Peace vs. Accountability in Colombia

The emergence and rapid expansion of an international prosecution system over the last few decades has been one of the main features of contemporary international affairs. This phenomenon, consolidated with the establishment of a permanent International Criminal Court[1], reflects a growing international consensus that "the most serious crimes of concern to the international community as a whole must not go unpunished."[2] While progress in the field of international criminal law has been welcomed and supported by international lawyers, human rights activists, non-governmental organizations, and the United Nations, it has also raised concerns about the illegality of amnesties[3] as techniques for ending violent internal conflicts, and how their presumed illegality could hamper processes of national reconciliation.

This essay proposes to analyze and compare the main arguments of those who support the idea that "justice" -in a strict accountability sense- is an essential precursor to peace, against proposals for alternative means of dealing with mass violations of human rights, including some measure of impunity in extreme cases as the only alternative to create the political conditions to negotiate peace. Since there has been a growing discourse within the human rights law field concerning the duty to prosecute and a rather general support for an enforcement approach to human rights protection, the main purpose is to analyze and assess the suitability of this approach when dealing with protracted, and seemingly non-negotiable internal conflicts.

This analysis is structured in four main sections. In the first section the question of why do we punish is addressed, analyzing the duty to prosecute from legal and moral perspectives. The second section examines the role that the United Nations and Human Rights Movements play within the debate, and its overall impact. The Colombian Congress is currently analyzing a law project -which if approved- would conditionally replace prison with alternative mechanisms of punishments; the law would benefit insurgents who voluntarily agree to the terms of the agreement and lay down their arms. Thus, in the third section, the Colombian case study is utilized as an analytical tool to illustrate how the complex legal and moral issues discussed in the previous sections apply in this particular case.

It will be emphasized how different conceptions about the concept and aim of justice contribute to antagonize these seemingly irreconcilable positions. It is argued that in some cases amnesties will be necessary to go forward with a peace process, and that they should not be equated with impunity, as there are other mechanisms than can focus more on the rationale behind the idea of punishment and achieve its goals by other means. The essay concludes proposing a reconsideration of the implications of a

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[1] The Rome Statute of the International Criminal Court was adopted on 17 July 1998 and entered into force on 1 July 2002.
[2] As stated in the preamble of the Rome Statute of the International Criminal Court.
[3] Amnesty has been defined as "an act of oblivion within the competence of national authorities." See. Mahnoush H. Arsanjani, "The Future of The International Criminal Court: The International Criminal Court and National Amnesty Laws." *American Society of International Law Proceedings*, vol. 93, 1999, p. 65

enforcement approach towards human rights protection, and the need to balance legal considerations with the inevitable political requirements of any dispute-solving mechanism.

1. The Duty To Prosecute and the Rationale of Criminal Justice

The state's duty to prosecute is embodied in article 8 of the *Universal Declaration of Human Rights*[4] which states: "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law." At the international level, states are also bound by humanitarian law to prosecute those accused of violating the laws of war. Before the issue of the illegality of amnesties is considered, it is important to address the question of why there is such a duty to prosecute.

1.1 Why do we punish?

Two schools of thought have traditionally addressed the answer to this question: retributionist and utilitarian.

The concept of retributive justice derives from the Kantian or "pure" retributive theory, which posed retribution as "*the* justifying aim of justice."[5] This line of thought stems from "a view of the very nature of man as a responsible moral agent to whom rewards or punishment should be assessed according to the morality of his choice of behavior."[6]

The utilitarian theory of punishment was largely influenced by the views of Jeremy Bentham; he argued that because punishment entails suffering, there could be no justification to make others suffer unless some secular good could result from this exercise. Thus, from a utilitarian perspective, the only proper justification for punishment is the prevention (deterrence), reduction, and modification of anti-social behavior. This theory sees man not as a moral agent, but rather as an object of causal forces determining its conduct; therefore, it supports the rehabilitative ideal.[7]

It could be said that contemporary criminal law interplays with both theories. The main arguments for the utility of trial - derived from standard domestic criminal justice- include: trial as *deterrence* of potential criminal behavior in society; trial as *justice*, focusing on the moral obligation of states to punish perpetrators, and on the need to uphold the rule of the law; and trial as a *route to truths*, emphasizing the importance of legal procedure as fact-discovery to determine the underlying causes and consequences in cases of mass violations of human rights.[8]

1.2 Amnesties: analysis from a legalistic perspective

[4] This declaration was adopted by the United Nations General Assembly on December 10, 1948: G.A.Res. 217.
[5] Joseph M.P. Weiler, "Why Do We Punish? The Case For Retributive Justice." *University of British Columbia Law Review*, vol. 12, 1978, p. 315
[6] Ibid, p. 296
[7] Ibid, 296-298
[8] Colm Campbell, "Peace And The Laws of War: The Role of International Humanitarian Law In The Post-Conflict Environment." *International Review of the Red Cross*, No. 839, International Committee of the Red Cross, September 2000, pp. 627-651

The most invoked argument for the illegality of amnesties under international humanitarian law is that they constitute a violation of states' duties under the *Geneva Conventions* of 1949. State parties to these treaties agreed to the recognition of individual criminal responsibility for particularly severe violations of the conventions, known as "grave breaches."[9] States ratifying the conventions are thus obliged to investigate, prosecute, or extradite persons suspected of committing 'grave breaches', regardless of their nationality or the place where the crime is committed. This obligation is often characterized by the Latin phrase *ne bis in idem*, translated as 'extradite or prosecute.'[10] During the negotiations of the statute of the International Criminal Court, amnesties were rejected in the context of the defense of the principle of *ne bis in idem*.[11]

1.3 Analysis: could amnesties be justified?

From a strict legalistic point of view, amnesties 'appear to be illegal' because they go against an established legal obligation to prosecute those accused of committing serious violations of human rights. However, there is still no general consensus on this issue because the practice of the States has not been uniform. Going beyond the legality or illegality of amnesties, it would be pertinent to focus on the question of under which criteria, could they be justified.

It is important to make first a distinction between two different situations:

1) Cases where the country is not facing a protracted conflict but severe violations of human rights are reported to occur within the territory, and the state is unilaterally not willing to take measures to prosecute the perpetrators.
2) Cases where the State is in state of commotion due to a prolonged and devastating civil war, and due to the circumstances, the State is unable to protect the victims from human rights abuses.

Under the second scenario, the State might be caught in the dilemma between the duty to protect its citizen's right to effective judicial remedies vs. what the former National Director of Research in the South African Truth and Reconciliation Commission, Charles Villa-Vicencio, has called "the right to peaceful co-existence."[12] He argues that the protection of life and the right to a peaceful co-existence is a fundamental

[9] These conventions are distinguished by the group of persons being protected. According to the fourth convention which protects civilians, grave breaches consist of: " Willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." Convention (IV) Relative to the Protection of Civilian Persons in Time of War, (1950), 75 U.N.T.S. 287, Art. 147.

[10] William A. Schabas, An introduction to the International Criminal Court, Cambridge University Press, 2001, pp. 45-46 See Articles 50/51/130/147 common to the four Geneva Conventions.

[11] Yasmin Naqvi, "Amnesty for War Crimes: Defining the Limits of International Recognition." *International Review of the Red Cross*, vol. 85, No. 851, International Committee of the Red Cross, September 2003, p. 590

[12] Charles Villa-Vicencio, "The Reek of Cruelty and the Quest for Healing. Where retributive and Restorative Justice Meet." *Journal of Law and Religion*, vol. Xiv, 1999-2000, p. 167

human right that ought to take precedence over "abstract" notions of justice and even the "moral/legal?" obligation to prosecute.[13]

Indeed, in conflict areas where there are high levels of unrest and the government has limited authority, it cannot effectively protect the fundamental rights of the civilians. In these exceptional circumstances, the theory of "consequential legitimacy" could be used to legitimize an amnesty law that can affect the life of a nation; "this approach grounds a law's legitimacy in its effects."[14] Thus, if a law does in fact leads to the conclusion of a peaceful settlement of a civil war and reconciles a society, it could carry some degree of legitimacy.

1.3.1 Reconsidering Justice

Nigel Biggar[15]argues that the dilemma between the moral demands of justice and the political requirement of peace can be negotiated if the nature and purpose of criminal justice is reconsidered. If we recall the analysis of section 1 commenting on the legal and moral foundations for the duty to prosecute, criminal justice seems to put much emphasis on the punishment of the perpetrator. However, supporters of alternative means of justice, e.g. truth commissions, argue that the main purpose of criminal justice is not the punishment of the perpetrator, but the vindication of the victim.[16] Seen from this perspective, punishment is still retributive, but not in the sense of inflicting pain on the perpetrator. Rather, its retributive character lies in its being a response to someone who has broken the law, focusing more on the "symbolic significance of punishment:" this is, the assertion of the dignity and the worth of the victim.[17]

It is important to emphasize that regardless of whether or not to punish the perpetrator is the principal aim of criminal justice, it is in fact part of it. The full vindication[18] of the victim will require such punishment. However, if we think of justice as goal oriented, starting with the vindication of the victims, the protection of potential victims, and the reform of perpetrators, in that given order, then this particular method of analysis can be applied during a peace processes: not putting punishment as an end in itself, and achieving some of its purposes by other means. The following session will discuss how truth commissions offer an alternative for the vindication of victims through non-punitive means.

1.3 Truth Commissions

[13] Ibid
[14] William W. Burke White, "reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation." *Harvard International Law Journal*, vol. 42, 2001, p. 476
[15] See. Nigel Biggar, "Making Peace or Doing Justice: Must We Choose?" in Nigel Biggar ed., Burying The Past: Making Peace and Doing Justice After Civil Conflict, Georgetown University Press, Washington, D.C, 2001
[16] Ibid, p. 10
[17] Charles Villa-Vicencio, "The Reek of Cruelty and the Quest for Healing. Where retributive and Restorative Justice Meet," p. 174
[18] Vindication generally involves: recognizing the injury as such: acknowledging the dignity of the victim; giving material and psychological support to the victims in order to try to repair the damage as far as possible; establishing the truth of what happened, and who was responsible. See Nigel Biggar, "Making Peace or Doing Justice: Must We Choose?" pp. 10-11

"Truth commissions are temporary bodies, usually with an official status, set up to investigate a past history of human rights violations that took place within a country during a specific period of time."[19]Unlike tribunals or courts, they do not have prosecutorial powers and they focus more on documenting a country's legacy of conflict and human rights violations, clearing the path to move forward and heal wounds. Through the verification of the victims' accounts, the public identification of the perpetrator, and the official acknowledgement of the abuses, truth commissions seek to restore the victim's dignity, providing with another alternative of accountability.

Whereas tribunals are usually associated with prosecution and punishment, truth commissions are often criticized of fomenting impunity. This antagonism is more often expressed in debates about trials vs. truth commissions. The following analysis will focus on the comparative advantages of truth commission to deal with mass violations of human rights, in particular cases of protracted conflicts.

At the national level, it is often very difficult to prosecute the intellectual authors and perpetrators responsible for political violence and serious violations of human rights, more over, if large numbers are involved, and countries have weak, and corrupt legal systems. The newly established International Criminal Court and other international tribunals[20] have emerged as alternatives; but then, because of the high cost and length of the prosecution, the number of international prosecutions will always be restricted, focusing on "the most culpable, politically symbolic perpetrators."[21]As a matter of fact, the International Criminal Court is supposed to be concerned not only with the "most serious crimes", but also with the "most serious criminals."[22]

Another important distinction between trials and truth commissions is that although both seek to re-establish social order and the rule of the law, the main focus of the trials are the perpetrators (individual criminality) while the methodology of truth commissions is victim- oriented. The result is that the court decisions tend to produce a polarizing result, dividing the "blamers from the blamed;"[23]its strict legalistic methodology tends to undermine recognition of community complicity, and leaves unanswered the questions on how and why such atrocities did occur. Whereas in the truth commissions, the victims' testimonies contribute to the wider aim of breaking the silence of state impunity, creating "historical justice" and "promoting reconciliation."[24]

[19] Audrey R. Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons From Haiti, South Africa, and Guatemala." *Human Rights Quarterly*, vol. 23, The Johns Hopkins University Press, 2001, p. 2
[20] For instance, the International Criminal Tribunals for the former Yugoslavia and Rwanda set up by the Security Council.
[21] Michael Humphrey, "From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing." *The Australian Journal of Anthropology*, vol. 14, issue 2, August 2003, p. 184
[22] William A. Schabas, An introduction to the International Criminal Court, p.24
[23] Michael Humphrey, "From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing," p. 181
[24] Ibid, p. 176

When injuries have occurred in the political context of a civil conflict, the perpetrators tend to justify their actions as struggles against social injustice, national liberation, among others, and they are likely to regard attempts to bring them to trial as "the continuation of war by judicial means."[25] This illustrates the epistemological and evidentiary limitations of both trials and truth commissions in their attempts to find the truth and promote justice, for concepts of "truth", "justice", and "reconciliation," are "elusive" concepts that defy strict definitions. Perhaps the postmodernist claims that "whatever we accept as truth and even the way we envision truth are dependent on the community in which we participate and our own social experience"[26]is a particularly useful analytical tool to enhance the argument that there is not such a thing as "perfect justice" and the importance of trying to identify the ideological or political justifications that legitimized the abuses from a perpetrator's point of view. For justice can be better served if more emphasis is put on the prevention of conflict, through the identification and implementation of policies to reverse the causes of the "structural"[27]violence.

To conclude this section, it is important to emphasize two points:

First, truth commissions are far from being "ideal" mechanisms for justice. Their official mandates, the perceptions and priorities of their commissioners, the availability of operational resources, missing data, all shape the nature of their findings and the quality of the report they produce.[28] Moreover, since the perpetrator takes part in this process (which as it was emphasized before does not involve powers for prosecution) usually as part of the conditions of an amnesty agreement, it is a choice not without a moral cost. Its legitimacy depends on the country's (public consensus) acceptance of this process as the only alternative to start a peaceful transformation of the country.

Second, truth commissions are better suited to pursue the "macro-truth"[29]this is, the assessment of contexts and patterns of human rights abuses, than trials dealing with the specifics of particular cases. This point is important because "patterns, trends, tendencies, and the big picture are often the pieces most missing from the history of transitional societies."[30] Although many victims want acknowledgement of the abuses, they also may need to feel that they are not alone, and that the abusers were not merely "a few

[25] Nigel Biggar, "Making Peace or Doing Justice: Must We Choose?" p. 10
[26] Audrey R. Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons From Haiti, South Africa, and Guatemala," pp. 4-5
[27] This term emerged in the 1960s, "To direct attention to the way in which institutions and policies damage or destroy individual values and development. The absence of employment or a social role, the lack of opportunities for education and development, are examples of structural violence….is probably the major source of crime and aggression in societies which is why problem solving conflict and resolution seeks to move beyond a particular situation and to enter the field of political philosophy." See. John W. Burton, Conflict Resolution: Its Language and Processes. Scarecrow Press, Inc, England, 1996, p. 42
[28] Audrey R. Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons From Haiti, South Africa, and Guatemala," p. 4
[29] Ibid, p. 41
[30] Ibid

bad apples, but rather than an entire legal, ideological, political, military system was responsible for year, or decades of human rights violations."[31]

2. Peace vs. Accountability: The Role of the United Nations and the Human Rights Movement.

With the end of the Cold War and the proliferation of intra-state conflicts worldwide, there are several examples where the UN peace- keeping activities showed little concern for legal constraints, endorsing amnesties that were accompanied by the parallel establishment of truth commissions as integral parts of peace accords:

For instance, the United Nations was actively involved in the so-called "Mexico Agreements (27 April 1991) between the government of El Salvador and a coalition of rebel groups, which provided for the establishment of a truth commission to investigate "serious acts of violence." Although it was not originally designed to substitute judicial proceedings, the government of El Salvador adopted a law that granted amnesty to all the persons charged with serious crimes. In that case, the UN Secretary General did not condemn the amnesty as such; rather, it noted that it should have been based on a broader national consensus. [32]

In 1993, the UN was actively involved in the "Governors Island Agreement" in Haiti. Interestingly, at that time the Security Council approved the peace accord referring to an amnesty clause as "the only valid framework for resolving the crisis in Haiti."[33]Likewise, after strongly condemning the apartheid regime of South Africa,[34] when the South African new constitution was proclaimed (1993), including an amnesty clause granting full immunity for all categories of crimes committed within a political context, the General Assembly adopted resolutions welcoming the transition to democracy, without reference to the duty to prosecute.[35]

The UN also participated in the Guatemalan Peace Accords (1994), which contained a limited amnesty clause (it excluded immunity for crimes punishable under international law), accompanied by the establishment of a truth commission. Similarly, in 1999, the UN supported the Lukasa Ceasefire Agreement in the Democratic Republic of Congo which provided that the parties to the conflict and the UN would cooperate to create favorable conditions to prosecute those accused of committing international

[31] Ibid, pp. 41-42
[32] Carsten Stahn, "United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?" *International Review of The Red Cross*, vol. 84, No. 845, International Committee of the Red Cross, March 2002, pp. 191-193
[33] Ibid, pp. 193-194
[34] Yasmin Naqvi, "Amnesty for War Crimes: Defining the Limits of International Recognition," p. 621
[35] See. UNGA Res/48/159, 20 December 1993.

crimes; however, it acknowledged that these conditions "may include the granting of amnesty and political asylum, except for genocidaires."[36]

It could be said that the UN participation in the peace processes in Guatemala and Congo, compared against the cases of El Salvador, Haiti and South Africa, reveals that the UN moved from policies supportive of full-amnesties in peace processes, towards a policy supportive of "limited" amnesties.

However, during the last two-three years, there has been a change of direction in UN peace- building approaches. The main feature of this approach is a combination of accountability and reconciliation mechanisms, "limiting prosecution to the most serious atrocities while furthering alternative forms of justice in the case of less serious crimes."[37] The examples of Sierra Leone[38] and East Timor[39] reflect these changes; in both cases, there was an explicit prohibition to grant amnesties for international crimes:

The UN brokered Lomé Peace Agreement, concluded between the government of Sierra Leone and the Revolutionary Front on July 7 1999, had a provision granting a blanket amnesty to all combatants; however, the Special Representative of the Secretary General for Sierra Leone made a reservation to the agreement, stating that the amnesty clause "shall not apply to the international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law."[40]Similarly, the Secretary General's Special representative in East Timor stated in section 32.1 of regulation 2001/10 that "no immunity conferred by operation of this or any other provision of the present regulation shall extend to a serious criminal offence."[41]

The developments of the UN peace-building initiatives analyzed in this section are of particular significance, because they reflect the United Nations more critical attitude towards the unlimited granting of amnesties, and its particular emphasis on "prosecution" as an essential component of any response to human rights violations.

It is important to consider the possible implications derived from this approach. The current international human rights standards make the crimes committed during a civil war not amnestiable. This means that the truth commissions that complement the national or international tribunals will be dealing exclusively with minor issues like cases involving juvenile criminals. Thus, it will be more difficult for the members of illegal armed groups to sit at the negotiations table if they know they will be strictly punished.

[36] Carsten Stahn, "United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?" pp. 194-195
[37] Ibid, p. 198
[38] This court is a *sui generis* treaty-based institution of mixed composition and jurisdiction. It was the result of an agreement between the United Nations and the government of Sierra Leone on the creation of mixed international domestic court to prosecute criminals responsible for human rights violations committed during the Sierra Leone's civil war.
[39] The United Nations Transitional Administration in East Timor (UNTAET) adopted regulation 2000/15 setting up panels with exclusive jurisdiction over serious criminal offences. See Carsten Stahn, "United Nations Peace-Building, Amnesties and Alternative Forms of Justice: A Change in Practice?" p. 197
[40] Ibid, p. 199
[41] Ibid, p. 201

At the aggregate, the potential of the truth commissions to vindicate the victims, promote reconciliation, and address the main causes of structural violence, could be undermined.

2.1 Human Rights Movements

It is important to discuss the role that the human rights movement[42]plays within the debate between accountability vs. peace, for human rights advocates and researchers have been actively involved in campaigns to build a stronger system of international justice. This campaign for international justice relies mostly on the "enforcement approach to human rights protection;"[43] this is, documenting human rights abuses and demanding indirectly through lobbying or directly through courts, prosecution and redress for victims. Thus, through this approach, the human rights movement reinforces the current United Nations approach to justice described in the previous section.

While the expansion and sophistication of the international prosecution system is positive in the sense that it reflects the international community's concern with the proliferation of human rights abuses worldwide and its commitment to do something about it, it is also appropriate to question whether this efforts to promote international justice should necessarily entail more courts and procedures. Or, in other words, has this approach the potential to make a big difference?

2.2 ***Analysis of implications***

One of the consequences of a pure enforcement approach to human rights protection is that it tends to isolate international human rights organizations and human rights concerns from direct involvement with peace implementation missions and post settlement governments.[44] This is somewhat ironic, considering that human rights advocates are also peace advocates.

The challenge for the human rights movement in these particular cases is not an easy one. In one hand, it is their responsibility to condemn and demand that the state do something about gross violations of human rights; On the other hand, "no state wracked by armed hostilities and internal conflict is able to ensure that respect is accorded to the full slate of human rights and freedoms of the population concerned."[45]Thus, in these extreme circumstances, peace will be first necessary for the state to be able to protect the population's human rights. If the price of maintaining the enforcement approach will be paid in additional lives lost from the continuation or prolongation of the conflict, perhaps in these circumstances, the human rights organizations should rethink their priorities. If they superimpose their own priorities they can jeopardize the entire peace-negotiation process.

[42] This includes: UN Charter-based supervisory mechanisms like the UN Human Rights Commission, treaty-based monitoring institutions like the Human Rights Committee, some other regional bodies like European Commission for Human Rights and the Inter-American Commission for Human Rights, *inter alia*, and Non Governmental Organizations dealing with human rights issues.

[43] Tonya L. Putnam, "Human Rights and Sustainable Peace" in Stephen John Stedman, Donald Rothchild, Elizabeth M. Cousens eds., Ending Civil Wars: The Implementation of Peace Agreements. Lynne Rienner Publishers, United States, 2002, p. 251

[44] Ibid, p. 239

[45] Ibid, pp.239-240

This is not to say that human rights organizations should support all the amnesty laws. It must first be considered whether a particular amnesty law, in a particular conflict, can truly - as a last resource – bring peace to a divided country. If this is the case, where prosecutions are foregone for the sake of peace, the human rights organizations can work with the government towards the search for alternate means of achieving accountability: this could include support for the establishment of a truth commission (which will focus on the vindication of the victims dignity), monetary reparations, preventing the accused from holding public office, among others.

Additionally, a peace process of this magnitude will only make sense if it involves a comprehensive strategy addressing the structural causes of the conflict. This necessarily requires the participation of UN entities, the civil society, financial institutions, and funding agencies. Thus, the human rights institutions cannot be excluded from this movement. Moreover, they have an even more constructive role to play if we link human rights with development, especially if the human rights violations in a given conflict are consequence of previous violations of social, civil, and economic rights by those in power.

To conclude this section, some thoughts on the cases of Sierra Leone and South Africa: during the negotiations of the *Lomé Accord*, many international human rights organizations condemned the amnesty on the grounds that "impunity could never lead to long-term peace."[46]On that occasion, not only many leaders of the civil society, students, church leaders, among others, agreed to the amnesty at a national conference, but even a UN representative who had participated in the negotiations criticized the position of Human Rights NGOs as "sanctimonious for failing to recognize reality, that without the amnesty, the war would have continued."[47] Likewise, Nelson Mandela summarized his moral – political philosophy of the matter on amnesty when he said: " without these enemies of ours, we can never bring about a peaceful transformation to this country."[48]The points discussed in this section suggest that the statement "impunity can never lead to long-term peace" should not have an "absolute" value, and that impunity – in particular cases of protracted conflicts could be addressed in ways other than "prosecution."

3. CASE STUDY: COLOMBIA

3.1 Background

Violence has been a historical phenomenon in Colombia.[49] Most analysts on Colombia's political history tend to agree that the current Colombian crisis has been the result of a legacy of several decades

[46] Karen Gallagher, "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone." *Thomas Jefferson Law Review*, vol. 23, 2000-2001, p. 150
[47] Ibid, p. 165
[48] New York Times, 28 March 1998, A-5. As cited in Donald Shriver, "Where and When in Political Life is Justice Served by Forgiveness?" in Nigel Biggar ed., Burying The Past: Making Peace and Doing Justice After Civil Conflict, Georgetown University Press, Washington, D.C, 2001, p. 25
[49] There were eight major civil wars during the 19th century, and during the 20th century the period between 1946-1964 is known as *la violencia*, was marked by heavy bipartisan violence (armed clashes between militias supporting either liberals or conservatives. After *la violencia*, the government has been fighting guerrilla insurgency, and more recently, paramilitary groups.

of restrictive democracy, absence of agrarian reforms, economic policies that have increased the levels of income inequality,[50]and the historical utilization of the military as the means to repress political opposition.

A comprehensive review of the structural causes of the conflict is beyond the scope of this essay.[51] Particularly important to this analysis, is the widespread violations of human rights throughout the country, and the controversy originated by the submission of the *'ley de alternatividad penal'* which could grant some sort of amnesties to insurgents under certain conditions. The bill proposes that the insurgents confess the truth, release arms, and face trial before a competent judicial organ. Consequently, after meeting certain conditions, e.g. active participation in the peace process, and active participation in acts leading to the reparation of the victims,[52] the accused will be subject to some alternative punishments, others than prison.[53]

This case-study illustrates many of the points discussed in the previous sections; particularly, the condemnation of the proposal by the United Nations and human rights organizations on the grounds that Colombians cannot talk about peace if they do not talk first about "justice." Does the lack of support for this proposal undermines the prospects for a peaceful resolution of the conflict? The first question to address is whether, under the current circumstances of the conflict, there are other potential alternatives to end the conflict:

Although the roots of the Colombian conflict are not to be found in the drug issue, drugs have added a new dimension to the conflict, as they now constitute the main source of financing for the groups involved in the armed conflict. The profitability of drug related businesses, has contributed to expand the military capabilities of the guerrilla and paramilitary movements, therefore, intensifying the levels of intra-state violence.

As a result of the escalation of violence, there are substantial increases in breaches of international humanitarian law and more victimization of civilians. Breaches include massacres, attacks on the civil population, hostage taking, forced displacement, among others. "Colombia's murder rate is the highest in

[50] According to the World Development Report 2000/2001, for the survey year of 1996, the highest 20% of the Colombian population absorbed 60.9% of the share of income or consumption, while the gini coefficient (measures the extent to which distribution of income among individuals or households within an economy deviates from a perfectly equal distribution. A gini index of 0 represents perfect equality, while an index of 100 would imply perfect inequality) for the same year was of 57,1. See World Development Report 2000/2001, *World Bank*, Table 5: Distribution of Income or Consumption, Online, p. 282, http://www.worldbank.org/poverty/wdrpoverty/report/tab5.pdf, (October 24, 2003).

[51] For more information on the history and evolution of the conflict see Charles Bergquist, Ricardo Penaranda, and Gonzalo Sanchez, eds., *Violence in Colombia: The Contemporary Crisis in Historical Perspective,* Scholarly Resources Inc, Wilmington, 1992

[52] The Bill contemplates the following mechanisms for reparations to the victims: social work contributing to the recuperation of the victims; active collaboration with institutions providing social services to the victims; material contributions to institutions doing social work for the victims; public manifestation of sorrow, active collaboration in the dismantlement of illegally armed forces, collaboration in fact-finding missions through the release of information.

[53] Ibid, "Texto del Proyecto de Ley Radicado Por El Gobierno." Online, http://www.presidencia.gov.co/documentos/2003/agosto/penas.htm (28 October 2003)

the world, and homicide is the leading cause of death in the country."[54]To make things even more complex, due to the increasing connection between insurgent groups and their drugs-related source of income, it is now more difficult to differentiate U.S sponsored counter-narcotics efforts from counter-insurgence operations. Thus, U.S military assistance to Colombia[55], rather contributes to the maintenance of a status quo between the government and the insurgent forces.

Depending on how researchers interpret the historic evolution of the guerrilla, some may argue that in its early stages of development, and before the flourishment of the drug business, their political ideology had some degree of legitimacy. However, for decades the government tried to repress the guerrillas militarily, and there were scarce attempts to address the issue in a comprehensive manner. Decades of armed struggle, and the drug issue, have deteriorated and degraded the conflict. The government has lost authority in some regions, and civilians in rural areas are the main victims of daily clashes between militaries (who sometimes support the paramilitaries), paramilitaries, and guerrillas.

When trying to answer the question on whether there are other prospects to settle the conflict, it could be argued: 1) a military solution is very improbable, due to the financial capabilities of the insurgents and the military contributions of the US to the Colombian armed forces; 2) the profitability of the drug business gives few incentives for the insurgents to surrender their arms; 3) since each party to the conflict has its own motive to justify the use of force (guerrillas have their own history of struggle for social justice and the paramilitaries claim to fight the guerrillas due to the inability of the state to protect its citizens), the feasibility to conclude an agreement "acceptable" to all the parties of the conflict is unfortunately minimal. More over, when some of today's problems are largely the result of governmental violations of social, economic, and political rights. This is connected to the discussion on the elusive concept of justice, and how its meaning is perceived differently by different groups.

3.2 Peace and Accountability: Must Colombians Choose?

The particular emphasis on the enforcement approach can be mirrored in the United Nations and the human rights movement's position towards Colombia. Once the text of the bill was released to the press and discussed in a public audience, the human rights movement initiated a campaign against the government's initiative:

For instance, a Human Rights watch Briefing Paper, entitled "Colombia's Checkbook Impunity" qualified the proposal as "cash-for-impunity."[56] Likewise, during the public audience, the Director of the UN Colombia's Office of the High Commissioner for Human Rights, Michael Fruhling, said that the bill has an

[54] Alan Seagrave, "Conflict in Colombia: How Can Rebel Forces, Paramilitary Groups, Drug Traffickers, and Government Forces Be Held Liable for Human Rights Violations In a Country Where Impunity Reigns Supreme?" *Nova Law Review*, vol. 25, 2000-2001, p. 536

[55] Colombia is third largest recipient of U.S military aid after Israel and Egypt.

[56] Colombias's Checkbook Impunity: A Briefing Paper, Human Rights Watch, September 22, 2003, Online, http://hrw.org/backgrounder/americas/checkbook-impunity.htm (October 17 2003)

excessively soft character, and "opens the door to impunity" because it does not sanction the perpetrator according to established principles of just retribution and proportionality of penal sanctions.[57] While this paper is being concluded, the first programmed demobilization of an estimated 800 paramilitary fighters (Bloque Cacique-Nutibara) took place. On the same day, the Executive Director of the Americas Division of Human Rights Watch, Jose Miguel Vivanco, commenting in the government's television broadcast of the demobilization, stated: "The broadcast is a travesty. Instead of handing these criminals a microphone, the government should be concentrating on arresting them and bringing them to justice."[58]

A speech by Luis Carlos Restrepo, Colombian High Commissioner for Peace, during a public audience before the congress, NGOs and the civil society, reflects the dilemmas that the Colombian government currently faces:

> "There is a dilemma for those who seek peace in Colombia. Actually, the international norms are so strict, that if we had to limit indults exclusively to political crimes (without committing homicides or armed actions), then all the guerrilla and paramilitary blocks would be inevitably excepted from this benefit…what can we do with all these people who cannot be amnestied? …We believe that it must be the democratic society and the republic's congress who have to limit the criteria to decide how far can we go in this particular issue…this has to be an instrument who combines the *interests of peace with the interests of justice*."[59]

Section two concluded proposing a reconsideration of the idea that impunity can never lead to long-term peace. It could be said that the international reaction to the Colombian bill- namely claims for strict accountability in the form of prosecution- might address the interests of a perpetrator-based form of justice, without fully satisfying the interests of peace. This is because a strong rejection to the bill proposal minimizes the possibilities for a financially solvent insurgent group to surrender without legal benefits. In addition, if there exist few prospects to settle the conflict by military means, the result would be the continuance and status quo of the dirty war. Even if the war continues and some insurgents are brought to justice, few numbers of prosecutions would not make a significant positive impact upon the conflict, if they were contrasted with the increasing numbers of victims that would come along with the continuation of the conflict.

3.3 Conclusion

On July 15, the AUC (United Self-Defense Forces of Colombia) and the government signed an accord with the goal of completely disbanding the AUC (a reported 13,000 Paramilitary fighters and their leaders) by December 31, 2005. It remains to be seen if the bill will be approved by the Congress and under which conditions; however, an initiative of such magnitude necessarily needs a legal framework to incorporate

[57] Observaciones sobre el Proyecto de Ley "por la cual se dictan disposiciones en procura de la reincorporación de miembros de grupos armados que contribuyan de manera efectiva a la paz nacional." Pronouncements, Office in Colombia of the UNHCHR (United Nations High Commissioner for Human Rights), online, http://www.hchr.org.co/publico/pronunciamientos/ponencias/ponencias.php3?cod=29&cat=24 (October 23, 2003)
[58] HRW Documents on Colombia: "Colombia: Paramilitary Television Broadcast a "Travesty" Human Rights watch, Online, http://hrw.org/press/2003/11/colombia112503.htm, (November 25, 2003)
[59] Presidency of the Government of Colombia. *Center of State News*, "Proyecto de Alternatividad Penal Responde a Esfuerzos Colectivos de Paz", Online, http://www.presidencia.gov.co/cne/2003/septiembre/23/17232003.htm (28 October 2003)

the ex-combatants into the civil life of the country, and it also needs the support of international community. If this initiative succeeds with the paramilitaries, then parallel negotiations with the guerrillas could bring good prospects to put an end to decades of civil war.

The international human rights movement and the United Nations could make a better contribution to conflict resolution in Colombia if they gave conditional legitimacy to the bill, addressing the issue of "justice" by engaging and pressing the government to achieve its purposes by other means. This would be based on the inclusion of political calculations to the ethical and legal equation of justice, and the fact that Colombians need a comprehensive process of national reconciliation that prosecutions alone cannot realistically achieve. The peace process could complement the *ley de alternatividad* penal with the implementation of a truth commission which would focus mostly on the vindication of the victims, and on answering the questions on how and why violence spread throughout the country in the first place. Justice in this case would not be perfect, but it might be the only alternative to stop gross violations of human rights and the change the history and the future of a country.

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