

Paul Seils June 2015

Squaring Colombia's Circle

The Objectives of Punishment and the Pursuit of Peace

Summary

A key item in negotiations to end the conflict in Colombia concerns the issues of criminal responsibility and punishment of FARC members for serious crimes committed by them in the course of the conflict. This paper argues that two questions need to be answered to guide the discussion: What are the policy objectives in punishing the guilty in these particular circumstances? And what are the best means for securing those objectives?

The particular circumstances relate both to the current attempt to end the half-century-long conflict through negotiations in Havana and the steps taken over the past ten years with regard to punishment that indicate relevant policy objectives. For instance, the demobilization of the so-called Self-Defense Committees led to a process in 2005 whereby senior-level members could exchange a full confession of crimes for a sentence of five to eight years' imprisonment. Some such confessions have related to the murder of several hundred individuals. It is impossible to suggest that the penalty in these cases was in any way proportional to the gravity of the crimes; however, this does not mean that the process is illegitimate. It means that the objectives of punishment were something other than imposing a "proportionate sentence."

TABLE OF CONTENTS

Summary	1
Introduction	2
The Objectives of Transitional Justice	2
International Law and Punishment	2
Conclusions on the Law	6
The Objectives of Punishment	8
Conclusions on Objectives of Punishment	12
Sentencing: Condemnation, Persuasion, and Peace	13
On the Nature of the Trial	14
Conclusions	15
Recommendations	15

The best way to understand the policy aims of punishment in the current context of peace negotiations is as a mixture of reformative, retributive, and communicative goals. In particular, in transitional contexts like Colombia, where one aim is to reaffirm core rights and social values, the communicative goal of punishment is especially important. It expresses not only society's disapproval of the conduct, but also affords the perpetrator the opportunity to reflect on his or her crimes and acknowledge their wrongfulness.

This paper argues that if the objectives of punishment are to be met, three key things are needed: First, trials must be public, accessible, transparent, and serious. They must be capable of capturing the solemn public process of determining the guilt or innocence of the accused so that the public is engaged and aware. Second, any punishment should include the possibility of requiring the convicted to meet with their victims (if victims so wish), to allow victims to express how the crimes have impacted their lives and seek a response from the perpetrators. Third, additional measures of punishment should be directed toward both some disagreeable consequences as well as reformative measures.

In normal circumstances punishment for serious crimes would mean incarceration, but these are not normal circumstances. Alternative measures that include financial penalties, asset seizure, temporary exclusion from political office, and community service orders may all go some way to meeting the goals of punishment. A suspended sentence should be added to these measures. Those who argue that some measure of incarceration is necessary must also recognize that such a measure will not reflect the gravity

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace

About the Author

Paul Seils is vice president of ICTJ. He previously worked in the Office of the Prosecutor of the International Criminal Court, the High Commissioner for Human Rights, and the International Commission against Impunity in Guatemala (CICIG). of the crimes in question. Ultimately, whether the objectives of punishment require incarceration in these particular circumstances will be a decision for the Colombian people.

Introduction

If negotiations between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) prove to be successful, the terms of the peace agreement are to be put to a popular referendum. One of the key issues facing the Colombian people will be whether to accept or reject proposals regarding the punishment of FARC guerrillas should they be convicted of serious crimes.

This paper focuses on two things: the objectives of such trials and the objectives of punishment. It may be assumed that a trial is simply the means by which we legitimately arrive at a punishment, but it would be a significant error, especially in a context that claims to pursue the objectives of "transitional justice," to miss the importance of the trial itself. A proper understanding of the importance of the process has direct consequences for our consideration of what may or may not be an acceptable measure of punishment.

With regard to punishment, this paper argues that an appeal to "proportionality" as the guiding factor in punishment is unhelpful here, given what has already been accepted practice in Colombia. Something other than restricted appeals to retributivism and proportionality are needed.

It may well be that lighter sentences than would normally be required are approved as part of a negotiated settlement in Colombia. Even if lighter punishments are somehow justified, the process by which convictions are reached must be serious and thorough, exposing the nature of the crimes and the participation of the accused. Those alleged to be responsible must be given a meaningful opportunity to face the accusations against them. The public must be able to see what has happened and participate in affirming the wrongfulness of the acts before the courts. Victims in particular must be given a sense that their rights are being vindicated, that someone is being held to account for things that should never have happened.

This paper addresses only the trial and punishment of those members of FARC considered to be among the most responsible for serious crimes.¹ The same approach is not necessarily advocated in respect of crimes committed by other entities in the conflict, like the armed forces. It may be that at least in respect of punishment a heavier sentence is required to reflect the solemn role of the armed forces as guarantors of the constitution and citizens of the country.

The Objectives of Transitional Justice

There are many misunderstandings and controversies about the nature of transitional justice. Some believe it is simply a form of criminal justice diluted by the need for transaction and compromise—a kind of "criminal justice lite." Alex Boraine perhaps addressed this misperception best when he said such a view

fails to account for the limits of law, particularly in cases of mass crimes such as genocide, ethnic cleansing and crimes against humanity. In trying to come to terms with these types of crimes, not only does our moral discourse appear to reach its limit, but it also emphasizes the inadequacy of ordinary measures that usually apply in the field of criminal justice.²

¹ For an examination of the idea of the most responsible, see, for example, Paul Seils, ICTJ, "Propuesta de criterios de selección y priorización para la ley de Justicia y Paz en Colombia," March 2012, www.ictj.org/sites/default/files/ICTJ-COL-PaulSeils-Propuesta%20de%20criterios%20de%20selección%20y%20priorización-2012.pdf

² Cited by Louise Arbour in "Economic and Social Justice for Societies in Transition," Journal of International Law and Politics 40:1 (Fall 2007): 2, footnote 2.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace Reaching the limits of moral and legal discourse requires taking another look at the social contract and the measures needed to restore the conditions for that contract to work. Transitional justice is an attempt to achieve justice in these complex circumstances. Above all, it aims to ensure that victims' rights are treated seriously and that effective efforts to restore trust between the state and its citizens take place to assist the development of a rights-respecting society.

The pursuit of truth, justice, reparations, and institutional reform all seek the same goals in transitional contexts: acknowledging that the normal response to violations is both unavailable and insufficient and that measures built around these ideas can provide a meaningful way to guarantee victims' rights and restore trust in state institutions as protectors of those rights. ³ Whatever approach is chosen, the punishment of the most responsible should not be considered in isolation from other processes, but in the context of the totality of measures that seek to address serious human rights violations.

International Law and Punishment

International human rights law does not require specific sentences for violations. The human rights treaty bodies that have interpreted the duties of the state to investigate and prosecute violations have made various findings, but they do not and cannot substitute their own views on specific sentences for those provided under national laws and procedures.⁴ In contrast, international arrangements and treaties regarding international courts and tribunals have established sentencing provisions.⁵

The UN Human Rights Commission,⁶ the UN Human Rights Committee, and the Inter-American Court of Human Rights have provided guidelines for states to ensure that punishment is proportional to crimes and that lenient sentencing does not transform into a manner of impunity.

The notion of proportionality means that there should be a proportional relation between the crime and the punishment: the more serious the crime, the more serious the punishment. If, in addition, the decision is taken to focus on those most responsible for serious crimes, punishment based on proportionality would require the most serious penalty imaginable.

As will be seen later in this paper, a plea to proportionality ignores both what appears to be already accepted practice in the case of Colombia (notably the penalties prescribed under the Legal Framework for Peace (Law 975 of 2005 or Justice and Peace Law) for demobilized paramilitaries) as well as the nature of the problem at hand—how to secure an end to the conflict while securing a meaningful punishment for serious crimes. The question to be answered is not only about the relationship of the punishment to the offense, but also the objective of that punishment in relation to other competing goals—in particular securing an end to the conflict.

³ This does not mean that all measures can or should be implemented or planned simultaneously; often this is neither practicable nor desirable. The state should make the most of available opportunities; taken together, they each make an important contribution to the project of recognizing victims' rights and restoring trust between the state and citizens.

⁴ See, for example, the Inter-American Court, *Barrios Altos v. Peru*, March 14, 2001. The court noted that although it could not and did not seek to substitute for the national courts in sentencing, in cases of serious violations of human rights it would look at the proportionality of the state's response and the nature of the conduct when it concerned state agents.

⁵ See, for example, Rome Statute of the International Criminal Court, Articles 77 and 80.

^{6 &}quot;Principles Relative to the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions," E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989). Principle 1 states, "Government shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal law and are punishable by appropriate penalties that take into account the seriousness of such offences," www.ohchr.org/ EN/ProfessionalInterest/Pages/ArbitraryAndSummaryExecutions.aspx. Note also Article 6 of the Inter-American Convention on the Prevention and Punishment of Torture:

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace

Inter-American Court of Human Rights

In the case of the La Rochela Massacre the Inter-American Court made several observations on sentencing. It decided that the punishment should be the result of a judgment issued by a judicial authority, that it should be proportional to the acts committed, and that "every element which determines the severity of the punishment should correspond to a clearly identifiable objective and be compatible with the Convention."⁷

The Inter-American Court has also noted in respect of a case dealing with enforced disappearance:

States have a general obligation, in light of Articles 1(1) and 2 of the Convention, to ensure respect for the human rights protected by the Convention, and that the duty to prosecute unlawful conduct that violates these rights is derived from that obligation. The prosecution must be consequent with the State's obligation to ensure rights; it is therefore necessary to avoid illusory methods that only appear to satisfy the formal legal requirements. In this regard, the rule of proportionality requires that the States, in exercising their duty to prosecute, impose penalties that truly contribute to prevent impunity, taking into account various factors such as the characteristics of the offense, and the participation and guilt of the accused.⁸

An interesting development may be under way at the court. In the case of the El Mozote massacres in El Salvador, the court's ruling followed similar lines as those in past decisions. It noted that the provision of the broadest amnesty possible at the end of a noninternational conflict could not extend to war crimes or crimes against humanity.⁹ The court, therefore, found El Salvador responsible for having failed to investigate and punish those responsible. It did not address the issue of what punishment would be necessary.

In a separate opinion in the El Mozote case, Judge Diego Garcia-Sayán noted that the development of the court's jurisprudence on the issue of amnesties had never dealt with the situation of a process aimed at ending a noninternational armed conflict, as had been the case in El Salvador.¹⁰ (Indeed, all of the relevant case law relates to violations on the part of state actors.) He noted that "armed conflict and negotiated solutions give rise to various issues and introduce enormous legal and ethical requirements in the search to harmonize criminal justice and negotiated peace."¹¹ He concludes:

In this context, it is necessary to devise ways to process those accused of committing serious crimes such as the ones mentioned, in the understanding that a negotiated peace process attempts to ensure that the combatants choose peace and submit to justice. Thus, for example, in the difficult exercise of weighing and the complex search for this equilibrium, routes towards alternative or suspended sentences could be designed and implemented; but, without losing sight of the fact that this may vary substantially according to both the degree of responsibility for serious crimes and the extent to which responsibility is acknowledged and information is provided about what happened. This may give rise to important differences between the "perpetrators" and those who performed functions of high command and gave the orders.¹²

⁷ Inter-American Court of Human Rights, La Rochela Massacre v. Colombia, May 11, 2007, para. 196.

⁸ Inter-American Court of Human Rights, Heliodoro Portugal v. Panama, August 12, 2008, para. 203.

⁹ Inter-American Court of Human Rights, The Massacres of El Mozote and Nearby Places V. El Salvador, October 25, 2012, para. 286

¹⁰ In addition to Barrio Altos v. Peru, these are Almonacid Arellano et al. v. Chile (2006), La Cantuta v. Peru (2006), Gomes Lund et al. v. Brazil (2010), and Gelman v. Uruguay (2011).

¹¹ Concurring Opinion of Judge Diego Garcia-Sayán, Judgment of The Inter-American Court Of Human Rights, The Massacres of El Mozote and Nearby Places V. El Salvador, October 25, 2012, para. 30.

¹² Ibid.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace This is not yet the confirmed position of the court, nor does it offer a precise opinion on the kind of punishment that would be necessary for serious crimes. However, his separate opinion indicates that the goals of proportionality in sentencing may be subject to limitations imposed by the objective of ending a conflict and may require a reimagining of the balance between proportionality and other objectives, or perhaps simply a broader understanding of proportionality in the context of a peace negotiation.

United Nations Human Rights Committee

In the case of *Bautista de Arellana v. Colombia*, the Human Rights Committee noted that disciplinary or administrative penalties alone would not satisfy the need for appropriate punishment, particularly in cases of grave violations of human rights.¹³

This decision establishes a requirement that criminal acts demand a criminal penalty. A fine or an entirely suspended sentence imposed by a criminal court seemingly would meet the minimum threshold of not being an administrative or disciplinary penalty. However, it is unclear what kind of sentence would pass the "illusory test," that is, what kind of sentence is necessary to be a "real punishment," not a way of ensuring impunity.

International Criminal Court

The Rome Statute of the International Criminal Court in Article 80 states that the ICC's sentencing provisions should not in any way prejudice national sentencing laws. This means that states may pass whatever sentences they deem appropriate under their own legislations; they do not have to follow the parameters established in Part VII of the Rome Statute.¹⁴

Article 80 of the statute is not concerned with the issue of appropriate sentencing as an indication of the genuineness of proceedings. While states are not obligated to pass similar sentences to those established by the Rome Statute, they are required to meet their preexisting human rights obligations—to ensure they do not pass illusory sentences. Indeed, if states are free under the Rome Statute to impose even harsher penalties than those prescribed by the Rome Statute, they are also free to impose more lenient penalties. That much appears to be uncontroversial.

While Article 77 establishes maximum sentences, it does not prescribe minimum sentences, because "the number and importance of aggravating circumstances may demand very concrete considerations."¹⁵ Article 77 also includes the possibility of fines and forfeiture, but only as additional elements to a principal penalty of imprisonment. While in some sense these are innovative measures, they also are at odds with national practice in several countries, including Colombia. For example, under Articles 34 and 35 of Colombia's criminal code the principal penalty can include or consist entirely of imprisonment, fines, or deprivation of other rights.

The Office of the Prosecutor of the ICC (OTP) has taken the view that imprisonment is essential as the only means of meeting the proportionality requirement.¹⁶ The prosecutor, to be fair, recognizes that the context requires an appreciation of all measures of accountability, including truth seeking, reparations, and reform. However, the emphasis remains on the notion of a penalty that is proportional to the crime. It is the very idea of proportionality that has to be explored in detail. The brevity of the prosecutor's communications on this issue means that the ICC did not enter into a public debate about a number of important

¹³ OHCHR, "Selected Decisions of the Human Rights Committee Under the Optional Protocol," vol. 6, 2005, 103–109, www.ohchr.org/ Documents/Publications/SDecisionsVol6en.pdf

¹⁴ This provision addressed, in part, a concern that states that allow the death penalty would not have been permitted to impose it as a State Party to the ICC. See Rolf E. Fife, "Article 77 - Applicable Penalties," in Otto Trifferer (editor), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Oxford: Hart Publishing, 2008), 1443.

¹⁵ Ibid., 1424.

¹⁶ See Semana, "Una 'carta bomba,'" August 17, 2013, www.semana.com/nacion/articulo/una-carta-bomba/354430-3

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace questions, including those raised by Judge Garcia-Sayán of the Inter-American Court in the El Mozote case. Similarly it could be argued that the reasons suggested for not prescribing a minimum sentence apply a fortiori to situations where the aim is not only to punish violations but also to simultaneously end a conflict.¹⁷

In a recent speech, James Stewart, deputy prosecutor of the ICC, offered a more complex view on punishment¹⁸. He recognized that its objectives encompass goals such as deterrence, recognition of victims' suffering, and communication of public condemnation, reflecting an important evolution of the debate. Stewart reaffirmed the idea that a total suspension of a sentence would shield the accused from their responsibility. While this argument is not without its problems from the perspective of the law, the issue cannot be addressed in this paper. However, it is positive that Stewart notes an alternative sentence would, in theory, satisfy requirements as understood by the OTP.

Conclusions on the Law

Neither international human rights treaties nor international human rights jurisprudence establishes specific penalties for serious human rights violations. International treaties and other instruments establishing tribunals, like the Rome Statute, provide sentencing provisions, but do not bind states in respect of national proceedings.

Only a limited number of issues can be unambiguously understood from the cases cited: that punishment should not be illusory and that criminal conduct requires a criminal penalty. Administrative, disciplinary, or quasi-judicial measures will not meet the standards required. While proportionality is often cited as a predominant factor, the cases have not asked to what extent the context is relevant in weighing different values and objectives.

Two issues are relevant in cases involving those most responsible within the FARC for serious crimes. First, unlike all of the cases so far that have developed Inter-American jurisprudence on amnesty for violations by state agents, Colombia is concerned with violations by nonstate agents. Second, the only way in which the most responsible of the FARC can be punished appears to be to require their agreement to submit to Colombian criminal law. (The usual presumption of the effectiveness of the system does not apply in the context of this prolonged internal conflict).

For Colombia, the OTP has accepted the reality of political deals whereby demobilization leads to more lenient sentences, as indicated by its position in relation to the Justice and Peace Law.¹⁹ The difficulty, however, is that the OTP's 2013 letter to Colombia's Constitutional Court appears to suggest that proportionality remains the key element in sentencing. As will be discussed later, a five- to eight-year sentence for the leader of a paramilitary group in respect of tens or even hundreds of murders cannot be described as proportional. If such a sentence is to be justified, it requires a different understanding of the purposes of punishment in these circumstances.

Perhaps neither the Inter-American Court nor the OTP have recognized yet that there is a potentially significant gap between a sentence that is genuinely or even relatively proportional and a sentence that while not being even relatively proportional could nonetheless be deemed to be more than illusory. This, it would appear, is the best explanation for the OTP's acceptance of the Justice and Peace Law's penalties of five to eight years in jail, even where the accused have confessed to killing several hundred individuals.

¹⁷ The Constitutional Court in Colombia has issued a statement indicating that a total suspension of the sentence would not be permissible. The court did not discuss the meaning of the "total sentence" or the ways in which the principal sentence might be composed.

¹⁸ James Stewart, "Transitional Justice in Colombia and the Role of the International Criminal Court" (speech, Universidad El Rosario, Bogotá, May 13, 2015).

¹⁹ See Office of the Prosecutor of the ICC, "Situation in Colombia: Interim Report," November 2012, para. 165, www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace An important element to be addressed is to ensure that not only the punishment, but the process as a whole, is more than illusory. The experience that Colombians have had of the Justice and Peace Law is, in this respect, something that should not be repeated. It was complicated, opaque, and far from accessible to the public at large. Prosecution of the most responsible has to be something that the society as a whole and the victims of the particular crimes can witness and understand. It should be solemn, serious, and transparent.

International Practice

The degree to which international practice can helpfully inform Colombia's approach regarding the appropriate balance between the pursuit of peace and extracting nonillusory punishments from a negotiated settlement is limited.

The punishment provisions under the Justice and Peace Law are significantly more lenient than the practice of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), for example.²⁰ The Inter-American Court has yet to consider the matter specifically; however, we know that it has thus far shown no inclination to seek to replace national sentences with its own estimation of what would be appropriate. Again, the OTC in its November 2012 report did not suggest that the Justice and Peace Law's maximum penalty of eight years would present a problem in its assessment of cases.

National Practice

Northern Ireland and Colombia represent perhaps the two most significant attempts to consider reduced sentences in transitional justice contexts. It has generally been more common to see pardons granted after convictions (sometimes very soon after convictions) or amnesties preclude prosecution.

In Northern Ireland, under the 1996 Good Friday Agreement, a system was created that allowed prisoners from both Republican and Unionist paramilitary organizations to be released early from prison.²¹ While the system created a minimum requirement that no one could be released until they had spent at least two years in jail, almost all of those who benefitted from the system served much more time than that. Only 3 out of 636 beneficiaries spent only two years in jail.²²

However, the uniqueness of the Northern Ireland experience is not limited to its early-release system, which only applied to people serving prison sentences at the time the agreement was signed. News reports in 2014 indicated that a different approach was taken to suspects who were not in custody:²³ approximately 186 people received letters from the director of public prosecutions stating that there were no proceedings open against them and that the government had no intention to prosecute them, but that new information or statements of self-incrimination could lead the matter to be reconsidered.²⁴ The letters do not rule out

²⁰ See, for example, Barbora Hola et al, "Consistency of international sentencing: ICTY and ICTR case study," *European Journal of Criminology* 9, no. 5 (2012): 540; James Meernik, "Sentencing Rationales and Judicial Decision Making at the International Criminal Tribunals," *Social Science Quarterly* 92, no. 3 (September 2011): 589–600, discussing punishment rationale and sentencing determinants empirically at the ICTY, ICTR, and Special Cour for Sierra Leone; James Meernik, "Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia," *The Journal of Conflict Resolution* 47, no. 2 (April 2003); 140–162; Barbora Hola et al, "Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice," *Leiden Journal of International Law* 22, no. 1 (March 2009).

²¹ See Kieran McEvoy, "Prisoners, the Agreement, and the Political Character of the Northern Ireland Conflict," *Fordham International Law Journal* 22, no.4 (1998); 1560, 1998; Christine Bell, "Dealing with the Past: Dealing with the Past in Northern Ireland," *Fordham International Law Journal* 26, no. 4 (2003).

²² Christine Bell, "Dealing with the Past: Dealing with the Past in Northern Ireland," Fordham International Law Journal 26, no. 4 (2003), 1113.

²³ Those not in custody were divided into three categories: 1) a small number who had escaped from prison, 2) a group who had warrants issued for their arrest, and 2) a group of those who may have been under investigation but had not yet been arrested. The letters that were issued relate to this last group.

For a detailed account of what the letters say and how the issue developed, see Vincent Kearney, "What do controversial On the Run letters actually say?," *BBC*, February 27, 2014, www.bbc.com/news/uk-northern-ireland-26376541

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace future prosecution entirely, thus falling short of an amnesty in strict terms. Yet, it is difficult to accept that there was no coordinated political hand behind a decision that gave the exact same outcome to all of the said suspects in apparently similar language.

The situation in Colombia is different than that of Northern Ireland. In one important sense all of the leaders of the FARC may be fugitives from justice if they were convicted of crimes *in absentia*. A decision will have to be made about what sentence will be imposed in respect of any prior convictions.

Colombia's Justice and Peace Law calls for a focus on prosecuting those most responsible and allows the attorney general to prioritize and select cases for prosecution; effectively this would allow a decision to suspend investigations of lower-level FARC suspects. Therefore, the greatest difficulty remains in respect of those regarded as the most responsible for crimes who have not yet been prosecuted and for those who are not yet in custody.

The example of Northern Ireland's early-release system cannot be considered in isolation; it must be considered alongside its approach to those not in custody. Two points are worth noting. First, several thousand prisoners from the FARC are currently in jail. A significant number of them may be eligible for an early-release system similar to Northern Ireland's. Second, a good number of these might be eligible for immediate release on the basis of an appropriate application of amnesty in light of Geneva Convention Protocol II, article 6 (5).²⁵ Serious consideration should be given to both of these issues.

However, Northern Ireland did not seek to disaggregate the most responsible from other perpetrators. While its approach may be instructive as a way to deal with those who are already in prison, it offers little guidance in terms of differentiating measures vis-à-vis the most and least responsible. Events in the last year in Northern Ireland regarding the nonprosecution letters also show the importance of ensuring that whatever measures are developed anticipate as many contingencies as possible. Failure to do so may well destabilize the process in the years to come.

The Objectives of Punishment

The literature on both the moral justifications and purposes of punishment is extensive. This paper can only offer the briefest conceptual introductions.

The purposes of punishment can include incapacitation, deterrence (specific and general), reform, retribution, restitution, and communication.²⁶ The last of these may include approaches that apply ideas of positive deterrence and persuasion.²⁷ For reasons that will become apparent, this approach offers the most compelling account of what criminal punishment can achieve in transitional contexts in particular. Further, it should be noted that both the justification and purposes of punishment are developed under the presumption that a system's fundamental efficacy is not in question.

²⁵ See , Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Penal Prosecutions, www.icrc.org/applic/ihl/ihl.nsf/9861b8c2foe83ed3c12564o3oo 3fb8c5/dda4oe6d88861483c12563cdoo51e7f2

²⁶ Incapacitation: protecting society by placing the offender in custody; b) specific deterrence: imposing unpleasant consequences so that the offender behaves differently after punishment; c) general deterrence: imposing unpleasant consequences on the offender so that all society is aware of the risks of offending behavior; d) retribution: imposing unpleasant consequences as an end in itself; e) rehabilitation: treating the offender through punishment to change his behavior and facilitate social reintegration; f) restitution – this focus more on the victim than other objectives and can include restorative elements in criminal penalties; g) communication - public affirmation of society's shared values, aiming to persuade the offender as a rational moral agent of his wrongful conduct, while denouncing his unacceptable conduct and consolidating trust in accepted norms and the institutions that protect them.

²⁷ See, for example R.A. Duff, *Trials and Punishments* (Cambridge: Cambridge University Press, 1986) Chapter 9, 233–262; Pablo de Greiff, "Deliberative Democracy and Punishment," *Buffalo Criminal Law Review* 5, no.2 (2002): 373–403.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace Transitional justice becomes necessary only where the normal responses to serious violations are not possible, usually due to the twin factors of the massive scale of violations and political or institutional fragility. Indeed one possible definition of transitional justice suggests precisely the kind of justice that is both possible and necessary when the efficacy of the system has been critically challenged by massive breach.²⁸ This does not necessarily mean that the conventional understandings of the purposes of punishment become irrelevant, but some become much less compelling than others.

All punishment aims to make the offender suffer. One key question is, what is the purpose of that suffering? A purely communicative approach might denounce the unacceptability of a given behavior with no more than a statement. But the purpose of punishment goes beyond disapproval to condemnation. That condemnation—taking the criminal seriously as a rational moral actor—hopes to engage him or her in the recognition that a given conduct was wrong. This persuasive aspect is the fundamental purpose of the punishment, not a contingency resulting from it.²⁹

If one accepts that transitional justice relates to a context in which the efficacy of the system protecting fundamental rights has broken down, it makes sense to think of accountability efforts as aiming to restore trust in that system. Trust-building efforts would privilege approaches that take all parties, including criminals, seriously as rational moral agents and place less emphasis on purely or predominantly consequentialist approaches. Communicating condemnation and its persuasive effect are more compelling in transitional contexts generally, as will be shown, especially when the justice system seeks to accommodate a conflict-resolution process at the same time.

Incapacitation / Protection of Society

Incapacitation as an objective seeks to put the perpetrator in a situation in which he cannot present a danger to society at large. The most obvious means of incapacitation is imprisonment. The underlying logic is the belief that such a step is necessary because of the danger of reoffending. If such a danger does not exist, then that logic falls away.

Specific Deterrence

Specific deterrence is aimed at the particular perpetrator. Unlike incapacitation, the aim is not to stop him or her from committing crimes for an allotted period of time, but to force a change in future behavior as a result of imposing unpleasant consequences for past conduct.

At a certain point the issue becomes one of risk assessment for the perpetrator. If the risk of similar unpleasant consequences in the future is not a sufficient disincentive, the offender will not be deterred. If the offender is driven by a perceived need, ideology, or moral conviction, the threat of unpleasant consequences decreases as an effective means of preventing future offenses. More significantly, if there are no apparent reasons to believe that the offender is likely to commit similar offenses again, the logic of specific deterrence disappears.

In the case of the FARC, the hypothesis is that the crimes that have been committed, or are being committed, are in principle due to the context of the conflict itself. If the conflict ceased to exist, there would be no incentive to commit more crimes. With the end of the conflict and the demilitarization of the FARC, the means, opportunity, and motive for similar criminal conduct would be removed.

One might expect that the most senior leaders of the FARC would be disinclined to engage in criminal activity after the signing of a peace agreement whose terms they had agreed to. If these

²⁸ Paul Seils, "La restauración de la confianza cívica mediante la justicia transicional," Justicia Transicional en Ibero-America (2009):

³⁰⁻³³

²⁹ See R.A. Duff, Trials and Punishment (Cambridge: Cambridge University Press, 1986), 236.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace suppositions are correct, the objective of specific deterrence in respect of the most senior members of the FARC seems irrelevant.

General Deterrence

The effectiveness of general deterrence depends not only (some might say, not especially) on the severity of the penalty but more on its certainty.³⁰ In Colombia, this suggests that there may be a general deterrent effect in punishing the most responsible FARC members because it shows that no one can get away with their crimes. The difficulty lies in whether the idea of general deterrence is useful in the exceptional circumstances of crimes committed in a prolonged internal armed conflict, where there has been a mass breakdown of the system.

Besides the objections to the arguments of general deterrence on moral and empirical grounds, the more systemic, long-term, and generalized the crimes, the less persuasive the objective of general deterrence. The circumstances of conflict and systemic dysfunction render general deterrence implausible as the best description of the purpose of punishment in this case.

The only serious counter argument to this is that while recognizing that the system has failed on a long-term, generalized basis, the purpose of punishment is to show that things will be different going forward. But this relies less on the certainty of punishment than on a renewed commitment to the rule of law.

Retribution

Perhaps the most common understanding of punishment is framed in terms of retribution. Retribution is premised on the moral responsibility of the offender for his past conduct. In strict terms, retribution as an objective does not seek to reform the offender; it only seeks to make the offender suffer. It is sometimes suggested, even by courts, that retribution is a form of judicial vengeance. This is a dangerous view and risks trivializing the significance of due process.³¹

Retribution is sometimes regarded as a procedural form of *lex talionis*—"an eye for an eye." Modern practice is not proportional in this sense, but a retributive approach to punishment probably implies that the more serious the offense, the more severe the penalty will be. At the same time, one of the consistent criticisms of retributivism has been its inability to produce criteria of proportionality in respect of conduct. Punishment that aims to make the offender suffer because of (and in proportion to) the harm he or she caused needs to take seriously both the range of possible conducts to be punished and the meaningfulness of the idea of proportionality in that range. In cases of extreme criminality—for example, mass killings or torture—the proportional aspect of retributivism becomes increasingly questionable. If a maximum sentence, for example, is 40 years in jail, regardless of whether the convicted committed 1 murder or 100 murders, the proportionality from a retributive point of view is doubtful.

In the particular case of Colombia, we already have seen an approach that allows for a maximum sentence of eight years in jail, even when an offender admits to several hundred murders. An eight-year sentence in relation to one hundred murders amounts to less than one month in jail per

³⁰ For example, some scholars argue that the important thing about deterrence is the certainty of punishment more than the severity of it. See Daniel Nagin and Greg Pogarsky, "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence," *Criminology* 39, no. 4 (2001). For a general survey of literature on deterrence, see Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment* (Washington, DC: The Sentencing Project, November 2010), www.sentencingproject.org/doc/deterrence%20briefing%20.pdf

³¹ See, for example. *Her Majesty the Queen v. C.A.M.* (1996) 1 SCR 500, in which the Canadian Supreme Court defined the difference between vergeance and retribution. Vergeance was described as "an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person." Retribution was described as "an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct."

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace murder. There are still a number of justifications for such a sentence, but it would be very difficult to claim that it inflicts a punishment in proportion to the harm caused.

It is possible for a "disproportionate" sentence to maintain a retributive element in the sense that it may still be premised on moral responsibility for past conduct and passed with the aim of imposing a degree of suffering. Many people will feel, however, that insufficient suffering by means of a reduced sentence limits the usefulness of the description of "retribution" in the way that it might be generally understood.

Rehabilitation

The notion of rehabilitation can be captured by a variety of words, such as "reform" and "reintegration." Under this objective, the aim of punishment is to enable the offender to see the error of his or her ways and re-enter society as a law-abiding citizen.³²

Under international human rights obligations, Colombia is bound to ensure that the aim of punishment is reformative.³³ Little is said about how rehabilitation and reform is to be secured. Some forms of punishment are more clearly aimed at encouraging rehabilitation, like teaching prisoners skills so they can find jobs rather than return to crime. Restorative programs that allow offenders to see the devastation that their crimes have wrought on others can also be a powerful tool in rehabilitation as well as a restorative process in themselves.

The notion of rehabilitation as an objective is useful because it shows that there should be something more to punishment than "locking people up and throwing away the key."

Communication: Social Affirmation of Values

The notion of communication was briefly discussed at the beginning of this section.³⁴ This approach is premised on a number of basic principles: Above all, t seeks to induce in the offender the pain that flows from an *understanding of the condemnation* the punishment expresses.

A communicative theory of punishment involves offenders, judges, and law-abiding citizens in a "unitary enterprise." As Duff says,

Our reasons for maintaining such a system of law have to do with the prevention of crime and the good of the community but we do not simply use citizens or criminals as means to these ends: the law addresses all the citizens as rational moral agents, seeking their assent and their understanding; and punishment is part of that continuing dialogue through which the law aims to guide his conduct by appealing to the relevant reasons.³⁵

The fact that this concept of punishment (as communication) engages all of the relevant social actors is particularly attractive for describing the aims of punishment in transitional contexts. It is not purely perpetrator-centric: it takes law-abiding society as a whole seriously and seeks to affirm the values of that society in a solemn, meaningful way.

What does this mean in practice? It means that the penalty that the justice system imposes has to be capable of expressing appropriate condemnation for the conduct in question and also be

³² The argument that punishment should aim to communicate condemnation and persuasion is also linked very closely to a rehabilitative goal.

³³ International Covenant on Civil and Political Rights (entry into force 23 March 1976), Article 10(3); and American Convention on Human Rights, OAS Treaty Series No. 69 (1988), Article 5(6).

³⁴ See de Greiff at note 28 for a more detailed presentation of the underlying philosophical theories.

R.A., Duff, *Trial and Punishments*, 238. It should be added that Duff's communicative theory acknowledges retributivist elements insofar as its central justification is connecting past conduct to present punishment, but it diverges from retributivism in its forward-looking purpose and with consequentialism in that this purpose is logically related to the means of achieving it, not contingently.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace capable of producing a reflection on the part of the person convicted that would lead him or her to be persuaded that those actions were wrong and required reform. An important difference here is that adherence to the law results not from the fear of consequences but rather from a positive sense of shared values.

On the face of it, a communicative theory could complement forms of symbolic punishment. It is at least possible that an understanding of the condemnation of society could be achieved without imposing additional negative consequences. The arguments in favor of it constituting something more than symbolic punishment lie in two areas: "communication" demonstrates persuasively both 1) the recognition of wrong and 2) the commitment to reform on the part of the offender.

Duff argues that one can understand punishment as a kind of penance similar to what one might encounter in a religious community, noting its communicative, reformative, and retributive aspects. The justification for heavier sentencing is to force the offender to focus on the implications of his crimes: It should assist in reconciling the offender to himself and to society as a whole.³⁶

In the particular circumstances of the FARC and the current peace negotiations, it is important to recognize that not all of the FARC's actions constitute crimes under international law. Rebellion and connected political crimes may not constitute international crimes. However, certain actions, if proved, would constitute criminal acts under any circumstance (domestic or international). A *communicative* approach to these acts seeks to have those responsible for the crimes recognize the wrongfulness *of those acts*, not of the act of rebellion itself or its connection to political crimes.

One important aspect in helping to persuade people of the wrongfulness of their acts is to make real the impact of their conduct on victims. This has become an increasingly common aspect of criminal procedure over the last 40 years. Restorative approaches are commonplace now in many jurisdictions in juvenile criminal law, and the use of victim impact statements at sentencing has increased in many jurisdictions around the world.

The practice of victims confronting offenders in the context of more serious crimes committed by adults is not widespread, but it is increasing. There is a strong argument that such an approach be adopted in the sentencing provisions for those who have planned or defined policies that led to serious crimes or ordered serious crimes (that is, those most responsible) for two reasons. First, bringing those responsible for planning systematic crimes face-to-face with their victims humanizes the crimes. It destroys the "respectability vacuum" that senior officials may attempt to place between themselves and the deeds of their foot soldiers. Second, if there is any real hope that those responsible for planning or otherwise directing systematic serious crimes can understand society's condemnation and be persuaded of the value of reform, hearing directly from victims about their suffering may be a powerful tool.

Conclusions on Objectives of Punishment

The notions of incapacitation, specific deterrence, and general deterrence are not persuasive policy objectives in the context of a successfully negotiated end to a conflict, like Colombia. If the rationale under which crimes are committed is removed, so is the opportunity for reoffending; thus, no further policy intervention is needed to stop the crimes from reoccurring. If we seek to punish offenders, it must be for other reasons.

Retribution as a formal, deliberative goal is not to be dismissed. As noted, technically even a reduced sentence may have a retributive component, but it may be misleading to suggest that

³⁶ Ibid., 256-262.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace radically reduced sentences for extremely serious crimes would be seen as "retributive" in the eyes of the general public.

If society deems it valuable to make serious criminals suffer, those who have deliberately and systematically killed, kidnapped, or tortured civilians in large numbers (or ordered such actions) would have to be seen to suffer more than those who committed such crimes on an isolated basis. The more significant the dilution of punishment for massive crimes, the more untenable it becomes to describe the objective of the punishment as genuinely retributive.

It is, therefore, suggested that punishment of FARC members found to be the most responsible for serious crimes can be understood not in purely retributivist terms but as a combination of communicative, reformative, and retributive objectives.

With regards to rehabilitation, a constructive approach, including restorative processes, fits closely with the notions of social affirmation. Helping the offender to understand the nature of the harm caused by his or her actions—or humanizing the harm—can be a powerful means of reinforcing the logic of shared minimum standards of conduct.

Sentencing: Condemnation, Persuasion, and Peace

Ultimately theories of punishment and the pursuit of policy goals come up against a critical challenge. Retributive, consequentialist, and expressivist theories of punishment all require that the punishment is proportionate to the severity of the crime, but all struggle to come up with convincing criteria of proportionality, particularly retributivists. That dilemma becomes more complicated when punishment competes with other goals.

Sentencing and the criminal justice system exist in permanent tension with other political and social objectives, but these tensions are obviously more threatening in less stable situations. When one of the competing objectives is to end an armed conflict, the question of proportionality and whatever generally agreed-upon criteria might be accepted in normal times appear to be put under severe stress.

The mixed approach suggested here has many attractions. It acknowledges the notion of condemnation as an important social function; it privileges the idea of persuasion in trust-building efforts to rehabilitate the criminal; and it decentralizes the perpetrator and makes society as a whole a serious component in the punishment dialogue. The question that remains, however, is what kind of punishment is needed to convey appropriate condemnation and is likely to be persuasive regarding the value of reforming wrongful conduct.

The aim is indeed for those responsible to feel the pain of condemnation that is expressed through punishment. However, something more than symbolic punishment is needed in order for society to be persuaded that those responsible recognize the wrongfulness of the acts in question and are committed to participating appropriately in society in the future. It is dishonest to pretend that "something more" in these circumstances will be genuinely proportional to the gravity of the offenses. Some element of compromise is necessary to meet the competing objectives of effectively communicating condemnation and securing peace.

In normal times the proportionality of punishment for the kinds of serious crimes under discussion would clearly require significant terms of imprisonment. But these are not normal times, and the tensions competing with the aims of punishment are exceptional, not quotidian. No punishment will be proportional and at the same time capable of successfully convincing the accused to submit to the law of the state. The best that can be hoped for is an approximation whereby a significant degree of condemnation and social persuasion for reform is achieved.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace It is certainly possible to imagine a number of measures in which strong condemnation can be communicated. One of these already has been mentioned: the requirement that perpetrators face the victims of their crimes, if the victims desire such a meeting.

A second scenario could include the possibility of excluding convicted criminals from standing for political office for a period of time. While it is true that one fundamental objective of a peace negotiation is to convert a military organization into a political one, this does not necessitate that all of those judged to bear the greatest responsibility for serious crimes also become politicians, and certainly not immediately. A period of exclusion would help to communicate that although the usual sentence of long imprisonment might be avoided, it would not be acceptable to enter directly into political office.

A third scenario might require significant reparations for victims, although whether the most responsible have individual assets worth seizing remains to be seen. If not, some measure of organizational reparations payment may be considered, but it would have to be made in recognition of the crimes committed by the organization, not as some kind of good-faith gesture.

A fourth scenario could include community service. Indeed it might be suggested that especially in the post-conflict context of Colombia the aim of social communication and acceptance of social values could even be better expressed through imaginative deployment of community service orders, more than through custodial sentences. The precise nature of such service would depend on a number of logistical factors, including the age and health of the offenders as well as security considerations.

The degree to which imprisonment or house arrest would be able to convey a sufficient degree of condemnation remains open to debate. The letters from the OTP indicate that it believes some form of imprisonment would be essential to satisfy the demands of proportionality. Because they do not say how long the imprisonment should last or in what circumstances, they are not especially illuminating on this issue.

It is conceivable that a package of measures including these elements could approximate a meaningful expression of social condemnation. It would inevitably be a compromised expression of condemnation, but it has to be understood in the context of a peace negotiation. Society would be saying that it is prepared to moderate the expression of its condemnation in order to facilitate the re-entry of FARC members into society, to play a meaningful part in a peaceful future.

On the Nature of the Trial

There are a number of ways in which the trial of the most responsible may occur. It is not possible or prudent to enumerate or evaluate those scenarios here. What should be clear, however, is that the effective communication of values and indeed punishment arising from the trial will depend in large part on the efficacy of the trial itself. The more the trial proceedings are seen by society as a genuine means to establish and communicate responsibility for serious crimes, the more they will successfully meet their objectives. The more they are seen as a maneuver to subvert the exposure of crimes and those responsible for them, the more pointless and counterproductive they will become.

There may be some justification in compromising on the nature of penalties, but there is no justification in compromising on the essential virtue of the trial—the social exposure of wrong-doing, the harm caused to social values, and holding those responsible publically to account.

Far from any compromise being justifiable regarding the nature of the trials, every effort should be made to ensure publicity and access to serious and transparent proceedings.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace

Conclusions

International law offers only vague guidance on the kinds of sentences that may be acceptable for serious international crimes. The most important issue appears to be that sentences should seek to be proportional to the crimes committed and not illusory. International practice is not especially relevant in this case. For Colombia, the most important indication comes from the OTP and its apparent acceptance of the eight-year threshold under the Justice and Peace Law. Of course, it is possible that the OTP would lower that threshold even more. As discussed above, other national experiences are not very useful in indicating what kinds of sentencing provisions might be acceptable in the Colombian context. Ultimately, Colombians must decide what kind of punishment will satisfy them.

This paper argues that a successful peace negotiation would effectively remove the context in which FARC members committed crimes. As such, the policy objectives for punishment of incapacitation and specific and general deterrence fall away. In addition, when negotiations lead to significant concessions on sentences, the meaningfulness of punishment as genuinely retributive is also diminished, if not entirely removed.

The most coherent policy objectives to be pursued in criminal punishment in Colombia in respect of the FARC are best described in terms of the expression of social condemnation, with the hope of persuasion to reform. While these objectives might be met with a lesser custodial sentence than would be required if the primary objective was retribution, it does not mean that meaningful punishment can or would be evaded altogether. A successful approximation of condemnation, persuasion, and reform may be possible with a combination of measures. If the penalties are genuinely illusory—and the process leading to them is similarly unconvincing—it is not worth doing: It is an insult to the intelligence of society and the dignity of victims. But deciding what is and is not illusory can only be done if it is understood what is trying to be achieved.

It is inevitable that some form of compromise must be reached before those alleged to be the most responsible from FARC submit to a criminal process that could lead to their punishment. Above all, the combination of punishment measures should seek to allow those convicted to show that they indeed understand the harm caused by their criminal activities and they accept the shared values of Colombian society, as expressed in the law. The punishment must be capable of being taken seriously as condemning the breach of the core values of society. It should be creative, embracing possibilities of restorative justice approaches, reparations funds, community service, and possibly some limited periods of political exclusion.

It is difficult to see how the relevant social values could be affirmed or those found to be the most responsible for serious crimes could be rehabilitated in the absence of some measure of imprisonment. It might also be argued that accepting such a process willingly, rather than grudgingly, as a political calculation, would be the more adept choice for the FARC leadership, although one cannot underestimate the complexities involved in such a decision.

Recommendations

When defining punishment for FARC members found to be the most responsible for systematic international crimes, the principal focus should be on pursuing the objective of punishment as a social action of condemnation, persuasion, and reform. A number of preconditions would help to establish a context of good faith at an organizational level. These include:

1. A general recognition of harm caused as a result of conduct not permitted by international law and an initial and substantial contribution from the FARC to a reparations fund in light of the harm caused.

Squaring Colombia's Circle: The Objectives of Punishment and the Pursuit of Peace

Acknowledgements

ICTJ gratefully acknowledges the generous financial support of the Swedish Embassy.



- 2. A firm determination that court proceedings against those accused of being the most responsible would be public, transparent, and serious. This would include the participation of victims in proceedings to express their views on the impact of harms suffered and appropriate media coverage of proceedings. This should occur even if the accused plead guilty.
- 3. The requirement that those convicted agree to be confronted in meetings with victims after sentencing to hear their views and discuss the impact of their crimes in detail.

ICTJ Justice Truth Dignity The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved. To learn more, visit **www.ictj.org** ICTJ Bogota Calle 73 No. 7-06, 7th Floor Bogota, Colombia Tel: +57 1 248 0488 www.ictj.org