

Uses and Abuses of Transitional Justice in Colombia

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For many centuries, transitions from war to peace or from authoritarianism to democracy have been almost entirely shaped by politics. The political need of putting an end to violence fully determined the legal solutions adopted to bring about a transition. Thus, law was not seen as a real limit to the politics of transition, but rather as an instrument to fulfill its goals.

This situation has changed in the last decades. The boom of humanitarian consciousness and the recent evolution of international and national human rights' standards¹ have imposed the necessity of protecting the rights of victims of atrocities committed in the regime prior to the transition. This explains the fact that the use of transitional justice language has become ineludible in transitional contexts. Indeed, as the term itself shows, transitional justice aims at bringing justice into transitions, that is, at framing the politics of transitions within certain legal standards, particularly those regarding victims' rights to truth, justice and reparations.²

However, the question still remains of whether transitional justice legal standards actually work as effective normative limits to the political options available for bringing about a transition. This is so because the use of a certain discourse -such as that of transitional justice- does not necessarily imply a transformation in praxis; it may merely consist in a rhetorical turn with symbolic or legitimizing effects. That is why it is important to carefully analyze if the language of transitional justice may

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¹ See, among others, Joinet, L. 1997. United Nations, Human Rights Commission, 49th period of sessions. *Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. L. Joinet pursuant to Sub-Commission decision 1996/119*. Doc. E/CN.4/Sub.2/1997/20/Rev. 1; Orentlicher, D. 2004. United Nations, Human Rights Commission, 60th period of sessions. *Independent Study on best Practices, including Recommendations, to assist States in Strengthening their Domestic Capacity to combat all Aspects of Impunity*. Doc. E/CN.4/2004/88. For a thorough analysis of these standards, see Botero, C. and Restrepo, E. 2006. "Estándares internacionales y procesos de transición en Colombia" [International standards and processes of transition in Colombia], in Uprimny, R., Botero, C., Restrepo, E. and Saffon, MP. 2006. *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia* [Transitional justice without transition? Truth, justice and reparations for Colombia]. Bogota: DeJuSticia.

² This does not mean that transitional justice aspires to make law fully conquer or rule over transitional politics, since it is thought of as a special type of justice determined and limited by the political dynamics of transitional times. In that way, although the definition of transitional justice is far from being unanimously accepted and is the object of intense debates, it is widely admitted that transitional justice consists in a set of mechanisms or processes aimed at achieving equilibrium between the legal imperative of justice for victims and the political need of peace.

serve different interests, and particularly if it may be used not only for promoting transformative effects, but also for perpetuating the status quo.³ And that is why it is also important to inquire if the recent recurrent use of transitional justice implies the rule of law over politics at least in certain matters, or if politics still fully shape legal formulas in contexts of transition.

The purpose of this article is to tackle the former issues. From a conceptual perspective, it seeks to reflect on the relation between law and politics, and particularly between legal standards containing victims' rights on the one hand, and political dynamics that underlie and determine the results of a given transition – especially a negotiated transition-, on the other hand. To do so, the article will use the Colombian case as an illustration of this relation, by focusing on the role that transitional justice mechanisms –and especially the recognition of victims' rights- play in current political peace negotiations between the Colombian government and paramilitary groups. From this starting point, the article will attempt to reach some conclusions that might be extended to the analysis of other situations.

The article is divided in three main sections. The first section of the article consists in a brief characterization of the Colombian case, with the purpose of showing why it is relevant for a conceptual analysis like the one that is intended. The characterization puts special emphasis on the complexities derived from using transitional justice language and mechanisms in contexts where a full or complete transition is not taking place. The second section of the article attempts to study the role of transitional justice -and particularly of the recognition of victims' rights- in negotiated transitions, through the analysis of two variables: (i) the different possible uses –manipulative or democratic- of the transitional justice discourse, depending on the different interests it may serve, and (ii) the relation that exists between justice and peace. Although the analysis of these two variables is made from a conceptual perspective, the Colombian case is constantly referred to because it is used as an illustration of the complexities of more abstract reflections. The third and last section of the article draws some final remarks on the importance of making a cautious use of the discourse of transitional justice in the Colombian context, which may be extended to the study of other situations.

I. The Colombian case: transitional justice without transition?⁴

³ For the categories of transformative or emancipatory effects, on the one hand, and perpetuating or legitimizing effects, on the other hand, see, among many others, Santos de Sousa, B. 1998. *La globalización del derecho [The globalization of law]*. Bogotá: Universidad Nacional de Colombia & ILSA; Kennedy, D. 1999. *Libertad y restricción en la decisión judicial. El debate con la Teoría Crítica del Derecho (CLS) [Freedom and restriction in judicial decision. The debate with the Critical Legal Theory (CLT)]*. Bogotá: Siglo del Hombre Editores (Diego Eduardo López ed.).

⁴ This is the title of a book the authors of this paper are coauthors of: Uprimny, Botero, Restrepo and Saffon, *Ob. Cit.*

The current situation in Colombia is quite useful to analyze the relation between transitional justice legal standards and the politics of transitions –particularly negotiated transitions-. Indeed, as we will show, the Colombian case is characterized by a paradoxical situation: the transitional justice language is recurrently used, in spite of the fact that the country is in the midst of an ongoing conflict. This situation renders the complexities of the relation between political dynamics and legal standards on victims' rights remarkably acute. That is why it seems like a relevant case for the analysis of such relation.

In what follows, we will briefly refer to the key traits of the Colombian armed conflict that render it complex, and we will then develop the argument according to which, although the country is in the middle of such a conflict, the transitional justice language is persistently used.

A. Complexity of the Colombian conflict

The Colombian internal armed conflict is very complex.⁵ This is due not only to its specific traits, but also to the elements that characterize the context in which it takes place.

There are several traits of the Colombian conflict itself that render it complex. First, it is one of the longest armed conflicts in the world.⁶ The most cautious analysts point at 1964 as its contemporary origin⁷, since this was the year in which the Colombian Revolutionary Armed Forces (FARC for its Spanish initials) – the strongest guerrilla group in the country- took arms. However, many other analysts point at the period of violence between the liberal and conservative political parties in the 1940s as the origin of the conflict as we know it nowadays.⁸ Be as it may, the Colombian conflict

⁵ For a study of the complexities of the Colombian conflict and the difficulties of its characterization, see IEPRI (ed.). 2006. *Nuestra guerra sin nombre. Transformaciones del conflicto en Colombia* [Our war with no name. Transformations of the conflict in Colombia]. Bogota: Norma.

⁶ Along with the Palestinian-Israeli and the India-Pakistan conflicts. On this, see Colombian National Commission for Reparations and Reconciliation (CNRR for its Spanish initials). 2006. *Hoja de Ruta* [Road Map], available at: www.cnrr.org.co/hoja_de_ruta.htm.

⁷ The CNRR has used this date to identify the universe of victims of the Colombian conflict in a preliminary way. Thus, it has stated that it considers as victims “all those persons or groups of persons who, in reason or with occasion of the internal armed conflict that the country lives since 1964 have suffered individual or collective damages occasioned by actions or omissions, which violate rights contained in dispositions of the Colombian Political Constitution, International Human Rights Law, International Humanitarian Law and International Criminal Law, and which constitute an infraction against the national criminal law” (free translation). CNRR. 2006. *Fundamentos Filosóficos y Operativos. Definiciones estratégicas de la Comisión Nacional de Reparación y Reconciliación* [Philosophical and Operational Foundations. Strategic Definitions of the National Commission for Reparations and Reconciliation], available at: www.cnrr.org.co/cd/pdf/Definiciones_estrategicas.pdf. This definition of the universe of victims created a great deal of controversy when the CNRR first suggested it.

⁸ Gonzalo Sánchez has argued that, although it has had different cycles and logics, the Colombian conflict is only one. See Sánchez, G. and Peñaranda, R. 1991. *Pasado y presente de la violencia en Colombia* [Past and present of violence in Colombia]. Bogota: IEPRI-CEREC.

has gone on for at least forty years, and that certainly makes the finding of a negotiated durable peace a quite difficult task.

A second element of complexity is the fact that the conflict is not between two factions –as conflicts often are–, but includes various violent actors. Thus, there have been several subversive guerrilla groups that have openly confronted the State’s authority on the national territory.⁹ Today, only two of those groups are still active, and one of them, the Army of National Liberation (ELN for its Spanish initials), is currently at the first stages of a peace negotiation with the government, still with uncertain results. However, FARC, the other group, has not shown any serious desire of holding peace negotiations with the government, and in the last years has continued and even incremented the commission of atrocities against civil society, which particularly include kidnappings and assassinations.

But guerrilla groups and the official army are not the only actors of the conflict. Since the 1980s, right-wing paramilitary groups appeared with the justification of the need to combat guerrilla groups in a stronger way. They rapidly expanded in terms of both number of members and power.¹⁰ To do so, they held strong ties with economic elites, and established strong relations of tolerance, collaboration and complicity with State agents, which not only include members of the public force¹¹, but also agents of intelligence, local politicians, national Congressmen.¹² Paramilitaries committed heinous crimes against civilians, especially including massacres and forced disappearances. In 2002, almost all paramilitary groups that constitute the confederation of United Auto-Defenses of Colombia (AUC for its Spanish initials) negotiated a peace agreement with the Government, which has produced the demobilization of over 30.000 paramilitaries, and the commencement of trials against

⁹ Apart from FARC and ELN, which still exist and confront the State, several other guerrilla groups have existed in Colombia and have demobilized, such as the April 19 Movement (M-19 for its Spanish initials), the Popular Liberation Army (EPL for its Spanish initials) and the indigenous guerrilla group Quintín Lame, among others.

¹⁰ On their quantitative or numeric expansion, see Romero, M. 2003. *Paramilitares y autodefensas. 1982-2003* [*Paramilitaries and auto-defenses. 1998-2003*]. Bogota: IEPRI-Planeta. On paramilitaries’ political and economic expansion, see Duncan, G. 2006. *Los señores de la guerra: de paramilitares, mafiosos y autodefensas en Colombia* [*The warlords: of paramilitaries, mafia and auto-defenses*], Bogota: Planeta. See also Saffon, MP. 2006. *Poder paramilitar y debilidad institucional. El paramilitarismo en Colombia: un caso complejo de incumplimiento de normas* [*Paramilitary power and institutional weakness. Paramilitarism in Colombia: a complex case of disobedience to law*]. Bogota: Los Andes University, Master’s thesis.

¹¹ On this see the five cases that have been decided by the Inter-American Court of Human Rights against the Colombian State, regarding atrocities committed by paramilitaries with the collaboration or omission of agents of the public force. Inter-American Court of Human Rights, *Case of the massacre of 19 merchants vs. Colombia*, Ruling of July 5, 2004, series C No. 109; *Case of the massacre of Mapiripán vs. Colombia*, Ruling of September 15, 2005, series C No. 134; *Case of the massacre of Pueblo Bello*, Ruling of January 31, 2006, series C No. 140; *Caso of the massacres of Ituango vs. Colombia*, Ruling of July 1st, 2006, series C No. 149; *Caso of the massacre of La Rochela vs. Colombia*, Ruling of May 11, 2007, series C No. 163.

¹² See Duncan, *Ob. Cit.*; Saffon, *Ob. Cit.*

almost 3.000 of them.¹³ However, for various reasons, the nature of these groups makes it more difficult to find formulas for assuring that peace negotiations will effectively guarantee the dismount of their power structures and non-recurrence of atrocities.

On the one hand, paramilitary groups are pro-systemic, not anti-systemic actors.¹⁴ They never intended to overthrow the Government or to defeat the Colombian army, but rather to support their struggle against guerrilla groups through illegal means. Moreover, for many years the State did not persecute them, and even benefited from their support.¹⁵ On the other hand, paramilitary groups are not organized hierarchically and do not have a united or centralized mandate, but rather function as semi-autonomous cells of a nodal structure.¹⁶ Finally, due to their ways of operating, paramilitaries built strong economic and power structures, through both their financing power –obtained from drug traffic and a strong concentration of land- and their collusion with State agents.¹⁷ Thus, they do not derive their power as much from weapons as they do from these power structures. All these traits of paramilitary groups suggest that peace and the guarantee of non-recurrence of atrocities cannot be assured merely by a demobilization process. Indeed, on its own, such a process might allow for power structures to remain intact, and even to become stronger in virtue of a legalization process.

Besides the previously mentioned actors, it is impossible to ignore that drug trafficking has been a central protagonist in the Colombian armed conflict.¹⁸ Drug lords sustain complex relations with armed groups, which vary from financing their activities to becoming more directly involved in them, to the point of becoming their most visible leaders in some cases. In any case, drug trafficking constitutes a key

¹³ The legal framework for these events have been laws 782 of 2002 and 975 of 2005, as well as their governmental decrees.

¹⁴ For this distinction see Múnera, L. 2006. “Proceso de paz con actores armados ilegales y parasistémicos (los paramilitares y las políticas de reconciliación en Colombia)” [“Peace process with illegal and para-systemic armed actors (paramilitaries and reconciliation policies in Colombia)”], *Revista Pensamiento Jurídico* No. 17.

¹⁵ For an analysis of the Colombian legal framework, on the base of which many paramilitary groups were created, see Inter-American Court of Human Rights, *Case of the massacre of 19 merchants vs. Colombia*, Ruling of July 5, 2004, series C No. 109; *Case of the massacre of Mapiripán vs. Colombia*, Ruling of September 15, 2005, series C No. 134; *Case of the massacre of Pueblo Bello*, Ruling of January 31, 2006, series C No. 140; *Caso of the massacres of Ituango vs. Colombia*, Ruling of July 1st, 2006, series C No. 149; *Caso of the massacre of La Rochela vs. Colombia*, Ruling of May 11, 2007, series C No. 163.

¹⁶ On this, see Alonso, M., Giraldo, J., y Alonso, D. 2005. “Medellín: El complejo camino de la competencia armada” [“Medellin: The complex way of armed competition”], in *Diálogo Mayor. Memoria colectiva, reparación, justicia y democracia: el conflicto colombiano y la paz a la luz de experiencias internacionales* [Major Dialogue. Collective memory, reparations, justice and democracy: the Colombian conflict and peace in the light of international experiences]. Bogotá: Universidad del Rosario.

¹⁷ Duncan, *Ob. Cit.*

¹⁸ López, A. 2006. “Narcotráfico, ilegalidad y conflicto en Colombia” [“Drug-traffic, illegality and conflict in Colombia”], in IEPRI (ed.), *Ob. Cit.*

element for explaining why the conflict tends to go on and on, since it works as an almost unlimited source of financing.

A third element of complexity of the Colombian conflict can be found in the nature of the conflict itself. Because of its protracted character and its multiple and heterogeneous actors, its logic is not easy to grasp. There is a strong discussion among analysts regarding the way the conflict should be defined. Some argue it is a civil war; others talk about a terrorist threat; one could also think of it as a war against society. That is why the title of a recent book is very suggestive, when it refers to it as *a war with no name*.¹⁹

A fourth element of complexity of the Colombian conflict is the magnitude and harsh situation of victims of atrocities. There are around three million victims of forced internal displacement²⁰, who have also often been victims of other crimes or threats, and who have lost their lands and belongings. The situation of forcibly displaced people constitutes a true humanitarian tragedy, since victims of the conflict tend to be one of the most vulnerable and marginal sectors of society, not only because of the sufferings they were submitted to, but also because of the socioeconomic situation to which those sufferings have pushed them to. Besides the forcibly displaced population, there are also thousands of victims of other atrocious crimes, including homicides, forced disappearances, sexual violence, social intolerance, extorsive kidnappings, massacres, arbitrary detentions, among others.²¹ In general, victims in

¹⁹ IEPRI (ed.), *Ob. Cit.*

²⁰ Official sources talk about a little more than two million forcibly displaced persons in the country. See Acción Social, *Estadísticas de la población desplazada* [*Statistics of displaced population*], available at: www.accionsocial.gov.co/contenido/contenido.aspx?catID=383&conID=556. This is, however, a cipher that only takes into account the number of persons who are officially registered in the government's Displaced Population Only Register and, thus, excludes displaced people who have not been able to register. That is why other sources, such as the United Nations High Commissioner for Refugees, talk about around three million forcibly displaced people. See UNHCR, 2006. *Global Trends Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, June, 2007, available at: www.unhcr.org/statistics.html.

²¹ For some preliminary calculations of the total amount of victims in Colombia and the cost of their reparation, see González, C. "Prólogo" ["Prologue"]. 2007, in *Las cifras del conflicto* [*The ciphers of the conflict*]. Bogotá: INDEPAZ; Richards, M. 2007. *Quantification of the financial resources required to repair victims of the Colombian conflict in accordance with the Justice and Peace Law*. Bogotá: CERAC.

Colombia pertained to the least favorable sectors of society even before the commission of atrocities.²²

Apart from the previously traits inherent to the Colombian conflict, there are some elements that belong to the context in which it takes place and that render it even more complex. The first element has to do with the deep influence that the international community in general, and the United States in particular, have on Colombian politics. This influence has led to the internationalization of the Colombian conflict, which has become more and more evident as time goes by. The international community's concern with the humanitarian crisis in Colombia, and especially the United States' interest in the politics against drug trafficking have shaped to a great extent both the dynamics of the conflict and the legal treatment given to armed actors that decide to demobilize.

In fact, given that Colombian armed groups are heavily involved in drug trafficking, the United States have strongly increased their participation in the Colombian conflict in the last ten years, especially through the so called "Plan Colombia". Moreover, many paramilitary demobilized leaders have been indicted for drug smuggling and requested in extradition by the US government. Although the Colombian government made it clear that it would not make them effective as long as the paramilitaries continued in the demobilization process, those requests of extradition have played a key role in the peace negotiations between the former and the latter. Indeed, while the paramilitaries have seen them as an incentive for achieving a demobilization agreement, the government has used them as a threat in case they do not abide to the agreement.²³

The second element of complexity of the context in which the Colombian conflict takes place consists in the ambiguous nature of the political regime. In spite of the persistence of the armed conflict and the seriousness of the human rights abuses therein produced, Colombian institutions have managed to maintain important democratic features. For instance, civilian elections are regularly held -even if increasingly interfered by illegal armed groups-, and the judicial system keeps a very

²² This is so, perhaps with the exception of some victims of extorsive kidnapping. In this, the Colombian situation is similar to that of Guatemala -where the majority of victims belonged to Mayan ethnic groups- and Peru -where the majority of victims were rural-, and very different to that of Argentina and Chile where victims were mostly from the middle classes. In previous articles, we have argued that the socioeconomic status of victims is very important for determining the nature reparations should have, and particularly for establishing whether they should have a transformative potential rather than a mere restitutive one. See Uprimny, R. and Saffon, MP. 2007. "Plan Nacional de Desarrollo y reparaciones. Propuesta de un programa nacional masivo de reparaciones administrativas para las víctimas de crímenes atroces en el marco del conflicto armado" ["National Development Plan and reparations. Proposal of a national massive program of administrative reparations for victims of atrocious crimes in the frame of the armed conflict"]. Bogota: CODHES. In press.

²³ On this, see the interesting analysis made in the introduction to this volume by Morten Bergsmo and Pablo Kalmanovitz.

important degree of independence and manages to control some abuses of power.²⁴ Thus, it is possible to identify the political regime as a *dangerous democracy in danger*, which is very risky for its inhabitants, but at the same time is threatened by illegal powerful actors.

The third and final element of the context that renders the conflict even more complex has to do with the profound polarization of the Colombian society. This polarization brings about a tendency to criticize more severely or to only criticize the violence produced by one of the sides of the conflict –depending on the side of the political spectrum in which the critic is-. As a consequence of this tendency, there is a lack of a general minimal agreement on the wrongness of gross human rights violations committed by the armed actors, which seems essential for finding a long-lasting peace. One very recent event exemplifies this situation.

Some judicial decisions, the mass media and the confessions of perpetrators have revealed the cruelty of the methods used by paramilitaries to forcedly disappear, torture, murder and hide the remains of their victims²⁵, as well as the complicity of the army, many local politicians, Congressmen and close collaborators of President Uribe with paramilitarism.²⁶ In spite of this, as a recent poll shows, many people do not fully reject the atrocities committed by paramilitaries, nor the strong ties existing between them and State agents. According to that poll, the knowledge of the cruel ways in which paramilitaries committed atrocities against civilians did not affect the positive perception people had of them in 38% of the cases, and increased such positive perception in 9% of the cases. Moreover, 73% of the population believes the government should make a stronger effort to struggle guerrilla groups than paramilitary groups, and 47% of the population thinks guerrilla groups are more responsible of the violence in the country than the rest of armed actors.²⁷

B. The use of transitional justice in the midst of an ongoing conflict

As we showed in the previous section, in spite of the massive demobilization of paramilitaries that has taken place in the last years, the Colombian internal armed conflict is still far from ending. On the one hand, the armed conflict with guerrilla

²⁴ This is so except for judges who inhabit zones of armed conflict, where armed actors intervene in their decision-making either by directly deciding the cases of their competence, or by threatening them. For a brief reference to this phenomenon, which is in the course of being thoroughly analyzed in a research project conducted by Mauricio Garcia Villegas at DeJuSticia, see Uprimny, R. 2006. “Entre el protagonismo, la precariedad y las amenazas: las paradojas de la judicatura” [“Among protagonism, precariousness and threats: paradoxes of judicature”] in Leal, F. (ed.), *En la encrucijada, Colombia siglo XXI [In the crossroads, Colombia XXI century]*. Bogota: Norma.

²⁵ See “Juicio histórico a paramilitares” [“Historical trial against paramilitaries”], *El Tiempo*, April 23, 2007.

²⁶ See, among many other press references, “Para-políticos” [“Para-politicians”] and “El ventilador de Mancuso” [“Mancuso’s fan”], *Revista Semana*, May 19, 2007.

²⁷ “La gran encuesta de la parapolítica” [“The grand poll of parapolitics”], *Revista Semana*, May 5, 2007.

groups, and particularly with the FARC movement, has continued and has even intensified in the last years. A peace agreement with this guerrilla group does not seem like a real possibility in the short term. On the other hand, it is highly doubtful that the process of demobilization of paramilitaries will bring about the dismantlement of their power structures. Thus, the guarantee of non-recurrence and the sustainability of peace with paramilitaries are at risk.

In that context, it is not accurate to talk about a transition from war to peace in Colombia. A full or global transition is not taking place, since recent negotiations have not included all armed actors. Furthermore, it is possible to say that not even a fragmentary or partial transition is taking place regarding paramilitary groups because, even if their members have surrendered their weapons, their economic and political organizations seem to remain intact.

Nevertheless, in the last years everyone has been talking about transitional justice in Colombia. Indeed, most actors involved in the political discussion on how to face atrocities committed by paramilitaries explicitly promote the use of transitional justice language and mechanisms, or at least implicitly use the logic and categories of transitional justice to analyze the Colombian situation. The generalized use of transitional justice is not only paradoxical for the obvious reason that it is taking place in the midst of an ongoing conflict and with no clear signs of a transition. What seems most paradoxical about this situation is the fact that, at first, none of the actors used or intended to use the transitional justice language; however, for very different reasons, they all ended up adopting it.

That is undoubtedly the case of the government and paramilitary leaders themselves, who at the first stages of the process vigorously rejected the application of criminal justice to atrocities committed by paramilitaries, but who soon began to use the discourse of transitional justice and to admit the necessity of a minimum degree of punishment that it implies. In fact, when the discussion on the legal framework for the demobilization of paramilitarism started taking place, paramilitary leaders emphatically said that they would not spend a single day in prison.²⁸ On its turn, the government defended the importance of peace and reconciliation, by invoking the restorative justice paradigm -supported, among many others, by Desmond Tutu in South Africa's transition- as the most adequate framework for the negotiations with paramilitaries. As a result, the first bill proposed by government to Congress in 2003, entitled the *Alternative Penalties law*²⁹, consisted in a concession of legal pardons to all armed actors who accepted to demobilize, and was based on the restorative idea

²⁸ Declaration of Salvatore Mancuso, paramilitary leader and spokesman at the time, at an audience in Congress. See "Vinieron, hablaron y se fueron. Armando Neira relata en exclusiva para SEMANA.COM los detalles de la polémica visita de los paramilitares al Congreso" ["They came, spoke and left. Armando Neira narrates in an exclusive for SEMANA.COM the details of the polemic visit of paramilitaries to Congress"], *Semana.com*, July 29, 2005.

²⁹ In Spanish, ley de alternatividad penal.

that criminal punishment did not contribute and could even become an obstacle for achieving reconciliation.³⁰

However, the bill was rapidly withdrawn from Congress, as a result of the harsh criticisms it received from different sectors, and particularly from international and local human rights organizations, victims' organizations and some political groups. These sectors claimed that the bill consisted in an impunity law, since it aimed at being applied to all armed actors -including those who had committed gross human rights violations and international humanitarian law infractions-, and its benefits were not conditioned to the effective satisfaction of victims' rights. The government soon replaced the bill by what later became law 975 of 2005, commonly known as the *Justice and Peace law*.

This new bill implied an important change in the discourse of the government, which passed from one of absolute rejection of criminal punishment and total silence on victims' rights to an admission of the importance of achieving equilibrium between peace needs and justice requirements. This was translated in the law explicitly recognizing victims' rights, imposing a very lenient criminal punishment (not higher than eight years and not lower than five, regardless of the quantity and grossness of the atrocities) for demobilized actors who had committed atrocities, and requiring from them minimal duties related to truth and reparations.³¹ Although this new legal proposal altered the initial conditions under which paramilitaries decided to demobilize, they never openly contested or rejected the text. Moreover, when the Constitutional Court reviewed the constitutionality of the law, paramilitary leaders defended its original text and treated it as a promise that should not be broken.³² In that way, the change of discourse can also be attributed to paramilitary leaders, who passed from sustaining that they would not remain in jail for even one day, to accepting the possibility of a reduced criminal punishment.

The previously described change of discourse does not mean that the initial approach and objectives of both the government and paramilitaries changed in any other way than semantically. As many NGOs and a minority of Congressmen claimed, the bill proposed by government and finally approved by Congress did not contain the necessary mechanisms for assuring that victims' rights therein recognized would be adequately protected.³³ In that way, the Justice and Peace law was criticized as a more

³⁰ See *Gaceta del Congreso [Congress Journal]* No. 436 of 2003.

³¹ Regarding truth, the law required the demobilized to confess the crimes in which they had participated, but did not establish that incomplete or false confessions would imply the loss of criminal benefits. Regarding reparations, the law required that the demobilized only surrendered the illegally obtained assets they still possessed, thus allowing them to keep most of their assets either by laundering or legalizing them, or by transferring them to third parties.

³² On this, see the introduction to this volume by Morten Bergsmo and Pablo Kalmanovitz.

³³ For a detailed analysis of the flaws of the law concerning the protection of victims' rights, see Uprimny, R. and Saffon, MP. 2006. "La ley de 'justicia y paz': ¿una garantía de justicia y paz y de no repetición de las atrocidades?" ["The 'justice and peace' law: a guarantee of justice and peace and of non-recurrence of atrocities?], in Uprimny, R., Restrepo, E., Botero, C., Saffon, MP, *Ob. Cit.*

subtle and disguised form of impunity and, for that reason, its passing was contested in Congress and its constitutionality was challenged before the Constitutional Court immediately after its issuance.³⁴

The strategy used by human rights and victims organizations for contesting the Justice and Peace law before both Congress and the Constitutional Court also implied a turn in their discourse. Indeed, the organizations that opposed the law used the logic and categories of transitional justice in important ways to challenge it. This use of transitional justice implies a tension with the idea, defended by most of these organizations, according to which there is neither a transition nor a transitional context in Colombia.³⁵ Moreover, the use of transitional justice logic and categories by these organizations contrasts with the maximalist rights-based approach that these organizations adopted at the first stages of the political discussion on the legal framework, according to which victims' rights should be protected without any constraint –the political need of achieving peace notwithstanding-.³⁶

During the discussion of the bills, these organizations moved to a less radical position, which admitted that a negotiated settlement could imply a specific legal formula capable of responding to the political need of achieving peace, but which anyhow stressed the importance of adequately protecting victims' rights and of assuring the guarantee of non-recurrence. In that way, although rejecting the existence of a transition in Colombia, human rights and victims organizations made use of the core principle of transitional justice, which –as we have already mentioned- consists in the importance of finding equilibrium between the requirements of peace and justice.

For that reason, these organizations supported the alternative bill promoted by some Congressmen, which also admitted the possibility of a reduced criminal punishment, but established it should be proportional to the crimes committed, and should only be conceded if each beneficiary confessed all crimes in which he or she had participated

³⁴ According to the Colombian 1991 Constitution (art. 241), any citizen can challenge a law before the Constitutional Court through a “public action of unconstitutionality”. In deciding these actions, the Court exercises its power of judicial review by abstractly revising the constitutionality of the law. Its decisions have *erga omnes* effects, which means that the declaration of unconstitutionality of a certain disposition immediately implies that the disposition is expelled from the legal order, while the declaration of constitutionality of a disposition in principle excludes the possibility of the Court revising its constitutionality again.

³⁵ On this, *see* Cepeda, I. 2007. Conference for the panel “Fundamentos éticos y políticos para la reconstrucción del país” [Ethical and political foundations for the country's reconstruction], presented at the seminar *Reconstrucción de Colombia* [Colombia's reconstruction], organized by Planeta Paz, DeJuSticia, CODHES, Fundación Manuel Cepeda Vargas and Unijus. Bogotá, August, 2007. This tension remains and, in our point of view, it seems more and more inevitable. Indeed, although it is not clear at all that a transition is taking place in Colombia, the use of the transitional justice discourse has become ineludible and, as we will discuss in the following section, it appears to offer important elements for the defense of victims' rights and for the empowerment of their organizations.

³⁶ This initial position is reflected in a bill, presented by Senator Piedad Córdoba as another alternative to the Justice and Peace bill, which intended to “dictate legal dispositions on Truth, Justice, Reparations, Prevention, Publicity and Memory for the submitting of paramilitary groups that initiate dialogs with the government”.

and integrally repaired his or her victims.³⁷ Once this bill was defeated by the Justice and Peace law, human rights and victims' organizations also used the transitional justice logic and categories to challenge the constitutionality of the law before the Constitutional Court, essentially arguing that it flagrantly violated victims' rights to truth, justice and reparations, and consequently did not search for or achieve any equilibrium between peace and justice.³⁸

In 2006, the Colombian Constitutional Court issued ruling C-370 of 2006, the most important of a series of rulings concerning the constitutionality of different dispositions of the Justice and Peace law.³⁹ In this ruling, the Court explicitly established that the law was based on the core principle of transitional justice, according to which it is essential to achieve equilibrium between the political need of peace and the legal imperative of protecting victims' rights. For that reason, the Court ruled that the general idea of the law according to which a reduced criminal punishment could be justified in order to achieve peace was acceptable. Nonetheless, the Court found that such a reduction of punishment should be accompanied with adequate mechanisms aimed at sufficiently protecting victims' rights, in the absence of which these rights were disproportionately affected and the principle of transitional justice was broken. According to the Court, this happened with several dispositions of the Justice and Peace law, which did not contain enough guarantees for the satisfaction of victims' rights, and which therefore violated international and constitutional legal standards on the subject.⁴⁰ As a consequence, the Court declared

³⁷ The alternative bill was promoted by Congressmen Rafael Pardo, Gina Parody, Rodrigo Rivera, Luis Fernando Velasco, Carlos Gaviria and Germán Navas, and intended to “dictate dispositions for guaranteeing the rights to truth, justice and reparations of victims of human rights violations and of the Colombian society in processes of reconciliation with illegal armed groups”. Among other issues, this alternative bill included the perpetrators' duty to repair their victims with both legal and illegal assets, and the State's duty to repair in case of insufficient assets or impossibility to individualize the perpetrator.

³⁸ Ruling C-370 of 2006 of the Constitutional Court contains a summary of the arguments of the organizations that presented the first action of unconstitutionality against the law.

³⁹ Apart from ruling C-370 of 2006, the Constitutional Court has issued the following rulings on the constitutionality of the Justice and Peace law: rulings C-127 of 2006, C-319 of 2006, C-455 of 2006, C-531 of 2006, C-575 of 2006, C-650 of 2006, C-670 of 2006, C- 719 of 2006, C-080 of 2007.

⁴⁰ This was the case of the dispositions regarding the perpetrator's duty to confess and to repair to which we referred previously, among many others.

the unconstitutionality of some of these dispositions⁴¹, as well as of some of their interpretations.⁴²

As the previous description shows, the different political actors who struggled to define the content of the legal framework for the negotiations with the paramilitaries ended up using the transitional justice language and categories. In particular, all these actors' discourses coincide in two basic ideas of transitional justice: (i) the principle according to which it is necessary to find equilibrium between peace and justice; (ii) the recognition of the normative character and the applicability of victims' rights to truth, justice and reparations. However, this coincidence was not the result of a general agreement or consensus among the different actors on the convenience of using the transitional justice language. Rather, it happened in spite of the fact that none of these actors was interested in or willing to use the transitional justice categories and language at the first stages of the discussion.

How can such an unwilling coincidence be explained? Was the change in the government's and paramilitaries' discourse a mere rhetorical strategy, aimed at producing legitimizing effects? Or was it rather the result of legal standards on victims' rights operating as normative limits to political options available for peace negotiations? As we will see in the following section, both these questions can receive a partially affirmative answer because they correspond to two different ways of understanding the role played by transitional justice in peace negotiations -that is, the discursive and the normative role of transitional justice in such contexts-.

II. The role of transitional justice in peace negotiations

In this section, we attempt to conceptually analyze the role that transitional justice plays in peace negotiations. We believe this is an important reflection, as it may shed

⁴¹ This was the case of the disposition that established that the time passed in the peace negotiations' zone by the paramilitaries could be subtracted from the already very lenient punishment (from 5 to 8 years) that would be imposed to perpetrators of atrocious crimes. According to the Court, this disposition was unconstitutional as it implied a disproportionate affectation of victims' right to justice, and the rupture of the transitional justice principle of equilibrium between peace and justice.

⁴² For instance, in the case of the Justice and Peace law's disposition according to which perpetrators had the obligation to confess the crimes in which they had participated, the Court declared its constitutionality, under the condition that it was interpreted in such a way that the confession had to be true and complete and that, if these requirements were not complied with, the perpetrator would lose the criminal benefit of a reduced punishment in any stage of the process. In the case of the law's dispositions regarding the perpetrator's duty to repair victims, the Court declared them constitutional under the condition that such duty was understood as implying the surrendering of all assets, including those legally obtained, as well as those passed on unto others as a means for evading responsibility. Moreover, the Court established that perpetrators' duty to repair was not restricted to their victims, but could cover the victims of the group to which they belonged, and who could not be repaired by their direct victimizer either because he or she had not been identified, or did not have enough assets to integrally repair his or her victims. Finally, the Court declared that the State maintained a subsidiary responsibility regarding reparations, which implied that in the absence of sufficient assets provided by perpetrators to repair their victims, the State would have to provide the remaining assets needed for integral reparations.

light on the complex relation that exists between law and politics in such contexts. Moreover, this reflection may be useful for explaining concrete cases –like the current Colombian situation- in which different actors with different and even opposing interests use the transitional justice discourse. In order to accomplish that purpose, we will use two analytical variables, which seem appropriate and useful to understand the role played by transitional justice in peace negotiations.

The first variable looks at transitional justice as a discourse, and aims at inquiring about the way in which such discourse is used, depending on the interests it serves. The use of this variable is based on two main presuppositions. On the one hand, the variable implies that there is not a univocal use, but rather various possible uses, of transitional justice language and mechanisms. Thus, the variable is based on the idea that the content of transitional justice is ambiguous or flexible, in such a way that it may be interpreted –and even manipulated- in different ways. On the other hand, the use of this variable implies that the different ways in which the discourse of transitional justice is interpreted and subsequently used depend on the interests of the actors who use it. And, given that these interests are different and may even be contradictory, the variable also implies that actors who use the transitional justice discourse struggle or compete for its meaning and content, and that the imposition of certain meaning as the dominant or hegemonic one is the result of an unequal distribution of power among actors.

The second variable through which the role played by transitional justice in peace negotiations can be analyzed looks at the relation between peace and justice, which is at the base of any conception of transitional justice. As we have mentioned before, this relation refers to the more abstract relation between politics and law and, in the case of peace negotiations, it consists in the relation between the political dynamics of the negotiations and the legal standards on victims' rights. The use of this variable has the purpose of analyzing the different ways in which this relation between peace and justice, or between politics (negotiations) and law (legal standards) can be understood or interpreted. Thus, the variable is based on the presupposition that there is, in fact, some kind of distinction between law and politics, the existence of which allows for an analysis of the relation between both of them. This presupposition implies refusing the idea that law in general, and transitional justice legal standards in particular, are only discourses, whose nature cannot be distinguished in any way from that of politics. Therefore, by using this variable, one is assuming that, although transitional justice may function as a discourse that can be used politically, it is not reduced to such discursive component, but also has a normative facet. This assumption entails the idea that transitional legal standards have some degree of hardness, which allows them to function as a believable threat, and which accounts for their normative or imperative nature. It is precisely this nature that which lets them be distinguished from politics to some extent.

After having announced their basic content as well as the presuppositions on which they are based, in the following lines we will put these two analytical variables at

work. For each of these variables, we will develop some conceptual reflections, and we will use the Colombian case as an illustration of them.

A. Uses of the transitional justice discourse

It is possible to identify at least two uses of the transitional justice discourse, which depend on the different interests it may serve: the manipulative use and the democratic use of transitional justice.

The first consists in the use of the discourse of transitional justice, and particularly of victims' rights, with the main purpose of hiding impunity. It is a manipulative use, in the sense that it adopts the language of transitional justice as a mere rhetorical instrument, through which no material or practical transformation is done, but an important symbolic effect is obtained.⁴³ This symbolic effect consists in the legitimation of the formulas for dealing with past atrocities that result from the political dynamics of peace negotiations, and which generally aim at impunity as the easiest way to achieve a negotiated peace. Such formulas are designed and agreed to regardless of victims' rights, and are thus fully shaped by politics. Nonetheless, when they are presented as transitional justice mechanisms, they appear as constrained by and even submitted to the legal standards that contain those rights.

In that way, the transitional justice discourse is manipulated in order to legitimize those impunity formulas, and thus, to perpetuate the unequal power relations between perpetrators –who continue benefiting from them- and victims –whose rights are left unprotected-.⁴⁴ When this happens, the use of the discourse of transitional justice is not only manipulative, but also oppressive.

The second possible use of the transitional justice discourse is characterized by its democratic or emancipatory nature. Indeed, in sharp contrast with the former, this use of transitional justice has the purpose of struggling against impunity. Given that transitional justice mechanisms, and especially victims' rights to truth, justice and

⁴³ On the symbolic or legitimizing effect of discourse in general *see*, for all, Bourdieu, P. 2001. "Las formas de capital" ["The forms of capital"], in: *Poder, derecho y clases sociales* [*Power, law and social classes*], Bilbao: Desclée de Brower, Chapter IV, p. 134. On the symbolic efficacy of law in particular, *see* García Villegas, M. 1994. *La eficacia simbólica del derecho* [*The symbolic efficacy of law*]. Bogotá: Ediciones Uniandes; Bourdieu, P. 2000. *La fuerza del derecho* [*The force of law*]. Bogotá: Uniandes.

⁴⁴ On the unequal power relations that exist between victims and perpetrators, *see* Gómez-Müller, A. 2007. "Olvido, ideología y memoria" ["Oblivion, ideology and memory"], Conference presented at the seminar *Reconstrucción de Colombia* [*Colombia's reconstruction*], *Ob. Cit.*

reparations, are conceived as tools for achieving that purpose⁴⁵, the democratic use of such discourse consists precisely in claiming the effective application of its mechanisms. Therefore, it aims at transcending the mere rhetorical content of transitional justice, in order to make it instrumentally –and not only symbolically– efficacious.⁴⁶ Thus, the democratic use of the discourse of transitional justice takes its content seriously; to do so, it interprets it as having an actual normative or legally binding dimension that may work as a constraint to the formulas for dealing with the past, which result from the political dynamics of peace negotiations.

This is a democratic use of transitional justice because it seeks to preclude impunity through the materialization of victims' rights and, in so doing, it aims at the recognition and effective protection of human rights in contexts where these rights have been massively and systematically violated. Moreover, the process of using the transitional justice discourse in this manner is, in itself, not only democratic but also emancipatory, as it brings about the empowerment of victims of human rights violations. This empowerment is crucial for achieving a transformation of the asymmetric power relations between victims and perpetrators, since it helps re-build victims' identity as moral and political subjects with rights, identity which is often lost as a consequence of their submission to gross human rights violations.

Both of the previously described ways of using the transitional justice discourse can be found in the current Colombian situation. In fact, the existence of these two possible uses of the discourse helps explain, to some extent, the paradoxical fact that, in a context where no transition is taking place, most political actors use the language of transitional justice, in spite of having radically different and even contradictory interests and purposes. In Colombia, in the context of peace negotiations between the government and paramilitaries, the transitional justice discourse is used both as a means to hide impunity and as an instrument for struggling against impunity.

The manipulative use of transitional justice is essentially done by the government and paramilitary leaders, but it is also widely supported by the majority of civil society. It consists in utilizing a generous rhetoric on truth, justice and reparations, in order to hide and legitimize partial processes of impunity. The most prominent illustrations of this manipulative use of transitional justice can be found in the original text of the

⁴⁵ In fact, the recent international recognition of truth, justice and reparations as subjective rights of victims of atrocities is best understood if it is seen as a response to the human rights' and victims' movements enduring struggle against impunity. Without a doubt, Latin America has been one of the most important settings for these developments. Thus, the struggle of Chilean and Argentinean human rights' and victims' movements against the impunity of crimes committed by authoritarian regimes led to the first international recognitions of victims' rights by the Inter-American Commission of Human Rights. In the eighties, these recognitions brought as a result friendly settlements between governments and victims. A more recent example is found in Peru, where the human rights' and victims' movements struggle against impunity, and particularly against amnesty laws, brought about the famous decision of the Inter-American Human Rights Court on the case *Barrios Altos*, in which victims' rights were explicitly recognized as directly applicable human rights, and amnesty laws were declared to be contrary to them. Inter-American Human Rights Court, *Barrios Altos Case*, Ruling of March 14, 2001, Series C No. 75.

⁴⁶ For this distinction, see García Villegas, *Ob. Cit.*

Justice and Peace law, and in the regulatory decrees of this law issued by the government after the Constitutional Court ruled on the constitutionality of the law.

As we mentioned in the previous section of this paper, the bill of what later became the Justice and Peace law was presented by the government to Congress after the failure of its first proposal of a legal framework for dealing with the atrocities of demobilized paramilitaries. The fact that the previous bill did not contain one single reference to transitional justice mechanisms and particularly to victims' rights, along with the fact that the swap to the transitional justice discourse was sudden and could be made without any resistance on the part of paramilitaries, work as important indications of the merely rhetorical nature of that swap.

Be as it may, the original text of the Justice and Peace law is a clear example of a manipulative use of transitional justice. Indeed, although the law's declarations regarding the principles of truth, justice and reparations were very generous, it did not contain adequate institutional mechanisms to sufficiently materialize them.⁴⁷ Thus, it was a law that was widely recognized as generous in the protection of victims' rights⁴⁸, but whose applicability would inexorably lead to the lack of protection of those rights. This is perhaps why paramilitary leaders never criticized the Justice and Peace law and, on the contrary, defended its text as a binding commitment acquired by the State when the Constitutional Court declared the unconstitutionality and the conditioned constitutionality of many of its dispositions in ruling C-370 of 2006.⁴⁹

As a response to the strong reactions of paramilitaries to the Court's decision -which included the threat of abandoning the peace process, and which some leaders like Vicente Castaño put into practice-, the government has made several attempts to go

⁴⁷ As we mentioned earlier in this text, some of the main flaws of the Justice and Peace law in protecting victims rights had to do with (i) the admission of the possibility of subtracting from the already very lenient punishment of demobilized armed actors the time paramilitaries spent in the zone where they negotiated peace with the government; (ii) the fact that incomplete or false confessions by paramilitaries did not imply the loss of criminal benefits, (iii) and the restriction of the duty to repair only to illegally obtained assets still possessed by paramilitaries.

⁴⁸ One of the best examples of this recognition is the remark supposedly made by Moreno -Chief Prosecutor of the International Criminal Court- to Eduardo Pizarro -President of the Colombian National Commission for Reparations and Reconciliation (CNRR for its Spanish initials)-, according to which the Colombian Justice and Peace law is the first experience in the world of an attempt to achieve peace by applying justice. Pizarro frequently quotes this remark both in public conferences and in his newspaper articles. See, for instance, Pizarro, E. 2006, Conference with occasion of the International Colloquium *Reparaciones a las víctimas en Colombia y Perú: Retos y perspectivas* [*Reparations for Victims in Colombia and Peru: Challenges and Perspectives*]. Bogota: Alianza Francesa, December, 2006, available at: www.pucp.edu.pe/idehpucp/images/docs/ponencia%20de%20eduardo%20pizarro.doc.

⁴⁹ On this, see the introduction to this volume by Morten Bergsmo and Pablo Kalmanovitz.

against the ruling through the issuance of regulatory decrees.⁵⁰ Without a doubt, these decrees constitute the most evident illustration of the manipulative use of transitional justice by the government, moved by the pressure of paramilitaries. Indeed, through them, the government has tried to go back to the original text of the Justice and Peace law, that is, to the stage of the process in which transitional justice, and particularly victims' rights, worked as tools for legitimizing partial processes of impunity, and not as effectively applicable legal norms –like the decision of the Court has required them to-.

Put together, the previous events could be interpreted in the following way: peace negotiations between the government and paramilitary leaders –the concrete content of which was never known because they were kept secret- favored a legal strategy of evasion of retributive justice, through the use of the categories of restorative justice, and particularly of the notions of reconciliation, pardon and forgiveness. However, due to the fact that this strategy soon encountered important political and legal resistances, peace negotiations chose the manipulation of the transitional justice discourse as a new strategy for achieving the same objective of impunity. This strategy began by promoting a legal text whose rhetoric was favorable to victims' rights, but whose implementation would admit the continuity of partial processes of impunity. And, once that text was questioned and transformed by the Constitutional Court, the strategy became one of evading its application, through the use (or rather the abuse) of the government's power to regulate laws.

Certainly, it is difficult to prove or even to put this interpretation to test, for the only ones who know the strategies or formulas agreed on in peace negotiations were negotiators themselves. Nevertheless, it seems like a quite plausible interpretation, not only because the events that were previously narrated perfectly fit into it, but also because it helps explain the fact that, in spite of all the changes suffered by the legal framework –many of which have evidently affected paramilitaries-, paramilitary leaders have not broken –and probably will not break- peace negotiations.

Regardless of the admission of this interpretation, the truth is that there is plenty of evidence that proves the manipulative use of transitional justice by the government and paramilitaries. Moreover, this appears to be the dominant or hegemonic use of transitional justice in the Colombian political context, not only because of the actual power of its actors, but also because they have managed to successfully put it into practice, and the majority of civil society has implicitly agreed to it. Indeed, except for a very small minority, public opinion has not been particularly critical of the way

⁵⁰ This is particularly the case of governmental decrees 3391 and 4436 of 2006. Among many other issues, through these decrees, the government went against the decision of the Constitutional Court of declaring unconstitutional the possibility of subtracting the time passed by paramilitaries in the peace negotiations zone from the criminal punishment to be applied to their atrocities, as well as the definition of the conformation of and participation in paramilitary groups as sedition –i.e. a political offense, susceptible of being amnestied-. In both cases, in order to maintain the unconstitutional dispositions alive, the government argued that, in virtue of the principle of favorability, the Court's decision should only be applied to those paramilitaries who demobilized after such decision, in spite of the fact that almost all paramilitaries demobilized before.

the government has developed peace negotiations with paramilitaries. On the contrary, as a recent poll shows, in spite of the fact that 38% of the population believes the President of the Republic held illegal agreements with paramilitaries, 75% of the population perceives his work in a favorable way. Furthermore, there does not seem to be a generalized perception of the need to punish paramilitaries. Thus, as the same poll shows, for 25% of the population the existence of paramilitary groups is justified, for 33% of the population it is necessary for combating guerrilla groups, and for 32% of the population the State should not struggle against paramilitarism.⁵¹

However, the discourse of transitional justice has not only been used in a manipulative way in Colombia. It is also possible to identify democratic uses of transitional justice, which have been promoted by a minority but which, nonetheless, have produced very important effects. Human rights organizations, victims' movements, the Constitutional Court, the Supreme Court of Justice and the Inter-American Court of Human Rights mainly compose the minority that has used the transitional justice discourse in a democratic way. This use has consisted in taking victims' rights and the guarantee of non-recurrence seriously, in order to combat impunity. In that way, it has been a struggle for the real efficacy of the legal content of transitional justice and against its mere legitimizing effects. The most notorious examples of this democratic use of transitional justice can be found in the diverse attacks of both the political discourse and the legal framework defended by the government regarding the demobilization process, in the use of such legal framework in emancipatory ways by both victims and judges, and in the production of community or "from-below"⁵² proposals of mechanisms for the satisfaction of victims' rights and for assuring the non-recurrence of atrocities.

Throughout the process of demobilization, human rights organizations and victims' movements have criticized the political discourse defended by the government in very articulated ways. A good example of such an attack is offered by the struggle in which these organizations have endeavored against the notion of reconciliation, widely used (and abused) by the government, and by other social sectors such as the church and demobilized paramilitaries. The government persistently uses this notion as a justification of the convenience of applying the restorative justice paradigm to the

⁵¹ "La gran encuesta de la parapolítica" ["The grand poll of parapolitics"], *Ob. Cit.*

⁵² The concept "from below" refers to a theoretical proposal according to which sociological and sociolegal analyses should include the perspective of local communities and members of civil society that lack power. According to this proposal, traditional analyses fall short because they do not consider these actors' points of view and initiatives as relevant objects of study and, thus, focus in official institutions and members of the elite, that is, in actors and initiatives "from above". Authors who defend this proposal tend to establish a correspondence between hegemonic perspectives and from-above actors, as well as between contra-hegemonic perspectives and from-below actors. *See*, among others, Santos de Sousa, B. *Ob. Cit.*; Santos de Sousa, B. and Rodríguez, C. (eds.). 2005. *Law and Globalization from Below: Towards a Cosmopolitan Legality*. Cambridge: Cambridge University Press; Rajagopal, B. 2003. *International Law from Below. Development, Social Movements and Third World Resistance*. Cambridge: Cambridge University Press.

Colombian situation⁵³, which implies the exclusion of legal formulas containing retributive justice and the establishment of strong links between victims and perpetrators.⁵⁴ To do so, the government defines the notion of reconciliation in a maximalist or fundamentalist way, according to which reconciliation requires that citizens establish strong links of solidarity and sympathy among them, and particularly that victims forgive their perpetrators and are willing to create links of the kind with them.

Human rights organizations and victims' movements have harshly criticized this notion for imposing forced forms of reconciliation, which go against victims' rights to justice, freedom and dignity, and which seem anti-democratic. Indeed, if reconciliation is understood in such a *thick*⁵⁵ way, all those who do not agree with it may be seen as an obstacle to reconciliation and peace. In the particular case of victims, although the decision to forgive corresponds exclusively to the moral –not the legal- ground, this vision of reconciliation leaves them no choice but agreeing to forgive their perpetrators, although this forced forgiveness may violate their rights and even create resentments that may become an obstacle to peace. That is why human rights organizations and victims' movements have proposed alternative interpretations of reconciliation, which may be compatible with democracy and with victims' rights, particularly by always guaranteeing the right to dissent and not to forgive. According to these interpretations, in order to socially reconcile, forgiveness is not necessary; it suffices to assure the recognition of all members of the polity –including former enemies- as co-citizens.

The critique of the government's notion of reconciliation and the defense of this alternative interpretation have had significant democratic effects. On the one hand, they have recognized and defended the possibility of not forgiving perpetrators and of dissenting as valid options that do not necessarily go against peace and reconciliation. By doing so, the critique of the government's notion of reconciliation and the defense of an alternative interpretation have implied an empowerment of victims. On the other hand, this democratic use of transitional justice and of victims' rights has traduced in a political and legal attack of the legal dispositions that contain the criticized notion of

⁵³ For a critique of the use of restorative justice as the dominant paradigm of transitional justice in general, and of the Colombian situation in particular, see Uprimny, R. and Saffon, MP. "Transitional Justice, Restorative Justice and Reconciliation. Some Insights from the Colombian Case", available at: www.global.wisc.edu/reconciliation/.

⁵⁴ Based on a restorative perspective, the government has defended very problematic legal formulas. Thus, as we previously mentioned, it proposed the *Alternative Penalties* bill, which excluded criminal punishment of demobilized actors even if they had committed atrocious crimes. More recently, through regulatory decree 3391 of 2006, the government created "productive projects", in which victims are to work with perpetrators, share the profit of the work with them, and conceive such profit as reparation.

⁵⁵ This expression is used by David Crocker in Crocker, D. 2002. "Democracy and Punishment: Punishment, Reconciliation, and Democratic Deliberation," *Buffalo Criminal Law Review*, No.5, pp. 509-49.

reconciliation.⁵⁶ Although many of these attacks have not yet produced effects, a good first example of their success is offered by the withdrawal of the *Alternative Penalties* bill.

The notion of reconciliation has not been the only target of human rights organizations' and victims' movements' political and legal attacks. These organizations and movements have closely followed the discussion and proposals of legal formulas for dealing with paramilitaries' atrocities, and have criticized them whenever they go against victims' rights or put the guarantee of non-recurrence at risk. The most notable example of these efforts is the legal battle that these organizations and movements have eagerly engaged against the original text of the Justice and Peace law. Thoroughly scrutinizing the text and identifying its flaws in victims' rights protection, they have presented multiple actions against the constitutionality of its dispositions before the Constitutional Court, which essentially argue in favor of an effective protection of victims' rights and against the rupture of equilibrium between justice and peace.⁵⁷

The attack of these organizations and movements against the law has not have completely successful effects, if one takes into account that the Constitutional Court did not concede their initial request, according to which its whole text should be declared unconstitutional.⁵⁸ However, this attack has had quite successful effects, as it has brought about the declaration of unconstitutionality of many dispositions of the law that disproportionately affected victims' rights.⁵⁹ The declarations of unconstitutionality made by the Constitutional Court constitute, in themselves, another democratic use of the transitional justice discourse. Indeed, as we mentioned earlier in this paper, they are based on the transitional justice principle that establishes the need of equilibrium between peace and justice, which implies that victims' rights can be restricted but not disproportionately sacrificed in the sake of peace. In that way, the Court's rulings have aimed at effectively protecting victims' rights and at restricting legal formulas that conduce to impunity.

The Constitutional Court has not been the sole State institution that has used the transitional justice language and mechanisms in a democratic way. Another important

⁵⁶ Such is the case of the *Alternative Penalties* bill –which was politically attacked in Congress-, of decree 3391 of 2006 –the legality and constitutionality of which have been challenged before the State's Council by the Colombian Commission of Jurists and many other organizations-, and of the dispositions of the Peace and Justice law that refer to the notion of reconciliation –the constitutionality of which have also been challenged before the Constitutional Court by many non-governmental organizations.

⁵⁷ A summary of each of the actions of unconstitutionality presented against the Justice and Peace law can be found in the Court's rulings that such actions have prompted. *See* Constitutional Court, rulings C-127 of 2006, C-319 of 2006, C-370 of 2006, the C-455 of 2006, C-531 of 2006, C-575 of 2006, C-650 of 2006, C-670 of 2006, C- 719 of 2006, C-080 of 2007.

⁵⁸ For the arguments that supported this request, *see* Constitutional Court, ruling C-370 of 2006, which includes a summary of the first action of unconstitutionality presented against the law.

⁵⁹ *See* Constitutional Court, rulings C-127 of 2006, C-319 of 2006, C-370 of 2006, the C-455 of 2006, C-531 of 2006, C-575 of 2006, C-650 of 2006, C-670 of 2006, C- 719 of 2006, C-080 of 2007.

example (although not the only one at the national level⁶⁰) is offered by the courageous task in which the Supreme Court of Justice has recently been engaged of prosecuting Congressmen who have engaged in collusion with paramilitary groups, which so far has produced the detention of over ten Congressmen. This task is essential for combating impunity and guaranteeing non-recurrence of atrocities because it aids in the dismantling of paramilitary political power structures and in the purge of official institutions.

Along with the Constitutional and the Supreme Courts' examples, it is important to recognize the important democratic use of transitional justice made by another tribunal, although this time of a supranational nature: the Inter-American Court of Human Rights. Through its five rulings against the Colombian State regarding massacres committed by paramilitaries with the omission and/or complicity of State agents⁶¹, the Inter-American Court has undertaken an active role in elucidating the truth about paramilitarism in general, and of collusion with State agents in particular. The elucidation of the truth of such phenomena is essential for realizing not only the rights to truth, justice and reparations of victims that have addressed the Court⁶², but also for realizing the collective right of the Colombian society as a whole to know the truth about past atrocities.⁶³ Thus, it constitutes a fundamental way of using victims' rights in a democratic way.

But the elucidation of truth of the paramilitary phenomenon has not been the only way in which the Inter-American Court has engaged in a democratic use of transitional justice. In the case of *La Rochela massacre*, its most recent ruling on Colombian Paramilitarism, the Court expressly referred to the current legal framework used in Colombia to address wrongdoings committed by paramilitarism. The Court did not engage in a detailed analysis of such framework –as it had been requested by claimants–, but it did say that although equilibrium between justice and peace could be sought, it could not be used as a means of producing impunity *de facto*. In that way, the Inter-American Court imposed a clear limit to the Colombian

⁶⁰ Control organs such as the National Controller's Office (Procuraduría General de la Nación) have also acted in favor of the effective application of victims' rights.

⁶¹ Inter-American Court of Human Rights, *Case of the massacre of 19 merchants vs. Colombia*, Ruling of July 5, 2004, series C No. 109; *Case of the massacre of Mapiripán vs. Colombia*, Ruling of September 15, 2005, series C No. 134; *Case of the massacre of Pueblo Bello*, Ruling of January 31, 2006, series C No. 140; *Caso of the massacres of Ituango vs. Colombia*, Ruling of July 1st, 2006, series C No. 149; *Caso of the massacre of La Rochela vs. Colombia*, Ruling of May 11, 2007, series C No. 163.

⁶² Indeed, through the elucidation of the truth of omission and/or collusion of State agents regarding atrocities committed by paramilitaries, the Inter-American Court of Human Rights has been able to establish a doctrine according to which a State can be internationally responsible for the action of third parties. This is how it has managed to condemn the Colombian State to pay reparations to victims of massacres committed by paramilitaries. *See id.*

⁶³ For an analysis of the rulings of the Inter-American Court of Human Rights as a mechanism for constructing a narrative of past atrocities in Colombia, see Saffon, MP and Uprimny, R. 2007. "Las masacres de Ituango contra Colombia: Una sentencia de desarrollo incremental" ["The massacres of Ituango against Colombia: A ruling of incremental development"]. Mexico: Universidad Iberoamericana, in press.

State's attempts to achieve peace with paramilitaries: the impossibility of bringing about impunity through the application of apparently acceptable legal standards on victims rights. In so doing, the Inter-American Court used the transitional justice discourse in a democratic way.

The previous examples show that “from-above”⁶⁴ agents, including State and supra-State institutions, can also engage in a democratic use of transitional justice. Thus, these examples are useful to question the stance according to which emancipatory practices only come from below.⁶⁵ However, it is true that most of the democratic or emancipatory practices in general, and the democratic uses of transitional justice in particular, do come from below.

Apart from the already mentioned examples, a remarkable illustration of such uses can be found in the community-based initiatives and proposals on how to protect the rights of victims to truth, justice and reparations, and to assure the guarantee of non-recurrence. To only mention one of many initiatives of the sort⁶⁶, a good example of this can be found in the proposal presented to Congress by the National Movement of Victims of State Crimes, which consists in a constitutional amendment in order to explicitly include truth, justice, reparations and the guarantee of non-recurrence as fundamental rights, and to establish some mechanisms for the applicability of this guarantee.⁶⁷ This initiative constitutes a clear democratic use of transitional justice, as it insists in the direct applicability and fundamental character of victims' rights, as well as in the importance of guaranteeing the sustainability of peace. However, it is far from being successful because it has not found support of any kind in Congress.

In conclusion, the manipulative use of transitional justice as an instrument of impunity predominates in Colombia. As a result, law, and particularly legal standards on victims' rights, seems to be dominated by political dynamics. That is why transitional justice's potentiality of working as a social transformation tool should not be overestimated. In particular, one should be skeptical towards the possibility of achieving a full transformation of the hegemonic use of the discourse of transitional justice and, thus, of establishing legal constraints to the politics of peace negotiations. However, we do believe it is crucial to recognize the value of democratic uses of transitional justice. Although these uses are done by a minority of society and remain marginal in terms of the changes they produce in the peace negotiations' framework, they have produced very important effects.

⁶⁴ For this concept *see supra* note 52.

⁶⁵ We believe this is the stance of Boaventura de Sousa Santos. *See Santos de Sousa, Ob. Cit.*

⁶⁶ For another illustrative example of a from-below initiative on truth and reconciliation, *see* Díaz, C. 2007. “Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia”, Forthcoming publication.

⁶⁷ Such mechanisms include the constitutional prohibition of any delegation of the State's power to use weapons to civilians, and the realization of purges within the State's public force.

Indeed, for the very first time in Colombia, victims' rights are at the center of all political and legal discussions regarding the question of how to deal with past atrocities. This has also resulted in the recognition of victims as a relevant political actor with whom issues regarding this question should be discussed. As innocuous as this may seem, it constitutes a radical change in Colombian political dynamics, where the perspective, needs and interests of victims had never before been taken into account. Moreover, this change has contributed to the empowerment of victims, to the strengthening of their movements, and to the establishment of important transnational networks with international NGOs, which are all essential elements for achieving the transformation of unequal power relations between victims and perpetrators. Finally, the democratic uses of transitional justice have also produced some concrete results in the reform of the legal framework for dealing with atrocities. Although these results are minor if compared with the general tendency to use transitional justice in a manipulative way, they constitute small victories, which seem very important in the midst of such an adverse context for the protection of victims' rights.

B. The relation between peace and justice

The second analytical variable through which the role played by transitional justice in peace negotiations can be studied focuses on the ways in which the relation between the values of peace and justice, or between the political dynamics of peace negotiations (politics) and transitional justice legal standards (law) can be interpreted. In our concept, apart from the traditional vision of this relation, which sees in it an inevitable tension between peace and justice, there is an alternative and complementary vision, according to which transitional justice legal standards may work as virtuous restrictions that shape the political dynamics of peace negotiations.

The traditional vision of the relation between justice and peace identifies an inevitable tension between both values. According to this vision, peace and justice are objectives that pull in different -and often contradictory- directions and, for that reason, the means for achieving one or the other tend to be opposed, at least in the short term. Thus, while impunity is an important tool for achieving peace because it offers an attractive reason for perpetrators of atrocities to find a negotiated solution to conflict, the imposition of retributive justice and the protection of victims' rights are central for achieving justice. In that sense, impunity is seen as an obstacle for realizing the value of justice and, inversely, the protection of victims' rights may be seen as an obstacle for realizing the value of peace. As a consequence, at least in the short term, the adoption of any transitional justice formula necessarily implies a partial sacrifice of either peace or justice, and this conclusion is seen as the inevitable *tragedy* of transitional justice.

Although the existence of a tension between peace and justice is undeniable, there is an alternative vision of the relation between these two values, which complements – instead of excluding- the one previously described. According to this complementary vision, the relation between peace and justice can be understood not only in terms of a

tension, but also in terms of a virtuous relation. This latter conception consists in admitting that legal standards on victims' rights might function, not as obstacles to peace negotiations, but rather as virtuous restrictions capable of channeling such negotiations. The admission of this possibility is based on the assumption that legal standards on victims' rights constitute a minimum but inescapable legal imperative, which is perceived as having a hard or non-negotiable core and, in that way, as constituting a believable threat.

In a certain sense, if they are clear and seem very difficult to manipulate or to circumvent, legal constraints might reduce uncertainty and diminish the spectrum of possible outputs of a peace settlement, making it easy to reach a more acceptable commitment between the interests of antagonistic actors, particularly armed actors and victims. In fact, if legal standards on victims' rights are thus conceived, by virtue of them, actors of peace negotiations may end up changing their initial political stances towards less radical positions, which may come closer or even coincide with those of actors with initially opposing interests and expectations. Thus, legal standards on victims' rights would work not as obstacles to peace, but rather as virtuous restrictions that channel peace negotiations, by restricting the available political options for framing them, and by bringing conflicting interests and expectations of different actors closer –even to the point of generating consensual spaces among them–.

As Jon Elster argues, Monika Nalepa has used a similar reasoning for explaining the passing of lustration laws in post-communist Eastern European countries like Poland and Hungary.⁶⁸ In those countries, post-communists themselves promoted the enactment of such laws while they were still in power, even though it was them and their supporters who would be punished by lustration measures. According to Nalepa, the promotion of these laws can be explained as a “preemptive move”, aimed at preventing the enactment of more severe laws by future anti-communist governments. Indeed, given that post-communists envisaged that they would lose power to the hands of anti-communists and knew that lustration laws would be passed anyway, they opted for promoting more lenient laws than those that would have been promoted by their antagonists.

In that way, the fact that lustration laws were perceived as inescapable and constituted a real threat for post-communists produced a change in the expectations of these actors and, consequently, in the political stance they took. Indeed, having the certainty that lustration laws would be passed inevitably, they could no longer maintain a position according to which those laws were inadmissible. Thus, they decided to defend a less harsh punishment formula, which was, on its turn, admitted by anti-communists as an admissible solution. That is how a consensual space among antagonistic actors was created.

⁶⁸ Nalepa, M. 2003. “Suffer a Scratch to Avoid a Blow? When Post-Communists Hurt Themselves: A Model of Transitional Justice Legislation”, at the time unpublished manuscript, Department of Political Science, Columbia University, cited in: Elster, J. 2004. *Closing the Books. Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press, pp. 258-260.

Such a consensual space could not have existed, had the threat of lustration not been real. Thus, it is the normative strength of transitional justice legal standards –the need to lustrate in the case of Eastern Europe; the requirement of satisfying victims’ rights to a minimum degree in the case of Colombia-, which allows for the interests and expectations of antagonistic actors to move closer. In the absence of the normative strength of legal standards, each actor has wholly different interests and expectations. As a result, a context of polarization, in which the possibility of an encounter of visions is inexistent, is very likely to happen. In contrast, when legal standards are perceived as normative constraints, they might be able to change the expectations of antagonistic actors in such a way that they come closer. This move might lead to the creation of a consensual space in which, although actors maintain different interests, their visions might encounter one and another.

We could try to stylize the argument in the following way. When transitional justice legal standards are not perceived as normative constraints, maximalist stances prevail among antagonistic actors. Indeed, all actors conceive their point of view is justified by principles and, thus, they are not willing to cede. In contrast, when actors perceive those legal standards as normative constraints, they might move to more flexible stances, in which they cede in their principles to some extent and, as a result, they move closer to their antagonists’ stance, even to the point of sharing a consensual space with them. For instance, when antagonistic actors are perpetrators and victims – as is the case in Colombia-, in the absence of the perception of legal standards as inescapable constraints, their visions shall be completely different and separated, as a result of being maximalist. Thus, while perpetrators will think of themselves in terms of a heroic memory –in the case of paramilitaries, a memory of salvation of the country against guerrillas- and will then believe that forgive and forget are the only ways of recognizing their heroic participation in conflict, victims will think that the full application of legal standards on victims’ rights is the only way of dignifying them –peace negotiations notwithstanding-. These maximalist stances imply polarization, as the encounter of visions of antagonistic actors does not seem plausible.

In contrast, if perpetrators perceive such legal standards as inescapable legal constraints, the possibility of receiving a full amnesty might be excluded from their range of expectations. In that way, perpetrators might enter the range of victims’ expectations, as a result of accepting that their rights must be protected to some extent. On their turn, seeing that it is now possible to achieve agreements with perpetrators regarding the ways of satisfying their rights, victims could also move away from their maximalist vision and accept that their rights might be limited to some extent. In both cases, actors would then move from a principialistic stance to a less radical and more committed one. In so doing, they would enter a consensual space, in which plenty of different options for achieving an agreement between actors exist. These different options might be thought of as a spectrum of possibilities for satisfying victims’ rights in the context of a peace negotiation, which might be closer or further away from the interests of one actor or the other.

The former could be schematically structured in the following way:

1	2	3	4	5	6	7	8
Forgive and forget (Maximalism)	Rhetorical acceptance of the need to protect victims' rights, but exclusion of the possibility of actually doing so	Admission of the possibility of minimally satisfying truth and reparations, but exclusion of the possibility of punitive justice	Admission of a minimum degree of punitive justice, along with a minimum satisfaction of truth and reparations	A minimum degree of punitive justice, along with a full satisfaction of truth and reparations	Admission of some degree of restriction of victims' rights, which does not implied their disproportionate affectation	Claim of full protection of victims' rights, but consideration of the existence of a context of negotiations)	Full application of victims' rights -peace negotiations (Maximalism)

As we can see, while columns 1 and 8 are poles in which the visions of antagonistic actors do not encounter at all, columns 2 through 7 imply that encounter and constitute different possibilities of materializing an agreement, some being closer to the interests of perpetrators, and others to the interests of victims. However different, all these possibilities contained in columns 2 to 7 imply an encountering of perpetrators' and victims' visions; therefore, they are the result of legal standards acting as virtuous restrictions, that is, as constraints capable of bringing antagonistic visions closer.

Both of the previous ways of interpreting the relation between peace and justice, or between political peace negotiations and transitional justice legal standards, are useful for understanding the current Colombian situation. On the one hand, the interpretation according to which there exists an unsolvable tension between the values of peace and justice seems especially accurate in a context in which armed actors who demobilize were not submitted by the State, but voluntarily decided to negotiate peace. In such a context, these actors will most certainly condition peace to impunity or, at least, to a non-retributive imposition of justice. Therefore, there will exist an inevitable tension in the pursuance of both peace and justice, at least in the short term.

That is why this interpretation of the relation between peace and justice is frequently used in Colombia as an explanatory tool of the country's situation. Applying the analytical variable that was developed in the previous section of this paper, the use of this interpretation may have both a manipulative and a democratic character. In its first facet, the inevitable tension between peace and justice is used as an argument for privileging the former over the latter, at least in the first stages of the process. Many analysts and political actors use this argument whenever they defend ideas such as the necessity of achieving peace before endeavoring in the application of justice, the

nature of victims' rights as obstacles to peace and reconciliation, and the convenience of making victims' rights flexible for the sake of peace.⁶⁹

The interpretation of the relation between peace and justice as one of inevitable tension has also been used in a democratic way in Colombia. Indeed, by admitting the existence of the tension, but also by reminding of the importance of finding equilibrium between the values in conflict, many have argued that peace cannot be used as an excuse to violate victims' rights. Moreover, they have also argued that the tension between peace and justice often exists only in the short term, because justice is actually not an obstacle, but rather seems extremely relevant, for achieving a durable and sustainable peace.⁷⁰

On the other hand, the interpretation of the relation between peace and justice according to which the latter may function as a virtuous restriction of the former is useful to understand the paradoxical use of the transitional justice discourse by most Colombian actors. In fact, this situation can be explained not only by the different uses that may be given to such discourse, but also by the discourse's normative power and, thus, by transitional justice's legal standards' potentiality to restrict the political options available for achieving a negotiated peace. It is then possible to argue that the government's and paramilitaries' sudden swap to the language of transitional justice through the defense of the Justice and Peace law was not just the result of the manipulative use of the discourse by those actors, but also a reaction to realizing that there exists a minimum and inescapable legal imperative regarding the protection of victims' rights. The perception of this minimum imperative as inescapable may have been the result of the pressure of international and national human rights organizations and of victims' movements. It may have also been the result of the current legal international environment –often reminded by human rights organizations-, and particularly of the imminent risk of intervention of the International Criminal Court, or of any other judicial system by virtue of the principle of universal jurisdiction if justice is not adequately guaranteed.⁷¹

⁶⁹ A good example of this is the *Alternative Penalties* bill, originally presented by government to Congress as a proposal of the legal framework for dealing with atrocities committed by paramilitaries. The following paragraph made part of the defense that the government made of the bill in Congress:

“The legislative proposal is oriented towards a restorative conception that goes beyond the identification of punishment with revenge, which characterizes a discourse in which the main concern is to react against the delinquent with a similar pain to that which he or she produced on the victim and, only as a second concern, to search for non recurrence (prevention) and victims' reparation. It is important to take into account that, in doing justice, law aims at reparation and not at revenge. In face of evidence that prison, as the only response to crime, has failed in many occasions in its purpose to achieve resocialization of delinquents, contemporary criminal law has advanced in the issue of alternative sanctions” (free translation) (Gaceta del Congreso [Congress Journal] No. 436 of 2003).

⁷⁰ For this line of reasoning, see Uprimny, Botero, Restrepo and Saffon, *Ob. Cit.*

⁷¹ On the possibilities of the International Criminal Court's intervention and of the application of the universal jurisdiction principle, see Botero and Restrepo, *Ob. Cit.*

Be as it may, the conception of legal standards on victims' rights as containing a hard core from which political actors cannot subtract when negotiating peace might have functioned as a virtuous restriction. Indeed, it is possible to suggest that the swap to the transitional justice discourse of the government and paramilitaries was a result of them knowing that a minimal protection of victims' rights was binding and could not be negotiated and, thus, of them preferring to defend a lenient criminal punishment (such as the Justice and Peace law's) than to face the risk of more severe future laws. According to this interpretation, this swap brought the interests and expectations of the government and paramilitaries closer to those of victims, and allowed for the existence of a minimal consensual space among them. Such consensual space could be found in all actors accepting the impossibility of violating victims' rights for the sake of peace, and in victims' rights passing to the center of political discussions.

Applying table No. 1 to the Colombian situation, one could conclude that the paramilitaries' and government's swap to the transitional justice discourse got them out of column 1, that is, out of the vision according to which the only admissible formula was forgive and forget. By admitting (at least rhetorically) the necessity of protecting victims' rights, they moved closer to victims' expectations and, thus, made the latter believe that agreements were possible. As a result, victims also moved out of column 8 and to a less radical stance, according to which a context of peace negotiations could bring about less-protective configurations of the protection of their rights. This has meant the entry of both actors to a consensual space constituted by the recognition of the impossibility of totally violating victims' rights, represented by columns 2 through 7. Key changes of legal standards have produced moves in actors' expectations from one column to another. However, such changes have not forestalled the manipulative uses of transitional justice and victims' rights. Thus, the government and paramilitaries have attempted to stay in the first columns, which imply a rhetorical but not a real acceptance of the applicability of victims' rights, even after key changes in the legal framework like the Constitutional Court's decision to modify the Justice and Peace law. As we mentioned before, they have done so through the use of governmental decrees, which go against the Court's decisions.

III. Final remarks: towards a cautious use of the transitional justice discourse in Colombia

In this paper, we argued that the language and mechanisms of transitional justice could be used in manipulative ways, that is, as a rhetorical tool in order to hide impunity. We showed that this is the dominant use of transitional justice in Colombia, done by the government and paramilitary leaders, but also implicitly supported by the majority of civil society. However, we also argued that the discourse of transitional justice could be used in democratic ways, that is, as an instrument for struggling against impunity and effectively applying victims' rights. We showed that this has been a marginal but all the same very important use of transitional justice in Colombia, done by human rights organizations, victims' movements, the

Constitutional Court, the Supreme Court of Justice and the Inter-American Court of Human Rights. Moreover, we argued that, in some circumstances, transitional justice could function not only as a discourse, but also as virtuous restrictions that, instead of being an obstacle to peace, may channel the political dynamics of peace negotiations and, as a result, bring the interests and expectations of antagonistic actors closer. We also showed that this interpretation could be useful to explain the sudden swap to transitional justice discourse of the government and the paramilitaries, and the consequent existence of a consensus on the imperative force of minimum hardcore legal standards, accepted by them and also by victims and human rights organizations.

A question necessarily rises from the previous conclusions: should the discourse of transitional justice be used in a context like Colombia? Some scholars and grass root leaders are very skeptical and even fearful of this language, as they think it will always lead to a manipulative use.⁷² The Colombian political scene shows that this fear is partially grounded, as the manipulative use of transitional justice as an instrument to hide and legitimize impunity is dominant. Besides, there are additional reasons for having reticence towards the use of transitional justice in the country. On the one hand, the use of such discourse may create aggravated distortions. Indeed, given the absence of an even fragmentary transition, the use of transitional justice may be perceived as a justification of a permanent special and privileged regime for leniently dealing with atrocities of powerful actors. This perception would be easily derived from the fact that, while demobilized paramilitaries who have committed innumerable atrocities are given lenient punishment, the small-scale criminality is being submitted to all the rigor of criminal law. Certainly, this contrast may accentuate inequity problems and the feeling of impunity, which characterize ordinary processes of transitional justice.⁷³

On the other hand, the use of the language of transitional justice in the Colombian context may contribute to guaranteeing recurrence instead of non-recurrence of atrocities. In fact, even if transitional justice mechanisms were adequately –i.e. democratically and not manipulatively- used, the power structures of paramilitarism might not be disarticulated anyhow. This is so because, when dealing with pro-systemic actors, it does not seem enough to guarantee truth, justice and reparations. Specific mechanisms for assuring that their political and economic power structures will be effectively dismantled are necessary for guaranteeing non-recurrence of

⁷² See, for instance, Cepeda, *Ob. Cit.*

⁷³ On the feeling of impunity, see, for instance, Hamber, B. 2003. “Dealing with the Past: Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland”, *Fordham International Law Journal*, No.26, pp.1074-94.

atrocities.⁷⁴ In the absence of such mechanisms, impunity may end up being legitimized and victims' claims silenced.

Finally, the use of the discourse of transitional justice in Colombia may lead to precarious analyses of the situation. Indeed, if no transition is taking place, it seems difficult to talk about equilibrium between peace and justice. Therefore, it seems difficult to justify restrictions to the full protection of victims' rights in the sake of peace.

The previous ideas are strong arguments for rejecting the use of transitional justice in Colombia. However, there are also good arguments for defending the use of such discourse in the country. On the one hand, as we argued in this paper, there exists a democratic use of transitional justice, which can have and has actually had very important political and legal effects in the Colombian context. Such use of transitional justice has brought victims' rights at the center of any discussion on how to deal with atrocities. As a result, it has generated the recognition of victims as political subjects whose points of view are relevant, and has thus contributed to their empowerment. Furthermore, the democratic use of transitional justice has produced the admission of the idea that the search for peace cannot annul victims' rights, and the practical effect of certain adjustments to the legal framework, aimed at avoiding a disproportionate affectation of those rights. Additionally, the democratic use of transitional justice has generated very valuable from-below proposals on how to protect victims' rights.

On the other hand, as we also argued in this paper, transitional justice legal standards might operate as virtuous restrictions that channel negotiation processes and that, in so doing, normatively shape such processes, and bring opposing interests and expectations of actors closer. Without a doubt, the functioning of legal standards on victims' rights as virtuous restrictions favors democratic consolidation in the long run.

Finally, despite its flaws, the use of transitional justice language seems unavoidable in the Colombian context. In fact, even a precarious transition like the one generated by negotiations with paramilitaries has the dilemma of peace versus justice at its core. In the current situation, it is impossible to ignore or to leave aside this dilemma, which constitutes the basic principle of transitional justice. Besides, the use of the discourse of transitional justice ensures that victims' rights will be at the center of discussions regarding peace negotiations. Although this does not assure that such rights will be adequately protected, it is certainly a contribution to the empowerment of victims, since it guarantees that their rights will not be absent or made invisible in those discussions. Moreover, the use of the discourse of transitional justice opens the

⁷⁴ Some examples of mechanisms of the sort are purges or lustration laws applied to institutions where collusion with paramilitaries has been generalized, such as the public force; the active prosecution of all public servers who have colluded with paramilitaries; the reform of laws and institutions that permitted the creation of paramilitarism and its power structures, such as laws admitting the delegation of the use of weapons on civilians –which are seen as the origin of paramilitarism–, laws establishing weak controls on political elections –which have allowed for them to be manipulated by armed actors–, or laws privileging formal over real property and possession –which have allowed armed actors to bring about a *legalized* agrarian counter-reform–, among many others.

possibility of learning from the stock of knowledge and the practical experiences associated with transitional justice approaches.

The inevitability and the democratic potential of transitional justice are very powerful reasons for not rejecting the use of this discourse in Colombia. However, we believe that only a cautious and not naïve use of transitional justice should be promoted. By this we mean, first, that it is extremely important to be aware that there are uses and abuses of transitional justice ideas and proposals, and to identify them in order to potentialize their democratic virtues and to minimize their manipulative risks. Given that the latter seem to dominate the political discussion in Colombia, it is crucial to always be aware of the possible manipulation of transitional justice and, when identified, to openly criticize it. Moreover, it is also vital to encourage the democratic use of transitional justice, as well as to defend it against attacks. Indeed, this use of transitional justice has very important democratic effects and does not necessarily constitute an obstacle to peace, but may even contribute to it through the imposition of virtuous restrictions to political negotiations. However, it is important to always bear in mind that, although very important, the effects of this use of transitional justice remain limited, as they are confronted to a manipulative use of such discourse that dominates the political scene.

Second, a cautious and not naïve use of transitional justice implies defending the existence of a minimum but non-negotiable content of legal standards on victims' rights, as virtuous restrictions that do not impose obstacles to peace negotiations, but that rather channel them. Indeed, the idea of such hardcore of legal standards may be perceived as a believable threat by actors of peace negotiations who, as a result, may move to less radical positions and towards more consensual spaces, in which the impossibility of annulling victims' rights for the sake of peace and the need to satisfy these rights to some extent are admitted by all actors.

Third, a cautious and not naïve use of transitional justice in Colombia implies avoiding a potential shortcoming of a standard application of that approach to peace negotiations with pro-systemic or friendly-State armed actors. As we mentioned in this paper, the differences between these actors and anti-systemic or enemies-of-the-State actors (such as guerrilla groups) are important. For instance, when the latter surrenders their weapons, they give up almost all their power; in contrast, a paramilitary organization can surrender its weapons, but nonetheless retain most of its power, among other things, because this power is linked to collusion with State authorities. For that reason, in negotiation processes with pro-systemic actors, it is important to apply specific and more drastic measures of non-recurrence than those usually applied by transitional justice formulas.

Moreover, the differences between pro-systemic and anti-systemic actors are important for identifying the way in which the official political regime allowed for atrocities to be committed and, thus, for proposing institutional reforms aimed at impeding them in the future. Indeed, as Michael Fehrer has noted, the stigmatization of the former regime is fundamental for guaranteeing non-recurrence of atrocities in a

transition. Through it, it is possible to assign responsibility not only to individual actors, but also to political projects.⁷⁵ In the case of Colombian paramilitarism, this would imply exposing and stigmatizing the different levels of omission and collusion of State agents with paramilitaries, which implied the absence of effective persecution of the latter and the corruption of the former, and which therefore allowed for atrocities to be committed. The stigmatization of these links between paramilitary groups and the State should bring about specific reform proposals aimed at giving a radical end to them and at impeding them to reappear in the future.

Last but not least, a cautious and not naïve use of transitional justice in a context in which a transition is not taking place demands a thorough reconsideration of the conceptual framework and of usual recommendations of transitional justice, in order to understand how they should be applied to ongoing conflicts or partial negotiations with some armed actors. One example shows this: Truth Commissions are a somewhat standard recommended instrument for fostering the right to truth in a transition from war to peace; however, it is not clear at all that a Truth Commission could adequately operate in an ongoing conflict like the Colombian, due to the acute security problems of victims and the possibility of bringing about fragmentary or incomplete versions of the truth, among other problems.

The reconsideration of the way in which the conceptual framework and usual recommendations of transitional justice operate in the midst of an ongoing conflict is also important for avoiding manipulative uses of such framework. For instance, although reconciliation is certainly a key concept in the discourse of transitional justice, it must be thought of in the light of the particularities of the Colombian context. Thus, while in some contexts –such as the South African transition- it might have been defined in a *thick* or maximalist way, which implies closeness between victims and perpetrators, this does not seem like a good idea in Colombia.⁷⁶ Given the asymmetrical power relations between victims and perpetrators, and given many victims' rejection of the idea of forgiveness, a democratic notion of reconciliation seems much more appropriate for the Colombian context.

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⁷⁵ Fehrer argues that, in the absence of stigmatization of the prior regime, atrocities committed in countries where the State is not yet fully consolidated can be explained as the result of conflicts in pre-democratic regimes, rather than a result of undemocratic or authoritarian regimes. These explanations are problematic, as they exclude “nascent democracies” –such as Colombia and many other countries of the global south- from the requirement of applying the Rule of Law to perpetrators of atrocities. Indeed, atrocities are interpreted as the product of a stage of civil strife among factions, prior to the consolidation of the state and the Rule of Law. Thus, reconciliation can be thought of as a civilizing process, as a cultural leap from barbarianism to the consolidation of a democratic regime. See Fehrer, M. 1999. Terms of Reconciliation”, in Hesse, C. & Post, R. (eds.). *Human Rights in Political Transitions. Gettysburg to Bosnia*. New York: Zone Books.

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