



JUSTICE FOR PEACE
The Restorative model in the Special Jurisdiction for Peace
Presented in the Conference Northern Ireland and Colombia: Lessons from Peace
26th – 27th April 2022
Yale University
New Haven, CT

Eduardo Cifuentes Muñoz
Justice in the Appeals Chamber
President of the Special Jurisdiction for Peace

Ladies and Gentlemen:

It is an honor for me to be able to participate in this event and talk with you about the contributions of the Special Jurisdiction for Peace to transitional justice processes in the world. In this event we are analyzing the cases of Ireland and Colombia, but these are, as you will see, two very different experiences that represent different contributions to peace making and peace building processes in our respective countries.

In this presentation I want to analyze the three models of transitional justice that we have had in Colombia: from the model of amnesties and pardons, typical of the processes of the 1990s, to the process with the FARC-EP, which is based on continuing dialogue to obtain the truth of what happened and for the recognition of the damage caused to the victims.

The model of amnesties and pardons

Colombia has a long tradition in peacebuilding and in carrying out peace processes. As Iván Orozco Abad shows, in a now classic text on the application of humanitarian law in

Colombia, the figure of the rebel was built under the shadow of the combatant. In this way, at the end of the wars of the 19th century, it was common for the parties in dispute to demobilize and guarantee their political participation, on the basis that the rebels had taken up arms to make a political project come true, which after demobilization they would pursue by peaceful means. Because of this vision, the rebels were given privileged treatment and were not sanctioned for their participation in the war, with which it seemed that the status of combatant was recognized within the framework of a non-international armed conflict. Thus, at the end of an armed conflict, the armed actors signed a peace treaty and agreed to forgive each other for the crimes committed during the confrontations, except for barbaric acts, which today we would classify as international crimes. In these cases, amnesty was denied, and the person was investigated and tried for the crimes committed.

In the peace processes of the 1980s and 1990s, amnesty continued to play a central role, but these are processes without the participation of the victims and without taking their rights into account. The idea of investigating the international crimes committed by the armed actors was foreign to these peace negotiations and, with very few exceptions, no investigations were carried out to determine the crimes committed in the context of the armed conflict or to establish who their most responsible were. Criminal proceedings were the only forum in which crimes were investigated and there was little truth that contributed to a better understanding of the causes of the conflict, the crimes committed, and the damage caused to their victims. To that extent, the only guarantees of non-repetition that existed were those related to constitutional reforms aimed at broadening political participation, but none of a structural nature that would allow the armed groups' political agenda to advance.

The justice and peace retribution model

The peace processes of the 1990s culminated in the demobilization of guerrilla groups such as the M-19, the Corriente de Renovación Socialista CRS, which was a dissident group from the ELN; a dissident group of the EPL and the Quintín Lame indigenous guerrilla movement. As a result of a series of decisions and legal provisions adopted in



the 1960s and 1980s, the emergence of paramilitary groups was allowed, tolerated or promoted. This led to a situation of deterioration of the Rule of Law, not only due to the action of these armed groups, but also because the response of the State was not in accordance with the principles of democratic justice, to the point of establishing a system of secret judges and witnesses in what was called at the time a criminal law of the enemy.

The Justice and Peace model was characterized by light sentences, but with prison time. Several challenges arose in the implementation of the model, but I would like to refer to two of them: on the one hand, when dealing with systemic crimes, the penal system had to learn to investigate massive and/or systematic crimes and, therefore, to adopt strategies of investigation that went beyond the case-by-case analysis and that will focus on the patterns of macro criminality.

The other challenge presented by Justice and Peace was that of the participation of the victims and the type of process that this entailed. Following the classic model of the criminal process, the participation of the victims was quite limited, since it was allowed in few spaces and, normally, with a view to economic reparation and not to obtain the truth and to satisfy the other rights of the victims. The space of participation of the victims in justice and peace is limited to a small part of the trial, in which the victims narrated the damage suffered with the international crimes and that story and the evidence provided served as the basis for the determination and evaluation of the damage and its subsequent compensation. This last point had to be satisfied by the State, which responded in solidarity for the damage caused by the paramilitary groups. That is, despite the absence of acknowledgment of State responsibility, economic reparation was guaranteed as part of its duty of solidarity with the victims of the armed conflict.

The restorative and dialogical model of the Special Jurisdiction for Peace

The peace process with the FARC-EP is the most recent transitional justice process in Colombia. The Final Peace Agreement created a complex investigation system that is based, unlike other processes, on the centrality of the victims and on a strategic view of the investigation from the beginning. The two fundamental contributions of the current



transitional justice process are, on the one hand, an investigation model that is based on the selection and prioritization of cases; and, on the other, in a victim-centered system, for which its main purpose is not retribution for the crimes committed, but reparation for the damage caused and the restoration of broken ties with a view to laying the foundations for non-recurrence.

This model leaves aside the international and domestic punitive penal reaction in force - which contemplate the maximum penalties for these crimes judged as the most reprehensible--, and instead appeals to a notoriously less drastic restorative-retributive modality: in the first place, some so-called restorative sanctions (*sanciones propias*) that will be imposed on those who, upon being found most responsible for the most serious and representative crimes, acknowledge truth and responsibility before the Recognition Chamber -in the first stage of the dialogical procedure-. In this case, the sanction will have a duration of 5 to 8 years and will include "effective restrictions of freedoms and rights" - not deprivation of liberty - and will have reparative and restorative functions of the damage caused. Secondly, the alternative sanctions that will be imposed on those who acknowledge truth and responsibility in the adversarial procedure. These sanctions will have a duration of 5 to 8 years and their function will be essentially retributive because they consist of deprivation of liberty as we traditionally know it. The difference with the restorative sanctions lies in the fact that the recognition of truth and responsibility is given late, which deserves a greater reproach. Finally, the ordinary sanctions that are imposed on those who do not recognize truth or responsibility and are defeated in court. The sanction is prison between 15 and 20 years.

The new transitional justice formula is strategic, selective, and subject to prioritization criteria. Indeed, instead of prosecuting all the culprits, which would be impossible, it focuses on those most responsible for the most representative crimes. The rest are amnestied or pardoned, if the crimes are not serious, or they will receive non-punishment measures -such as the waiver of criminal prosecution--, provided that they contribute to the truth and the reparation of the victims.



The new solution strengthens the active participation of the victims, called to confront the stories of the alleged perpetrators and to offer their own information and reports. The dialogical method for receiving and confronting stories of victims and perpetrators is indicated as the most appropriate and suitable for maintaining an interaction of this type. The practice of the JEP has been successful in working from the macro case, which can be synthetically defined as a large case that groups or accumulates many events that occurred in the armed conflict and that are similar among themselves, to identify criminal patterns, concentrate on the most serious and representative crimes and attribute criminal responsibility to those most responsible for these acts. On the other hand, this practice has managed to discard the investigation and prosecution on a case-by-case basis and, instead, has proposed the study and identification of crime patterns, that is, a set of behaviors with a common underlying nature -which is not limited to the repetition of the same criminal type, or to behaviors associated with the commission of the same crime-, and that is characterized by responding to a criminal plan or policy. Finally, the most responsible person has been defined as the one who, due to their hierarchical position, rank or leadership, de facto or de jure, of a military, political, economic or social nature, has had a decisive participation in the generation, development or execution of macro crime patterns, e.g. domain of these paradigmatic types of crime that occurred in the armed conflict, and who, regardless of their hierarchical position, rank or leadership, participated decisively in the commission of especially serious and representative crimes that defined the pattern of macro crime, to the point that his judicialization would substantially contribute to the goals of the transition to a degree comparable to the prosecution of the architect of the policy.

How does the JEP work?

The special jurisdiction for peace has three chambers: the amnesty and pardon chamber, which analyzes and grants transitional benefits to former members of the FARC-EP and their collaborators; the Chamber for the Definition of Legal Situations, which is responsible for studying and granting the benefit of waiving criminal prosecution to members of the Public Force, civilian third parties, and State agents who have committed crimes related to the non-international armed conflict; and the Chamber for the



Recognition of Truth, Responsibility and Determination of Facts and Conduct, which investigates, in the different macro cases, the patterns of macro crime and macro victimization and determines who was most responsible for these crimes.

The JEP is characterized by having two types of procedures: one dialogical and another adversarial. The first is the general rule and seeks to establish a dialogue between the victims and defendants so that they can provide as much truth as possible about what happened. Once the Recognition Chamber determines the facts and behaviors and identifies who was most responsible, the defendant has the opportunity to acknowledge his/her responsibility for the patterns of macrocriminality and the representative facts. If it does so, a Resolution of Conclusions is issued, with a proposal for restorative sanctions that is discussed with the victims and is sent to the Recognition Section of the Tribunal for Peace, where the corresponding restorative sanction of rights is imposed, without entailing deprivation of liberty. If the person belatedly acknowledges his responsibility, a custodial sentence of 2 to 5 years is imposed.

But if the person does not acknowledge his responsibility, the adversarial procedure is activated, and the case is sent to the Investigation and Accusation Unit (UIA), which charges before the Section with Absence of Acknowledgment of the Tribunal for Peace. An adversarial trial is held and, if the person is found guilty, according to the probative evidence provided, a sentence of 15 to 20 years in prison is imposed.

In addition, in the Tribunal for Peace there is the Revision Section, which deals with the review of sentences, and the Appeal Section, which deals with resolving appeals and serving as the interpretive closing court of the JEP.

The truth is the central axis of the system. It must be understood that in this balance between justice and truth that is the Colombian model of transitional justice, a little retributive justice is renounced in exchange for a maximum of truth and reparation for the victims of the armed actors of the armed conflict. Without the truth, it is not possible for any of the defendants to access the benefits provided for in the special jurisdiction for peace.



What is the balance of the first 4 years and what is expected of the new macro-cases?

The balance of the first years of the Special Jurisdiction for Peace is very good. Many atrocities that Colombia experienced during the conflict have become known thanks to the work of the JEP. With its investigations and findings, the Jurisdiction has exceeded the threshold of truth reached by ordinary justice and has clarified new portions of truth about some of the most serious and representative events of the war. More than 13,300 defendants are linked to the jurisdiction and more than 325,000 victims of the armed conflict have been accredited. As specific advances of the investigation through the 7 macro-cases opened, I can mention the following:

- The JEP has issued the first 3 accusations for international crimes within the macro cases related to the taking of hostages and other serious deprivations of liberty by the FARC-EP, and false positives or extrajudicial executions presented as casualties in combat by the state armed forces. Most of the people accused in these two cases (30 out of 34) acknowledged responsibility and today, in the case of extrajudicial executions, the public hearing of acknowledgment is taking place. The judicial proceedings of those who did not acknowledge responsibility in this case have been forwarded to the Accusation Investigation Unit of the JEP.
- The other 5 macro cases advance towards imputations. Three of them investigate crimes committed in some specific territories in Colombia and are known as macro-territorial cases. These cases involve more than 200,000 victims recognized individually or as part of collective subjects. The other two macro cases investigate crimes committed against more than 5,000 members of a persecuted political party: the Patriotic Union political party and the illegal recruitment of more than 18,000 children. In these cases, information has been compiled from reports submitted by victims', ethnic and human rights defenders' organizations, as well as from State entities. The related appearing parties have been summoned to voluntary depositions to speak about the findings of the investigation and the truth demands of thousands of victims as well as their observations which had been received and incorporated to the cases.



- Regarding the new prioritizations, it is expected, basically, to cover the serious crimes that occurred in the context of the armed conflict that until now had not been prioritized, to have a more complete understanding of the complexity of the armed conflict and to speed up the route to indict the most responsible, given the transitory nature of the Jurisdiction. The investigation strategy in these macro cases is given by actor or type of victim and not only by criminal conduct as in some of the seven already opened. With this, it is intended to clarify 298,559 criminal acts of forced disappearance, forced displacement, homicides, massacres, and sexual and gender violence and thus cover, practically, the universe of international crimes that occurred in the Colombian armed conflict.

What is expected in terms of restoration in the next 2 years?

The acknowledgment of responsibility of those most responsible in the other macro cases and the imposition of the first sanctions with restorative content are especially expected. In the first place, the space of the JEP allows the victims to narrate their pain, to put it into words, to communicate it and, therefore, to turn it into suffering. The task of the defendants is to recognize that pain so that they find themselves in the suffering of the other and that they understand that what happened should not have happened. It is expected that the dialogical process in several macro cases of the judicial process before the JEP will culminate in the next two years, which will have a very important restorative effect because the pain of the victims is communicated and dignified through the clarification of the truth.

On the other hand, the imposition of sanctions with a restorative content will imply that those sanctioned will begin to carry out works and activities with a restorative content, which are consulted with the victims, and which ideally are articulated by the national government. It is expected to see ex-combatants inserted in these jobs, which may be: participation in effective reparation programs for displaced peasants, environmental protection and recovery, substitution of illicit crops, literacy and training in school subjects, cleaning and eradication of anti-personnel mines or explosive remnants of war;



and construction and repair of infrastructure in rural or urban areas such as schools, highways, health centers, homes, community centers, aqueduct, electrification and connectivity networks, among others. In this way, those defendants not only contribute to the repair and restoration of the damage caused by executing the imposed sanction, but also participate in a scenario of inclusion of ex-combatants, so that they are incorporated into the new society resulting from the agreement of peace.

Conclusion: peace through the word

Colombia has gone through various models of transitional justice. The current model is one that is based on achieving peace through words. Not only because it is the result of a peace negotiation in which it was assumed that the national government was not defeated and that, therefore, it was necessary to listen to the demobilized armed actor and to its victims.

Within the framework of the judicial process, constant dialogue allows progress to be made in achieving peace and in the dignity of the victims through recognition. The word becomes, in this way, the central axis for achieving peace. Therein lies its strength, but also its weakness. The regulatory framework itself is aware of this. For this reason, the first judicial and procedural route that it establishes is the one that revolves around the word and the dialogical search for truth. If this fails, the second route is followed, that of the criminal procedure itself, which can mean sentences of up to 20 years in prison for those found guilty. Given that the route of the criminal process may be, due to its delay and demands of all kinds, a reunion with a past of impunity, the effort we are committed to is that the first route becomes a high-speed, efficient, and quality highway to stabilize by way of Justice, peace. That is the challenge.

One final remark:

One cloud covers the entire transitional solution. The enormous and insatiable demand for justice of the victims cannot be resolved, at least in the first place, through the criminal and punitive mechanisms of ordinary criminal justice, which have historically produced



a high balance of impunity and are incapable of processing until its end the totality of the claims of justice. That is why the transitional solution was imposed. But this transitional solution cannot be judged considering the parameters of ordinary criminal justice, since it entails a new paradigm that is selective and not universal, since it focuses on those most responsible and only on the most serious and representative crimes. On the other hand, this model, as far as the non-adversarial route is concerned, opposes traditional schemes since it is based on the voluntary contribution of truth and acknowledgment of responsibility. The paradox lies in the fact that if the non-adversarial route fails, then within the JEP itself, the traditional route of adversarial-type criminal proceedings is contemplated, in which truth and responsibility are not freely recognized but through an accusatorial criminal justice system, which is more complicated and delayed, in addition to carrying a past of ineffectiveness. It would be paradoxical if the new paradigm were replaced by the classic model of criminal prosecution. In any case, the two routes are there, and their coexistence could serve so that those responsible for serious crimes end up preferring the contribution of truth to jail, which is the rule of the adversarial regime. So far, in the two most advanced macro cases, the non-adversarial route has been successful, and, for this reason, we keep our hope alive that the cloud that covers the transitional solution will gradually disappear and that truth and restorative justice will succeed.

