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PEACE INITIATIVES AND COLOMBIA'S ARMED CONFLICT

FUNDACIÓN ideas PARA LA PAZ

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PEACE IN COLOMBIA FROM THE PERSPECTIVE OF TRANSITIONAL JUSTICE

The passage of Law 975, known as the Justice and Peace Law, could have been interpreted as marking the beginning of a transitional justice process in Colombia. It combined the basic elements constituting a transition: a political agreement (the Ralito Pact), a social demand for historical truth and justice,[1] a commitment to reparations for victims, the creation of special transitory mechanisms, and initiatives for social reintegration and demobilization, acknowledging the central tenet of victims' rights.

Three years after the passage of the law, different sectors in Colombia expressed serious doubts about the kind of transition taking place in Colombia and, in many cases, openly questioned whether a "transition" worthy of the name was was taking place at all.[2] There were numerous reasons that the situation in Colombia appeared much the same in 2005: the continuation of outright war, the persistence of impunity, numerous atrocious deaths, ongoing kidnapping, and the continued invisibility of victims. This situation led some to conclude that Colombia's most important task was to guarantee respect for human rights and for international humanitarian law. By this logic, ending the conflict was the principal objective to which all others should be subordinated.

One line of this legitimate reasoning is that the humanitarian aspects of the conflict, particularly securing the release of hostages held by the guerrillas, should come before any other consideration. The argument is essentially ethical—there should be no more kidnappings or killings—and is a powerful one, accompanied as it is with a basic call for security.

What good is Transitional Justice in Colombia?

In seeking to understand the value of transitional justice in Colombia, we must first define what it means. Transitional justice refers to the interdependent and complex set of mechanisms that aim to bring victims' rights—many of them inalienable—into accordance with the needs of a democratic political regime and the achievement of peace. Ultimately, it is about political and technical procedures that aim to ensure that the peace that is achieved and the political regime emerging from peace is sustainable ethically, judicially, and politically. These three facets are the essential qualities of any transitional measure. Political decisions must be rooted in ethics and fundamentally related to the rights of the victims. At the same time, political decisions have a rationale that is technical and procedural and, as such, very complex. In some sense, transitional justice is the result of a collection of practices and experiences, the product of a casuistic exercise.[3] Since the term "transition" was adopted in the field of political science and since Guillermo O'Donnell reflected on transitions in the Southern Cone, the concept itself has undergone substantial revision.[4] Indeed, there is little in Colombia that resembles the experience of democratic transition in countries such as Argentina or Chile.

At the same time, many aspects are similar or appear with even greater intensity. International law in 2008 is infinitely more complex and elaborate than that which served as a point of reference for democrats in Argentina in 1983 or accord-seekers in Spain in 1976. The rights of victims have been enshrined in the principles and directives of the United Nations; the jurisprudence of the inter-American system of human rights has made transcendental declarations on these issues, and the statute of the International Criminal Court has established a considerably more rigid framework. None of these elements existed in 1991 when Colombia decided to reform its constitution and grant amnesty to demobilized guerrillas in the most successful political reinsertion program the country has ever seen. Surely the events of 1991 would be viewed differently today.[5]

We could always embrace the relativist argument—in vogue with some U.S. and European jurists—that posits that legal norms, including international ones, are the product of purely political considerations, and as such, are merely variables to be taken into account, ultimately subject to the overriding interests of states. While I do not believe in the ritual sacredness of the law, neither do I believe that its perspectives should be ignored or undervalued. Neither of these two extremes contributes to

the efficient and sustainable resolution of the problems at hand.

Alberto Fujimori, president of Peru from 1990-2000, believed that by granting a broad amnesty in 1995 he would resolve the political problem of his alliance with the armed forces. Fujimori now faces daily trials for human rights violations in the midst of that process, the Inter-American Court of Human Rights ruled in 2001 that obstacles to the criminal prosecution of human rights violations should not be accepted. In Chile, many in the political class believed that the issue of the crimes committed during the Pinochet government would be resolved by a truth and reconciliation commission. Over 400 lawsuits have been brought against officials and yet there is still talk of impunity. Even the case of Spain provided a perfect example of a *pacto de olvido* (pact of forgetting). The Moncloa Pact established a political model for suppressing memory. Yet every year, Spaniards call for exhumations and reparations and the legislature approved a law that establishes a commission to study the consequences of the Civil War.

Journalist Tina Rosenberg has described how the ghosts of the past are an expression of frustrations in the present.[6] While no reconciliation process in the world has fully satisfied the right to truth, justice, and reconciliation, some countries have certainly done better than others. Without a doubt, countries like South Africa, Hungary, Argentina, and others reflect substantial achievements, with more solid and stable democratic regimes than, for example, Congo, Sierra Leone, or Guatemala. These latter countries up until now represent failed experiences, because of a stubborn resistance to accept these ghosts of the past. Certainly each country constitutes a special and unique case. Nonetheless, substantial similarities exist.

The International Center for Transitional Justice (ICTJ) has worked in over 30 countries around the world and assisted in the formulation and application of the Justice and Peace Law in Colombia. We believe that, in terms of a transition, Colombia's experience has been unique and, indeed, precedent setting for the rest of the world. Nevertheless, Colombia can certainly benefit more from international experience, so as to avoid well-known pitfalls as it carries out the process.

Colombia's Constitutional Court established the ethical parameters within which the political initiative of the Uribe administration could be carried out. The Court established that the objective of the Justice and Peace Law was not demobilization per se, but rather, the protection of the rights of victims during the demobilization process.[7] The Court sought to mitigate the tension in the law between its provisions for reduced sentences for demobilized combatants and society's call for truth, justice, and reparations. The Court also established the ethical framework within which different public agencies would be able to implement the law.

The ICTJ established a permanent office in Colombia in October 2006 and began the task of observing and assisting with different aspects of the implementation of Law 975. The ICTJ focused especially on:

- The establishment of procedures to guarantee victims' participation in legal proceedings;
- The way that justice and peace prosecutors were conducting deposition hearings (the so-called *versiones libres*);
- Critical aspects requiring legislation or appropriate public policies, especially concerning mental health care for the victims as well as the complex issue of the restitution of assets;
- Development and implementation of reparation policies, both collective and individual;
- Initiatives to recover historical memory, particularly in light of the work of the National Commission on Reconciliation and Reparation;
- The jurisprudence of the Supreme Court concerning the issue of para-politics.

The work of the ICTJ is carried out through institutional agreements with the Prosecutor General's Office, the Attorney General's Office, the National Commission on Reparations and Reconciliation, and the Supreme Court of Justice. It has also contributed to studies by the Ministry of Justice and the Interior (to develop the government's program for providing reparations) and the Ministry of Defense (to evaluate possibilities for reforming the military criminal justice system). These accords

made it possible for the ICTJ to attend over 250 deposition hearings over the course of almost a year, to review hundreds of court proceedings, and to develop technical proposals such as a manual for prosecutors and judges on how victims could participate. The Center's labors—in alliance with key institutions—have centered on promoting improvements and reforms to strengthen the rule of law and support initiatives by civil society and human rights and victims' organizations.

The process in Colombia over the past two years has been intense. The transition has experienced significant advances but also severe limitations in terms of guaranteeing the sustainability and the integrity of the policies adopted. Major issues still remain to be addressed. In the following sections I will present an overview of the progress and the limitations in terms of truth, reparations, justice, and institutional reform.

Historical Memory: Conspicuously Absent

In most countries that have gone through a process of transitional justice, one of the first steps is the establishment of a commonly-shared historical memory. For example, in Argentina and Peru, truth commissions reconstructed the human rights violations of the past, while in South Africa public hearings served as a forum for victims to be heard by society.

Opting politically for Law 975 resulted in a strange media atmosphere. The most visible aspects of demobilization have taken place in the courts, through revelations made during deposition hearings. Other aspects of the law—such as the work assigned to the National Commission on Reparation and Reconciliation—took on a secondary importance in light of the government's emphasis on the provisions of the law playing themselves out in the judicial arena. One issue that was marginalized has been the manner in which the history of violence in Colombia can be objectively reconstructed.

Colombian academics have a long and rich tradition of studying and explaining the phenomenon of violence.[8] In 2008 Colombia marked the 60th anniversary of the 1948 assassination of Jorge Eliécer Gaitán, an event often referred to as the moment at which the divisions between 'Colombia the nation' versus 'Colombia the polity' became so irreconcilable that violence became the accepted means of resolving differences over politics, ideologies, economics, and even personal issues.

Interpretations of Colombian history continue to be controversial. In particular, no clear "spaces" or forums have existed or do exist in which the victims and organizations most affected by violence can tell their stories. Law 975 charged the National Commission on Reparations and Reconciliation with preparing a report on "the origin and evolution of the illegal armed organizations." To that end, the CNRR established a Working Group on Historical Memory. This group, made up of 12 renowned and respected academics, is carrying out case studies, beginning with the Trujillo massacre. But this group is not considered to be a truth commission. Its studies will likely provide a sense of context, but will not necessarily provide an exhaustive account of the crimes committed.

A study backed by the Open Society Institute and conducted by María Victoria Uribe with ICTJ support has identified over 130 unofficial initiatives aimed at establishing memory and memorializing victims, including an ambitious project undertaken by the municipal government of Medellín. Very few people know of the existence of a small, but nevertheless official truth commission, composed of three former Supreme Court presidents. It was created by the Supreme Court to study the capture and recovery of its building in November 1985 and establish responsibility for the events. The ICTJ is actively supporting this initiative. While we are aware of its limitations, the ICTJ is convinced that this is a unique experience. For the first time in Colombia, there is an official effort to listen to the victims and to develop collective truth about the incidents that took place.

Beyond these initiatives, victims have very few formal and official opportunities to be heard. Similarly, victims' access to legal resources is limited, and few cases are being directed to the Inter-American Court of Human Rights. There are two possible explanations for the absence of victims from the process of constructing the truth. First, victims have traditionally been excluded from political negotiations, such as those that took place over the demobilization of the M-19. This exclusion could be due to the social, ethical, and cultural charac-

teristics typical of most Colombian victims. As in Guatemala and Peru, the victims of massacres, disappearances, and torture in Colombia are poor *campesinos* with little political and social power. A more specific explanation for the absence of victims from this process is that Law 975 seeks the truth revealed freely and voluntarily by those who perpetrated crimes in the name of paramilitary organizations.

Law 975: Political Transition and Paramilitary Demobilization Trials

More than 2,000 people have turned themselves in in order to receive benefits under the Justice and Peace Law. This, in turn, has generated a massive movement of victims to register. According to information from the Prosecutor General's office, over 129,000 people have registered as victims in the hope that they will have the opportunity to participate in the deposition hearings. For the time being, the Prosecutor General's office has become the most important institutional actor in the justice and peace process. Just several months after the law took effect, an inter-institutional committee was created to involve other public agencies. As of mid-2008, a mere 23 prosecutors had taken over 950 depositions from demobilized fighters, who offered information in exchange for the reduced sentences to which they are eligible under the law. In only one case was it been possible to bring charges against a mid-level commander of a paramilitary bloc.

Despite the obstacles, the Prosecutor General's office has made notable achievements. With few resources, they have been able to meet with thousands of victims, hold court and public hearings, register thousands of victims, and provide legal aid as well as moral and psychological support. Unfortunately, prosecutors have also taken on tasks that they are simply not prepared to handle.

The ICTJ has had the opportunity to observe several deposition hearings. The amount of incriminating information freely revealed by the paramilitary leaders is surprising, but more surprising still is that the information is seldom reported in the media.[9]

State agencies, the victims, and the human rights organizations are not prepared to handle a massive process of determining responsibility for human rights crimes. For example, it has been difficult for actors to recognize that the crimes committed by the paramilitaries do not constitute isolated incidents or common crime, but rather are part of very complex strategies that require systematic investigation. The government has opted to set out regulations for different aspects of the law that were unclear and proposed investigating, first, by blocs; later it proposed investigating by crimes, but not by individuals. Time, however, is of the essence, and the investigative plan does not offer clear guarantees for anyone.

But the more complex problem is that of guaranteeing that victims are able to participate effectively in the justice and peace proceedings. The extraordinary proceedings, in which the trial is summary and the only recourse available to the victim is that of reparations, have already produced considerable frustration. For example, the discovery of multiple common graves has not resulted in a registry of victims, nor to the participation of victims or their families in the exhumations. On average, a victim must attend 15 hearings to hear about an incident that directly affects him or her.

Belated but Apparently Advancing Justice

In mid-2008 the Prosecutor General's office ordered the arrest of and brought criminal charges against 10 members of the military who were involved in a 2005 massacre of members of a peace community in San José de Apartadó. This is a transcendental decision that breaks with the longstanding tradition of impunity in Colombia. Additionally, the Supreme Court ordered that 26 members of Congress be investigated for ties to the paramilitaries. Numerous individuals are also being investigated for crimes against humanity, including members of the military who were in charge of the operation to recover the Supreme Court building in 1985. While this recent surge in activity might be a result of the temperament of the prosecutor general and the independence of the Supreme Court, it is also related to the understanding that the current climate has provided a little more space for justice in Colombia.

Once again, however, the problem is the lack of a systematic approach and of social backing. The investiga-

tions are isolated and follow the ordinary procedures of the criminal justice system. Also, social support for the judicial branch is inconsistent when compared to social support for the government. In Fujimori's Peru, for example, enormous public support for the security policies made it possible for him to disregard judicial investigations and promulgate amnesty laws without suffering political consequences. In Suharto's Indonesia, the leader's charismatic power and the need for social unity made it possible for many Indonesians at the time to disbelieve the reports of genocide being perpetrated in East Timor. Without a doubt, the combination of exorbitant government power and weak social support for the judiciary produces a fragile and complicated situation.

Political Reform and Guarantees of Non-Repetition

Processes of transitional justice include the adoption of policies for making reparations to the victims and to reform institutions. Reparations are understood not only as a moral but also as a political obligation to victims, to restore their rights and assets. Eduardo Pizarro, president of the National Commission on Reparations and Reconciliation, has insisted that it is necessary to be concerned for tomorrow's victims; this is very true in a country where new victims are created each day. Notwithstanding Pizarro's statement, there is an immense debt pending to the victims, especially when comparing the specific benefits provided to demobilized fighters with the merely humanitarian aid programs for the victims.

Recognizing this need, the government has developed a proposal to make reparations to individuals, a positive departure from the mistaken argument that reparations would only be possible and desirable through court proceedings. The reparations program aims to be universal, a truly fundamental attribute for a program that involve mechanisms for recognition of the victims. The limitations of the government's proposal, however, are so serious that it can hardly be considered as more than a good and effective humanitarian aid program. One limitation is both conceptual and political, in that the government refuses to accept that granting these resources is related to any sort of governmental responsibility. Second, the proposal limits compensation solely to the victims of illegal armed organizations, thereby discriminating against victims of the State. Third, because Colombia lacks a reliable registry of the victims of these crimes, it is impossible to calculate the initiative's cost or the time that would be necessary for effective implementation.

Programs for mental health care, effective mechanisms for the restitution of land and assets, symbolic reparations, housing programs, and education programs simply do not exist for the victims. These programs remain to be developed. This involves providing the victims with programs that offer at least the same benefits as those enjoyed by demobilized fighters. Symmetry of treatment is an indispensable condition for reconciliation.[10]

Political reform has also been absent from public debate. Indeed, the discussions of accords and negotiations are moving away from political reform. A new constitution or the re-founding of the political system is simply out of the question, and a situation like that of 1991 is highly unlikely particularly in light of the weakness and "lumpenization" of the guerrilla and paramilitary organizations. Nonetheless, there are subjects that must be addressed. The most important of these include land ownership, the distribution of wealth, care for vulnerable population groups, a solution to the plight of the displaced, and political reform. The legitimacy of public institutions is in direct proportion to the guarantees for sustainable peace.

Transitional Justice in Peace Processes

Negotiations with the National Liberation Army (ELN) remain suspended, and in the meantime, different opinions have been sought on the feasibility of an amnesty as a preliminary step toward their demobilization. The prosecutor from the International Criminal Court delivered a clear message to Bogotá: amnesty may not be granted for crimes against humanity or for war crimes without compromising the ability of the ICC to take up the case at some point in the future. The issue of amnesty is being played out in the case of Darfur, for example; but in Uganda, arrest warrants for the Lord's Resistance Army ultimately led to a truce. Given the current state of international law, amnesty can not be

considered an alternative form of conflict resolution in every case.

That said, it is certainly possible to think about creative solutions that involve humanitarian agreements and peace accords. The Justice and Peace Law is one option, although many have disagreed with its provisions and it is in itself incomplete. It is therefore necessary to explore the following aspects:

- Focus the process on victims' rights, with no discrimination whatsoever, and on the basis of a) serious and consistent processes of establishing historical memory; b) programs for comprehensive reparations; and c) urgent humanitarian aid, specifically for displaced persons;
- Promote decentralized programs for demobilization, disarmament, and reintegration into society, involving local governments and social organiz ations. These programs should include mechanisms for real citizen participation and effective interaction with the victims;
- Create incentives in the area of criminal law, distinguishing between individual and collective demobilization and including the use of pardons, reduced sentences, and special prison regimes, all with the requirement that individuals seeking such benefits clarify the specifics of crimes and identify the whereabouts of persons who have disappeared;
- Establish an agenda for political reforms that does not imply the convening of a new constituent assembly, but which does address the reform of land ownership, restitution of assets and social programs focused on vulnerable groups;
- Create a basic political agreement on the fight against drugs.

Colombia has been the beneficiary of considerable international aid, both for humanitarian purposes and for counterinsurgency and counter-drugs purposes. Moreover, the so-called Groups of Friends of Colombia's peace processes have provided mechanisms for consultation and support. What is not in evidence to date, however—at least not publicly—is an agreed-upon strategy of the international community with respect to peace processes and political agreements in favor of the victims. The implementation of Plan Colombia, beyond its macro-considerations, only complicates and distorts the strengthening of Colombia's democratic institutions.

It is not true that Colombia is on the verge of a far-reaching peace process; there are still too many obstacles. Neither, however, is it true that the situation remains unchanged. The regional and national dynamics have been particularly intense, and the government's military victories have shifted the political balance. What has remained a constant is the neglect of the victims and their absence from the political debate. •

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1 According to a study by the ICTJ and the Fundación Social, over 76 percent of Colombians surveyed said that the most important aspect of a peace process is establishing the truth about crimes committed and carrying out justice, whereas only 34 percent said that justice should be sacrificed to make way for a peace agreement.

2 The emergence of new paramilitary groups and the threat of the "Black Eagles," as well as the perception that paramilitary leaders continue to control armed groups and the drug business from prison, give the impression that paramilitary demobilization is not genuine.

3 [Casuistry is the part of ethics that resolves issues of conscience, particularly when duties appear to conflict. Eds.]

4 Guillermo O'Donnell and Philippe Schmitter. *Transitions from Authoritarian Rule in Latin America*. See also: Stephan Haggard and Robert Kaufman. *The Political Economy of Democratic Transitions*.

5 Ruti Teitel in *Transitional Justice* maintains that there are three generations of transitional justice. The first refers to classic processes of transition from dictatorships to democracy in the Southern Cone and those that took place in Eastern Europe. The second refers to civil wars and peace accords, or substantial transformations of political regimes (Central America and South Africa). The third is a hybrid model, in which conflict and transitional justice coexist and develop simultaneously. This would be the case of Colombia, but it also reflects, to differing degrees, Peru, Cambodia, Sierra Leone and, in a more complex environment, Afghanistan and Iraq.

6 Tina Rosenberg. *Tierras Embrujadas*. Basic texts on transitional justice. ICTJ, 2002.

7 Ruling C-370. The ruling declared several provisions of the original law unconstitutional and thus substantially halted its application.

8 Among the classic studies on violence in Colombia can be highlighted: Alape, Arturo. *La Paz, la Violencia: Testigos de Excepción*. 5 Edición. Bogotá: Editorial Planeta, 1999. González, Fernán; Bolívar, Ingrid J. y Vásquez, Teófilo. *Violencia política en Colombia. De la Nación fragmentada a la construcción del Estado*. Bogotá: Cinep, 2003. Guzmán, Germán; Fals Borda, Orlando y Umaña, Eduardo. *La violencia en Colombia, estudio de un proceso social*. Tomo I y II. Bogotá: Universidad Nacional, 1962.

Pécaut, Daniel. *Crónica de dos décadas de política colombiana: 1968-1988*. Bogotá: Siglo XXI Editores, 1988.
Sánchez G., Gonzalo y Peñaranda, Ricardo (Compiladores). *Pasado y presente de la violencia en Colombia*. Segunda edición aumentada. Santa Fe de Bogotá: IEPRI-CEREC, 1991.
Varios Autores. *Colombia: violencia y democracia*. Bogotá: Universidad Nacional, 1987.

9 For example, in his first deposition Salvatore Mancuso gave testimony concerning the funding that paramilitary organizations received from different private companies, prompting an inquest by the Prosecutor General's office.

10 The most successful reparations programs have been comprehensive and have inspired broad social backing. Examples include the Reparation and Social Assistance Program (PRAIS) in Chile and the Comprehensive Reparation Plan in Peru.