



TRANSITIONAL JUSTICE MECHANISMS: INTERNATIONAL CASES

INTRODUCTION

“For the UN, transitional justice is the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law.” - United Nations Approach to Transitional Justice

Over the three-year course of the GOC-FARC peace talks, there has been much debate about possible transitional justice mechanisms to support the post-conflict transition. On September 23rd 2015, an agreement on justice was announced by President Santos and FARC command ‘Timochenko’, signaling a significant step towards peace, which now has a deadline of March 23rd 2016.

Among the mechanisms mentioned in the announcement of the agreement were “comprehensive truth, reparations, justice and non-repetition” measures, and a “truth, coexistence and non-repetition clarification commission.” Significantly, the agreement will create a “Special Peace Jurisdiction,” (SPJ) of two spaces: the Courtroom, and the Peace Tribunal. Colombian magistrates, as well as a small group of highly qualified foreigners, will sit in these spaces. The SPJ will cover all those who have been directly or indirectly involved in the conflict, including members of both guerrilla groups and state forces. To gain any special treatment by the SPJ, the person must contribute to truth and reparations, and guarantee no repetition. The sentencing laid out by the SPJ is the followingⁱ:

- For those who contribute to truth and confess their crimes immediately, a minimum of five and maximum of eight years with “restriction on freedom” “in special conditions”;
- For those who do not immediately but later confess and tell the truth, a minimum of five and maximum of eight years with an “effective restriction on freedom” in “ordinary conditions”;
- Those who deny their crimes, and are later found guilty, will spend 20 year in prison in “ordinary conditions”.

In order to understand the implications of this mechanism in Colombia and anticipate possible concerns, it is useful to examine measures that have been employed in other countries when regular local justice systems were deemed unable to fulfill transitional justice goals. This spotlight will examine a few cases that could influence implementation of transitional justice in post-conflict Colombia.

ICC: GERMAIN KATANGA, DRC

The International Criminal Court (ICC) focuses on genocide, crimes against humanity, and war crimes. It was established in 1998 by the Rome Statute, which was brought into effect by state parties in 2002.ⁱⁱ



State parties or the UN Security Council can refer “situations” of human rights violations to the Court for investigation if they believe the states are not able or willing to conduct “genuine” investigations and judicial processes in their own judicial systems. The Prosecutor can also initiate investigations upon receiving information from local entities. The ICC can only conduct investigations in a state that has not referred the situation if it deems that state unable to fulfill judicial investigative and prosecution responsibilities per the Rome Statute. Twenty-two cases in nine situations have been brought before the ICC so far.ⁱⁱⁱ

The ICC has made two convictions in its 13-year history, most recently in March 2014 against Germain Katanga, former leader of the Ituri Patriotic Resistance Forces in the Democratic Republic of Congo (DRC), who conducted a massacre in Bogoro village. The Court made a 2-to-1 decision to convict Katanga as an accessory on four counts of war crimes and one of crimes against humanity. Katanga will be in prison for 12 years.^{iv} Analysts, victims’ representatives, and others have mixed reactions, with some expressing appreciation that the victims’ right to justice has been fulfilled, and measures can be taken (outside the ICC) to provide reparations. Others criticized the decision not to convict Katanga of sexual slavery and use of child soldiers, which is mentioned but not included in the conviction because of an apparent lack of strong evidence that Katanga was directly responsible. One of the three ICC judges who processed the case also expressed disagreement with Katanga’s conviction as an accessory when he had a central role. Overall, however, the conviction was praised as a significant representation of the ICC’s fulfillment of its goals and responsibilities.^v

IACHR: RIO NEGRO MASSACRES, GUATEMALA

The Inter-American Court of Human Rights (IACHR) was created in 1979 upon ratification of the American Convention on Human Rights by members of the OAS. Its mandate is to apply the Convention to violations of human rights in OAS states. Cases are referred to the Court by member states or by the Inter-American Commission on Human Rights, and in this adjudicatory function the Court makes a ruling, which can include a conviction. The IACHR also has advisory functions, so it makes recommendations to members on how to effectively uphold human rights.^{vi}



One of the most well known cases processed by the IACHR was that of five massacres carried out against the people of Rio Negro, Guatemala, by state forces between 1980 and 1982. Mayan community members protested their

resettlement when the construction of a dam made their homeland unlivable, and the government reacted with violent oppression, alleging that the protest was due to the subversive guerrilla influence. Victims' groups presented the case to the Commission in 2005, and recommendations on justice for Rio Negro were made to the Guatemalan government. When these recommendations were not adopted, the IACHR took the case in 2010 and found the State to be responsible for violating almost every Article of the Convention. The Court's September 2012 decision ruled that the State had a range of obligations to fulfill the victims' rights, including return of the victims' remains to their families, a historical memory museum, and psychological care for survivors. The State has since made progress in some obligations, but not all, and there has been broad criticism of its slow efforts to fulfill the rights of the victims of this and other conflict-related violations.^{vii}

ICTY: SLOBODAN MILOSEVIC, FORMER YUGOSLAVIA

The International Criminal Tribunal for the former Yugoslavia (ICTY) was the first UN-established war crimes court, and addresses crimes against humanity, war crimes, and genocide committed in the Balkans conflicts between 1991 and 2001. The ICTY has conducted multiple trials and proffered 160 sentences for leaders of the armed groups. The ICTY continues to process high-level individuals and support local justice systems in the processing of mid- to low-level command cases.^{viii} The ICTY Prosecutor decides when to initiate investigation of an individual, and operates independently, not influenced by any external body. Upon finding grounds for prosecution, the Prosecutor presents cases for trial.^{ix}



In 1999, Slobodan Milošević – then President of the Federal Republic of Yugoslavia – and four others were indicted by the ICTY. This was the first indictment of a sitting head of state by an international court. Milošević was accused for the murder and deportation of hundreds of thousands of Albanians in Kosovo. Milošević's death in 2006, after four years of trial but before a conviction could be made, underlined criticism of the Tribunal at the time. This included the amount of red tape that had to be navigated to investigate, and the inability of the ICTY to apprehend other individuals under the same investigation, instead relying on national police forces who lacked the capacity and political will to support the investigations. The two former leaders who were indicted at the same time as Milošević were still at large at the time of his death, further delaying any sort of sentence and justice for the victims.^x

INTERNATIONAL COMMENTARY ON COLOMBIA

Previous statements about Colombia by ICC Prosecutor Fatou Bensouda caused controversy in Colombia, and were clarified in a speech by Deputy Prosecutor James Stewart. He addressed the Legal Framework for Peace, which will apply to the FARC upon signature of a peace agreement. He stated that reduced, suspended, or alternative

sentences may be permissible if they are not so short that they become insignificant in light of the magnitude of crimes, and therefore invalidate the genuineness of the process. He added that amnesties would raise serious issues if provided for Rome Statute crimes.^{xi}

Since the agreement on justice was announced, Bensouda has stated only that she will examine the text in detail when it is released, but that she is so far satisfied that at least it does not include outright amnesty.^{xii} However, Human Rights Watch Americas Director Jose Miguel Vivanco stated that the agreement facilitates impunity, as those responsible for crimes against humanity will not go to prison but rather be detained in "special conditions", so the agreement will never be accepted by the ICC.^{xiii}

The IAHRRC has been less forthcoming with statements on how it views Colombia, and has not yet made a statement on September's announcement. However, analysts look to other Latin American cases to highlight the breadth of possible IAHRRC reactions to Colombian transitional justice, for example the Court has both supported and criticized amnesties and alternative sentences in the past.^{xiv}

Other commentary includes a statement by US Special Envoy to the peace process Bernard Aronson, who emphasized that the agreement does not allow for impunity, and is a strong example of a local mechanism that will benefit Colombia.^{xv} In addition, Colombian victims' representatives have spoken out, stating that they see the agreement as a positive step forward towards peace, with sanctions that also contribute to reparations.^{xvi} However, without the full text of the agreement, it is impossible to ascertain whether Colombia's local mechanisms will measure up to international standards.

What is certain is that Colombia is under close scrutiny by the ICC and other international entities as it progresses towards the application of justice for the range of crimes that have taken place in its long internal conflict. Only time will tell whether the mechanisms proposed in September can fulfill the difficult task of satisfying all involved, from local victims to international justice bodies.

ⁱ Comunicado conjunto, GOC and FARC, September 23rd 2015. <http://bit.ly/1PMo0yO>

ⁱⁱ ICC Website at <http://bit.ly/QnGNHE>

ⁱⁱⁱ ICC Website at <http://bit.ly/1e0wSCq>

^{iv} The Prosecutor v. Germain Katanga. <http://www.icc-cpi.int/iccdocs/doc/doc1529337.pdf>

^v ICC Convicts Congolese Warlord. Voice of America, March 7th, 2014. <http://bit.ly/1Q1MYdn>

^{vi} Corte Interamericana de Derechos Humanos webpage <http://bit.ly/1EVVHgT>

^{vii} Rio Negro Massacres v. Guatemala, Case Summary. Loyola Law Review, 2014. <https://iachr.ils.edu/cases/r%C3%ADo-negro-massacres-v-guatemala>

^{viii} ICTY Webpage <http://www.icty.org/sections/AbouttheICTY>

^{ix} ICTY Prosecutor's Office Webpage <http://www.icty.org/sections/AbouttheICTY/OfficeoftheProsecutor>

^x Prosecutors Seek To Learn Lessons. Global Policy, June 2006. <http://bit.ly/1NIFbIZ>

^{xi} "Transitional Justice in Colombia and the Role of the International Criminal Court" James Stewart, Bogota, May 13th 2015. <http://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf>

^{xii} "Acuerdo sobre justicia conllevaría impunidad para los autores de delitos graves": HRW. El Espectador, September 25 2015. <http://bit.ly/1MZexqz>

^{xiii} Ibid.

^{xiv} El proceso de paz y sus límites en el derecho internacional. El Tiempo, March 16th 2015. <http://bit.ly/1OABISL>

^{xv} "En acuerdo de justicia de Gobierno y Farc no hubo impunidad": EE. UU.' El Tiempo, September 25 2015. <http://bit.ly/1KGozXw>

^{xvi} "Victimas consideran pacto con Farc 'decisivo' para respeto de derechos humanos. El Espectador, September 28 2015. <http://bit.ly/1MXhPI>