

Avoiding amnesty in the age of accountability: Colombia's proposal for alternative sentencing

Eludiendo la amnistía en la era de la responsabilidad:
la propuesta colombiana de condena alternativa

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Summary: Introduction. 1. Amnesty, the age of accountability and alternative sentencing. 2. The Colombian solution: alternative sentencing. Conclusions. References.

Abstract: One of the more conspicuous symptoms of the anti-impunity movement in transitional justice is a growing objection towards the use of amnesty. While international standards are slowly but surely building a legal barricade to prevent amnesty and impunity, states are searching for alternative measures capable of persuading hostile actors to demobilise. One promising solution to this is Colombia's proposal for prosecutions accompanied by alternative sentencing under the *Marco Jurídico de la Paz*, which aims to demobilize the guerillas and end a 50-year conflict. But for this proposal to be a genuine alternative to amnesty rather than a political attempt to avoid international legal obligations, it must satisfy victims' requirements for truth, justice and reparations. This paper examines the potential use of alternative sentencing as a mechanism of transitional justice within the scope of the "age of accountability".

Keywords: amnesty, transitional justice, accountability, impunity, Colombia, FARC, truth, justice, reparations, alternative sentences.

Resumen: Uno de los más destacados síntomas del movimiento de lucha contra la impunidad en la justicia transicional es la creciente objeción al uso de amnistías. Mientras los estándares internacionales construyen, lenta pero firmemente, una barricada legal para prevenir la impunidad y el uso de amnistías, los estados buscan medidas alternativas capaces de persuadir a los actores hostiles para su desmovilización. Una solución prometedora a dicha complicación es la propuesta

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colombiana de acompañar los procesamientos o acciones de carácter penal con sentencias alternativas previstas bajo el *marco jurídico de la paz*, el cual trata de desmovilizar a las guerrillas y poner fin a un conflicto que ha durado 50 años. Sin embargo, para que esta propuesta se convierta en una alternativa genuina a la amnistía en lugar de quedarse en un intento político de evitar obligaciones legales internacionales, deberá satisfacer las exigencias de las víctimas en relación a la verdad, la justicia y las reparaciones. Este artículo examina el potencial de la condena alternativa como un mecanismo de justicia transicional en el ámbito de la “era de la responsabilidad”.

Palabras clave: amnistía, justicia transicional, responsabilidad, impunidad, Colombia, FARC, verdad, justicia, reparaciones, sentencias alternativas.

Introduction

The “peace v justice” debate is perhaps the most salient motif of the short yet turbulent lifespan of transitional justice. Though wars have been waged and peace agreements brokered since the beginning of human civilisation, the dawn of the human rights movement has brought with it a heightened global sensitivity to the voices of individual people and communities, which in turn has influenced the ebb and flow of both peace and justice. Since the Nuremberg trials, post-conflict academia has fluctuated in its approach to the debate, with both the ‘peace’ and ‘justice’ camps falling into and out of favour as the field of transitional justice developed. Amnesty was the double-edged sword for the peace camp, and the blanket or non-conditional amnesties adopted during the Latin American “third wave” triggered a monumental backlash from victims’ groups and human rights advocates, inspiring a renewed attentiveness to justice (Huntington, 1993).

Characteristically lagging behind policy and practice, international law is finally catching-up with this movement, and while it was once acceptable for authorities to play the peace card and bring in unconditional amnesties excusing gross violations of human rights, global society is now spinning a legal, political and moral web of accountability ensuring truth, justice and reparations for victims of conflict. Since the Latin American ‘spring’, we have seen a rapid consolidation of the “justice cascade” (Lutz & Sikkink, 2001), where criminal trials and tribunals have replaced amnesties in post-conflict situations. It is in this context, following the establishment of the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for Former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and ultimately the creation of the International Criminal Court (ICC), that Ban Ki Moon famously announced that “the old age of impunity is over... in its place, slowly but surely, we are witnessing the birth of a new Age of Accountability” (Ban Ki Moon, 2010).

This is precisely the context in which the Colombian government is now operating. Under the shadow of the Inter-American Court of Human Rights (IACtHR or Inter-American Court) and the ICC, geopolitically situated in the thick of the anti-impunity forest, Colombia’s current peace talks with the Fuerzas Armadas Revolucionarias de Colombia (FARC) are an unprecedented opportunity for the two parties to reach an agreement ending a 50-year conflict without the use of amnesty. The challenge is to devise an agreement that is lenient enough to entice the guerrillas to put down their arms, yet licit enough to comply with the materialising international call for accountability.

The proposed solution is the use of alternative sentencing, whereby members of the FARC will be criminally prosecuted for human rights violations and if found guilty will be spared regular life-sentences typically affiliated with such egregious crimes. This method might very well be capable of achieving the pragmatic benefits associated with amnesty and incentivising demobilisation, as well as avoiding legal repercussions following the use of amnesty. But adoption of this method risks being perceived as a manoeuvre to avoid international criticism and legal backlash without addressing the underlying normative problems linked to amnesty. Consequently, it will not be enough for alternative sentencing to simply comply with the current anti-impunity movement; it must be capable of holistically trumping the achievements of amnesty and substantially effective in attaining the objectives affiliated with post-conflict societies, namely, truth, justice and reparations.

To examine this contention, this paper aims first to analyse the status of amnesties to determine how and why an alternative solution to amnesty is required by international law and practice. It then outlines the proposal for alternative sentences in Colombia, with an emphasis on the legality and legitimacy of this approach through the lens of international law. Finally, the impact of alternative sentencing on the achievement of truth, justice and reparations is analysed to determine whether this solution is merely a reactionary mechanism for achieving the results of amnesty while avoiding legal repercussions, or whether this technique is preferable to amnesty from a more holistic perspective.

1. Amnesty, the age of accountability and alternative sentencing

1.1. *The utility of amnesty*

The use of amnesty as a mechanism for inducing stability dates back to the very creation of law itself.¹ Its utility is grounded in notions of *realpolitik* and “the ultimate sovereign prerogative of states to begin and end wars” (Perry, 2011: 77), and as such is staunchly established at the far end of the “peace” spectrum in the “peace vs. justice” debate.² Amnesties’ capability to catalyse peace lies in their ability to encourage disarmament and

¹ An equivalent to amnesty is mentioned in the Hammurabi Code from 1700BC (Lessa & Payne, 2012: 3); and by Athenians at the end of civil war circa 404 BC (Weisman, 1972: 530).

² It should be noted that in recent years, many have tried to reconcile “peace” and “justice” by claiming that they are complementary rather than oppositional objectives.

demobilisation, entice authoritarian regimes to relinquish power, eliminate the potential for spoilers and facilitate peace agreements (Transitional Justice Institute, 2013). These preliminary objectives purportedly contribute to the consolidation of peace, democracy and the safeguarding of human rights in the long-term (Olsen, Reiter, & Payne, 2012: 336). When used in conjunction with other transitional justice mechanisms —such as the South African conditional amnesty that was granted in exchange for a full confession— amnesties can also contribute to the realisation of other transitional goals, such as the revelation of truth and reparations for victims (Transitional Justice Institute, 2013).

1.2. *The demise of amnesty and the age of accountability*

The use of amnesty or its equivalent can be traced back to antiquity, but the appropriate starting point in a discussion of its demise is indubitably the end of the Second World War (Laplante, 1997: 917). Although there is no independent event or single moment in time that heralded the beginning of the 'age of accountability' and the invalidation of amnesty, the last 60-70 years have exhibited what Lutz and Sikkink have termed "norm-affirming events" that provide proof of a "justice cascade" (Lutz & Sikkink, 2001), in which the prevalent ideology is one of anti-impunity and disdain for amnesty. In the period following World War II, the concept of individual, universal rights began to solidify as independently enforceable rights, exercisable outside the limits of state sovereignty (Lessa & Payne, 2012: 1). This caveat on Westphalian notions of sovereignty and non-interference opened the doors for international accountability and marked the beginning of the end of the sovereign prerogative to prioritise social stability over individuals' rights to justice (Laplante, 1997: 931). According to Lisa Laplante:

"[T]he human rights movement suddenly planted serious questions about [amnesty's] legitimacy through three main arguments: first, international law creates a state duty to investigate, prosecute, and punish those responsible for serious violations of human rights; second, international law provides victims a fundamental right to justice... and third, post-conflict policy recognizes that criminal justice is good for democracy and the rule of law" (Lutz & Sikkink, 2001: 917-918).

Although these early developments focused on state accountability rather than individual, the Nuremberg Trials marked the emergence of international criminal liability for human rights violations (Sikkink, 2012: 40).

The significance of the Nuremberg Trials cannot be underrated, as not only do they mark the first time that the international community convicted individuals for offences against humanity as a collective, but, as the nominal forebear of transitional justice, they also placed an emphasis on criminal prosecutions as the paradigm for justice during transitions, implicitly neutralising the acceptability of amnesty.

Despite this early endorsement of criminal trials, the following period, influenced by the Cold War, exhibited a certain resistance in accepting the idea of international accountability (Laplante, 1997: 922). This persistence of Westphalian ideology was reinforced in the Latin American “third wave”, when Southern Cone countries perpetually employed the use of broad or blanket amnesties to facilitate transitions from dictatorial regimes or military rule into democracy (Laplante, 1997: 923). Outgoing regimes, notably in Argentina, Chile, Peru and Brazil, insisted on amnesty provisions as ‘carrots’ to facilitate their exit and reintegration into society.³ Like the influence of the Nuremberg trials as a “norm affirming” event, the impact of the ‘third wave’ amnesties is monumental, as “the cynical, disingenuous exploitation of amnesties that arose in Latin America during the 1970s and 1980s arguably helped to stigmatise and trigger a growing aversion to their use as a tool for securing peace” (Perry, 2011: 94).

Due to the exploitation of amnesty in Latin America, and the reactions and oppositions of victims, civil society and human rights institutions, these countries became the frontline for the battle against impunity. The “third wave” was preceded by an unconscionable quantity of massacres, forced disappearances, extrajudicial killings, kidnappings and the like, which inevitably left a wake of tyrannised and disillusioned victims who found no means for reparations after the introduction of broad, blanket amnesties. “Transnational advocacy networks” (Lutz & Sikkink, 2001: 4) consisting of lawyers, civil society organisations and victims groups had to collaborate to find ways to challenge these amnesties and ensure some form of justice and reparations. The IACtHR along with the Inter-American Commission of Human Rights (IACHR or Inter-American Commission) has proven itself to be the most useful means to this end. Decisions from the Inter-American Court, notably the landmark *Velásquez Rodríguez*⁴ and *Barrios Altos*⁵ cases, set a precedent in the region regarding the state duty to investigate, prosecute and punish human rights violations

³ For example: *Ley de Amnistía*, Ley 26.479 (Congreso del Perú), 14 June 1995; *Ley de Punto Final*, Ley 23.492, Boletín Oficial (Argentina), 29 December 1986.

⁴ *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

⁵ *Barrios Altos v. Perú*, Inter-Am Ct. H.R. (Ser. C) No 83, (2001).

(Alvira, 2013: 123). While these and subsequent cases were not able to extrapolate a direct prohibition on the use of amnesty from the state's domestic and international obligations, creative litigants were able to effectively circumvent the domestic and international position on the prerogative of states to use amnesty, and use existing treaty provisions to question their legitimacy.

Parallel developments from the international arena complemented and reinforced the decisions and influence of the IACtHR and IACHR. Kathryn Sikkink has suggested that historically there have been three models for accountability: the immunity or impunity model, the state accountability model and the individual criminal accountability model (Sikkink, 2012: 23). Though these models are by no means linear or progressive, the newest model is indisputably individual criminal accountability, a concept that has rapidly expanded since its initial conception in the Nuremberg trials. The shift from state accountability to individual accountability is manifest in treaties such as the 1948 International Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) and the 1987 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), which include a specific state duty to prosecute and punish.

The full force of these provisions was demonstrated with the 1998 attempted extradition of Chilean General Augusto Pinochet in spite of an applicable amnesty law in Chile (Rodríguez Rescia, 2010: 215). This act consolidated international criminal accountability for serious human rights violations, effectively denying individuals the ability to comfortably rely on domestic amnesty provisions to escape prosecution. The creation of the ICTY and the ICTR in the early to mid-1990s was also a crucial development in this respect (Freeman & Pensky, 2012: 57). But the proverbial nail in the coffin for amnesties for serious human rights violations ostensibly came with the Rome Statute of the International Criminal Court (Rome Statute) in 1998 (United Nations General Assembly, 1998). The Statute's "complementarity" provisions—which permit the Prosecutor to investigate one of the offences within its scope⁶ when a signatory state is either 'unwilling' or 'unable' to prosecute and punish⁷—essentially act as a fallback accountability mechanism for states shielding offenders with amnesties. Any doubt over the ability of the Office of the Prosecutor (OP) to employ the Rome Statute

⁶ Namely genocide, crimes against humanity, war crimes and the crime of aggression; see UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Art. 5.

⁷ *Ibid.*, Arts. 17(1)-(2).

in such a manner has essentially been quelled by the current Colombian peace process, where the OP has unequivocally communicated that if Colombia were to offer amnesties for serious human rights violations, the ICC would classify such an act as being 'unwilling' to prosecute and activate the jurisdiction of the ICC (Bensouda, 2013).

Therefore the expansion of international human rights, along with the evolution of international criminal law have contributed as both catalysts of, and subjects to the 'justice cascade' – 'norm affirming events' establishing a global antipathy for the use of amnesty in response to serious human rights violations.⁸

1.3. *The Status of Amnesty Under International Law*

1.3.1. INTERNATIONAL TREATY OBLIGATIONS

No multilateral UN treaty makes specific reference to the prohibition of amnesties, however a common creative approach has emerged whereby a prohibition is inferred predominantly by the implicit or explicit state duty to prosecute certain violations, as well as the right to a remedy for victims of violations (Freeman & Pensky, 2012: 46). Two examples of the explicit duty to prosecute have already been provided in the Genocide Convention and the CAT, and comments, resolutions and communications from the Human Rights Committee and the Economic and Social Council seem to infer this duty in relation to violations of other conventions. In relation to violations of the International Convention of Civil and Political Rights (ICCPR)⁹ the duty to prosecute and punish might not be considered a strictly binding legal obligation, as "at its strongest, the committee 'urges'

⁸ It should be noted that certain empirical studies have demonstrated that globally, the adoption of amnesties has not necessarily declined, which indicates a degree of divergence between theory and practice. While this may be concerning, a closer examination that takes into account regional variations shows that since the 'third wave', Latin American states have adopted significantly less amnesties; while the rise in amnesties from 2010 onwards might be in response to the Arab Spring. This promotes circumstantial theories that suggest that the flux in amnesty use correlates to nothing more than the *requirement* for amnesty i.e. the presence of conflict. Alternatively, the persistence of amnesty could simply reflect that the growing threat of prosecution and trials has forced governments to require more onerous guarantees against prosecution, which supports the idea of a justice cascade rather than negating it. (See: Lessa & Payne, 2012: 3; Mallinder, 2012: 70-71, 82, 83.)

⁹ See: United Nations Human Rights Council, *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCCPR/C/21/Rev.1/Add.13, 26 May 2004; United Nations Human Rights Council, *CCPR General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the*

prosecution" (Schabacker, 1999:7). Prosecution is required, however, in the CAT, the Genocide Convention, the Geneva Conventions in relation to grave breaches¹⁰ (including non-international armed conflicts)¹¹ and the International Convention for the Protection of All Persons From Enforced Disappearances.¹² With the exception of Protocol II of the Geneva Conventions, the duty to investigate and prosecute is generally limited to the prosecution of state agents (Freeman & Pensky, 2012: 47-48), and in conventions such as the CAT the wording can be ambiguous, allowing some margin of appreciation in deciding how exactly to prosecute (Freeman & Pensky, 2012: 47). Importantly, while extending the duty to prosecute from the primary conventions to non-international armed conflicts, Protocol II of the Geneva Conventions also contains an express requirement to grant amnesty in Art 6(5). The International Committee for the Red Cross (ICRC) has since attempted to limit the scope of that article by stating that it can only provide combat immunity in the interest of national unity, but cannot cover attacks against civilians (ICRC, 2005; Perry, 2011: 84). Nevertheless, this provision has been used by domestic courts to uphold amnesties in response to human rights violations, for example by the South African Constitutional Court in the landmark *AZAPO* case.¹³

Optional Protocols thereto, or in Relation to Declarations under Art 41 of the Covenant; AAPR/C/21/Rev.1/Add.6; 4 November 1994.

¹⁰ Though grave breaches of these conventions are strictly speaking international humanitarian law (IHL), the overlap with human rights violations is well-established, and a duty to prosecute under IHL often implies a duty to prosecute human rights violations.

¹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.

¹² United Nations General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations Treaty Series, vol. 78, art. 1; United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, Art. 6 United Nations General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Art. 6.; International Committee of the Red Cross, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31, Arts. 49-51; International Committee of the Red Cross, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85, Arts. 50-52; International Committee of the Red Cross, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, Arts. 129-131; International Committee of the Red Cross, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287; Art. 146-148.

¹³ *Azanian People's Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*, Constitutional Court of South Africa, Case No. CCT17/96, 25 July 1996.

In addition to the duty to prosecute, an inferred prohibition to amnesty can be drawn from the right to remedy provided in various multilateral treaties such as the ICCPR (Art. 2(3)) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Art. 6). Freeman & Pensky have suggested that there are two different interpretations of this right: a broad approach, which includes the right to prosecution, and a narrow approach, which simply requires states to make a good faith effort to provide some form of compensation. Which of these approaches is adopted varies across regions (Freeman & Pensky, 2012: 48-49).

The UN has also published a number of documents that clearly demonstrate their stance regarding amnesties and encourage member states to adopt similar positions. In particular, the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (Impunity Principles)¹⁴ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principles for the Right to Reparations)¹⁵ set out detailed requirements for states to avoid impunity by prosecuting individual offenders, and to grant specific methods of reparations respectively.

1.3.2. CUSTOMARY INTERNATIONAL LAW

International treaties and customary international law are the two most widely cited legal sources in support of an inference prohibiting the use of amnesties. For a norm to qualify as customary international law, it is generally understood that two elements must be satisfied: first, there must be a general (not universal) state practice; and second, that state practice must be accepted as law (also known as the requirement for *opinio juris*).¹⁶

Regarding the requirement for 'general state practice', it is important to acknowledge that especially within the field of human rights, there is a marked difference between what states say and what they do (Schabacker, 1999: 11). Some states continue to enact amnesties in response to serious human rights violations despite having adopted treaties and issued statements declaring an open opposition to impunity and accepting

¹⁴ United Nations Human Rights Council, *Report of the independent expert to update the Set of Principles to combat impunity*, 18 February 2005, E/CN.4/2005/102.

¹⁵ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 2006.

¹⁶ United Nations, *Statute of the International Court of Justice*, 18 April 1946, Art. 38; Klabbers (2013: 26).

the responsibility to punish such violations. Furthermore, in establishing the existence of general state practice, “what matters in particular is that those states whose interests are especially affected by a customary rule participate in its making” (Klabbers, 2013: 27). Therefore it might be significant that the states that “require” amnesties (such as the Arab Spring states), are not necessarily the same states that most actively oppose amnesties.

With respect to the *opinio juris* element, which requires that the general practice be accepted as a legal duty as opposed to a moral or political one, commentators have suggested that this test is satisfied either by the mere existence of general and consistent state practice or when states have unequivocally stated their motivation as legal. Regardless of which of these tests is adopted, it is exceptionally difficult to determine whether states that punish human rights violations and refuse the use of amnesty do so out of political motives or legal ones (Schabacker, 1999: 12).

In spite of this apparent uncertainty regarding the permissibility of amnesty under international customary law, *jus cogens* prohibitions, such as torture and genocide, must be treated as illegal under customary international law. This has been used by some as grounds for claiming that states are obliged to investigate, prosecute and punish violations of *jus cogens* (Freeman & Pensky, 2012: 52). The universality and non-derogability of *jus cogens* would seem to imply that states cannot adopt laws that protect those who violate them (Freeman & Pensky, 2012: 53). These contentions point to a rapidly emerging customary norm that prohibits the use of amnesty for certain human rights violations.

1.3.3. INTERNATIONAL AND REGIONAL JURISPRUDENCE¹⁷

Decisions from international courts and tribunals—in particular the ICC, ICTY and ICTR—“reinforce and consolidate a network of case law” that is often referred to by international and national institutions (Freeman & Pensky, 2012: 57). As previously mentioned, the operations of the ICC have been crucial in pressuring states to employ mechanisms to inves-

¹⁷ It should be noted that this section considers judicial decisions relating to amnesty in Colombia, and as such has not included the decisions from the African Commission on Human and People's Rights or the European Court of Human Rights. Both of these bodies, however, have adopted similar positions to that of the Inter-American Court and Commission with respect to the impermissibility of broad amnesties. See: *Malawi African Association and Others v. Mauritania*, Comm. No. 54/91, African Commission on Human and Peoples' Rights, 11 May 2000; *Margus v. Croatia*, App. No. 4455/10, (ECTHR, 2014), *Case of Association '21 December 1989' and Others v. Romania*, App. No 33810/07, (ECTHR, 2011).

tigate, prosecute and punish serious violations of human rights. The ICC's influence on the peremptory normalisation against the use of amnesties is largely enforced by the complementarity provisions of the Rome Statute.¹⁸ The ICC in the past has considered that a state that grants amnesty for those whose actions fall within the scope of the Rome Statute is to be considered 'unwilling' to prosecute (Bensouda, 2013).

From the jurisprudence of tribunals such as the ICTR and ICTY, one seminal case emphasising the international duty to prosecute *ius cogens* crimes is the *Furundzija* case from the ICTY, where the judges suggested that:

"[I]t would be senseless to argue, on the one hand, that on account of the *ius cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law".¹⁹

This opinion reflects the prevalent approach taken by these tribunals, reinforcing the idea that the prohibition of amnesties is becoming a peremptory norm.

1.3.4. INTER-AMERICAN COURT OF HUMAN RIGHTS

The quintessential decision of the IACtHR regarding the permissibility of amnesties is the case of *Barrios-Altos v Peru*.²⁰ Before this case, the Court had already insisted that states have a duty to investigate, punish and compensate violations of the American Convention on Human Rights (ACHR) in *Velasquez Rodriguez v Honduras*.²¹ In *Barrios-Altos*, however, the Court made explicitly clear that any state enacting amnesty would violate this requirement, despite there being no explicit prohibition of

¹⁸ UN General Assembly, *Rome Statute of the International Criminal Court*, *op. cit.*, Arts. 17(1)-(2).

¹⁹ *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 1998.

²⁰ *Barrios Altos v. Peru*, Inter-Am Ct. H.R. (Ser. C) No 83, (2001); it should be noted that the Commission had already addressed the permissibility of amnesties in prior cases, most notably in the *Lucio Parada Cea et al v El Salvador*, Case 10/480, Inter-Am.Ct.H.R.(Ser. C), No. 1/99 (1999); *Masacre Las Hojas v. El Salvador*, Case 10.287, Inter-Am.Ct.H.R.(Ser. C), No. 26/92 (1993).

²¹ *Velázquez Rodríguez vs. Honduras*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), paras. 174-176; Alvira (2013: 127).

amnesty in the ACHR (Rodríguez Rescia, 2010: 258). With respect to the general permissibility of amnesties, the Court stated:

“all amnesty provisions... are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations [that] violate non-derogable rights recognised by international human rights law”.²²

This particular paragraph leaves very little doubt regarding the Court's opinion on the prohibition of any amnesty that prevents investigation and punishment of violations under the ACHR (Rodríguez Rescia, 2010: 258). In subsequent cases, via the inception of “conventionality control” the Court goes so far as to suggest that amnesties that are incompatible with the Convention are essentially ineffective from the moment of their creation (Binder, 2011: 1212). In light of the discussion above, it is interesting to note that the IACtHR often refers to customary international law in support of its prohibition of amnesty, especially in relation to *jus cogens* prohibition of torture and genocide.

While the *Barrio-Altos* approach has been fairly consistently followed by the Court and the Commission,²³ recent cases have questioned the scope of the prohibition on amnesty, especially whether it applies to all amnesties or only to self-amnesties or blanket amnesties (Alvira, 2013: 127). In the case of *Gomes Lund v Brazil*²⁴, however, the Court insisted that whether an amnesty could be classified as a self-amnesty, mutual amnesty or a political agreement was irrelevant as long as it prevented the investigation and punishment of violations under the Convention.²⁵ The Court has also clarified that such amnesties are prohibited even if an investigation of violations has already been carried out by a Truth Commission.²⁶

In the judgment of the *Massacres of El Mozote* case, the Court suggested that under Art 6(5) of the Geneva Convention, some amnesties in response to non-international armed conflicts are “justified to pave the way to

²² *Barrios Altos v. Peru*, Inter-Am Ct. H.R. (Ser. C) No 83, (2001), para. 41.

²³ See for example: *del Rosario Gómez Olivares and ors (on behalf of Almonacid Arellano) v Chile*, Series C No 154, IHRL 1538 (IACHR 2006).

²⁴ *Gomes Lund v Brazil* Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. Ser. C No. 219 (2010).

²⁵ *ibid*, paras. 174-175; Alvira (2013:128); also see *Cantoral Huamani and García Santa Cruz v Perú*, IACHR Series C No 176, IHRL 3041 (IACHR 2007).

²⁶ *Gelman v Uruguay* Merits and Reparations, Judgments, Inter-Am. Ct. H.R. (Ser. C) No. 221 (2011). *La Cantuta v. Perú*, Judgment, Inter-Am.Ct.H.R.(Ser. C) No. 162 (2006); Alvira (2013: 128); Laplante (1997: 971).

a return to peace”²⁷. However, the Court qualified this exception by clarifying that:

“Art 6(5) of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in non-international armed conflict or who are deprived of liberty for reasons related to armed conflict, provided that this does not involve facts... that can be categorised as war crimes, and even crimes against humanity”.²⁸

We can see, therefore, that as Latin American states implement increasingly complicated amnesties or pseudo-amnesties, the IACTHR appears to be adapting its jurisprudence so as to encompass these emerging amnesties and victims’ rights under the ACHR (Rodríguez, 2013: 76).

From this collective examination of the political, legal and academic developments regarding the use of amnesties, it is perhaps suitable to conclude that there is at minimum an emerging norm and accompanying framework prohibiting the use of amnesties for serious human rights violations. Whether by reputational accountability or genuine willingness to respect victim’s rights, states are undoubtedly responding to this norm.

2. The Colombian solution: alternative sentencing

2.1. *Alternative sentencing instead of amnesty*

As we have seen, states must now navigate a legal and political minefield if they wish to enact amnesties for human rights violations in the “age of accountability”. In particular, governments wishing to enact amnesties for members of an outgoing regime or violent opposition must now factor in the considerable ability of the ICC to spoil this ‘carrot’. Additional treaty obligations, especially for Latin American states, contribute to an accumulating number of legal obstacles making it increasingly difficult for amnesties to remain viable.

In light of this obstacle course, states must find alternative mechanisms to achieve the objectives of amnesty while avoiding castigation by civil society and legal institutions. Criminally prosecuting serious human rights violators but offering alternative sentences or sentencing benefits may be a solution to this dilemma. A criminal process followed by a comprehensive

²⁷ *Massacres of El Mozote and Nearby Places v. El Salvador*, Inter-Am. Ct. H.R. (ser. C) No. 252/83 (2012). para. 285.

²⁸ *Ibid*, para.286.

reparations strategy purportedly complies with the state's obligations to prosecute, plus satisfies victims' rights to justice, truth and reparations; however the state's offer of reduced, lenient or alternative sentences in exchange for cooperation could be enough of an incentive to induce potential spoilers to cooperate. This method therefore seems to achieve many of the objectives of amnesty, while simultaneously satisfying the requirements of the "age of accountability".

Acceptance of the use of trials and alternative sentencing in place of amnesty intimates that the necessary element for complying with international obligations and victims' rights is the procedural aspect of the trial process itself. When taken in conjunction with the rhetoric of the 'justice cascade', this contention seems to imply that special weight is afforded to criminal trials and investigations themselves as satisfying international obligations rather than the punishment of offenders. Paul Seils suggests that the purposes of punishment under regular criminal law can include incapacitation, deterrence, reform, retribution and communication (Seils, 2015: 8), yet in a transitional context, many of these objectives are redundant because the incentive to re-offend for combatants dissipates after the negotiation of a peace agreement (Seils, 2015: 12). What remains is the communicative objective, or the "social affirmation of values" (Seils, 2015: 11). This may be due to the symbolic significance of a public conviction, as well as the importance given to the revelation of truth and admission of wrongdoing that should accompany criminal investigations and trials. When a state charges an individual, submits them to an investigation and trial process and determines guilt, it signifies to the victim and broader society that the state does not condone the actions committed by the guilty. If we accept that the procedural element of the investigation and prosecution itself is sufficient to comply with international obligations, then the use of criminal investigations and trials followed by alternative sentencing may theoretically be capable of replacing amnesties in transitional or post-conflict contexts.

Indeed, previous transitional justice projects have made use of similar methodology. The Gacaca Courts in Rwanda utilised traditional justice mechanisms and sentencing as part of a comprehensive and relatively effective transitional justice scheme (Flacks, 2006: 8). In Timor-Leste, 'minor' offenders were exempt from prosecution if they were willing to participate in a truth commission and provide reparations or community service in agreement with their victims (Flacks, 2006: 13). Both of these alternative approaches, however, were effectively amnesties or pseudo-amnesties as they precluded the possibility of a formal prosecution and criminal sentencing. In contrast, Northern Ireland's 1996 Good Friday Agreement and Colombia's 2005 Justice and Peace Law both involved reduced sentences following a

criminal trial process (Seils, 2015: 7). Other than these attempts—which had limited success— there is a distinct lack of comparable transitional justice frameworks that have included formal criminal trials followed by alternative sentences such as those currently proposed by Colombia.

2.2. *Colombia: contextual background*

Colombia's history since the 1940s is riddled by a drawn out and complicated conflict between multiple parties, earning the country a reputation as host of the "world's longest war" (Vulliamy, 2015). Importantly, despite the continuing violence, the country has managed to maintain a relatively strong commitment to the rule of law and an active and independent judiciary (International Centre for Transitional Justice, 2009: 2).

Despite multiple attempts at peace talks, the Colombian government's previous peace processes have resulted in the partial or complete dissolution of guerrilla groups and paramilitaries on only two occasions – once in 1989 following an agreement with the M-19 guerillas, and more recently in 2005 under the *Ley de Justicia y Paz* (Justice and Peace Law or JPL) intended to demobilise the paramilitaries²⁹. In the wake of failed peace talks with the FARC and the *Ejército de Liberación Nacional* (ELN) in the 1990s, the government—especially under Álvaro Uribe— had intensified military campaigns, significantly weakening the FARC's capacities in the region. This weakening, along with a change from the hardline Uribe administration to that of Juan Manuel Santos in 2010, and the declassification of the FARC as a terrorist organisation, laid the foundations for renewed peace talks between the government and the FARC in 2012 (Crisis Group, 2013: 9).

These negotiations were made possible by a 2012 legislative act, the *Marco Jurídico para La Paz* (Legal Framework for Peace or LFP), which amended the Colombian Constitution by inserting a transitory article detailing a framework of application for transitional justice mechanisms, such as a truth commission and criminal investigations, with the purpose of "facilitating the end of the internal armed conflict and attaining a stable and lasting peace, with guarantees of non-repetition... and victims' rights to truth, justice and reparation".³⁰ Shortly after this amendment was passed, Santos' government commenced negotiations with the FARC based on a platform incorporating six topics for discussion: agricultural development, political participation, ratification of the agreement, solution

²⁹ *Ley de justicia y paz* (Justice and Peace Law) Law 975 of 25 July 2005 (Colombia).

³⁰ *Marco jurídico para la paz*, Law no.1 of 31 July 2012 (Colombia), transitory art. 66.

to the drug trade, victims and implementation, verification and end of the conflict (transitional justice).³¹ While negotiators have certainly made significant progress, this final point —transitional justice— is undoubtedly the most difficult to negotiate, with both parties having to make significant concessions if they hope to achieve peace.

Importantly, both the FARC and certain sectors of civil society see the guerrillas as political freedom fighters and as such have explicitly stated that their actions do not amount to regular criminal acts deserving prison sentences.³² In March 2015, FARC negotiators specifically stated “let it be known that no accord is possible that would impose a single day in prison for any guerrilla for having exercised the right to rebel, a precious gift of humanity, in order to end the injustices our people have suffered”.³³ The Colombian government, however, is under intense pressure to comply with duties to investigate, prosecute and punish human rights violations under the ACHR, the Rome Statute and other international conventions, as well as ensuring that victims’ rights to reparations, truth and justice are met. Indeed, the negotiations in Colombia represent the first peace process subject to the oversight of the ICC (Alvira, 2013: 134), and the OP has not hesitated to inform the Colombian authorities when certain proposals might activate intervention from the ICC. Moreover, Colombia is also responding to the limited success of the JPL framework, which was not particularly well-received due to the limited number of paramilitaries to face successful convictions, leaving a residual sentiment of disguised impunity (Gómez Isa, 2013: 2). This pressure from civil society, coupled with pressure from the ICC and the IACtHR has left the Colombian authorities and the FARC compelled to pioneer unprecedented alternatives to transitional justice mechanisms such as amnesty.

2.3. *The proposed operative framework*

The LFP does not specifically state the exact process and mechanisms for investigation, prosecution and punishment but rather outlines the

³¹ See: *Acuerdo General para la terminación del conflicto y la construcción de una paz estable y duradera*, 26 August 2012, at <<http://wsp.presidencia.gov.co/Documents/AcuerdoTerminacionConflicto.pdf>> (consulted 12 July 2015).

³² Cadena Radial Bolivariana CRB, “Voz de la Resistencia” (interview with Iván Márquez), 01 April 2013, at <<http://resistencia-colombia.org/index.php/crb/2738-la-paz-frente-a-las-premuras-legislativas-y-electorales>> (consulted 12 July 2015).

³³ Washington Office in Latin America, “Peace Timeline 2015”, at <<http://colombiapeace.org/timeline2015/>> (consulted 12 July 2015).

boundaries for any available process.³⁴ The framework leaves open the possibility for minor offenders to be amnestied, and major offenders to be prosecuted and excused from penal punishment by either alternative or suspended sentencing.

Although the operational guidelines of the LFP were approved by the Colombian Constitutional Court,³⁵ the involvement of the ICC has effectively limited the potential scope of the framework. In two letters addressed to the Colombian Constitutional Court in 2013, the ICC's Chief Prosecutor Fatou Bensouda specifically stated that any deal including amnesty or suspended sentences for serious human rights violations would be considered "unwillingness" to prosecute and compel intervention (Bensouda, 2013). In these letters, the Prosecutor states that sentences that are "grossly inadequate" in relation to the human rights violations committed will activate the admissibility provisions of the Rome Statute and require prosecution by the ICC. This interference has effectively limited the options available to the negotiating parties as it is unlikely that either side will agree to a deal that may eventually be superseded by the ICC. As a result, the option of suspended sentences has been removed from the negotiating table, as well as any sentences that might be considered "grossly inadequate". What is left is the provision of alternative sentences that comply with the ICC by unequivocally inferring some form of punishment while at the same time satisfying the FARC's insistence on avoiding regular prisons.

Consequently, in September 2015 the government and the FARC issued a statement outlining a preliminary agreement on accountability. This agreement suggests the establishment of two temporary institutions—the Chamber of Justice and the Tribunal for Peace—which will function in tandem "to do away with impunity, obtain truth, contribute to victims' reparations, and judge and impose sanctions on those responsible for serious crimes" (Washington Office for Latin America, 2015). While amnesty will be offered for "political crimes", more serious crimes such as genocide, torture, hostage-taking, enforced disappearances and extrajudicial killings will be investigated and tried by the Chamber of Justice. Those who are found guilty under this mechanism will not face penal incarceration, provided that they admit responsibility, tell the truth and contribute to reparations. Instead, they "will have a component of restriction of liberties and rights" of 5-8 years, which may include community

³⁴ Washington Office in Latin America, "Peace Timeline 2013", at <<http://colombiapeace.org/timeline2013/>> (consulted 12 July 2015).

³⁵ Corte Constitucional (República de Colombia), *Sentencia C-579 de 2013*.

service “aimed at the satisfaction of victims’ rights”.³⁶ Importantly, the negotiators have extended the scheme to include military or state personnel involved in human rights violations.

2.4. *The legality & legitimacy of alternative sentencing*

Although these proposals for alternative sentencing might prima facie be considered in compliance with Colombia's international obligations, there is still some doubt regarding the degree and severity of punishment required. Whether victims' right to truth, justice and reparations are complied with will be dependent both on the mechanisms chosen to prosecute human rights offenders and other mechanisms such as reparations schemes and truth commissions.

Domestically, the LFP has already been declared in line with the Colombian Constitution, subject to a number of parameters that should apply to any subsequent legislation such as the prohibition of suspended sentences for those “most responsible”.³⁷ However, as has already been mentioned, this approval refers merely to the constitutionality of the framework, and any future provisions implemented by the Colombian government will again be subject to scrutiny by the domestic legal system. Previous experiences with the 2005 JPL have shown that the constitutional court is not afraid to intervene when legislation falls short of Colombia's international obligations, even as part of a peace process (Crisis Group, 2013: 12).

Whether the Inter-American human rights institutions will consider alternative sentences to be in line with Colombia's obligations under the ACHR is unclear, and neither body has made any statement explicitly approving or disapproving such an option. Some assumptions might be drawn, however, based on previous comments or statements by the IACHR. The Commission has unequivocally expressed concern at the original drafting of the framework, stating that it “provoke(s) a number of concerns in the area of human rights”.³⁸ These concerns have so far been centred on issues regarding ‘prioritisation’ (i.e. the selection of prosecutions dependent on the seriousness of offences), and the question of alternative sentencing has not been openly addressed. When advising

³⁶ *Ibid.*

³⁷ Corte Constitucional (República de Colombia), *Sentencia C-579 de 2013*.

³⁸ Inter-American Commission on Human Rights (7 December 2012), Annex to Press Release 144/12, at < http://www.oas.org/en/iachr/media_center/PReleases/2012/144A.asp> (consulted 12 July 2015).

the Colombian authorities on the acceptability of the LFP, however, the IACHR did refer to its case law by stating that:

“[F]or the State to satisfy its duty to adequately guarantee the range of rights protected by the Convention... [it] must fulfil its duty to investigate, try, and, when appropriate, punish and provide redress for grave violations of human rights”.³⁹

The Commission's emphasis on investigation, prosecution *and* punishment might be cause for concern for the Colombian negotiators (Basch, 2007: 195-229). Indeed, the IACtHR has fairly unequivocally stated that in order to comply with the right to remedy, sentences in response to human rights violations should be proportional to the crime committed, and penalties must “truly contribute to prevent impunity”.⁴⁰ Precisely what this requirement entails, however, is not certain, and in a recent judgement Judge Diego Garcia-Sayan hinted at the possibility that the requirement for proportionate and non-illusory sentences may be mitigated when there is a national interest in securing a peace agreement.⁴¹ Given that neither the Commission nor the Court has yet issued any statement unequivocally requiring that Colombia inflict regular prison sentences for those that violate the ACHR, it would seem that the implementation of a criminal trial followed by alternative sentences may comply with the requirements of those bodies.

On the broader international level, how much punishment is required is again an open question. Whether alternative sentences would comply with the ICC's conditions is unclear, but it seems likely that some limitation of freedom and/or community service might be punishment enough to avoid the classification of “unwillingness” to prosecute. Though ineffective or excessively lenient punishment will likely be considered incompatible with the complementarity provisions of the Rome Statute, the minimum threshold for punishment remains unclear and the OP has remained intentionally open on this question:

³⁹ Inter-American Commission on Human Rights (31 December 2013) “Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia” OEA/Ser.LV/II/ Doc. 49/13, para 251, citing *Case of the La Rochela Massacre v. Colombia* Inter-Am Ct. H.R. (Ser. C) No. 163 (2007), para.193.

⁴⁰ *Heliodoro Portugal v. Panama*, Inter-Am Ct. H.R. (Ser. C) No. 186 (2008), para. 203; cited in Seils (2015: 4).

⁴¹ Concurring Opinion of Judge Diego Garcia-Sayán, *The Massacres of El Mozote and Nearby Places V. El Salvador*, Inter-Am Ct. H.R. (Ser. C) No. 252 (2012), para. 30; cited in Seils (2015: 4).

"[T]he Office will consider the issue of sentences, including both reduced and suspended sentences, in relation to the facts and circumstances of each case... the Office will assess whether... reasonable efforts have been made to establish the truth about serious crimes committed by each accused person, whether appropriate criminal responsibility for such crimes has been established, and whether the sentence could be said, in the circumstances, to be consistent with an intent to bring the concerned person to justice"⁴²

This statement was issued prior to the delivery of the letters outlining concern for the use of suspended sentences, which indicates that the OP is individually assessing the potential options for punishment as they are proposed. From this statement it would seem that elements considered important by the ICC are truth, justice and allocation of criminal responsibility. The use of criminal trials intended to expose the truth, allocate criminal responsibility and achieve justice could hypothetically comply with these conditions without the allocation of regular prison sentences. The same elements also seem to be prioritised by other international bodies, such as the UN treaty bodies in their examination of compliance with various treaty provisions. This is especially likely when we consider that the UN Human Rights Committee, in a previous case concerning Colombia, stated that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of art. 2(3), of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life".⁴³

In sum, Colombia may comply with international legal obligations so long as it adopts criminal investigations and trials followed by sentences that are not deemed grossly disproportionate or illusory. Similarly, victims' rights to truth, justice and reparations may also be complied with without having to implement regular criminal sentences for offenders, though this will be discussed in further detail below. Particular attention should be paid, however, to the requirements of the IACtHR - if Colombia's alternative sentencing mechanism is deemed unsatisfactory there is a credible chance that the IACtHR will find a violation of the ACHR and thus undermine the legitimacy of the process and its ability to replace amnesty.

⁴² ICC (International Criminal Court) Office of the Prosecutor (Interim Report, November 2012), 'Situation in Colombia', at <<http://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>> (consulted 10 July 2015), para. 206.

⁴³ *Bautista de Arellana v Colombia*, Communication No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995); Seibert-Fohr (2009: 18).

2.5. *The impact of alternative sentencing on enabling transition*

As we have seen, opposition to amnesty comes predominantly from the academic and human rights sphere rather than from statesmen who might be more concerned with stability than with individual rights. The adoption of alternative sentencing, therefore, must be considered not only in its capacity to achieve the same political objectives as amnesty—inducing opposing parties to demobilise and ending conflict—but also in its ability to achieve the broader, social objectives associated with transitional justice mechanisms. So far we have seen that alternative sentencing will quite possibly allow the Colombian government to avoid allegations of impunity and satisfy international legal obligations preventing the use of amnesty; however, the potential for alternative sentencing to achieve other objectives of transitional justice must also be examined before it can be considered as a legitimate mechanism for accountability. While there is no single panacea for recovery from conflict and violence, respecting truth, justice and reparations can be seen as a starting point from which to pursue longer-term goals such as lasting peace, reconciliation or the consolidation of the rule of law.⁴⁴

2.5.1. TRUTH

One of the most conspicuous characteristics of the Colombian model is the presence of criminal trials. When considering the potential for alternative sentences to reveal truth, therefore, it is essential to consider the truth-seeking functions inherent within a trial process. The ability for criminal trials to meet the unique demands for truth that emerge within transitional contexts has been highly, and rightly, criticised in recent years, which is in part why many actors have insisted on the inclusion of truth commissions to accompany or replace criminal trials. Proponents for criminal trials, however, may refer to the quality of the forensic, micro truth that such trials are capable of revealing (Landsman, 1997: 81-92). Furthermore, truth-telling in transitional contexts requires not just the recovery of facts but also “the official acknowledgement of those facts by an authoritative mechanism, such as legal tribunals or courts”.

These alleged benefits, however, might seem meek when juxtaposed with the onslaught of criticism negating the quality of truth exposed during trials. The purpose of criminal trials, focused on determining the criminal liability of a specific person for isolated acts, along with strict procedural

⁴⁴ As seen above, these objectives are also protected as “rights” (Garbett, 2013: 205).

and evidentiary rules, often means that contributions to both macro and micro versions of truth are comparatively negligible (Bisset, 2012: 34). Rules of evidence may exclude potentially important information and testimonies are necessarily focused on the information of the accused, which might not result in a holistic understanding of events capable of contributing to broader objectives of transitional societies (Crisis Group, 2013: 31). This may in turn have a collateral effect on victims of conflict, as:

“dealing with atrocity within the limits of international criminal law by definition reduces the human experience to what is legally relevant to the primary aim of criminal procedure: determining the guilt of those who happen to stand trial” (Brants, 2013: 3).

These were the experiences of international criminal tribunals such as the ICTY and the ICTR, both criticised because they purportedly lacked the ability to contribute to social and historic truths and the creation of collective social memory (Hazan, 2006: 30-31; Clark, 2011: 248).

Moreover, the substantial quantities of resources required to undertake effective and reliable prosecutions can mean that only a handful of potential defendants will ever actually make it into a courtroom to “tell the truth”, which quantitatively limits truth (Landsman, 1997: 85). Those who are eventually prosecuted may be disproportionately representative of one particular group, exacerbating the truncated truth emerging from ordinary trials, perhaps best demonstrated by the exclusion of Rwandan Patriotic Front members from prosecution in the ICTR (Hazan, 2006: 30-31).

Even after successful prosecutions, the resulting truth may not be universally accepted by society: in Bosnia and Herzegovina three versions of truth emerged following the ICTY, one for each ethnic group who chose to interpret the findings of the trials to accommodate their own distinct social beliefs (Clark, 2011: 248). This claim appears to implicitly contradict those who say trials are useful in not only knowing but also acknowledging truth on a broader social scale.

Truth-seeking impediments such as these might lead us to believe that “if we want to know the ‘truth’ about Auschwitz, we would be better to read Primo Levi than a transcript from the trial of a single camp guard” (Brants, 2013: 3). This sentiment is corroborated by Desmond Tutu, who once claimed that criminal trials should be discredited because the perpetrator ‘has no incentive to tell the truth’.⁴⁵ The Colombian framework,

⁴⁵ *Truth and Reconciliation Commission of South Africa Report* (1998), Vol. 1 Foreword, para. 24.

however, seems to provide such an incentive to wrongdoers, potentially dispelling some criticism from those claiming that the adversarial nature of trials and the extensive resources required diminish the value of truth revealed. By incentivising the FARC and members of the Colombian military to tell the truth, the prosecution process could become less adversarial, more open and less costly.⁴⁶

However, Colombia's previous experience under the JPL must act as a cautionary guide with respect to the value of truth revealed from criminal trials. While many have commended the JPL process for its contributions to truth—Crisis Group reports that by 2013 40,000 crimes had been acknowledged and 5,000 bodies recovered as a result of the process—the Colombian authorities have only managed to prosecute a few dozen of the 4,800 paramilitaries identified for prosecution (Crisis Group, 2013: 5-6). The limitations of criminal procedures have subsequently been acknowledged by the Colombian authorities, and Crisis Group quotes one magistrate confessing that "a transitional justice process is not a criminal trial, and thinking this was our most important error" (Crisis Group, 2013). The overall process, therefore, was largely discredited by Colombian society, who did not either collectively accept the truth as legitimate or consolidate this truth into a broader, macro-level truth about the root causes of conflict, capable of contributing to long-term reconciliatory aspirations.

In light of these flaws, the Framework for Peace has expressly called for the creation of a Truth Commission,⁴⁷ the terms of which have already been agreed upon at the peace talks in Havana (Isacson, 2015). The relationship between such Commission and trials is uncertain though it is unlikely that the Commission will be able to directly recommend prosecutions. Nevertheless, the inclusion of a truth commission along with a criminal trials process may be able to ultimately make a very valuable contribution to truth-seeking for Colombian society, far more valuable than if criminal trials, with or without alternative sentences, were adopted in isolation.

In sum, judging by the previous experience of the JPL combined with the myriad of inhibitions to truth affiliated with criminal trials, the use of alternative sentencing in Colombia will have controvertible benefits for truth unless accompanied by an effective truth commission and incorporating all members of the conflict.

⁴⁶ With regard to costs, it should also be noted that unlike some other states adopting transitional mechanisms, Colombia has a particularly functional, independent and well-resourced judiciary, capable of supporting a considerable number of prosecutions (Crisis Group, 2013: 34)

⁴⁷ *Marco Jurídico Para La Paz*, Law. No.1 of 31 July 2012, (Colombia), Art.(1).

2.5.2. JUSTICE

The significance of victims' perspectives on the impact of justice processes cannot be underestimated, as it is usually their rights that are most compromised during conflict (Van der Merwe, 2008: 23) and it is they who will consequently have to "bear the pain of seeing the perpetrators walk away free of punishment" (Goldstone, 1995-96: 493). The requirement to respect the rights of victims is gaining traction in the 'age of accountability', perhaps best demonstrated by the adoption of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law.⁴⁸

As previously mentioned, the normative shift towards a greater recognition of victims' rights in transitional justice is both a causative and reactionary element of the rejection of amnesty. This is acknowledged in the Colombian LFP as well as the negotiating platform between the government and the FARC, which includes provisions for the inclusion and protection of victims. The insistence on some form of prosecution recognises that criminal prosecutions and mechanisms of retributive justice are perceived as achieving a superior quality of justice in the eyes of victims. Victims' surveys from Colombia tend to support this contention, with one particular survey finding that 89% of victims thought that the guerrillas should be tried and sentenced (Lyons & Reed-Hurtado, 2010: 6). Following this assumption, the trials process and declaration of guilt comes closer to satisfying demands for criminal and retributive justice. The trial process is purported to provide psychologically therapeutic benefits, offering victims a sense of cathartic justice, as well as "a sense that their grievances have been addressed and can hopefully be put to rest, rather than smouldering in anticipation of the next round of conflict" (Thoms, Ron & Paris, 2010: 333). This theoretically contributes to justice by restoring equality between the dignity of the victim and the wrongdoer, as well as establishing accountability for the wrongdoer (Boraine, 2000: 147). Importantly, the criminal trial process is also capable of providing some form of *restorative* justice if trials are structured to include stronger victim participation, perhaps based on the ICC module that claims to provide both restorative and retributive justice (Garbett, 2013: 197). Moreover, the LFP's proposed truth commission may also significantly contribute to the realisation of restorative justice goals.

⁴⁸ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147.

In spite of these potential advantages, the Colombian framework has been criticised in part because it does not comply with an ideal standard of justice. According to the Organisation of American States, the Colombian state has implicitly recognised the limitations on justice in the LFP:

“(The LFP) is controversial because it establishes a system of transitional justice that accepts, from the outset, that total and complete criminal punishment of everything that transpired during the armed conflict is not an achievable goal and that that objective, however laudable, will have disastrous consequences for effective protection of Colombian citizens’ human rights.”⁴⁹

This acknowledged inability of the Colombian government to comply with an ideal, retributive conceptualisation of justice echoes the retrospective rationalisations used by the architects of the South African TRC and reveals the potential for the adoption of criminal trials to ultimately result in a justice deficit. Indeed, the Colombian government must have learnt from the JPL process that ambitious goals for justice may end up backfiring when the justice system becomes overloaded. It must be acknowledged, however, that this deficit could in part be mitigated by the presence of a truth commission. Moreover, even if only few cases progress to a trial stage, the impact of “show” trials may independently satisfy some of the institutional-level objectives of justice even if the victims’ requirements for justice remain unsatisfied (Hazan, 2006: 32).

The adoption of alternative sentences might be construed as subverting the fundamental element of punishment, which is required by ideal varieties of justice. Within the Colombia context, a number of surveys have suggested that a significant majority of the population believes that the guerillas need to be punished and should serve prison sentences (Centro de Memoria Histórica, 2012: 64; Nuzio, Rettberg & Ugarriza, 2015: 348). This necessarily entails an examination of the nature of punishment and why it is considered essential to justice. As previously seen, Seils includes incapacitation, deterrence, reform, retribution, restitution and communication among the objectives of criminal law punishment (Seils, 2015: 8). Of these objectives, those that most directly serve the interests of justice are communication, retribution and restitution. Retribution and restitution can be seen to contribute to the requirements of justice by restoring dignity to the victims and correct social imbalances. To satisfy

⁴⁹ Inter-American Commission on Human Rights, *Justice, Truth and Human Rights: fourth report on Human Rights Situation in Colombia*, OEA/Ser.L/V/IL Doc. 49/13, 31 December 2013, para. 351

these objectives, alternative sentences must be perceived as meaningful for the victims, enough to restore feelings of social equality. If we acknowledge that most victims will have a predetermined “yardstick” for punishment as being equated to prison sentences, it will be difficult to subsequently convince them that time spent in an alternative facility or performing community service will qualify as sufficient punishment, proportionate to the crimes committed (Guarín, 2013: 47). The communicative function of punishment may be associated with the accountability requirement of justice and the idea that ‘justice must be done and be seen to be done’. If the sentences administered to the FARC are perceived as too lenient, then it is unlikely that civil society will accept the allocation of accountability, compromising the achievement of justice. It could be said, therefore, that whether or not justice is ‘served’ in the alternative sentencing process depends on whether the alternative sentences will be accepted as punitive enough to comply with a standard of retributive justice; as Seils suggests:

“If the penalties are genuinely illusory —and the process leading to them is similarly unconvincing— it is not worth doing; it is an insult to the intelligence of society and the dignity of victims” (Seils, 2015: 15).

Alternatively, the actors involved in the process could deter the social call for punishment, and placate victims via the trial process and declaration of criminal guilt. While this may not be as tangible as penal incarceration, it may be enough to qualify for a procedural interpretation of justice rather than remedial.

2.5.3. REPARATIONS

The most apparent benefit to reparations inherent in the adoption of alternative sentences is the ‘satisfaction’ and potential for restitution that comes with a trial process acknowledging suffering and accountability (Moffett, 2014). Moreover, the prosecution and accompanying criminal record and imprisonment contribute to the requirements under guarantees of non-repetition by specific and general deterrence. Simply undertaking criminal trials, however, is unlikely to satisfy victims, an issue that became apparent following local reactions to the ICTY and ICTR. In both of these cases, the prosecutions and convictions of the wrongdoers did not effectively contribute to restoring the sense of equality and dignity that is the ultimate goal of the reparations process (Thoms, Ron & Paris, 2010: 339). This is partly true due to the nature of criminal trials and their focus on the wrongdoer and the state itself rather than the victim (Bisset, 2012: 37),

as well as the fact that the wrongdoer is not required to admit guilt, show remorse or make restitution to the specific individual (Mani, 2005: 59-60, 62). In the case of Colombia, a sense of disappointment from a trials process might be compounded if the alternative sentences imposed on the FARC were seen as fostering impunity. In this case alternative sentences would suffer from the same handicap as amnesties. Moreover, if reparations mechanisms are exclusively attached to a trials process, then reparations will be restricted to the few cases that actually make it to trial (Moffett, 2014) and risk being excessively retrospective in nature or too similar to a tort mechanism (Gray, 2009: 1096). However, the adoption of alternative sentencing —especially if they involve community service— may contribute to victims' restitution and satisfaction due to the direct input from the wrongdoers themselves (Flacks, 2006: 4). By including the offender, a reparations process is capable of achieving forward-looking objectives by re-integrating FARC combatants into the community, teaching them life-skills and ensuring non-repetition. Within the Colombian context, however, such an objective must be approached with caution, as surveys have revealed that over 80% of the population has stated that they would not be comfortable with having a member of the FARC as a neighbour (International Centre for Transitional Justice, 2006: 2).

Colombia has already experienced the dangers of attaching reparations process to a criminal trial with the JPL. Under that system, in order to receive reparations, victims had to report the crime, participate in the trial process and establish guilt, a particularly onerous and time consuming process which ultimately meant that between 2005 and 2008 only 24 victims received damages (Summers, 2012: 224). The failures of the JPL process also demonstrate the danger of linking reparations to notions of guilt, as denial of responsibility can exacerbate social divisions, affecting both material and symbolic, individual and communal reparations (Torpey, 2005: 38). Partially in response to the failures of the JPL framework for reparations, the Colombian government has introduced the 2011 Victim's Law,⁵⁰ which establishes victimhood independently from the establishment of perpetrator liability and includes specific administrative mechanisms for restitution, compensation and more. Many of the potential disadvantages to reparation that could result from exclusively adopting alternative sentences would be mitigated in the Colombian context both by the Victim's Law and the terms of a future agreement between the FARC and the government, who are

⁵⁰ *Ley de Víctimas y Restitución de Tierras*, Law 1448 of 2011 (Colombia).

currently negotiating a framework to specifically address reparations for victims (Panam, 2015). While the Victim's Law predominantly addresses material requirements for reparations, the FARC have recently proposed both material and symbolic reparations, such as apologies and memorialisation (Foget, 2014). Generally speaking, these proposals and the inclusion of "victims" as a specific negotiating platform is a promising step forward, but the process may potentially be undermined by the minimal inclusion of the victims themselves in negotiations, as well as the demonstrated reluctance of both the FARC and the government to acknowledge responsibility (Washington Office on Latin America, 2014). This is a particularly important consideration, as the material contributions to reparations provided for under the Victim's Law will be compromised unless victims of both the FARC and government forces feel that those bodies are personally accepting accountability for their previous wrongdoing by personally contributing to symbolic and material reparations (Crisis Group, 2013: 41). The inclusion of government responsibility in the reparations process is paramount both for the sake of victims – some of whom might be excluded if reparations are reserved specifically for victims of the FARC⁵¹—and for the FARC themselves—who need acknowledgement of wrongdoing on behalf of the Colombian government in order to preclude the potential for re-armament and re-mobilisation. Providing that the Colombian government and the FARC are capable of accepting dual responsibility and devise a comprehensive framework for reparations, many of the potential difficulties affiliated with criminal trials and alternative sentences could be mitigated.

Conclusion

The preceding examination of the effects of alternative sentencing suggests that the use of this mechanism, if adopted in conjunction with an effective reparations program and a truth commission, may make a worthwhile contribution to the realisation of truth, justice and reparations for victims of the Colombian conflict. Special attention must be paid to setbacks that may be affiliated with criminal trials, in particular the micro-version of truth that tends to emerge from trial processes. For the time being, the adoption of alternative sentencing to entice the guerrillas to demobilise may very well be justified, at least in place of amnesty.

⁵¹ On this point, Pablo de Grieff specifically refers to the requirement for "completeness" by ensuring that various groups of victims are included (Grieff, 2006: 456).

Yet, even if the Colombian solution is a preferable alternative to amnesty, is it acceptable in the 'age of accountability'? From a legal perspective, we have seen that global institutions are rapidly mounting a legal barricade preventing the use of amnesty, but this barricade does not seem to extend to guaranteeing specific forms of punishment. Therefore, considering the comments of the ICC and the current jurisprudence that focuses on the duty to prosecute rather than explicitly punish, *prima facie* it would seem that the Colombian solution might avoid judicial consequences.

But we must consider that the 'age of accountability' and the framework protecting the movement was born in response to the dissatisfaction of victims and civil society, and as such perhaps the question should be restructured from a less legal, more ethical perspective: will alternative sentences satisfy Colombian civil society? It cannot and should not be enough for alternative sentences to be simply 'not-illegal', they must also contribute in a meaningful way to realising the rights and restoring the dignity of the Colombian people. The answer to that question may very much depend on whether incarceration is perceived as essential to effective accountability, justice and reparations, which may unfortunately be the case in Colombia. If civil society does respond negatively to alternative sentencing, then the next logical question is: is it worth it? Considering the exceptional financial cost and structural difficulty involved in implementing effective prosecutions, and acknowledging the lessons that history has taught us regarding the limitations of criminal processes, then would those resources be better spent in establishing a truth commission and especially a reparations program rather than lengthy and costly prosecutions with unsatisfactory alternative sentences? Again the answer to this question lies within the fundamental nature of human rights themselves, along with the emerging belief that consequentialism is an unwelcome philosophy in this particular field - the ends do not justify the means if the means involve denying even one individual the right to have their dignity restored.

If civil society and victims remain unsatisfied with the alternative sentencing process, yet international law deems it acceptable, certain questions should be asked regarding the authenticity of the 'age of accountability'. If the process is perceived by victims as legitimate, it will be worth the complicated circumvention of amnesty, but if not, then the use of alternative sentencing could be interpreted simply as a political tool to avoid the potential international legal repercussions affiliated with an amnesty, without actually addressing the concerns of the victims who historically started the accountability movement in the first place. If this is the case, then it could appear that rather than genuinely responding to the

requirements of victims and the advocates of the 'age of accountability', the global political order may simply be creating enough checkpoints to permit impunity to pass under the guise of accountability. This implicitly questions whether the furore surrounding amnesty is worth the costs involved avoiding it. But to do this now would represent a significant step backwards in the fight against impunity, and perhaps it is preferable to hope that the benefits of the Colombian proposal for alternative sentencing, combined with an effective and meaningful reparations program and truth commission, will lead the Colombian people to that ideal, elusive meeting-point between peace and justice.

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