was succeeded by dissident or emerging groups, which currently act under the modality of mid-level commanders and demobilized persons, who reoccur in armed and criminal actions (re-armed); others can be classified as criminal organizations that already existed and became visible by occupying the territorial vacuums left by the demobilized fronts, or by groups that were recently formed (rising) (National Commission for Reparation and Reconciliation, 2007).

Thus, as Aponte (2012) explains, it must be said that in the Colombian case, by tradition, the following concur:

self-defense groups, whose command structure, presence and dominance or territorial dispute is identified under the development of concerted actions over a territory (in addition, of course, to the permanent actions of intimidation against the civilian population that supports them in co-opted and privatized territories) (2012, p. 30).

Now, the idea of organized groups that concur under the modality of organized criminality in the scenario of armed conflict is important for the exercise of *ius puniendias* as sanctioning and state control mechanism. Although this is not the main object of the study, it is crucial to explain the criminal liability of individuals or groups that make up organized apparatuses of power, a theory widely argued by Roxin (2000), to also link as perpetrators of the punishable conduct, those who, using others as instruments, infringe the criminal law in clearly identified and organized groups.

This is what is known as perpetration-by-means in organized apparatuses of power, which attempts to prevent the disappearance of the central perpetrators of the atrocities with the widely organized criminal structures, thus criminally prosecuting the heads of the

organizations. Thesis that has been followed by the Supreme Court of Justice (File Number 50236 SP5333-2018 of September 5, 2018), defining the following constituent elements of the figure:

The existence of a hierarchical organization
The position of command or hierarchy held by the agent within the company.
The commission of a crime materially perpetrated by members of the structure whose execution is ordered from the command and goes down through the chain of command, or is part of the criminal ideology of the structure.
That the agent knows the order given or the criminal policy in the framework of which the crime is committed and wants it to be carried out.

Armed structures, whatever the group's qualification, have played a leading role in the scenario of fear, unleashing a dynamic of violence that not only speaks of the conflict, but also of diverse or related modalities. For example, as explained by Restrepo, González, & Tobón (2011), based on data from the Conflict Analysis Resource Center (CERAC), in 2010 "neo-paramilitary groups perpetrated almost twice as many violent actions as the FARC, not counting combat." Therefore, the classification described above is understandable, since currently, with the processes not only of demobilization, but also after the Havana Agreements, various groups have emerged that have a structure that identifies them as criminal organizations, even while not originating from the traditionally opposing sides (González, 2013), as they are groups that evolve around the exercise of violence, under the control of the population and the insurgency in different modalities.

This situation "drinks" from the tradition of armed conflict but is based on a transformation of violence in Colombia. With these new organizational structures represented in emerging criminal gangs, fear then, comes to have a significant place when talking about the different forms of violence - in its modality of organized criminality - in a path that has sought peace, with such varied and complex options, accompanied, as Alfredo Witschi-Cestari would say, by short and long term paths and zones of high security and high risk, where in spite of the barbarism, the "Colombian conflict is an alley with a way out" (UNDP, United Nations Program for Human Development, 2003).

But for others, as Uprymny (2006) states, Colombia has gone through a process of transitional justice, but without transition. This issue is not concluded, as there are still discussions to come, in accordance with the normative development of the Legal Framework for Peace, along with its implementation, and with it, the action of the Special Tribunal, in the same context.

Fear as a control device

The last decade of the 20th century and the first two decades of the 21st century have been marked by phenomena that have focused on fear as an analytical category, not only as a mechanism of political control, but also as a weapon that deeply weakens the social and political structure of States, which is, at the same time, permeated by insecurity, fear and panic, which are not only instilled by global phenomena, but also by contextual ones, that is, phenomena that develop in a particular way in each territory, in geographic centers of Nation-States.

This is aggravated by the presence of global fears, for example, those triggered on

September 11, 2001, by the attack on the World Trade Center in the U.S. An event that unleashed a propagandistic "boom" environment to annihilate those who are labeled as terrorists. In this scenario, the thesis of the "clash of civilizations" of Samuel Huntington (2001), reactivates a new fear, terrorism (Van Der Pijl, 2016), but this time, on planetary scales. Altogether, the emergence of individual and collective fears become dynamisers that keep the world on alert (Virilio, 2012). Additionally, and intrinsically linked, the Latin American scenario at that time was mediated by very suspicious legitimization processes. Elements described by Aniyar as follows:

1. Informal penalties: "deaths in confrontation with the police", police operations, dangerous laws;
2. The arguments of power and control based on the supposed existence of inferior races in the subcontinent;
3. Intentional crimes to ensure colonization;
5. The analysis of emerging legislation to justify criminal actions in dictatorial regimes;
6. The fear of crime to build consensus;
7. The use of criminology in the service of power (2010, 27-28).

Therefore, an already established line of insecurity was maintained, but it would nevertheless give impetus to a period of global fear of unsuspected dimensions. The phenomenon of terrorism appeared before world public opinion and legislation was focused on achieving these ends (Capel, 2002). That is to say, a new geopolitics appeared loaded with fear and the need for resources to fund armies equipped with high technology capable of finding the enemy.

At the time, Colombia's opposing armed groups demanded control through terror, precisely because of the evolution of these groups (guerrillas and paramilitaries) into "enemies" of the State. In Schmitt's logic and under the application of extreme law, with the rise, on the one hand, of new emerging criminal realities and, on the other, the increase of a "legislative tide" with maximum state intervention, due to the advent of criminal regulations that mutated in response to the persecution of particularly dangerous individuals.

This is a Jakobsian expression of the criminal law of the enemy (Günther & Cancio, 2006), especially in the context of the fight against terrorism, the general problem of organized crime and the internationalization of criminality (Aponte, 2006), with the rise of drug trafficking to and from Colombia. However, as Aniyar (2010) explains, a criminal law of terror and a proliferation of informal penalties evolved to contain a growing miserable population, without jobs and without basic subsistence resources provided by the State.

It is important to point out that all historical eras have been marked by the feeling of uncertainty and fear, but in the current era there is a special interest in understanding fear and insecurity, mainly due to the different ways in which fear materializes on a daily basis. These forms do not obey a standard, a single origin or a special event that can be understood and addressed definitively to answer the questions and needs that originate in different societies, States and cultures (Porretta, 2010).

The reality is that there is no single answer to so many fears. However, perhaps if there is clear evidence of intentions in the generation of panic, not only those related to the control of some over others, but also those associated with economic interests, linked to the power derived from weapons, plus the production of conditions capable of creating new consumption focused on mitigating fear and generating minimum security conditions that, in the case of Colombia, mark a constant tension between the defense of human rights and the transitional justice process.

Fear, following Zaffaroni in his foreword to Aniyar de Castro (2010), is associated with

feelings of insecurity and anxieties about an uncertain future. Because, as Ciaran says: "Man as an abstraction sometimes says nothing: only when talking about terror or needs. In violence or hunger, concrete man is debated anywhere on earth"; "fear is an invention of civilized man, as a consequence of the emergence of multiple needs" (Zaffaroni, 2010).

All these circumstances make it necessary to study fear conceptually, not only from philosophy but also from political theory, taking into account that in Colombia, not only the direct victims but society in general has been disturbed by the phenomena described above and these factors have directly influenced the social, economic, political and legislative scenario of the country. At the same time, a set of responses have been deployed facing towards predictive proposals with the maximization of criminal intervention (Zaffaroni, 2006), rather than to the progressive development of human rights.

Fear as a pattern in human history has been addressed by different authors in the political, cultural and social contexts. Philosophers and scholars such as Corey Robin, Aristotle, Thomas Hobbes and Robert Castel, have addressed fear as an inherent element of man with nature and civility. The latter is the position followed by Hobbes, who assumes that fear is a necessary condition for abandoning the state of nature and transitioning to civility. These laws,

such as those of justice, equity, modesty, piety, and, in short, that of do unto others as you would have others do unto you) are, in themselves, when there is no fear of a certain power motivating their observance, contrary to our natural passions, which induce us to partiality, pride, revenge, and the like (Hobbes, 1984, pp.137-138).

In the case of Robin (2009), he assumes that fear is constructed internally or externally, as a basis for dominating underlying controversies, suggesting a bipolar friend/enemy rationale with determined ends. Context where external fear "implies the fear of a collectivity of remote risks or of some object -such as a foreign enemy- foreign to the community. A line also followed by Schmitt when he establishes that, if a people is afraid of the risks and penalties linked to political existence, what will happen is that another people will appear to exempt it from both, assuming its protection against external enemies and consequently political dominion; it will then be the protector who determines who the enemy is on the basis of the eternal nexus of protection and obedience (Schmitt, 1984).

These elements, transferred to the Colombian case, allow us to observe that fear and the desire for power go hand in hand. Although the social contract is agreed upon fear, according to the Hobbesian thesis, the desire for power also pushes to annihilation, abandoning the pact in a barbaric state where, in the Colombian case, the sides or groups that concur, at the same time as the armed conflict, or as a consequence of it, annihilate each other, disobeying the pact.

Note, for example, how in the case of "Operation Genesis", the Colombian State was internationally sanctioned responsible by the Inter-American Court of Human Rights (or IACHR Court), due to the massive violation of human rights in the context of the armed conflict. In this scenario, some testimonies indicated, without being contested by the State, that after killing one of the victims of the attack, those responsible proceeded to dismember his body. The paramilitaries played with his head as if it were a soccer ball in the presence of members of the community (Inter-American Court of Human Rights, November 20, 2013).

This demonstrates the use of fear as a control and domination device, since the immediate response to the barbaric acts perpetrated in the aforementioned case was dispossession, deterritorialization and forced displacement, with all the resulting violations.

In a general context, in Latin America the understanding of the phenomenon or variable fear has been transcendental, fear can only become global if it is traceable and also finds concrete social scenarios (Ordóñez, L. 2006). The convergence, *verbigratia*, of situations of terror, criminality and death, as López (2017) explains, make it a propitious space to understand its use as a strategy that has worked from governance and has been able to generate dynamics for domination and social control.

One could mention countless organizations and states whose economic base is anchored to the device of fear, which is also explained, in a forceful manner, in the studies of the Belgian sociologist, Armand Mattellart (2009), in his proposal *La globalisation de la surveillance. Aux origines de l'ordre sécuritaire*.

In the Colombian case, there is no doubt that the business is war and the multiple forms of violence in all its facets and stages, where finally, the concentration of economic, political and social power is derived from the use of fear as a weapon of control and domination. This has been used for decades by various actors, governmental and private, national and foreign, throughout the length and breadth of the country.

Discussions on international standards for the protection of human rights in transitional justice processes

The debate developed around fear leaves many questions and most of them unanswered. This does not mean that, in the end, contributions are not made, given the social and political demands that the Colombian context merits, to leave alternatives, at least in relation to the questioning that motivated this study.

Now, considering the aforementioned scenario it must be stated that the transitional justice process in Colombia was a mediated solution to the humanitarian drama of war, in the better sense of the term. It was a scenario that, as noted above, has been influenced by fear in the face of the ravages and transformations as a result of armed conflict (Buendía, 2003).

Along these lines, Colombia faces different and complex questions, among them, as Huntington (1994) suggests, the transition related issues associated with the drastic change of inadequate laws for democracy and, above all, how to deal with those who have been openly committed to human rights violations" (1994, p. 191). Although there are many studies and approaches to transitional justice on the international scene, it is necessary to say that there is no known ideal transitional justice process on a global scale, if we consider these processes are typically imperfect, as one party demands what the other does not wish to do, or in other words, one party demands what the other fears and tries to avoid through conciliated forgiveness.

Consequently, these processes are characterized by the constant tension there is between victims and perpetrators. Thus, on the one hand, we find social demands for punishment and accountability on individuals who have committed atrocious crimes, and on the other, the need for forgiveness in order to transcend that conflictive past to a phase of respect for human rights, where international humanitarian laws are not transgressed.

However, such reconciliation policies may well have, as proposed by Teitel (2003), negative long-term consequences. For example, "encouraging the settlement of past grievances may involve conservative ramifications. Such an approach would undermine broader political reforms and in general any attempts to successfully lay the foundations to develop democracy. Furthermore, the responses herein discussed have largely involved national political decisions, they often overlook the larger structural causes associated with

the bipolar balance of power" (2003, p. 17).

Transitional justice, therefore, is not a set of unique and exclusive procedures applicable in all contexts, uniformly. As a matter of fact, the circumstances of conflict and war, may contextually demand dissimilar procedures, but what there is consensus on, at least, as far as the Inter-American Court of Human Rights (hereinafter "IACHR Court"), attending to the international *corpus iuris* as inter-American doctrine on the matter, is that transitional justice processes must meet minimum standards in attention to the criteria of justice, truth, reparation and measures of non-repetition. In this regard, some authors, such as Arthur, 2011; Uprimny, 2016; Elster, 2004; Palacios, 2016; and Teitel, 2003, can contribute to the expansion of the outlined definition.

As far as the right to truth is concerned- primary demand on the part of victims in Colombia- the Inter-American Court has established that it is imperative and constitutes a form of reparation in itself (Inter-American Court, *Velásquez Rodríguez vs. Honduras*, 1998); moreover, it is an autonomous right and it is key for the exercise of other rights, as is the case, for example, of the right to justice. When it comes to transitions, as Uprimny (2006) explains, their objective is to leave armed conflict behind and reconstitute the social fabric, taking into account such a transformation implies the difficult task of reaching balance between justice and peace demands, that is, between victims' rights and the conditions imposed by armed actors to demobilize, in cases of war contexts.

In this sense, transitional justice could be understood as "any trial, purge and reparation process that take place following the transition from one political regime to another" (Elster, 2006, p. 15). It is also viewed as "a series of practices, institutional arrangements and social engineering techniques with the aim to facilitate the transition to a situation of lasting and democratic peace, within the limits imposed by international law, for societies that have been or are immersed in violent conflicts or dictatorial regimes" (Forcada, 2011, 9).

With this being said, Colombia has created a sufficiently solid regulatory body, known as the Legal Framework for Peace, with the objective of complying with international standards on the matter. Subsequently, Laws on amnesties, pardons and other special criminal treatments (Law 1820 of 2016) came about. It is worth mentioning, however, that the prohibition of this type of laws is an imperative international norm -*ius cogens*-, as these mechanisms offer the possibility to prevent investigation, prosecution and punishment of international crime perpetrators in case of serious violations of human rights and serious breaches of international humanitarian law, which translates into wide margins of impunity, and are the complete opposite to the victims' right to truth, justice, and reparation.

In this regard, the Inter-American doctrine has determined that,

amnesty provisions, statutes of limitation and the establishment of exclusions of responsibility that seek to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, summary, extra-legal or arbitrary executions and forced disappearances, all of which are prohibited because they breach unrepealable rights recognized by international human rights law, are inadmissible (Case of Barrios Altos v. Peru, Merits, 2001, para. 41).

This is why,

(...). Amnesty laws in cases of serious human rights violations are manifestly incompatible with the letter and spirit of the Pact of San José, since they violate the provisions of Articles 1(1) and 2 thereof, i.e., in that they prevent the investigation and punishment of those responsible for serious human rights violations and,

consequently, the access of the victims and their relatives to the truth of what happened and to the corresponding reparations, thus hindering the full, timely and effective rule of justice in the relevant cases, favoring, instead, impunity and arbitrariness, also seriously affecting the rule of law, reasons for which it has been declared that, in light of International Law they lack legal effects (Gelmán Case vs. Uruguay, 2011, para. 226).

Consequently, the duty to not leave these crimes unpunished is transferred, and the national and international means, instruments and mechanisms must be used to guarantee the effective prosecution of such conducts and the punishment of their perpetrators, in order to prevent them and avoid impunity (Almonacid Arellano et al. v. Chile, Merits, Reparations and Costs, 2006). That is why, laws on amnesties, pardons and other special criminal treatment (Law 1820 of 2016), as an integral part of the Legal Framework for Peace, in Colombia, will not apply for crimes against humanity, genocide, and serious war crimes -that is, any infraction of International Humanitarian Law committed systematically- hostage taking or other serious deprivation of liberty, torture, extrajudicial executions, forced disappearance, rape and other forms of sexual violence, child abduction, forced displacement, as well as the recruitment of minors, all in accordance with the Rome Statute, which in turn, created the International Criminal Court.

Law 1820 of 2016 is contemplated as a mechanism to extinguish the criminal, disciplinary, administrative and fiscal action, which will be granted for the political crimes of "rebellion", "sedition", "conspiracy" and "seduction, usurpation and illegal retention of command" as well as any other crime that's related to these, as per this law, to those who have incurred in them. This does not extinguish the right of the victims to receive reparation, taking into account, among other things, the obligations resulting from the American Convention, in the context of the Inter-American system for the protection of human rights.

Nevertheless, legal institutions for the beneficiaries of the Truth, Justice, Reparation and Non-Repetition Comprehensive System - SIVJRNR, as holders of special treatment under Law 1820, will only be possible as long as they contribute to providing full truth, repairing the victims and guaranteeing non-repetition. Providing full truth, in this context, means recounting, when the elements are available to do so, in an exhaustive and detailed manner the acts committed and the specific circumstances, as well as the necessary and sufficient information to attribute responsibilities. However, the duty to provide truth does not imply the obligation to accept responsibility.

These complex issues give us a sense that the transitional justice process is, despite international standards that demand respect for human rights, a process characterized by the fear of a society that has not yet overcome the ravages of conflict, which constantly generate deep tensions. This is aggravated to a greater extent by the existence, as observed, of emerging criminal gangs, which, although not necessarily related to the sides traditionally confronted, do correspond to the most fearful suspicion for Colombian society, as conflict seems to mutate with new actors.

Progress of the Special Court for Peace in terms of results

The Special Jurisdiction for Peace - JEP, as a transitory jurisdiction, has the function of guaranteeing the right to justice for armed conflict victims, seeking the truth and possible reparations from the perpetrators. The JEP, therefore, will focus on specific spatial-temporal situations of the armed conflict, where serious human rights violations were committed. In this regard, it should be noted that, so far, there are seven cases under its jurisdiction, which are:

Case 1. Hostage Taking and Other Serious Unlawful Confinement Committed by the FARC-EP

In this scenario, the JEP investigates crimes committed against freedom and the ones resulting from this, by the FARC-EP, between 1993 and 2012. It currently has 21,396 victims, who suffered massive violations of their human rights, with cruel, inhuman and degrading treatment, in the different areas where the FARC-EP was located. The groups where most violations of the right to freedom occurred are located in the geographical area of the Orinoco and Amazon regions, particularly in the departments of Guaviare, Vaupes, Caqueta, Meta, Vichada, Arauca and Casanare, as can be seen in the attached map relative to case 1.

The JEP's reconnaissance board carried out investigations where around 17 reports were obtained from state entities and members of civil society, in which patterns of violent behavior were highlighted, with a series of crimes that represented a source of income for these guerrillas. Additionally, not only did they execute them to make a profit but also to punish civilians who refuse to side with them, or to request the exchange of hostages for imprisoned guerrilla members (JEP, taking hostages and other unlawful forms of confinement committed by the FARC EP, 2021).

Case 2. Prioritizes the Territorial Situation of Ricaurte, Tumaco and Barbacoas (Nariño)

In the Pacific, specifically in the department of Nariño, a total of 84,599 accredited victims were found, who were subjected to massive human rights violations by the FARC-EP and law enforcement officers, in places like Ricaurte, Tumaco and Barbacoas in the department of Nariño. Seventy-eight percent of these territories belong, as legally constituted property, to indigenous and African-Colombian people who are also the main victims of these serious human rights violations along with peasants, women and LGBTQ communities.

Case 3. Unlawful killings made to look like combat casualties and carried out by elements within the military

As far as this is concerned, the JEP investigated more than 4,000 of these events between 1984 and 2014 for alleged "false positives", prioritizing human rights violations in the departments of Antioquia, Meta, Huila, Casanare, Norte de Santander and Cesar, as shown in Figure 1.



Fig 1. Prioritized JEP Territories (Case 01).²

This case, in particular, was taken into account, thanks to the Attorney General's Office report, also called "Muertes ilegítimamente presentadas como bajas en combate por agentes del Estado" (Deaths unlawfully presented as combat casualties by elements of the armed forces), which states that the most critical stage of these criminal conducts occurred between 2006 and 2008 (JEP, Auto No. 05 of 2018).

Case 4. Territorial Situation in the Urabá Region

It should be noted, that the Urabá region has a history of economic and political conflicts, which have taken place between 1986 and 2016, where major human rights violations were committed in the towns of Turbo, Apartadó, Carepa, Chigorodó, Mutatá and Dabeiba, in the department of Antioquia and El Carmen del Darién, Riosucio, Unguía and Acandí, in the department of Chocó. Human rights violations include forced displacement, murder, torture, sexual violence, forced disappearance, among others. So far, 35,174 victims have been accredited, including people belonging to indigenous communities and territories (Embera, Wounaan, Senu and Guna Dule), Afro-Colombian communities, community councils, peasant organizations, LGBTI people, union activists, women victims of sexual violence, peasants from the Guacamayas village, among others.

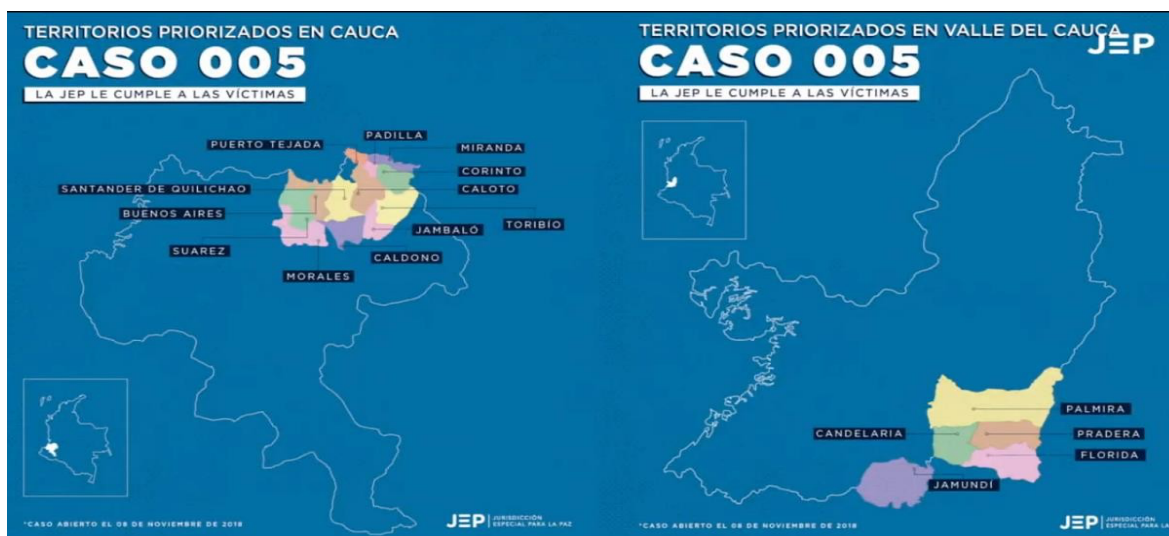
The JEP has already conducted 4 proceedings where both, victims and members of the FARC-EP and armed forces came together to try and reconstruct the truth of what happened in the midst of armed conflict in the Urabá region. Additionally, by July 30, 2019, the Chamber for the Recognition of Truth, Responsibility and Determination of Facts and Conduct ordered that precautionary measures be taken into account to protect the rights of victims, who were being affected by members of the armed forces (JEP, Territorial Situation of the Urabá Region, 2020).

²Retrieved from: <https://www.jep.gov.co/especiales1/macrocasos/03.html>

Case 5. Prioritizes Territorial situation in the region of northern Cauca and southern Valle del Cauca

In this context, the JEP has identified subjects of special constitutional protection as direct victims, such as the indigenous population, Afro-Colombian communities and peasants. These massive human rights violations and terrible breaches of international humanitarian law were committed in 17 municipalities in Colombia, as shown in figure (no. 2): Santander de Quilichao, Suárez, Buenos Aires, Morales, Caloto, Corinto, Toribío, Caldono, Jambaló, Miranda, Padilla and Puerto Tejada, in the north of Cauca and Palmira, Pradera, Florida, Candelaria and Jamundí in the south of Valle del Cauca.

Fig 2. Prioritized territories in Cauca and Valle del Cauca. JEP (Case 05)³



Bear in mind Cauca makes up a 40% of the country's ethnic population and its indigenous population is the most affected by serious human rights violations, this is reflected, in turn, in the various interventions by the Inter-American Court of Human Rights, which has imposed several precautionary measures in favor of this ethnic group located in the region.

Case 6. Victimization of members of the Patriotic Union.

It must be said that the UP, *Unión Patriótica*, was a political party created in 1985, after an agreement between the Colombian Government and the FARC, however, after the presidential elections of 1986, when the party reached 4.5% of the votes and came in third place, began the murders, forced disappearances, torture, among others, of members of the party and its supporters.

In other words, although the government promised to grant them the necessary guarantees to carry out their activities like any other political organization, in reality an institutional policy of extermination was constituted and, in effect, the attacks against the UP meet the definition of genocide, enshrined in Article (II) of the Convention on the

³ Retrieved from: <https://www.jep.gov.co/especiales1/macrocasos/05.html>

Prevention and Punishment of Genocide that Colombia belongs to.

These events took place in Magdalena Medio, Urabá, Meta, the Caribbean Coast, Northeast and Northeastern Antioquia, and the south of the country, where the armed forces, state agents, civilian third parties and paramilitary groups exercised systematized and generalized violence, committed serious human rights violations and persecuted their members for political reasons. Two massacres stand out particularly in this case, the first being in Aracatazo, Chigorodó and the second in Segovia, both in the department of Antioquia. To date, the JEP has heard accounts from 22 victims and survivors of the UP in exile and is studying more than 50 applications (JEP, *Victimization of members of the Unión Patriótica*, 2020).

Along the same lines, it should be noted that the case was also brought forward before the Inter-American system for the protection of human rights (IACHR, 2017) years ago, in search of truth, reparation and justice, under grounds related to the unfounded or arbitrary use of criminal law and torture, causing violations of the rights to personal liberty, judicial guarantees, honor and dignity and judicial protection, among many other violated rights.

Case 7. Recruitment and Use of Children in Armed Conflict

Finally, due to international standards for the protection of human rights, children and adolescents are subjects of special constitutional protection, and this is why, their rights were violated in the midst of armed conflict, the SJP opened the case with Record No. 29 of March 1, 2019.

In this regard, the JEP discovered around 8,000 cases of minor recruitment carried out by the FARC and the armed forces, including indigenous, Afro-Colombian, Palenquero, Raizal and Rrom children, whose rights were violated between 1971 and 2016. Recruitment consisted, according to investigations, in having them work as cooks, porters, using them for sexual purposes and sexual violence, among others.

To date, the information systematization process has shown that the JEP is collecting accounts from victims and, likewise, has summoned several former FARC-EP guerrillas to voluntarily give testimony on how the policy to include minors in conflict was created (JEP, *Reclutamiento y utilización de niñas y niños en el conflicto armado*, 2020).

In short, the study presented allows us to conclude that, in Colombia, the categories addressed and the factors of fear and criminality have influenced and will continue to influence the country's political, social and economic life, in the face of the imprecise outcome of the Special Justice for Peace. What aggravates the matter is the fact that organized crime and political violence are increasingly imprecise dividing lines, and both integrated, complex forms of violence that transform and undermine any type of institutional control emanating from the State.

On the other hand, even with the Havana Agreements, the Colombian State keeps armed conflict alive and this has generated rough tensions around conflict and peace. Especially when the tendency, in successive governments, has been, in general, the search for an amicable solution to leave their violent past behind.

Correspondingly, even if at least ten years ago Colombia was thought to have invested in transitional justice without an actual transition, today it is possible to think of an imperfect transitional process, as long as there are actors willing to reconcile the tensions arising from war and the peace process, but this does not mean that all interests are perfectly reconcilable, however, eventually, some party will have to give in based on what the other demands.

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