

Justice, truth and reparation in the Colombian peace process

By Felipe Gómez Isa

■ Executive summary

A key challenge facing the Colombian peace process is how to secure peace while simultaneously guaranteeing victims' rights. In July 2012 the Colombian Congress adopted the Legal Framework for Peace, a package of transitional justice mechanisms designed to facilitate negotiations, prevent impunity for serious war-related crimes and provide guarantees to victims. Under the Framework the principles of prioritisation and selection are to be applied to the bringing of criminal proceedings, i.e. for deciding in which situations and according to which criteria some offences may be prioritised over others and even whether criminal investigations might focus solely on the main perpetrators of war-related crimes. This is the minimum threshold that should be demanded of both the Colombian state (especially the armed forces) and the FARC Secretariat.

The Framework also makes provision for a truth commission to investigate the extremely serious crimes committed in Colombia and leaves in the state's hands a number of important instruments that allow a flexible approach to be taken regarding the punishment of crimes committed by armed actors. The granting of such benefits will be subject to those being demobilised making significant contributions to achieving lasting peace and securing truth and reparation for victims.

Introduction

Colombia is facing the arduous task of addressing one of the main dilemmas that any process that seeks to end armed conflict through negotiation has to tackle: that of achieving a balance between securing peace and the obligation to guarantee the victims' rights to justice, truth and reparation for violations of their human rights. It is precisely this task that transitional justice¹ mechanisms are designed to facilitate.

Most peace negotiations in the past, in both Colombia and elsewhere, have tried to reach a settlement by granting significant impunity to the perpetrators of human rights violations. The context has now changed radically and there is little likelihood of impunity² for any of the perpetrators and disregard for the rights of victims being accepted (Sánchez Duque, 2011: 9).

When approaching the negotiating process with the Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo (Revolutionary Armed Forces of Colombia-People's Army, FARC-EP), the Colombian state does not have absolute freedom of manoeuvre, since a specific and sophisticated framework has been established under international human rights law and international humanitarian law (IHL), as well as by Colombian legislation and both internal and international jurisprudence (Sánchez & Uprimny, 2011: 131). This framework stipulates that there can be no impunity for serious offences under international law such as those committed by the various actors in the Colombian armed conflict and that victims' rights are guaranteed.

It is very significant that, unlike former peace processes in Colombia, the current General Agreement for the Termina-

1 The UN secretary-general (UN, 2004: 4) has defined transitional justice as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".

2 See in this regard Orentlicher (2005).

tion of the Conflict and the Construction of a Stable and Lasting Peace between the Colombian Government and the FARC-EP includes “the human rights of the victims” as an agenda item (point 5), something that would have been unthinkable until very recently.

The international legal framework currently consists of all the international human rights treaties ratified by Colombia 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, adopted by the United Nations (UN) General Assembly in December 2005 (UNGA, 2005). These principles constitute a road map for transitional justice processes in which justice, truth, and comprehensive reparations for the victims of gross human rights violations and the establishment of guarantees of non-repetition must be ensured.

Legal Framework for Peace (2012)

In July 2012, in an attempt to facilitate negotiations with the FARC-EP by incorporating it into a transitional justice programme, the Colombian Congress adopted an amendment to the constitution through the so-called Legal Framework for Peace (Framework).³

Despite the criticisms that adoption of this amendment provoked,⁴ it is an attempt, not without risks and contradictions, to lay the foundations for securing a political solution to the internal armed conflict that has devastated Colombia for over 50 years and for guaranteeing the rights of the victims (Orozco, 2012). As stipulated in Article 1 of the Framework, the transitional justice instruments “shall ensure as far as possible the rights of the victims to truth, justice and reparation”.

Firstly, the Framework establishes the principle of “differentiated treatment for the different armed groups operating outside of the law who have been parties to the internal armed conflict and also for state actors”. This means recognising that the paramilitary groups and guerrillas are different in nature, since the latter can claim the status of political offenders⁵ and, as a consequence, qualify for certain privileges within the framework of the peace negotiations,⁶ except in the cases of genocide, war crimes and crimes against humanity (Valencia Villa, 2012: 7). In addition, gross human rights violations committed by state actors have been included among the issues to which national and international standards concerning justice, truth and reparation need to be applied. This has been seen as an outright betrayal by the Uribe camp and certain sectors of the armed forces.

The Framework starts by reiterating the “State’s duties to investigate and punish”. It goes on to call for “mechanisms of an extrajudicial nature to clarify the truth and ensure reparation for victims”. In this regard it provides for the establishment of a truth commission, a mechanism that could be very interesting if it is provided with the appropriate tools and powers to clarify the whole truth about the very serious violations committed by the various actors involved in the Colombian armed conflict.

At the heart of the Framework are the principles of prioritisation and selection, which are described as “inherent to the instruments of transitional justice”. It is the responsibility of the attorney-general to determine the prioritisation criteria for bringing criminal proceedings, i.e. to establish the grounds for deciding which types of conduct most deserve prosecution. For its part, Congress, at the initiative of the government, shall determine by statutory law (a type of law that needs to be adopted by a qualified majority and to have been examined in advance by the Constitutional Court to ensure that it is constitutional) “the selection criteria that will allow efforts to be focused on the criminal investigation of those most responsible for all offences that acquire the connotation of crimes against humanity, genocide or war crimes committed in a systematic manner”.

This is the most controversial aspect of the Framework,⁷ since, in order to ensure that Colombian society enjoys the human right to peace, it makes it possible to refrain from prosecuting certain offences and certain members of illegal armed groups in order to focus on those who are “most responsible”. It is stipulated that the seriousness and representativity of cases will be taken into account when determining the selection criteria. The truth is that, regardless of whether or not it is appropriate, this principle leaves many questions unanswered.

Some analysts say that the principle of selection should have been supplemented by the principles of necessity and proportionality (Sánchez & Uprimny, 2012: 42). In other words, case selection should only come into play when it is strictly necessary to secure peace and when proportionality to the seriousness of the criminal acts in question is maintained. This is a particularly controversial feature of the Framework, since it is not going to be easy to convince members of the FARC-EP Secretariat that they should go to prison for the serious crimes they committed (Orozco, 2012). In fact, the FARC-EP has harshly criticised the Framework and, within its social-revolutionary mystique, it presents its members as victims rather than perpetrators. In the words of Rodrigo Granda, one of the FARC negotiators at the table in Havana, “we have not made anyone

³ Legislative Act 01 of 31 July 2012, establishing transitional justice instruments within the framework of Article 22 of the constitution and setting out other provisions.

⁴ The fiercest criticism came from groups close to former president Álvaro Uribe.

⁵ Compared to being merely a “terrorist threat”, as guerrilla groups were seen during the period of President Uribe’s democratic security policy (2002-10). An analysis of the role of the political offence in Colombian legal history as a means for securing peace appears in Tarapués (2011: 381-99).

⁶ As stipulated in Article 150.17 of the Colombian constitution (1991), Congress may “[g]rant ... by a two-thirds majority of the votes of the members of one or the other chamber and for serious reasons of public convenience, *amnesties* or general *pardons* for political crimes” (emphasis added).

⁷ See the criticisms made of the principle of selection, given that it can leave the door open to impunity for serious crimes (Human Rights Watch, 2012; Comisión Colombiana de Juristas, 2012; López, 2012).

suffer. We are the victims of this war”, a claim that has been called arrogant and totally unacceptable (Madariaga, 2012: 70).

For its part, Congress will also be able to determine in which cases it is appropriate to suspend sentences and apply extrajudicial penalties, alternative sentences, and special methods of enforcing and carrying out punishments, as well as conditionally waive criminal proceedings in the courts. Having this vast array of sentencing possibilities is intended to make it easier to reach agreements with the guerrillas.

According to the provisions of the Framework, all these measures are subject to certain conditions, including laying down arms, acknowledging responsibility, helping to clarify the truth and provide comprehensive reparation to the victims, releasing hostages, and freeing minors who have been forcibly recruited. In other words, the state has broad discretion to apply generous benefits in terms of sentencing if those being demobilised co-operate with the courts and work for a stable and lasting peace.

Finally, another interesting feature of the Framework is that it seeks to ensure that people who have been demobilised from guerrilla groups can still participate in politics. According to transitory Article 67, “a statutory law shall regulate which offences will be considered akin to political offences for the purposes of being able to participate in politics”. It is a case of resurrecting the notion of the “political offence” with a view to ensuring that those who have been demobilised can participate in politics. Its scope does not, however, extend to crimes against humanity or genocide that have been committed systematically, the perpetrators of which will not be able to participate in politics or stand for election.

The expansion of military jurisdiction

In December 2012, following an acrimonious debate, Congress adopted an amendment to the constitution that expands military jurisdiction (Colombia, 2012) so that the prosecution of offences committed by members of the armed forces can be transferred from the ordinary courts to the military justice system. This means the referral to military courts of all breaches of IHL except for seven offences specifically mentioned in the Legislative Act: crimes against humanity, genocide, enforced disappearance, extrajudicial execution, sexual violence, torture and forced displacement. This expansion of military jurisdiction has been criticised by both the UN and the Inter-American Commission on Human Rights, as well as by human rights

organisations (the Colombian Commission of Jurists and Human Rights Watch), since it may pave the way for further impunity for crimes committed by members of the armed forces. In February 2013 several members of Congress and human rights organisations filed an appeal on grounds of unconstitutionality before the Constitutional Court. The truth is that this contentious amendment does not send out a good message from the perspective of human rights, especially at a time when the Inter-American human rights system is trying to limit the scope of military jurisdiction.⁸

The right to justice

The right to justice has extensive international legal recognition. It implies, first of all, that states have a duty to investigate, prosecute and punish the alleged perpetrators of human rights violations. Secondly, it requires states to maximise the measures taken to prevent impunity for gross and systematic human rights violations.

There is debate concerning whether states are obliged to criminally prosecute and punish those guilty of crimes related to human rights and IHL or whether, in the context of peace processes, they enjoy a measure of discretion based on criteria relating to peacebuilding and national reconciliation.

A principle is emerging to the effect that gross human rights violations (genocide, war crimes and crimes against humanity) impose a general duty to prosecute and punish those responsible,⁹ although in genuinely exceptional cases during periods of transition the state could invoke the abovementioned criteria to partially limit that duty. The main disagreements are centred around the scope of such limitations. For some (Orentlicher, 1995: 414), only if criminal proceedings seriously jeopardise the life of the nation or irreversibly threaten a peace process should certain limits on criminal prosecution arising from application of the principle of a state of necessity be accepted. For others (Zalaquett, 1995: 6), the margin of discretion available to states is considerably broader, since it is they who have to balance the requirements of the victims’ right to justice with the requirements of a collective nature related to peacebuilding and reconciliation.

Such limitations on justice can be adopted in a context in which the full right to truth and reparation for the victims is guaranteed and, ultimately, when the package of measures limiting the liability of the perpetrators has been accepted by the population as a whole via a consultation or through their democratically elected representatives. The danger of applying these criteria in a discretionary way is that it may

⁸ The Inter-American Court of Human Rights (2010) has said that “in a democratic State, the military criminal jurisdiction shall have a restrictive and exceptional scope”.

⁹ Both the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) require either criminal prosecution or, in the case of torture, extradition so that those responsible can be tried in another competent country (Articles 4 and 7, respectively). The obligation to investigate, prosecute and punish those responsible for gross human rights violations has also been included in the Basic Principles and Guidelines concerning the right to reparation, Principle 4 of which states that “[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the *duty to investigate* and, if there is sufficient evidence, the *duty to submit to prosecution* the person allegedly responsible for the violations and, if found guilty, the *duty to punish* her or him” (emphasis added).

leave the way open to impunity, forgetting, and a failure to provide comprehensive and effective reparation for the victims. It is these dangers that have led human rights bodies to be extremely cautious when governments try to adopt amnesty laws that, in the interest of national reconciliation, limit the criminal liability of some of those responsible for gross human rights violations.

One of the strongest stances taken against amnesty laws and other measures that seek to avoid criminal prosecution has been that taken by the Inter-American Court of Human Rights (2001). In the emblematic *Case of Barrios Altos v. Peru*, it said that:

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.¹⁰

On the other hand, when those responsible have not committed gross and systematic human rights violations such as those described above, some argue that limited amnesties and pardons subject to certain conditions can play a role in peacebuilding and national reconciliation, as long as the rights to truth and reparation for the victims are ensured, as they were in South Africa, where some of those responsible were granted amnesty on condition that they collaborated in fully clarifying the truth about the violations committed under apartheid.

In the case of Colombia, this model may be accepted as a possible solution for lesser crimes committed by members of the FARC-EP, but not for serious crimes under international law (Valencia Villa, 2012: 9). Flexibility and generosity can be acceptable if they genuinely contribute to the effectiveness of the rights to truth, reparation and the non-repetition of heinous acts, i.e. if they are an effective means of securing peace and reconciliation. Under this model, the granting of sentencing benefits should always be guided by the principle of proportionality, i.e.

the pardoning of the perpetrators is only justifiable if it is the only means that exists for achieving peace and reconciliation, and if it is proportional to the seriousness of the acts committed by the accused, his or her rank and the contributions they make to justice (Uprimny, 2006: 28).

Furthermore, the state would have an obligation to set in motion mechanisms that hold the perpetrators to account before society and ensure full reparation for the victims, such as the truth commission provided for in the Framework. In conclusion, pardons may be granted to those responsible, but only as long as they are justified in order to secure peace and reconciliation and have been carefully weighed up against the principle of proportionality and effective assurance of the victims' rights to truth, reparation and the establishment of guarantees of non-repetition.

Some important criteria relating to the right to justice were established in a May 2006 judgment issued by the Colombian Constitutional Court in which it interpreted some of the most controversial aspects of the Justice and Peace Law (Colombia, 2005), which was intended to facilitate the demobilisation of paramilitary groups. Given the tensions between peace and justice, the court stressed the need to apply the method of *ponderación*, or due consideration, i.e. "to weigh up the constitutional rights which are in conflict, with the aim, where possible, of reaching a harmony between them, or deciding which of the two ought to prevail" (Colombia, 2006: sec. 5.4). Applying the method of due consideration, the Constitutional Court concluded that

the attainment of a lasting and stable peace ... by means of the demobilisation of the outlawed armed groups may involve certain restrictions in terms of the objective value of justice and the correlative rights of the victims to justice, given that if this were not the case, peace would be an unrealisable ideal due to the judicial and factitious situation of those who have taken part in the conflict; this has been demonstrated by the historical experience of different countries which have overcome internal armed conflicts.

However, the court continued,

peace does not justify everything. The value of peace cannot be given an absolute importance, because it's also necessary to guarantee the materialisation of it is essential content of the value of justice and of the victims' right to justice, as well as the other rights of the victims.

The court therefore accepts the imposition of certain restrictions on the right to justice in the interests of securing peace, but only as long as the minimum content of the right to justice is guaranteed.

¹⁰ On June 14th 2005 the Supreme Court of Argentina declared laws 23,492 and 23,521, adopted under the government of Raúl Alfonsín and known as the Full Stop Law and Due Obedience Law, respectively, to be null and void, tightening the net around impunity still further.

The jurisdiction of the International Criminal Court

Something that was discussed in the negotiations with the paramilitaries (2003-06) and again currently in the negotiations with the FARC-EP is the eventual entry onto the scene of the International Criminal Court (ICC). Colombia deposited its instrument of ratification of the Rome Statute of the ICC on August 5th 2002 and it entered into force on November 1st 2002. Using its prerogative under Article 124 of the Rome Statute, the Colombian government, when depositing the ratification instrument, made a declaration in line with the provisions of that article which states that:

for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.

This means that the ICC would not have jurisdiction over war crimes committed in Colombia until November 1st 2009,¹¹ but that it does have jurisdiction over cases of genocide and crimes against humanity committed since November 2002.

Since June 2004 the ICC's Office of the Prosecutor has been conducting a preliminary examination¹² of the crimes committed in the Colombian armed conflict by the guerrillas, paramilitary groups and the armed forces, and of the state's response to such crimes. Given the principle of complementarity that governs international criminal justice, the ICC has to consider whether there is "unwillingness [to act] in a particular case ... having regard to the principles of due process recognized by international law".¹³ If the state is unwilling or unable to conduct investigations into the alleged perpetrators and bring them to justice, the jurisdiction of the ICC would come into play subsidiarily. It is really a case of preventing impunity for crimes that are abhorrent to the conscience of humankind and which have affected thousands of victims in Colombia. International criminal justice can thus be turned into a very convenient tool for supplementing a society's efforts to see justice done and guarantee the victims' right to truth and reparation.

The right to the truth

The right of victims and society to know the whole truth about the events that have taken place is a crucial component of any process of transitional justice and reconciliation. Only when the victims know the whole truth, and when justice has been done and reparation made for the harm

caused is it possible for a genuine process of forgiveness and national reconciliation to begin. However, the *knowledge* that the truth provides has to be accompanied by *acknowledgement* of the victims. The truth should not be kept just within the victims' closest circle; it must be officially and publicly recognised, thereby proclaiming its validity to the public and society as a whole. The right to the truth entails a duty of memory on the part of the state. This is both an individual and a collective right, since it is not only the victims who have the right to truth and memory: the whole of society is interested and needs to be able to exercise this right.

In this regard, the truth commission envisaged in the Framework could be a good tool for ensuring the right to the truth for the victims and Colombian society.

The right to reparation

Reparation is not going to solve all the problems related to the past that societies in transition or searching for peace, such as Colombian society, face. Some of the consequences of gross human rights violations are simply irreparable, at both the individual and collective level.

Reparations are a process and not just a specific moment in time in which certain symbolic acts are carried out and the victims are given certain financial benefits and other forms of assistance. What is important is not the form that the reparation made to the victims takes, but the processes that take place around it. That is why symbolic reparation measures, many of them related to memory policies, are so important for both individual victims and society as a whole: reparation is not solely a financial or material phenomenon, it requires a whole raft of measures designed to change the political and social imaginary into which the victims have to be incorporated.

Reparation is a political process that seeks to re-establish the political community and restore a new equilibrium to society, where the victims have their status as such recognised and go on to play a new role in the political and social arena.

The principles relating to the right to reparation do not see it as something separate, but as a process framed within justice-and-truth policies. The principles also mention a range of different reparation measures that states can use when designing their reparation programmes. In this regard, depending on the particular circumstances of each case and each country, states can adopt the following forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

¹¹ The Office of the Prosecutor of the ICC (2012) has determined that "there is a reasonable basis" to believe that since November 1st 2002 various actors in the Colombian armed conflict have committed the following acts constituting crimes against humanity: murder, enforced disappearance, extrajudicial executions (the so-called "false positives"), the forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape and other forms of sexual violence. It also pointed to the commission of the following war crimes: attacks on the civilian population; the taking of hostages; and conscripting, enlisting and using children to participate actively in hostilities.

¹² Under Article 15 of the Statute of the Permanent International Criminal Court.

¹³ Article 17 of the Statute of the Permanent International Criminal Court.

The government of President Juan Manuel Santos has taken some important steps, one of them being the adoption in 2011 of the Victims and Land Restitution Law (Colombia, 2011), a crucial element for resolving the armed conflict in Colombia and ensuring victims' rights. Despite its limitations, it should be acknowledged that this is a very important step in the right direction that could create adequate conditions for facilitating negotiations between the government and the FARC-EP.

One aspect of the peace negotiations with the FARC-EP that is going to be very controversial is that the guerrillas have an obligation to make reparation to their victims. In this regard, they are going to have to return any land they have seized and use any other goods and resources they have illegally confiscated to ensure the right to reparation for the victims (Madariaga, 2012: 70).

Conclusions

The historic opportunity to achieve stable and lasting peace in Colombia cannot be brought about at any price. Today the victims' right to justice, truth and reparation poses a very significant ethical and legal limit on the state's room for manoeuvre when negotiating peace with the various armed actors. The Legal Framework for Peace adopted in 2012 is a laudable attempt to try to balance the achievement of peace and reconciliation against the victims' rights. The most controversial aspect of the Framework is undoubtedly the principle of selection, which could mean that certain offences committed in the context of the Colombian armed conflict are not prosecuted and punished. Under no circumstances should those most responsible for war crimes, crimes against humanity and genocide, both within the state and in armed groups, be allowed to escape investigation and prosecution. As far as criminal punishment is concerned, the Framework introduces a whole raft of sentencing benefits that can be granted if those being demobilised effectively help to secure peace and ensure the victims' rights to truth and reparation. In this regard the criteria of necessity and proportionality need to be scrupulously adhered to in order to ensure that the principle of selection and the sentencing benefits do not end up becoming a kind of covert amnesty that ensures impunity.

Recommendations

The Colombian state should:

- discharge its constitutional duty to seek peace and ensure justice;
- discharge its duty to investigate, prosecute, and punish gross human rights violations and breaches of IHL committed by the various armed actors, including the armed forces; and
- in the context of the peace negotiations with the FARC-EP, bear in mind its legal obligations to respect and guarantee the victims' rights to justice, truth and reparation, as well as to establish guarantees of non-repetition.

The FARC-EP should:

- negotiate in good faith and heed the Colombian people's call for peace;
- recognise the serious crimes it has committed in the context of the armed conflict; and
- be willing to work to ensure the victims' rights to truth and reparation.

The international community (especially the countries that acted as guarantors and facilitators of the Havana negotiations) should:

- firmly support the peace process under way in Havana between the Colombian government and the FARC-EP;
- remind the various actors of their obligations with regard to human rights and IHL;
- oppose any kind of agreement that ensures impunity for the very serious human rights violations that have been committed during the Colombian armed conflict; and
- be willing to support the reconciliation process by all necessary means if the Havana negotiations are successful.

The ICC should:

- continue to carefully examine the crimes committed by the various actors in the Colombian armed conflict and determine whether the Colombian state's response to such crimes meets the standards established under Colombian and international law.

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