

POLITICAL PARTICIPATION:
AN IMPLIED CONDITION FOR
ENDURING PEACE IN COLOMBIA

*PARTICIPACIÓN POLÍTICA:
UNA CONDICIÓN PARA UNA PAZ
DURADERA Y ESTABLE EN COLOMBIA*

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* I dedicate this, my first article in an indexed journal, to my Mom, Olga Maldonado, who has always supported me in the process of achieving my goals, and has always encouraged me to move forward in life.
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ABSTRACT

After moving a significant step forward towards enduring peace and reconciliation through the Congressional enactment of the Victims and Land Restitution Law, in September 2012 the Colombian Government publicly announced the formal initiation of peace talks with the Revolutionary Armed Forces of Colombia (FARC), the oldest still standing guerrilla movement in the country. However, this news did not come entirely by surprise. Just two months before, on July 31st 2012, the Colombian Congress had passed a constitutional amendment—known as the Legal Framework for Peace—exclusively designed to facilitate peace talks by providing the legal foundations of transitional justice mechanisms. This article aims to analyze the scope and meaning of the participation in politics provision of the Legal Framework for Peace, which paves the way to negotiating a political settlement for the non-state armed groups that agree on a ceasefire and a peace commitment. Based on an analysis of the criteria that have been commonly applied to define which type of common crimes should be considered to be associated with a political offence, and taking into account the political participation provision as a basic commitment to any successful transition, I will conclude by addressing the need that the statutory law—that will develop the Legal Framework for Peace—refrain from referring to an exhaustive list of crimes. Rather, I propose that the legislative implementation of the last provision of the Legal Framework for Peace should rely on criteria that will structure a more flexible and responsive case-by-case analysis. In any case, it is necessary to take into account that unlike the cases of South Africa and Northern Ireland, as well as the traditional understanding of the political offence in the Colombian context as exclusively referred to the granting of amnesties or pardons, article 3 is aimed to opening the possibility for the armed groups—and their members—to enter the mainstream of the democratic process. Although the idea of the FARC participating in parliamentary elections and transforming into a political party seems disquieting for an important portion of the public opinion, the truth is that this issue constitutes a groundbreaking condition for a successful political transition in Colombia.

Keywords author: Legal Framework for Peace, armed conflict, political participation, political offence, peace process, transitional justice.

Keywords plus: demobilization, guerrillas, Colombia, amnesty, statutory law, political action.

RESUMEN

Después de dar un gran e importante paso hacia la consecución de una paz duradera y estable mediante la sanción de la Ley de Víctimas y Restitución de Tierras, en septiembre de 2012 el Gobierno nacional hizo público el inicio de

conversaciones de paz con las FARC, la guerrilla más antigua en el país. Esta noticia, sin embargo, no fue una total sorpresa. Justo dos meses antes del anuncio, el 31 de julio de 2012, el Congreso nacional aprobó un Acto Legislativo –también conocido como el Marco Jurídico para la Paz– diseñado para facilitar las negociaciones de paz mediante el establecimiento de instrumentos jurídicos de justicia transicional. En este artículo se analizará el significado y contenido del tercer artículo del Marco Jurídico para la Paz que abre la puerta a la participación en política de miembros desmovilizados de aquellos grupos armados que acuerden un cese al fuego y suscriban un acuerdo para la terminación del conflicto. Así, a partir de un análisis de los criterios a los que, por lo común, se recurre con el propósito de definir qué tipos de penas pueden considerarse conexas al delito político, y según la importancia de la participación en política de los excombatientes para una transición exitosa, concluiré en la necesidad de que la ley estatutaria que desarrolle el Marco Jurídico para la Paz evite definir una vinculación mediante el establecimiento de una lista exhaustiva de delitos. En su lugar, en el presente artículo se propone la adopción de una serie de criterios que permiten un análisis caso por caso de la posibilidad de participar en política. De cualquier modo, debe tenerse en cuenta que, a diferencia de las experiencias de Sudáfrica e Irlanda del Norte, el entendimiento tradicional del delito político en el contexto colombiano es especialmente relevante para efectos de la concesión de amnistías o indultos; el Artículo 3 del Marco Jurídico para la Paz está encaminado a permitir la participación en política de los grupos armados y sus miembros. Si bien la idea de la participación en política de las FARC es difícil de asimilar, y ha sido ampliamente criticada por sectores de la opinión pública, lo cierto es que este aspecto constituye un elemento esencial para una transición exitosa hacia la paz.

Palabras clave autora: Marco Legal para la Paz, conflicto armado, participación política, delitos políticos, proceso de paz, justicia transicional.

Palabras clave descriptor: desmovilización, guerrilla, Colombia, amnistía, ley estatutaria, vida política.

SUMMARY

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“In many ways making peace is harder than waging war. It takes time to forgive and for our wounds to heal. It takes courage to acknowledge our own failures. But whatever our position, there comes a time when we have to accept one another, with all our differences, and reach common ground”.

Archbishop Desmond Tutu.

INTRODUCTION

After moving a significant step forward towards enduring peace and reconciliation through the Congressional enactment of the Victims and Land Restitution Law, which was highly criticized as a transitional justice measure in the midst of the armed conflict, in September 2012 the Colombian Government publicly announced the formal initiation of peace talks with the Revolutionary Armed Forces of Colombia (FARC), the oldest still standing guerrilla movement in the country. However, this news did not come entirely by surprise. Just two months before, on July 31st 2012, the Colombian Congress had passed a constitutional amendment –known as the Legal Framework for Peace (hereinafter, LFP)– exclusively designed to facilitate peace talks by setting forth the legal foundations for transitional justice mechanisms to be applied to the non-state armed groups and its members. Based on the existence of a comprehensive program of reparations for the victims of the conflict, the LFP, accordingly, lays the legal foundations for the application of three different prongs of transitional justice measures.

First, in the field of criminal justice, it authorizes the application of criteria for the selection and prioritization of criminal cases involving demobilized members of the non-state armed groups, the application of the prosecutorial discretion and the suspension of sentences. Second, as part of the efforts to unveil the truth of events having taken place over the course of the conflict and build a collective memory, it provides for the creation of a Truth and Reconciliation Commission tasked with issuing recommendations on the implementation of transnational justice mechanisms, including the above-mentioned criteria for

the selection of cases. Finally, as the third and as the Office of the “*Ombudsman*” has constantly pointed out perhaps the most controversial measure, the LFP mandates Congress the enactment of a statutory law defining the scope of offences that should be considered to be associated with political offences for the purpose of authorizing the participation in politics of the members of the non-state armed groups¹.

This paper aims to articulate a set of principles and criteria that should be applied in the Colombian context for the purpose of determining under which circumstances an offense is associated with a political objective, thus potentially enabling the political offender to run for office in accordance with article 3 of the LFP.

To this end, part I will focus on the definition of the political offence and of the notion of crimes associated with a political objective as a precondition for the demobilized members of the non-state armed groups to participate in national politics. In this part, I will start by analyzing the Norgaard principles, which later informed the wording of Section 20 of the South African Reconciliation Act dealing with “*politically motivated crimes*” for amnesty purposes. Later on, I will mention the criteria taken into account for applying the political offence exception to extradition in Northern Ireland. To conclude this section, I will address the evolution of the meaning of political offense in Colombia. In part II, in turn, I will describe the way in which the issue of political participation was dealt with over the course of the transition processes in El Salvador, South Africa, Northern Ireland and previous peace processes in Colombia. Following this brief explanation of the importance of ensuring a democratic political settlement for the parties to the conflict, I will refer to the legal and political background that facilitated the current peace negotiation between the government and the FARC.

1 Legislative Act No. 1 of 2012, “Por medio del cual se establecen instrumentos jurídicos de justicia transicional en el marco del artículo 22 de la Constitución Política y se dictan otras disposiciones”, Colombia (July, 2012) [Hereinafter, the Legal Framework for Peace or LFPJ]

This analysis will shed some light on the intended purpose and scope of the political participation provision of the LFP in the context of the peace talks in Colombia, as well as inform our analysis on the proper way to approach to the definition of political offences and the acts connected to it, whether it be an exhaustive list of crimes or a more open-textured, case-based approach (Part IV).

I. THE “POLITICAL OFFENCE” AND THE NOTION OF “ACTS ASSOCIATED WITH A POLITICAL OBJECTIVE”

The notion of the political offence and the acts associated with it has traditionally been linked to the granting of pardons or amnesties, and has also been widely recognized as an exception to extradition, traditionally intended to prevent persecution on the basis of political ideology. On top of the definition of the political offence as such (*i.e.* rebellion, sedition, political uprisings), a heated debate arises when attempting to determine which other crimes, due to their close relationship with political objectives, should also be deemed “*political*”, and thus be subject to a more favorable treatment². In this section I will address how the notion of political offences and of acts associated with political objectives, as initially defined in the context of the Namibian transition, was applied in South African context as an enabling criterion for the granting of amnesties, and as an exception to extradition requests in Northern Ireland. Finally, I will point out to the evolution of the political offence in Colombia.

Since the political participation provision of the LFP is not intended to establish the conditions for the granting of amnesties or the application of an exception to deal with an extradition request, but to enable the application of the participation in politics

2 As Antje Petersen explains, political offences may be classified into two different categories: “*pure*” political offences, such as treason, sedition and espionage; and “*relative*” political offences, which include common crimes that are connected to a political uprising. A. Petersen, *Extradition and the Political Offense Exception in the Suppression of Terrorism*, 67 *Indiana Law Journal*, 1 ss. 3, 775 (1992).

provision of the LFP, it will be necessary to determine whether in the context of the Colombian peace process this provision calls for a broad and flexible, rather than a narrow approach to the types of crimes that may fall within its scope.

A. The Norgaard Principles in Namibia

The set of principles –proposed by the *then* President of the European Commission on Human Rights, Carl Norgaard– intended to substantiate the concept of a “*political prisoner*” in the context of the transition in Namibia after the country gained its independence from the illegal occupation of Apartheid South Africa in 1990³, these set of principles became internationally considered and widely accepted as a fitting approach to fleshing out the definition of political offences and the acts associated with political objectives, also applicable for other purposes⁴. According to Norgaard, the following criteria should influence on the determination whether a criminal act should be considered a political offense:

- a. an offender’s motive (whether it was personal or political)
- b. the circumstances in which the offence was committed (whether it was committed during an uprising)
- c. the nature of the political objective (such as overthrowing a government) and offense
- d. the object of the offense (whether it was directed against government agents, property or ordinary citizens)
- e. the relationship between the offence and the political objective⁵.

3 B. Ojo, *Namibia-Africa Last Colony. A Democratic Experiment in Contemporary African Politics: a Comparative Study to Democratic Legitimacy*, 109 (B. Ojo, Ed., University Press of America, Lanham, 1999).

4 A. Bhargava, *Defining Political Crimes: a Case Study of the South African Truth and Reconciliation Commission*, 102 *Columbia Law Review*, 5, 1311 (2002).

5 *The Norgaard Principles*, Mail & Guardian (Mar. 31, 1995). <http://www.mg.co.za/article/1995-03-31-the-norgaard-principles>

The Norgaard principles were later adopted in the South African context to decide the applications for amnesty, in accordance with the Promotion of National Unity and Reconciliation Act, and have also been considered by the Courts in Northern Ireland when deciding whether to apply the political offence exception to extradition. Therefore, these principles constitute a starting point in the definition of the criteria that should be applied in determining the application of the political participation provision in the LFP.

1. South Africa

The political transition in South Africa from the apartheid regime to a democratic state involved the enactment and application of transitional justice measures in a variety of fields politically salient. Along with a process to disarm, demobilize and reintegrate former combatants into a new defense force, the transition process included the enactment of a new Constitution, the call for a democratic election and the creation of a Truth and Reconciliation Commission with comprehensive functions.

The peace talks, which began in 1990 right after the release of Nelson Mandela, first led to an agreement on the need to define the conditions for the release of political prisoners and the return of political exiles, as well as the power to grant amnesties to the members of the parties previously engaged in the armed struggle. The Groote Schuur Minute, as it is called after the eponymous location where it was signed, led to the enactment of two different Indemnity Acts covering members of the African National Congress political party (ANC), other political liberation movements and members of the National Party, despite their social condemnation⁶.

In 1991, the parties to the conflict subscribed to the National Peace Accord in 1991, which defined the basic aspects of the

6 H. Van Der Merwe & G. Lamb, *Transitional Justice and DDR: the Case of South Africa*, 7 (Research Unite, International Center for Transitional Justice, 2009).

transition. This process ultimately culminated in the drafting of an interim constitution authorizing amnesties for politically motivated crimes, a provision that later became the core feature in South African's transition process. As the epilogue to the 1993 Constitution shows, the amnesties provision of the South African Constitution was deemed as a necessary step towards national reconciliation:

“In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after October 8 1990 and before December 6 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed”⁷.

Therefore, complying with the post-amble of the 1993 Constitution, the National Parliament enacted the Promotion of National Unity and Reconciliation Act 34 of 1995, also known as the *Truth and Reconciliation Commission Act* (TRC Act). As stressed in the AZAPO decision, the Act entrusted the TRC with the task of developing the amnesty provision of the Constitution, and with carrying out investigations of human rights violations and making recommendations in the field of reparations for the victims⁸. As a result, three Committees were established: the Committee on Human Rights, the Committee on Reparations and Rehabilitation, and the Committee on Amnesty. According to Sections 18, 19 and 20 of the TRC Act, the Amnesties Committee was responsible for receiving, investigating and deciding on the applications for amnesties *“in respect of any act, omission or offence on the grounds that it is an act associated with a political objective”* (Section 18-1)⁹.

7 Constitution of the Republic of South Africa, *Act 200 of 1993, repealed by Constitution of the Republic of South Africa* [No. 108 of 1996]. <http://www.info.gov.za/documents/constitution/93cons.htm#CHAP15>

8 Constitutional Court of South Africa, *The Azanian Peoples Organization (AZAPO) vs. The President of South Africa*, Case CCT 17/96, 25 (July, 1996), 6.

9 Promotion of National Unity and Reconciliation Act 3 of 1995. [Hereinafter TRC Act] <http://www.justice.gov.za/legislation/acts/1995-034.pdf>; see also: AZAPO, *id* at 5.

With respect to the definition of politically motivated crimes or “*acts associated with a political objective*”, Section 20 (3) of the TRC Act incorporated and further developed the Norgaard Principles as follows¹⁰:

“20. *Granting of amnesty and effect thereof*

(1) *If the Committee, after considering an application for amnesty, is satisfied that-*

(a) *the application complies with the requirements of this Act;*

(b) *the act, omission or offence to which the application relates is an act associated with a political objective committed in the course of the conflicts of the past in accordance with the provisions of subsections (2) and (3); and*

(c) *the applicant has made a full disclosure of all relevant facts, it shall grant amnesty in respect of that act, omission or offence.*

[..]

(3) *Whether a particular act, omission or offence contemplated in subsection (2) is an act associated with a political objective, shall be decided with reference to the following criteria:*

(a) *The motive of the person who committed the act, omission or offence;*

(b) *the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;*

(c) *the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;*

(d) *the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;*

(e) *whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organization, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and*

(f) *the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted-*

¹⁰ Barghava points out that the Norgaard Principles were first introduced in the Indemnity Act of 1990 and the Further Indemnity Act of 1992. Finally, the drafters of the TRC act decided to incorporate a modified version of the Norgaard Principles to include the acts committed between and against political groups different from the government. A. Bhargava, *supra* note 4, p. 1312.

(i) for personal gain: *Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organization or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or*
 (ii) *out of personal malice, ill-will or spite, directed against the victim of the acts committed*¹¹.

These criteria would control the Amnesty Committee's decisions on the question whether a criminal offence could be regarded as a political offence or associated with a political objective. Therefore, any decision to grant an amnesty had to be grounded on both objective (context, legal and factual nature of the act, its gravity, and whether the act responded to an order) as well as subjective criteria (the motive, the objective of the act or omission, and the proportionality of the offence in relation to the objective pursued). The determination of the relationship of the act or omission with a political objective included a complex assessment of the underlying circumstances of the act or omission, which in some cases would result in broadening the scope of crimes included, whereas in other cases it would result in reducing such cases.

However, concerning the application of these criteria, Anurima Bhargava, who has researched in depth the application of the criteria for granting amnesty in South Africa, contends that even though there were six different factors to guide and bear on the decision whether an act was associated with a political objective, the South African Truth and Reconciliation Commission focused on criterion (e), namely "*whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organization*"¹². In this vein, after analyzing the Amnesties' Committee most prominent decisions on the definition of political crimes, she stresses the need

11 TRC Act, *supra* note 9.

12 Bhargava's conclusions are based on the study of the decisions of the Amnesty Committee in the *Chris Hani, the Amy Biehl* and the St. James Massacre cases. A. Bhargava, *supra* note 4, pp. 1314-1317.

to take into account other factors both subjective and objective other than the existence of superior orders, as well as the overall context and the totality of circumstances surrounding the act or omission. In effect, she points out that

“[A]n emphasis on orders underplays the motives of perpetrators and clouds the inquiry into why these crimes were committed [...]. An accurate picture cannot be established when perpetrators have incentives to align their motives with the programmatic objectives of the established political organizations to which they claim affiliation [...] As a result, she concludes that “[T]aking account of the totality of the circumstances better reflects the larger context within an act was committed, beyond the relationship of the applicant to their political organization and its members. The Act directs the Committee to take a totality of the circumstances approach, guided by all of the factors contained in Section 20(3) of the Act”¹³.

In order to understand the actual implications of the application of the granting of amnesties as well as the importance of reading the amnesty provision in a contextualized manner, it is worth mentioning the judgment of the South African Constitutional Court in the *Du Toit* and the *McBride* cases, both of which refer to the scope and meaning of the expunging requirement contained in Section 20(10) of the TRC¹⁴. In *Du Toit*, the Constitutional Court dealt with the question whether Section 20(10) of the TRC Act could be construed as to entitle a person that had been convicted of murder to be reinstated in a post he had lost as a result of the conviction. The Court decided that the expunging requirement could not be read as to undo what had happened in the past. Therefore, Section 20(10) did not have the effect of

¹³ *Ibidem*, p. 1324.

¹⁴ According to Section 20(10) of the Truth and Reconciliation Act:

“Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public”. TRC Act, *supra* note 9.

restoring the amnestied convict to the exact same position he or she held before the amnestied crime was committed¹⁵.

Conversely, in the *McBride* case, the Constitutional Court had to decide if a male offender convicted of murder, which was later granted an amnesty, could still be called a “murderer” in an article published in a newspaper with the aim to oppose his appointment as a senior police officer¹⁶. In an analysis that required pondering the values sought by the TRC Act against the right to freedom of expression of the newspaper and its editor, the Court held:

“This points to the conclusion that section 20(10) expunges the previous conviction, and reinstates the former convict to full civic status, so that he or she is deemed never to have been convicted. But it does no more. It does not render untrue the fact that the perpetrator was convicted, or expunge the deed that led to his or her conviction. Those remain historically true. The statute does not address these facts of history, nor does it attempt to mute their description. It does not stifle the language that may accurately describe the events that led to the conviction, nor does it censor the terms that may truthfully be applied to the facts, though the law of defamation does”¹⁷.

Hence, the Court decided that the TRC Act of 1995 could not be understood as to govern the entire discourse and interpretation of the facts beyond the official records for criminal and civil purposes, thus censoring the words used in a newspaper article. Both *Du Toit* and *McBride* stand for the importance of reading the implication of the granting of amnesty with due regard to the context in which it was embedded in a very realistic manner¹⁸.

In conjunction with the objective and subjective criteria discussed above, it is crucial to take into account that the Truth and Reconciliation Act also qualified the category of applicants

15 Constitutional Court of South Africa, *Du Toit vs. Minister for Safety and Security and Another* [2009] ZACC 22; 2009 (6) SA 128 (CC); 2009 (12) BCLR 1171 (CC), in Constitutional Court of South Africa, *The Citizen 1978 (PTY) Ltd, et ál. vs. Rober John McBride*, Case CCT 23/10 [2011] ZACC11, Apr. 8, 2011, 53.

16 *Óp. cit.* p. 2.

17 *Ibidem*, p. 72

18 Constitutional Court of South Africa, *The Citizen 1978 (PTY) Ltd, et ál. vs. Rober John McBride*, Case CCT 23/10 [2011] ZACC11, Apr. 8, 2011, 52 and 78.

who could be granted an amnesty by referring to the members of political organizations. In any case, the granting of amnesties would be conditioned on the full disclosure of all relevant facts:

“20. Granting of amnesty and effect thereof

20. (2) In this Act, unless the context otherwise indicates, “act associated with a political objective” means any act or omission which constitutes an offence or delict which, according to the criteria in subsection (3), is associated with a political objective, and which was advised, planned, directed, commanded, ordered or committed within or outside the Republic during the period I March 1960 to the cut-off date, by-

(a) any member or supporter of a publicly known political organisation or liberation movement on behalf of or in support of such organization or movement, bona fide in furtherance of a political struggle waged by such organisation or movement against the State or any former state or another publicly known political organisation or liberation movement;

(b) any employee of the State or any former state or any member of the security forces of the State or any former state in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against a publicly known political organisation or liberation movement engaged in a political struggle against the State or a former state or against any members or supporters of such organisation or movement, and which was committed bona fide with the object of countering or otherwise resisting the said struggle;

(c) any employee of the State or any former state or any member of the security forces of the State or any former state in the course and scope of his or her duties and within the scope of his or her express or implied authority directed-

(i) in the case of the State, against any former state; or

(ii) in the case of a former state, against the State or any other former state, whilst engaged in a political struggle against each other or against any employee of the State or such former state, as the case may be, and which was committed bona fide with the object of countering or otherwise resisting the said struggle;

(d) any employee or member of a publicly known political organisation or liberation movement in the course and scope of his or her duties and within the scope of his or her express or implied authority directed against the State or any former state or any publicly known political organisation or liberation movement engaged in a political struggle against that political organisation or liberation movement or against members of the security forces of the State or any former state or members or supporters of such

publicly known political organisation or liberation movement, and which was committed bona fide in furtherance of the said struggle;
(e) any person in the performance of a coup d'état to take over the government of any former state, or in any attempt thereto;
(f) any person referred to in paragraphs (a), (b), (c) and (d), who on reasonable grounds believed that he or she was acting in the course and scope of his or her duties and within the scope of his or her express or implied authority;
*(g) any person who associated himself or herself with any act or omission committed for the purposes referred to in paragraphs (a), (b), (c), (d), (e) and (f)"*¹⁹.

In this respect, Anurima Bhargava, argues:

*"The threshold requirement, then, to apply for amnesty was employment by the State or membership in an established liberation movement, such as the African National Congress (ANC), the Pan Africanist Congress (PAC), their respective military wings, UmKhonto weSizwe (MK) and the Azanian People Liberation Army (APLA), and the Inkatha Freedom Party (IFP). Non-state actors who were members of right-wing movements in support of apartheid, like the Afrikaner Weerstandsbeweging (AWB) and the Conservative Party (CP), were also eligible to apply for amnesty"*²⁰.

As a result, the political characterization of the offender constituted a pre condition for granting amnesties. Therefore, an assessment of the political nature of an offence should rest on a balanced and contextualized approach aimed to understand all the relevant circumstances surrounding the act and the motivation of the offender. This type of analysis requires that all factors be taken as mutually supportive, thus avoiding single-pronged approaches that could eventually lead to contradictory results.

2. Northern Ireland

The sectarian violence between protestant/unionists and catholic/nationalist movements that characterized the political strug-

¹⁹ TRC Act, *supra* note 9.

²⁰ A. Bhargava, *supra* note 4, p. 1311.

gle in Northern Ireland led to a unique approach to transitional justice that focused on reconciliation measures²¹.

The increased involvement of the state in the political violence in the period called “*the Troubles*”²², in particular police repression of civil rights movements, gave rise to a tri-partite conflict, which ultimately led to the notion that “*radical extremism in the form of the Irish Republican Army (IRA) was necessary*”²³. During the late 1960s, violence escalated as a result of terrorist attacks frequently perpetrated by the IRA. Though the conflict in Northern Ireland degenerated into terrorist violence, it never lost its political nature. This, in turn, explains the need to define the contours of the political offence exception to extradition in light of its two main purposes, namely “*to protect the offender from prosecution for political crimes and from prosecution for purely political motivation in and by the requesting state*”²⁴.

In the case of Northern Ireland, an abundance of case law endeavored to define the scope of offences that would constitute a legitimate ground to deny a request for extradition²⁵. To this end, the Irish Supreme Court referred to a set of considerations to determine if, given a certain set of facts, it would be reasonable to deny extradition on the basis of the political nature of the crime at issue. Based on an analysis of the Supreme Court decisions in the *McGlinghey*, *Shannon*, and *Schtraks* cases, as well as decisions of Courts elsewhere concerning members of the IRA, such as the *MacKin* case decided by the United States Court of Appeals of the second circuit, Alpha Connelly summarizes these criteria as follows²⁶:

21 N. Aiken, *Learning to Live Together: Transitional Justice and Intergroup Reconciliation in Northern Ireland*, 4 *The International Journal of Transitional Justice*, 166–188, (2010).

22 D. Beggan, *State Repression and Political Violence: Insurgency in Northern Ireland*, XXIII *International Journal On World Peace*, 4, 62 (2006).

23 *Op.cit.*

24 A. Petersen, *supra* note 2, p. 773.

25 Petersen explains that the political offence was initially formulated to ensure respect in other jurisdictions for the political right to freedom of speech, particularly embedded in the Western democracies. In addition, she explains that the political offence exception also ensured international comity, by fostering non-interference in the political struggles of other States, *Op.cit.*, p. 774.

26 Alpha Connelly also refers to other criteria exclusively relating to the extradition process, such as the political structure of the requesting state and the treatment that the accused

Motive of the offender: according to Connelly, the question to ask here is “whether the offender was ideologically motivated or rather was impelled by emotion such as greed or revenge”²⁷. In considering this criterion, as the author continues, the Supreme Court noted, “not every person who commits an offence in the course of a political struggle is entitled to protection”²⁸. Likewise, with respect to the difference between political and mere criminal offences, the author points to the Chilean Supreme Court, who determined that “[p]olitical offences are founded in motives of political or public concern and are characterized by altruistic or patriotic sentiments, while criminal offences arise from egotistical motives of two kinds those which are more or less excusable (emotion, love, honour), and those which are reprehensible (revenge, hatred, profit)”²⁹.

Similarly, with respect to the importance of taking into account the motive of the offender, Humberto de la Calle points out the interesting development that the theory of the political offence has experienced throughout time. According to this author, “[i]n the pre constitutional era, when the sovereign held full power, [the political offence] was characterized as a *lese-majesty crime*”, whereas later in history the political offence was grounded in altruistic ideas, thus rendering it a less grave crime³⁰. Finally, De la Calle highlights that from the onset, the political offence was considered to cover other offenses associated with it, such as killing in the course of an armed conflict³¹.

At the same time, Connelly emphasizes the importance of weighing this criterion against the criteria below, since the political motive may not suffice for the purpose of applying the exception to extradition:

will be subjected to therein. Please note that when referring to the criteria developed by Connelly, I will also refer to the way it has been interpreted by other analysts. A. Connelly, *Ireland and the Political Offence: Exception to Extradition*, 12 *Journal of Law and Society*, 2, 153-182 (1985).

27 *Ibidem.*, p. 156.

28 *Schtraks vs. Government of Israel*, (1964) A. C. , in Alpha Connelly, *supra* note 27, p. 156.

29 *Ibidem.*

30 H. De la Calle, *Castigo y perdón en el proceso de justicia y paz con los paramilitares en Colombia*, in *Justicia y paz: ¿Cuál es el precio que debemos pagar?*, 93 (A. Rangel, Ed., Intermedio Editores Ltda. y Fundación Seguridad y Democracia, 2009).

31 Humberto de la Calle, *Castigo y perdón en el proceso de justicia y paz con los paramilitares en Colombia*, in *Justicia y paz: ¿Cuál es el precio que debemos pagar?* 93 (A. Rangel, Ed., Intermedio Editores Ltda. y Fundación Seguridad y Democracia, 2009).

- a. *Purpose of the offender*: this criterion refers to “*the ultimate objective of the alleged offender*” which differs from the “*motive of the offender*” to the extent that it looks into the goals rather than the reasons. Though this result-oriented analysis involves a high degree of subjectivity, it also involves an objective element requiring a direct connection between the offence and the result³². Concerning the type of objectives that may qualify as political, Connelly stresses that while a crime committed with the intention to overthrow or replace the existing government could clearly classify as a political offence, other type of acts, such as those seeking a change in the government’s policy in a certain field, may or may not fall within such category³³. Finally, Connelly highlights the importance of the close relationship between the offence and the objective sought, since some objects could seem too remotely connected to be considered as political.
- b. *Target*: there are two variants that inform this criterion. The first one deals with the question on “[a]t what or at whom was the behavior of the offender aimed?” (Subjective approach). The second variant, points to the question of “*what or who was injured?*” (Objective approach)³⁴. Under this taxonomy, while a conduct expressly aimed to the state itself, and its fundamental institutions could be deemed as politically motivated, an act directed at the person of property of civilians would fall outside³⁵.
- c. *Nature of the conduct*: this criterion addresses the conduct itself, which “*is assessed not in relation to its particular target or victim, or as a means to achieving the objective of the accused, but rather as to some intrinsic quality, and a judgment is made as to whether it merits the benefit of the*

32 A. Connelly, *Ireland and the Political Offence: Exception to Extradition*, 12 *Journal of Law and Society*, 2, 157 (1985).

33 *Op.cit.*

34 *Ibidem*, p. 159.

35 A. Connelly, (1985), *Ireland and the Political Offence: Exception to Extradition*, 12 *Journal of Law and Society*, 2, 160.

*political offence exception or not*³⁶. Under this approach, the barbarism and heinousness of the conduct turns into the determinative question for the purpose of applying the exception to extradition or allowing it.

- d. *Circumstances surrounding the offence*: sometimes an offence that would rarely be considered as associated with a political objective could turn into such in light of the context and circumstances surrounding it. Indeed, pursuant to the “*political incidence test*”³⁷, as this criterion is commonly referred to “*the circumstances which have been regarded as conferring a political character of an offence are an uprising, a disturbance, an insurrection a civil war or struggle for power [...] [O]n this view, political offences are crimes against persons or property which are incidental to a war, revolution, rebellion or political uprising at the time and site of the commission of the offence*”³⁸. This test, therefore, emphasizes those acts that were committed by groups of people over the acts committed by individuals acting on their own interests³⁹.
- e. *Characteristics of the offender*: in Northern Ireland, one of the main debates surrounding the political offence exception to extradition was its application to “*terrorists*”. However, as Christine Van de Wijngaert notes, to regard this as the main issue in the process of defining the contours of the exception does not entirely reflect reality. Every conflict, she stresses, has “*condemned*” a particular category of offenders. Indeed, she notes, “*ever since its inception in extradition law, practical applications of the rule have given rise to reactions and often also to international tensions. Each political conflict situation has produced asylum seekers, who, successfully or unsuccessfully claimed protection against extradition by raising the political offence*

36 *Óp. cit.*, p. 162.

37 For more about the “*political incidence test*” see: A. Petersen, *supra* note 2, p. 775.

38 *Schtraks vs. Government of Israel* [1964] A.C., 556 at 591 and *Mackin*, 668 Federal Reporter, 2nd Series (1981) 122 at 124, in Alpha Connelly, *supra* note 12, p. 164.

39 A. Connelly, *supra* note 27, p. 165.

exception”⁴⁰. She mentions the “*fascists*” and “*communists*” as a result of the Russian revolution, the “*collaborators*” and “*quislings*” after the Second World War, the “*passive offenders*” who fled from the East due to the Cold War, the “*freedom fighters*” often also regarded as “*terrorists*” from the post-colonial wars, among others examples⁴¹. Every type of conflict can be said to have given rise to a certain category of political offenders, notwithstanding the name with which the government or civil society has stigmatized them. Hence, the mere categorization of a group as “*terrorist*”, without any actual conviction for such crime, does not necessarily halt the application of the exception to extradition, and does not entail that this crime cannot be said to be linked to a political objective.

The motive and purpose of the offender would structure what has been referred to as the subjective approach to the political offence, which focuses on the intentions of the offender⁴². According to Christine Van Den Wijngaert, this was the approach followed in the *MacCan* case decided in 1980, where the Court of Appeals of Aix-en-Provence refused the extradition of an IRA-member, accused of having participated in a bombing of a public cinema close to the headquarters of the British army in the German Federal Republic⁴³. On the other hand, the set of criteria that focus on the act rather than the intention or purposes sought by the offender give shape to the objective approach to the political offence. Based on the latter approach, the Irish government refused the extradition of a person accused of assisting

40 C. Van Den Wijngaert, *The Political Offence Exception to Extradition: Defining the Issues and Searching a Feasible Alternative*. Report presented at the International Seminar on Extradition, International Institute of Higher Studies in Criminal Sciences, Noto, 742 (1983).

41 *Op cit.*, pp. 742-743.

42 *Ibidem*, p. 745.

43 C. Van Den Wijngaert, *The Political Offence Exception to Extradition: Defining the Issues and Searching a Feasible Alternative*. Report presented at the International Seminar on Extradition, International Institute of Higher Studies in Criminal Sciences, Noto, 742 (1983).

a spy escape from prison, due to the intrinsic connection of the offence with the political crime of espionage⁴⁴.

In another case, in applying the political incidence test, the Court of Appeals for the Second Circuit in the United States held that “*an attempted murder of a British soldier in Northern Ireland by a member of the IRA*” constituted a political offence “*because of it being connected with the overall conflict situation on Northern Ireland*”⁴⁵. Later on in 1985, with the ratification of the Supplementary Extradition Treaty, between the United States and the United Kingdom, which amended the treaty previously signed in 1972, the scope of the political offence exception was further narrowed to exclude its invocation by suspected terrorists⁴⁶.

Both of these approaches become relevant for the purpose of defining the “*connexity*” requirement for the determination of a political offence, or the scope of the “*relative*” political offences, whereby a common crime is deemed political due to its close connection with a “*purely*” political offence⁴⁷.

The preceding analysis of the criteria followed by the Irish Supreme Court to decide whether to apply the political offence exception to extradition leads to similar results, as the case of South Africa⁴⁸. As explained above, an assessment of the extent to which a common offence may be linked to political offences and political objectives require a process of pondering a series of factors (subjective and objective) that not merely focus on the intentions of the offender, but requires scrutinizing the underlying circumstances and the political context.

44 Bourle vs. Attorney General, 107 Irish Law Times (1973), in C. Van den Wijngaert, *supra* note 41, p. 746.

45 Mackin, Court of Appeals, 2 Circ., 23 December 1981, 668 F 2d 122, in C. Van den Wijngaert, *supra* note 41, p. 746.

46 J. Kinneally III, *The Political Offense Exception: is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?*, 2 *American University International Law Review*, Iss 1, 204 (1987).

47 See C. Van den Wijngaert, *supra* note 41, p. 745; see also: A. Petersen, *supra* note 2.

48 These criteria have also been applied in cases pertaining to extradition requests of IRA members decided by Courts outside Northern Ireland. See: A. Petersen, *supra* note 2, p. 777.

3. Colombia

In Colombia the debate not only focuses on the interpretation to be given to the “*connexity*” requirement referred to above (“*relative*” political offences), but also touches upon the very nature of the typified as “*political offences*” by the Criminal Code now in force: rebellion, sedition and mob violence (“*pure*” political offences)⁴⁹. To understand the scope and meaning of the legal concept of the “*political offence*” in the Colombian context, therefore, it is necessary to inquire into the nature of the conflict and the category of actors that it involves.

The origins of the armed conflict may be traced back to the mid-1960s, when peasants and social activists began to unite to fight for social, political and land reform, calling for “*socio-economic justice and the participation of marginalized sectors in the country’s political life*”⁵⁰. The bipartisan violence stirred up by the assassination of popular leader Jorge Eliécer Gaitán in April 9th, 1948, followed by the defeat of former dictator Gustavo Rojas Pinilla and the conformation of the Colombian National Front⁵¹, these actions led to the mobilization in the 1960s of several guerrilla movements such as the Colombian Revolutionary Armed Forces (FARC), the National Liberation Movement (ELN), the Popular Liberation Army (EPL) among others. In 1972, a more urban guerrilla, the 19th of April Movement (M-19), was created in reaction to the alleged electoral fraud of 1970⁵².

49 The Criminal Code now in force includes these offences (*rebelión, sedición y asonada*) under the title of “*crimes committed against the institutional and legal regime*”, Law 599 of 2000, “Por la cual se expide el Código Penal”, Colombia (2000). Arts. 463-466.

50 S. Jaramillo, Y. Giha & P. Torres, *Transitional Justice and DDR: The Case of Colombia*, 10 (Research Unit, International Center for Transitional Justice [CTJ], 2009).

51 The National front was an agreement under which the two traditional parties: conservatives and liberals would alternate power for a period of 16 years. Fernán E. González also talks about the criminalization of social protest during the 1970s, which along with the lack of social reform exacerbated the difficulties of the bipartisan regime under the National Front. F. González, *The Colombian Conflict in Historical Perspective*, in *Alternatives to War. Colombia’s peace processes*, 12 (M. García Durán, Ed., Conciliation Resources, CINEP, London, 2004).

52 *Op. cit.*, p. 13

The struggle against the guerrillas led the government to declare the state of siege⁵³ in the national territory, thus enabling the government to exercise exceptional powers to issue legislative decrees to deal with the raging violence. The set of emergency decrees issued during the prolonged state of siege, which among other things authorized civilians to carry weapons otherwise restricted to armed forces use⁵⁴, linked to the emergence of the *Death to Kidnappers* group supported by former drug-traffickers⁵⁵, and fostered the creation of paramilitary groups⁵⁶. Unlike the guerrillas, these non-state armed groups intended not to subvert the national government, but to act as its substitute in places under the guerrilla's control⁵⁷. Later on, these groups engaged in illegal drug trafficking to secure funding for their activities, whilst providing them with the necessary economic and political support to expand their control over strategic pieces of land⁵⁸. Some of these groups, gathered under the *Colombian United Self-Defense Forces*, later demobilized between 2003 and 2006.

From this brief account of the political causes of the conflict it follows that in Colombia the categorization of a certain conduct as a political offence was deeply rooted in the historic context as well as the characteristics and causes of the emergence of the non-state actors in question. As Alejandro Aponte points out, in the 19th century the conduct of “*rebellion*” was framed in the dynamics of the inter-partisan struggle between liberals and conservatives⁵⁹. It is noteworthy that more than mere “*rebels*”,

53 IACHR, Case of the Pueblo Bello Massacre vs. Colombia. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C/140, p. 95. See also: Tribunal Superior de Distrito Judicial de Bogotá, Sala de Justicia y Paz, Case 110016000253200680281. M. P. Uldi Teresa Jiménez López. Tribunal Superior de Bogotá, [El Iguano] (Dec., 2010).

54 For an explanation of the provisions of these decree, see: IACHR, Case of the Pueblo Bello Massacre vs. Colombia, *supra* note 54, p. 95.

55 See: F. González, *supra* note 52, p. 13.

56 IACHR, Case of the Pueblo Bello Massacre vs. Colombia, *supra* note 54, p. 95.

57 S. Jaramillo, Y. Gilha & P. Torres, *Transitional Justice and DDR: The Case of Colombia* 10 (Research Unit, International Center for Transitional Justice [CTJ], 2009).

58 I. Orozco, *Elementos para una fundamentación del delito político en Colombia: Una reflexión a partir de la historia*, 9 *Análisis Político*, 35 (1990).

59 A. Aponte, *Delito político, estrategias de defensa jurídica, derecho penal y derechos humanos en Colombia: una reflexión crítica*, 6 *Revista de Derecho Público*, 145 (Universidad de los Andes, 1996).

the political actors taking part in the bipartisan struggle were deemed combatants, and as such, subject to protection under the emerging rules governing armed conflicts⁶⁰. It was only until the beginning of the 20th century that the conduct of “*rebellion*” stretched out to comprise what had been previously considered as legitimate means of civil protest. Consequently, union members, indigenous people seeking the restoration of their land and peasants who sought the fulfillment of minimum work conditions began to be criminalized as “*rebels*”⁶¹. As a general rule, “*civil unrest*” was considered as rebellion, and therefore outlawed.

During the 1960s, the criminal type of rebellion was essentially applied in cases involving members of the recently created guerrilla movements⁶². In the 1970s, as the concerns on the possibility of a civil unrest increased, and the violence quickly spread into the cities, the then recently elected president Julio Cesar Turbay sanctioned into permanent legislation the executive decrees that had been previously enacted during the “*State of Siege*”. As a result of this permanent legislation, also known as the “*Security Statute*”, all types of social movements were assimilated to armed subversion and all categories of social activists were considered “*subversives*”⁶³. Consequently, political offences such as sedition, turbulent opposition and even social protest became absorbed by the notion of rebellion, and penalized thereof⁶⁴.

The political panorama changed as a result of the peace process with the M-19. It then became apparent that the interpretation of the political offence had to be modified against the backdrop of the emerging peace negotiations. In addition, it became necessary to redefine the contours of the crimes associated with the political offence since the crime of rebellion never

60 A. Aponte, *Delito político, estrategias de defensa jurídica, derecho penal y derechos humanos en Colombia: una reflexión crítica*, 6 *Revista de Derecho Público*, 145 (Universidad de los Andes, 1996).

61 *Op. cit.*

62 *Ibidem*, p. 147.

63 A. Aponte, *supra* note 59, pp. 149-153.

64 *Op. cit.*, p. 154; F. González also talks about the criminalization of social protest during the 1970s which along with the lack of social reform, exacerbated the difficulties of the bipartisan regime under the National Front. F. González, *supra* note 53, p. 13.

appeared alone⁶⁵. The Amnesty Law of 1982, which favored the release of the political detainees – mainly members of the M-19–, specifically excluded the crime of holding and using weapons of the military (“*porte de armas*”) as a crime associated with a political objective.

As noted before, the escalation of the violence generated by the guerrilla movements and the corresponding state response to this threat further caused the emergence of paramilitary groups. From the late 1980s onwards throughout the 1990s, the entire country was immersed in the violence caused by drug cartels, insurgency and self-defense groups (paramilitaries)⁶⁶. The guerrilla movements became later involved in terrorist attacks and in illegal drug trafficking, a situation that caused violence to skyrocket and the boundaries of the political offence to narrow⁶⁷. In 1988, the executive branch issued decree No. 180, referred to as the “*Antiterrorist Statute*”, as a result of which the members of the guerrilla movements could no longer be called and treated as insurgents, and became to be called and penalized as “*terrorists*”; social protest in general was associated to “*terrorist activity*”⁶⁸.

In 1997, Congress enacted Law no. 418, also known as the “*Public Order Law*”, which was later extended and modified by Law 548 of 1999, Law 782 of 2002, Law 1106 of 2006 and Law 1421 of 2012⁶⁹. Law 418 allowed for the demobilization of non-state armed groups (through individual as well as collective demobilization processes), opened the door to peace negotia-

65 A. Aponte, *supra* note 60, p. 156.

66 A. Bejarano, *La paz en la administración de Barco: de la rehabilitación social a la negociación política*, 9 *Análisis Político*, 8 (1990).

67 M. García Durán, Ed., *Alternatives to War. Colombia's Peace Processes Accord*, 5 (Conciliation Resources, CINEP, London, 2004).

68 A. Aponte, *supra* note 60, p. 169. Later on, during the 8 years of government of former president Uribe, the category of “*political offence*” was rarely used, and even became to be “*stigmatized*”, due to the characterization of the previously called “*insurgents*” or “*rebels*” as dangerous “*terrorists*”. I. Orozco, *Lineamientos de política para la paz negociada y la justicia post-conflicto*, 8 (Fundación Ideas para la Paz, Working Paper No. 9, Feb., 2012).

69 Law 418 of 1997, “Por la cual se consagran unos instrumentos para la búsqueda de la convivencia, la eficacia de la justicia y se dictan otras disposiciones”. Colombia (Dec. 26, 1997), modified by Law 548 of 1999, Law 782 of 2002, Law 1106 of 2006 and Law 1421 of 2012.

tions and peace agreements and set forth various measures of assistance and care in favor of the victims of the conflict. Pursuant to this law, demobilized members of the non-state armed groups (guerrilla movements and members of the former United Self-Defense Forces) accused of political offences who were not accused of atrocious, ferocious or barbaric crimes, could apply to the legal benefits of pardon, the suspension of arrest warrants or preclusion of the proceedings⁷⁰. Furthermore, in case C-928 of 2005, the Constitutional Court decided on extending the benefit of individual pardons to crimes associated to a political offence⁷¹.

Initially, the granting of these benefits required an official recognition of the political nature of the non-state armed groups; however, this requirement was eliminated under Law 782 of 2002, making it possible to grant legal benefits to members of paramilitary groups without implying any recognition on their political status⁷².

In 2003 former President Alvaro Uribe entered into negotiations with the powerful right-wing paramilitary group, the United Self-Defense Forces of Colombia (AUC). This process was followed by collective demobilizations, which required a prior agreement with the corresponding “*Bloque*” or “*Frente*” as well as individual demobilizations of former combatants who freely decided to return to civilian life without having a peace agreement with the Government⁷³. Later on, the Congress passed Law 975 of 2005, also known as the “*Justice and Peace Law*” (JPL) that provided the legal basis for the demobilization of the paramilitary groups. While the benefits of Law 418 applied to members of the non-state armed groups accused of politically

70 Law 418 of 1997, Art. 50.

71 Constitutional Court of Colombia. Judgment C-928 of 2005. It should be further clarified that the Court limited the application of the “*connexity model*” for the granting of pardons in the context of individual demobilization processes, thus expressly excluding the application of pardons and related-measures in cases pertaining to collective demobilizations.

72 S. Jaramillo et. ál., *supra* note 51, p. 10; See also: International Center for Transitional Justice. ICTJ Program Report, Colombia (Oct. 2, 2012). <http://ictj.org/news/ictj-program-report-colombia>

73 S. Jaramillo et. ál., *supra* note 51, p. 4.

motivated crimes or crimes associated with political offences, the JPL set forth a special criminal procedure that included the benefit of alternate sentences consisting of five to eight years of imprisonment for perpetrators of atrocious crimes, provided they satisfied the eligibility conditions. It was further committed to guarantee victims' rights to justice, truth and reparations⁷⁴.

It is worth noting that under article 71 of the Justice and Peace Law the crime of “*criminal conspiracy*” (the crime of belonging to a paramilitary group) was assimilated to the crime of “*sedition*” in order to enable individual demobilized members of the paramilitary groups to benefit from the “*Public Order Law*” framework, exclusively directed to political offenders. However, in judgment C-370 of 2006, the Colombian Constitutional Court declared article 71 of the JPL unconstitutional⁷⁵. In addition, in an interlocutory decision in 2007, the Criminal Chamber of the Supreme Court of Justice determined that the conformation of self-defense forces could not be assimilated to a political offence⁷⁶, henceforth dismissing the legal “*equivalence between these two legal conducts by establishing the incompatibility of article 71 of Law 975 of 2005 with the Constitution, precisely because of the similar treatment afforded to common crimes and political crimes*”⁷⁷.

This decision paradigmatically reflects the traditional approach to the concept of “*political offence*” in Colombia, which focuses mainly on the characteristics of the actor in question. According to this approach, which also features in a judgment of the Criminal Chamber of the Colombian Supreme Court in 2005⁷⁸, the category of political offences comprises, among

74 For more about Law 418 and Law 975 see: Ministerio del Interior y de Justicia-Unión Europea, *Justicia Transicional. Aportes para construir un lenguaje unificado de transición en Colombia*, 15 (Author, Bogotá D.C., 2011) (non-official translation by Jose Gómez).

75 Constitutional Court of Colombia. Judgment C-370 of 2006.

76 Supreme Court of Justice, Criminal Chamber. Case 26945 (July 11, 2007). (Opinion: Yesid Ramírez Bastidas).

77 IACHR, *Report On The Implementation of The Justice And Peace Law: Initial Stages In The Demobilization Of The AUC And First Judicial Proceedings*. OAS/Ser.L/V/II. Doc. 32 (Oct., 2007).

78 Supreme Court of Justice, Criminal Chamber. Case 24310, (Oct. 18, 2005). (Opinion: Marina Pulido de Barón).

others, the conduct of the members from those non-state armed groups, which exercise control over a part of the territory and satisfy the threshold requirements of Protocol II to the Geneva conventions, provided the conduct is linked to the strategy designed and put into place by the responsible command of said organization⁷⁹. Therefore, the definition of the political offence depends on the political character of the actor in question, which in turn depends on the characterization ascribed to it⁸⁰.

The declaration of the unconstitutionality of article 71 of the Justice and Peace Law, coupled with the Supreme Court's case law pertaining to the scope of the political offence as such, recaptured the traditional view of the paramilitary groups as common criminals, as opposed to the intrinsic political nature that characterizes the guerrilla groups⁸¹.

In turn, in regards to the crimes associated with political objectives ("*relative*" political offences), before the LFP, there was no legal provision *expressly* authorizing the application of this category as a result of the Constitutional Court's decision in case C-456 of 1997⁸². As mentioned before, the application of the "*connexity*" model was specifically restricted to the granting of pardons in the context of individual demobilizations⁸³.

To take stock, the categorization of certain offences as political offences in each of the above mentioned cases –South Africa,

79 Supreme Court of Justice, Criminal Chamber. Case 24310, (Oct. 18, 2005). (Opinion: Marina Pulido de Barón).

80 In this regard, Iván Orozco further explains that in Colombia, the traditional understanding of the political offender rested upon the characterization of the offender as "*rebel*". Furthermore, this author analyses how the notion of "*rebel*" was conceived and understood at the shade of the notion of "*belligerent*" under the International Humanitarian Law. I. Orozco, *Elementos para una fundamentación del delito político en Colombia: una reflexión a partir de la historia*, 9 *Análisis Político*, 35 (1990).

81 I. Orozco, *Lineamientos de política para la paz negociada y la justicia post-conflicto*, 15 (Fundación Ideas para la Paz, Working Paper No. 9, Feb., 2012).

82 In this judgment, the Constitutional Court of Colombia declared article 127 of the previous Criminal Code of 1980 and article 184 of the Military Criminal Code of 1988, which expressly incorporated the "*connexity*" model, unconstitutional. On the other hand, in Case C-986 of 2010, the Constitutional Court referred to the possibility that, under the "*connexity model*", political offenders and those convicted for crimes associated with political objectives could fall outside the purview of the ineligibility requirements provided for in article 122 of the Political Constitution of 1991, as amended in 2009.

83 *Supra* note 72.

Northern Ireland and Colombia— depended on the purpose sought by the measure at issue: the granting of amnesties, the need to apply the well-known exception to extradition, and the application of the different legal benefits provided in the legal framework dealing with the parties to the armed conflict, respectively. In addition, in each case the importance ascribed to each criterion, responded to the intrinsic dynamics in each process, sometimes failing to reflect a non-discretionary approach such as in the case of Northern Ireland.

Similarly, in the case of Colombia the evolution of the meaning and scope of the political offence, as well as the delimitation of the type of acts committed in furtherance of a political offence, reflect the changing nature of the armed conflict as a result of the emergence of new political actors and the escalation of violence caused by the involvement of the parties to the conflict in drug trafficking and terrorism. This circumstance, linked to the Supreme Court's decisions of 2005 and 2007 also provide an explanation to the special weight given to the offence of "*rebellion*" over the remaining political offences set forth in the Criminal Code, as well as explains the traditional approach rendering the characterization of the offence of "*rebellion*" dependent on the political nature of the non-state armed group in question.

The intrinsic complexity of the study of the "*political offence*" in Colombia therefore explains the need for a more flexible approach to comprehending the political offence from its "*pure*" and "*relative*" perspectives, for the purpose of applying the political participation provision of the LFP, which shall differ from the understanding ascribed to it exclusively for the purpose of granting an amnesty or pardon.

II. POLITICAL PARTICIPATION

In the aftermath of a transition process from a situation of conflict to the peaceful coexistence of opposing views, both the need to carve out spaces for former rebels to participate in the public political arena as well as, more specifically, the recognition of

some political actors, constitute the *sine qua non* condition for a reliable peace process and, after the terms of peace have been negotiated, for a sustainable and prospering democracy.

Typically, peace negotiations rest upon the possibility to participate in the design of a new institutional framework that supports democratic values, including the drafting of a new constitution that reflects the principles and values that will govern the conduct of the government under the rule of law⁸⁴.

However, unlike past experiences in peace negotiations and processes, in the case of Colombia there exists no such agreement as to the need to come to terms regarding a new constitution enshrining democratic values and setting forth a comprehensive bill of rights. This has turned the participation in politics provision into the core issue of the ongoing peace process, not as a means to rethink the state, but as a necessary tool to implement what is already embedded in the Political Charter.

In order to get a grasp of the importance of negotiating an inclusive political settlement between former hostile parties, which evidently serves as a milestone for further successful political transition, I will describe the political and historical circumstances that led to the peace processes in El Salvador, South Africa and Northern Ireland, emphasizing the undertakings in the field of political participation. In concluding this section, and in order to understand the historical background and the constitutional foundations of the negotiating process currently carried out in la Habana, Cuba, I will briefly describe the peace process with the M-19 that ultimately led to the convocation of a National Constituent Assembly and the proclamation of the Colombian Political Constitution of 1991.

84 Declaration of Cessation of Hostilities, January 8th 1985; Agreement on a Ceasefire between the Government of the Democratic Socialist Republic of Sri Lanka and the Liberation Tigers of Tamil Eelam, February 23, 2002, in F. Benavides, *Political Crimes and Peace Processes*, 20 (Paper presented to the ICTJ's office in Bogotá, 2011).

A. El Salvador

The Salvadorian civil war between the US-supported right wing government and a coalition of liberation armies led by the Farabundo Martí National Liberation Front (FMLN) was deeply rooted in the unequal access to power and land distribution⁸⁵. For this reason the transition efforts, facilitated by the demilitarization of the civil society movement, focused on designing a participatory political system gathering ideologically different political parties⁸⁶. As Alexander Segovia explains:

*“[t]he end of the conflict depended crucially on the possibility of turning the guerrilla army into a political party. This required wide-ranging political and institutional reform aimed at demilitarizing society and strengthening the country’s democratic institutional framework. The peace negotiations, therefore, revolved around two basic issues: the democratization and demilitarization of society, and the incorporation of the guerrilla forces into the legal political system”*⁸⁷.

Due to the importance of the democratization efforts in the country’s transition, the Peace Agreement entered into between the Government of El Salvador and the FMLN at Chapultepec Castle on January 16th, 1992 incorporated numerous such commitments⁸⁸. In particular, Chapter VI of the Chapultepec Agreement was exclusively dedicated to the political participation of the FMLN:

*“Chapter VI. Political Participation of the FMLN
The following agreements have been reached concerning political participation by the FMLN (...):*

1. *Adoption of legislative or other measures needed to guarantee former FMLN combatants the full exercise of their civil and political rights,*

85 A. Segovia, *Transitional Justice and DDR: The Case of El Salvador*, 4 (Research Unit, International Center for Transitional Justice, 2009).

86 *Op.cit.*

87 *Ibidem.*

88 *El Salvador: Impact of the 1992 Accords* (Research Directorate, Immigration and Refugee Board, Canada, 1994). <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6a82f4>

with a view to their reintegration, within a framework of full legality, into the civil, political, and institutional life of the country.

2. *Freedom for all political prisoners*
3. *Full guarantees and security for the return of exiles, war-wounded and other persons currently outside the country for reasons related to the armed conflict.*
4. *Granting of licenses for FMLN mass media*
5. *Cessation of the armed conflict implies the commitment and the right of FMLN to full political participation, without any restrictions other than those deriving from the new institutional and legal framework established by the agreements reached during the negotiations.*
6. *Legalisation of FMLN as a political party, through the adoption of a legislative decree to that end.*
7. *Guarantee that FMLN will be able to conduct its activities normally when it becomes a political party, meaning:*
 - a. *Freedom to canvass for new members;*
 - b. *The right to set up an appropriate infrastructure (premises, printing works, etc.);*
 - c. *Free exercise of the right of assembly and mobilisation for FMLN leaders, activists and members;*
 - d. *Freedom for FMLN to purchase and use advertising space in the mass media.*
8. *Legal solution to the participation of FMLN members in COPAZ, once the latter formalizes its existence”⁸⁹.*

Moreover, the Peace Accords included a Chapter on the cessation of the armed conflict, which in turn was divided in four different parts: (1) the cease-fire; (2) the separation of forces; (3) the end of the military structure of the FMLN and the reincorporation of its members, within a legal framework, into the country’s civil, political and institutional life; and the (4) United Nations verification of those activities. To facilitate implementation of the accords, a joint working group was formed, made up of the Chief of Military Observers of the United Nations Observer Mission in El Salvador (ONUSAL), as chairperson, and one representative from each of the parties⁹⁰.

89 Peace Agreement between the Government of El Salvador and the Frente Farabundo Martí para la Liberación Nacional (FMLN), México D.F., Jan. 16, 1992, General Assembly A/46/864. http://peacemaker.un.org/sites/peacemaker.un.org/files/SV_920116_ChapultepecAgreement.pdf

90 See also: A. Segovia, *supra* note 86, p. 6.

Following the obligations derived from the Peace Accords, an election process was carried out on March 20th, 1994 with candidates from the right-wing National Republican Alliance (ARENA) and the coalition formed by the FMLN and the National Revolutionary movement (MRN). Armando Calderón, from the ARENA political party, received 49.2 percent of the votes cast, while the CD-FMLN-MRN candidate, Rubén Zamora, received 25.6 percent of the votes⁹¹. Since no candidate obtained an absolute majority, a second round of elections was held. As a result of this second ballot Mr. Calderón Sol was proclaimed as the president-elected⁹². His ARENA party also won the majority of the seats in the elections for the legislative assembly (39 seats), but the FMLN kept an important number of 21 seats⁹³.

As the previous account reveals, the FMLN's willingness to demobilize and dismantle rested upon the possibility of full reincorporation into the civil life and the option for its members to run for political office and participate in the political system at large. Absent the consent regarding a political settlement for the FMLN, the possibility for a cease-fire agreement would have been reduced considerably from the beginning, if not inexistent.

B. South Africa

Coming to terms with South Africa's political transition process is difficult without addressing the process of negotiating a political settlement for the anti-apartheid political parties, in particular the ANC. The democratic election process of 1994 signaled the end of the apartheid political order, as well as the initiation of a rather peaceful transition process that would rest on the need of reconstructing a society that had been torn apart by

91 There were some allegations of "irregularities" during the 1994 presidential elections. *El Salvador: Impact of the 1992 Accords* (Research Directorate, Immigration and Refugee Board, Canada, 1994).

92 *El Salvador: Background* (United Nations Observer Mission in El Salvador, ONUSAL). <http://www.un.org/en/peacekeeping/missions/past/onusalbackgr2.html>

93 *El Salvador: Impact of the 1992 Accords*, supra note 95.

racial segregation⁹⁴. Against such backdrop, lasting peace could only be achieved through measures directed at addressing the underlying causes of the conflict, the lack of political settlement of the anti-apartheid movements being one of them⁹⁵. The necessity to call for a democratic election process, therefore, became a recurrent issue in the peace negotiations agenda.

On June 1st 1993, in the midst of the negotiation process initiated in 1991, the parties agreed on April 27th 1994 as the date for South Africa's first ever non-racial elections to be held. On the same day, the Negotiating Council instructed the Technical Committee on Constitutional Matters to draft a transitional constitution, intended to be, ultimately adopted, as the new democratic constitution by an elected Constitutional Assembly⁹⁶.

Approximately 19 political parties participated in the 1994 elections. As a result of these elections, the ANC received more than 60% of the popular vote, winning 252 seats in the National Assembly; while the NP won 82, followed by other minority political parties. Similarly, the ANC won by majority in seven provincial legislatures; the NP won in the Western Cape⁹⁷.

C. Northern Ireland

On April 1998, four years after the IRA and the Combined Loyalist Military Command had publicly announced a ceasefire⁹⁸, the parties to the conflict signed the Belfast Agreement, also known as the Good Friday Agreement, setting forth obligations in two different aspects. First, it addressed the international obligations

94 For more about the transition in South Africa see: D. Powell, *The Role of Constitution Making and Institution Building in Furthering Peace, Justice and Development: South Africa's Democratic Transition*, 4 *The International Journal of Transitional Justice*, Iss 2 (2010).

95 P. Camay & A. Gordon, *South Africa Civil Society and Governance Case Study 1* (Cooperative for Research and Education, CORE, Johannesburg). <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02424/04lv03275/05lv03294/06lv03321.htm>

96 *Chronology of Documents and Reports* (O'Malley, the heart of hope). <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02127.htm>

97 US Library of Congress, *The 1994 Elections* in O'Malley reports. <http://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02128/05lv02130.htm>

98 K. Boyle & T. Hadden, *The Peace Process in Northern Ireland*, 71 *International Affairs* 2, 273 (1995).

for the Republic of Ireland and the United Kingdom deriving from the acknowledgement of the status of Northern Ireland as part of the United Kingdom. Furthermore, the multiparty negotiations carried out between eight different political parties⁹⁹ and the government concluded in an agreement dealing with, among other issues, the civil and cultural rights, the decommissioning of illegally-held guns owned/possessed by paramilitary groups and, as Benavides points out, the political participation of the Sinn Féin party members in the political process in Northern Ireland¹⁰⁰. The Belfast Agreement was approved by means of public referenda in the Republic of Ireland and in Northern Ireland¹⁰¹. Following these commitments, in 1999 the British government transferred power to Northern Ireland, forming a power-sharing executive¹⁰², which was subsequently suspended and reinstalled depending on compliance with the peace accord's undertakings.

With regard to the Multi-Party agreement, following succeeding agreements between the parties, in 2003 a new democratically elected assembly was formed, consisting of a wide majority by the pro-British Democratic Unionist Party and the Sinn Féin. After several setbacks in the course of the peace process, the IRA ultimately announced the end of its armed struggle, instructing its military units to resume disarmament¹⁰³. Yet, in spite of the political obstacles that hampered full compliance with the Belfast Agreement, the recognition of Sinn Féin and other political actors as lawful political parties represented a milestone for the transition into peace in Northern Ireland. As Kevin Boyle's ar-

99 The 8 political parties were: the Ulster Unionist Party, the Social Democratic and Labour Party, Sinn Féin, the Alliance Party, the Progressive Unionist Party, the Northern Ireland Women's Coalition, the Ulster Democratic Party and Labour. See: A. Morgan, *The Belfast Agreement, a Practical Legal Analysis*. <http://www.cain.ulst.ac.uk/events/peace/morgan/index.html#fn48>

100 F. Benavides, *supra* note 85, pp. 5-8.

101 *The Thorny Path to Peace and Power Sharing*, CBC News. (March, 2007). <http://www.cbc.ca/news/background/northernireland/timeline.html>

102 *Óp.cit.*

103 *Ibidem.*

ticle on the Northern Irish Peace Process professes, this was the controlling view even before the parties signed the peace accord.

Regarding the importance of building a multi-party system for the transition to peace in Northern Ireland, in 1995 Boyle wrote at the wake of peace negotiations:

*“[T]he ‘peace first’ strategy successfully pursued by John Hume, Gerry Adams, Albert Reynolds and John Major in the face of widespread criticism by politicians and commentators would not have been possible if substantial progress had not been made on terms of an eventual political settlement. The story of the peace process must include the tortuous search for all-party agreement on new structures for the government of Northern Ireland”*¹⁰⁴.

D. Colombia

The Constitutional Reform of 1991 brought to an end a series of political processes, including failed peace negotiations with the guerrillas and several other changes that had taken place since the mid 1980s. According to Fernán González, prior to the election of the Constituent Assembly, the country was in the midst of a “*serious crisis of political representation that profoundly affected the legitimacy of the state institutions and the means of political mediation in society*”¹⁰⁵. The violence had exacerbated as a result of “*narco-terrorism*”, a term used to describe the characteristics of the fight between the drug cartels and the State, and within the drug cartels themselves. Notwithstanding the fact that several peace initiatives were launched, not all of them focused on the same dynamics and causes of the conflict¹⁰⁶. Some of them, such as the strategy adopted by former President Belisario Betancur, were linked to the defense of human rights and followed a very broad agenda of political and social reforms. Other initiatives, like the peace process carried during the government of former president Virgilio Barco, focused on a more-limited agenda that

104 K. Boyle & T. Hadden, *The Peace Process in Northern Ireland*, 71 *International Affairs* 2, 273 (1995).

105 F. González, *supra* note 52, p. 13.

106 For an explanation on the different dynamics of the conflict in Colombia, see: F. González, *supra* note 52.

would develop in three stages: demilitarization, transition, and ultimately incorporation into civilian life, which in turn included the possibility of a political settlement¹⁰⁷.

The peace initiatives under the government of Virgilio Barco marked the beginning of the demobilization process of the M-19 and other guerilla movements¹⁰⁸. These talks resumed in an agreement by the parties on political favorability and amnesties for the members of the guerrilla. Failing the passing by congress of a bill intended to incorporate such agreement, the M-19 sought to have a list of names of demobilized members included in the electoral list for the March 1990 elections, for all public posts except for that of the President. Furthermore, a civil society movement of students and educators, promoted the inclusion of a “*seven ballot*”¹⁰⁹, calling for the convocation of a National Constituent Assembly.

The elections for the National Constituent Assembly, carried out in December 1990, led to the conformation of politically diverse body of 70 delegates, 19 out of which were former members of the M-19¹¹⁰. Finally, on July 20th 1991, the Constituent Assembly promulgated the new Political Constitution, setting forth the legal and political foundations for any further peace attempt.

As the previous account reveals, the political transitions in El Salvador, South Africa, Northern Ireland, would have not been achieved if the parties of the peace process had not agreed upon

107 M. García Durán, *Colombia: Challenges and Dilemmas in the Search for Peace*, in *Alternatives to war. Colombia's peace processes. Accord*, 7 (M. García-Durán, Ed., Conciliation Resources, CINEP, London, 2004). V. Grabe, *Peace Processes 1990-1994. Alternatives to War. Colombia's peace processes. Accord*, 40 (M. García-Durán, Coord., Conciliation Resources, CINEP, London, 2004).

108 A. Bejarano, *La paz en la administración de Barco: de la rehabilitación social a la negociación política*, 9 *Análisis Político*, 4 (1990).

109 This ballot (“*papeleta*”) was introduced in addition to the other six ballots for the elections for Senate, Chamber, Assembly, Council, Mayor and the presidential primary. S. Taylor, *The Politics of the Ballot in Colombia: Access, Production, Distribution, and Design* (Prepared for the 2011 Meeting of the Midwest Political Science Association) http://www.academia.edu/637719/The_Politics_of_the_Ballot_in_Colombia_Access_Production_Distribution_and_Design

110 *Las figuras de la Asamblea Nacional de 1991*. El Universal (Jun. 17, 2011). <http://www.eluniversal.com.co/cartagena/politica/las-figuras-de-la-asamblea-nacional-de-1991-29843>

a satisfactory political settlement -by means of the conformation of a new political party- for the FMLN, the RUF, the ANC and the IRA, respectively. Similarly, the peace process with the M-19 in Colombia stresses the importance of reaching a national consensus on the need to allow the political participation of the FARC for enduring an effective ceasefire and a successful political transition.

III. THE HISTORIC, POLITICAL AND LEGAL BACKGROUND OF THE LEGAL FRAMEWORK FOR PEACE

In this part, I will briefly describe the political background that led to the enactment of the LFP and the debate that the provision on political participation has spurred in the public sphere and among the most prominent members of the political parties. Although the idea of the FARC participating in parliamentary elections and transforming into a political party seems disquieting for an important portion of the public opinion, the truth remains that this issue constitutes a stepping stone for a successful political transition in Colombia.

A. Political and Historic Background

During the course of the conflict, there have been several attempts to negotiate a ceasefire with the FARC, the most recent being the round talks during the government of Andrés Pastrana in the late 1990s. In spite of the failure of these attempts, the initiated processes left a number of lessons that, coupled with the enactment of the Law on Victims and Land Restitution and the Legal Framework for Peace, provided the perfect environment for approaching peace yet again.

The first attempt to negotiate peace with the FARC resulted in the signing of the “*Uribe Accords*” on March 28th 1984¹¹¹. Along

111 C. González, *Negotiations with the FARC 1982-2002*, in *Alternatives to war. Colombia's peace processes. Accord*, 46 (M. García-Durán, Ed., Conciliation Resources, CINEP, London, 2004).

with the conformation of the National Peace and Verification Commission, the democratization program contained in the agreement with the then president Belisario Betancur led to the conformation and public launching of the Patriotic Union (UP), the FARC's political party¹¹². In this regard, Camilo González notes, “[t]he Betancur government believed that the creation of the UP and the “democratic opening” would serve as the most effective way to draw the FARC's interests into the legal sphere”¹¹³. In addition, as described by the Inter American Commission on Human Rights:

*“[t]he Patriotic Union was not conceived as a political party in the strictest sense of the term, but more as a political alternative to the traditional power structure that would serve as a vehicle for the various manifestations of civil and popular protest. The Patriotic Union was also envisioned as the political vehicle of the FARC for possible reintegration into civilian life. The newly-formed party received immediate support from opposition left-leaning political movements, such as the Communist Party, and quickly obtained significant electoral success in elections in 1986 and 1988”*¹¹⁴.

However, not only the Verification Commission became a body without force, but also the democratization program failed as a result of the change of government and the military ambush carried out by the FARC in the municipality of Puerto Rico in 1987¹¹⁵. What is more, the situation deteriorated due to the systematic persecution of the UP members, carried out by self-defense groups (paramilitaries) with the acquiescence of state forces and, allegedly, also by state agents themselves¹¹⁶.

112 C. González, Negotiations with the FARC 1982-2002, in *Alternatives to war. Colombia's peace processes*. Accord, 47 (M. García-Durán, Ed., Conciliation Resources, cinep, London, 2004).

113 *Op. cit.*

114 IACHR, Case 11227. Report on Admissibility, 5/97, 3 (March 12, 1997).

115 C. González, *supra* note 112, p. 47.

116 In its decision dated March 12, 1997, the IACHR declared admissible the petition submitted by Corporación Reiniciar, Comisión Colombiana de Juristas and the Colectivo de Abogados José Alvear Restrepo against the State of Colombia for the alleged persecution and harassment of the members of the Patriotic Union (UP), manifesting in extrajudicial executions, disappearances, unfounded criminal prosecutions, attempted assassinations and threats. The case concerning former senator and member of the UP, Manuel Cepeda Vargas was detached from the prior mentioned petition and finally submitted before the Inter-American Court. In its judgment of May 26, 2010, the Court declared the State

Later on, between 1991 and 1992, in the midst of the conformation of the Constituent Assembly, rounds talks were held in Caracas, Venezuela and Tlaxcala, Mexico. These rounds turned out to be unsuccessful due to the reciprocal mistrust by the parties, exacerbated by the military attack of the peace headquarters in “*la Uribe*”, the strengthening of the military pressure, and the continuing kidnappings and attacks on behalf of the guerrillas¹¹⁷.

The peace talks continued during the government of former president Andrés Pastrana, in 1999. In order to facilitate the peace talks, an area of 42,000 square kilometers in the eastern plains of Colombia was completely demilitarized¹¹⁸. These negotiations, known as “*El Cagúan Process*”, finally reached a breakdown as a result of the increasing opposition to the demilitarized zone, the change of the political environment caused by the initiation of the “*war against terrorism*” and the US labeling of the FARC as the most dangerous terrorist group in the Americas¹¹⁹.

Among various other lessons to be drawn, the previous attempts to negotiate peace with the FARC buttress the importance of reaching a national consensus on a political settlement of the conflict that includes the possibility for the FARC to transform into a political party, with the proper assurances to prevent what happened to the UP from reoccurring.

B. The Current Peace Talks

On September 4th 2012, after 6 months of holding private meetings, president Juan Manuel Santos, and the highest ranked

of Colombia internationally responsible for the violation of the rights to life, personal integrity, judicial guarantees and protection, honor and dignity, freedom of association, freedom of thought and expression, and the political rights to the detriment of Senator Manuel Cepeda Vargas and ordered the State to make reparations thereof. IACHR, Case Manuel Cepeda Vargas vs. Colombia. Preliminary Objections, Merits, Reparations and Costs. Series C- 213. 265. Judgement May 26, 2010.

117 C. González, *supra* note 112, p. 48.

118 *Op.cit.*, p. 49. For more about the importance of establishing a demilitarized zone for the negotiations with the FARC see: E. Refshauge, *Demilitarized zone essential for peace talks: expert* (Colombia Reports, September 25, 2012). <http://colombiareports.com/demilitarized-zone-essential-for-peace-talks-expert/>

119 C. González, *supra* note 112, pp. 49-50.

member of the FARC, Rodrigo Londoño (alias “*Timochenko*”), publicly professed the initiation of a new round of peace talks aimed at a final cease of hostilities. According to the announcement, the peace negotiations agenda would rest on the following five main topics: (i) rural development: to deal with the social inequalities created by the absence of an agrarian reform and the violent taking of land from peasants; (ii) guarantees for political opposition and participation by all citizens; (iii) the end of hostilities, which includes issues such as disarmament, demobilization and reintegration into civil life of demobilized members of the guerrilla; (iv) drug trafficking: aimed at finding a negotiated social settlement for those families that conform the social base of the FARC, whose economy is dependent on the cultivation of “*coca*” base; (v) victims: an issue that includes reparations to the victims of all parties to the conflict¹²⁰.

The second point of the agenda is, perhaps, the most controversial and the one that has been facing a great deal of political opposition. In fact, defining the scope and meaning of the reference to the political offences in the political participation provision of the LFP is a task that involves taking sides on the question of how to deal with the demobilized guerrilla members that have been convicted of gross violations of human rights and serious violations of international humanitarian law –an issue that has spurred the most heated debate¹²¹.

120 “*Santos y ‘Timochenko’ anuncian proceso de paz ‘serio, digno, realista y eficaz’*”. Revista Semana (September 4, 2012). <http://www.semana.com/nacion/articulo/santos-timochenko-anuncian-proceso-paz-serio-digno-realista-eficaz/264173-3>; See also: *Diez puntos claves del proceso*. Revista Semana. <http://m.semana.com/politica/articulo/diez-puntos-clave-del-proceso/266501-3>

121 The Head of the Office of the “*Ombudsman*” has publicly announced that he will strongly condemn any agreement that could give rise to the participation in politics of the members of the FARC leadership convicted of crimes against humanity and war crimes as opposed to the Constitution and the so called “*Constitutional Block*”. *El obstáculo de la participación política de las Farc*. El Espectador (February 5, 2013). <http://www.elespectador.com/noticias/politica/articulo-403141-el-obstaculo-de-participacion-politica-de-farc>

C. The Relevant Provisions in Force Regarding the Political Offence in Colombia

The Political Charter of 1991 expressly allows for a more lenient treatment of political offenders, which is reflected in three different sets of measures¹²². First, the Constitution expressly prohibits the extradition of political offenders¹²³. Furthermore, it authorizes Congress to grant general amnesties and pardons to political offenders and empowers the government to grant individual pardons¹²⁴. Moreover, the Constitution itself specifically authorized the granting of amnesties to “*members of the guerrilla movements that reincorporated in the civil life in accordance with the reconciliation program*”¹²⁵ accused of political crimes committed before 1991. Finally, the Constitution exempts political offences from the ineligibility criteria applicable to members of the National Congress, the members of the Deputy Assemblies, governors, mayors, and judges in the High Courts (Supreme Court, Constitutional Court and Council of State)¹²⁶.

As was mentioned before, the Criminal Code typifies the offences of rebellion, sedition and mob violence as political crimes¹²⁷. Likewise, concerning crimes currently deemed as connected to political offences (“*connexity*” requirement), it is worth noting that Law 1424 of 2010, which applies to the low-ranking demobilized paramilitaries, provides for a list of offences that could eventually fall within this category¹²⁸.

However, by authorizing the enactment of a statutory law to define what type of conducts are to be deemed as linked to a

122 Constitutional Court of Colombia. Case C-456 de 1997.

123 Political Constitution of 1991, Colombia (1991), Art. 35.

124 *Op.cit.*, articles 150 and 201.

125 *Ibidem*, Transitory Provision 30.

126 *Idem*, Arts. 179, 299, Transitory Provision 18 and Article 232.

127 Law 599 of 2000, *supra* note 50.

128 It is worth recalling that as a result of the Supreme Court’s case-law the conformation of paramilitaries cannot be assimilated to the political offence of sedition. Therefore, the list of crimes comprised in Law 1424 of 2010 (use of illegal uniforms and symbols, transmitters and receptors and illegal possession of weapons), as it will mainly apply to low-level demobilized members of the paramilitary groups, is only indicative of the type of crimes that could be considered as connected with a political offence. Colombia. Supreme Court of Justice, Criminal Chamber, *supra* notes 77 and 79.

political offence for the purpose of allowing former members of the guerrilla to participate in politics, the LFP reopened the old and unsettled debate on the application of the “*connexity*” requirement to determine the category of offenders that will benefit from the more lenient treatment provided for in the constitution in what relates to the possibility to participate in politics, leaving this category yet to be defined¹²⁹.

IV. CONCLUSIONS: THE CRITERIA FOR DEFINING THE NOTION OF “*CRIMES ASSOCIATED WITH A POLITICAL OBJECTIVE*” IN COLOMBIA

Unlike the “*El Caguán*” peace talks, the current negotiation process is not aimed at reaching an agreement to redefine a new state model¹³⁰. The promulgation of the 1991 Political Constitution –after a period of intensified violence–, the enactment of the Victims and Land Restitution Law, as well as the LFP are themselves legal and political achievements that have moved the country closer to a negotiated discontinuation of the conflict. The challenge, therefore, is to take the most advantage of the current legal and the political juncture to reach an agreement on a political settlement that would turn peace into the best option for all parties to the conflict.

In light of the need to provide the FARC with a satisfactory political arrangement; the preceding analysis shows that the best approach to the political participation provision of the LFP is through the definition of a set of criteria to govern the determination whether a common crime is associated with a political offence.

As a result, since the “*pure*” political offences are already defined in the Criminal Code, I hereby submit that the following criteria should be deployed when deciding, on a case by case basis, on the application of the “*connexity*” model for the purpose

129 ICTJ Program Report: Colombia, *supra* note 73.

130 C. González, *supra* note 112, p. 49.

of allowing former members of non-state armed groups to fully exercise their political rights in accordance with the LFP:

A. Objective Criteria

1. The Political Nature or Gravity of the Act or Omission:

Pursuant to article 3 of the LFP, acts constituting crimes against humanity or acts of genocide, when committed as part of a systematic attack, shall never be political offences or considered to be linked with a political offence. Accordingly, this criterion mandates the *a priori* exclusion of all cases pertaining to members of the non-state armed groups accused of and convicted of these heinous crimes.

2. The political and Legal Context in which the Crime was Committed, and in Particular if the Conduct Took Place in the Course of the Hostilities:

Part I of this paper provides a brief description of the armed conflict in Colombia, focusing on the causes that led to the emergence of a variety of non-state armed groups that differ from each other due to its “*political*” characteristics. In turn, Parts II and III describe the political and legal backgrounds that somehow delineate the current peace process carried out in La Habana. The “*political incidence test*” stresses the need to take all these circumstances into account when assessing whether an offence qualifies as “*political*”. Moreover, the political importance attached to the conduct of “*rebellion*” among the list of “*political offences*” in the Colombian context demands a special consideration of the crimes committed in the midst of the hostilities.

3. Whether the Act Responded to a Superior’s Order:

This criterion requires an analysis whether the conduct was committed in the execution of an order issued by a higher ranked member of the non-state armed group, or with the corresponding

approval from the leadership of the organization in question. The application of this criterion may sometimes involve an assessment whether the offender was convicted as direct or indirect perpetrator, an analysis for which Roxin's theory on the "*control over organized power structures*" might become relevant¹³¹.

4. The Characteristics of the Non-state Armed Groups to which the Offender Belongs:

This factor pertains to the characteristics of the non-state armed group and the actor's membership in it, regardless of the characterization of the members of the organization as "*terrorists*" or "*drug traffickers*". This analysis implies bearing in mind that the LFP specifically excludes from the application of all transitional justice mechanisms, including the possibility to participate in politics, those groups –and their members– that are not considered as parties to the armed conflict, as well as former members of the illegal armed groups that, once demobilized, continued to engage in criminal activities¹³².

5. The Purpose of the Legislative Measure Authorizing Resort to the "*Connexity*" Model:

Under this view, the application of the criteria for determining the existence of a political offence, as analyzed before, should attain to the aim intended by article 3 of the LFP, namely, allowing the participation in politics of the members of the guerrilla movement that is currently taking part in peace talks with the government. Eventually, these criteria will prove useful for defining the "*connexity*" requirement for other purposes, such as

131 For an explanation on how the Peruvian Truth and Reconciliation Commission applied Roxin's theory on "*indirect perpetration by means of the control over organized power structures*", See: J. Ciurlizza & E. González, *Truth and Justice from the Perspective of the Truth and Reconciliation Commission*, in *The Legacy of Truth and Justice*, 10 (L. Magarrell & L. Filippini, Eds., Lima, 2006).

132 Additional Protocol II supra note 17; See also Article 1, paragraph 2. Legal Framework for Peace (Legislative Act 1, 2012).

the granting pardons or amnesties, in accordance with the authorization contained in the corresponding legislative measure.

6. The Existence of a Prior Conviction for the Crimes at Issue:

In light of the ICC Office of the Prosecutor's recent interim report on the situation of Colombia, the analysis whether to apply the "*connexity*" model should involve an assessment on the existence of a prior conviction as a result of a genuine proceeding according to the ICC's standards, and the execution of the sentence thereof¹³³.

B. Subjective Criteria

1. The Motive of the Offender:

In applying this criterion, the decision-maker will have to analyze whether the crime was driven by altruistic ideas, such as the ones that explain the conformation of the guerrilla movements in Colombia.

2. The Purpose Sought by the Offender when Committing the act or Omission:

This criterion demands inquiring into the political nature of the goal sought by the offender. In applying this criterion, it is important to take into consideration the Colombian Supreme Court's case-law that support the conclusion that the conformation of self-defense groups may not be assimilated to a political offence, due that, unlike the guerrilla movements, the paramilitary groups never aimed at overthrowing the government or substituting the constitutional and legal regime¹³⁴.

¹³³ International Criminal Court, Office of the Prosecutor. Situation in Colombia: Interim Report, 50 (November, 2012).

¹³⁴ Supreme Court of Justice, Criminal Chamber, Case C-26945, *supra* note 77.

3. The Target of the Offence:

In deciding whether the act could qualify as a “*political offence*”, the decision maker will have to determine whether the act was directed towards the legal and constitutional regime of the state, its fundamental institutions, or its agents. Similarly, this criterion implies looking into the “*protected legal interested*”, as defined in the Criminal Code currently in force.

C. The Proportionality Test

The relationship between the offence and the political objective: after analyzing the offence in light of the objective and subjective criteria explained above, the decision maker should assess the proportionality between the conduct and the political objective sought by it, taking into special consideration the question if the measure is suitable to achieve the aim pursued.

The suggested mixed approach to defining the “*connexity*” requirement in Colombia (“*relative political offences*”), modifies and extends the Norgaard Principles in order to adjust to the political context of the peace process in Colombia, as well as to reflect the purposes sought by the political participation provision of the LFP, namely to enable the transformation of the FARC into an effective political party and to allow its members to run for public office as a condition for a peaceful end to the conflict.

Finally, as concluded in the analysis of the cases of South Africa and Northern Ireland, these criteria should be considered as mutually supportive, and therefore should be applied in a consistent and coherent manner that requires pondering the importance of effectively applying the political participation provision of the LFP—or the purposes sought by any further legal measure authorizing resort to the “*connexity*” model—, against the constitutional principles and values involved in each case.

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