

# Human rights, management of the transition and the post-conflict

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I want to express briefly some ideas about the most passionate and polemic cores of the transitional justice which could be defined as a great field of perplexities, most of them, from my point of view, of moral nature.

It is about a field in which we as lawyers or whomever at times tries from the Political Science, to reflect upon, have not the last saying on. The legal discussions offer short or medium term solutions, but do not solve in deep the moral questions that surround the already very old Colombian conflict in which all type of atrocities have taken place.

In none of the post conflicts (by the end of international or domestic wars) or transitions to the democracy, at the end of the dictatorships or segregationist regimes, the legal consideration has been enough. However, in our country, as it is colloquially said, with a “Santanderista” tradition, many consider that the legal sphere is predominant in the negotiation of the armed conflict. The truth is, while legal solutions should be offered and they in turn end up founding the accords in the transitional justice, they generate moral reluctance, since people normally address the issue from a criminal law view point rather than a much wider perspective. It is important to say, some would like *retributive justice*, at the old-fashioned way, in which it was easier to understand the penalty, while in negotiation contexts they are led under a more established paradigm of *restorative justice*, the victims have a more predominant role and therefore the integral reparation and the promise of non-repetition.

Throughout my classes of International Criminal Law, I have defined the transitional justice as “justice of resignation”(justicia de la resignación) since the societies that long-lived in the middle of constant violation of human rights could not or did not want to search, judge and punish (as international duties) those violations had rigged common criminal systems, sometimes because whomever held the power was who established the rules

and new regulatory decrees (consider the Nazi case, or the most recent one, Chile, where the re-elected Bachelet has recently announced a constitutional reform, precisely to leave behind the current Chilean constitution, which was Pinochet dictator’s legacy) other times, because the same competitors for the power, competed in atrocities and then accorded on blockages to the legal regime, on granting themselves pardon, amnesties and other forms of impunity. This is no possible today, since those forms are outlawed for the most serious crimes.

The international criminal tribunals are often seen as a panacea due to the very deeply rooted wrongdoings and impunity. However, the evidence shows that International Criminal Court that has just uttered a few judgments—bearing in mind it started to work about 15 years ago—this court is characterized by using the selection and prioritization principles reserved to the most serious crimes and therefore to the highest responsible.

Even though I am a professor of a subject entitled International Criminal Court. I am skeptical about those international courts responding appropriately before situations such as the Colombian one. I have more confidence on schemes such as The Special Peace Jurisdiction (*Jurisdicción Especial de paz (JEP)*) accorded in the Havana under the condition that experiences such as the one on justice and peace, or the investigations on the relationship, paramilitary-politics (*parapolítica*) are not discarded; at least as long as they were coordinated during the performance of Ivan Velasquez, today an important member in the process of overcoming impunity in Guatemala.

I also believe that a Truth Commission (*Comisión de la Verdad*), such the one accorded in The Havana, will not openly say what happened. This is a task that previous clarification experiences have developed, from the oldest ones, such as the commission formed by Guzman Campos, Umaña Luna and Orlando Fals Borda, to the most recent

one which is the Center of Historic Memory (*El Centro de Memoria Histórica*). The most relevant challenge of the Truth Commission will be to offer us explanations that can lead to the reconciliation and the no repetition.

Another great challenge to face by the FARC is the transition from the armed intervention to the politics. While John Jairo and I were discussing some topics for this introductory section, we remembered that hackneyed saying by Von Clausewitz, *the war is the continuation of the politics by other means*. The challenge could not be *the continuation of the war through the politics*, but *the expansion of the democracy*. That is indeed, very difficult for our society, considering the devastating experience that was (and that apparently continues being, since recently Imelda Daza was target of an attack) the genocide of the Patriotic Union, popular movement (*Union Patriótica*).

La larga duración de esta guerra tiene como trasfondo una sistemática subvaloración de los conflictos sociales y políticos que exacerbaron la Violencia y que perduraron más allá de los acuerdos bipartidistas. Cuando las élites empezaron a enfrentar la Violencia quisieron resolverla a costo cero. Partían arrogantemente del supuesto de una escasa capacidad de proyección armada o política de unas guerrillas de origen y composición campesina, o le apostaban a su bandolerización y desaparición como proyectos políticos insurgentes.

Esta ha sido una guerra prolongada porque tanto guerrillas como Estado se ilusionaron con una pronta y decisiva victoria militar, incluso en momentos de negociación, como el del Caguán, aprovechado por ambas partes, mientras estuvieron sentadas en la mesa, para incrementar su capacidad bélica.

Que Colombia haya entrado así a la fase de terminación pactada de la confrontación es, hoy por hoy, un triunfo de la democracia para el mundo que hará de Colombia uno de los referentes más frescos y laboriosos para la solución de los conflictos armados internos. Colombia es observada hoy como ejemplo de las complejidades de la guerra y, a la vez, ejemplo de las complejidades de la negociación.

Nos tardó tanto llegar hasta aquí porque esta ha sido para muchos, y de diversas maneras, una guerra con la que ha sido posible convivir en relativa tranquilidad. Pese a la enorme cantidad de víctimas, esta ha sido vivida como una guerra ajena, distante de los centros de poder político y económico, anclada en las periferias, lejana socialmente para los habitantes de las ciudades. Ha sido, en gran parte de su trayectoria, un conflicto armado de muertos anónimos, de muertos campesinos, de tragedias rurales”

Nuestro entusiasmo con la terminación negociada del conflicto armado interno está lleno de alertas, de las cuales debemos ser conscientes, para no desfallecer en este propósito colectivo y atribuirle a la paz impactos negativos que no le corresponden. Al respecto, el analista y exministro de Relaciones Exteriores de Israel, Shlomo Ben Ami, nos advierte: “La guerra la hacen los guerreros, la paz la hace la sociedad”. Y a la sociedad esa tarea le tomará mucho tiempo”.

Las Farc no fueron el principio de todos nuestros males, ni su desaparición como actor armado marcará el fin de todas nuestras dolencias. La paz soñada está lejos. Pero el camino para llegar a ella se vislumbra más claramente cuando no está lleno de muertos. (En línea).

I would like to bring into question two recent articles: the first one, written by Gonzalo Sanchez, general manager of the Historical Center of Memory (Centro de Memoria Histórica) in collaboration with Maria Cristina Gonzalez, for Arcadia Magazine, entitled A path with no more dead people (*un Camino sin más muertos*) (Sanchez, 2016).

We have, in different times and intensity, lived that path, but it has never cease in the last decades. I remember the first time I saw Carlos Pizarro, entering the cathedral in Manizales accompanied by his bodyguards. Who he needed, considering he was entering the funeral services of Bernardo Jaramillo Ossa, killed in the air bridge of Bogota, the very same day he stopped using his bullet-proof vest. Bernardo Jaramillo had taken the UP's (Union Patriótica) presidential candidacy after Jaime Pardo was murdered. One month after Jaramillo's murder, Carlos Pizarro was also taken, he was killed on a flight from Bogota to Barranquilla; the memories were written on Carlos Fuentes' posthumous book *Aquiles o el guerrillero y el asesino*. These three important characters for the class and political struggle were, by then, the most guarded people in Colombia. These murders teach us all that neither bodyguards not protection schemes are enough, what needs to be ended is the hatred, and that is the most difficult part. Gonzalo Sánchez (2016), also tells us: “ours, has been a long-lasting and heartbreaking war, it kept more and more weapons, but less and less society” (2016, online)

Let's hope that the Peace, holds that society that became an orphan because of the war. This will be partially said by the plebiscite that will take place soon, to this regard, I will say just two things. Although I was in favor of Ferrajoli's thesis and other authors who defend the unquestionable importance of the Human rights and therefore, these not being subject to the majorities' rules, It is a fact that the President Santos decided on the popu-

lar referendum for the accords, which is the most complicated path considering previous experiences in countries such as Guatemala, Chile or Uruguay in this side of the globe, or Spain in Europe. There is no doubt this being due to the urgency of giving (the necessary) legitimacy to what was accorded in the Havana, correspondingly, Ferrajoli adds, there are legitimate rules, but they are not valid (desirable) and there are rules that are valid, but not legitimate; hence in a context of so much political and social aggressiveness, seeking for both, valid and legitimate accords would be the most convenient.

However, I find childish the arguments that claim that we are to vote on the referendum for the peace content rather than for the peace itself. The content of the rights are almost always mediated by political, economic and social junctures, and most times it is difficult to distinguish between a right and its own contents and reach. This is more of a contemporary feature. An indigenous leader told me once “in the past, it was easier to speak about rights, because it was said: here it is a school or a hospital needed; now it is precise to say some rights are not being guaranteed or things like that”. Finally, the Court has spoken and the challenge will be the government’s and everybody else’s who believe in the necessity and wish of giving a Yes to the peace.

Going back to the origin: a first challenge for the others to be possible, thus, in the plebiscite we cannot settle for the threshold. In 1998, a citizens’ mandate that appeared at first not to have much success, got ten million votes, with concrete messages to the armed actors: “Stop kidnapping people, respect life, do not disappear people, do not attack people’s integrity, do not recruit children...”. it was primarily a humanitarian message. Today, the message is even more substantial and with a binding effect, do we have to surrender to four and a half million votes?

The second article, with which I would like to conclude, was written by Hector Abad Faciolince (2016), he claims, “Here I will say, what many would regret me saying” and continues:

“If President Santos really wants to make peace with the whole country, he should offer to the military, and to Uribe and his interests and fears, a deal that protect them. The adjusted penalties or related to the conflict should be addressed equally to everybody. I am afraid, the war will continue if the military and the civilians get stronger penalties than the guerilla. If Santos decides on a special treatment to the military and civilians involved in the conflict (and he is the only one with the power to do so), I believe that even the Democratic Center party (Centro Democrático) would vote Yes on the plebiscite.

Here, there is certain right and left that will not rest until their opposition gets punished. It is precise to disarm that right and left with a special pardon”.

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