

Transitional Justice without Transition? The Colombian Experience in the Implementation of Transition Measures*

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* The title of this article evokes the title of a book on this topic that we published with some colleagues in 2006. Once more, we decided to use this title to point out that five years later, the structural conditions that limited the transition measures in Colombia still seem to be valid. (See Uprimny et al., 2006).

From a certain perspective, Colombia is presented as an exception to the regional patterns. While in many countries there is a current debate to deal with the legacy of human rights violations from the past (either from largely overcome internal conflicts or from military dictatorships that have been in decline for more than twenty years), Colombia is still experiencing a bloody armed conflict of more than 40 years of existence and which has resulted in a large number of victims of human rights violations.

Given the circumstances, unlike the situation of its peers, Colombia must guarantee, at the same time, the security of its population by deactivating the armed conflict and satisfying the rights of over ten percent of the population who has suffered the direct victimization caused by such a conflict. In this context, the tensions of a transition with justice have reached their highest level and are summarized in a very complex question: how can a situation of peace and reconciliation be guaranteed by also ensuring the respect for the rights of victims? Or in other words: in a context of latent conflict, how can an increase in the number of victims be avoided by guaranteeing the rights of millions of victims?

The answer is not simple because due to the limitations, unlike other countries, they had to embark on transitional paths towards democracy by prioritizing peace objectives to the detriment of the rights of victims; at present there are international regulatory standards that do not accept an absolute sacrifice of such rights. As a consequence, Colombia cannot seek peace first and then fulfill the rights of victims upon guaranteeing certain democratic stability. The peace agenda and the victim agenda are intrinsically related.

As a complement of this difficult tension, the implementation of transitional justice measures in the country is inserted in a historical logic of social and institutional paradoxes. These two factors largely explain why the discussion and implementation of transitional measures in Colombia are so fervently debated in the country, and why the current so-called transition process has been plagued with success, failure, stagnation, and several paradoxes, in spite of its relatively brief period of implementation.

Given these circumstances, trying to characterize the so-called transition process in Colombia is not easy. There are several interpretations of the political bets promoted by different actors of this process. The purpose of this chapter is to present, to an international audience but not highly experienced in the country's situation and in a rather schematic manner, the complex reality of the debates and the measures commonly related to the paradigm of transitional justice.

With this objective in mind, we will do a descriptive exercise of the most relevant political and contextual facts of this process, as well as the most analytical approximation aimed at explaining the trends and decisions that have steered the process to one direction or the other. Therefore, our text divides this explanation into four main sections. In the first section, we will present a very brief introduction to the historical trends that explain some of the paradoxes of the Colombian political regime. We will be explaining the recent interest in starting a transition to an old conflict embedded in the history and political culture of the country. The second section will focus on describing the main political events, both in regards to the conflict to be overcome, and the mechanisms that have been designed so far to deal with it. Therefore, we will seek to summarize the main characteristics of the conflict and the so-called transition in Colombia. The third section will explain the issues that have caused the most controversy and discussion during the process and how they have been implemented. This means that this section will present the political, regulatory, and institutional debates resulting from the transition measures, which in a few cases have polarized the country. Finally, we will conclude the chapter with an assessment of some of the lessons from the transitional experience in Colombia, both in order to think of the possible paths of the efforts in Colombia, and to think of similar contexts in other transitions.

1. The Context

The political regime of Colombia is difficult to analyze and evaluate, not only due to some ambiguous and paradoxical factors in the last few decades, but also because the situation of human rights, violence, and the Rule of law has been changing since the last decade, when the situation evolved in a complex manner and had mixed results.

If we conduct a long-term structural analysis of the Colombian political regime, we will find some paradoxes. In the last 150 years, as compared to its Latin American neighbors, except for a brief period, Colombia has not experienced a democratic rupture leading to a military dictatorship. Moreover, Colombia has a long standing and well-established tradition of respect for the independence of the Judiciary, as well as an almost unique tradition in the judicial control of laws, which was established in 1910. In 1991, a new Constitution was enacted, and it strengthened the judicial protection of human rights, promoted equality and non-discrimination, and improved participative democratic mechanisms.

From this perspective, Colombia seems to be a well-established and advanced democracy. However, if other aspects are reviewed, the reality will be quite different because of the weaknesses that drastically limit the actual validity of a democratic system in the country. On the one hand, the development of the Colombian State has been historically precarious: state institutions have not been able to have a total control of the national territory, thus making some territories to be controlled by private armed groups (Bejarano *et al.*, 2001), but this does not signal an absolute weakness of the State (García Villegas, 2009). As a consequence, Colombia has experienced a prolonged and bloody conflict for over 40 years. Various guerrilla groups have been involved in this conflict; for instance, the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de Colombia* - FARC) and the Army of National Liberation (*Ejército de Liberación Nacional* - ELN), which are confronting the official Police Forces and are responsible -as seen below- for multiple gross violations of human rights and infringements of international humanitarian law¹. Other groups and flashpoints of violence have increased violence because of the involvement of self-defense and paramilitary groups, which have strong links to some sectors of the official armed forces, politicians, landowners, and drug dealers (Iepri, 2006). These groups are, in turn, accountable for hundreds of massacres and over 60,000 enforced disappearances.

Moreover, Colombia faces other forms of criminal and social violence. The combination of these types of violence has made the country have extremely high rates of homicide and kidnapping in the last 50 years,² and has caused a humanitarian crisis since the early 1980s, with tens of thousands of extrajudicial executions and enforced disappearances, and several million people have been internally displaced. Furthermore, Colombia has a persistent and drastic inequity and high poverty rates. The Gini coefficient of the country is 0.58, one of the highest in the world, and about 46% of the population lives below the poverty line, and 16% below the extreme poverty line (National Planning Department, 2011).

Given the circumstances, in some aspects Colombia is a democracy based on the principle of the Rule of Law, but in other aspects it is an authoritarian regime that violates the rights of citizens, or at least it is a precarious State that lacks the ability to or interest in protecting its citizens. Therefore, Colombia is not a consolidated democracy, but it is not a dictatorship or a failed State either. Democratic elections are regularly held for the selection of government officials, and other mechanisms for the separation of branches

1 According to Amnesty International, in the last two decades, the armed conflict has taken the lives of at least 70,000 people, most of them civilians killed outside the battlefield; 2,227 people have been unlawfully deprived of their liberty between 2004 and 2007; 4,000 people have been victims of selective deaths since 2002; seven people die or disappear per day outside the battlefield; from 8,000 and 13,000 are soldier boys and girls; and Colombia has the highest rate of victims of anti-personnel land mines in the world. See Amnesty International (2006).

2 For a general long-term review of the evolution of homicides in Colombia, see Melo (2011).

are more or less effective. Thus, political scientists and other analysts are facing problems to define this ambiguity of the Colombian political system.

In the last eight years, this ambiguous democracy developed in a complex manner, thus producing mixed results. Regarding security matters, for example, many aspects improved appreciably due to an increased presence of the armed forces across the national territory,³ the partial demobilization of the paramilitary groups and a series of important military victories of the Army over the leftist guerrillas, particularly the FARC. However, the armed confrontation with the guerrillas continued, and the so-called demobilization of the paramilitary groups has not been very successful⁴ -as it will be analyzed below - and the humanitarian crisis has persisted and, in some cases, it has worsened. As a result, violence in Colombia still is intense and brutal.

In 2006, the Constitution was amended to allow the immediate reelection of the then president, Uribe, and his authoritarian style caused some very negative effects on the validity of the Rule of Law (García Villegas and Revelo, 2009). In other words, it not only weakened the system of checks and balances established by the Constitution, but also a significant number of opposition leaders, human rights advocates, and even Supreme Court justices were subject to an unlawful intervention of their private communications and were victims of surveillance and illegal monitoring by the Department of Administrative Security (DAS), which is assigned to the Presidency of the Republic. Furthermore, over the years it was evident that the Congressional and regional elections were highly illegitimate because of the alliance between paramilitary organizations and a large number of candidates. This process has been publicly referred to as “parapolitics.”⁵

To summarize, in the last few years there were major security improvements for the population. In fact, Colombia has now more state control over its territory. But the humanitarian crisis and the armed conflict are still present, and the Rule of Law has been deteriorating (Echandía, *et al.*, 2010). In other words, during the Uribe Administration (2002-2010) Colombia had more State, but less Rule of Law. In this context, in 2010, the country elected Juan Manuel Santos as the new president with the support of the political forces allied to former President Uribe. Consequently, President Santos will supposedly keep both the policies and the style of his predecessor. Nevertheless, to continue with the paradox, President Santos has maintained some of the policies of his predecessor, but he has made major changes that might improve the validity of the Rule of Law and –as it will be analyzed below- the guarantee of the rights of the victims of human rights violations. But, as we will explain in this chapter, the actual impact of these modifications is uncertain, and it is also uncertain if they could be maintained in a highly volatile political environment such as that of Colombia.

3 Nonetheless, these advances were not absolute. During this period, there were countless human rights violations. The Database on Human Rights and Political Violence of the CINEP/PPP recorded 1,280 disappearances, 6,233 arbitrary detentions, 8,836 extrajudicial executions, and 1,502 cases of torture between 2001 and 2009 (CINEP, 2010).

4 According to the Group of Humanitarian Aid to the Demobilized, assigned to the Ministry of National Defense, between August 7, 2002 and July 31, 2011, 3,747 members of paramilitary groups were individually demobilized. The Ministry of National Defense, the Humanitarian Service Program for the Demobilized -GAHD- (2011). On the other hand, the Office of the High Commissioner for Peace of the Presidency of the Republic pointed out that as of July 2010, 31,671 members of paramilitary groups have been collectively demobilized. See High Commissioner for Peace (2010). At present, several organizations have stated that there are about 10,000 active paramilitary members. See Colombian Commission of Jurists (CCJ), cited by Verdad Abierta (2011).

5 As of September 2010, the Supreme Court of Justice conducted investigations against 44 Representatives of the Chamber and 72 Senators about these facts. Up to that date, the investigations concluded that eighteen of them were accountable for crimes such as ‘plot to commit a crime,’ electoral fraud,’ and ‘voter hindrance.’ In 95 investigations are still in process (Supreme Court of Justice, 2010). For a comprehensive review of the evolution of the so-called “parapolitics,” see the research by Corporación Nuevo Arco Iris, Arcanos No 13, (2007). See also Romero (2007).

2. The Facts

In the last few years, a transitional justice discourse has settled down; some of its mechanisms have been established; and the rights of victims have been incorporated in the political debate. For a brief explanation of the rise of this discourse, as well as the debates where such mechanisms have been designed and implemented, this section will present a brief summary of the historical background of the armed confrontation, the resulting victimization, the mechanisms, and the progress and setbacks in the early stages⁶.

2.1 Historical Background of the Armed Confrontation

In the mid-Twentieth Century, Colombia experienced a period known as “Violence,” derived from a violent confrontation between armed groups related to the main political parties: the Liberal Party and the Conservative Party. This democratic instability led to a brief and unusual military dictatorship led by General Rojas Pinilla in 1953 and which lasted until 1957, when he was overthrown, and this was the beginning of a national reconciliation process, during which liberals and conservatives reached an agreement called “National Front,” and they agreed on sharing the power of the State and taking office in an alternate manner for sixteen years. During this period, most armed resistance groups affiliated with the Liberal Party were dismantled, disarmed, and reinserted in a civilian life, but some armed groups remained; most of which became criminal gangs that were controlled by the State. Nevertheless, some of them, particularly the one led by Manuel Marulanda, evolved into a new type of guerrilla groups.

In the 1970s, three guerrilla movements rose in arms against the State: the Army of National Liberation (ELN), along with Guevarist lines; the Revolutionary Armed Forces of Colombia (FARC), founded on the basis of a communist agrarian conception, and the People’s Army of Liberation (EPL), with a Maoist orientation. Then, other groups joined, among them, in 1974, the M-19 Movement, as a result of an alleged and probable electoral fraud in 1970 against General Rojas Pinilla (Pecaut, 1987; García Villegas, 2009).

In the mid-1970s, the Colombian State sought to deal with this violence by using exception regulations. The Government at that time issued Decree 3398 of 1965, that stipulated that “every Colombian (...) not required for the mandatory service, can be used by the Government in activities and tasks that will contribute to the reestablishment of the normal situation” (art. 25). This decree authorized the Ministry of Defense to “protect, if needed, as particular property, weapons devoted to the private use of the Armed Forces” (art. 33). Under these rules, which became permanent laws in 1968, the so-called self-defense groups were created and strengthened in different regions in the country under the sponsorship of the Police Force (Inter-American Court, 2004; IACHR, 2004).

In the following two decades, the country experienced a consolidation and strengthening process of the guerrilla groups and the anti-subversive movement. On the one hand, the guerrilla movement experienced growth at times, particularly in sparsely populated regions of the country that have significant economic resources, either from coca plantations, precious mineral mining, or oil extraction.⁷

On the other hand, the self-defense paramilitary groups, initially composed of lawful sectors -such as livestock farmers or local politicians- and whose purpose was to reject the guerrilla bribes, were linked with unlawful sectors -such as drug dealers- and benefitted from the indulgence and support of the National Army (Gutiérrez, 2006). Paramilitarism increased, particularly after the negotiation efforts between the Betancur Administration (1982-1986) and the guerrilla; therefore, its growth has been linked with the resistance

⁶ For space limitations, this section will summarize some characterizations of these topics that we have done in more detail with other colleagues from Dejusticia in previous documents. For a more detailed version of the facts, see Saffon and Uprimny (2008); Guzmán, Sánchez and Uprimny (2010); Uprimny (2009); Sánchez (2009).

⁷ This growth took place after the 1970s when the guerrillas from the 1960s declined and were rather marginal.

to such peace efforts by sectors of the Army, drugs trade, and members of traditional elites, especially livestock landowners. An example of this violence is the systematic extermination of a large number of political leaders of the Patriotic Union Party, founded as a result of the peace process between the FARC and the Betancur Administration, assassinated by paramilitary groups and drug dealers, in an alliance with the security forces of the State (Dudley, 2004). This systematic extermination process of civilians linked with guerrilla groups was called the “dirty war.” This was partly promoted by paramilitary groups and a sector of the Armed Forces as the tool to deal with a tactic used with the guerrillas, known as the “combination of forms of fighting,” through which the guerrillas sought to continue fighting using legal and illegal methods. But, moreover, the dirty war was promoted as a political opposition extermination policy and as a gruesome tool of the new regional elites of the local power.

Towards the end of the 1980s, particularly after the massacre of nineteen court officials in La Rochela, the violence used by the paramilitary groups disclosed the need for a legal framework that promoted its creation (Inter-American Court of Human Rights, 2007). In 1989, the Colombian Government suspended the implementation of Decree 3398 of 1965, to prevent it from being interpreted as a legal authorization to organize armed civil groups outside the law.

But the violence did not stop, especially the violence related to the paramilitary groups, the drugs trade, and the burgeoning cartels. The most intense stage of this war took place before the presidential elections of 1990. Various presidential candidates were selectively assassinated, thus leading to a significant distress in the country. At the same time, the Government at that time attempted a peace negotiation with some guerrilla groups. As a result of these agreements, at the beginning of the 1990s, some thousands members of the M-19, the EPL, and the Quintín Lame, a small indigenous guerrilla group created in the 1980s, were demobilized as part of a democratization process that will end up with a summon for a National Constituent Assembly that led to a New Political Constitution.

In spite of the enactment of the Constitution of 1991⁸, the political violence continued throughout the 1990s and even intensified during the second half of this decade (Gutiérrez Sanín, 2011). During this decade, both paramilitary and guerrilla groups were significantly strengthened and became real armies. The FARC, for example, embarked on a sustained military advance in this decade, increased recruiting levels, and upgraded their weapons (Ávila, 2008). This helped them achieve an important military success against the Armed Forces⁹. On the other hand, the paramilitary groups increased their armed actions and chose to create a unified command organization that resulted in the United Self-Defense Forces of Colombia (AUC). At the turn of the century, the paramilitary groups had about 10,000 combatants divided into ten blocs, while the guerrillas were concentrated into 21,000 guerrilla fighters distributed among over 100 fronts (National Planning Department, 2002)¹⁰.

On December 1st, 2002, some leaders of the AUC announced their intention to negotiate the demobilization of their forces with the Administration of President Álvaro Uribe Vélez and declared a unilateral ceasing of hostilities. In the following months, there were negotiations, and an agreement was reached for a demobilization process to be concluded on December 31, 2005. On July 22, 2005 Law 975 of 2005, known as the “Justice and Peace Law,” came into force and sought to become the legal framework for the demobilization and reinsertion process. According to official records, in 2006 the initial stage of the

8 As pointed out by Francisco Gutiérrez Sanín (2011), the Constitution of 1991 was considered at that time as a “peace agreement,” not only because it was the result of the total disarmament and demobilization of several armed groups (such as the M-19 and the EPL), but also it was preceded by an intellectual climate permeated with the idea that democratization and peace were closely related.

9 In 2001, for example, the FARC kept, as “prisoners of war,” about 380 military men and police officers.

10 This figure can be contrasted with the number of paramilitaries who were later demobilized (more than 32,000), which suggests that such a demobilization involved more people than the actual number of members of these forces.

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demobilization process was completed by a volunteer handover of 31,670 people who identified themselves as members of 38 blocs of the AUC¹¹.

However, the demobilization of these combatants has not resulted in the deactivation of the armed conflict and the ensuing violence. Even though the policy of security and contra insurgency of the State has struck strong military blows against the guerrillas in the last few years, these groups still have a large number of combatants, with a significant offense power and important military and political structures. According to estimates by the Observatory of the Armed Conflict of Corporación Nuevo Arco Iris, the FARC have about 11,000 fighters distributed into 64 fronts (Ávila, 2008). On the other hand, the central command of the ELN is still intact and has even won battles against the FARC in some regions and has survived the offense by the State through the partial links of some its structures with the drugs trade, in a type of “passive resistance” (Ávila and Celis, 2008).

On the other hand, the demobilization of a large number of members of the self-defense groups has not led to a ceasing of the violence perpetrated by these groups. According to the reports of the MAPP/OAS Verification Mission and the Inter-American Commission on Human Rights (IACHR), the continuity of this violence can be verified through different dynamics: (1) regrouping of the demobilized into criminal groups that exercise control over specific communities and illegal economies; (2) sectors that did not demobilize; and (3) emergence of new armed actors and strengthening of some existing actors in zones abandoned by demobilized groups.¹²

2.2 Victims of the Colombian Conflict

The repertoire of violence and intimidation mechanisms of the Colombian armed conflict has been extensive and systematic. The acts of violence perpetrated by conflict actors have translated into gross violations of human rights and infringements of the International Humanitarian Law against the civil population. Even though there is not a group that has the full support of the civil society and the authorities,¹³ some data from authorized sources allow showing the dimension of the atrocities.

According to the IACHR, this spiral of violence has led to massacres against members of the most vulnerable sectors such as indigenous groups, afro-descendant communities, and the poorest peasant population; as well as to the selective elimination of human rights advocates, justice operators, labor union and social leaders, journalists, and popularly elected candidates (IACHR, 2004). Amnesty International estimates that in the last twenty years of conflicts, about 70,000 people have been killed (Amnesty International, 2004). Moreover, violence has produced the most serious and dramatic humanitarian tragedy of the hemisphere. An estimated four and half million people have been internally displaced by violence (UNHCR, 2008). At the same time, this displacement and intimidation have resulted in the massive plundering of properties, houses, and lands of a large number of Colombians: at least 6,600 000 hectares –which would account for half the land area of Switzerland– have been plundered with violence and armed intimidation between 1980 and 2010 (Follow-up Commission, 2010).

11 Together with this collective demobilization process, the Colombian State has encouraged the individual demobilization of guerrilla fighters and other armed forces through the laws contained under Decree 128 of 2003. At the time this chapter was written, according to official sources, 20,182 people have been individually demobilized, besides the aforementioned 30,000 paramilitaries.

12 In fact, only to mention some figures of 2008, the MAPP/OAS identified situations of rearmament in 153 municipalities in a corridor that extends from the Urabá to the East, including the south of Córdoba, Bajo Cauca, the south of Bolívar, Barrancabermeja, and some neighboring municipalities, the south of Cesar, and Ocaña, in the north of Santander (MAPP/OAS, 2009).

13 The problem with figures in Colombia is that there is a large project to combine the methodological criteria to estimate the number of human rights violations and the infringements of the International Humanitarian Law, or a Truth Commission that is aware of these acts. Therefore, while the official figures are rejected by large sectors of the civil society because of the significant under-registration, the data provided by some social organizations are branded by the Government because they allegedly provide inflated figures. Moreover, the conflict and the gross violations of human rights occur in a context of intense “ordinary” violence that sometimes makes it difficult to distinguish the different types of violence.

Other forms of victimization and violation have been equally generalized and systematic. Therefore, for example, at the beginning of 2011 the Government admitted that 58,000 complaints of enforced disappearance have been filed, that is, more than the complaints filed after the military dictatorships of the Southern Cone. In May 2011, the national authorities reported that 22,000 dead bodies have been found and about 10,000 of them have been identified.

Moreover, in recent years, arbitrary detentions have increased. According to complaints filed by civil society organizations, from August 7, 2002 to August 6, 2004, about 6,332 were arbitrarily detained by the Colombian government (Coordination among Colombia-Europe-United States, 2008). These organizations have reported that from July 2002 to December 2007, about 932 people were victims of torture, of which 201 survived and 731 were killed. On the other hand, Colombia has the largest number of kidnappings in the world in the last few decades. From 1962 to 2003, there were 25,578 kidnappings for extortion purposes (DNP, 2004). And to make things worse, the guerrillas –especially the FARC – have constantly resorted to the use of attacks using explosives in an indiscriminate manner and to the use of antipersonnel mines. According to Handicap International, Colombia is the country with the largest number of victims of antipersonnel mines in the world: 6,238 victims from 1990 to August 2007.

The violence and discrimination against women have been serious and frequent. In a study, the IACHR explained, in detail, the circumstances that have historically exposed women to discrimination, social stereotypes, inferiority treatment, as well as the civil, political, and social consequences of their disadvantageous situation; they have been exploited and manipulated by the actors of the armed conflicts (IACHR, 2006). Women have been victims of different forms of gender violence such as sexual violence and violence used to impose guidelines of social control over their life, as well as the disproportionate effect of other forms of violence that affect not only men but also women, such as forced displacement (Constitutional Court, 2008; Guzmán, 2009). According to a report of Oxfam International, about 60% and 70% of the women have been victims of some kind of violence (physical, psychological, sexual, or political abuse). Regarding sexual violence, while it is not possible to estimate the magnitude of this crime exactly, since sexual violence at a national level presents a significant under-registration of unreported cases that account for more than 90%, sources range from 35% to 17% (Oxfam, 2009).

2.3 The Demobilization Process and the Insertion of the Discourse of Transitional Justice in Colombia

As mentioned above, in 2005, due to the negotiation process with some paramilitary groups, the Justice and Peace Law was passed to serve as the legal framework for demobilization. This law, besides governing the special criminal procedures to be used against the demobilized individuals who have perpetrated atrocious crimes,¹⁴ establishes the concept of victim¹⁵ and the scope of his/her rights. The law is characterized by the

14 To guarantee the satisfaction of the right to justice, a special criminal proceeding was designed, characterized by the speed and immediacy of results. This criminal proceeding starts when the Office of the Public Prosecutor receives the list of candidates –demobilized individuals who are under suspicion for perpetrating atrocious crimes-, the institution has the duty of investigating the acts they might be accountable for and document them. Then, their preliminary interviews are heard, and they must confess their accountability for the facts under investigation, as well as the properties they will return for reparation purposes. Then, there is verification stage in which the Office of the Public Prosecutor must make sure that the demobilized individuals did not omit any facts in which they participated or might be accountable for. Then, they are accused and charges are pressed. If the demobilized individuals accept them, the Justice and Peace Court will determine the legality of such acceptance. During this hearing, a comprehensive reparation motion is filed, in which victims must actively participate –they can do it through a legal representative- because they must state the reparation they are expecting and certify the damages. Once a reparation agreement is reached, the Court must issue a decision.

15 Law 975 of 2005 considers that the victims who are entitled to the mechanisms enshrined therein are those who were affected by members of unlawful armed groups who demobilized individually and collectively by virtue of such regulations.

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significant benefits provided to the demobilized population. Those who confess their crimes and hand in their properties for the reparation of victims in spite of the type and number of crimes perpetrated will receive an alternative sentence of five to eight years in prison.¹⁶

Law 975 also created the National Commission of Reparation and Reconciliation , (CNRR), as the institutional body with a mixed composition (with representatives from official institutions and the civil society), to be in charge, among other duties, of: (i) guaranteeing the involvement of victims in judicial proceedings; (ii) establishing reparation guidelines; (iii) coordinating the return of properties and guiding the collective reparation process; (iv) supervising the reparation process; (v) serving as a verifier and guarantor of combatant demobilization; and finally (vi) contributing with historical truth. For this latter objective, the Commission decided to create the “Group of Historical Memory” (MH), composed of a group of academicians who were provided with independence to promote their studies and research.

As pointed out by Gustavo Gallón (2007), since the beginning the CNRR generated different reactions due to its ambiguous character. On the one hand, it elicited optimism, but on the other hand, it elicited strong criticism. In spite of the efforts of most of its officials, the CNRR failed to become a key political actor for the coordination of transitional efforts and the accompaniment of victims (Gallón, 2007), even though the Group of Historical Memory received an important recognition and support by society. Therefore, even though the law established an eight-year period, the victim’s law led to the premature death of the CNRR, which will cease to exist when the institutionalism proposed by Law 1448 is consolidated, which might occur by mid-2012.

The **justice and peace process** has been very controversial in the country. For some analysts close to the Government, it is an appropriate model for a peace process because it guarantees the rights of victims, without impunity. However, a significant portion of the social movement believes that it is a problematic process. Some critics and opponents consider it is a hidden impunity mechanism (Valencia Villa, 2005, and Colectivo de Abogados José Alvear Restrepo, 2006). Others have stated that in spite of considering acceptable standards, it can lead to de facto impunity due to the “limitations of its implementation mechanisms” (Uprimny and Saffon, 2007). For others, the law and its regulatory decrees are in favor of perpetrators because they do not properly guarantee the protection of the rights of victims.

The law has undergone significant changes since it was enacted. The initial proposal of the Government allowed demobilized individuals not to serve a sentence and did not include guarantees of the rights of victims. This proposal was the target of serious criticism by the civil society, human rights organizations, and the international community. The pressure allowed the law enacted in December 2005 to have a scheme different from the initially proposed scheme, according to which the demobilized individuals who perpetrated atrocious crimes could serve an alternative sentence. This body of regulations used for principles a language close to the rights of victims, but it did not foresee proper mechanisms to guarantee them. In 2006, the law was accused of being unconstitutional on several occasions. Then, there was an intervention by the Constitutional Court, which through decision C-370 it introduced major changes, such as requiring a full confession by demobilized individuals –both of their crimes and of the properties that would be used for reparation purposes- to access the benefits enshrined in their favor. This made the law adjust essentially to the relevant international standards. However, the implementation mechanisms are still poor and, consequently, the rights of victims cannot be fully satisfied (Uprimny, 2011).

¹⁶ Pursuant to data provided by the National Unit for Justice and Peace of the National Public Prosecutor’s Office, as of March 31, 2011, candidates had confessed 1,755 cases of massacres, 48,541 cases of homicide, 2,834 cases of unlawful recruitment, 4,812 cases of enforced disappearance, 9,918 cases of forced displacement, 1,797 cases of extortion, 2,016 cases of kidnapping, 86 cases of sexual violence, 636 cases of torture, 93 cases of trafficking, manufacturing, or carrying of drugs. See National Public Prosecutor’s Office (2011).

Later, the Inter-American Court of Human Rights (hereinafter, the Inter-American Court) solved various cases against Colombia, relating to crimes perpetrated by some demobilized paramilitaries (Inter-American Court, 2007). In those cases and especially in the decisions about La Rochela massacre, the representatives of the victims requested the Inter-American Court to make an explicit statement about the suitability of the Justice and Peace Law pursuant to international standards. The Inter-American Court refrained from specifically analyzing the legitimacy of the law, alleging reasonable procedural reasons,¹⁷ but in any event, in that decision the court recalled its doctrine set forth since the case of Barrios Altos of 2001, according to which, any legal arrangements are inadmissible -such as amnesty provisions, provisions on prescription -that are intended to prevent the investigation and punishment of those responsible for serious violations of human rights because they violate “non-derogable rights recognized by the International Law on Human Rights.”¹⁸

In order to implement the scheme set forth in the law and adjusted by the Constitutional Court and the limitations established by the Inter-American Court, the institutions involved carried out several institutional adaptations. The Office of the Public Prosecutor created a National Justice and Peace Unit, led by specialized prosecutors in charge of conducting the investigations against the demobilized paramilitary fronts. Moreover, Justice and Peace courts were created, and their justices are the competent authorities in charge of hearing the accusations and the comprehensive reparation issue that should be filed at the end of the criminal proceeding. The Office of the Public Prosecutor also created a Justice and Peace Unit whose main duty is to represent the interests of victims during the proceedings. The Office of the Public Prosecutor assigned some of the court prosecutors so they could intervene in these proceedings by representing the interests of society and as guarantors of human rights.

To conduct the investigation of the acts perpetrated by the demobilized paramilitary fronts, the National Unit for Justice and Peace of the National Public Prosecutor’s Office decided to adopt an investigation scheme per unlawful armed group or front. Therefore, it does not investigate individual cases or perpetrators, but the conduct, *modus operandi*, and acts of the members of the front, who must face the criminal consequences for having participated in atrocious crimes. However, six years after passing the law, the proceeding only has a final judgment that sentenced two people¹⁹.

2.4 Advances, Bottlenecks, and Setbacks of the Proceeding

One of the main criticisms against the justice and peace process has been the sluggishness of the sentences issued by the courts. Based on data provided by the National Prosecutor’s Office, at the end of 2010 the accused have confessed 17,262 cases, which will entail the filing of criminal proceedings to elucidate the accountability of 4,511 perpetrators, who were responsible for violations against 314,383 victims recorded in the database of the National Prosecutor’s Office. At this rate, prosecuting these cases will take forever, which casts doubts on the practicability of the model. Moreover, we have the fact that a minimum sentence of five years and a maximum of eight years pose the risk that the accused will end up serving alternative sentences before issuing the judgments holding them accountable.

17 The essential procedural argument of the Inter-American Court is that it is not its duty, when deciding about individual cases, to review the adaptation of regulations to the American Convention because its duty is to verify if the rights of petitioners have been violated, so it could not conduct a specific assessment of the Justice and Peace Law since this law has not been applied to possible perpetrators of the crimes studied under this decision.

18 Inter-American Court of Human Rights, Case of La Rochela Massacre, Decision of May 11, 2007, Series C No. 163, par. 294.

19 This is the sentence by the Supreme Court of Justice in the case relating to a massacre occurred in the district of Brisas, township of Mampuján, in the municipality of María La Baja, in the department of Bolívar. This decision issued the first two final sentences of eight years in prison against Edwar Cobos Téllez, aka “Diego Vecino” and Úber Enrique Bánquez Martínez, aka “Juanchito Dique,” two paramilitary commanders of the extinct Bloque Héroes de los Montes de María and Frente Canal del Dique, of the United Self-Defense Units of Colombia.

Moreover, it should be pointed out that the Justice and Peace Law should not be applied to every demobilized person. The initial intention of the Government was to apply it to those combatants who were being investigated for atrocious crimes. Those who were not being investigated will be then accountable for the offense of creation of unlawful groups, which could be pardoned because the Law established a benign framework by assimilating it into a political offense.²⁰ However, the justice done by the Supreme Court and the Constitutional Court determined that a political offense was not applicable to members of paramilitary groups.

Given the circumstances, of the 32,000 collectively demobilized paramilitaries, a few more than 4,000 have been subject to the Justice and Peace Law, and justice was has been done only for 10,749 resolutions by dismissal, leaving 19,000 without a solution to their legal situation. The definition of what to do to solve such a situation has not been subject to a consensus to date. Initially, a decision was made to amend the Criminal Procedural Code (Law 906 of 2004) and to allow the application of the “principle of opportunity” under certain circumstances. Therefore, the law authorized the prosecutor to suspend, interrupt, or refrain from prosecuting the demobilized paramilitaries and request hearings, either individual or collective, for the application of the principle, as long as they collaborated with justice and promised not to reoffend.

However, the Constitutional Court stated that such mechanism was also unconstitutional since it allowed the State to refuse investigating the behavior of such people, even in case of crimes against humanity. Allowing the impunity of those crimes is forbidden by the international law; therefore, the Court stated that a rule, even without mentioning the words amnesty or pardon, which leads to the same result, contravenes the Constitution. Less than a month after the decision of the Court, the Government made Congress pass a new regulatory Framework: Law 1424 of 2010 (known as the Law on the agreement of contribution to historical truth). This law is applicable to the demobilized people who were not accused of atrocious crimes and who, to take advantage of the benefits of the Law, should contribute to rebuilding the historical memory by clarifying the context in which each of them participated, the formation of an organized group outside the law and of which they were members and, in general, about all the facts or acts relating to their involvement in the group. Furthermore, the paramilitaries must pay damages and render social services to the communities where they have returned to have a civil life. As of the date when this report was written; however, this law has not been regulated and a decision was to be made to determine if the Constitutional Court would endorse it since the regulations were required by some human rights NGOs and opposition members of Congress.

Regarding reparations, there was a similar situation: even when different mechanisms have been discussed, and some of them have been collected in the laws and policies, their implementation degree is still very precarious. First, the court-granted reparations in the justice and peace proceedings are still a promise to fulfill due to the aforementioned sluggishness (Díaz and Bernal, 2009). On the other hand, while in 2008 an Administrative Individual Reparation Program was implemented through a presidential decree (Decree 1290 of 2008), the lack of clarity and publicity for the selection of recipients and the granting of solidary indemnifications of the program (PGN, 2010) is added to the strong criticism about its content and scope, which is very limited (Sánchez, 2009)²¹

20 As stated by Iván Orozco (2006), in the Colombian legal tradition a “rebel” or “political criminal” has been traditionally characterized as a combatant who is a member of a group that has risen up in arms for political reasons, a front to which the international law has granted immunity to its acts of war. Therefore, they received a benevolent treatment: punishable activities undertaken by rebels in combat were not punished as such; they were rather subsumed into the crime of rebellion. See also Sánchez (2011).

21 Pursuant to the National Prosecutor’s Office, “as of December 2009, the Administrative Reparation Committee (CRA) issued a decision about 10,593 individual administrative reparation requests, of a total of 278,334 requests. Of these 10,593 requests, all of them were favorably decided. The recipients of these requests were 26,375 people, of which 23,173 (87%) are women and 3,202 (13%) are men. In contrast, most victims, that is, of the people directly affected by crimes that are subject to admin-

2.5 The Recently Passed Victim's and Land Restitution Law

The Victim's Bill was submitted by the Santos Administration just one year after a similar bill was sunk in Congress by his predecessor. Therefore, the mere fact that the initiative was proposed by the Executive Branch was an evident signal of change. Furthermore, the discussion in Congress represented an outstanding progress since the bill achieved not only the active involvement of the governmental coalition parties and a large portion of the opposition, but also a fundamental political consensus after a period of significant polarization in the country regarding the rights of victims. Anyway, as it happens with this type of political consensus, the final draft of the Victim's and Land Restitution Law (Law 1448 of 2011), while it was considered by many national and international sectors as a historical step for the country, it is also the target of criticism, both political (by the leftist and rightist sectors) and technical-institutional.

The Victim's and Land Restitution Law is intended to provide, in a single instrument, different measures and guarantees to the victims, but it does not codify all the existing relevant regulations. Nevertheless, the law deals with several topics, which makes it both a comprehensive and ambitious law. Consequently, it has: (i) an introductory chapter about a series of general principles; (ii) a chapter on the involvement of victims in criminal proceedings; (iii) a section devoted to caring for victims and assistance actions; (iv) a chapter on reparations; (v) a chapter about the institutional arrangement that will operate the victims' care and reparation system, (vi) a chapter about special regulations for demobilized boys and girls; and (vii) a final chapter containing additional regulations about involvement and others.

In our opinion, while the law has overcome some of the debates that polarized the discussion during the Uribe Administration, it still has some problem areas. That is, the text shows some advantages but also limitations and risks in the articles. Let's analyze some of them.

Regarding the successes of this law, first they include the consensus process and the symbolic recognition it represents. At the same time, this openness allowed the correction of one of the fundamental problems of the previous bill, i.e., the discrimination against the victims of the State agents. The approved draft -with the exception of members of unlawful groups and their relatives- is based on the acknowledgment of victimization based on the facts not the agent, as it was mistakenly defended by the previous government. It also allowed the text of the law to expressly acknowledge the concept of armed conflict that, as we will see in the following section, has been a much disputed topic.

Second, the law incorporates, in general and appropriately at the level of principles, the international regulations for the rights of victims. Such principles are very important not only as a social and political recognition of the State for the victims, but also because most reparation mechanisms will be regulated by the Executive Branch, which makes it necessary to establish clear principles to guide the regulations.

Third, the law shows the intention of correcting mechanisms that are poorly working, such as administrative reparations (even though it does not leave them exposed to the regulation of the Government). Likewise, the bill is planning a proposal of an institutional design that will coordinate the comprehensive care for victims, which is intended to reduce the formalities and the access routes to the rights.

Fourth, the systematization of the rights of victims in the criminal proceedings is appropriate in general terms (even though at a technical level, the suitability of including such measures in the victim's law not in the Criminal Procedural Code might be at issue). Some of these measures are also intended to reduce the gender discrimination detected in the access to ordinary proceedings and the justice and peace proceedings.

istrative reparation, are male. The data provided by Acción Social indicate that of the 10,593 requests, 9,827 (92%) are related to cases in which the victims are men, while in the 766 remaining cases (8%), the victims are women." PGN (2010).

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Finally, the law makes an important bet on the establishment of measures for each and every component of the reparation (restitution, compensation, satisfaction, rehabilitation, and non-repetition guarantees), in which the land restitution chapter stands out. The law creates a mixed system, judicial and administrative, so that people who have been dispossessed of their lands as a result of enforced displacement, can file a claim expeditiously and with some advantages, derived from the relaxation of the burden of proof and the creation of presumptions of dispossession.

Moreover, the legislative text has some limitations or drawbacks. First, even though the law abandons the problematic idea that the State grants reparations based on the principle of solidarity, its rationale is not clear. Therefore, by failing to expressly mentioning the accountability of the State, the law can lose a significant part of its strength as a symbolic measure of recognition, which is ultimately what most victims have required.

Second, the law does not deal with the issue of granting reparations without a historical explanation. The search and acknowledgment of the truth about what happened are not covered by the law, thus affecting not only the possibility of satisfying the right to truth for the victims and society at large, but also preventing undisputed victim reparation and recognition. Moreover, without an effective policy of the prosecution of the most serious cases and atrocities perpetrated during the conflict, reparation measures have an empty content. However, it is impossible to foresee if there will be a deliberate governmental intention to articulate these needs.

Third, the law does not overcome the discrimination against the victims who were members of unlawful armed groups because it establishes that those who have belonged to illegal armed groups and their relatives will not be considered victims. In this topic about who will be considered a victim, there is still debate about the people victimized by armed groups that were activated after the paramilitary demobilization (officially known as Criminal Bands or Bracim), in the sense that if they are included in the law because the regulation says that it will not be applied to what is considered “ordinary violence,” that is, violence not related to the conflict.

Fourth, there is a complex issue: the articulation between social and political victim policy. Though theoretically and abstractly, the bill and its statement of the reasons make a distinction among humanitarian aid, social policy, and reparations,²² many specific measures tend to confuse the three aspects, especially regarding displaced people because it declares housing subsidies as reparations that are as part of a social policy.

Therefore, with all its advantages and limitation, the law poses additional risks and challenges that could only be overcome based on suitable regulations and a clear political will during its implementation. At least five challenges can be distinguished as priorities for the Government. The first challenge is the regulation of more than fifteen programs and measures that the law delegated to the Government, among them: administrative reparations, reparation measures for indigenous peoples and black communities, collective reparation, among others. The second challenge is to guarantee security to the victims who will access the mechanisms, especially land claimants. The third challenge is to guarantee an adequate participation of victims and their organizations, both in the design and implementation of the measures. The fourth challenge is to adapt the institutional structure needed to implement the law, so that it is timely, effective,

²² One of the main objectives of the proponents of the bill was to avoid a confusion that usually happens in Colombia among the state duties of comprehensive reparation, humanitarian aid, and social policy. This confusion happens because the materialization of these duties sometimes coincides in practice. However, the reparation of victims of atrocious crimes, the provision of social services to every citizen and the humanitarian aid given to the victims of disasters are autonomous duties of the State, and they have a different origin and rationale. For an academic discussion of this distinction, see Uprimny and Saffon (2007a).

respectful, and sensitive to the victims. Finally, the topic of the tax impact of the law and the investment the State should make on reparations still is a ghost prowling in the implementation of the law; the State and society must make all the necessary efforts to implement the measures set forth in the law. The symbolic effect of the passing of the law and the commitment of the Government will become negative if the law is not translated into specific and concrete measures that go beyond the disguised provision of social benefits or an empty recognition.

3. The Debates

The design, discussion, and implementation of these transition measures have stirred important and sometimes heated academic and political debates. Some of these debates are more general, about structural topics of the application or non-application of the transitional model or its orientation, while the others have focused on regulatory and institutional mechanisms and on the options of public policy to be adopted. In this section, we will present a summary of the main debates divided into two types: structural debates and debates related to regulatory and institutional arrangements.

3.1 Structural Debates

3.1.1 Characterization of the Colombian Conflict and its Political Regime²³

The first element that has caused a lot of controversy in the implementation of transitional measures in Colombia is the characterization of the armed conflict and the resulting legal and political consequences. The Colombian internal armed conflict is very complex, not only due to its specific characteristics, but also due to the elements of the context where it is developed (IEPRI, 2006). First, it is one of the longest armed conflicts in the world.²⁴ Second, as seen in the previous section, it is not a conflict between two factions –as it usually happens–; it includes several actors: the State, the guerrilla groups, and the paramilitary groups.

The latter add a unique complexity to the Colombian conflict because it deals with pro systemic actors,²⁵ who never fought against the State; on the contrary, they supported the fight against the guerrilla groups through unlawful methods. Therefore, for years the paramilitaries were not really persecuted by some State sectors; on the contrary, the State benefitted from its anti-subversive activity, and many of its agents established close links of tolerance, collaboration, and complicity with the paramilitaries, which have not only included members of the Police Forces, but also intelligence agents, local politicians, and members of Congress (Duncan, 2006; Saffon, 2006). These links with State agents, together with the links with the regional landowner elites and the drugs trade, allowed the paramilitary groups to build stronger and more important political and economic power structures than their military power. Consequently, even though in 2002 these actors started negotiations with the Colombian government, it is uncertain if such negotiation and demobilization processes will lead to an effective dismantling of the paramilitary power structures and, through this method, to the guarantee of non-recurrence of the atrocities. In fact, it is possible that these power structures will remain intact and, even, strengthened due to a legalization process.

Besides the State, the guerrilla groups and the paramilitary groups, the main role played by the drugs trade in the Colombian armed conflict should not be taken for granted (López, 2006). The funds from drugs have significantly contributed to their perpetuation since they account for an almost unlimited source of

23 A more elaborate version of these characteristics can be found in Saffon and Uprimny (2007).

24 Together with the Palestine-Israel conflict and the conflict between India and Pakistan. To this regard, see the National Commission of Reparation and Reconciliation (2006).

25 As opposed to anti-systemic actors such as the guerrilla groups. For an explanation of this difference, see Múnera (2006).

funding for the armed actors. On the other hand, due to their prolonged nature and the multiplicity and heterogeneity of its actors, there has been a discussion about the definition of the conflict: some speak about a civil war; others speak about a terrorist threat; but it can also be described as a war against society.

Besides the aforementioned characteristics inherent to the Colombian conflict, there are some unique elements of its context that makes it more complex. The first element has to do with the profound influence of the international community, in general, and the United States specifically, on the Colombian policy. This influence has led to the internationalization of the Colombian conflict, which has become more and more evident. The concern of the international community for the humanitarian crisis experienced by Colombia and, especially, the interest of the United States in an anti-drug policy,²⁶ have largely shaped the dynamics of the conflict and the legal treatment of the demobilized armed actors.

The third and last element of the context, which adds complexity to the conflict, has to do with the profound polarization of the Colombian society. This polarization has resulted in a tendency to criticizing the violence caused by one of the sides of the conflict more severely and exclusively –depending of the end of the political spectrum where the critic is found-. As a consequence of this tendency, there is not a minimum consensus on the punishment of gross violations of human rights perpetrated by all the armed actors, a consensus that is essential to achieve a long-lasting peace.²⁷

This debate has had important practical implications for the definition of the transitional mechanisms and the method to specify them. Moreover, the Uribe Administration banned the term of armed conflict to describe armed violence and prescribed the use of the concept of “terrorist threat.”²⁸ With the denial of the nature of the armed conflict, the Government sought to eliminate the political character of the confrontation, especially of the status of the leftist guerrillas. However, this modification did not eliminate other uses and rules that are directly derived from the recognition of a conflict, such as the legislation on international humanitarian law (which in Colombia is contained in the Criminal Code), or the special legislation that allows the Government to promote peace processes with armed groups. In fact, the Government promoted the recognition of the paramilitary groups as political criminals in order to facilitate decriminalization measures such as amnesty or pardon, which are reserved by the Political Constitution for political crimes.

The importance of defining the armed violence related to the rights of victims was evident in the discussion of the failed victim statute of 2008. In fact, one of the reasons why the Government convinced Congress not to pass such a bill was the fact that the existence of an armed conflict was acknowledged. And,

26 In early 2000, the US Congress approved the “Colombia Plan,” which is intended to fight against unlawful drugs and organized crime. Of the total funds of the Colombia Plan, 26.6% was allocated to institutional strengthening, 57.5% to the fight against unlawful drugs and organized crime, and the remaining 16% to economic and social reactivation (DNP, 2005).

27 As an example to illustrate this situation, as of 2007 some court decisions, the media, and the confessions of the perpetrators have revealed the cruelty of the methods used by the paramilitaries to conduct enforced disappearances, torture, kill, and hide the remains of their victims, as well as the complicity of many members of the Army, local politicians, members of Congress, and close collaborators of the then President Uribe with paramilitarism (see, among many other press references, “Juicio histórico a paramilitares,” *El Tiempo*, April 23, 2007; “Para-políticos” and “El ventilador de Mancuso,” *Revista Semana*, May 19, 2007). In spite of this, as shown by a survey by Revista Semana at that time, many people did not completely reject the atrocities perpetrated by paramilitaries or the close links between them and the State agents. According to this survey, the information about the cruel mechanisms used by paramilitaries to perpetrate atrocities against civilians did not affect the positive perception of people in 38% of the cases, and such a positive perception increased in 9% of the cases. Furthermore, 73% of the population believed that the Government should make more efforts to fight against the guerrilla groups than against the paramilitary groups, and 47% of the population believed that the guerrilla groups had more responsibility for the violence in the country than the rest of the armed actors. See “La gran encuesta de la parapolítica,” *Revista Semana*, May 5, 2007.

28 This happened even though the State adopted measures whose use is derived from the recognition of an internal armed conflict. Therefore, promoting the use of the concept of “terrorist threat” can be seen more as an attempt to manipulate language to achieve political returns than as a continuity of the debate about the characterization of the elements of the armed confrontation. For a thorough discussion about this topic, see Uprimny (2005; 2011).

precisely, due to the sensitiveness of the issue and the strong opposition that it caused in certain political sectors, the original text of the Victim's Bill categorically excluded the concept of conflict. Nevertheless, during the parliamentary debate, against every political forecast, President Santos himself decided to include the category of armed conflict to specify the universe of victims of the law. This caused a division in the Government's faction because former President Uribe urged not to pass that inclusion. At the end, a decision in favor of the current Government was made, and the law now explicitly acknowledges the existence of an armed confrontation, and this has been interpreted as a possible door for the definition of future approaches to explore political methods to solve the conflict with the leftist guerrillas.

3.1.2 Transitional Justice without Transition?

The Colombian armed conflict is complex. But, in spite of the demobilization process of paramilitary groups that started in 2002, such a conflict is still far from coming to an end.²⁹ In this context, it does not seem appropriate or suitable to speak of a transition from war to peace in Colombia. A complete transition is not taking place because the recent negotiations have not included all of the armed actors. Also, it is possible to say that a fragmented or partial transition regarding the paramilitary groups is taking place because even if their members have given up their arms, it seems that their economic and political organizations are still valid.³⁰

Nevertheless, the recent demobilization process led to a new chapter in the history of the Colombian armed conflict. The development of new international standards, the pressure from the public opinion, the mobilization of social sectors, and the performance of other actors such as judges and the international community, made this process to gradually become the beginning of transitional justice and, at least in the discourse, a concern for the rights of victims.³¹

Consequently, even though several social sectors and organizations of human rights believe it is wrong to talk about transitional justice in Colombia, several institutions have been formed, and the debate about public policy has included the search for truth, justice, and reparation for the victims. The reluctance is derived from various aspects, but especially, from the persistence of the armed conflict and the politicization of the process with the paramilitaries. These and other factors make it impossible to expect a real transition to a more democratic regime in Colombia (Uprimny and Saffon, 2006). Even though the process has many drawbacks and difficulties, the intervention of social organizations, the international community, and judges, has made it possible to include in the debate the rights of victims as a standard that must be met by the legal system and the political activities in the country. However, as seen in the previous section, the mechanisms that have been developed are still deficient and in some cases inadequate to guarantee these rights in a comprehensive manner.

29 At this moment, the Colombian case is also atypical in the international context. Colombia is one of the few countries where a Plan for Disarmament, Demobilization, and Reintegration (DDR) has been developed in the presence of armed violence perpetrated by unlawful armed groups -GAI- with whom peace agreements have been achieved. Moreover, this is the first time when there have been two parallel demobilizations -one collective and the other individual- and their causes differ.

30 The discussion of the magnitude of the disarmament of combatants and groups who have demobilized stems from the big difference in the official figures of demobilized combatants and surrendered arms. Pursuant to data from the MAPP/OAS, while as of 2009, 31,671 combatants have demobilized, only 18,051 arms have been returned. See CNRR (2011).

31 As pointed out by historian Mario Aguilera, amnesty and pardon have been common legal concepts. For example, this author has indicated that from 1820 to 1995, 63 pardons and 25 amnesties have been granted; most of them were registered in negotiation processes between the State and groups that were trying to seize power. From the 1980s to this day, seven amnesty or pardon laws have been passed and they have ended up in a total demobilization of about ten guerrilla groups (Sánchez, 2011). However, none of the demobilizations or peace negotiations spoke about the rights of victims as it was done after passing Law 975 of 2005.

This inclusion of the rights of victims in the negotiation policy was possible thanks to the fact that Colombian organizations of human rights have creatively “translated” those international standards into the Colombian debate, so their political and legal claims against impunity have been definitely strengthened, but they have also significantly influenced the way the public opinion deals with this issue. Never before has there been so much debate in Colombia about the rights of victims, and the discussion of the Victim’s Law is a sign of the position of this issue in the national political agenda. Moreover, that duty of local human rights groups and victim organizations was strengthened by the support for the fight against impunity by other international non-governmental organizations (such as Human Rights Watch or Amnesty International), or certain international human rights institutions (such as the Inter-American Commission on Human Rights or the UNHCHR³²) or, even certain governments, so a non insignificant transnational network of activism against the possible impunity of paramilitary crimes was formed. Particularly, the role of the human rights protection bodies of the Inter-American System should be pointed out because they have closely and continuously monitored the situation in Colombia. Moreover, the Inter-American Court of Human Rights has played a major role in the process, in the establishment of legal standards of human rights to be met by the process.

Therefore, beyond a theoretical debate to determine if transitional justice mechanisms are characteristic of the post-conflict, and to define how such post-conflict will start, initiating a massive policy to satisfy the rights of victims amid an armed conflict poses challenges and important, practical, and even tragic difficulties. For example, starting a truth and historical memory process amid a conflict faces evident barriers that, in turn, prevent the satisfaction of other rights that need that explanation, such as the persecution of those responsible in the justice system and the definition of victims who should be the recipients of the reparation policy. Moreover, to the extent that the Colombian conflict continues affecting a significant sector of the population, the universe of victims will grow every day, and so will the need for the State to guarantee humanitarian aid to a significant number of citizens. Consequently, the duty of the State is to allocate human and financial resources both to the reparation policy and the institutional reform and to humanitarian aid. This had led, in the case of Colombia, to trying to merge the two duties of the State, thus violating the right to victim reparation.

But, starting a massive land restitution and reparation process amid a conflict poses high risks for the security of victims. And unfortunately, this intuitive argument has been empirically ratified in Colombia, where the people who lead these claims, particularly at this time in which those who are claiming for land restitution are victims of attacks that have taken the lives of tens of male and female leaders. To this extent, if we want a victim policy to have some success chance in this context, it must be articulated with an aggressive policy for the protection and deactivation of risk focal points. In certain ways, the State must start implementing an institutional reform that will allow incorporating non recurrence guarantees, something that is commonly interpreted as a task performed at the end of transition processes.

3.1.3 The Verticality and Horizontality of Violence and the Risk of Excessive Punishability

The third structural topic to discuss in the case of Colombia is where and if criminal punishments can be applied in a context plagued with several violent actors, in which some of them have demobilized, but

32 In Colombia, the involvement of specialized human rights organizations and multilateral organizations has been constant and extensive. Therefore, for example, since 1996 there is an office in Colombia of the Office of the United Nations High Commissioner for Human Rights, with an accompaniment and technical support mandate that authorizes it to issue an annual report on the situation of human rights and international humanitarian law. Moreover, other bodies of the UN system have extensive delegations and mandates in the country, such as the case of the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Development Programme (UNDP), which acts as the resident coordinator of the system in Colombia, as well other funds and programs such as UNICEF and UN Women.

others are still part of the conflict. Mainly, the dilemmas are focused, on the one hand, on what to do with thousands of the current demobilized population and to what extent the retribution paradigm of criminal justice should be applied, and, on the other hand, there is a discussion to determine if the same mechanisms should be applied or if it is possible to access more benign frameworks that are traditionally used in the country for the reinsertion of political criminals.³³

As presented in the description of facts, some political positions have defended the thesis that the retributive paradigm of criminal justice has to be abandoned in favor of the implementation of restorative measures focused on individual and collective damages to society and victims, but it should not be focused mainly on punishment. On the other hand, the strong advocates of the campaign against the impunity of the atrocities perpetrated during the conflict defend a full prosecution of all the cases that might be catalogued as international crimes.

This political debate has been associated with an interesting theoretical debate. Some authors, like Orozco (2002, 2003, 2009), insist on the need to analyze the state of affairs to be overcome because the logic and possibilities of pardon are not the same in a transition of a stable dictatorship to a democracy, as the case of a transition from a civil war to peace. According to these approaches, it is necessary to distinguish two types of massive violation of human rights: on the one hand, the cases of dictatorships or totalitarian regimes, such as Nazism or the dictatorships of the Southern Cone, characterized by a victimization or vertical or asymmetrical barbarism, in which the distinction between perpetrators and victims is quite clear because the former exercise violence and the latter suffer from it. On the other hand, civil wars and armed conflicts, in which barbarism is more asymmetrical or horizontal, and the distinction between victims and perpetrators is less clear because each armed actor (with their respective social support bases) is at the same time a victim (since they are the target of attacks by the enemy), but also a perpetrator (because they use violence with other armed actors and their social bases). Therefore, there is a reciprocal victimization. Consequently, the figure of the “avenger” (a victim who becomes a perpetrator) plays an important role in the development of these scenarios of horizontal violence in which the concepts of victim and perpetrator sometimes tend to be confusing.

Based on this distinction, Orozco suggests the thesis that pardons are more legitimate and seem more politically viable and appropriate when there is a transition from horizontal violence to peace, which is usually a “**double transition**,” than in the case of a transition from a stable dictatorship to a democracy, which is a “**simple transition**” (2003). Even though Orozco admits that empirical evidence are far from being conclusive, he thinks it is reasonable to assume that in a double transition, based on horizontal violence or symmetrical barbarism, it is more possible (and even legitimate) to resort to forms of pardons, both for regulatory and factual reasons. On the one hand, in negotiations, the hardest sectors of the parties to a conflict will tend to forge an alliance to implement strategies to avoid a punishment for their atrocities, so the forces in favor of pardons are significant; on the other hand, these warriors -and sectors of their support bases- will tend to deem those pardons legitimate because they see them as forms of reciprocal pardon to the extent that, due to a certain lack of differentiation between victims and perpetrators, each actor sees himself or herself as a victim that forgives his/her perpetrator (the other party) and that he or she has a certain right to be forgiven.

Based on this line of reasoning, some believe that the decisions of the courts that have refused to use legal proceedings to take the 19,000 aforementioned combatants who have used a sacred vision of victims and their rights out of the limbo, and according to which any relative impunity mechanisms, even for crimes that are deemed less serious, lead to the violation of the rights of victims to truth and to the punishment of those responsible for such violations. Therefore, they believe that by following a post-conflict justice model,

33 For a review of political crimes in Colombia, see Orozco (1990) and Sánchez (2011).

criminal justice must be selective and, under such circumstances, conditional amnesties that might become justice mechanisms can be granted (Orozco, 2009).

Nevertheless, even considering the important topic of the distinction between horizontal and vertical violence, the use of a certain degree of punishment is defensible in the country. On the one hand, the atrocity of the crimes against humanity and war crimes calls into question the dominant use of restoration instruments as a dominant scheme because we would be dealing with behaviors, in principle, unforgivable. Consequently, the demand for a retributive punishment of those atrocious behaviors is not a desire for revenge, but the need to publicly condemn and exclude those behaviors from the society that they are trying to establish. As a result, the privileged use of restorative instruments in the face of crimes against humanity is very complicated.

Moreover, in Colombia it is not clear if we are dealing with a massive horizontal violence, with generalized reciprocal forms of victimization. Without excluding that such reciprocal violence exists and can be significant, in Colombia the civil population is suffering multiple victimization by different armed actors. In such a context, there are not any ethical or political reasons for victims, in particular, and the Colombian society, in general, to accept the reciprocal pardons that might be granted at the helm of the armed actors.

Finally, the restorative dimension becomes stronger and more effective when communities share some basic values that allow the request and granting of pardon to reinforce shared values and reconciliation between the offender and the victim. In transitional processes, there is supposedly certain shared vision of the past, as a result of different processes such as the successful activities of a truth commission. Therefore, in South Africa, restorative practices might have been somehow effective because they were based on the general condemnation of Apartheid, which did not have any internal or international advocates. On the other hand, when society is still divided regarding the meaning of the past that we want to overcome, the use of restorative instruments and the calls for reconciliation at any price become quite problematic, if not perverse because they become impunity instruments that tend to delegitimize victims or the social sectors who are demanding justice and are characterized as people or social groups that have not been able to overcome their feelings of revenge.

In political and practical terms, this debate is not solved yet. Quite on the contrary, it has reemerged with the explicit recognition of the armed conflict by the Government and the discussion of a possible framework of peace negotiated with the leftist guerrillas, and with the claims of unconstitutionality that are currently under process in the Court against Law 1424 of 2010.

3.2 Debates of Regulatory and Institutional Adaptation

3.2.1 The Definition of Victim

As any public policy, a victim policy should be based on a definition and identification of their universe of beneficiaries. Based on such an assessment of damages and the population concerned, it is possible to develop proper measures to correct violations and injustice. Moreover, the definition of victims in society sends a public message of fundamental significance. Therefore, it is common to see how governments have tried to adjust or adapt this definition of victim, on the one hand, to limit or restrict the universe of reparations to be granted and, on the other hand, to exclude political enemies of a specific regime from the category of victims.

Something similar has been experienced by Colombian. On the one hand, some people have defended a comprehensive definition of victim, for instance, victim organizations, human rights organizations, international observers, and project drafters. On the other hand, an opposing position believes that the concept of victims should be restricted to those people who have been victimized by actions directly perpetrated by “armed groups outside the law,” pursuant to definitions established by the Justice and Peace Law. This was the position promoted by the former government, their Caucus in Congress, some academics, and opinion columnists. This last position, besides excluding victims who were members of unlawful armed groups, strongly opposes the recognition of the victims of State agents, arguing that this would prevent the fight against leftist guerrillas and prejudge the State for possible liability lawsuits.

3.2.2 The Period to Be Covered by the Victim Policy

Another consequence of the lack of a clear definition about the nature of armed violence in Colombia is the indetermination of the specific period of violence to be overcome with the transition. In other countries, like Argentina, Brazil, Uruguay, or Chile, it has been relatively easy to agree on the dates of their human rights crisis. The beginning and end of repression are relatively clear because everything starts with something similar to a coup d'état and ends with something similar to the overthrow of a dictatorship.

But, as we analyzed, in Colombia there is no consensus about the specific start date of the human rights crisis. For some sectors, the beginning of the armed conflict and the worsening of human rights violations was April 9, 1948, the day when the assassination of a political leader led a historical period referred to as “Violence.” Others believe that the problem is more recent and started with the emergence of leftist guerrillas in the 1960s, or even more recently, with the assassinations and massacres of the 1980s. But, others believe that we have to go earlier than April 9; for example, to the massacre in the banana plantations in 1928.

This topic was in fact intensely discussed in Congress during the debate of the Victim's Law. Initially, a proposal was made to grant reparations to the victims after 1991. This date was adopted without much support and, supposedly, it was done in honor of the Constitution that was passed that year. But this “honor” turned out to be questionable because it did not take into consideration very serious cases, such as most of the genocide of the Patriotic Union and other terrible massacres, such as that of Segovia and Tres Esquinas in 1988. In the final version approved by the law, the chosen date was 1985. For some analysts it was a critical year because the peace processes with the guerrillas failed, the UP extermination began, the paramilitary groups emerged, and the M-19 occupied the Palace of Justice. However, others have criticized the exclusion of victims of abuses from the Security Statute during the Turbay Administration (that started in 1978).

Moreover, the law establishes that the land restitution is aimed at victims of dispossession as of 1991, and that non-economic reparation measures (such as truth, explanation, and satisfaction measures) will apply for every victim, no matter if the victimization took place before 1985. Consequently, the law established three different dates to determine the beginning of the conflict and victimization to be covered.

Moreover, in Colombia there has been a debate, though less important, about when to grant a reparation if the conflict is still taking place. The most restrictive position, defended by the Uribe Administration, was to take the effective date of the law as the beginning date. This position was defeated in Congress and the Victim's Law stipulates that reparation should be granted to every person who has been victimized until the last effective day of the law -which had a ten-year term- and this will lead to the reparation of victims until 2021.

3.2.3 Rationale of the Reparation Measures

There has been an additional debate in Colombia between those who believe the State, as the accountable party -either by act or omission- must acknowledge its responsibility and grant reparations to the victims accordingly, and those who believe that, since they are an armed group outside the law, the main direct perpetrators of the violations, they are the accountable party and, therefore, the reparations to be eventually granted by the State, must be granted without compromising its accountability.

This was the formula adopted in the Justice and Peace Law even though the Constitutional Court explained that the party that should first grant reparations are the perpetrators of the crimes and, as a subsidy -by virtue of the principle of solidarity- the specific group to which the perpetrators belong. Only when the funds are not sufficient to guarantee the reparation of victims, the State should play a residual role to protect the rights of victims and stipulate the amount of the indemnification in the event that the funds of the perpetrators are insufficient.³⁴

During the discussion of the victim's bill that failed in 2008, this topic caused heated debates. On the one hand, victim organizations defended the position that the reparation program must be based on the recognition of the accountability of the State, its duty to respect and guarantee the rights protected in the national and international regulations, as the only way to dignify, guarantee, and satisfy victims. On the other hand, some supporters of former President Uribe argued that the duty of respect and guarantee cannot be extended to the point of adopting, as a general rule, that in every case of gross violations of human rights, the State is accountable. Moreover, the Government at that time argued that if it accepted the thesis of accountability, it would directly affect the State agents because the recognition of its victims would work as an automatic recognition of their criminal liability, thus violating the right of the State agents to due process.

Finally, Congress adopted a transactional formula to deal with the debate. Moreover, the victims of State agents had to receive reparation, and in order to guarantee that there would not be any legal consequences for the State or its agents, the law specifically stipulated that the granting of an administrative reparation to a victim of a State agent cannot be deemed legal evidence for people who want to go to court and it does not presume any criminal liability of the agents. Nevertheless, to avoid further debates, the law did not specify the accountability of the State. No section of the law stipulated the basis of the reparations, so the symbolic recognition stipulated by the law and which saves the State harmless from any liability becomes weaker.

4. Lessons

The reconstruction of the debates related to the implementation of transitional justice in Colombia shows that we are in the face of a dynamic and contradictory process that has not been totally controlled by anybody, but it has been the result of the interaction between the visions and perspectives, often opposing, of different actors and institutions, with unequal powers and in a turbulent context: the paramilitaries, interested in achieving impunity; the Government that has supported demobilization as an element of its security policy; the human rights and victim groups, which have fought against impunity; national and international judges, who have tried to implement the new standards of the rights of victims; the US government, especially concerned about the drugs trade; other actors of the so-called international community, etc.

That contextual fight is inserted in a regime that has been traditionally characterized by serious ambiguities and paradoxes, something that stresses some of these contradictions, but at the same time, it allows their survival. Therefore, it is not easy to easily define the transitional process in Colombia and its

³⁴ See Constitutional Court. *Sentence C-370 of 2006*.

outcomes even though it is still early to talk about them. Nevertheless, during this five-year debate, it is now possible to point out some characteristics and to draw some lessons about this process which could be implemented in the future. Let's see some of them.

4.1 Potentialities and Risks of the Transitional Justice Discourse

At a theoretical level, there has been an intense debate about the possible definition of transitional justice because, as pointed out by its scholars, the concept itself is malleable and is based on a series of processes difficult to characterize. Such a flexibility of the concept of transitional justice, as well its potential uses, has been evident in the Colombian political practices, in which there has been an fierce fight for the appropriation of the sense of transitional justice. While some sectors have emphasized reconciliation, thus reducing transitional justice to a weak form of restorative justice, which favors the impunity of atrocious crimes, other sectors, particularly human rights and victim groups, have emphasized the demand for justice and have insisted on the idea that every transition must respect the rights of victims. Consequently, there have been different uses, but there have also been abuses of the transitional justice approaches in Colombia: some have been more democratic and in favor of the victims; others have been more authoritarian and in favor of impunity (Saffon and Uprimny, 2008).

The existence of these two uses of the discourse explains, to some degree, the paradoxical fact that, in a context where there is no transition, most political actors use the language of transitional justice even though they have different and even contradictory interests and purposes. In Colombia, in the framework of negotiations between the Government and the paramilitaries, the discourse of transitional justice is used both as a mechanism to conceal impunity and as an instrument to fight impunity.

Under these circumstances, the Colombian experience shows that the implementation of mechanisms typical of this form of justice can lead to significant democratic and emancipatory discourses, particularly for the guarantee of the right of victims of gross violations of human rights. Undoubtedly, this can prove to be very positive in contexts where there has not been a total elimination of the flashpoints of violence and violations. Nevertheless, the paradigm of transitional justice and the malleability of its own definition can be an advantage for those who are seeking to foster the impunity of present and past violations. Consequently, the acceptance of discourses, standards, and mechanisms is essential to determine, in any context, the qualities and risks of betting for the implementation of a transitional framework.

4.2 Importance of the Regulatory Standards for the Implementation of Highly Polarized Processes

An important lesson of the Colombian experience is that the legal standards of transitional justice can operate as virtuous restrictions that guide the negotiation processes and that, by doing it, they shape those purposes, thus joining opposing interests and expectations together. In spite of the debates about the content and scope of the mechanisms, something that has not been called into question in Colombia is the existence of international standards and their mandatory implementation in the country. In fact, in a very short time the discussions reached a consensus about the existence of some rights that could not be ignored during these discussions. However, something that did not achieve a fast consensus was the content and scope of those rights. Nonetheless, the first agreement significantly restricted the options of discussion and guided, so to speak, many debates related to the nature and content of some mechanisms. For example, this can be seen in the discussion of the Victim's Law, in which it was possible to reach some consensus that would have seemed impossible some time ago.

Consequently, we believe that the Colombian experience calls for a careful and suspecting use of transitional justice, which entails the defense of the existence of a minimum, but non-negotiable, content

of legal standards of the rights of victims, as virtuous restrictions that do not impose obstacles to the peace negotiations, but they rather channel them. In fact, the defense of this hard core of legal standards is important because it emphasizes the thesis that there is a regulatory matching of the peace negotiations, particularly due to the new international environment, which makes armed actors have less radical stances and be closer to consensual spaces, where every actor accepts the impossibility of overriding the rights of victims in favor of achieving peace and the need to somehow satisfy these rights.

4.3 Internal and Reflexive Discussion of Standards When Developing a Public Policy

While the human rights standards are an important contribution for the shaping of more democratic transitions based on humanitarian principles, which make them more sustainable and permanent, inserting them in national contexts is not an easy task. On the one hand, an automatic and irreflexive importation of regulatory standards might lead to the tightening of the parties and a resulting proscription of dialogue, and to very limited options to establish mechanisms to generate a transition. On the other hand, regulatory standards do not represent a finished roadmap to know how to make progress in the negotiations, reform the institutions and political culture, or find the best mechanisms and distribution channels to meet the required standards. Therefore, those standards should be adapted to the local reality and propose new regulatory and institutional frameworks to develop them because international regulatory parameters are just a contribution to the beginning of the process.

In that context, the success of Colombia lies in the fact that human rights groups were able to creatively “translate” those international standards in the Colombian debate³⁵, so they not only critically strengthened their political and legal claims against impunity, but they also significantly influenced the ability of the public opinion to start dealing with the issue.

Therefore, such international standards for the rights of victims could initially become local legal decisions because Colombia has an important tradition of judicial independence,³⁶ and after the Constitution of 1991, and largely due to the work of the Constitutional Court and based on the concept of the constitutionality bloc, the judges have been open to the international law on human rights and a growing sensitivity to the rights of victims.

This situation made courts such as the Constitutional Court and the Supreme Court of Justice to strongly defend the rights of victims and the implementation of those new international standards in the Colombian context, so they were able to modify the possible agreements that might have been reached by the Government and the paramilitaries regarding impunity. The Colombian judicial independence introduced the uncertainty about the dynamics of the negotiations between the Government and the “paras,” a somehow democratic uncertainty because it also allowed specifying, through certain regulations, the scope of the rights of victims. Therefore, there has been a sort of tacit alliance between certain sectors of the Colombian Judiciary and such transnational activism networks against impunity in Colombia. Therefore, the law, applied by the judges, was able to somehow limit the impunity strategy sought by the paramilitaries, with the approval of the Government.

That translation of standards has gone farther and has produced important academic and public policy developments. In the area of reparations, for example, the Colombian debate provides the comparative transition area with valuable conceptual discussions, such as discussing the purposes of a massive reparations

³⁵ Regarding the idea that some human rights activists are a kind of “translators” or intermediaries between the international human rights standards and the local fights, see Merry (2006). This author shows that these activists translate the abstract human rights standards in the language of the local culture, so they can be more easily incorporated in the local fights, and at the same time, those activists also contribute to building, based on local experiences and claims, those international standards.

³⁶ Regarding the important judicial independence in Colombia, see Uprimny, García-Villegas, and Rodríguez (2006).

policy in contexts characterized by poverty and exclusion; reflections about the conceptual distinction and practical articulation between different obligations and actions of the State, such as social policies, humanitarian aid and reparations, as well as proposals for institutional development to deal with the massive processes of property restitution or to foster truth disclosure and historical memory processes in contexts that are still violent, among others. Some of these theoretical accumulations have been subject to developments oriented to true mechanisms of public policy, as seen after the establishment of the mechanisms set forth in the Victim's and Land Restitution Law.

4.4 The Significant Strength of the Victims: Transitional Justice from Below³⁷

A fourth positive experience of the Colombian process so far – and that should be undoubtedly used – is the promotion of transitional justice “*from below*,” which seeks to incorporate the voices, opinions, needs, and demands of the communities and victims that seek to exercise their right to reparations in the Colombian context. A transition process must be aimed at counteracting the exclusion of the victims of society, particularly in the public decision making. The reparation measures must be then a message of recognition for the victims by the rest of society and solidarity in the face of unfair suffering. In that context, a participative process in the area of the rights of victims is not only necessary but also desirable because it has an important reparation effect by counteracting the fragmentation and fostering and strengthening victim organizations.

As discussed throughout the text, the victims of human rights violations in Colombia suffer from a high level of social vulnerability derived not only from the different and profound effects of crimes on their victims, from the points of view of intangible assets and net worth. Moreover, the stratum and composition of this population indicate that systematic violations, especially forced displacement, have been perpetrated against social sectors that were already vulnerable and excluded, such as peasants, women, young people and children, ethnic minorities, and people with disabilities, among others. In Colombia, even though the middle and high strata of society have also been victims of armed conflict, particularly, kidnappings, it is true that most victims of atrocious crimes perpetrated under an armed conflict situation come from traditionally vulnerable and excluded populations, even though it is evident that the situation of displacement significantly worsens the vulnerability and marginalization of victims.

Moreover, historically public policies have not had effective participation mechanisms that guarantee that the opinions and perspectives of the victims will be heard in the process of developing policies and laws. However, this is not a unique characteristic of the Colombian case. It has been repeated in several processes of transitional justice in the world. All over the world, the efforts of national transformation have been fostered to the detriment of local experiences and initiatives. The logic explaining this tendency is reasonable: transitional societies usually undergo such institutional and social ruptures that the only possibility of achieving a fast transformation is through centralized measures, with a strong political support and significant financial resources. The main issue is, then, how to make sure that this kind of efforts will be achieved in a society that has democratic structures that have been weakened by conflicts. The favorite response to solve this dilemma has been to strengthen a unified and centralized public policy with universal claims.

As long as a large part of the transformation is based on the rescue of values such as national unity and the Rule of Law, it is important for democratic reconstruction policies to come from a legitimized and strong political body, which can make these agendas progress. Moreover, the construction of cohesion and civic trust largely depends on the implementation of standard measures that guarantee a minimum material

³⁷ Regarding the concept of “Justicia transicional desde abajo” see McEvoy and McGregor (2008); Bell *et al.* (2007); Robins (2011); Arriaza and Arriaza (2008); Theidon (2007).

equality. Finally, a democratic transformation requires the State, as the object of international law and main guarantor of human rights to play role of respect and guarantee of such rights, which leads its institutional structures to take on a responsibility that they have been unable to fulfill in the past.

Therefore, the objectives of the centralization of policies are not insignificant. In fact, a sustainable and permanent peace in a context of respect for human rights requires certain degree of significant institutional strengthening, as well as generalized public messages addressed to the victims of violations and to society as a whole.

Nevertheless, the tendency to unloading all the expectations on the State, especially Governments, has led to a disassociation between the agenda of public policy makers, on the one hand, and the expectations and needs of the victims, on the other hand. The international experiences of transitions show a large debt regarding the participation of victims in the process of transformation and, in turn, the failure of many of these experiences is largely explained by this same lack of participation.

For years, different social scientists, victim organizations, and international agencies have stressed the deficiencies of this vision focused exclusively on the centralized power of the State. It is important to mention two examples of criticism. On the one hand, some people say that the centralization of transitional processes are naïve and, thus, limited by assuming that the discourses of the State or the bourgeoisie will be translated directly at a local level, as it is expected in the “Establishment.” A common example to explain this criticism is the ideal time to achieve peace. Critics point out that the signing of peace declarations and agreements, while they are symbolic times of social cohesion, it is naïve to think that, by themselves, they will lead, locally, to the dismantling of the conflict and to reconciliation. In general, the international experiences have tended to giving an excessive importance to the meaning of these moments of peace to the detriment of the peace achieving process and of the local efforts that really contribute to the ceasing of conflicts. Peace, according to these critics, is a process that is achieved when conflicts cease in our daily life, not when a declaration or agreement is signed.

On the other hand, according to the critics, the role of victims, even in the exercises of peace, has been marginal and, so to speak, merely procedural. In theory, and in the political discourse, justice is a right of the victims and, therefore, all the activities that seek to do justice and punish the perpetrators of violations are aimed at meeting the needs of victims. Nevertheless, the advanced criminal process, in most cases, does not take into account the voice and needs of victims. In criminal proceedings, the focus of attention is usually on the accused, not on the victim. Victims are called only when they are necessary to support the investigation as witnesses, as an additional element of evidence, but without any possibility of participating further.

Based on considerations like these, most of the critics have been disappointed, so to speak, at all those unified and institutionalized transition exercises and at the effectiveness of the foreign or “exogenous” transition formulas, even those that have been legitimized based on the discourse of international standards of human rights. On the contrary, these critics have given a significance to the local and community initiatives, both in terms of justice and the construction of peace and reconciliation (McEvoy and McGregor, 2008; Bell *et al.*, 2007).

The Colombian experience has tried – though in a shy way – to make these two approximations have a dialogue. By themselves, they seem to be incomplete and inconvenient. On the one hand, it is up to the State, *vis à vis* its constitutional and international obligations, to take coherent, coordinated, and effective actions to guarantee a democratic transition process that respects human rights standards. On the other hand, any measure or public policy in favor of the victims that is not based on deliberative and consultative processes will be disrespectful of the human rights standards, and, eventually, it will be ineffective. First,

the standards of the International Law on Human Rights are based on the principle of citizen participation in the development, adoption, and implementation of public policies. A public policy cannot claim to have a rights approach if it is not based on a transparent and participative process. Second, a democratic transition process that does not include the expectations and needs of the victims has little chance of achieving the degree of social inclusion necessary and of counterattacking the polarizations of the past. The process to build public policy proposals is understood as a process to reestablish the citizenship, empowerment, and dignification of victims.

Therefore, the experience of the Colombian case points out that it is necessary to balance the centralized efforts to achieve the transition and the democratic transformation of society, with the voices of the victims and the local efforts to build peace and achieve reconciliation.

4. As a Conclusion

In Colombia, the discussion and implementation of measures under a democratic transition process is relatively recent as compared to other countries in the continent, such as the countries of the Southern Cone or Central America. In spite of this, such measures have led to heated discussions about the practical application of transitional mechanisms in a reality such as that of Colombia, and about the best way to achieve the objectives of a democratic transition.

The discussions are based on the concept of transitional justice because due to the validity of an armed conflict that does not cease to exist, such as the Colombian case, it is ambiguous to talk about the implementation of “measures to deal with the past,” or about the term “transition.” Moreover, the features of the Colombian armed conflict –whose characterization is also a topic of discussion – make the implementation of such measures even more difficult. For example, it is important to determine the best negotiation parameters for armed groups, when they are part of different structures and with different objectives; the scope of the obligations of the State of punishing the perpetrators of violations of human rights, or the responsibility of the State for acts perpetrated by unofficial armed groups.

In spite of these debates, and because the circumstances of the conflict remain, the country has developed a series of important mechanisms associated with the framework of transitional justice, and the rights of victims are always a topic of discussion – these rights have been legally recognized – as well as the need to implement mechanisms that guarantee those rights.

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