Between the transition to peace and the achievement of justice in Colombia

By Justicia en Las Américas

Author: Daniel Cerqueira* for Asuntos del Sur

How can we reconcile the alternative of amnesty with the international standards on the prosecution of serious human rights violations?

The negotiations between the Colombian government and FARC leaders has raised a number of discussions on the social, political, and legal impact that a potential demobilization of the guerrillas would have on the country. From a legal perspective, some alternatives placed on the table require a reinterpretation of the rule of international law that prohibits amnesty for certain crimes. Although in its judgment in the case of the Massacres of El Mozote the Inter-American Court of Human Rights addressed the amnesty negotiated between the Salvadoran Army and the FMLN, this Court has not established a specific rule in relation to exemptions from responsibility provided during an armed conflict with the nuances of the Colombian transition process. If it were possible to simplify the debate on the legal feasibility of amnesty for members of the FARC by breaking it down into two categories, we would have on one side those who tolerate a certain degree of harm to justice in the interest of peace, provided that the most serious crimes are prosecuted and appropriate truth and reparations mechanisms are established. At the other end, we would have those who defend the imperative obligation to investigate and punish serious human rights violations.

Although the amnesty alternative has been considered by the Juan Manuel Santos administration, it is still not clear what its scope would be and the Colombian Judiciary has not ruled on the validity of a potential law in this respect. To date, the Constitutional Court has limited itself to upholding Legislative Act No. 01 of 2012, known as the "legal framework for peace," in particular the provision that allows for selection and prioritization in the prosecution of crimes committed in the context of the armed conflict. Although that decision opens the door slightly to exceptions in the prosecution of serious human rights violations, doubt remains as to whether by opening the window of amnesty the desire for peace will be accompanied by the disproportionate restriction of the right of access to justice.

In the middle of this crossroads, sectors of the government and FARC leaders have defended the holding of public consultations in order for citizens to take a position on the most controversial issues discussed in Havana. In relation to this alternative, it is important to recall that in the case of Gelman v. Uruguay the Inter-American Court examined the legality of a referendum in which the majority of the Uruguayan people had opted for upholding the so-called Law on the Statute of Limitation for Punitive Claims of the State (*Ley de Caducidad de la Pretensión Punitiva del Estado*) with respect to the crimes committed during the military dictatorship. In spite of the fact that the referendum had been held in a democracy and under a transparent process of citizen participation, the Inter-American Court underscored that "the protection of human rights is an insurmountable limit to majority rule, that is, to the scope of matters 'subject to the decision' of majorities in democratic forums, in which conventionality control must also

take priority […].” This position makes it clear that a potential referendum or a constitutional convention in Colombia would satisfy the objective of providing legitimacy to the peace accords, but would not remove the need to affirm the validity of the decision of the majority consulted.

While the public consultation might take care of the forms of negotiations between the government and the FARC, the heart of the matter lies in examining the inevitable conflict between the international standards applicable to the prosecution of serious human rights violations and the possibility of implementing transitional justice mechanisms that tolerate a certain degree of impunity. Given this dilemma, we envision three approaches:

- Limit the rule against amnesties established in the case law of the Inter-American Court to post-conflict scenarios, keeping it separate from transitions negotiated in the midst of an internal armed conflict.

On this point, any attempt to find an implied exception to the aforementioned rule would be limited by older rules of international criminal law that prohibit amnesties (negotiated or self-imposed) in cases of genocide, war crimes, or crimes against humanity. In this respect, by means of subsumption (understood as the application of a consequence provided for by law to the facts of a case), the only way to prevent a conflict of authority would be to limit the application of amnesty to human rights violations that do not rise to the level of the aforementioned international crimes.

- Resort to a balancing exercise to determine which constitutional principle should take precedence in light of the factual scenarios of the transition process in Colombia.

According to the most prominent exponent of so-called balancing exercises—Robert Alexy—this act entails evaluating whether the restriction of the right of the FARC’s victims to access justice meets the following requirements: (i) the potential amnesty law observes the procedures of pre-established laws; (ii) it is suitable for the accomplishment of the aim pursued; and (iii) it is necessary in a democratic society. This solution presents a significant challenge, as for several decades now the international criminal courts and the Inter-American Court, in weighing justice against other principles at stake in transition processes, have favored justice when the restriction stemming from an amnesty law extends to acts of genocide, war crimes, or crimes against humanity. The scope of what can be resolved through constitutional balancing is therefore the same as what can be resolved by means of subsumption.

- Determine that the principle of justice must take priority in light of the mechanisms of the transition processes.

Along these lines, and with a view to observing the current inter-American standards, it will be assumed that criminal prosecution is inevitable. However, the main issue does not rely on the punishment of the perpetrators of certain offenses, but rather on the manner in which the prosecution and establishment of the facts will take place. Part of the difficulty of reconciling transitional justice mechanisms with the standards of the Inter-American Human Rights System lies precisely in the quasi-ontological relationship between justice and criminal conviction set forth in the decisions of its bodies. The inflection point appears to be in the use of a metadiscourse on justice that, on one hand, differentiates it from truth and reparation, and on the other, conditions its satisfaction on the traditional forms of prosecution,

conviction, and incarceration. It is well known that the conceptualization of justice in transition processes tends to include mechanisms of restoration that underlie not only the punishment but also the satisfaction of the imperatives of truth, reparation, and reconciliation. The intent here is not to place justice and truth at odds with one another, but rather to deconstruct the one-dimensional perspective that conditions the concept of justice on the punishment of anyone responsible for the commission of a crime.

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Daniel Cerqueira is a senior program officer at the Due Process of Law Foundation, headquartered in Washington DC. Daniel has a Masters in International Law with Honors from Georgetown University in the United States, and is currently completing a Masters Degree with the Global Rights and Constitutional Democracy Program at the Universitá degli Studi di Genova in Italy. He obtained his law degree from the Universidade Federal de Minas Gerais and a bachelor's degree in International Relations from the Pontificia Universidade Católica de Minas Gerais, both in Brazil. From January 2006 to January 2014, he worked as a lawyer at the Inter-American Commission on Human Rights (IACHR) as a human rights specialist in different sections of the Executive Secretariat. Tw: @dlcerqueira