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Narratives of transitional justice in Latin America

Efforts aimed at enhancing stable democracies and the rule of law in the region

As a consequence of the constant human struggle for a more just and peaceful world, diverse transitional justice's scenarios continue engaging the majority of the world's societies. Latin America is not the exception. Multiple events that the region has experienced in recent times attest this situation.

The new efforts and advancements towards the enhancement of the rule of law, and the consolidation of a long and stable peace in the region, reflect a joint effort of various national and international bodies to promote a balanced and effective protection of human rights, as the foundation of democracy. In the described scenario, the purpose of this report is precisely to review and analyze some recent transitional justice's developments in Latin America, as well as the tensions and efforts that have arisen in the region, in the process of guaranteeing the rights of the victims of gross human rights violations during the dictatorships, civil wars, and internal armed conflicts that have taken place in different countries of the continent.

Recent transitional justice developments in the region

Both South and Central America countries are continuing to face transitions from a violent past with the aim of protecting victims' rights to justice, truth and reparation. In terms of dealing with past or ongoing internal armed conflicts, in December 2012, the Inter-American Court of Human Rights declared that the State of **El Salvador** was

responsible for the slaughter of about 1000 farmers in *El Mozote*, committed by the military forces of this country in the context of counterinsurgency operations that took place during the internal armed conflict between 1980 and 1991. The president of the Inter-American Court, Diego García Sayán, issued a concurrent vote, which has been interpreted as a modulation of the Court's jurisprudence on amnesties in cases of internal armed conflicts.



Memorial of *El Mozote's* massacre, El Salvador.

Photo: worldpress

In November 2012, the Inter-American Court of Human Rights also condemned the State of **Guatemala** in the case known as *Gudiel Álvarez and others - "Military Journal" V. Guatemala*, for the forced disappearance of 26 people between 1983 and 1985, who had been identified by the military intelligence as "internal enemies".

Another transitional justice case that has been highly discussed in Guatemala is the judgment of a

Federal Court against the former dictator Efraín Ríos Montt. The ruler was found guilty for the homicide of 1771 Ixil Mayas during the eighties, which was characterized by the Tribunal as a genocide in the context of Guatemalan armed conflict, that lasted 36 years, killed 200,000 citizens, and left 45,000 people missing. However, shortly after the decision was announced, the Guatemalan Constitutional Court overturned the ruling on procedural grounds.

According to the judgment, Ríos Montt's right to due process was violated during the proceedings. In the described context, the trial of Ríos Montt has been highly controversial: while some sectors claim that the proceedings against the former dictator hinders the path towards peace, others –especially the country's indigenous majority, still widely marginalized– consider the conviction as a *conditio sine qua non* for a reconciliation process to take place.

In **Colombia**, President Juan Manuel Santos, in 2011, led the enactment of the *Victims and Land Restitution Law*, which seeks to respond to the multiple victims' de-

Peace: a legal limit and baseline for future peace agreements.

The reform introduces in the Colombian Constitution interdisciplinary transitional justice instruments, in order to facilitate a negotiated solution to the internal armed conflict, without renouncing to essential victims' rights to truth, justice and reparation.

Among the new features included in the amendment, are the creation of a Truth Commission, and the inclusion of criteria for prioritization and selection of crimes to facilitate and organize the exercise of the criminal action in contexts of macro-criminality. The Colombian Constitutional Court endorsed the latter possibility in August 2013, after a process where representatives of Colombian legal, political, and academic community, widely discussed their implications. The reform establishes, however, that the exercise of the criteria for the selection of crimes is conditioned by the expedition of a law by the Colombian Congress, which will also be subject to the further control of the Constitutional Court, prior to its enforcement.



In Oslo a dialogue table between Colombian Government and FARC-EP was formally installed in October, 2012

Photo: 20minutos.es

mands on justice, truth and reparation, after more than five decades of armed conflict. Furthermore, in 2012 Colombian Congress passed a constitutional amendment known as the *Legal Framework for*

Likewise, in August 2012 the Colombian government also formalized the *General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace*, with the oldest guerrilla

group of the continent: the Revolutionary Armed Forces of Colombia (FARC).

After several months of peace talks, on May 26 and November 6 2013, respectively, the parties announced settlements on the first two points of the Agenda outlined in the aforementioned General Agreement: Comprehensive Agricultural Development and Political and Citizen Participation.

Dialogues on the remaining four points of the Agenda still continue, generating great expectations, concerns and debates, both in the national and international field, mainly about how much truth, justice and reparation Colombian society is willing to sacrifice in order to attain a peace agreement with guerrilla groups.

In 2013, three other countries in the region enforced laws designed specifically to guarantee victims' rights: **Mexico, Ecuador, and Bolivia**. In January 2013, Mexico's Congress issued the "General Law on Victims", with the aim of recognizing and securing the rights of the victims that have suffered damages as a consequence of criminal activity. Subsequently, in January 2014, the Mexican government installed the National System for the Attention of Victims, in charge of consolidating the first national registry of victims in Mexico.

On the other hand, in October 2013 the National Assembly of Ecuador approved a bill to support the prosecution of gross violations of human rights and crimes against humanity that occurred in this country between October 4 of 1983 and December 31 of 2008, and also established mechanisms for victims' reparation. Lastly, in December 2013, Bolivia endorsed an Act that supports the creation of a Truth Commission to investigate and prosecute human rights violations committed during the dictatorships that ruled this country be-

tween November 1964 and October 1982.

In February 2011, the Inter-American Court of Human Rights condemned **Uruguay** for the kidnap, torture and forced disappearance of María Claudia García de Gelman in 1976. The events took place during police and military operations of the Uruguayan security forces, with the collaboration of Argentinian armed forces. The implementation process of this judgment, far from being subject of a unanimous assessment, is causing controversies in the Uruguayan institutions and society. Thus, it has motivated several pronouncements of the Executive, Legislative, and Judiciary branches, and a subsequent decision of the Inter-American Court of Human Rights in an effort to find a balanced way out.



The Inter-American Court of Human Rights has addressed many transitional justice cases in the region.

Photo: Archive of the Inter-American Court

In **Peru**, President Ollanta Humala denied a pardon applied for by the former President Alberto Fujimori, who had been found guilty and condemned for the commission of gross human rights violations during his mandate, between 1990 and 2000. This decision created significant political tensions, framed in a discussion about the proper legal and political treatment of the violence that took place in Peru during the eighties and nineties of the last century, due to the struggle between guerrilla groups and the Peruvian state.

Simultaneously, in March 2011 the Inter-American Commission on Human Rights issued a report that was applauded by some sectors and rejected by others, concerning the State's responsibility over extrajudicial executions committed in 1997, during an operation to release some hostages that were taken by members of the Túpac Amaru Revolutionary Movement. The Inter-American Court of Human Rights will likely deal with those cases in the near future as well.

Later on, in 2013, Peru celebrated 10 years of the Truth and Reconciliation Commission's Final Report, which describes violations of human rights suffered by the victims of the Peruvian conflict. Meanwhile, as an example of the efforts of Peru to ensure the victims' right to justice, in the same year the Supreme Court confirmed a 25-year imprisonment imposed upon those found guilty for the Barrios Altos massacre. Moreover, the Peruvian judiciary sentenced the former army captain, Jose Esquivel, to 15 years in prison, after being found guilty for the forced disappearance of Santiago Cueto Antezana, who had been detained at the Military Base Acobamba, Huancavelica, in 1984.



Session of the Truth and Reconciliation Commission in Peru.

Photo: liberalismoperuano.blogspot.com

In August 2012, **Brazil** witnessed the first proceeding to punish crimes committed during the dictatorship from 1964 to 1985: the

judgment against Sebastião Rodrigues de Moura, regarding the forced disappearance of members of the Araguaia communist guerrilla, between 1972 and 1975. In this criminal trial, the judge Nair Pimenta de Castro argued the continuous nature of the crimes and, thus, the non-applicability of the Amnesty Act of 1979.

The judgment was adopted in a particular context where various sectors in Brazil and institutions still insist on the validity of the Amnesty Act –unlike its neighbors, where hundreds of military leaders have been prosecuted for crimes committed during the Latin America dictatorships despite similar amnesty laws–.

During the same period of time, Brazil's Truth Commission announced that their mandate was limited to the investigation of the crimes committed by state agents during the military dictatorship, not the ones of the opponents. This conclusion rose criticism from retired military officers, concerned with the creation of a "partial truth" about what had happened during the dictatorship.

In **Argentina**, recent convictions against members of the military and police forces increased the number of prosecutions in this context. The life imprisonment against Emilio del Real, Luis Sosa and Carlos Marandino, issued by the Federal Court of Comodoro Rivadavia for an event known as the Slaughter of Trelew—the execution of 16 political activists in 1972–, is one example. So is the judgment of the Federal Court of Mendoza against various police officers and retired military members, for crimes against humanity committed during the dictatorship.

Also, in March 2013, the Argentine judiciary system sentenced the former dictator Reynaldo Bignone, to life imprisonment for crimes against humanity committed in the

clandestine detention center known as “Campo de Mayo”.

According to a report prepared by the Superintendence for the Prosecution of Crimes Against Humanity –a dependency created by the Supreme Court of Justice of Argentina–, from 2008 to May 2013, there were 439 national convictions concerning crimes against humanity. Likewise, the Argentine Ministry of Justice recently informed that in 2013 only, there were 23 convictions for crimes against humanity during the military dictatorship in that country.

Likewise, **Chile** has also been characterized by public debates on the extent to which the society has come to terms with its dictatorial past. Moreover, the Working Group on Enforced or Involuntary Disappearances of the UN insists on the need to ensure that the people condemned for forced disappearances, honor their custodial penalties. In this scenario, the recent commemoration of the 40th anniversary of the *coup d'etat* promoted by Augusto Pinochet that overthrew Salvador Allende’s government has raised conflicting opinions. On one hand, some political actors, together with the judiciary itself, recognized their responsibility for tolerating, not opposing or even collaborating with the dictatorial regime. On the other hand,

there is a sector that still supports the legitimacy of the *coup d'etat*, and defends the measures taken during this time, which they avoid to name as a “dictatorship”.

Tensions and efforts for the consolidation of democracy in Latin America’s post-conflict scenario

The aforementioned recent transitional justice developments in the region are significant peace-building efforts to overcome the consequences of gross violations of human rights, caused mostly by civil wars, armed conflicts or a dictatorial past. Yet, this quest to pursue mechanisms that allows the satisfaction of victim’s rights, without challenging consolidated peace processes, is not exempt from emotions and, most of the times, ideology.

Controversies are frequently initiated against measures to investigate, prosecute and sanction the perpetrators of serious human rights violations, arguing their incompatibility with peace agreements and amnesties granted in the course of such settlements.

It may be true that in the trials and tribulations before a transition from dictatorship or war to democracy, or prior to the signing of a peace treaty, concessions to the parties



The Konrad Adenauer Stiftung’s Group of International Criminal Law recently published the Third Volume of the book *Inter-American Human Rights System and International Criminal Law*.

may be decisive to achieve an agreement. However, it has been repeatedly demonstrated through studies and history itself, that a forced peace at the expense of the most fundamental principles of justice and victims rights provides a weak basis for peace building. As a result, there is not actually a dichotomy between peace and victims' rights, but a close relationship of mutual conditioning among them.

Finding a sustainable balance for social peace is a delicate task. Yet, the discussion about what is the proper equilibrium should involve broad sectors of society: victims, combatants, government, academia, the judiciary system, the media and society in general. True legitimacy of agreements and transitional justice instruments is achieved through public debates of all the different issues that a transition to peace involves –i.e. justice, truth, reparation, and reintegration of former combatants–. Consensus and acceptable compromises for all the interested parties may only be attained with a transparent, open and public dialogue.

In the absence of such a joint endeavor towards a society's common vision of peace, the debate is often reduced to retributive justice and channeled through national and international courts, which are agencies that may well respond to the individual pursuit of justice, but can hardly address the broader picture.

Nevertheless, given that the traditional judicial institutions have shown that they lack the capacity to address the demands on justice, truth and reparation of millions of victims during a post-conflict scenario, the Inter-American Court of Human Rights has recently restricted the requirement of criminal prosecution in these contexts to the most atrocious crimes. Particularly, cases in which impunity, due

to lack of prosecution, investigation and sanction, would challenge the credibility and the existence of the rule of law. Moreover, the Inter-American Court of Human Rights has emphasized the use of other transitional justice measures to satisfy the victim's rights.

These instruments, such as administrative reparation, recognition of responsibility, and the installation of truth commissions, are necessary to achieve the restoration of social peace after internal conflicts, through the satisfaction of victims' demands for truth, reparation, justice and guarantees of non-repetition. Forgiveness and reconciliation –or at least a state of individual and collective spirit that allows a peace building process to take place–, can only be achieved after the satisfaction of these claims.

Another pressing transitional justice challenge in Latin America is to establish the treatment that should be given to agents of the state that had committed, supported, or approved human rights violations. In these cases, the interests of society and, particularly, the victims, sometimes are confronted with the rights of the accused –i.e., due process or the presumption of innocence–.

Due to an inadequate protection of the interests and rights of victims during dictatorships and civil wars in the region, the Inter-American Court of Human Rights has established a strong case law that not only orders measures to reveal the truth behind serious human rights violations, but also demands reparation for the victims, recognition of State's responsibility and the prosecution of the perpetrators.

Furthermore, the Inter-American Court has even voided amnesties, after considering them to be against the dispositions of the American Convention on Human Rights. While some sectors and

States have considered this jurisprudence as a positive effort to address the prosecution of pending human rights violations, other have considered that international intervention in human rights cases is inconvenient, given that it reopens old wounds that were just beginning to heal.

A quest for tailor-made public policies aimed at sustainable peace building

The complexity of the different post-conflict scenarios in Latin America requires differential solutions to facilitate the satisfaction of all the diverse interests at stake. The peace building examples aforementioned are a testimony of this on-going process that is increasingly enriched with more inclusive and sustainable agreements, thanks to the gradual consolidation of democracy and the rule of law in the continent.

Beyond individual traumas and the testimony of brave victims that have fought vigorously for their rights and the consolidation of peace in Latin America, the collective memories of the communities that suffered serious human rights violations, are sensitive to the way in which the rest of society, and the State in their representation, narrates such events.

While the set of transitional justice instruments today is available to any peace-building scenario, its application in each place and time requires a tailor-made response, sufficiently flexible to be viable, but, at the same time, inspired and conditioned by the most basic principles of justice and civilization in order to be lasting.

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