About the Working Paper Series

The Centre for Human Rights and Legal Pluralism (CHRLP) Working Paper Series enables the dissemination of papers by students who have participated in the Centre's International Human Rights Internship Program (IHRIP). Through the program, students complete placements with NGOs, government institutions, and tribunals where they gain practical work experience in human rights investigation, monitoring, and reporting. Students then write a research paper, supported by a peer review process, while participating in a seminar that critically engages with human rights discourses. In accordance with McGill University's Charter of Students' Rights, students in this course have the right to submit in English or in French any written work that is to be graded. Therefore, papers in this series may be published in either language.

The papers in this series are distributed free of charge and are available in PDF format on the CHRLP's website. Papers may be downloaded for personal use only. The opinions expressed in these papers remain solely those of the author(s). They should not be attributed to the CHRLP or McGill University. The papers in this series are intended to elicit feedback and to encourage debate on important public policy challenges. Copyright belongs to the author(s).

Abstract

This essay considers whether sanctions alternative to imprisonment could be a viable way to address the commission of international crimes at a national level following an international armed conflict. States have an obligation under international law to prosecute such crimes, but are also often at the negotiating table towards the end of a conflict. Using the Colombian peace agreement's section on justice for victims as a model (in both its positive and negatives), I explore the possibility of alternative sanctions in zero-sum situations where the justice vs peace

Contents

Introduction 4

1. Context and Scope 4

1.1. Theoretical Context 5

1.2. Methodology ....

Introduction

In his article “Bridging the Gap between Criminological Theory and Penal Theory within the International Criminal Justice System”, Athanasios Chouliaras considers that international criminal justice (ICJ) has passed through its “formative” and its “mature” phases, and is now in its “reflective phase” – he states that we must engage in a “reevaluation the institutions of international criminal law in the light of the distinctive traits of international criminality”.[1] In the spirit of reevaluation, this essay considers whether sanctions alternative to imprisonment

1. Context and Scope

1.1 Theoretical Context

The specific question that this essay seeks to answer is underpinned by two different theoretical frameworks: first, this questioning conc a specific practice in the world of transitional justice. Transitional justice refers a set of judicial and extra-judicial mechanisms put in place in a time of transition from conflict to peace, in order to right the wrongs that have occurred and ultimately, to prevent their reoccurrence. Secondly, I draw the underlying logic of my arguments from penological theory, the study of the punishment of crime.

The field of transitional justice examines how regimes in power address the crimes that were committed in a time of conflict.[3] The ultimate justificdd3pa4(al)-2 (t)1-2.1 (d)-1 (o)-1 (f)-31 (g)-3 (r)

in particular, holding criminal trials for those who breached humanitarian and international law. Indeed, many international covenants include or have been interpreted to include a requirement for states to prosecute and punish the perpetrators of certain types of[7] crimes.

The driving tension that has arisen from situations of transitional justice is often referrfs ofMC

Theorizing punishment is by no means a new area of study. There have been many justifications given for imposing punishment on perpetrators of crime over the centuries - retribution, deterrence, incapacitation, fostering a sense of security, etc.[10] The imposition of prison sentences is rising throughout the world, and leading in some areas to overcrowding and breaches of prisoners' human rights.[11] Recently, more and more progressive and critical

I am examining this peace agreement as it is indeed unique—it is the first modern example of a state contemplating the use of alternative sanctions for the perpetrators of international crimes in the context of peace negotiations, in a time when international law explicitly requires the prosecution and punishment of these individuals.

1.3 Colombia

Internal conflict has been ongoing in Colombia since 1964, and has been characterized by continuing violence between state forces and various paramilitary groups, crime syndicates, and guerilla rebel groups.[14] The motivations of each group are varied and complex, and are intertwined with the country's history of anti-communism and drug-trafficking. Approximately 94,000 peoples' deaths can be attributed directly to the 5-decade-long conflict, most of whom are civilians.[15] One of the most powerful antagonists to the Colombian state is the FARC-EP (Revolutionary Armed Forces of Colombia—People's Army), a guerilla movement that formed in the 1960s as a force for Marxist-Leninism.[16] FARC-EP has been accused of using illegal tactics throughout the decades, including kidnapping for ransom, extortion, extrajudicial killings, and other methods that violate human rights.[17] The Colombian Armed Forces have

LTh2(P)-2 (ha)1 (s be)2(f)-2 J anty tha tac0t1t6udin ui2 (g)-2 (ai)-1 (on(fc)2 (eue)2 (t)ya)1 (v)-

on conditions that both sides will agree to, one of which is the possibility of avoiding prison sentences for those who recognize and confess their responsibility.

1.4 Terminology

In order to delimit the scope of this essay, it is important to define the terms I will be using:

Alternative sanctions: This term connotes a system of sanctioning that diverges from the regular criminal system, either in type or length of sanction. In the Colombian context, greatly reduced sentences are considered “alternative”, as are various types of “community service” based projects that only entail moderate deprivations of liberty, such as participation in the implementation of infrastructure construction and repairs, or projects such as eliminating landmines, replacing illicit crops, etc.[19] In this essay, I assume that these sanctions are given at the end of a procedurally fair and legal criminal trial.

Stalemate: In the context of this essay, “stalemate” refers to situations in which mechanisms of peace and justice appear to frustrate each other's goals. Specifically, it is a situation where a peace agreement without transitional justice mechanisms would be unacceptable, but this peace agreement will not be signed by some or all parties if it contains the possibility of sanctions unacceptable to the parties.[20] I am not using this term to refer to situations of post-conflict in which the situation has stabilized and the victor has relative freedom to choose the mechanisms of transitional justice that are warranted.

Victim: This essay uses the definition set out in the United Nation “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”

---

[19] Final Peace Agreement for the Termination of Conflict and the Construction of a Durable Peace, signed June 23, 2016, online at http://farc-epeace.org/peace-process/agreements/agreements.html [Final Agreement]. I recognize that this version is an English translation and therefore may not reflect perfectly the provisions of the original agreement. As well, the organization of this agreement is inconsistent, making precise citations difficult. When necessary, I refer to the closest possible section header, and include paragraph numbers when these are available.

[20] See Juan Carlos Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Leiden: Martinus Nijhoff Publishers, 2013) at 80 [Ochoa]. Ochoa notes the examples of South Africa, El Salvador, Guatemala, Haiti, and Mozambique.

as well as on the national level, given that States have the primary duty to prosecute these crimes.[24] This section explores the idea that international crimes are fundamentally different from national crimes, but also that prosecuting these crimes on a national level is fundamentally different from international prosecution. On this basis, restricting the choice of punishment to imprisonment appears unreflected and inappropriate.

2.1 The Uniqueness of International Crimes

The creation of all of the international ICJ institutions has, in general, been justified by recalling the horror of the crimes that were committed en masse, and with shocking cruelty and disregard for the value of human life, as in Germany's Third Reich or Cambodia under the Khmer Rouge.[25] MalÍ > !áa ¦Ñ ;% áÑ!áh • ,Ô;ÑÍ ƒÁ§!#â ‘,Ê;Ña "â f

 13

Based on this generally accepted idea of the uniqueness of international crimes, it is therefore surprising that the international response has taken the form of tribunals and courts that bear such striking resemblance to national systems of criminal justice, which are designed to deal with individual criminality. Specifically, for the purposes of this essay, it is curious that the system of sanctions in international tribunal appears to be based upon the model of a national criminal justice system. All international criminal tribunals, without exception, give imprisonment as the minimum sanction.[41] National tribunals, at least on paper, also impose a minimum of a prison sentence.[42]

This is logical, if one thinks of international crimes as simply more serious versions of national crimes – if this is true, then it is obvious that imprisonment is the least a convicted person should receive. However, the current status of sentencing of international crimes butts up against the limits of the logic of basing the length of the punishment on the severity of the crime. Punishments must be proportional to the crime, but under national law, one murder may attract life imprisonment. What, then, of a genocide? One accused can only serve one life sentence. This "problem of proportionality" is a common critique of ICJ institutions.[43] Instead, based on the idea that international crimes are fundamentally different from international crimes, it would make sense for this to be taken into account when determining the availability of different sanctions. Instead, the drafters of the ICC's Rome Statute dismissed alternative sanctions as "entirely inappropriate".[44]

2.3 Dislocation between the Goals of ICJ and the Sanctions Given

In this same vein, there appears to be a general lack of attention paid by ICJ institutions to setting out specific goals for each punishment given, and to setting out plainly how imprisonment is supposed to meet these goals. Silvia d'Ascoli submits that there is an absence of justification for sentencing in ICJ: "the system of international criminal justice has not yet

---

[41] Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge UP, 2009) at 51-53 [Drumbl].
[42] *Ibid* at 69.
[43] D'Ascoli, *supra* note 12 at 27.
[44] International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session: Draft Statute for an International Criminal Court with Commentaries*, 22 July 1994, at 60. Online at http://www.refworld.org/docid/47fdfb40d.html

two “yardsticks” (goals of punishment and victims’ rights) were chosen as they reflect both pragmatism and principle.[64] Achieving the goals of reconciliation, rehabilitation, pedagogy and truth-finding, as well as fulfilling in a meaningful way the rights of victims, are more likely to lead to long-term, positive peace, on top of immediate negative peace. As well, fulfilling the rights of victims is a principle upon which the victims themselves, civil society, and the international community place great weight[65] and any alternative response to international crime is going to be scrutinized for its adherence to the principle that victims’ rights must not be ignored.

3.1 The Colombian Model

As noted in Part 1, the Colombian peace agreement’s section entitled “Agreement on Victims” will serve as an illustration of such a transitional mechanism. The 400-page Final Agreement addresses comprehensive rural reform, reforms of the democratic political system, the problem of illicit drugs, and finally, transitional justice. This final section creates four judicial and extra-judicial transitional justice mechanisms: a truth commission, a special unit to search for missing persons, a comprehensive system of reparations, and finally, the Special Jurisdiction for Peace (“SJP”).

The SJP is the criminal justice aspect of the Final Agreement, and its task is to “administer justice and investigate, clarify, prosecute and punish serious human rights violations and serious breaches of International Humanitarian Law.”[66] The SJP, which applies to any rebel groups that have signed the agreement as well as state forces,[67] foresees a mechanism that differentiates the process and sanctions based on both the crimes that have been committed and the degree to which the accused accept their responsibility and give a full confession.

64

First, the agreement foresees granting "the broadest possible amnesty"[68] to those who have committed political crimes, such as sedition or rebellion, as recommended by the Geneva Convention,[69]

obligation under international law of States to prevent, prosecute, and punish international crimes, this system has been subject to much criticism and debate as to whether such provisions constitute adequate punishment.

3.2 Alternative Sanctions and the Goals of Punishment

The specific goals of the SJP are enumerated: “The goals of the justice component … are to satisfy the rights of victims to justice, offer truth to the Colombian society, protect the rights of victims, contribute to the achievement of a stable and long-lasting peace and adopt decisions that grant full legal security to those who participated directly or indirectly in the internal armed conflict [...].”[76] While somewhat vague, these goals do seem to line up with the previous section’s argumentation that in conflict situations, the goals of punishment should be more restorative and victim-focused, as opposed to focused on retribution. It is made explicit that the implementation of justice mechanisms has the purpose of restoring peace to the country.[77] An analysis of the SJP shows that various restorative goals of punishment can be achieved in a meaningful way by this model in a way that is appropriate for a conflict-transition situation.

3.21 Rehabilitation of the Offender and Reconciliation with the Community

The judicial process that would be applied to participants according to this agreement provides possibilities for reconciliation with Colombian society and specific communities. In the context of this essay, I consider “reconciliation” to refer to repairing a minimum of bas trust between, on the one hand, the actors in the conflict (whether rebel or state agents) and on the other, the communities and individuals who were subject to the international crimes.

between us.[78] It is a large part of ensuring that violence does not reoccur.[79] The alternative sanctions envisioned by the Final Agreement are explicitly described to be "of a restorative and reparative nature".[80] The sanctions involve community-building projects that would work towards promises made in other areas of the Final Agreement, such as participating in reparation programs for displaced farmer peasants; programs for the protection of the environment in reserve areas; construction and reparation of infrastructure in rural areas, such as schools, roads, health centres, housing, community centres, municipal infrastructures; the improvement of electrification; demining, etc.[81] The accused would thus be engaged in rebuilding part of the devastation caused by the conflict, and would be, in fact, actively helping the victims by contributing to the development of their communities. The logic behind these sanctions seems similar to that of community service orders given for national crimes: the aim is for the offender to make reparations to the community. In Sierra Leone, with regards to the transitional justice mechanism of disarmament in exchange for stipends and training, it was observed that anger with this "preferential treatment" was short lived, but what remained was frustration with the impoverishment of the country, which sowed the seeds of further divisiveness.[82] Thus, sanctions that involve convicted persons helping to relieve the burdens of a community may foster attitudes more open to reconciliation.

Just as these rebuilding programs may allow the communities to accept the offender, it may also serve as a way to rehabilitate the offenders themselves. Active and effective rehabilitation of the offenders is often ignored in a prison system.[83] A convicted criminal, as a human being, deserves the chance to learn to correct his behaviour and recognize the

---

[78] International Institute for Democracy and Electoral Assistance, Reconciliation After Violent Conflict: A Handbook, David Bloomfield & Teresa Barnes, eds, 2003 at 12. Online at http://www.un.org/en/peacebuilding/pbso/pdf/Reconciliation-After-Violent-Conflict-A-Handbook-Full-English-PDF.pdf.

[79] Ibid at 19.

[80] Final Agreement supra note 19 at part 5.3.1.

[81] Ibid at part 5.3.1, "Sanctions applicable to persons that comprehensively acknowledge truth in the Chamber for the Acknowledgement of Truth and Responsibilities", parts A-C.

[82] Rosalind Shaw, "Linking Justice with Reintegration? Ex-Combatant

wrongfulness of his actions, and his punishment should in part aim for this goal. Because the sanctions given in the Colombian model are based on the convicted person's willingness to cooperate with the system, it reflects his or her current potential for rehabilitation, as opposed to a system of punishment that looks to the past for a person's worst moment. "Community service orders may be seen as having a mixture of objectives, including elements of punishment, reparation, and the potential for rehabilitation."[84] Community service confronts the offenders with the effects of their crimes, improves their attitudes towards society, and provide them with useful employment skills.[85] In the case of long-term internal conflict, contributing to the reparation of targeted communities may also help the perpetrator to recognize the widespread effects of the conflict and his or her participation in it. As well, those who are sanctioned with reduced prison sentences are required to commit to "his or her re-socialization through work, training or education during his or her period of deprivation."[86]

3.22 Fact Finding and Pedagogy

Part of the value of criminal trials is their ability to create a narrative of the crime(s), which is important for accountability, reconciliation, and providing justice to victims.[87] Transitional justice mechanisms in general are expected to contribute towards creating a historical narrative of the conflict, for the purposes of ensuring conflict does not return for another cycle. This particular model of alternative sanctions provides extra incentives for the accused to provide information that may contribute towards creating this narrative of truth.

reserved for those who do not give their full cooperation and acknowledge their responsibility. As noted above, retribution should not be placed at the top of the list of priorities for a judicial post-conflict mechanism. However, in some contexts, ignoring it completely may upset the balance that must be struck in order for the transitional justice project to gain public legitimacy, given the current emphasis that current international and national criminal systems place on retributive punishment. A penal process that completely rejects any retribution, in the context of peace negotiations, may be seen as an attempt to allow impunity for those who committed international crimes during the conflict.[95] The Colombian model attempted to strike this balance by reducing the retributive elements for pragmatic reasons.

3.3 Victims' Rights

The concept of victims' rights has gained increasing recognition in transitional justice situations – the argument for transitional mechanisms is more and more often framed in terms of vindicating victims' rights to justice, truth, and reparations.[96] These rights have been enshrined in various international instruments, most importantly the UN's Basic Principles, as well as the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity ("Updated Principles").[97] Both of these instru

examines the potential of the alternative sanctions model for compliance with these instruments - the agreement explicitly states, “the main purpose of the sanctions will be to satisfy the victims of the rights and consolidate peace.”[100] To what extent does this Colombian model give

listened to in cases of prioritization and selection of cases.”[106] The results of the trials and final sentences will be sent to the Truth Commission, which is mandated to make its information fully available.[107] - i ( ) T j - 0 . 0 m u 4 (n 7 . 0 . 1

of its human rights obligations.[111] However, principle 28 of the Updated Principles provides that while disclosing information about violations cannot exempt an accused from criminal responsibility, that "disclosure may … provide grounds for a reduction of sentence in order to encourage revelation of the truth." As well, the Inter-American Court of Human Rights has specified only that a punishment is a necessity in order to fulfill the right to justice,[112] and that "measures aimed at preventing criminal prosecution or voiding the effects of a conviction" are unacceptable.[113] Alternative sanctions do not necessarily run afoul of these requirements.

This issue brings up the question of how one can evaluate whether the right to justice has been fulfilled in a particular situation. One might consider whether the victims feel a sense of this right having been vindicated, or not - for example, if alternative sanctions erodes their confidence in the legitimacy of the entire peace process. This, however, will vary individual by individual, as victims are not one homogenous group with a homogenous opinion on the matter.[114] One might also consider the ICC's conclusion on the matter as determinative - whether the Prosecutor decides that particular alternative sanctions are evidence of the State being "unwilling or unable genuinely to carry out the investigation or prosecution," as per Article 17 of the Rome Statute. However, the ICC's Deputy Prosecutor has indicated that alternative sanctions may be acceptable and thus not trigger the court's jurisdiction, provided they are "consistent with a genuine intention to bring the convicted person to justice."[115] As well, it is not clear that the ICC's use of the term "justice" refers to the same type of justice that might satisfy this right.

If the ultimate goal of the right to justice is reconciliation and peace,[116] but this can be achieved in certain circumstances without criminal punishment, to what extent is the "right to justice" necessarily linked to a certain type or outcome of a crim

Bibliography

Books

d’Ascoli, Silvia. Sentencing in International Criminal Law: the UN ad hoc Tribunals and Future Perspectives for the ICC (Portland: Hart Publishing, 2011).

van Boven, Theo. “Victim-Oriented Perspectives: Rights and Realities” in Thorsten Bonacker & Christoph Safferling, eds, Victims of International Crimes: An Interdisciplinary Discourse (The Hague: TMC Asser Press, 2013) 17.

Crow, Iain. The Treatment and Rehabilitation of Offenders (London, Sage Publishing: 2001).

Cryer, Robert and Friman, Hakan. An Introduction to Criminal Law and Procedure (Cambridge: Cambridge UP, 2010).

Díaz, Catalina. “Colombia’s Bid for Justice and Peace” in Kai Ambos, Judith Large & Marieke Wierda, eds, BTT2 1 TTw J / 0.001 T (n t)- (e)2 (P)-2 (ublP O)3 (33.285 <i /T(sh)(33.28585 -1.29e

and Serious Violations of International Humanitarian Law” (2005) 1:76 Revue Internationale de Droit Pénal 77.

Zolo, Danilo. “Peace Through Criminal Law?” (2004) 2 Journal of International Criminal Justice 727.

International Jurisprudence or Treaties

Case of Gutiérrez-Soler v Colombia, Merits, Reparations and Costs, 12 September 2005. Inter-Am Ct HR.

Case of the Mapiripán Massacre, Judgment of September 15, 2005. Inter-Am Ct HR, Ser C No134.

Case of Velasquez Rodriguez, Judgement of July 29, 1988. Inter-Am Ct HR, Ser C No 4.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 Jul,01 Tw -290 001 Tw 2.2a Tf r69 (6t)1 (s)3(at)1 (i) 609 0 13

Avocats sans frontières Canada, “Note 4: The Justice Dimension of the Peace Agreement”, Practical Notes by Lawyers without Borders Canada, 2016. Online at http://www.asfcanada.ca/uploads/publications/uploaded_processus-paix-ang-note-4-pdf-105.pdf.

Final Colombian Peace Agreement, signed 26 September 2016. Online at https://farc-epeace.org/peace-process/agreements/agreements/item/939-agreement-victims

Human Rights Watch, “Human Rights Watch Analysis of Colombia-FARC Agreement” 21 December 2015. Online at https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement.

International